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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 2, 1971

MEMORANDUM FOR JOHN EHRLICHMAN

SUBJECT: Antitrust Policy Review

I think this is well worth reading carefully. You may want to talk with Ken and possibly send it to members of the Task Force.

G

George P. Shultz

Attachment
Memo to GPS from Ken Dam of 9/28/71

E Y E S O N L Y

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 28, 1971

MEMORANDUM FOR THE DIRECTOR

Subject: Antitrust Policy Review (Memorandum of September 14, 1971)

1. Legislative Reform.

A major reform of the antitrust laws is long overdue. But a legislative reform package that goes as far as it should go would be a political disaster in an election year. Antitrust has a sacrosanct place in the hearts of most Americans, even though they do not understand how the antitrust laws work. To seek comprehensive legislation that could be viewed as a drastic weakening of the antitrust laws would cause a coalescence of antitrust's hidden constituency (labor, small business, small-town America and, now, Nader and other consumerists) and would tag the Republican Party indelibly as the party of Big Business. I found Jim Loken's memo (Tab B to Lew Engman's memo) persuasive and well-reasoned.

Major reform requires four things: (1) an investment of Presidential prestige; (2) the relative calm of an election off-year; (3) a fundamental rethinking by the informed public (business press, antitrust bar, academics, etc.) of the present-day role of antitrust; and (4) a well-developed, internally consistent reform package. These last two items will take time, organization and orchestration.

To achieve such a reform package, we need a study group or commission, probably within the Executive Office. It should be made up largely of government employees, but a substantial input from outside economists and lawyers would be needed to assure a far-reaching, yet practical, reform.

Public announcement of the existence of this study group or commission would help to stimulate the fundamental rethinking referred to above. So too would in-depth background press interviews with key Administration officials at the time the study group or commission was appointed and when it reported. Another step in the same direction (which I recommend for its own sake) would be a public conference on the Merger Guidelines. (See Section 3, below.)

2. Enforcement Policy.

If it is agreed that a legislative initiative would be unwise in an election year, the question then becomes what would be possible to achieve through a change in enforcement policy. In this respect the memorandum and its appendices suffer from the weakness of most discussions of antitrust -- a failure to keep straight what is meant by competition and by anticompetitive effects. Once these terms are defined carefully, most of the confusion disappears. But the Antitrust Division and the FTC confound the confusion in their public statements and enforcement actions.

By competition economists refer to an industry structure in which a number of firms function without collusion. (Differences of view exist as to how many firms are enough.) To this definition one may add the behavioral condition that the firms be vigorous rivals. Over the past few decades the Supreme Court has tended to add, or even to substitute, a different concept -- namely, that it is anticompetitive to place any business firm at a disadvantage. This last concept is more of a populist political definition of competition than an economic definition. As is often pointed out, the antitrust law, as currently interpreted, too often tends to protect competitors at the expense of competition.

In contrasting the economic and populist definitions of competition, several points should be emphasized. First, if one applies the economic definition, it would follow that the offenses to be prosecuted would be price-fixing, allocation of customers, monopolization and horizontal mergers (i.e., mergers among competitors). Only these types of acts reduce the effective number of competitive units within an industry and thereby misallocate resources and raise prices to consumers. In most other offenses (such as vertical mergers, exclusive dealing, tie-ins), the courts have been concerned with the "foreclosure" of small competitors; no harm to competition or to consumers is involved unless the defendant already has a monopoly, in which case the action could and should allege monopolization. Similarly, the argument against price discrimination (under the Robinson-Patman Act) is primarily that it disadvantages small firms in the distribution chain since those firms have to pay the higher price; barring the discrimination may actually raise prices to consumers by inhibiting price competition and other forms of rivalry by manufacturers. Moreover, the case against reciprocity is that it is unfair to small firms that cannot practice it; as George Stigler argued in an addendum to the Stigler Report, the economic consequences are de minimus. Finally, the case against conglomerates is largely social and political (i.e., that conglomerates concentrate power in the society); harm to economic competition from a true conglomerate merger cannot be shown since, by definition, the number of competitors in a given market is not reduced.

