The New Gibberish at the FTC

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AFTER ALMOST ninety years of debate, government enforcement of our antitrust laws still reflects their ambivalent origins. Some see the laws as designed to ensure competitive markets, while others see them as designed to protect small businesses.

Thus, one goal of antitrust enforcement is to maximize competitive rivalry—meaning that the statutes should be implemented with an eye to eliminating all barriers to competition. Applying this view to specific cases, courts have prohibited restraints ranging from price-fixing agreements by pipe manufacturers to mergers of competing railroads with adjoining lines for purposes of monoply. They have also condemned efforts to divide markets among competing firms and to engage in economic boycotts. Indeed, any practice whose central purpose is to create a cartel or to exclude competitors from markets is considered so pernicious that it is punished by criminal penalties, without proof being required that it has actually restricted competition.

On the other hand, popular supporters of antitrust worry more about the size of businesses than about market efficiency. Their focus has been the conduct of large firms, not the effect of that conduct in the marketplace. Some courts have even been persuaded to require that larger firms follow rules which restrict their competitive efforts—that is, to favor the rivalry offered by smaller firms over the pressure toward efficiency supplied by larger firms. One result has been that the antitrust laws have occasionally been applied to constrain seemingly benign uses of market power. Thus, when Alcoa was the nation's sole supplier of aluminum, it found itself condemned for having vigorously pursued "honestly industrial" tactics because their overall purpose was "to exclude others and perpetuate its hold on the [aluminum] ingot market." The difficulty with this conclusion, of course, is that this kind of conduct is exactly what competition seeks—tough and inventive rivalry.

This tension between ensuring competition and preserving smaller (and often less successful) firms in the market has made antitrust enforcement less predictable than most government policies. For example, during the 1950s and especially the 1960s, Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice—aided and abetted by the Supreme Court—often moved to curtail market power and protect small businesses, even where efficiency might be sacrificed. In 1962 the Supreme Court went so far as to suggest that mergers which would increase efficiency in shoe retailing could be condemned if small (and apparently less efficient) firms were threatened.

In recent years, however, the pendulum has appeared to swing in the other direction. Changes in court and enforcement personnel, their increasing understanding of economics, and an awareness of academic criticism of past antitrust decisions have led to a new antitrust sophistication. In addition, conglomerate mergers have lost some of their appeal in the stock market and, as a result, the interest in efforts to devise an antitrust response to this merger activity has waned. Moreover, double-digit in-

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flation has forced greater attention on efforts to achieve efficiency, thereby limiting the attractiveness of enforcement policies that might result in cost or price increases. One consequence has been that in 1977 the Supreme Court expressly reversed its ten-year-old policy against any manufacturer control of independent retail outlets and allowed firms to assign dealers to particular locations in order to enhance their profitability. In this context, the Court desired the likely benefits accruing to competition from increased rivalry among brands of different manufacturers more than it feared the losses caused by possible reductions in competition among dealers selling the same brand.

It is obviously difficult to draw the line between the benefits of efficiency, on the one hand, and the need to preserve some competition, on the other. To be sure, it is not hard to find simple and easy examples of practices—such as price-fixing, dividing up markets, and the like—that serve no socially useful purpose. Price-fixing, properly defined, is intended solely to increase the profits of those who engage in it and to transfer wealth from consumers to producers. But that is not true of other contractual arrangements, such as the assignment of a firm's output to one buyer, mergers between competing firms, distribution agreements, and similar practices. Arrangements of this kind pose difficult questions because their purpose may be to improve a company's operations (for example, ensure a source of supply) or to deny a competitor a critical item. Consequently, the legality of such arrangements must depend upon a close evaluation of their actual business justification, and of the possible gains and losses that result from allowing them to continue.

Reflecting increasing economic sophistication, the enforcement agencies and courts have been reaching for new ways in which to weigh competing and conflicting claims. For example, the FTC's staff has given thoughtful consideration to whether performance data support oligopoly theory or whether large firms are in most instances the result of inexorable market forces and are likely to serve consumers well. The Antitrust Division has gone so far as to dismiss complaints of predatory pricing against two major tire companies because it could not "demonstrate that the defendant in either case set prices below marginal or average variable costs."

Whether these actions are ultimately valid is, for this discussion, beside the point. What is significant is the high level of careful analysis and insight being displayed by government agencies charged with enforcing the antitrust laws. As an aside, it is interesting to note that as the economic analysis becomes more complex, closer attention is being paid to simple price-fixing, for it appears that primitive efforts to manipulate the market are still the most dangerous and frequent threats to the public welfare.

