INDUSTRIAL PROBLEMS AND THE FEDERAL TRADE COMMISSION

Remarks

of

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I

In the opinion of the average citizen the proper relationship of Government to business is one in which the Government exercises a minimum regulatory control compatible with protecting the public interest, and at the same time exerts a maximum effort to encourage the general conditions which promote the best interests of agriculture, labor, investors, management and the public generally. To the average citizen, "the enforcement of free competition is the least regulation business can expect," but he wants the respective roles of government and business to be one of cooperation. While enduring wartime shortages he looked forward to days of plenty under a resumption of competitive selling, the resurgence of free enterprise and the relaxation of wartime controls.

To Americans it is a truism that competition fosters self-reliance, independent thinking, initiative and ingenuity. Free enterprise is the road to business growth. Somehow business decisions made by the many impart resilience and toughness to an economic system.

We meet today on the common ground that our country needs small business; that our country cannot afford monopoly; and that facts indicative of a trend toward economic concentration and consequent lessening of competition should be carefully examined and weighed

II

More than 1,800 formerly independent manufacturing and mining concerns have been swallowed up through merger and acquisition since 1940. Their combined asset value was $4.1 billion, or nearly 5 percent of the total asset value of all manufacturing concerns in 1943. Moreover, it was the larger corporations each having assets of over $5 million (in many instances achieved through earlier acquisitions) that accounted for some three-fourths of these recent 1,800 acquisitions.

The war contributed powerfully to the trend of concentration. Government purchases and government financing of productive facilities were channeled predominantly into the hand of corporations which already occupied positions of dominance. Surplus profits created by such channeling have given a strong impetus to the trend by providing funds for additional wartime and postwar expansion through acquisition of former competitors. Out of $175 billion of government contract awards between June 1940 and September 1944, $107 billion or 67 percent, went to only 100 of the more than 18,000 corporations receiving such awards. During the war 68 corporations received two-thirds of the $1 billion appropriated by the government for research and development purposes in industrial laboratories.

The level of industrial concentration apparently has been raised by the disposal of surplus war facilities. Six large corporations, alone, which had less than 10 percent of all manufacturing facilities in 1939 had acquired 48 percent of the value of the war plants sold as of June 30, 1946.

The most recent information on the wartime growth of concentration available from the Bureau of Internal Revenue shows that the larger manufacturing corporations, those with assets of $50 million or more each, increased their share of total assets from 42 percent in 1939 to 52 percent in 1943.

An even more precipitous increase in concentration took place in the metal products industries--the field most vitally affected by the war. In these industries, corporations with $50 million or more in assets increased their share of total assets from 49 percent in 1939 to 59 percent in 1943, and their proportion of gross sales from 38 percent to 51 percent.

The effect of war contract awards upon concentration was forecast in 1941 by the Final Report of the Temporary National Economic Committee. That report had warned that "It is quite conceivable that the democracies might obtain a military victory over the aggressors only to find themselves under the domination of economic authority far more concentrated and influential than that which existed prior to the war" (Final Report, P. 3). What another war would do to extend and entrench such domination by a few over the many needs no comment.

The degree of prewar concentration in the economy as a whole and in manufacturing industries in particular was stated in the report of the Senate Small Business Committee, submitted in January 1946:

> The 200 largest nonfinancial corporations owned about 55 percent of all the assets of all the nonfinancial corporations in the country.
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> One-tenth of 1 percent of all the corporations owned 52 percent of the total corporate assets.
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> Less than 4 percent of all the manufacturing corporations earned 84 percent of all the net profits of all manufacturing corporations.
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> More than 57 percent of the total value of manufactured products was produced under conditions where the four largest producers of each product turned out over 50 percent of the total United States output.
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> One-tenth of 1 percent of all the firms in the country in 1939 employed 500 or more workers and accounted for 40 percent of all the nonagricultural employment in the country.
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> One-third of the industrial research personnel was employed by 13 companies.

More mergers and acquisitions in the manufacturing and mining industries took place in 1946 than in any of the previous 15 years. In 1946, the number of mergers was 26 percent above the number in 1945, and 225 percent above the annual average of the years, 1940-1941. Years of greatest business activity and high price levels are the years in which the greatest number of mergers take place. In 1920, the number of mergers increased more than six times over the number during 1919. It may not be irrelevant to note that it was in March 1920, that the Supreme Court handed down its decision upholding the legality of the United States Steel Corporation's numerous corporate acquisitions and mergers.

Beginning in 1926, the number of mergers substantially surpassed the number for 1920 and increased each year thereafter until 1929 when it reached a record figure. Again it may not be irrelevant to note that it was in November 1926 that the Supreme Court handed down its decision curtailing the power of the Federal Trade Commission to order the divestiture of stock unlawfully acquired whenever the merger was completed by an acquisition of physical assets, even though such assets were acquired as a result of the use of power obtained through unlawful stock acquisitions. In 1943, there began a new wave of mergers, which is still continuing.