The second point to be stressed is that it is the populist thrust of much antitrust enforcement that provides the constituency for antitrust referred to in connection with legislative reform. It should be no surprise that those antitrust prohibitions that protect small business but cannot be defended on economic grounds are precisely those that are the most popular with Congress. As a general rule, only consumers and the economy as a whole benefit from prosecutions against economically anticompetitive acts, such as price-fixing.

The implication of the foregoing analysis is that the Antitrust Division should concentrate on prosecuting price-fixing and other horizontal offenses rather than tie-ins, exclusive dealing, exclusive territories, reciprocity and similar acts that merely disadvantage small firms while having no impact or even having positive effects on economic competition. What would be the practical barriers to such an enforcement policy? First, the staff may not like it since many young lawyers like to bring cases on new theories -- theories that push back the frontiers of the law. While this is a problem, the fact is that most young lawyers like to gain trial experience and hence a sufficient number of new cases should maintain staff morale (which is important since unhappy staff lawyers are a fertile source of critical newspaper stories).

Second, although most experienced lawyers are convinced that price-fixing is extremely widespread, especially in regional and local markets, the response of Mr. McLaren to the Stigler Report recommendation of more emphasis on price-fixing was that the Antitrust Division was already prosecuting all known cases of price-fixing. No doubt McLaren's statement was true, but the fact is that the Antitrust Division has not been doing much looking for covert crimes like price-fixing. The Division relies almost entirely on the newspapers (hence the emphasis on mergers) and on complaints from businessmen (hence the emphasis on offenses that disadvantage small businesses). Since price-fixing is covert and does not have a single obvious victim (but rather consumers and the economy as a whole), it can be found only by thorough investigation. If Antitrust Division lawyers cannot dig out evidence of price-fixing, then the FBI should be used. I might add, as evidence of the widespread existence of price-fixing, that when the State of Illinois started enforcing the Illinois antitrust law several years ago, a good deal of blatant price-fixing in the Chicago area was quickly discovered.

A third difficulty is that lawyers do not assess enforcement policy with a cost-benefit calculus. Many antitrust enforcement officials believe that it is immoral not to prosecute every violation that is brought to their attention. Consequently, the Antitrust Division, and even more so the FTC, spend far too much time dealing with economically de minimus violations since those are the ones in which there are identifiable small business victims who bring the matter to the attention of the Division and the FTC. What the Division and the FTC do in such cases is to provide free legal services for small businessmen who could bring the actions themselves under the treble-damage provisions of the antitrust laws.

This point about free legal services provides a bridge to the fourth, and final, point. A failure by the antitrust authorities to act on complaints will lead to dissatisfaction at the staff level and perhaps some critical stories in the newspapers. But there is a way of handling this problem that has not been utilized. The Antitrust Division and FTC should not prosecute a case where the violation has its impact primarily on one or several identifiable victims; it is preferable that the victims sue under the treble-damage provisions. Only where the anticompetitive effect is spread widely throughout the economy, as in the case of price-fixing, is it appropriate that scarce public enforcement resources be brought to bear. The adoption of this criterion (which lawyers might call an "exhaustion of private remedies" doctrine) would itself reorient enforcement activity toward economically significant violations. In recent years a sophisticated antitrust plaintiffs' bar has grown up that can bring private treble-damage cases. These plaintiffs' lawyers naturally prefer to impose on the Government the job of proving the violation in the first instance because they can then sue later for treble-damages, relying on the Government judgment as prima facie evidence of a violation and obtaining by one means or another the evidence uncovered by the Government lawyers. Their fees, which tend to be calculated as a percentage of the recovery, are seldom diminished significantly by placing this burden on the Government.

In summary, one can reorient enforcement policy toward economically significant activity without running nearly as much political risk as would be involved in amending the antitrust statutes. This leaves outstanding the problem of private antitrust actions that tend to inhibit rather than to promote true economic competition, but this is not as high in the priority scale as reorientation of public enforcement. It should be noted that an implication of this reorientation is that resources for investigation (as opposed to prosecution) might be increased.

