For Release at 2:00 P.M. (EDT), June 14, 1954.

# ECONOMIC EVIDENCE IN ANTITRUST CASES

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Prepared for Delivery

Before

American Marketing Association

Ambassador Hotel

Atlantic City, New Jersey

Monday, June 14, 1954

# ECONOMIC EVIDENCE IN ANTITRUST CASES

The antitrust laws administered by the Federal Trade Commission prohibit various types of acts and practices which may have an adverse effect on competition.1/ Today I should like to explore, if I may, the use of economic evidence in determining this latter fact, that is, in ascertaining and adjudicating the ultimate question of injury to competition.

In recent years there has been a tug of war between two antithetical approaches to the problem of competitive effects, namely, the per se violation doctrine and the rule of reason.2/

Per se violation means that certain types of conduct are illegal as such, that is, the conduct is considered unreasonable per se. Injury to competition is conclusively presumed. The respondent is foreclosed from introducing evidence as to actual competitive effects. He is not permitted to offer marketing or economic justifications for the challenged practice.

Agreements among competitors involving price fixing, limitations on production, boycotts, allocation of markets and allocation of customers are frequently cited as per se violations. More recently agreements between suppliers and their customers containing tying clauses and exclusive dealing arrangements 3/ have been added to the list.

The growth of the per se doctrine in the courts has been based in part on expediency. The judges have felt they were not equipped, "either by experience or by the availability of skilled assistance," to appraise economic data.4/

Opposed to the per se doctrine is a rule of reason approach. It permits consideration and analysis of all the relevant marketing and economic factors. The ultimate test, under this approach, is whether an arrangement involves presence or absence of prejudice to the public interest.5/

In the Board of Trade case Mr. Justice Brandeis set forth the following criteria:6/

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1/There are certain exceptions to this. Sections 2(d) and 2(e) of the Clayton Act, as amended, for example, prohibit certain practices as such.

2/Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1148-1165.

3/Contra: In the Matter of The Maico Co., Inc., Docket 5822, decided by F.T.C. December 7, 1953. The Commission there held that it could properly consider economic and marketing factors in deciding exclusive dealing cases under section 3 of the Clayton Act.

4/Standard Oil of California, et al. v. United States, 337 U.S. 293, 310 (1949). The courts have, on the other hand, recognized that the Federal Trade Commission was created for the purpose of appraising economic data and market facts.

5/See United States v. Columbia Steel Co., et al., 334 U.S. 495 (1948), and United States v. United States Steel Corp., et al., 251 U.S. 417 (1920). Cf. United States v. Paramount Pictures, Inc., et al., 334 U.S. 131 (1948).

6/Board of Trade of the City of Chicago, et al. v. United States, 246 U.S. 231, 238, (1918).

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

In the Columbia Steel case,7/ the Supreme Court specified the following factors as relevant to the standard of reasonableness:

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable developments of the industry, consumer demands, and other characteristics of the market."8/

On several occasions, as Chairman of the Federal Trade Commission, I have taken the strong position that the Commission should not further extend the per se doctrine; that, except where the Supreme Court or Congress has directed otherwise, the Commission should determine competitive effects by examination, analysis and evaluation of relevant market facts.9/

If this view is to prevail, and if the forward march of the per se doctrine is to be halted, we must find satisfactory answers to three very practical questions:

1. What are the relevant economic and marketing factors?

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7/United States v. Columbia Steel Co., et al., 334 U.S. 495, 527 (1948).

8/In Appalachian Coals, Inc., et al. v. United States, 288 U.S. 344, 359 (1933), Chief Justice Hughes said:

"There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness."

In Standard Oil Co. (Indiana), et al. v. United States, 283 U.S. 163 (1931), Justice Brandeis applied the "rule of reason" pursuant to the requirement that "there must be a definite factual showing of illegality" as tested by the factors he mentioned in the Chicago Board of Trade case, supra.

9/See particularly "The Federal Trade Commission and the Administrative Process," address before the Section of Antitrust Law of the New York State Bar Association, January 28, 1954.

2. How can they be developed?

3. How can they be presented in evidence without unduly burdening the record or extending the time of trial?

These questions must be answered by the lawyer, the business economist and the marketing expert working together as a team.

I

The relevant economic and marketing factors would, of course, vary from case to case. The market, the industry, and the type of violation involved would form the frame of reference. The tests in a merger case under amended section 7 of the Clayton Act 10/ might be quite different from those in a restraint of trade case brought under section 5 of the Federal Trade Commission Act.11/ However, I will attempt no such refinements in this paper but will merely list some of the factors that may be relevant to one or another type of case, and some that may have common relevance to all types of cases.

Some economists belong to the behaviorist school while others belong to the structural school. The former focus attention upon the performance of the industry and the behavior of the firms therein as the key to the competitive situation. The latter group looks to the market structure, for example, to the number of sellers or buyers present in the particular market.

My own belief is that these are not mutually exclusive viewpoints. In some situations market structure and behavior are inseparable and in most situations an examination of all the relevant facts will involve both structural and behavior considerations. The distinction between the two therefore, although widely used in the literature on the subject, will not be followed in my analysis.