The stock market crash of 1929 which heralded the onset of the great depression was preceded by a great wave of corporate mergers and a wild speculation in their securities. Today speculation in the future of merged concerns, supported by war-swollen profits, is again operating as one of the important causes of the present upward trend in merger activity. This speculation, which stems from the expectation of greater profits resulting from the elimination of formerly competing concerns, leads inexorably to the elimination of our competitive economy and thus to the elimination of the possibility of legitimate speculation.

III

The factual diagnosis showing the relation of such presently unrestrainable corporate mergers to concentration is quite complete. Today's choice is one between legislative action recommended for many years by the Federal Trade Commission to plug this loophole in the present laws against such mergers and inviting a continued concentration leading to a frustration of our declared public policy.

In the present Congress are pending bills to amend the Clayton Act as recommended by the Commission so that acquisition by a corporation engaged in interstate commerce of the <u>assets</u> of a competing corporation also engaged in interstate commerce be made unlawful where the result tends to monopoly. Presently only <u>stock</u> (not <u>asset</u>) acquisitions so tending are unlawful under that Act and legal actions against even such unlawful acquisitions easily may be defeated.

IV

In exploring my next point, I feel that it is desirable to make some remarks in passing concerning the Commission's general nature and current work. The Commission was established in 1914, to detect and eliminate illegal trade restraints in their incipiency. Among the restraints of trade price fixing continues to be the most frequently recurring charge. Others falling in this category are conspiracy to boycott or threats to boycott, coercive agreements, collusive bidding, control and limitation of supply, misuse of patents and licensing agreements for monopolistic purposes, and various forms of basing-point, delivered-price and zoning systems designed to eliminate price competition. In essence they are repugnant to our national policy because they are auto-restraints on the commercial freedom of the parties to the detriment of the consuming public.

The basic legislative intent is that competition by individual traders must be fair as well as free. Congress wished to preserve and foster legitimate competition, but at the same time to outlaw all jungle type excesses inherent in the struggle to get business. These laws, therefore, aim to rid our economy of evil effects flowing from individual caprice and excess of competitive zeal as well as unlawful group activities. This approach to the problem was reflected in section 2 of the Clayton Act which proscribes discriminations in price between customers entitled to the same general treatment if such discrimination injures, prevents or destroys competition with the grantor or the recipient, or the effect may be to lessen competition or create a monopoly. The payment or receipt of brokerage by or to the other party to the transaction is made unlawful, as is the granting of allowances or facilities on terms not proportionally equal. Other practices unlawful under the Clayton Act, which emphasize the individual approach to the end that competition be fair and free of restraints, are reflected in the banning of full line forcing and tying contracts.

The Commission is also directed to eliminate deceptive acts and practices. Deception is harmful to the best interests of both consumers and scrupulous business. In this field of the Commission's work are matters involving false and misleading advertising of commodities through misrepresentation pertaining to composition, quality, purity, origin or attributes. The Wheeler-Lea amendments to the Federal Trade Commission Act empower the Commission to eliminate the dissemination of false advertisements for foods, drugs, cosmetics and therapeutic devices. The Wool Products Labeling Act, popularly known as the "truth in fabrics law," requiring informative labeling of certain fabrics also is administered by the Commission.

In the Commission there is machinery under which government and business can cooperatively evaluate and discuss commercial practices. During the past two decades more than 150 industries have participated in trade practice conferences, and this phase of the Commission's work presently is receiving greater emphasis. To the greatest possible extent consistent with the public interest, the aim is to avoid the necessity of a multiplicity of formal legal proceedings. This cooperative method of wholesale prevention and elimination of practices which involve the theme of unfairness without resort to the mandatory remedies against individuals, will implement a broader program of formal proceedings to prevent monopoly and to eliminate group restraints on competitive freedom. Investigations into complaints of unlawful conduct will be made increasingly on an industry-wide basis and the aim will be to eliminate all unfair trade practices and illegal restraints of trade found in any such industry simultaneously wherever possible and under either procedure on an industry-wide basis. It is hoped that the results will inspire further confidence in the Commission's effectiveness in both fields.

One of the most pressing problems confronting industry and government at the present time is the matter of the present high price level. This is a subject which has received the earnest consideration of the President and of the Congress to an increasing degree in recent months. It is an elementary proposition that if price levels remain artificially high, the net result is a restriction of the real purchasing power of the consumer. The ideal situation, of course, is one in which wages and incomes remain at the highest possible level and prices at the lowest level consistent with the ability to pay high wages and earn high income. It is also a maxim of economics that under free competition and under the inexorable pressure of the law of supply and demand an artificially high price structure must in time fall of its own weight through failure of purchasing power to keep up with prices.

