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Antitrust Laws in National Emergency

Samuel K. Abrams

ANTITRUST LAWS IN NATIONAL EMERGENCY*

SAMUEL K. ABRAMS**

IN A PERIOD of mobilization, antitrust litigation for the maintenance of our competitive economy becomes increasingly important. When priorities, allocations, price controls and other regulatory measures must be adopted in order to insure the fair and effective distribution of goods in short supply, opportunities for non-competitive practices multiply. Some manufacturers may be tempted to resort to tying clauses, full-line forcing, exclusive dealer arrangements, and other practices which may be detrimental to free competition.

To keep the channels of distribution open and to secure the maximum output of the economy for defense, it is essential that illegal practices be punished by prompt and vigorous enforcement of the antitrust laws.

The Antitrust Division must be alert to continue to take appropriate steps to eliminate illegal competitive practices which contribute to the advance of industrial concentration in the economy.

In addition to discharging these traditional functions, the Antitrust Division of the Department of Justice has been increasingly active since the outbreak of hostilities in Korea with new responsibilities which stem directly from the mobilization program.[1] These additional duties arise from provisions of the Defense Production Act of 1950, as amended,[2] and from directives of the President[3] which charge the Attorney General with specific responsibilities

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**Chief of the Legislation and Clearance Section, Antitrust Division, Department of Justice. Mr. Abrams acknowledges his indebtedness to Edward T. Whitehead and Kenneth R. Harkins, attorneys on the staff of the Antitrust Division, for their assistance in the preparation of this paper.

1. A valuable analysis of the effect of the mobilization program on that portion of the national policy expressed in the antitrust laws has been made by the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary of the House of Representatives in its report, The Mobilization Program, H.R. Rep. 1217, 82d Cong., 1st Sess. (1951).

2. 50 U. S. C. App. § 2601 *et. seq.* (1946); Pub. L. No. 96, 82d Cong., 1st Sess. (July 31, 1951); Pub. L. No. 139, 82d Cong., 1st Sess. § 602 (Sept. 1, 1951).

3. White House Press Release, Sept. 28, 1950. See also the President's memorandum, dated Dec. 20, 1950, transmitting to the defense agencies the first report of the Att'y General.

directed at safeguarding the American free economic system in the course of defense mobilization.[4]

The nature of the responsibility of the Antitrust Division in the present mobilization program is set forth in Section 2 of the Defense Production Act, as follows:

> "... It is the intention of the Congress that the President shall use the powers conferred by this Act to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise."

This statement of policy on the part of Congress was given practical effect by the President in a memorandum dated September 28, 1950, addressed to all defense agencies, in which he directed that such agencies should consult with the Attorney General and the Chairman of the Federal Trade Commission for the purpose of determining and, to the extent consistent with the principal objectives of the Defense Production Act and without impairing the defense effort, of eliminating any factors which may tend to suppress competition unduly, create or strengthen monopoly, injure small business or otherwise promote undue concentration of economic power.

The consultations which arise out of these expressions on the part of the President and the Congress constitute a major defense activity of the Antitrust Division. In addition, this Division represents the Attorney General in consultations preparatory to the consideration of proposed voluntary agreements under §§ 708(a)(b) and (c) of the Act, it conducts surveys, or requests the Federal Trade Commission to do so, and prepares the reports to the Congress and to the President under § 708(e), and it takes an active part in guiding the manner of operation of business advisory committees provided for by § 701(b)(ii) of the Act.

Consultation with Mobilization Agencies

The importance of the function of the Antitrust Division in the current emergency is, in many respects, greater than during an all-out war in which there is total mobilization of our resources for defense. When the nation is at war, our entire production engine

4. Except for certain litigation functions, these responsibilities of the Att'y General have been assigned to the Antitrust Division of the Dep't of Justice. Dep't of Justice Order No. 3732, Supp. No. 48, Oct. 5, 1950.

moves in a single direction, the nature and extent of our arms requirements become clear and the part which each segment of the economy is to play comes into focus.