3. Merger Guidelines.

In the foregoing section I argued that although horizontal mergers should be subject to strict enforcement, vertical and conglomerate mergers should not in most instances be the subject of prosecution. But the Merger Guidelines have to some extent tied the hands of the Antitrust Division. A failure to sue to bar a major merger will result in charges that the Division is failing to follow its own Guidelines.

The Merger Guidelines, which the Antitrust Division carries out to the letter and beyond, were promulgated by the Johnson Administration. Although they are de facto regulations (albeit they only purport to specify enforcement policy), no rule-making hearings were ever held. In most instances they went to the limit of the Supreme Court decisions of that period. Although the then Assistant Attorney General, Donald Turner, tried to exercise some restraint, he did not seriously try, so far as I can see, to examine the economic consequences of mergers and of their prohibition.

Therefore, I recommend a public conference to re-examine the Merger Guidelines with a view to revising them. The conference would involve, among other aspects, the preparation of carefully researched papers by academics, the Treasury and Commerce Departments, and business critics of antitrust as well as public hearings that would attract press coverage. Such a conference would stimulate wider interest in reform and would provide an occasion for the Adminstration to change merger enforcement policies while reducing to a minimum charges of political influence that would inevitably accompany an unexplained failure to prosecute major mergers. The Stigler Task Force urged McLaren to hold such a public conference, but he did not take up the suggestion because he was then already planning his anti-conglomerate offensive.

Kenneth W. Dam
Assistant Director

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Anti-Trust

THE WHITE HOUSE

WASHINGTON

ADMINISTRATIVELY CONFIDENTIAL

October 4, 1971

MEMORANDUM FOR: JOHN EHRLICHMAN

FROM: LEW ENGMAN

SUBJECT: Antitrust Policy Review

Following up on the antitrust meeting last week, we will develop a number of postulates on specific aspects of present antitrust enforcement policy, together with one or more specific alternatives which would be practically available for each postulate. These postulates will cover the entire range of antitrust policy, but particular emphasis also will be given to meaningful alternatives or initiatives in the broad areas of foreign competition and R & D.

Pete Peterson will put together a list of the specific changes which he believes are needed from the point of view of our international economic position. Dick Nordahl will give some particular focus to the R & D area in connection with the Magruder efforts. Pete Flanigan has asked Jim Loken to give us a paper on possible changes in enforcement policy vis-a-vis the regulatory agencies.

Over and above this effort, I have indicated to you before that I believe we should hire a consultant with practical legal experience in the antitrust area. I would hope that such a person can give us a meaningful input on practical alternatives in the various areas of antitrust enforcement policy, and particularly in the area of foreign commerce where Peterson does not appear to have any extensive staff backup. I would imagine that the task could be done in about three weeks' time, following which we could put together a paper for the President.

If you are still agreeable to this approach, I would appreciate any people suggestions you might have. One possibility which has occurred to me is Dick Pogue, of Cleveland, who is about 40 and a partner in the Jones, Day firm there. He is an antitrust lawyer with particular experience in the area of foreign commerce. Although I have never worked with him directly, I did hear favorable reports on him when I was involved in some European joint ventures and licensing arrangements back in the days before I came down here. The one

Told him to go ahead

possible problem which need not necessarily be a drawback is that he is from Jim Lynn's old firm, but if we did go ahead with him it would have to be absolutely clear that he would be acting as a consultant for the Domestic Council on a confidential basis. I am getting a further rundown on him.

I would appreciate your general reactions.

cc: Ken Cole

file
anti Trust
up here

KC

THE WHITE HOUSE

WASHINGTON

September 14, 1971

Eyes Only

MEMORANDUM FOR

SECRETARY CONNALLY
THE ATTORNEY GENERAL
GEORGE SHULTZ
PAUL McCRACKEN
PETER PETERSON
PETER FLANIGAN

RE: ANTITRUST POLICY REVIEW

As you know, a small unit of the Domestic Council staff has been reviewing current antitrust policy at the President's request.

I am sending you a copy of Lew Engman's memorandum to me dated September 1 with its attachments.

In these 30 or 35 pages are a succinct review of present antitrust policies and some possible future directions.