In the earlier days of our American economy of free enterprise, prices were highly sensitive to slight fluctuations in purchasing power and very few lines of commerce were dominated by enterprises sufficiently large as to have the ability to control and manage price levels. To illustrate, in an industry having twenty-five small manufacturers, all approximately of equal size, no one of them was sufficiently powerful to maintain an artificial and uneconomic price level, hence prices necessarily rose and fell with and accurately reflected purchasing power among consumers.

I have mentioned to you some of the problems which confront the American public as a result of the accelerating increase in corporate mergers. I feel very strongly that one result of this increase in corporate mergers and the concentration in fewer and fewer corporate hands of market controls has been to remove prices of many products from the arena of free competition.

The same result, namely the removal of prices from the free play of competition, is obtained when members of an industry agree together to manage the market through restrictive contracts, patent licensing policies, or outright understandings to fix prices. A good many situations of this type can now be reached under the Anti-Trust laws by the Federal Trade Commission and the Department of Justice. The Commission has had numerous cases in the past few years involving this type of combination to control markets.

It has always struck me as a phenomenon of the business world that perfectly respectable men of the highest integrity and character have no hesitation about entering into a gentleman's understanding with their competitors to avoid the free play of competition in one form or another. With few exceptions, these men are representative of the highest type of our citizenry, and they would be the first ones to complain bitterly about any unwarranted Government regulation of their business. And without exception these men are against monopoly and the fixing of prices as an abstract proposition of law or economics.

I appreciate full well that competition is very often a ruthless process which appears to work many individual hardships, particularly when there is a buyer's rather than a seller's market. Yet I know of no force which can be substituted for the free play of just this competition to regulate business in the public interest. Certainly all experiments looking toward permitting business to regulate itself in the sense of establishing private or even semi-public code organizations to control prices, markets, and all phases of business enterprise have failed. Nor has the Government demonstrated great ability to do that type of job. The plain truth about the matter is that men, either in Government or business, have human limitations which make for inevitable serious mistakes in judgment about managed pricing which would not be made if the production and prices in that business or industry had been subject to "regulation" by the forces of free and open competition. American business is so complex and so inextricably interwoven and interlaced that there is, in my opinion, no body of men sufficiently wise or skilled to plan in advance the varied decisions that the economic necessities of free and fair competition produce naturally and with sufficient flexibility to meet any unexpected changes in market conditions.

We saw several phenomena in the great depression which indicated the inflexibility of those segments of basic industry which either by concentration of production in a few hands or by gentleman's agreement among the major producers were able to maintain the high boom price levels in a period of economic distress. These industries suffered at least as much as those in which competition forced distressed prices, and the fact that they elected to curtail production and employment rather than to reduce prices contributed directly to delaying the swing of the economic pendulum by further curtailing not only the aggregate power to consume all products but also by discouraging potential buyers from consuming their goods.

Now we are on the other side of the mountain. There are present indications that prices have outrun purchasing power. Those industries and businesses which are sensitive to the play of free and open competition will have their prices adjusted to the market as an inevitable matter. However, in those industries in which concentration has led to a managed market or where understandings to restrict or prevent competition are employed, prices may or may not adjust themselves depending on the personal judgment of the market managers. To the extent that they elect not to reduce artificially high prices, a human blunder may be made by a few which can cause a great deal of economic suffering to the many.

I do not believe in or encourage the philosophy that it would be proper in these inflexible industries to regulate them and thereby to force price reductions by Government fiat. I do not believe that the human beings in the Government are any better equipped mentally to make such decisions of managerial discretion than are the human beings in business. The only advantage suggested for the Government making such decisions rather than private monopolists is that presumably the motivating force in the decision would be the interest of the public as a whole rather than any private or selfish interest.

If any of you think it strange that I should be resisting the principle of over-all Government regulation of business, I remind you that the basic concept of the Federal Trade Commission Act, as well as of the Anti-Trust laws in general, is that there should be a minimum of regulation of business and a maximum of individual freedom to compete under simple rules designed to keep competition clean and prevent artificial and monopolistic restraints or collusive agreements which suppress and eliminate the natural regulatory forces of competition.

V

I am personally convinced that the most pressing problem facing the public today is the preservation of free and fair competition as the primary regulatory force in business. Unless business men themselves help to halt the forces tending toward monopoly and the vesting of control in a few hands, they will find themselves inevitably heading away from the free enterprise system which is the keystone of our American way of life. Free and fair competition is the alternative to either domination and regulation by private groups of capital or that of a paternalistic State similar to those which have arisen abroad as a substitute for the forces of the free market.

As I mentioned earlier, most business men will agree with this statement of mine as an abstract proposition. Yet many of them see nothing inconsistent between this proposition and their own gentleman's agreement with their competitor allocating territories in which they each will have exclusive privileges or territories or a tacit understanding that neither will raise or lower prices without consultation. To preserve competition as a primary regulatory force in America requires something more than this sort of lip service. The requirements are not too complex. They appear to be that the laws against unfair and monopolistic practices must be universally observed in letter and in spirit and that the obvious deficiencies which hamper adequate enforcement of those laws must be corrected by legislative action.