The Antitrust Guide for International Operations - Another Point of View

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The Antitrust Guide for International Operations—Another Point of View

Volume 11 of the Cornell International Law Journal contains an article by Joseph P. Griffin1 critiquing the Justice Department's 1977 Antitrust Guide for International Operations2 and a critical rejoinder by Professor Donald I. Baker.3 Professor Baker was one of the principal drafters of the Antitrust Guide while serving as Assistant Attorney General in charge of the Antitrust Division prior to joining the Cornell law faculty. Thus, his remarks cannot be judged as those of an impartial observer. Accordingly, the object of this Comment is to present a different perspective on the Antitrust Guide and to elaborate on certain issues implicitly raised but not pursued by Mr. Griffin or Professor Baker.

I. The Antitrust Guide as a Response to Business Criticism

It would be a mistake to believe that the Antitrust Guide was an altruistically inspired effort by the Justice Department to sweep away the cobwebs of misunderstanding which surround the application of United States antitrust laws to international business operations.4 The Antitrust Guide, in reality, is a response to the criticism of an increasingly concerned and vocal American business community.5 The hypothetical examples in the Antitrust Guide are

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1Mr. Silverstein is a lawyer in Massachusetts and a doctoral candidate at The Fletcher School of Law and Diplomacy, Tufts University.
5"'The guide is intended to give the business community, the bar, and the Antitrust Division’s own staff some sense of the Division’s priorities and concerns. . . . It is a very deliberate attempt to make the subject less arcane, less technical, and less mysterious. . . ." Id. at 255.
6See, e.g., THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS: AN ISSUE ANALYSIS OF GLOBAL ECONOMIC REALITY, INTERNATIONAL ECONOMIC AFFAIRS DEPARTMENT, THE NATIONAL ASSOCIATION OF MANUFACTURERS (a report to Mr. Peter Chumbris, Subcommittee on Antitrust
designed not so much to aid the ordinary business person as to demonstrate
the "reasonableness" of the Antitrust Division's enforcement policies. These
examples skillfully create the illusion that an American business may engage
in a wide variety of international operations without incurring liability under
the antitrust laws. 6

But the hypotheticals are carefully qualified and the conclusions regarding
lawful spheres of activity are narrowly drawn. For example, in Case B, in-
volving a United States firm's acquisition of a foreign firm, the Guide's
conclusion that this transaction probably would not contravene the antitrust
laws is qualified in the event that the foreign firm, Glint, holds patent (or
trademark?) rights to its new product. 7 Yet, who can doubt that the Glints of
this world will have some form of proprietary protection for their valuable
new products? Similar qualifications abound throughout the Guide. As Pro-
fessor Baker concedes, the Guide "does not resolve all confusion and
fears," 8 and it is no substitute for "experienced antitrust counsel." 9 Profes-
sor Baker concludes, however, that if the Guide "simply reduces some sub-
stantial part of the confusion and fears in this area, it will have succeeded in
all that its creators could have hoped for." 10

This concluding statement reflects a disturbing lack of concern for the
adverse social welfare consequences of an unnecessarily vague or overly
zealous antitrust enforcement policy. Furthermore, Professor Baker seems
to discount the possibility of establishing a more concrete and balanced en-
forcement policy by innovative approaches. These points are discussed be-
low.

II. Some Economic Aspects of Current Antitrust Policy

A respected, if not universally accepted, body of economic literature ar-
gues that a perfectly competitive market is not only an unrealizable goal 11 but

and Monopoly, Senate Judiciary Committee, Sept. 11, 1974) [hereinafter cited as NAM Re-
port]. The foregoing report, the results of a ten-month study, concludes:
U.S. companies are handicapped in their international competitive efforts as exporters and
foreign investors by the extraterritorial application of U.S. antitrust laws. Contrary to com-
monly expressed assumptions, the NAM found that better than 70 percent of those firms
responding to its questionnaire indicated that U.S. antitrust laws had injured their interna-
tional competitiveness.