It seems to me that the next step would be for the gentlemen named above to meet, as a Committee of the Domestic Council, prepared to discuss and make recommendations for the future course of this study.

I am sure that the President will want to know what each of you thinks about these proposals at the time that they are submitted to him for review.

My office will be calling to arrange a meeting in the near future which is mutually accommodated to our calendars.

Meantime, may I request that you not share this document with anyone else. It is for your eyes only at this stage, for obvious reasons.

John D. Ehrlichman

THE WHITE HOUSE

WASHINGTON

ADMINISTRATIVELY ~~CONFIDENTIAL~~

#8 of 8

September 1, 1971

MEMORANDUM FOR: JOHN D. EHRLICHMAN

FROM: LEWIS A. ENGMAN LAE

SUBJECT: Antitrust Policy Review

The Domestic Council Committee on Antitrust Policy has compiled an extensive amount of material on existing antitrust law and enforcement policy. Based upon comments from interested agencies and departments, Dick Nordahl has compiled a preliminary and partial list of issues and options in significant areas of antitrust policy concern. (See Tab A).

At this point, however, there is a need to determine the breadth of the options which should be presented to the President, particularly within the framework of realistic short run alternatives for the remainder of 1971 and 1972.

The scope of the initial charge to the Committee would include the mandate of presenting very basic policy alternatives to the President, for example, amendment of the antitrust statutes to provide in effect that no particular size or number of firms is to be preferred in a given industry, and that mergers -- whether horizontal, vertical, or conglomerate -- are legal unless they spring from a clear attempt to restrain trade, fix prices, allocate territories, etc.

Nevertheless, I suggest that consideration be given at this juncture to isolating specific aspects of antitrust law and enforcement policy on which meaningful action can be taken by the President during the next few months. This would not necessarily preclude the preparation of the broader, more basic policy options for consideration in the long run. The separation of the review into short and long range aspects would also permit some specific short run changes to be made, if desired, without the delay occasioned by the basic theoretical disagreements which would be involved in consideration of more basic and sweeping changes in antitrust law.

A. EXTERNAL LIMITATIONS ON PRESIDENT'S OPTIONS

From a practical point of view, there are significant external limitations on the ability of the President to achieve sweeping antitrust reform, particularly in the short run, even if he desired to do so. A memorandum from Jim Loken at Tab B spells out some of these limitations:

1. The Federal courts interpret the vague antitrust statutes independently of executive branch influence or review;

2. Antitrust enforcement by the government is litigation-oriented and is not carried out as a part of overall economic policy, since the FTC is an independent regulatory agency and the Antitrust Division views itself as an independent prosecutor;

3. Private parties also have antitrust enforcement authority through the courts, and operate independently of any executive branch enforcement policies;

4. The Chairmen of the key Congressional Committees strongly favor vigorous antitrust enforcement and would resist or attempt to counter efforts by the President to "weaken" antitrust policy;

5. Nader and others have launched a public campaign attacking antitrust enforcement policies in general as not being tough enough, all with the intention of making the public more aware of antitrust policy.

It is my understanding that a forthcoming report from the Antitrust Subcommittee of the House Judiciary Committee dealing with conglomerates will recommend stronger antitrust enforcement procedures, including the creation of a new agency in the Executive Office of the President which would have the function, among other things, of reviewing all proposed mergers of companies exceeding certain minimum guidelines.

Thus, if the President desired to propose basic antitrust reform, he might have the best chance of success by doing so with a stunning program which would shock the antitrust bar and require a major selling job to the public and Congress. Political factors, as well as the lack of consensus within the Administration at this time, would have to be weighed in the decision of whether such a program should be developed as a meaningful alternative for 1972, whether it should be developed as a meaningful alternative for 1973 and thereafter, or whether it should not be pursued.

B. <u>SHORT RUN OPTIONS</u>

Even if it were determined not feasible to pursue sweeping antitrust alternatives in 1972, meaningful changes in specific areas of antitrust law could be developed as alternatives for action now.

