U.S. ANTITRUST LAW ON MERGERS AND ACQUISITIONS -- A COST TOO GREAT TO BEAR

The last decade has seen an extraordinary decline in the international competitiveness of American business. The seriousness of this problem is underscored by the trade deficit statistics. In 1982, the trade deficit was $42.7 billion. By 1984, this deficit had risen to $123.3 billion. Countless American firms have found that their ability to compete in world markets has been greatly eroded and that the U.S. domestic market is being flooded with the products of their foreign competitors.

Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act in 1950, prohibits mergers and acquisitions which may have the effect of substantially reducing competition or tend to create a monopoly. Unlike the Sherman Act (the original federal antitrust statute), Clayton 7 does not require that the government or a private plaintiff demonstrate that the merger or acquisition in question will actually result in an unreasonable restraint of trade or in a monopoly.

Clayton 7 reflected the prevailing socio-political views in 1950 and the existing international economic picture. In enacting Clayton 7 and the Celler-Kefauver amendments, Congress chose an economic policy which declared that "big is bad" while "small and many is good."

Conventional wisdom tended to support the view that large firm size was not important in achieving significant economies of scale and that high levels of concentration within an industry tended to lead to collusive pricing policies. Even mergers and acquisitions which were likely to generate important efficiencies were condemned by the federal courts under Clayton 7. Economic efficiencies (and thus ultimately consumer welfare) were sacrificed in order to preserve large numbers of small domestic firms.

The international trade picture today is vastly different than it was in 1950. In that year, American manufacturers dominated world markets. Japan and West Germany, for example, had only begun to rebuild. No one in the U.S. dreamed that automobiles, steel, electronic products and even cement would ever be imported in competitive amounts from overseas. During the past decade, foreign imports have dramatically increased their share of the U.S. domestic market and American firms have seen their sales in foreign markets sharply drop. American firms now generally find that their principal foreign competitors are very large multi-national corporations -- not the small or medium sized firms that Clayton 7 sought to preserve in large numbers in the U.S.

There have been equally dramatic changes in industrial economic theory during the past ten years. Extensive economic research since the 1960's has generally discredited the economic theories embodied in Clayton 7. These studies demonstrate that:

- (1) economies of scale are not clearly exhausted at any definite market share size; and
- (2) the positive relationship between industry profitability and concentration is due to the comparatively greater efficiency of larger firms in the industry rather than collusion.

In 1982 and 1984, the U.S. Department of Justice issued revised Merger Guidelines which set forth the Department's enforcement policy. The 1984 Guidelines in particular reflect the new international economic situation and the extensive body of economic research which disproves earlier theories regarding economies of scale and concentrated industries.

The 1984 Guidelines have made a number of very desirable changes in the Department of Justice's mergers and acquisitions policy. Unfortunately, neither the courts nor private litigants are bound by these Guidelines because they lack the force of law. The federal courts are free to continue following Supreme Court decisions of an earlier and very different economic era. Private litigants continue to file lawsuits which seek injunctions or damages against economically desirable mergers and acquisitions, notwithstanding the Department of Justice's internal enforcement policies. Even the Department of Justice itself may, in a later Administration, adopt a mergers and acquisitions policy which revises the 1984 Guidelines.

Clayton 7 is an antitrust statute whose time has long since passed. Clayton 7 prohibits a range of economically desirable mergers and acquisitions which would not be prohibited under the more rigorous "actual restraint" standard of the Sherman Act. Clayton 7, through the mechanism of private treble damage and injunction litigation, either deters efficiency-generating transactions or imposes large actual (e.g., attorney's fees) and potential (e.g., treble damages) costs on desirable mergers and acquisitions.

American firms seeking to compete in the world marketplace already bear substantial costs, such as environmental controls and the comparatively high standard of living of American workers, which are not borne by most of their foreign counterparts. Such costs are legitimate and generally supported by the American people. But, Clayton 7 imposes unjustifiable costs on American firms.

These unjustified costs should be removed by the repeal of Clayton 7 and any other unwarranted provisions of our antitrust laws.

This Administration has been deluged with requests for protectionist legislation. Such legislation, if adopted, would impose far greater costs upon the American consumer than the repeal of Clayton 7. The Department of Commerce believes that the repeal of Clayton 7 will enhance the efficiency of American firms, thereby strengthening the competitiveness of America in the world marketplace and help thwart the growing demand for protectionist measures.

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U.S. Department of Commerce
March 25, 1985