Department of Justice

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BY

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* AS DELIVERED

The Nation's antitrust laws are designed to provide maximum freedom of economic action up to the point where that freedom conflicts with the good of society.

At first glance, the mandate of the Department of Justice's Antitrust Division looks elementary. Two statutes account for the bulk of the Division's enforcement responsibility -- the Sherman and Clayton Acts -- and they could be carried around on a piece of paper small enough to tuck into your pocket. The Antitrust Division's attorneys use simple terms: Sherman 1, Sherman 2, and Clayton 7.

The complaints and indictments also speak succinctly -- in terms of conspiracy in restraint of trade, monopolization, or attempts to monopolize, and mergers that may substantially lessen competition.

Why then, is the Antitrust Division's mission so complicated? Why is the study and understanding of antitrust law a complex matter? Why are monopoly cases among the most difficult and time-consuming of all litigation?

To answer that, you must realize that the Sherman Act is not unlike the Constitution. The language is simple and to the point -- and always current. As a result, the Sherman Act, like the Constitution, adapts to changing economic and social conditions.

Interpretation of the Sherman Act since 1890 has given rise to a highly complex body of case law.

Just as the law has become complex, so has the economic system to which it is applied. The intricacies of today's business and financial affairs were unforeseen when the Sherman Act was passed.

The parallel growth of complexities in both case law and business practice requires more sophisticated enforcement -- enforcement that is as flexible and innovative as the practices with which it deals.

I

Congress has recently reemphasized its regard for the importance of antitrust enforcement by expanding the tools available to both government and private parties.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 established a new system of advance warning for significant mergers and acquisitions. It also gave the Antitrust Division much-needed civil investigative powers, and significantly lessened the burden of private enforcement. This last step was achieved by granting to state Attorneys General the right to bring treble damage actions, as parens patriae, on behalf of individual consumers in their states.

The premerger notification program should eliminate the phenomenon of "midnight mergers" -- mergers consummated before the antitrust enforcement agencies know of the plans. It provides the antitrust agencies with the information needed to make intelligent judgments about proposed mergers and acquisitions before these agreements are consummated.

The amendments to the Civil Investigative Demand (CID) authority of the Antitrust Division are also significant.

The Antitrust Division can now determine the facts through use of compulsory civil process, enabling the Division to make a much more intelligent judgment on a proposed enforcement action.

II

The Antitrust Division is now engaged in a vigorous drive on criminal price-fixing.

The Antitrust Procedures and Penalties Act of 1974 made a criminal violation of the Sherman Act a felony rather than a misdemeanor. The Act raised the maximum fine for a corporation from $50,000 to one million dollars. For individuals, the penalty was increased from a $50,000 fine and one year in prison to a $100,000 fine and three years in prison.

Felony charges are becoming more common. They should be a deterrent. The stigma of becoming a convicted felon is difficult to reconcile with a business leadership status in the community.

Even more significant is the fact that prison sentences for those convicted -- which have been extremely rare for antitrust violators -- may become more commonplace under the new felony authority.

And judges, who have been lenient, may become much tougher.

I believe firmly that hard-core price-fixing is a serious crime and should be prosecuted accordingly. I support the guidelines the Antitrust Division recently issued to its attorneys for recommending sentences in criminal antitrust cases.

The guidelines make clear to price-fixers that the Antitrust Division will move against them individually (and not just against their corporations) and that the Division will recommend stiff prison sentences upon securing convictions.

Predatory pricing is another subject toward which I expect to direct more criminal enforcement. Persistent below-cost pricing designed to destroy competitors, to coerce suppliers or customers of competitors, or to enforce systematic boycotts to drive a competitor out of the market, are per se violations. As such, they are well within the boundaries of traditional criminal antitrust enforcement.

Anticompetitive acts such as these are a serious danger to our economic system. They are designed to make competitors less competitive and they increase the chances that monopolization will occur.

Where predatory conduct -- and by that I mean conduct that has no redeeming competitive virtue -- is uncovered, I support the use of all our criminal enforcement resources against it.

In this connection, the FBI has the technical expertise to help handle the documents and financial information common to antitrust cases. I expect to utilize these investigative talents and other skills of the FBI to assist the Antitrust Division in investigating and preparing cases.

III

But, antitrust enforcement is much more than criminal enforcement. The Antitrust Division's mandate is to promote competition in all sectors of the economy, to the extent that competition can operate.

