

Unclassified

CCNM/GF/COMP/WD(2003)34



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

31-Jan-2003

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS  
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2003)34  
Unclassified

## **OECD Global Forum on Competition**

**THE OBJECTIVES OF COMPETITION LAW AND POLICY  
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- UNITED STATES --

*This note is submitted by United States under Session I (Part 1) of the Global Forum on Competition, to be held on 10-11 February 2003.*

JT00138532

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## UNITED STATES

### OBJECTIVES OF U.S. ANTITRUST LAW

The U.S. antitrust laws embody our nation's commitment to a free market economy. United States antitrust law derives from a handful of broadly worded statutes, the most important of which are: the Sherman Act, passed in 1890, which forbids both concerted conduct that unreasonably restrains trade and unlawful monopolisation; the Clayton Act, passed in 1914, which, among other things, forbids anticompetitive mergers and acquisitions; and the Federal Trade Commission Act, also passed in 1914, which gives the Federal Trade Commission authority to prevent firms and individuals from engaging in unfair methods of competition. Consistent with the crucial role that antitrust plays in the U.S. economy, the expansiveness of our statutory language has been characterized by our Supreme Court as having a "generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>1</sup> At the same time, however, the very breadth and adaptability of our laws, their sparse and inconclusive legislative histories, and their application to thousands of court decisions in the century since the passage of the Sherman Act, have combined to inspire lengthy and vigorous debates over the appropriate objectives of antitrust law and policy in the United States.

If U.S. antitrust policy can be said to have a summary text, it might be found in the words of the Supreme Court of the United States, when it said 45 years ago that:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>2</sup>

This formulation nicely frames the possible scope of U.S. antitrust objectives, as it stresses the primacy of protecting the process of competition and yet alludes to broader political and social policy goals that are served by the maintenance of competitive markets.

#### 1. The Objective of Promoting Economic Efficiency

The modern consensus is that the objective of antitrust policy is to maximise consumer welfare and promote economic efficiency through the optimal allocation of resources in a competitive market context. As the 1995 DOJ/FTC *Antitrust Enforcement Guidelines for International Operations* explain, "[f]or more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Throughout this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources."<sup>3</sup>

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<sup>1</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933).

<sup>2</sup> *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>3</sup> Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations*, §1 (1995).

Market competition enhances consumer welfare and promotes an efficient allocation of society's resources because those firms that best meet the needs of consumers with the lowest prices or best service will prosper. It is therefore a basic principle of U.S. antitrust law that antitrust laws should protect competition, not competitors. The mere fact that a particular competitor is injured by a practice does not mean that the practice is or should be prohibited. In fact, it is inherent in the process of competition that some firms prosper and others do not. It is the process of competition that U.S. law protects.

There is also general agreement that our antitrust laws should be construed to permit, and not to hamper, business arrangements that promote efficiency, and thereby enhance competition. Efficiency encompasses two elements. The first, termed "productive efficiency," involves minimising the cost of production and can be most simply understood as a ratio of a firm's output to its inputs. A firm that produces a product for \$80 is more efficient than a firm that produces the same product for \$85 is. The second element, termed "allocative efficiency," refers to the use and assignment of society's resources in the manner that will make society best off. Given a fixed amount of inputs or resources, changes in market structure or in firm behaviour are likely to change the status quo. Allocative efficiencies benefit society by moving the allocation of scarce resources toward a situation where no rearrangement of those assets would enhance welfare.

Finally, antitrust enforcement preserves a competitive process whereby rivals constantly pressure each other to innovate in order to survive in the market. This process leads to lower costs and improved quality and service over the long run, as well as in the short run. Thus, antitrust takes into account dynamic, as well as static, efficiency considerations.

Given this concern for economic efficiency and consumer welfare, U.S. antitrust laws prohibit cartel activity — like price fixing and bid rigging — because such conduct raises prices above, or reduces output below, levels that would otherwise exist in the marketplace. Antitrust also ensures that structural changes (e.g., mergers) are not permitted if they would substantially lessen competition or tend to create a monopoly. As the DOJ/FTC Horizontal Merger Guidelines explain, "the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources."<sup>4</sup> Antitrust guards against restrictive business practices in circumstances where it can be predicted with confidence that they would substantially harm rather than promote competition. And antitrust prevents the clear abuse of market power that would wrongfully oust competition from the marketplace, or prevent it from arising in the first place.

## 2. Other Objectives

This modern consensus about the primacy of efficiency and maximisation of consumer welfare as the proper objective of U.S. antitrust has been in place for over three decades now but has not always existed. For much of the early history of U.S. antitrust law enforcement, quite different goals have sometimes been espoused by prior Administrations, Congress, and the courts. In fact, twenty-six years ago, Professor Sullivan could still argue that:

Among the non-economic goals of antitrust, all quite tenable as policy objectives, are a preference for decentralisation of economic power, reduction of the range within which private discretion may be exercised in matters materially affecting the welfare of others, enhancement of the opportunity for more people to exercise independently entrepreneurial impulses, and, most blatantly, a social preference for the small rather than the large — if you will, a nostalgia for that

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<sup>4</sup> Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, §0.1 (1992).