Id. 12

"Thus, the Department of Justice reaches "... the general conclusion that a very large pro-
portion of international business transactions involving American firms and/or American
markets usually will not involve violations of U.S. antitrust law because such transactions will
not adversely affect U.S. consumers or competitors." ANTITRUST GUIDE, supra note 2, at E-2.

1 See ANTITRUST GUIDE, supra note 2, at E-5.
2 See Baker, supra note 3, at 255.
3 Id. Note the implication of this passage that a cautious business person will not rely on the
advice of general counsel or even that of the routine antitrust lawyer but only on the advice of
experienced antitrust counsel!
4 Id. at 261.
5 See, e.g., J. GALBRAITH, AMERICAN CAPITALISM (1952); J. GALBRAITH, THE NEW INDUSTRIAL
STATE (2d ed. 1971); Robinson, The Impossibility of Competition, in MONOPOLY AND COMPETI-
may not always be an economically desirable result.\(^\text{12}\) By definition, antitrust law is intended to demarcate the boundary between commercial practices which promote competition and are, therefore, beneficial to society and anti-competitive practices which are detrimental to society.\(^\text{13}\) In the economic jargon of Alfred Marshall, "consumer surplus" increases the more closely society approaches this boundary without crossing it.\(^\text{14}\) Correspondingly, there is a loss of "consumer surplus" and a "dead-weight" loss\(^\text{15}\) imposed on society as a whole when, because of uncertainty or overly zealous enforcement of the antitrust laws, firms operate inside the boundary.\(^\text{16}\)

\(^{12}\)See E. Chamberlin, The Theory of Monopolistic Competition (8th ed. 1965); J. Schumpeter, Capitalism, Socialism and Democracy 87-106 (3rd ed. 1950). See also Monopoly and Competition and Their Regulation (E. Chamberlin ed. 1954); Monopolistic Competition Theory: Studies in Impact (R. Kuenne ed. 1967); W. Friedmann, Law in a Changing Society 293-311 (2nd ed. 1972). The difference between "imperfect competition" and "monopolistic competition" is summarized in D. Dewey, Monopoly in Economics and Law 91-93 (1966). The argument, in essence, is that some element of monopoly power is necessary to promote industrial innovation. This is, of course, the basis for the United States patent system, which has also come under sharp criticism by the Justice Department.

\(^{13}\)In economic terms this is equivalent to saying that a society should produce at its "production possibility frontier." See, e.g., P. Samuelson, Economics 19-23 (10th ed. 1976); E. Mansfield, Microeconomics: Theory and Applications 202-205, 427-28 (2nd ed. 1975). Improper antitrust policy, as well as monopoly, can lead to market distortions and cause a society to produce inside its production possibility frontier.


\(^{15}\)Id.

\(^{16}\)Under conditions of uncertainty about the scope of the antitrust laws or unduly vigorous enforcement policies, firms will not produce up to the level that equates marginal cost and actual average revenue ($AR_A$). Instead, producers will perceive a steeper (that is, more negatively sloping) average revenue curve and produce only up to the point that equates marginal cost and perceived average revenue ($AR_p$). This condition is shown graphically below:
Thus, a law of diminishing returns applies to antitrust enforcement: there exists a point, however ill-defined, at which the gains from further enforcement efforts are more than counter-balanced by losses arising from greater uncertainty. This line of reasoning is a strong justification for an expansive "Rule of Reason" approach1 which accords some leeway to borderline commercial transactions.18 The "Rule of Reason" establishes in effect a narrow band around whatever is defined as "zero monopoly" conditions and thereby sanctions slight departures from perfect competition in limited circumstances.

In summary, from an economic standpoint, too much antitrust is as bad as too much monopoly. If the result is a net loss of consumer welfare, it matters little whether this is attributable to the work of monopolists or the men in white hats from the Justice Department.