In a period of partial mobilization of indeterminate extent in time, such as that in which we are now engaged, the problem is an entirely different one. We seek now to lay the groundwork for expandible productivity and to broaden the base of our production so that, in the event of a sudden outbreak of global war, we may immediately bring forth a torrent of end military items. Our aim is to blueprint total war from the standpoint of production and yet to produce only that quantity of goods necessary to meet the current needs of our armed forces.

The mobilization in which we are now engaged is one which is expected, at its peak, to take approximately 20 per cent of the nation's output of goods and services.[5] Without question, the country's resources can support a mobilization program of that magnitude. It must be recognized, however, that the impact of military production will affect specific industries and individual producers in varying degrees. It is erroneous to assume that the defense share will be a 20 per cent one across all industry and that such a percentage will have only a mild effect upon our competitive economy. In many industries, the defense "cut" will be a great deal deeper than 20 per cent, and, within an industry itself, the share may well vary among those in different phases of production.[6]

In this period of limited mobilization, therefore, our Government has found it necessary to institute price and wage controls, to establish priorities and allocations, to encourage the expansion of basic industries through certificates of tax amortization, loans and purchase commitments, and to engage in other activities directly related to the emergency.[7] The Antitrust Division has the greatest concern that each of these activities should be carried on in a manner which will promote competition and not monopoly and restraints upon our commerce.

Periods of widespread Government controls and of heavy military purchases contain the seeds of concentration of economic

5. Director of Defense Mobilization, Building America's Might 3 (Report to the President, April 1, 1951).

6. Third Report of the Att'y General of the United States pursuant to § 708(e) of the Defense Production Act of 1950, 11.

7. Priorities and allocations are authorized by Title I of the Defense Production Act of 1950, as amended, see note 2 *supra*, expansion of productive capacity and supply by Title III, and price and wage stabilization by Title IV. Certificates of tax amortization are issued pursuant to Int. Rev. Code § 124A (1950).

power. It was knowledge of this fact which impelled the Congress and the President to insist that mobilization should be so conducted as to preserve competition to the greatest extent possible. The lessons of the past are clear that, unless we utilize every possible safeguard, the consequences of mobilization will be the impairment of the vigor of our competitive system and the loss of small business enterprises which make up the solid core of our economy. It is in this context that the Antitrust Division conducts its consultations with the mobilization agencies.

To illustrate the nature of the consultations, the Antitrust Division has, on a number of occasions, reviewed with the Office of Price Stabilization the contents of pricing regulations. The fact that pricing techniques are an important source of antitrust violations need not be labored. The problem, however, becomes aggravated when a Government regulation becomes the vehicle for the introduction of such practices into an industry. The approach of the Antitrust Division to the matter becomes clearer by making reference to an extract from a letter, written June 5, 1951, by this Division to Mr. DiSalle, Director of the Office of Price Stabilization:

> "We are especially anxious that, in the formulation of ceiling prices for particular industries, you do not adopt pricing techniques which will serve either to encourage groups within an industry to combine for the purpose of fixing prices or to rigidify the future price structure of an industry in such manner as to discourage competitive pricing. We are fully aware of the administrative problems with which you are confronted in establishing price ceilings, both from the standpoint of their formulation and their enforcement. However, we feel that your regulations will reflect the purpose of the Act to preserve our system of free enterprise if thorough consideration and study are given to the alternatives available to you in the preparation of each regulation.
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> "Thus, we have noted that in certain cases ceiling prices are to be determined by reference to privately published guides, such as 'Blue Book,' 'Red Book,' 'Official Used Car Guides' or other manuals. *GCPR. Supp. Reg. 5, as amended.* We have previously discussed with you our objections to the use of the 'manufacturer's suggested list prices,' which appeared in the same regulation. In the same connection, your representatives have discussed with us their plans to issue regulations which will establish retail or wholesale ceiling prices by reference to manufacturers' or distributors' catalogues.
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> "We consider that all of such practices constitute positive deterrents to competition and that they create opportunities for

conspiracies and combinations in restraint of trade. Investigations conducted by us in the past and those which we now have under way made it plain that such pricing techniques are devices frequently used for the violation of the antitrust laws. We would consider it particularly unfortunate if such pricing techniques are given the blessing of a governmental administrative body."