mythical past when social, governmental and economic organisation was simpler, more comprehensible.<sup>5</sup>

For many years, the premise that antitrust protects the process of competition, but not competitors, coexisted uncomfortably alongside a significant tendency toward using the antitrust laws to protect small businesses, regardless of the consequences for the efficient functioning of competitive markets. In the famous *Brown Shoe* decision, for example, the Supreme Court observed that the Clayton Act, our chief merger statute, was concerned not only with addressing increased economic concentration of the sort that threatens to create market power,<sup>6</sup> but also with the promotion of competition through the “protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralisation.”<sup>7</sup>

This inconsistency of view was not necessarily thought to be a bad thing; Congress and the courts sometimes endeavoured to give simultaneous effect to a wide range of antitrust goals. As Judge Bork has observed:

In looking to the legislative history [of the antitrust laws], one discerns repeated concern for the welfare of consumers and also for the welfare of small business and for various other values — a potpourri of other values. ... Congress, in enacting these statutes, never faced the problem of what to do when values come into conflict in specific cases. Legislators appear to have assumed, as it is most comfortable to assume, that all good things are always compatible. They did, however, make certain choices that suggest that in cases of conflict consumer welfare is to be preferred to small producer welfare, as well as to all other values.<sup>8</sup>

Professors Areeda and Hovenkamp analysed the validity of alleged antitrust objectives other than economic efficiency, such as “fairness,” “dispersion of economic power,” and “distribution of opportunities,” and concluded that “neither the antitrust statutes nor the antitrust tribunal is in any sense a substitute for the legislative body addressing questions of maldistribution of wealth, or of economic dislocation caused by new innovation or consolidation. As a matter of *general* legislative policy, competition is hardly foundational, and government may often wish to intervene to mitigate its harsher effects. But antitrust’s purpose is to see to it that competition is promoted whatever its collateral consequences, not to make legislative judgments about when relief from the excesses of competition is appropriate.”<sup>9</sup> In addition, attempts to identify the specific “small businesses” (who can be either competitors harmed by efficient large firms, or customers who benefit from the low prices of those firms), or the desirable degree of “dispersion” of economic power pose formidable problems, and Professors Areeda and Turner asserted that the focus must be on the only “universal” interest group, consumers:

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<sup>5</sup> Lawrence A. Sullivan, *Handbook of the Law of Antitrust* 11 (1977).

<sup>6</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962).

<sup>7</sup> *Id.* At 344. Similarly, in *United States v. Von’s Grocery Co.*, 384 U.S. 270, 274-75 n.7 (1966), the Supreme Court stated that “[t]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organisation of industry in small units which can effectively compete with each other,” (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945)).

<sup>8</sup> Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 *Antitrust L.J.* 21, 24 (1985).

<sup>9</sup> Philip A. Areeda & Herbert Hovenkamp, *I Antitrust Law* ¶100b (2000) (emphasis in original).

Given the generality of the legislative statements and the ambiguity in identifying specific interest groups or the set of outcomes that would best serve them, any interest group approach to antitrust is best off to recognise “consumers” as its protected class. But consumers are almost invariably best served by low prices, low costs, innovation, and hard competition generally — all outcomes that are completely consistent with an exclusively economic approach to antitrust law.<sup>10</sup>

In the United States, the practical conflicts generated between pursuit of so many varied and often vague goals gave rise to the modern consensus, outlined above, that economic efficiency and consumer welfare is in fact the appropriate basis for U.S. antitrust policy. In fact, the course of U.S. antitrust over the past few decades has been an ever-tightening focus on economic analysis, efficiency and consumer welfare.<sup>11</sup> Indeed, since the mid-1970s the U.S. Supreme Court has consistently decided antitrust cases in light of this objective.<sup>12</sup>

Former Assistant Attorney General Charles A. James recently summed it up by quoting his predecessor, Thurman Arnold, and stating that:

Antitrust is, or should be, focused on protecting competition, not competitors. As one of my predecessors, Thurman Arnold, said 60 years ago: “[t]he economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognise that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win.”<sup>13</sup> Or, as our Supreme Court explained much more recently: “[t]he purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself...”<sup>14</sup>

### 3. Conclusion

In summary, competition is a fundamental economic policy of the United States, and antitrust laws provide the chief means of ensuring the integrity of the competitive process. The goal of the laws is to increase efficiency and productivity to the ultimate benefit of the consumer in the form of lower prices, better products, and increased value. After more than 100 years of practical experience and improved economic learning, the United States has achieved a strong consensus that promotion of economic efficiency and maximisation of consumer welfare are the only appropriate objectives for U.S. antitrust policy.

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<sup>10</sup> *Id.* At ¶111c.

<sup>11</sup> Charles A. James, *Antitrust in the Early 21<sup>st</sup> Century: Core Values and Convergence*, Program on Antitrust Policy in the 21<sup>st</sup> Century, Brussels, Belgium (May 15, 2002).

<sup>12</sup> *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *Continental T.V., Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

<sup>13</sup> *Quoted by* Jack Brooks, Address at Symposium in Commemoration of the 60<sup>th</sup> Anniversary of the Establishment of the Antitrust Division (Jan. 10, 1994).

<sup>14</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).