1. <u>Public, High Visibility Approaches.</u>

Publicly announced changes in antitrust enforcement policy, either through administrative action or proposed legislation, would have the advantage of indicating to business what types of activity would be permitted under the new approach. On the other hand, if such changes could be interpreted as "weakening" the antitrust laws, they would be attacked in Congress and by the "consumerists" and they also might generate demands for more restrictive legislation.

On balance, publicly announced changes would appear to be more feasible in specific areas where the desired goal can be identified with other recognized problems. Three which particularly seem to be apt possibilities are:

a. Changes enhancing the position of U.S. business operations in foreign commerce and affecting our competitiveness in foreign and domestic markets;

b. Changes facilitating joint R & D ventures in general, but particularly in pollution and other areas where specific guidelines or requirements have been established by governmental action;

c. Changes relating to patent licensing, particularly insofar as basic R & D and foreign commerce are affected.

Each of these areas might, for example, be put forward as a part of the President's new economic policy, as being designed to enable us to compete more effectively in the world under the rapidly changing conditions of the 1970's and 1980's. Jim Loken at Tab B also suggests that a public or visible approach might be taken in the following additional areas:

d. Territorial exclusives and related problems;

e. Price discrimination (Robinson-Patman Act problems).

2. <u>An Internal, Low Visibility Approach.</u>

In terms of the short run, another and not necessarily inconsistent approach to antitrust changes would focus on procedural changes which might have the effect of increasing the likelihood that specific enforcement actions of the Antitrust Division were in accord with general economic policy and goals. As Loken points out, the main impact of this approach would probably be the partial drying up of government-initiated litigation. While lack of public announcement of shifts in enforcement policy would have the disadvantage of not permitting maximum knowledgeable planning by business, the chances of avoiding outright political confrontation are greater than in utilization of the public or high visibility approach to antitrust changes, even though there might be some press attacks in specific cases.

The internal, low visibility approach is probably best adapted for dealing with specific conglomerate or other mergers, including mergers in the regulated industries.

3. <u>Counterbalancing Programs.</u>

As a counterpart to any changes in the direction of specific areas of antitrust enforcement policy, whether publicly announced or internally generated, it may be advisable to also include strengthening elements to antitrust enforcement in the areas where there is general agreement as to the need for strong action, for example:

a. Endorsement of a vigorous policy against conspiracies to fix prices, allocate territories, or suppress innovation, including reintroduction of the bill to increase maximum criminal penalties to $500,000 for corporations convicted of such offenses;

b. Greater emphasis to Administration programs which would have the effect of introducing pricing competition into the regulated industries.

C. FUTURE DIRECTION

Based on the foregoing, I would appreciate your views as to the direction the staff effort should now be focused in terms of antitrust policy review:

1. Emphasize development of specific antitrust enforcement policy alternatives for the President in areas (e.g. foreign commerce, joint R & D ventures) where meaningful action (probably largely administrative in nature, except for possibly R & D ventures relating to the environment, etc. where legislation might be considered) could be taken now, and/or

2. (a) Emphasize development of broad antitrust reform alternatives for the President, but in terms of the long run, and not at the expense of the more immediate objectives in number 1, or

(b) Emphasize development on a crash basis of broad antitrust reform alternatives for the President for 1972, but with some greater direction as to the degree to which the President may be politically prepared to take on this issue.

I would, of course, appreciate your comments in general.

ANTITRUST POLICY REVIEW

THE PROBLEM

Although Federal antitrust policy has a continuing effect upon the day-to-day operations and development planning of countless American business firms, this policy has never been a coordinated part of overall economic policy planning of the Federal government. The Antitrust Division of the Justice Department has operated as the litigation-oriented defender of competition without the need or the desire to concern itself with the far-ranging implications of its enforcement program.

With the support of most Federal courts on a case-by-case basis, the Antitrust Division of this and previous administrations, as the "enforcement" agency, has expanded the application of the antitrust laws into many so-called "gray areas," areas which arguably are not covered by existing antitrust statutes. The watchword of the Division has always been free and open competition.

Present antitrust policy is being criticized from two directions. Well publicized attacks such as the recent Nader report, "The Closed Enterprise System" and the anti-big business book, "America, Inc." charge that the Antitrust Division is not tough enough.