In the same manner, the Division has consulted with representatives of the National Production Authority and of Defense Production Administration with reference to allocations and priorities, and the grant of certificates of tax amortization. The manner in which allocations and priorities are issued may be the decisive factor in determining whether thousands of small businesses shall be preserved as constituent units of our competitive economy. By the same token, the grant of tax amortization certificates may be extremely significant in advancing or halting the trend toward concentration of industry.

An interesting example of this work of the Antitrust Division is found in its activities in connection with the aluminum expansion program which is now being sponsored by the Government.

The Department of Justice is interested in the aluminum expansion program both by reason of its responsibility to encourage competition in the course of mobilization and by reason of the continuing jurisdiction of the United States District Court for the Southern District of New York in the antitrust suit, *United States v. Aluminum Company of America*.[8] In its decision in the *Alcoa* case in 1950, the trial court held that competitive conditions had not been established and did not in fact exist in the aluminum industry. The court retained jurisdiction for five years to enable the Government to seek further and more complete relief.[9]

Inasmuch as there are only three producers of primary aluminum, Alcoa, Reynolds Metals Company and Kaiser Aluminum and Chemical Corporation, this industry is one of the most highly concentrated of all our critically important defense industries. The policy of the Antitrust Division is to encourage the expansion of the primary aluminum industry by the introduction into it of new independent producers.

The urgent necessity that new independent competitors should enter the aluminum industry is also evidenced by the need for an insured source of supply of primary aluminum for the nation's non-integrated fabricators of aluminum products. At the outbreak

8. 91 F. Supp. 333 (S.D. N.Y. 1950).
9. *Id.* at 418.

of hostilities in Korea, there were approximately 17,000 non-integrated manufacturers of aluminum articles, most of them relatively small businesses.[10] Since Alcoa, Reynolds and Kaiser together own approximately 85 per cent of the capacity to fabricate pig aluminum, it is imperative that other sources of supply must be established if we are to preserve the fabricating capacity of these small manufacturers, who, in World War II and in the present emergency, have demonstrated that they possess useful facilities and skills, of great diversity, to supply both defense and civilian needs.

In the course of discharging its responsibilities in this field, representatives of the Antitrust Division have been in frequent consultation since October, 1950, with mobilization officials in charge of the aluminum expansion program.[11] The Division's recommendations concerning the nature which the expansion of the aluminum industry should take have not to this time been adopted by the mobilization agencies. The function of the Division in regard to this and other similar programs, however, is solely a consultative one, and the ultimate decision concerning the allocation of capacity rests with those agencies charged with responsibility for our national defense and our defense production.

In addition to those agencies already mentioned, the Antitrust Division has been in frequent consultation with the Petroleum Administration for Defense, Office of Defense Mobilization, Defense Transport Administration, Federal Reserve System, General Services Administration, Munitions Board and the Departments of Defense, Interior, Agriculture, and Commerce. As new agencies, such as the Defense Materials Procurement Agency and the Small

10. Aluminum, H. R. Rep. No. 255, 82d Cong., 1st Sess. 4 (1951).

11. A letter, dated August 2, 1951, from the Att'y General to the Secretary of the Interior, is illustrative of the nature of these consultations. After pointing out that 174,000 tons of aluminum production capacity remained to be allocated, the Att'y General in this letter stated:

> "It is my belief that you should proceed with negotiations to work out contracts for this 174,000 tons of aluminum capacity with new aluminum producers rather than with Alcoa, Reynolds or Kaiser, the three concerns which presently constitute the entire industry. In the event that new producers can be introduced into the industry only by contracting with them on the basis of a price differential exceeding that established by the contracts with the three existing producers, I consider that, in the interest of national defense, you are authorized by law to grant such a price differential to new producers possessing the necessary qualifications as will enable them through efficient operations to fulfill their contractual commitments at a price consisting of manufacturing costs, normal depreciation and a reasonable profit. Statutory authority for broadening the base of this three-producer industry so vital to the national defense is found in Sections 303(b) and 701(b) of the Defense Production Act of 1950, as amended."

