SYMPOSIUM ON ANTITRUST LAW AND ECONOMICS

INTRODUCTION

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The articles appearing in this issue of the *University of Pennsylvania Law Review* were originally presented at a conference on Antitrust Law and Economics held at the University of Pennsylvania in November 1978.[1] Inasmuch as antitrust is a highly interdisciplinary undertaking, it is unsurprising that the participants at such a conference and the content of the papers join law and economics in a thoroughly interdisciplinary way.

Although the conference was not specifically organized to feature efficiency analysis, the strengths and weaknesses of that approach play a large role in most of the papers and surfaced as the recurring theme of the oral discussions. This would surely not have been true of a similar conference organized in the 1960's. Still, although there is a greater appreciation for, and reliance upon, efficiency analysis in antitrust than existed a decade ago, significant differences remain.

Major points of contention include: (1) the weight that is to be assigned to efficiency in relation to other values, (2) the factors that are mainly responsible for efficiency gains, and (3) the circumstances under which anticompetitive hazards appear. The political content of antitrust is germane to the first of these questions and is addressed in several of the papers. Whereas efficiency gains were mainly described in technological terms a decade ago, transaction-cost economies are now recognized as the driving force behind many changes in economic organization. Probably the principal issue on which the conference participants divide is the matter of strategic behavior—efforts by established firms to take up advance positions and/or respond contingently to rivalry in ways that discipline actual, and discourage potential, competition. Whether such behavior exists, what forms it takes, how widespread each type is, and what antitrust ramifications attach thereto, are all open to dispute.

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[1] The conference was held under the auspices of the Center for the Study of Organizational Innovation of the University of Pennsylvania.

Thus, although this conference celebrates an evolving consensus that microeconomic analysis, with special emphasis on efficiency, is central to the study of antitrust—an outcome that was highly problematic a decade ago, it also discloses that there are important unresolved issues on the research agenda. If a similar conference is organized six to ten years from now, one would hope that considerable progress will have been made in the effort to reach a consensus on the matters of strategic behavior that this conference serves to identify, but scarcely settles.

So much for an overview. Consider now the specific papers that were given at the conference and which appear in this issue. By design, the conference features different approaches to antitrust law and economics issues. Professor Posner's paper focuses mainly on differences between the Chicago School, with which he is prominently associated, and the Harvard School. He traces the origins of a distinctive Chicago approach to Aaron Director and his students and colleagues. What mainly distinguished the Chicago from the Harvard approach to antitrust was Director's insistence that antitrust issues be studied "through the lens of price theory." [2] The classic example used for contrasting Chicago with Harvard is that of tie-ins. Whereas Chicago explained the tie-in in terms of price discrimination (the main purpose of the tie-in being to serve as a metering device), Harvard subscribed instead to a "leverage" theory. Albeit intriguing, and even plausible, the latter has since been discredited.

More generally, Chicago has resisted the reliance upon entry-barrier arguments that is a prominent feature of the Harvard tradition. The strong version of the Chicago position asserts that meaningful entry barriers do not exist—a viewpoint that goes beyond what most students of antitrust law and economics are prepared to accept. Although many scholars would concede that entry-barrier arguments have been overused and sometimes reflect a failure to recognize merit outcomes (the realization that a meaningful barrier does not exist if a superior outcome is unattainable), few would agree that conditions of entry, and the possibility that firms engage in activities designed to influence those conditions, ought to be excluded from antitrust consideration.

Intertemporal analysis of barriers to entry squarely raises the matter of strategic behavior. As Posner acknowledges, strategic behavior is not a concept that Chicago has been at ease with. Cer-

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[2] *See* Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

tain issues, however—of which predatory pricing is one—cannot be accurately assessed without reference to strategic objectives. "Diehard" and other Chicagoans differ mainly over the role that each is prepared to assign to strategic behavior.

Vertical market restrictions are examined from a transaction-cost point of view in my paper. The transaction, rather than the firm or the industry, is made the basic unit of analysis. Attention is riveted on alternative modes of organizing transactions, with the objective of assessing their respective capacities to economize on transaction costs. This approach scrutinizes the incentive, adaptive, and contractual expense properties of alternative governance structures. The rebuttable presumption that new modes of organization are designed to economize on transaction costs is maintained.