On the other hand, while accepting the goals and benefits of competition, some critics of present antitrust enforcement policy question whether the cases brought by the Antitrust Division always do bring about more effective competition, and whether the Division has given proper attention to the factor of global competition. In effect, they ask whether the policy of competition as enforced under our antitrust laws should be incorporated into overall national economic goals to insure the continued growth of the American economy and its continued effectiveness in the increasingly intensive competition of the world marketplace.

SCOPE OF REVIEW

This memorandum will examine those major policy areas where questions exist as to whether present antitrust enforcement policies are correct and substantiated

CONGLOMERATE MERGERS

Present Policy

The Department of Justice will challenge any merger:

(1) between one of the most likely entrants into a concentrated market and any firm with a substantial share of that market;

(2) which threatens to entrench or increase the market power of a leading firm in a relatively concentrated or rapidly concentrating market;

(3) which creates the power to engage in reciprocity or the opportunity to benefit from reciprocity effect; or

(4) which contributes to the trend of increased aggregate economic concentration or threatens to further accelerate it.

The Department's policy is to determine the extent to which Section 7 of the Clayton Act is applicable to pure conglomerate mergers based on the above theories of challenge.

The Stigler Report strongly urged that the Department not pursue a program against large conglomerate mergers until such time as more is known of their effects on competition.

Issues

1. Is Section 7 applicable to pure conglomerate mergers?

2. Is aggregate concentration occurring in the U.S. economy; and if so, is it detrimental to the economy and competition?

3. Is concentration occurring within individual markets?

4. Should non-economic factors (political, social) be used as a basis for challenging mergers?

by valid economic data. The question running throughout this review is: Is a particular policy unduly impeding economic growth and the ability of the United States to effectively compete in the world marketplace? As each problem area of antitrust policy is reviewed, the position of the President's Task Force on Productivity and Competition, chaired by Professor George J. Stigler of the University of Chicago, as reflected in its March 7, 1969 report (the Stigler Report) will be noted. There are areas of both agreement and disagreement between the Stigler Report and present antitrust policies.

This memorandum will not deal with the substantial areas of antitrust policy where there is little controversy, which includes such criminal violations as conspiracies to fix prices, divide territories, and refuse to deal.

The attached papers deal with the following subjects:

-- Conglomerate Mergers
-- Foreign Commerce
-- Joint Research and Development Ventures
-- Failing Company Defense
-- Reciprocity
-- Territorial Exclusives (Franchises)
-- Patent Procurement and Licensing
-- Price Discrimination
-- Oligopoly
-- Vertical Mergers
-- Horizontal Mergers
-- Competition in Regulated Industries
-- Resale Price Maintenance

5. Should size alone be a legitimate test of the legality of conglomerate mergers?

6. Should efficiency and more effective use of resources and capital be an element to be considered before challenge of a merger?

7. Is present conglomerate policy a significant impediment to diversification through acquisition of a going concern?

8. Are the present theories of "potential competition" and "reciprocity effect" economically substantiated?

9. Is present policy unduly impeding economic growth and the ability of the United States to effectively compete in the world marketplace?

Options

1. Do nothing since merger wave has at least temporarily abated and most of the Department's conglomerate cases have been settled.

2. Seek legislation exempting pure conglomerates from Section 7 or including them and establishing basis for challenge.

3. Declare a moratorium either publicly or privately on pure conglomerate cases until economic consensus on conglomerates reached.

4. White House statement that Administration will not seek to block mergers which it feels will stimulate economic growth and lead to a more efficient utilization of resources.

5. Similar statements concerning mergers which will help the U.S. position vis-a-vis increasing foreign competition.

6. Revise Merger Guidelines to reflect a more positive stance in relation to conglomerate mergers.

Problems

1. June, 1969, speech by the Attorney General attacking economic concentration, which has been elevated to an extension of the Merger Guidelines involving a bigness test.

2. Soon to be released study of conglomerates by Antitrust Subcommittee of the House Judiciary Committee, the tone of which is not favorable to large conglomerates.