Defense Plants Administration, have been created to deal with particular problems arising in the mobilization effort, appropriate steps have been taken to render assistance to them by timely consultation on their problems.

During this period in which the defense program is accelerating and the impact of the program on our economy is heightening, consultations concerning the competitive effect of proposed defense activities have increased both in frequency and in importance.

Industry Advisory Committees

The Department of Justice has been vitally interested in the activities of departments and agencies of the Government bearing upon the creation and operation of business advisory committees. The Defense Production Act, § 701(b)(ii), provides that:

> "Such business advisory committees shall be appointed as shall be appropriate for purposes of consultation in the formulation of rules, regulations, or orders, or amendments thereto issued under authority of this Act, and in their formation there shall be fair representation for independent small, for medium, and for large business enterprises, for different geographical areas, for trade association members and non-members, and for different segments of the industry."

In order to minimize the possibility that participation in industry advisory committees would result in violation of the antitrust laws, the Department of Justice on October 19, 1950, formulated and issued to the mobilization agencies the following minimum requirements for the organization and operation of such committees:

(1) There must be statutory authority for the employment of such committees or there must be an administrative finding that it is necessary to utilize such committees to perform certain statutory duties;
(2) The agenda for such committees and their meetings must be initiated and formulated by the Government;
(3) The meetings to be held must be at the call of and under the chairmanship of full-time government officials;
(4) Full and complete minutes of each meeting must be kept; and
(5) The functions of such committees must be purely advisory and any determinations of action to be taken must be made solely by government representatives.[12]

The mobilization agencies were informed in this letter that, so long as the activities of industry advisory committees are carried on within these limitations, the Department of Justice would not

12. Letter, dated October 19, 1950, signed by Peyton Ford, Deputy Att'y General, to the mobilization agencies.

view the activities as constituting an independent violation of the antitrust laws. The letter emphasized, however, that it should be made clear to the participants in such activities that the Department retains complete freedom to institute proceedings, either civil or criminal, or both, in the event any particular plan or course of action is used to accomplish unlawful private ends, and that the Department retains full freedom to institute civil actions to enjoin continuance of any acts or practices found not to be in the public interest and persisted in after notice to desist.

On March 15, 1951, the Department, in a letter to all defense officials, called attention to the following improper practices in the formation and operation of business advisory committees which a number of private concerns had brought to the Department's attention:

(a) Committees have met without the benefit of a government chairman;
(b) Government representatives have lacked proper qualifications;
(c) Agenda have been prepared and meetings have been called by industry rather than by the department or agency concerned;
(d) Subcommittees, panels and other subgroups have not adhered to the requirements established for the full committees;
(e) The requirements with references to committee representation set forth in Sec. 701 (b) (ii) of the Defense Production Act have not been met; and
(f) Many of the committees, rather than being advisory, have in fact made decisions and exercised functions which properly should reside exclusively in government officials.[13]

The mobilization agencies were requested in this letter to take steps to insure that advisory committee procedures should comply with the Department's criteria. Since that letter, many agencies have consulted with the Antitrust Division for the purpose of promulgating regulations which accord with these standards.

On September 13, 1951, the Department of Justice wrote a letter[14] to all mobilization agencies listing eighteen improper practices in the creation and operation of industry advisory committees which were disclosed in a series of hearings conducted by the House Judiciary Subcommittee on Study of Monopoly Power.[15] In this

13. Letter, dated March 15, 1951, signed by H. G. Morison, Ass't Att'y General, to the mobilization agencies.
14. Letter, dated September 13, 1951, signed by H. G. Morison, Ass't Att'y General, to the mobilization agencies.
15. The hearings were those which resulted in issuance of the report, The Mobilization Program. See note 1 *supra*.

letter, the Department recommended that, wherever such improper practices occur, effective corrective steps be taken at once to insure that the committees should function in accordance with the standards established by the Department.