This approach to the study of economic organization may be contrasted with the earlier "inhospitability tradition," which attributed anticompetitive purpose and effect to novel or nontraditional modes of economic organization. The latter approach to the study of vertical restrictions prevailed at the time that *United States v. Arnold, Schwinn & Co.*[3] was argued and decided. That the efficiency presumptions associated with the transaction-cost approach provide a sounder basis for antitrust enforcement in this area is reflected in later scholarship and in the Supreme Court's subsequent decision in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*[4]

Inasmuch as vertical restrictions can have strategic anticompetitive effects if certain structural preconditions (of a monopoly, dominant firm, or tight oligopoly kind) are satisfied, efficiency presumptions can be successfully rebutted. As my paper demonstrates, the antitrust significance of the entry impediments associated with vertical restrictions also turns on transaction costs. Thus, although the phenomena of interest differ, the transaction-cost approach provides a symmetrical framework for the evaluation of vertical restrictions. The approach is relevant to the determination of whether non-trivial transaction-cost savings are attributable to particular vertical restraints and is equally applicable to analysis of the strategic aspects of such restrictions. In summary, the proposed legal principles with which the paper concludes make allowance for both the efficiency and strategic aspects of a given transaction.

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[3] 388 U.S. 365 (1967).

[4] 433 U.S. 36 (1977).

Professor Schmalensee's paper examines the economics of the Federal Trade Commission's Intial Decision in *Borden, Inc.*[5] and points to the need for more sophisticated economic analysis than rudimentary models commonly provide. The distinction between ordinary, garden variety antitrust cases and those which pose novel issues is relevant in this connection. Although "detailed mastery of economic refinements" [6] may be unnecessary in the former cases, greater sophistication may be essential to an adequate analysis of the latter set of situations. As Professor Schmalensee states,

> When substitution relations are such that there is no object that corresponds well to the classical concept of a market, when buyers and sellers lack important information, or when product differentiation of one form or another is important, however, there is at least a presumption that market behavior may not be well explained by standard models.[7]

The Schmalensee paper examines the question whether Borden's attempts to recover lost market share in the market for reconstituted lemon juice should be characterized as predatory conduct. In answering that question, Professor Schmalensee explores the utility of standard predatory-pricing models and market-definition criteria in the evaluation of Borden's behavior. He concludes that extant pricing models and conventional market-share measures are poorly suited to deal with differentiated product markets. Rather than become engrossed in efforts to devise refined market-share measures, Schmalensee instead counsels that attention should be focused on whether the purported predator enjoyed monopoly advantage and hence had an incentive to engage in predation. He contends that persistent excess profits establish a presumption of monopoly power such that dominant firms would have something to lose if rivalry intensified. Inasmuch, however, as all firms, monopolistic and otherwise, have something to lose from more intensive rivalry, Schmalensee presumably is arguing that dominant firms are better able to appropriate the gains of reduced rivalry.

Commissioner Pitofsky, in a paper prepared prior to his service on the Federal Trade Commission, examines the political content

[5] (Initial Decision), No. 8978 (Aug. 19, 1976), *reported in* [1976] 3 TRADE REG. REP. (CCH) ¶ 21,194, *modified,* Borden, Inc. (Opinion of the Comm'n), No. 8978 (Nov. 7, 1978), *reported in* TRADE REG. REP. (CCH) Adv. Sh. No. 361 at 8 (Nov. 27, 1978).

[6] Schmalensee, *On the Use of Economic Models in Antitrust: The* ReaLemon *Case,* 127 U. PA. L. REV. 994, 996 (1979).

[7] *Id.* 997.

of antitrust. He argues that it is "bad history, bad policy, and bad law to exclude certain non-economic considerations" [8] from the enforcement of antitrust. The goal of dispersed power is one that Americans value in both public and private sectors. This is evident from a review of the legislative history of various antitrust enactments, the amendment to section 7 of the Clayton Act [9] being the most recent example. Pitofsky further explores the political content of antitrust law by contemplating the reaction that would attend hypothetical mergers involving, for example, General Motors and IBM.

The mere existence of non-economic values does not, however, establish that such values are determinative of antitrust policy. Commissioner Pitofsky counsels against protecting small businessmen from the rigors of competition, protecting distributors regardless of efficiency, and using antitrust to promote income-redistribution goals. Rather, he argues that the goal of antitrust is to preserve a competitive *process* and that such a process orientation will afford adequate protection to small businesses against unfair or punitive practices by much larger firms.

The purported tension between economic and political goals thus shrinks substantially when the political purposes of antitrust are appropriately delimited and the limits of efficiency analysis are acknowledged and respected. As Commissioner Pitofsky states, "Elimination or containment of monopoly, elimination of unnecessary barriers to entry, and unreasonable business practices not only promote economic efficiency but tend to avoid undue concentrations of economic power." [10] Still, tensions remain. Lest antitrust resources be dissipated, greater effort is needed to distinguish those cases in which the political content is especially great from those in which efficiency considerations mainly govern.