III. Some Practical Aspects of Current Antitrust Policy

From a practical standpoint, uncertainty and overly zealous antitrust enforcement policies put American business at a serious competitive disadvantage.19 It is no secret that anticompetition laws in the United States are con-

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19See W. Friedmann, Law in a Changing Society 299-301 (2d ed. 1972). Cf. D. Dewey, Monopoly in Economics and Law 159-66 (3rd ed. 1966); Joelson, International Antitrust, 12 WM. & MARY L. Rev. 565 (1971). But see F. Scherer, Industrial Market Structure and Economic Performance 438-43 (1970). Professor Scherer argues that the "Rule of Reason" actually increases business uncertainty, introduces added costs due to more complex adjudication, and creates "an enhanced probability of irrational and erroneous choices." Id. at 439. It can be argued, however, that even under the existing system of ex post facto antitrust enforcement, an expansive "Rule of Reason" reduces uncertainty in borderline situations where there is truly an economic "justification" for conduct which might be held to violate antitrust law under a per se rule. Compare Northern Pac. R.R. v. United States, 356 U.S. 1 (1958) with Continental T.V., Inc. v. GTE Sylvania Inc., 429 U.S. 1059 (1977). Furthermore, if the Antitrust Division were to establish a procedure for binding advance determinations of the legality of proposed transactions as is advocated in part IV of this Comment, infra, Professor Scherer's criticism of the "Rule of Reason" would clearly be inapposite.
strued and administered more stringently than are similar laws in other countries, including our principal trading partners—Canada, Britain, Western Europe, and Japan. In fact, many of these countries actively encourage and support mergers, export associations, and even cartels in cases where the net effects are increased efficiency and benefit to the domestic economies.

One of the problems most frequently cited by the U.S. business community concerns the general ambiguity of antitrust statutes. Uncertainty with respect to international antitrust has serious ramifications for U.S. international business. It becomes difficult to properly weigh costs and advantages of a specific international investment. Many business representatives interviewed by NAM felt that the uncertainty of the law together with stiff penalties for being found in violation of antitrust statutes combine to force abandonment of many foreign ventures.

For example in H. Steiner & D. Vagts, Transnational Legal Problems 996-97 (2d ed. 1976), the authors, while noting that "[f]oreign antitrust laws offer a variety of parallels and contrasts," make the following generalizations:

First, most foreign laws permit more justifications for agreements among competitors than does the Sherman Act. Second, it is common in the EEC to grant dispensations to those agreements which are judged to be, on balance, beneficial. Third, it is rare for any foreign system to place such strong emphasis on discouraging monopoly or oligopoly as is found in Section 2 of the Sherman Act or Section 7 of the Clayton Act.

A good summary of the anticompetition laws of the European Community, Britain, Japan, and Canada, including contrasts with United States legislation, appears in the U.S. Senate Finance Committee Report, supra note 19, at 838-63. This report states:

The European businessman has an apparent advantage over his American counterpart in choosing his methods of sale and distribution as long as he can show that the restrictive practices engaged in will have the effects of increased efficiency and benefit to the economy. The European approach remains one of encouraging the growth of European industry to create rivals for the third-country industrial might of the United States and Japan.


Thus, the U.S. Senate Finance Committee Report concludes:

The United States antitrust laws are based on the philosophical premise that a freely competitive economic system is the most efficient and most desirable form of society. This view is not necessarily shared by America's trading partners and competitors. Their view is that restrictive business practices are not undesirable per se, and may in many instances be beneficial to the economic growth and development of the region.

Concepts of fairness in the application of sanctions prohibiting restrictive business practices are viewed differently in the United States and abroad. The American approach has been to prohibit unfair practices on the theory that increased competition results which in turn assures the growth of independent firms. The foreign approach is, in a sense, the more pragmatic one of examining the actual result of the restrictive business practice to determine what benefits it may produce.

U.S. Senate Finance Committee Report, supra note 19, at 864-65.