Business advisory committees, when properly conducted, perform a valuable function in advising and making recommendations to Government officials. Unless the standards for their conduct are scrupulously observed, however, the committees may become active in matters foreign to their purpose and may engage in or cause others to engage in practices detrimental to free competition.

Deviations from antitrust standards may well result in the loss to the Government of the valuable services rendered by the committees since many business enterprises may refuse to participate in committee activities by reason of the fear that they may become subject to penalties, including possible treble damage liability, for violation of the antitrust laws. For these reasons, the Antitrust Division has taken, and will continue to take, appropriate steps to bring about the elimination, as they are disclosed, of objectionable features in the operations of industry committees.

Voluntary Agreements

Sections 402(a)[16] and 708(a)[17] of the Defense Production Act of 1950 authorize Government officials to consult with business and other groups with a view to encouraging the formulation of voluntary cooperative agreements to further the objectives of the Act. Subdivisions (b) and (c) of § 708[18] also provide that the ap-

16. Section 402(a) reads:
"In order to carry out the objectives of this title, the President may encourage and promote voluntary action by business, agriculture, labor and consumers. In proceeding under this subsection the President may exercise the authority to approve voluntary programs and agreements conferred on him under section 708, and may utilize the services of persons and agencies as provided in section 710."

17. Section 708(a) provides:
"The President is authorized to consult with representatives of industry, business, financing, agriculture, labor, and other interests, with a view to encouraging the making by such persons with the approval by the President of voluntary agreements and programs to further the objectives of this Act."

18. Subdivision (b) and (c) of § 708 provide:
"(b) No act or omission to act pursuant to this Act which occurs while this Act is in effect, if requested by the President pursuant to a voluntary agreement or program approved under subsection (a) and found by the President to be in the public interest as contributing to the national defense shall be construed to be within the prohibitions of the antitrust laws or the Federal Trade Commission Act of the United States. A copy of each such request intended to be within the coverage of this section, and any modification or withdrawal thereof, shall be furnished

propriate Government official shall consult with the Attorney General and the Chairman of the Federal Trade Commission concerning any proposed voluntary agreement, and shall obtain the approval of the Attorney General prior to requesting private groups to act or to refrain from acting pursuant to any such agreement.[19] Acts or omissions to act pursuant to a voluntary agreement, if requested by such official and found to be in the public interest as contributing to the national defense, shall not be construed to be within the prohibitions of the antitrust laws.

It must be emphasized that, except to the extent of operations of voluntary agreements under § 708, the antitrust laws remain in full force and effect during the mobilization period. There has been no repeal or suspension of the antitrust laws during this period.[20]

If competitors take joint action which has not been requested in connection with an agreement approved under § 708, even though Government officials urge or give their tacit approval to such joint action, they may find themselves violating the antitrust laws, and therefore subject to their penalties. Congress has specified the pre-

to the Attorney General and the Chairman of the Federal Trade Commission when made, and it shall be published in the Federal Register unless publication thereof would, in the opinion of the President, endanger the national security.

"(c) The authority granted in subsection (b) shall be delegated only (1) to officials who shall for the purpose of such delegation be required to be appointed by the President by and with the advice and consent of the Senate, unless otherwise required to be so appointed, and (2) upon the condition that such officials consult with the Attorney General and with the Chairman of the Federal Trade Commission not less than ten days before making any request or finding thereunder, and (3) upon the condition that such officials obtain the approval of the Attorney General to any request thereunder before making the request. For the purpose of carrying out the objectives of title I of this Act, the authority granted in subsection (b) of this section shall not be delegated except to a single official of the Government."

