39. Antitrust

Congress should

- repeal the Sherman Antitrust Act of 1890, especially section 2, and eliminate the Federal Trade Commission's power to act against ill-defined "unfair competition";
- repeal the Clayton Act of 1914, especially sections 2 and 7; and
- repeal the Robinson-Patman Act of 1936.

Antitrust as Anti-Free Market

Antitrust laws allow the federal government to regulate and curtail basic business activities, including pricing, production, product lines, and mergers, usually in the name of preventing monopolies and fostering competition. The irony is that the laws in fact impose arbitrary government limitations on competition, keep prices for consumers high, and weaken American industries. Massachusetts Institute of Technology economist Lester Thurow wrote in his 1980 book *The Zero-Sum Society* that "the time has come to recognize that the antitrust approach has been a failure. The costs it imposes far exceed any benefits it brings."

American industries, in today's more integrated global economy with low trade barriers, do not lack competition. Imports, which were valued at 3.9 percent of America's gross domestic product in 1970, are 9.6 percent today. Exports were 4.1 percent of GDP in that year and are currently 7.2 percent. That new situation makes the rationale for antitrust laws even more absurd than in the past.

A recent example of the potential abuses of antitrust laws was the threat by Anne Bingaman of the Clinton administration's Justice Department to stop the August 1995 release of Microsoft Corporation's Windows95

operating program for personal computers. Microsoft was also planning to run its own online Microsoft Network (MSN) Internet access service. To make it easier and more tempting for Windows users to subscribe to MSN, whenever a machine using Windows95 was switched on, an icon that would allow subscribers to connect with MSN with a single click of the mouse would appear on a computer's desktop screen.

Bingaman believed that that would give Microsoft's MSN an unfair advantage over other online services such as America Online, CompuServe, and Prodigy—in spite of the fact that the alleged unfair monopolistic competitor, MSN, literally did not exist at the time Bingaman was threatening to stop Windows95. Further, the supposed Microsoft "advantage" consisted of the fact that it would take two clicks of the mouse for users of Windows to sign on to competing online services. And in any case, with three or four clicks of the mouse, a Windows95 user could put an icon for a competing online service onto the desktop menu with the MSN icon.

Fortunately, the Clinton administration did not act against Microsoft in that case, though it has harassed Microsoft in other ways. But that kind of silly second-guessing of the markets has characterized the history of antitrust laws.

Antitrust laws are always enforced arbitrarily and sometimes capriciously, violating the due process of law and relying on ex post facto rulings.

A fundamental principle of Anglo-American law is that crimes must be clearly defined. But with antitrust the definitions are vague and constantly changing, depending on the whims of regulators and policymakers. Businesses rarely know in advance which practices may constitute price discrimination or "predatory" pricing or may "substantially lessen competition" in the eyes of the antitrust enforcers. As Alan Greenspan once observed, antitrust

> is a world in which competition is lauded as the basic axiom and guiding principle, yet "too much" competition is condemned as "cutthroat." . . . It is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict—after the fact.

Consequently, businesses do not compete and serve consumers as vigorously as they otherwise would, for fear of running afoul of new and creative interpretations of what constitutes an illegal business practice.

There can never be a precise definition of "competition," for competition, as a dynamic process, constantly leads to the discovery of new techniques for competing. The criteria the government has used in the past to try to define competition—size of firms, prices that are "too high" or "too low," closeness of substitute products, and the like—are all meaningless and arbitrary.

Antitrust laws are anachronisms whose time may never have come and is certainly gone today. Congress thus should do three things.

Repeal the Sherman Antitrust Act of 1890, Especially Section 2, and Eliminate the Federal Trade Commission's Power to Act against Ill-Defined "Unfair Competition"

The first federal antitrust law—the Sherman Act of 1890—is usually portrayed as a law that was necessary to prevent large enterprises or industries from restricting competition by cutting output and driving up prices. Section 1 prohibited "every contract, . . . combination, or conspiracy in restraint of trade," while section 2 made "monopolization" illegal. The Federal Trade Commission Act of 1914 gave the newly created FTC general powers to act against "unfair competition."

But at the time of the passage of the Sherman Act, the economics profession almost unanimously considered the act inherently incompatible with rivalrous competition. Having observed the merger movement of the late 1880s, economists "rejected the idea that competition was declining," notes historian Sanford D. Gordon, who surveyed economists' attitudes toward the late 19th-century trusts.

Monopolies supposedly restrict output and raise prices. But the trusts that were accused of monopolizing their industries in the late 1880s had been, in fact, increasing their output several times faster than the overall economy had been growing during the decade preceding the passage of the Sherman Act. Also, during that deflationary period, those industries had been dropping their prices faster than the general price level had been dropping. That behavior is contrary to any definition of monopoly.