The prevailing philosophy behind current United States antitrust policy is perhaps best expressed by Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945):

[Congress] did not condone "good trusts' and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

Although Congressional intent regarding the Sherman Act is a subject of much controversy, see D. Dewey, Monopoly in Economics and Law 142-44 (1966), Learned Hand's interpretation appears inconsistent with the legislative history of the Sherman Act which includes the statement that it is only "the unlawful combination, tested by the rule of common law and
is no accident that substantial portions of the *Antitrust Guide*, Griffin's critique, Baker's rejoinder, and two recent case notes are devoted to the problem of conflicting legislation. Professor Baker's entreaties for stronger foreign antitrust enforcement notwithstanding, it is unlikely, in the face of stiffening international competition for export markets and the growing United States balance of payments deficit, that many countries will rush to follow American precedents in this area.

Professor Baker is openly critical of the Webb-Pomerene Act, which provides a limited exemption from the antitrust laws for export associations. This legislation was designed by Congress with the express purpose of facilitating competition by smaller American businesses with large, often government-backed foreign cartels. Thus, Professor Baker recently invited for-
eign countries to prosecute United States Webb-Pomerene associations. Again the emphasis is on other countries bringing their anticompetition policies into line without first questioning the propriety of United States antitrust policy. One wonders whether, in the spirit of evenhandedness, Professor Baker would support using United States tariff laws to exclude, as an "unfair method of competition," imports produced in a country with less-rigorous antitrust laws than in the United States. Of course, even this extreme approach to the problem of differences between United States and foreign antitrust laws and enforcement policies would affect only the domestic market and do nothing to facilitate greater American competitiveness abroad.

IV. Toward a Balanced and Predictable Antitrust Policy

The reality that current United States antitrust policy places American business at a competitive disadvantage in the international marketplace could perhaps be accepted in the name of free enterprise and related ideals if there were no better way of regulating monopolistic activities. It is possible, however, to devise alternative mechanisms for controlling anticompetitive activities which are both compatible with American ideals regarding free enterprise and, at the same time, less damaging to legitimate business interests. One such mechanism designed for a limited category of international commercial transactions is proposed and described in a recent article on legal barriers to energy technology transfer. Somewhat different enforcement mechanisms may be suitable for other types of commercial transactions.

The key to such alternative mechanisms is a willingness on the part of the Justice Department, not presently evident, to make binding advance determinations of the legality of certain kinds of proposed transactions so busi-

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3Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1976) (as amended), prohibits unfair practices in import trade. If, after investigation, the International Trade Commission (formerly the Tariff Commission) determines that the effect of the imported articles is to "destroy or substantially injure an industry efficiently and economically operated, in the United States, . . . or to restrain or monopolize trade and commerce in the United States," it may order that the goods be excluded from entry.
4Section 337 of the Tariff Act includes provision for the exclusion of articles covered by an unexpired United States patent. A companion provision, section 337(a), 19 U.S.C. § 1337a (1976), provides for the exclusion of unpatented articles produced abroad by a United States-patented process. If the exclusion of imports produced in a country with less rigorous antitrust laws is not directly covered by sections 337 and 337(a), it surely would require no major extension of the principles evident in these provisions to bring such cases within their scope. The U.S. SENATE FINANCE COMMITTEE REPORT, supra note 19, at 826-27, states that at least a few complaints of this nature have been brought before the Commission and that "[r]ecognition of the potential of section 337 has been voiced often."
nesses could operate within the framework of relatively fixed guidelines. The guidelines would have to be carefully drawn to reflect a realistic balance between valid antitrust policies and the exigencies of commercial operations in a complex and competitive international marketplace. The relatively fixed guidelines would provide American businesses with intelligible standards by which to structure their transactions; a binding advance ruling on each transaction would replace the present ad hoc, ex post facto enforcement policy.