19. Section 708 differs in this respect from comparable legislation enacted in World War II. Under the procedure established in § 12 of the Small Business Act, Pub. L. No. 603, 77th Cong., 2d Sess. (June 11, 1942), 56 Stat. 351, 357, voluntary cooperation by business units in compliance with a request from the Chairman of the War Production Board was not subject to the provisions of the antitrust laws if the Chairman had consulted with the Att'y General and had certified to the Att'y General that such activity was requisite to the prosecution of the war. Approval of the Att'y General to the proposed activities, however, was not required.

20. During World War II Congress provided for the suspension of the operation of any statute of limitations applicable to violations of antitrust laws. 18 U. S. C. § 590a (1946). This provision was considered necessary to protect the right of the Government to proceed in investigations and trials involving the antitrust laws which, because they interferred with war production, had been postponed pursuant to an agreement among the War, Navy and Justice Departments, approved by the President on March 20, 1942. White House Press Release, March 28, 1942.

cise manner and method by which immunity is granted. None other will suffice.[21]

Defense production pools represent one type of voluntary cooperative program which has been approved pursuant to the authority contained in these sections of the Act.[22] A production pool is an association of small manufacturing firms organized for the purpose of jointly obtaining and performing defense contracts. By combining their capital and production facilities in a pool, small manufacturers are able to participate in defense contracts from which they as individuals would be excluded. A pool can deal more effectively with Government procurement officers and prime contractors than can its members individually and can do so at less cost in time and effort. Pools are advantageous to the Government in that they increase capacity for defense production, accelerate defense production, decentralize production, and make it possible to utilize productive capacity of small producers during a period of partial mobilization. Production pools may be composed of manufacturers, who, in combination, are able to perform all manufacturing processes including packaging of the end product, or they may be composed of manufacturers of a single article who by joint action can produce a greater volume. At this time, six production pools have been approved under the Act.[23]

Another type of voluntary cooperative agreement which has been approved is represented by the integration committees utilized by the Department of the Army. These integration committees are formed pursuant to voluntary agreements which permit cooperative action by manufacturers under contract with the Armed Forces to produce essential military items such as tanks, rockets, artillery shells and tactical trucks. As new companies are awarded defense contracts for a particular item for which a committee has been approved, they become participants in the agreement covering that item. The committees exchange technical information concerning

21. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 226 (1939).

22. For a discussion of the organization and operation of production pools, see Defense Production Administration, Office of Public Information. Pooling Production For Defense (pamphlet).

23. The names of the pools which have been approved and the citation to the Federal Register in which published are:

(1) Omaha Industries, Inc., 16 Fed. Reg. 4475 (1951).
(2) Coordinated Manufacturers of Santa Clara, California, 16 Fed. Reg. 6544 (1951).
(3) Peoria Consolidated Manufacturers, Inc., 16 Fed. Reg. 8851 (1951).
(4) Greater New York Manufacturers Pool, 16 Fed. Reg. 8851 (1951).
(5) Central California War Industries, Inc., 16 Fed. Reg. 10042 (1951).
(6) Illinois Manufacturers Defense Pool, Inc., 17 Fed. Reg. 1527 (1952).

the production of the article covered by the agreement, interchange supplies and equipment, and make recommendations to solve production problems.

It has been found necessary to approve integration committees in the interest of securing adequate production of essential military items as quickly as possible. In approving agreements creating integration committees, the Antitrust Division has insisted that they be surrounded by every possible safeguard for the preservation of competition. Thus, these agreements provide that all ultimate decisions must be made solely by the Armed Forces, and that all activities shall be carried out in the course of meetings in which the Government has prepared the agenda, in which a Government official presides and and in which full and complete minutes are kept.[24]

Other voluntary agreements which have been approved include:

(1) A plan by which the extension of bank credits may voluntarily be limited to those loans which are necessary to the national defense or essential to the civilian economy. Under this plan, if a banker is uncertain concerning the inflationary effect of a proposed loan, he may come to a committee which will advise him whether it considers the loan to be an inflationary one. The banker is free to proceed as he sees fit with reference to making the loan after the committee has advised him of its views.[25]

(2) An agreement permitting companies engaged in foreign petroleum operations to take action to offset the shortage of crude oil and refined products resulting from interrupted petroleum operations in Iran.[26]