Members of Congress at that time clearly recognized those facts, but they wanted to pass a law that would protect less efficient and higher priced businesses. "Trusts have made products cheaper, have reduced prices," complained Rep. William Mason during the House debates over the Sherman Act. Low prices, he said, "would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprises."

That curious opposition to low prices needs to be understood in the context of the trade debate occurring at the time. Without protectionism, trusts were reducing prices and driving out less efficient producers. The Sherman Act was passed as a smoke screen for the real cause of monopoly in the late 19th century: tariffs. Sen. John Sherman (R-Ohio) himself sponsored the 1890 McKinley tariff, passed just three months after the Sherman Act. "That so-called Anti-Trust law," the *New York Times* wrote on October 1, 1890, "was passed to deceive the people and to clear the way for the enactment of this . . . law relating to the tariff." Senator Sherman attacked trusts because they "subverted the tariff system; they undermined the policy of government to protect American industries by levying duties on imported goods."

Protectionists did not want prices paid by consumers to fall. But they also understood that to gain political support for high tariffs they would have to assure the public that industries would not combine to increase prices to politically prohibitive levels. Support for both an antitrust law and tariff hikes would maintain high prices while avoiding the more obvious bilking of consumers.

Repeal the Clayton Act of 1914, Especially Section 7

The Clayton Act of 1914 restricted mergers between companies, but its result was to restrict price competition.

At a time when most industries face international competition or the threat of it, it is foolish and destructive to have laws, such as section 7 of the Clayton Act, that regulate mergers. Mergers usually occur because business partners believe the merger will create synergy—the value of the two companies combined will be greater than their individual values, which is to say that together they will serve consumers better. Mergers or takeovers are sometimes motivated by the belief on the part of the acquiring firm that the "target" firm is being poorly managed and that new management can improve efficiency and profitability. Such mergers facilitate the flow of productive assets into the hands of more efficient managers. Some mergers are simply alternatives to bankruptcy.

University of Chicago economist Yale Brozen concluded in his treatise *Concentration, Mergers, and Public Policy* that the regulation of mergers has "restrained output and the growth of productivity" and is "contributing to the deterioration of the competitive position of the United States" in international markets. That is a particularly telling point in light of the fact that Japan not only does not restrict mergers but actively encourages

them, recognizing their importance to productivity and competitiveness. Under the Japanese *Keiretsu* system, literally hundreds of firms sometimes merge (often vertically) to form "export trading companies" that successfully compete in international markets. U.S. policy could encourage greater competitiveness by scrapping section 7 of the Clayton Act and all other laws that restrict mergers.

Repeal the Robinson-Patman Act of 1936

The Robinson-Patman Act, along with section 2 of the Clayton Act, effectively outlaws price cutting by permitting price discrimination (charging different prices in different markets) only if it can be justified by differential costs of serving different markets, or if a price reduction is made "in good faith" to meet the price reduction of a competitor. Any business that initiates vigorous price competition runs the risk of being sued for having not waited for a rival to cut its prices first and then met the price cut "in good faith."

In any case, economists and courts simply do not have the technical expertise to determine whether or not price differentials are justified by cost differences, given the difficulties inherent in cost accounting. And in most instances, firms prosecuted for price discrimination have been forced to raise their prices.

Conclusion

Economies go through cycles of business mergers and divestitures. Public opinion goes through cycles of concern that enterprises are too large and concentrated or too small and weak, unable to meet challenges from large foreign competitors. But the largest companies of yesterday, such as integrated steel producers, have been replaced at the top of the industrial ladder by the Microsofts of today. In the future, no doubt other industries and enterprises will rise to the top. The only danger from monopolies is from those created or fostered by the government, such as the monopoly on most mail delivery.

Antitrust laws that allow the federal government to second-guess markets and hold up or prohibit sound business practices have no valid place in a market economy. Congress can help ensure that America businesses will be able to adjust to changing market conditions by eliminating those laws.

Suggested Readings

Armentano, Dominick. *Antitrust and Monopoly: Anatomy of a Policy Failure.* New York: Wiley, 1982.

Brozen, Yale. *Concentration, Mergers, and Public Policy.* New York: Macmillan, 1982.

DiLorenzo, Thomas J. "The Origins of Antitrust: An Interest-Group Perspective." *International Review of Law and Economics 5* (June 1985).

Greenspan, Alan. "Antitrust." In *Capitalism: The Unknown Ideal.* Edited by Ayn Rand. New York: Signet, 1966.

—Prepared by Thomas J. DiLorenzo