We live in a truly mixed economy, many sectors of which are governed more by regulation than by free-market forces. Even in those regulated sectors, however, there is a role for competition.

The Antitrust Division is a strong advocate for business competition in its dealings with Congress and in its appearances before regulatory agencies.

In addition, as part of a comprehensive study of the role that antitrust policies can play in those segments of our economy currently subject to regulation, the Antitrust Division recently issued a report on antitrust immunities.

The report focused on several exemptions -- milk marketing, insurance, and ocean shipping -- and conducted thorough studies of these exemptions.

Milk marketing, for example, appears to be a relatively innocuous subject -- until one realizes that regulations in this field affect the price and control the marketing of most of the milk produced in the United States.

As a result of milk marketing regulation, dairy cooperatives may have achieved monopolistic power in some regional markets. On occasion, the cooperatives have used provisions of the Federal milk order system as predatory tools. These tools have included predatory pricing to further attempts to monopolize and price squeezes against consumers who are also processors so as to drive independents out of the market.

Such conduct is clearly subject to antitrust action and is outside the scope of the agriculture antitrust exemption. The Antitrust Division has filed three cases in recent years charging dairy cooperatives with such conduct in violation of the Sherman Act. We will continue to be vigilant and will study the possibility of legislative or executive remedy as well.

IV

One of the most difficult areas of antitrust law is the problem of shared monopoly, oligopoly, price leadership, or conscious parallelism -- call it what you will.

There are many industries in which a very small number of firms hold dominant positions. Many economists attribute enormous costs to this essentially non-competitive market structure. What should we do about it?

One possibility is to prosecute these situations under the antitrust laws as "shared monopolies," using Section 2 of the Sherman Act or, in the case of the FTC, Section 5 of the FTC Act. Such cases would, of course, present novel legal issues.

In industries in which only a few people are required to agree to an effective scheme, it is much harder to prove an agreement. One must overcome the hurdle of "conscious parallelism" -- the argument that there has been no agreement but merely independent decisions to act in a parallel manner in the independent interest of each firm.

In industries dominated by a few large firms, there are few incentives to lower prices. Other competitors would likely match that reduction and overall profits would decline.

On the other hand, there are tremendous incentives to follow a competitor's raises, since that means more income from the same sales.

As a result, pricing in oligopoly industries tends to be done in lock-step. Price reductions -- and, much more common, price increases -- by one firm are followed by most or all others. In other words, the firms take parallel action, conscious of the likely reactions of their competitors.

Non-competitive pricing is the result. The hard question is whether such non-competitive pricing is, or ought to be, subject to antitrust attack. There are inherent difficulties with trying to deal with "conscious parallelism" through antitrust enforcement.

By definition, under conscious parallelism no direct communication occurs between the firms involved. Hence, there is no explicit agreement between the firms.

Thus, we must seek to prove an agreement by inference -- by arguing that the course of the conduct under attack leads inevitably to the conclusion that there must have been an agreement, however implicit, among the firms.

A second problem with antitrust enforcement in this area is the difficulty of obtaining effective relief.

One approach might be to order the oligopolists to sell their products at a competitive price.

Obviously, the supervision of such an order might pose difficulties for the courts. The courts would, in fact, become price regulatory agencies. This may not be a satisfactory way to resolve whatever problems arise from oligopoly pricing -- for reasons apparent to those who believe in the free enterprise system. But neither is it satisfactory to permit a few firms that dominate an industry to act as if they were one. "Shared monopoly," where it truly exists, ought to violate the antitrust laws, and judicially-controlled pricing protection may be an approach we may have to consider further.

"Conscious parallelism" poses, therefore, a very difficult problem. Nevertheless, I am extremely interested in pursuing innovative ways to deal with this kind of quasi collusion. In sum, innovative, creative thinking is needed in the antitrust field.

V

In conclusion, we come back to our starting point. The antitrust mission is extraordinarily clear and simple: to encourage business efficiency, to allow the market to serve as a measure of consumer preference and entrepreneurial reward. The rewards of the market, unfettered by cartels or conspiracies, are the surest way of assuring that American business efficiently produces what the American consumer wants.

I believe strongly in the free enterprise system. I believe with equal strength that vigilant antitrust action serves a vital role in guaranteeing that enterprise is truly free to produce and that consumers are truly free to choose.