24. Military items for which integration committees have been approved and the citation to the Federal Register in which certain of the agreements have been published, are:
(1) Optical fire control equipment, 16 Fed. Reg. 1965 (1951).
(2) Light gun tanks and allied combat vehicles, 16 Fed. Reg. 9826 (1951).
(3) M-34 modification kit, 16 Fed. Reg. 10467 (1951).
(4) Tracks for track laying type vehicles, 16 Fed. Reg. 10791 (1951).
(5) Small arms ammunition, 16 Fed. Reg. 12203 (1951).
(6) 3.5 inch rocket, 17 Fed. Reg. 1527 (1952).
(7) Medium and heavy gun tanks and allied combat vehicles, 17 Fed. Reg. 2022 (1952).
(8) 4.2 inch mortar shell.
(9) Artillery mechanical time fuses.
(10) M 21 A4 booster.
(11) M-48 type fuses.
(12) Heavy tactical trucks, 17 Fed. Reg. 1910 (1952).
(13) Light and medium tactical trucks, 17 Fed. Reg. 2823 (1952).
(14) Steel cartridge cases.
(15) Conventional artillery and mortar shells.
(16) Hydrogen thyratron tubes.
(17) Shell loading.
(18) .50 Caliber machine gun.

25. 16 Fed. Reg. 2372 (1951).

26. 16 Fed. Reg. 8375, 8377 (1951).

(3) A plan to conserve newsprint in Boston by means of an agreement whereby newspaper companies limit the number of papers they will make available at newsstand outlets in order to reduce the quantity of newsprint wasted in unsold newspapers.[27]

(4) A plan by which the owners of ocean-going tankers contribute on a pro-rata basis tanker capacity needed by the Department of Defense.[28]

(5) Agreements designed to facilitate the exchange of technical information concerning the production of B-47 bombers,[29] N-9 gun cameras[30] and J-47 jet engines[31] among the participants and generally to achieve close cooperation in the solution of production problems.

In many factual situations, the mobilization agencies may accomplish their objectives either by the issuance of regulations or orders, or through the formulation of voluntary agreements. In such circumstances, the Antitrust Division has recommended that serious consideration be given to the former procedure since the regulation or order frequently will afford a greater degree of protection to the business enterprises concerned, and will eliminate the necessity for agreements as to business practices between competitors.

When it has been determined that a voluntary agreement is to be utilized, the Antitrust Division considers that the agreement should be drawn in such a manner as to accomplish the specific objective required in the public interest as contributing to the national defense and, at the same time, to insure that our competitive system is impaired to the minimum extent possible. Exemptions from the antitrust laws should be limited to the degree actually required by the facts of the particular situation. This procedure conforms to the expressed purpose of the Defense Production Act that our mobilization program should be carried on, in so far as practicable, within the framework of the American system of competitive enterprise.

It is the view of the Antitrust Division that agreements should be so formulated as to contain procedural safeguards which will (a) protect the business participants from unjustified charges concerning activities carried on by them in the course of the program, and (b) forestall the possibility of violations of the antitrust laws by participation in activities which would not be within the exemption of the approved agreement.

27. 16 Fed. Reg. 11314 (1951).
28. 16 Fed. Reg. 1964 (1951).
29. 16 Fed. Reg. 8852 (1951).
30. Approved by the Att'y General December 21, 1951.
31. Approved by the Att'y General December 17, 1951.

The Division considers that the procedural standards set forth in the letter from the Department of Justice to mobilization agencies, dated October 19, 1950, should be adopted where appropriate, particularly those requirements providing for the initiation and formulation of the agenda by the Government, for the holding of meetings at the call of and under the chairmanship of full-time Government officials and for the keeping of full and complete minutes.[33]

Reports of the Attorney General

In § 708 (e) of the Defense Production Act,[33] Congress directed the Attorney General to make, or to request the Federal Trade Commission to make for him, surveys for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, injure small business or otherwise promote undue concentration of economic power in the course of the administration of the Act, and to report the results of such surveys with such recommendations as he deemed desirable to the Congress and to the President.