Professors Areeda and Turner examine claims of extended interdependence and effects on interindustry competition as grounds for condemning conglomerate mergers. They eschew "possibility" analysis in favor of a more meaningful scrutiny of the probable effects on competition. They accordingly define a set of minimum conditions that must be satisfied before extended interdependence can be considered worrisome. Included among these are: (1) the merged firm and at least one rival must confront each other in at

[8] Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

[9] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383 (codified at 15 U.S.C. § 18a (1976)). *See* Pitofsky, *supra* note 9, at 1060-65.

[10] Pitofsky, *supra* note 9, at 1066.

least two oligopolistic markets; (2) the merged firm and at least one other two-market firm must be significant in both markets; and (3) the merger must create a retaliation interdependency not previously present.

The potential for anticompetitive effects through the attenuation of interindustry competition between products such as petroleum and coal also comes under scrutiny in the paper. Whereas Commissioner Pitofsky evidently regards mergers between leading petroleum and leading coal companies as troublesome, Areeda and Turner argue that as long as the coal industry is competitively structured, no merged, two-product (coal and oil) firm can have discretionary power over coal prices. More generally, Areeda and Turner contend that interindustry mergers can have substantial anticompetitive effects only under very special and highly unlikely circumstances—where both industries are non-competitive, and the merging firms are dominant firms with similar interests in both markets. Accordingly, if public policy is to resist conglomerate mergers, Areeda and Turner would counsel that attention be focused on factors other than extended interdependence and interindustry competition effects.

Professor Weiss is a leading contributor to the structure-conduct-performance tradition of antitrust analysis. This is the approach that provided much of the economic underpinning for the older Harvard School tradition to which Posner refers. Despite shifts of interest and modes of analysis, it remains a vibrant tradition—with special emphasis on empirical analysis.

Many of the empirical issues relating to this tradition were examined at an antitrust law and economics conference held in March 1974.[11] Professor Weiss summarizes some of this background and reports on more recent studies that bear on the concentration-profitability controversy. He also contrasts the views of Professors Stigler and Bain on the antitrust significance of entry barriers. Weiss favors the Bain position and inquires, incredulously, whether anyone can doubt that entry into an industry is prohibitively difficult "where there is only enough room to support one efficient firm." [12]

Many antitrust scholars would argue, however, that the critical question for public-policy purposes is whether there are *remediable*

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[11] The proceedings of this conference are reported in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H.J. Goldshmid, H.M. Mann, & J.F. Weston eds. 1974).

[12] Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust,* 127 U. PA. L. REV. 1104 (1979).

barriers to entry. If, as is commonly the case, the more efficient of two technologies yields net social benefits, what useful purpose is served by characterizing this more efficient technology in entry-barrier terms? More instructive, presumably, would be an effort to focus on entry impediments *the removal of which* would not sacrifice valued economies of scale. The possibilities that history matters in the evolution of an industry, that unassisted market processes will not reliably undo evolved dominant-firm outcomes within a reasonable time period, and that strategic behavior is a significant concern all come under scrutiny when the issue is put in these terms. Attention to process [13] and transaction-cost factors arise in this way. Professor Weiss's remarks on the IBM case are in the spirit of these more microanalytic modes of investigation.

The upshot of this conference is that antitrust law and economics has come a long way in the past decade. Whereas antitrust enforcement policy in the 1960's was skeptical of, and sometimes hostile to, economies other than those realized by internal expansion, efficiency outcomes of all kinds are valued without apology today. Likewise, vertical market restrictions and other unfamiliar business practices were regarded with suspicion during the 1960's. By contrast, the possibility that nonstandard practices are driven by transaction-cost economies is widely conceded today. And whereas much antitrust argument was uninformed by rudimentary price theory in the 1960's, the role of microeconomics in antitrust is now securely established.

Despite these developments, antitrust law and economics is not apt to settle for the quiet life. Analytical convergence notwithstanding, a number of lively, unresolved issues remain. Among the leading issues are: (1) public policy toward conglomerates; (2) public policy toward dominant firms; (3) the incidence and ramifications of strategic behavior; and (4) the need for greater economic and legal sophistication in dealing with differentiated product industries.

Thus, although antitrust law and economics has made great progress during the past decade, the research agenda for the future is crowded, and the outcome is uncertain. Considering, however, the variety and quality of the new talents that are being brought to bear on these issues, the prospects for significant advances in antitrust law and economics research are distinctly promising.

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[13] For a recent and important discussion of the implications of various models of entry on concentration, see Nelson & Winter, *Forces Generating and Limiting Concentration Under Schumpeterian Competition*, 9 BELL J. ECON. 524, 543 (1978).