The FTC's New "Competition Policy"

It was, therefore, something of a shock when in late November 1977 (in an address to the New England Antitrust Conference in Boston) and again in late December (this time before an assembly of antitrust law professors in Atlanta) the chairman of the Federal Trade Commission, Michael Pertschuk, ended seven months of silence to announce his new "competition policy." Unfortunately, the results are neither satisfying nor encouraging. In less than two hours he managed, singlehandedly, to reset the antitrust clock and to push it in the direction of a "Brave New World." What he proposed, in short, was that antitrust should be based on a concern for "human values" rather than on simple "economic efficiency." He called upon antitrust enforcers to abandon their "narrow allocative efficiency approach" and, "through enforcement initiatives," to force corporate compliance with current energy policies, environmental requirements, employment programs, and the nation's "democratic, political and social ideals." Disdaining economic analysis, he urged—in his November speech—that antitrust enforcement look for guidance to the professions that study people and institutions—namely, psychologists, sociologists, historians, and political scientists.

This sweeping indictment of past antitrust enforcement and its bold promise for the future encourages caution in any outside critic. Nonetheless, criticism might inform the chairman's views, so it may be useful to speak out. On first reading Chairman Pertschuk's suggestion that psychologists should be consulted by the FTC, one wonders what he might mean. Is business behavior to be judged under the antitrust laws on the basis of whether it hurts or satisfies the feelings of competitors or customers? Is business or consumer happiness to be the new goal of a competition policy? It seems unlikely. Similarly, there comes to mind no substantive improvements that are likely to result from contributions that sociologists, historians, or political scientists might make to antitrust enforcement. The chairman's ideas seem, in short, to be nothing more than rhetoric—and one hopes, therefore, that he will abandon them. It is at least encouraging that this theme of the November speech was not repeated in December.

In any case, the FTC's new chairman should not be evaluated solely on these comments, for he had other things to say. In fact, I believe that the real test of his views lies somewhere in the six principles he announced as guides to his competition policy. These principles, he said in both speeches, will be the backbone of his antitrust agenda for the Federal Trade Commission during the next six years. They can be summarized as follows:

(1) Consumers should be provided with a variety of products and services at reasonable prices.

(2) The country's economic structure should be consistent with the nation's democratic, political, and social norms.

(3) Businesses should be kept within "human scale," with "room at the top" for "individual self-fulfillment."

(4) The economic structure should be self-policing and, as a consequence, require only minimal government interference.

(5) The economic structure must operate within a framework of fairness and ethical commercial conduct.

(6) Efficiency considerations alone should not dictate antitrust policy; a responsive policy must consider "social and environmental harms . . . [including] resource depletion, energy waste, environmental contamination, worker alienation, [and] the psychological and social consequences of market-stimulating demands."

Some of these principles are familiar and widely accepted. The first, for instance, is basically a restatement of the efficiency principle. The fourth reflects the Jeffersonian belief that government should do only what individuals cannot do for themselves. What is new in the chairman's antitrust platform is the primacy given social policy, especially in the third and sixth principles. This social vision is reinforced by the suggestions Mr. Pertschuk supplies to show where his new competition policy might lead us and what its effects would be.

Before examining this new policy, it is necessary to consider how the chairman intends to implement the program. That is, how will it be reflected in FTC enforcement policy? According to the new chairman, the answer is quite simple. It will be achieved by "*boldness* on the part of the decision-makers." This "*boldness* in enforcement" requires more than information of past trends and present violations. "It requires more and better prediction analysis—and *bold* action based upon reasoned prediction." Therefore, as he told the assembled law teachers, "we are determined to be *bold, innovative* and *risk-taking.*" (The emphasis is mine.)

There is the temptation to say no more, to allow these weightless words to be carried away by the first skeptical breeze. But this new strain of antitrust populism may not disappear so readily. Certainly, the hardiness of earlier versions, which focused more on the evils of the big trusts and on the virtues of the small businessman, suggests that the desire to use the antitrust laws to promote social justice rather than to maintain competition will not quickly fade from the political scene. It is always hard to overcome the appeal of doctrines that promise economic justice for all. Thus, there is good reason for critical comment on the Pertschuk policy.

There are, I think, two basic arguments against this visionary, indeed missionary, view of antitrust: first, it would be unwise, and second, it would rely upon unsound interpretations of the antitrust laws.