It is unlikely that such a radical proposal will receive a favorable response from the Justice Department. The counterargument is likely to be that the possible adverse effects of a particular transaction cannot always be foreseen, and therefore protection of the public interest requires review and reexamination of commercial transactions on a case-by-case basis after the anticompetitive results become manifest. It should be apparent in view of my earlier arguments, however, that this counter-argument is persuasive only as long as the negative social welfare consequences of uncertainty and overly zealous enforcement are disregarded. When the latter effects are taken into account, there is no reason why the existence of some small amount of monopoly activity in the few cases which, in hindsight, are judged incorrectly cannot be compatible with the public interest.

Something more is required, therefore, to explain why a group of highly competent and dedicated Justice Department officials has not been more adept in resolving the conflicts, inconsistencies, and uncertainties in international antitrust policy. At least a part of the answer may lie in the principle of "bureaucratic politics." According to "bureaucratic politics" theory, a conflict of interest may arise between a government organization and the public which it is intended to serve because the organization defines the public interest in terms of its perceived "mission" instead of defining its mission in terms of the public interest.

Thus, the Antitrust Division seems to believe that it must retain considerable leeway in reviewing commercial transactions for anticompetitive effects even if this leeway generates ambiguity and uncertainty in its enforcement policies. This is because the Antitrust Division seems to perceive its "mission" as stamping out monopoly, and it equates the public interest with the realization of this objective. The possibility that there may be a social disutil-

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33Id. at 411-12. Although the Antitrust Division has established a "Business Review Procedure," 28 C.F.R. § 50.4 (1967), available to businesses with doubts about their investment plans, many problems with this procedure have led to relatively infrequent use. See NAM REPORT, supra note 5, at 1425. The problems cited include delays of six weeks or more in obtaining a response, drawing attention to a transaction which might otherwise escape notice, public disclosure of the review letter, and, most significantly, the fact that a "clearance" from the Justice Department under this procedure creates no immunity from subsequent prosecution even if the actual transaction is exactly as described.

34See notes 11-18 supra and accompanying text.

35See, e.g., M. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY (1974); G. ALLISON, ESSENCE OF DECISION 144-186 (1971).

36See generally HALPERIN, supra note 35, at 26-62. Halperin discusses these issues in a limited way in terms of conflicts between "roles" and "missions". Id. at 40-51.
ity arising from increasing uncertainty as the antitrust enforcers press ever closer to their elusive goal clearly has no place in this idealistic view of modern capitalist society.

The foregoing argument need not imply any self-serving motivation on the part of Antitrust Division personnel. On the contrary, proponents of the "bureaucratic politics" principle usually emphasize the deeply felt sense of "mission" which motivates government officials in the sincere, if mistaken, belief that they are acting in the public interest. Although "bureaucratic politics" can never be entirely eliminated from government, its existence must be candidly acknowledged as a constraint in effectively serving the public. In evaluating alternative policies, Antitrust Division officials should recognize that their views may be colored by their sense of "mission" and that the public might better be served by approaches which, at first blush, appear contrary to the accepted norms.

Conclusion

Thus, this Comment has come full-circle. Starting with the caveat that Professor Baker's remarks concerning the Antitrust Guide for International Operations should not be judged as those of an impartial observer, it concluded with a possible explanation for such bias. In between, it was argued that, in spite of the Antitrust Guide, enforcement policies concerning international operations are unnecessarily vague and overly stringent and that such policies may not be in the public interest. It was further argued that superior enforcement mechanisms could be devised compatible with the public interest if the Antitrust Division were willing to accept a broader definition of its "mission."

The Antitrust Guide must be applauded and welcomed as a step toward a more rational antitrust policy. At the same time, the Antitrust Division cannot rest complacently on these laurels. It should continue to seek a more balanced and predictable enforcement mechanism.

\[^{11}\text{Id. At least one scholar in the field of organization theory, however, has linked bureaucratic power with controlling the points of ambiguity in an otherwise rational and predictable system. M. CROZIER, THE BUREAUCRATIC PHENOMENON, 145-169 (1964).}\]