The first report,[34] submitted December 7, 1950, pointed out the dangers to competition which are inherent in the fields of Government procurement, Government research, expansion of production facilities, allocations and priorities, price controls, fiscal controls, voluntary agreements and programs, and business advisory committees, and also discussed policies which should be carried out to minimize these dangers.

The second report,[35] submitted April 30, 1951, was based upon a survey of Government procurement after the outbreak of hostilities in Korea and recommended that a program of central procurement planning be established and utilized. This program would

32. Procedures for the guidance of the agencies concerned with the necessity for voluntary agreements, and the criteria and standards applicable to such agreements, were outlined in a letter dated Dec. 18, 1951, signed by H. G. Morison, Ass't Att'y General, to the mobilization agencies.

33. Section 708(e) of the Defense Production Act of 1950, as amended, reads:

> "The Attorney General is directed to make, or request the Federal Trade Commission to make for him, surveys for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power in the course of the administration of this Act. The Attorney General shall submit to the Congress and the President within ninety days after the approval of this Act, and at such times thereafter as he deems desirable, reports setting forth the results of such surveys and including such recommendations as he may deem desirable."

34. Dep't of Justice Press Release, Dec. 7, 1950.

35. Dep't of Justice Press Release, April 30, 1951.

catalogue all our present and potential producers of military goods and inventory the productive facilities of the nation. This report pointed out that if our procurement efforts are guided by informed planning, we will be able to spread military contracts in such a manner that all segments of business will be able to participate, and to take appropriate action to insure that those businesses not presently engaged in defense production will continue undiminished in strength until they are needed.

The third report,[36] submitted December 19, 1951, dealt with the compelling urgency for integrating our vast military procurement program into the nation's over-all economy in such a manner that the objectives of mobilization may be accomplished with the least impairment of the strength and soundness of the American system of competitive enterprise. The subject of the report and its recommendations were based upon a continuing survey of military procurement procedures since the beginning of hostilities in Korea. The report recommended that the responsible military and civilian agencies introduce into procurement for our Armed Forces the planning and scheduling which will insure that we obtain all of our military requirements as we need them and at the same time preserve the health of the competitive structure of the nation's economy. This would eliminate such practices as unnecessarily heavy purchases for delivery within short-term intervals, the use of critically short materials when adequate substitutes are available and similar usages which inevitably flow from a procurement program lacking basic planning.

The urgency that impels appropriate planning arises in great part from the unique nature of our defense and preparedness program. During the 1952 fiscal period it is expected that about 54 billion dollars will be available for military equipment and construction. Military procurement is steadily increasing and present planning does not contemplate that it will reach a maximum prior to sometime in 1953. Purchases for defense requirements are presently at the rate of approximately 4 billion dollars per month.[37] When the vast proportions and indeterminate duration of our military requirements are fully comprehended, it becomes clear that we must now establish an informed and orderly program of procurement.

The very magnitude of our current military program and the uncertainty of its duration or tempo warn us that our civilian econ-

36. Dep't of Justice Press Release, Dec. 19, 1951.
37. Director of Defense Mobilization, Three Keys to Strength 3 (Third Quarterly Report to the President, Oct. 1, 1951).

omy faces fundamental dislocations in production, distribution and employment. Many of these dislocations can be prevented entirely and the effects of others can be minimized if adequate programming and scheduling of military requirements are undertaken now.

Conclusion

The strength of our nation and the security of the free peoples of the world rest on the vast industrial machine which this nation has developed. In peacetime, our industrial might provides us with a standard of living unmatched by that of any other economy in the world. In times of emergency, it serves as the arsenal of democracy.

One of the primary factors contributing to our industrial growth has been the competitive spirit which is basic to our dynamic economy. It is, therefore, of fundamental importance that we insure the continuation of this freedom to compete during our mobilization effort. Only by its preservation will we be able to maintain the industrial strength guaranteeing our political and religious freedoms.