An Unwise Program Unlikely to Improve Competition

By focusing on competition and its needs, traditional antitrust enforcement has long sought to ensure that competing firms obtain new business and keep old customers by offering superior products at lower prices. Through competition, consumer wants will be satisfied at the lowest price and with the sacrifice of the least amount of scarce resources. In economic terms, competition serves the public interest because it maximizes both allocative efficiency (making what the consumer wants) and productive efficiency (using the fewest resources to do so). By relying upon market mechanisms to serve the public, antitrust enforcement has minimized government intervention in the marketplace and has been neutral and reactive rather than bold and self-generating.

Although Mr. Pertschuk pays lip service to this goal (in his first and fourth principles), he makes clear that his new "competition policy" would give priority to "socially conscious" values. Implicit in his argument is the notion that noncompetitive values should take preference. And to the extent that this goal is realized, consumers will be denied the benefits which a competition-anchored antitrust policy would provide. In practical or specific terms, what does this mean? Since Chairman Pertschuk gives no examples on this point—wisely, one suspects—it may be premature to speculate. But it does not seem far-fetched to suggest that his FTC might seek to prohibit a tire company from offering consumers lower-priced tires because cars equipped with such tires would consume more gallons per mile than cars equipped with radials. Or, for that matter, the commission might conclude that the current "gas and go" revolution in service stations must be stopped because of its adverse and, therefore, inhumane effects on jobs for attendants—or possibly because of the inconvenience forced on customers who have to wipe their own windshields and pump their own gas. Consumer choice, in this case, the availability of cheaper tires or self-serve gas stations, might have to be sacrificed to other values.

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These are, admittedly, fanciful examples, and it is unlikely that Mr. Pertschuk and his colleagues would select such questionable prosecutions, at least to begin with. On the other hand, they are not really far-fetched if one takes seriously Mr. Pertschuk's expressed concern about energy waste and worker alienation or his off-hand remark to the law teachers that the broad language of the FTC Act's Section 5 (prohibiting "unfair or deceptive acts") might require consumer representation on corporate boards. These illustrations do demonstrate, moreover, two cardinal points about the Pertschuk thesis. The first is that the substitution of other values for a competition-based antitrust scheme is never free or costless. Competitive values must be sacrificed if social values are to be given primacy—or else the new policy is nothing more than rhetoric and official deception. The second and equally important point is that the new chairman's "humanistic model" for antitrust is formless, shapeless, and unpredictable. There simply are no generally accepted "democratic and social norms" for applying the antitrust laws—and some of the new chairman's announced values are worrisome, at least to the extent they are offered as the basis for determining the shape and operation of much of our economy.

The problem is that unless antitrust law has an objective and principled foundation, antitrust enforcement can become the personal plaything of enforcement personnel, or the stock in trade of lobbyists and influence-peddlers. Even if corrupt influences were avoided, antitrust could be used to serve current policy notions, thereby lending enormous force and authority to political programs which otherwise might pass unnoticed and which, in any case, have little relevance to the delivery of goods and services. Here, liberals and conservatives are in agreement. Nixon-Ford Solicitor General (and now Yale professor of law) Robert Bork has warned: "The result [of reliance on noneconomic factors] can only be uninformed, ad hoc, political guesswork, not anything remotely recognizable as law." And Lyndon Johnson's antitrust chief, Harvard Professor of Law Donald Turner, has stated: "I fully expect to hear before long that a merger should be allowed because it will contribute to the [then] President's program for making America beautiful."

It is contradictory and somewhat disingenuous, moreover, for Pertschuk to propose that the economic structure be self-policing (principle number 4) and yet to come out strongly in favor of an antitrust policy tuned to individual self-fulfillment (number 3) and social objectives (number 6). Such criteria, being highly subjective, cannot be applied, nor can their application be policed, without constant resort to government interference in the marketplace. Until now it was generally thought that both the consumer and the community were best served by having many firms' competing for the consumer dollar. Thus, if the buying public preferred lower-priced conventional tires to the more expensive radials, despite the relative energy efficiency of the latter, then that is what the tire manufacturers should be allowed to make and sell. Only a direct governmental order could lead tire companies to ignore this consumer preference. But such an order, in addition to involving the government in overruling consumer decisions on what to buy, requires a policy decision that energy-efficient tires would better serve the public than its own buying decisions. Whether government intervention of this kind would be wise policy may be unclear. What is clear is that the open-ended command of the FTC Act, which prohibits only "unfair or deceptive" trade practices, provides no guidance for the commission to extend its sway in this direction. If permitted to overrule consumer choice in this area, there would seem to be no limit to Mr. Pertschuk's overriding other market decisions in favor of his personal preferences.

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The possible benefits of the new competition policy do not justify its social costs. Indeed, the benefits to worker and consumer alike from an antitrust policy grounded in energy and environmental concerns are likely to be nil; however, the unpredictability of government policy and its effect on business planning will discourage investment and competitive effort. When there is no assurance that the losses would be counterbalanced by significant gains, the proposed policies seem particularly unwise.

