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Book Review. Kaysen, C. and Turner, D.F., Antitrust Policy: An Economic and Legal Analysis

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BOOK REVIEWS

ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS. By Carl Kaysen and Donald F. Turner. Cambridge: Harvard University Press, 1959. Pp. xxiii, 345. $7.50.

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Antitrust has come a long way since the hearings, monographs, and reports of the Temporary National Economic Committee in the late 1930's, coinciding with the vigorous antitrust enforcement phase of the Rooseveltian New Deal, brought together an imposing array of information and views on the problems relating to monopoly and restraint of trade. The "new" Sherman Act has been developed through judicial doctrines which make of the statute a more effective set of controls over anticompetitive industrial structure and business conduct than existed before. The patent laws, construed in conjunction with the antitrust statutes, foster monopoly to a lesser extent than previously. On the legislative side, the deficiencies of section 7 of the Clayton Act have been remedied,[1] the penalty provisions of the Sherman Act have been strengthened,[2] and the applicable law of limitations has been clarified.[3] The report of the Attorney General's National Committee to Study the Antitrust Laws has brought together a far better analysis of antitrust doctrine and policy than was available before. The American Bar Association Section of Antitrust Law publishes in its semiannual proceedings an increasing flow of informed discussion of contemporary problems. Economic analysis, culminating in the recent hearings, studies and reports of the Congressional Joint Economic Committee,[4] makes available a much more refined and precise set of diagnoses of price behavior and its effects than existed a few years ago.

All of these developments, and the possibilities of more effective antitrust enforcement which grow from them, are now accompanied by a climate of opinion in this and other countries which places less complete reliance on planning and correspondingly more reliance on competition as economic determinants than was the case twenty-five or thirty years ago when the socialist influence was stronger. Even in Great Britain, the traditional

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1 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

2 69 Stat. 282 (1955), 15 U.S.C. §§ 1, 2 (1958).

3 69 Stat. 283 (1955), 15 U.S.C. § 15(b) (1958).

4 See the list of hearings, study papers and reports prepared under the study of employment, growth, and price levels, in S. Rep. No. 1043, 86th Cong., 2d Sess. 145-47 (1960).

stronghold of tolerance for private restrictions on competition, the Restrictive Trade Practices Act of 1956 has been implemented effectively and has called attention to legislative provisions and enforcement devices that may have value in this country.[5]

Notwithstanding these conditions favorable to a strong antitrust policy, it cannot be said that the central problem of freeing the economy from monopolistic private power has been solved. Relatively inflexible, "administered" prices continue in the sale of many commodities, apparently contributing significantly to the gradual and general inflation which has persisted in the face of declining prices in some areas of the economy;[6] and there is a recognizable correlation between this price inflexibility and industrial concentration on the selling side of the markets where goods are sold.[7] If this concentration has not increased, it has certainly not diminished;[8] yet antitrust enforcement rarely challenges it and even less often succeeds in curtailing it.[9] The heritage of the decades when mergers were numerous and market power was built up through practices now regarded as illegal is still with us; the strength of existing law and the present means of enforcement are not sufficient to cope with it.

Into this situation the authors have cast their volume, the crux of which is a concrete proposal, with which the book concludes, to supplement the present federal antitrust laws with new legislation. The book is for the initiated; the text surveys the whole range of antitrust issues in a relatively small space and comments on decisions and other developments which are assumed to be known to the reader. Its perusal is rewarding, for its treatment of the subject is realistic and accurate. Its objective of formulating a specific legislative measure that can be considered and made the basis of action, to the extent the proposal is deemed to be sound, is admirable. Remedies other than legislation are not likely to produce much effect at the present juncture of affairs. The authors' bill, beside formulating a new means of reducing market power grounded in existing industrial concentration, confirms and makes some additions to recent judicial holdings with regard to a range of anticompetitive practices.

In their introductory first chapter, the authors identify the aims of antitrust policy and the central problem with which they intend to deal. Briefly put, that problem exists because "we do not believe that the law

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5 See Dennison, *The British Restrictice Trade Practices Act of 1956*, 2 J.L. & Econ. 64 (1959); Rhinelander, *The British Restrictive Trade Practices Act*, 46 Va. L. Rev. 1 (1960).

6 Staff of Joint Economic Committee, 86th Cong., 1st Sess., Report on Employment, Growth, and Price Levels 104-34 (Comm. Print 1959).