Economists generally agree, regardless of their school, that the competition which the antitrust laws seek to preserve cannot be defined in terms of absolute or perfect competition. It is recognized that the public policy of the antitrust laws is governed by the reality that imperfect competition exists in most competitive markets. This concept, particularly when accompanied by a rule of reason approach, is sometimes referred to as "workable" or "effective" competition.

Against this background various tests, standards or criteria have been suggested for determining whether or not competitive conditions in a particular market comply with the requirements of the antitrust laws. These tests include but are not limited to the following: (1) ease of entry, that is, freedom of opportunity for new traders to enter the market; (2) opportunity for survival; (3) opportunity for growth and profits; (4) effective consumer choice of alternative goods and services with consideration of extent to which

10/64 Stat. 1125, 15 U.S.C. sec. 18.
11/38 Stat. 719, 15 U.S.C. sec. 45.

products or services are differentiated or substitutable; (5) level of concentration - the number and relative size of competitors selling in a particular market; (6) the merger or consolidation trend; (7) relationship between size and efficiency; (8) balance of bargaining power between seller and buyer; (9) degree of price competition and competitive meeting of prices; (10) responsiveness of price to changes in cost - are reductions in cost passed on to purchasers; (11) profit pattern; (12) degree of independence of action by competing sellers; (13) efficiency in production - are new products and processes being introduced in keeping with technological advances - is investment in capacity excessive in relation to output; (14) efficiency in distribution; (15) flexible adjustment to changing markets; (16) presence or absence of unfair competitive or trade practices.

One well known business economist has added national defense to this list of economic tests.12/ "This means," he said, "that a good antitrust policy must be consciously geared to the requirements of efficiency, progress and volume of production. These down-to-earth values will serve equally well our peace-time objective of more goods for more people and the defense objective of military might."13/

It has been suggested, as I have indicated, that these tests cannot be administered successfully by a court of law; that to ask courts to go into matters of this kind might cause antitrust administration to become mired in a bottomless bog.

This may or may not be true of the courts - personally, I doubt it - but the Federal Trade Commission was designed and set up for the specific purpose of dealing with complex problems of industries and markets. It was to be staffed with business specialists - lawyers, economists, marketing experts, accountants and statisticians who could appraise economic data and market facts. It was given wide powers of inquiry and compulsory disclosure. It was, in short, created for the purpose of supplementing the work of the courts by furnishing expert guidance as to competitive effects.

The importance of marketing facts should therefore be recognized by the Commission at all stages, that is, in the initiation of antitrust cases, in the development of a theory of the case, in planning and conducting the investigation, and in prescribing the remedy.

II

While there has been no lack of suggested tests or standards, not enough attention has been directed to the problem of gathering and tabulating factual data on the basis of which they can be applied.

To be sure, both government and private agencies devote considerable funds and effort to the collection and dissemination of economic facts, but this information often relates to such wide and heterogeneous classes of business enterprise that it loses much of its usefulness from an antitrust standpoint. In most cases the

12/Griffin, "An Economic Approach to Antitrust Problems," 1951, pp. 62, 82.
13/Id. p. 85.

classifications are too broad. The data are tabulated in terms of what are known as "2-digit industry groups," that is, general groupings, such as, "food and kindred products."14/ These are, of course, too broad to be meaningful in market analysis.

In applying standards of workable competition it is essential that the data being used relate to particular markets, commodities, or industries. Each antitrust case presents its own separate issues which serve to define and delimit the type of marketing data that may be relevant.

I am not suggesting - and it is unlikely that any antitrust lawyer would suggest - that it is feasible to maintain reservoirs of up-to-date facts relating to all markets, products, or industries. But I do suggest that we enlarge our archives of empirical data for key industries and key classifications to serve as a backdrop for the market and product analysis that may be required in the particular case.

The American Marketing Association, the American Bar Association and other similar organizations would perform a real public service, and greatly assist antitrust law enforcement, if they would appoint committees to consider this problem. The Attorney General's National Committee to Study the Antitrust Laws, of which I am a member, is now giving consideration to problems of this nature.

As a start, I am recommending that the Commission's Bureau of Economics conduct preliminary studies using existing sources of information. Data are available, for example, which could be tabulated to show the general structural characteristics of many industries. These can be compiled from the 1947 Census of Manufacturers and brought up to date whenever a new census is undertaken. They will show the industry's size, average size of plants, number of plants, number of companies, number of plants per company, level of concentration, and level of company concentration (that is, the share accounted for by the industry's 4, 8, 20 and 50 leading concerns).

In addition certain competitive relationships might tentatively be established from existing data. In the Commission's recent report on changes in concentration it was found that "... a rapid expansion in output, particularly if it takes the form of a marked increase in the number of plants, tends to be associated with decreasing concentration."15/ Other relationships illustrated by patterns of behavior, such as price and profit patterns, should be explored and developed.