An Unsound Interpretation of the Antitrust Laws

But the greater danger from Mr. Pertschuk's proposal is the new reach and authority that he suggests for antitrust laws. Admittedly, the laws governing antitrust are broad and vague —deliberately so—and have, as the Supreme Court once said, a "generality and adaptability comparable to that found to be desirable in constitutional provisions." But this flexibility, rather than being a license to aggrandize authority in government, is meant to be a mandate to use that power carefully in the service of the basic ends that these laws were designed to achieve. The antitrust laws were not written as an answer to the vexing issues of resource depletion, energy waste, environmental contamination, or worker alienation—despite the chairman's wishes—and it would pervert the statutory purpose to apply them to these ends. The open-ended authority the chairman proposes—free of the constraints that enforcement officials and courts have placed on the antitrust laws, primarily by relying upon economic criteria—would be intolerable in a democratic society. It was (and is) necessary for antitrust enforcement officials to exercise broad discretion—but not without reasonable limits.

This is not the place to outline all the questionable legal theories relied upon by the FTC chairman to support his innovative approach. For now, it is enough to note that he places primary reliance on cases such as *FTC v. Brown Shoe Company*, a 1966 Supreme Court opinion that has been widely condemned as illogical and economically illiterate, and probably one that would be ignored or overturned by the Court today. Mr. Pertschuk's new approach to competition policy is constructed on a sagging platform of suspect case law and throwaway sentences from stray decisions. It has no real support in the law. And it is contradicted by weighty authority, such as Judge Wyzanski's reminder that even the Supreme Court's recognition of the constitution-like provisions in the antitrust laws is, in fact, a warning to the courts and the agencies not to engage in social engineering.

The legal basis for the Federal Trade Commission's new agenda has other problems. They are more than mere awkwardness, though there is plenty of that, too—as in Pertschuk's claim that the agency will "refine the concept of actual potential competition." Take, for example, Pertschuk's proposed reinterpretation of the FTC's authority under Section 5 to declare unlawful those business activities that violate public policy. In the past, this useful doctrine has been applied to ban commercial bribery, harassment of competitors, business espionage, and the like. It is now suggested that the commission extend this rule beyond a prohibition of those obnoxious practices directly interfering with competition in order to enjoin "businessmen from employing illegal aliens" and firms "from cheating on . . . taxes" or to require that "a consumer representative be placed on the board of a company" that has violated the FTC Act. Litigating these questionable ideas would merely tie up the FTC's scarce enforcement resources and further slow its already lethargic processes.

Nor do I share Pertschuk's enthusiasm for the "exciting traditions" of "incipiency and spirituality," as he defines them, and for an expansive application of the Clayton and Robinson-Patman acts. Why either act should be extended to reach practices beyond those to which they have already been applied, other than because of a desire for "innovation and boldness," remains unclear. Since the Clayton Act already reaches potential violations, its further extension through application of the FTC Act seems redundant. And the commission has wisely allowed the Robinson-Patman Act to lie dormant for the past decade because this statute, which bars most price discrimination, in fact restrains rather than promotes competition. Not without reason has it been labeled the "Typhoid Mary of antitrust." The only valid occasion for the FTC's reversing its sensible policy of ignoring this horrendous statute would be its joining the Antitrust Division's recommendation to Congress that the statute be repealed.

What is of even greater concern is how the FTC's new policies would affect the rule of law. Chairman Pertschuk is no longer on Capitol Hill operating under the necessarily looser rules of a legislative chamber. What he now does and says influences the economy and the tone of business practices. The occasional critics of the antitrust laws notwithstanding, these laws serve an important public interest and are, in fact, a vital cog in keeping markets competitive and the economy vigorous. And, as the 1977 stock market suggests, the economy and therefore the public suffer when unpalatable and unwise economic policies are pressed by those in positions of substantial authority. Nor, for that matter, can any law survive constant assault. Of course, Mr. Pertschuk has not proposed, nor presumably does he favor, the destruction of the rule of law. But his personalized and politicized view of antitrust and his willingness to venture "immediately and boldly" into uncharted territory with only his own notions of social good for a map are, if accepted, equally dangerous. If his views are in fact adopted by the entire FTC, their likely contribution would be to intensify public dissatisfaction with antitrust enforcement, as his "socially conscious" policies failed to change patterns of energy consumption, unemployment, and environmental blight. A more modest view of antitrust seems better suited to the Federal Trade Commission—and the nation. ■

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