7 *Id.* at 125-26. See Stocking & Watkins, Cartels or Competition? 240-54 (1948); Blair, *Means, Thorp and Neal on Price Inflexibility*, 38 Rev. Econ. & Stat. 427 (1956); *Hearings Before Joint Economic Committee on Employment, Growth, and Price Levels*, 86th Cong., 1st Sess. 2237-62 (1959) (statement of R. F. Lanzilloti).

8 Kaysen & Turner, Antitrust Policy: An Economic and Legal Analysis xii (1959) (preface by Edward S. Mason).

9 The recent cases in which divestiture has been accomplished are enumerated by the authors at 109-11, 123.

on monopoly has reached the point of covering, or could be fairly construed to cover, the case where monopoly power is effectively exercised, wholly without agreed-upon courses of action, by a small group of sellers in an oligopoly market." (p. 21. See also p. 110). In such a market, neither the power of each large seller taken separately nor substantial identity of conduct among them affords a reliable basis for remedial antitrust action, despite some indications to the contrary in important court opinions. (pp. 107-09). During the past two decades antitrust enforcement has succeeded to a notable extent in curbing certain definite exertions of market power, such as tying arrangements, requirements contracts, collective refusals to deal, and patent licensing restrictions; but in the absence of these practices the disadvantage that could result from dissolving business entities or holding normal business conduct to be illegal have tipped the scales in favor of the status quo.

The second chapter of the book presents a brief survey, amplified in appendices, of market structures in the American economy, and is designed to indicate the extent to which market power probably exists. According to the criteria adopted by the authors, "structural oligopoly is the numerically dominant form of market organization in manufacturing." (p. 32). And because concentration is especially marked in the durable goods and investment goods industries, the economic importance of this preponderance of concentration is greater than the mere number of industries in which it exists would indicate. Statistically less reliable indications of concentration in the mineral industries indicate a similar condition there.[10] Account is also taken of the strategic and quantitative importance of the regulated industries which are largely exempt from antitrust legislation.

The remedy which the authors propose for the concentration of market power which the prevailing industrial structure indicates is the creation of a new Industrial Reorganization Commission charged with initiating proceedings in a new Economic Court to subject the firms in industries in which "unreasonable market power" is deemed to exist to divestiture, divorcement, and dissolution decrees. The authors reject any absolute limit on business size for two reasons:[11] first, business efficiency and progress are more important than competition, and to apply such a limit might lessen them; and second, even if it were applied to the greatest conceivable extent such as limiting firm assets to twenty-five million dollars, only about 10,000 firms would be added to the 3.6 million firms in the unregulated sector of the economy and the Jeffersonian purpose of promoting a society of small proprietorships, which might supply an alternative reason for such a policy, would not be appreciably advanced.

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[10] Compare Professor Louis B. Schwartz' proposal to limit initial expansion of antitrust legislation to "basic" industries. Schwartz, *New Approaches to the Control of Oligopoly*, 109 U. PA. L. REV. 31, 47 (1960).

[11] But note that Professor Schwartz advocates a figure of one billion dollars as one of the standards which would subject a firm to close regulation or dissolution. *Id.* at 47.

To identify those industries in which market power should be reduced by, in effect, reorganization decrees, the authors propose a statutory test which combines structural and performance elements. The performance element is the basic one, for market power is defined as "the persistent ability of a person, or of a group of persons whether or not acting pursuant to agreement or conspiracy, to restrict output or determine prices without losing a substantial share of the market, or without losing substantial profits or incurring heavier losses, because of the increased output or lower prices of rivals." (p. 266). Market power is evidenced, but not exclusively, by (1) persistent failure of prices to reflect substantial declines of demand or costs, or to reflect substantial excess capacity; (2) persistence of profits that are abnormally high, taking into account such factors as risks and excess capacity; or (3) failure of new rivals to enter the market during prolonged periods of abnormally high profits or of persistent or recurrent rationing. The structural element is added to the definition by a conclusive presumption that market power exists "where, for 5 years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales." (p. 267). Market power is "unreasonable" and is subject to a remedial decree unless the defendants show it "to have been created and maintained, entirely or almost entirely," by economies "dependent upon size," the "ownership of valid patents, lawfully acquired and lawfully used," or by "low prices or superior products attributable to the introduction of new processes, product improvements or marketing methods, or to extraordinary efficiency of a single firm in comparison with . . . other firms." (p. 268).