Of all the tests or standards which have been suggested, none has been proposed more frequently than ease of entry. The

14/An example of a "2-digit" group, as I have indicated, is food and kindred products; a "3-digit" industry is grain mill products; a "4-digit" industry is bread and other bakery products; etc.

15/Report of the Federal Trade Commission on Changes in Concentration in Manufacturing 1935 to 1947 and 1950, p. 57 (1954).

suggestion is that the greater the ease of entry, the greater the probability of competition and the less the need for government intervention to correct restrictive practices. There may be various types of existing statistical data which could be tabulated in such a way as to shed some light on this question.

As part of the Old Age Insurance Program, employers regularly file returns showing the industry in which they are engaged and number of employees. These can, we believe, be tabulated in such a way as to distribute business births by industry and by size of reporting unit.

One of the factors governing the ease of entry into any given industry is the amount of capital required. It has been said that "The most important single determinant of the degree of competition in a given industry is the shape of the long-run cost curve confronting the prospective entrant."16/ Although no definitive information can be obtained for any large number of industries, it may be possible to tabulate certain governmental data in such a way as to indicate the amounts involved for certain selected industries.

The Commission, as you know, makes a continuing study of changes in concentration. It has been suggested that this study should be enlarged to include "cross concentration" - although Congress will first have to provide the necessary funds. The purpose of such a study would be to ascertain whether the leading firms in a given industry are largely limited to that one industry or whether they are also the leading firms in other industries as well.

Because of the tendency of firms within an industry to specialize in the production of particular products, the general tendency is for the concentration ratio of an industry to be lower than the ratios for the particular products. The forthcoming Corporate Pattern Survey of the Federal Trade Commission will provide basic data on product concentration.

It seems to be axiomatic in economic theory that over the long-run prices in a competitive industry should be responsive to changes in cost. The belief is that where such responsiveness exists, competition is reasonably effective, and that where it is absent, restrictive forces are at work. Had cartel arrangements prevented manufacturers in this country from reducing prices as mass production methods lowered production costs, fewer people would own automobiles, farm equipment and household appliances and millions of workers who gain a living in these and in related industries would be less profitably employed. The national income would be much lower.

The basic difficulty in applying this standard is the absence of unit cost data. The collection of such cost data for all or even a substantial number of industries would be an expensive and complex undertaking.

16/Markham, Proceedings of the Section of Antitrust Law, American Bar Association, April 1-2, 1954, p. 149.

An indirect approach to the problem could be made by comparing trends of prices of finished goods with trends of relevant wage rates and of raw material prices. Most of the information required for the preparation of such trend comparisons is available in the form of wage rate, productivity and wholesale price data regularly gathered by the Bureau of Labor Statistics. Such comparisons might provide rough answers to the question whether, over a period of years, prices had moved in response to significant changes in direct costs.17/

The foregoing is merely suggestive of the type of studies that might be undertaken by the Federal Trade Commission using material now being gathered by government agencies. My main purpose in referring to them is to stimulate your thinking and perhaps thereby stimulate legal and economic research on the overall problem.

III

The third question I posed, namely, the problem of introducing economic proof in evidence in antitrust cases, will be more fully explored in a later paper.

Competition is a complex and constantly changing phenomena. It has never been sharply defined. Injury to competition, as distinguished from injury to a competitor, is seldom capable of direct proof and must therefore be inferred from all of the surrounding circumstances.

It is important to remember in this connection that the Federal Trade Commission is an administrative agency, not a court; that while Commission action must be supported by "reliable, probative and substantial evidence,"18/ technical rules of evidence are not applicable to administrative hearings.19/

Competitive effects need not, in my opinion, be determined by absolute facts such as precise sales, costs, profits, or share of the market of a particular party. It is enough, I believe, to show patterns, trends and relative positions.

Hearing officers, and judges too for that matter, should permit industry and company history, industry and company statistics, pricing and trade practices, price levels and variations in price and other business facts to be shown by methods usually employed by practical marketing men, - methods "resting mainly on common sense," that is, by "such ... evidence as a reasonable mind might accept as adequate to support a conclusion."20/ Summaries, tabulations, charts, graphs, sampling and polls of opinion, for example,

17/Since they would ignore changes in indirect costs, such comparisons would not be definitive.

18/Sec. 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006c.

19/Attorney General's Manual on the Administrative Procedure Act, p. 76 (1947); I.C.C. v. Baird, 194 U.S. 25, 44; F.T.C. v. Cement Institute, et al., 333 U.S. 683, 705 (1948).

20/See Consolidated Edison Co., et al. v. N.L.R.B., et al., 305 U.S. 197, 229 (1938).

must be admitted in evidence if antitrust enforcement is to succeed and hearing records kept to manageable proportions.21/

In closing let me repeat that a sensible and consistent antitrust policy depends upon the appraisal of relevant economic and marketing factors. In the absence of such information, commissions and judges are likely to continue, and perhaps to extend, the use of the per se approach in reaching decisions. Yet it must be obvious that competition can be judged only after the market facts have been weighed.



21/See Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases of the Section of Antitrust Law of the American Bar Association, pp. 40-50 (1954).