Limitations of space forbid even an approach to adequate discussion of this proposal. Given the prevalence of economically significant concentration in manufacturing industries under the apparently valid measures which the authors and others [12] apply, and given the "administered" price behavior and wasteful marketing methods which this concentration fosters,[13] one is led to hope for a statutory definition that would call, before performance is to be taken into account, for remedial action in far more instances than the authors' conclusive presumption would bring into court. The authors, however, deem the gaps in existing knowledge to be so great "that our conclusions about the functioning of any concrete market depend on the joint study of both structure and performance." (p. 16). Although "the concept of market power is basically a structural concept," (p. 75) its identification for remedial purposes is dependent in most instances on an examination of performance.

The trouble with this approach is illustrated by the difficulties connected with the "persistence of profits that are abnormally high" as evidence of market power. "Abnormally high" profits must be measured against a norm; and that norm, as defined by the authors, is "the long-run supply price of capital," indicated by "the bond-interest rate on first-grade industrial

[12] BAIN, INDUSTRIAL ORGANIZATION 85-265 (1959).
[13] *Id.* at 477-602.

bonds, plus an allowance for the extra riskiness of returns to equity capital, appropriate to the character of the industry," or by "the historical average returns for firms in competitive industries over long periods." (p. 63). The "extra riskiness" of certain industries might, for example, result from their vulnerability to cyclical fluctuations; but one supposes that many other factors might be urged. One questions, too, whether successful firms should be limited to the average profits of successful and unsuccessful ones in competitive industries. When to these difficulties are added those which the authors emphasize, of measuring the factors that may prevent market power from being unreasonable market power, the question naturally arises whether the proposal provides an essentially better enforcement tool than the Sherman Act. For reasons to appear, this reviewer believes that it does, even though a more drastic one might be defended.

An explanation of the conservative—even somewhat hesitant—nature of the authors' proposal appears in an illuminating preface to their book by Dean Edward S. Mason, where it is disclosed that "although this volume has been written by the two authors whose names are appended, the study is, in an important sense, the product" of a discussion group of lawyers and economists at Harvard, extending over several years. (p. xix). As to the central proposal of a market power standard, there was considerable disagreement in the group, and some remained unconvinced that the standard might not impose harmful checks on business growth by threatening the rewards of efficiency. Others doubted that it was sufficiently clear for effective adjudication. With such warnings confronting them, the authors' informed judgment could hardly have been different from what it is.

Whether or not it contains an ultimate solution to the market power problem, the Kaysen-Turner proposal embodies a distinct advance which, in the absence of improvement through the discussion it will doubtless arouse, seems worthy of enactment in substance. Its particular strengths lie on the administrative side. Although the creation of a third enforcement device consisting of a commission and a court, alongside the Federal Trade Commission, the Department of Justice, and the federal courts, requires considerable justification, this justification resides in the magnitude of the task to be undertaken if existing unreasonable market power is to be attacked successfully. It is too much to expect that the present agencies, burdened with the duties they have been attempting to discharge, could make much impression on the task, or that individual United States district judges could summon the confidence and fortitude to dismember major industrial enterprises which asserted sincerely and plausibly that their continuance was essential to progress and prosperity.

The authors have specific ideas for coordinating the efforts of the enforcement agencies that would exist if their proposal were adopted. (p. 265). One must assume, despite the historic differences between the Department of Justice and the Federal Trade Commission, that coordination is possible and will be undertaken in good faith if a specific congressional directive is enacted. The proposed Economic Court would be a fully judicial body, composed of judges assigned to it for periods sufficient to enable them to acquire expertness without losing the character of judges. (p. 255). Although much might be said for an administrative agency rather than a court to determine such matters in the first instance, the judicial device appears appropriate here, as English experience indicates.[14] Objection to the "combination of prosecutor and judge" is thereby obviated, and the prestige of the judiciary is employed in a task of major difficulty. And the expertness required is not that of the physical scientist or of intimate and continuing knowledge of a narrow range of affairs, such as many of the regulatory agencies use.

If Congress and the country are seriously in favor of a policy of relying on competition as the major device for securing the public interest in areas of the economy which are not regulated by an administrative agency, they should be willing to provide enough enforcement machinery for the job and give its units manageable tasks to perform. Whether or not the statutory language the authors propose supplies a clearer criterion for ultimate judgment of the existence of monopoly power than the Sherman Act now contains, something along the lines of their proposal is necessary to provide a foundation for enforcement action. Granted that a sufficient per se rule of illegality based on market structure is not feasible, the burden of proof should at least be shifted from the Government to the defendants when market power is shown to exist; such power surely justifies putting the possessor to his proof of consistency with the public interest as legislatively defined. Perhaps the necessity of undergoing legal scrutiny could be imposed, without substantial harm, on concerns having a far smaller place in the structure of a market or industry than is involved in the authors' "conclusive presumption." [15]

The authors rightly conclude that the criminal and treble-damage remedies under the Sherman Act get in the way of fair and effective enforcement against market power or business conduct that does not result from predatory intent or consist of violation of sharply defined prohibitions.[16] Although the fear of subsequent treble-damage recoveries against them—enhanced by the prima facie evidence that results from a conviction or decree on the merits in a Government action [17]—may induce defendants to plead *nolo contendere* or enter into consent judgments in such actions and thereby facilitate enforcement without trials, this advantage may be purchased at the cost of unwise agreements in some instances.[18] Certainly the implicit

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14 See note 5 *supra*.

15 See § 2(a) (9) of the legislative proposal by Walter Adams, in *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess., ser. 14, pt. 2B, at 1600-25 (1949).

16 See also Professor Schwartz' contention that "the criminal and treble-damage provisions of the Sherman and Clayton Acts would be inappropriate to cases of this character involving no imputations of misbehavior or illicit monopolistic intent." Schwartz, *supra* note 10, at 48.

17 69 Stat. 283 (1955), 15 U.S.C. § 16 (1958).

18 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 360-61 (1955).

adjudication of criminal guilt and the potentiality of large treble-damage recoveries, which reside in a decree on the merits, tend to induce caution in the judges in Sherman Act equity proceedings. (*Cf.* pp. xvi-xvii).[19] In criminal proceedings the prosecution has at times not been above resorting to rather blatant appeals to jury prejudice,[20] and the Government has recently secured confirmation of the severe one-sidedness of the use in civil proceedings of evidence uncovered by grand jury investigations, which exists so long as compelling reasons to the contrary are not made to appear.[21] All told, therefore, it is sound to propose, as the authors do, that criminal and treble-damage liability be confined to willful violations of a list of specific infractions which they would incorporate into the Sherman Act; that the monopolization provision of section 2 of the act be replaced by the provision for eliminating unreasonable market power which has been described; that the enforcement of the latter be confined to equity decrees; and that the Industrial Reorganization Commission have subpoena powers. (p. 265).

There is not space to discuss here the list of specific prohibitions (pp. 270-71) which the authors' proposed statutory amendments would add to the antitrust laws. Those which go beyond consolidating judicial and Federal Trade Commission doctrine into legislation include some interesting prohibitions of informational exchange among competitors and the outlawry of all price fixing by patentees in licensing agreements. As to the latter, there is express recognition that there could be instances in which "a price-fixing provision would be the only effective way, short of no licensing at all, in which a small firm patent-holder could protect its manufacturing operations against a large rival"; but on balance the prohibition is favored. (p. 173). Also favored is a statutory provision for five-year "petty patents" to afford an outlet for the strong pressure for reward to the creators of minor advances in the "arts." (p. 171). The authors also include useful summaries of important policy problems arising in the regulated industries (pp. 189-213) and in the relation of tax, government procurement and property disposal, small business aid, and tariff policies to market power. (pp. 214-33).

This book is especially commendable because it drives through to conclusions on all significant issues discussed, without pretense that the supporting data are better than they are and with a willingness to accept the consequences of doing the best that can be done with available information. The purpose is to contribute to progress in the solution of important public problems. Such a discussion is in accord with the best democratic methods and should find more support in academic traditions than it does. Here is political economy in a fine sense of the term. May there be more published efforts of a similar sort; and may legislative action result.

19 *Cf.* Milgram v. Loew's, Inc., 192 F.2d 579, 587 (3d Cir. 1951) (dissent of Hastie, J.).

20 An outstanding example is discussed in the opinions in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

21 United States v. Procter & Gamble Co., 356 U.S. 677 (1958).