FOREIGN COMMERCE

Present Policy

(1) Anticompetitive activities of American companies having substantial effect on United States foreign commerce are viewed as violations of U.S. antitrust law even though some or all of the conduct giving rise to restraints takes place outside of the United States. The Webb-Pomerene exemption for export trade associations is construed narrowly and its use is declining.

The Stigler Report recommends repeal of Webb-Pomerene because "creation of cartels in foreign commerce is antithetical to the underlying theory of the Sherman Act."

(2) The Department applies the antitrust laws to the operations and activities of foreign companies within the United States just as it does to United States companies. Exclusionary or discriminatory practices by United States firms directed against foreign firms are treated the same as if the victim of such practices were a United States firm. The Department has taken an active role in Treasury Department antidumping proceedings, usually arguing against the imposition of duties on foreign goods.

Issues

1. Should United States firms operating abroad be held to as strict antitrust standards as if they were operating within the United States?

2. Should foreign companies doing business in the United States be granted certain exemptions from application of antitrust laws in order to encourage foreign investment in the United States?

3. Should Webb-Pomerene Export Associations or other joint export arrangements be encouraged?

4. Should the Department be involved in antidumping proceedings?

5. Should over-all United States foreign economic policy be considered prior to the filing of antitrust cases involving foreign commerce?

6. Is present antitrust policy involving foreign commerce detrimental to United States attempts to compete in the international marketplace?

Options

1. Announce a policy of encouraging broader use of Webb-Pomerene Associations or suggesting new legislation to encourage joint export arrangements among United States companies.

2. A White House statement to the effect that joint arrangements to increase United States export trade will not be blocked by unnecessary and rigid application of United States antitrust laws.

3. Seek legislation that would effectively encourage foreign investment in the United States without fear of United States antitrust laws.

4. Seek legislation whereby United States exporters of technology could effectively block for a limited time the importation into the United States of goods produced with that technology.

5. Announce that United States business operating abroad will not be unduly hampered by rigid application of United States antitrust laws and seek legislation if necessary.

6. Do nothing since there are not many actual antitrust cases involving foreign commerce. Problem is the far-reaching effect of those few cases.

Problems

1. United States has been a leader in enforcing antitrust laws and other countries, notably the Common

Market and Great Britain, are now developed to the point where they are taking a harder antitrust line.

2. Freeing United States companies from antitrust restrictions could lead to retaliation or encouragement of international cartels.

JOINT RESEARCH AND DEVELOPMENT VENTURES

Present Policy

The Justice Department will challenge any such arrangement which places any restriction on the parties' individual business decisions and right to conduct independent research. Although the Department has permitted some consultation arrangements (e.g., G.M. and American Motors on exhaust devices) it discourages such ventures, choosing to rely on competition to provide technological innovation and development.

Issues

1. Is the present policy detrimental to U.S. position as technological leader in the world market?

2. Are there areas of concern such as pollution control and housing where exemptions should be made to obtain technological breakthroughs? Should exemptions particularly be made in industries affected by environmental or other standards which have been mandated by Congress on administrative regulation?

Options

1. Do nothing and perpetuate present policy of discouraging joint R & D ventures.

2. White House statement that antitrust laws will not be used to block reasonable joint efforts in high cost technological areas.

3. Support legislation (such as Griffin bill on auto pollution) which exempts certain ventures from antitrust laws.

4. Support general legislation which provides exemption when President designates an area to require joint work in the national interest.

Problems

1. Pro-bigness criticism and evidence that bigger ventures do not produce innovation based on past history.

FAILING COMPANY DEFENSE

Present Policy

This defense to the Department's challenge of a merger will be allowed if:

(1) the resources of one of the firms are such that it has no reasonable prospect of remaining viable; and

(2) good faith efforts by the failing firm have not turned up a reasonable offer of acquisition more in line with the purposes of Section 7.

Issues

1. Is this defense construed so strictly by the Department as to make it impractical?

2. Does present policy act as an impediment to a more efficient allocation of economic resources?

Options

1. Do nothing with the practical effect that the defense will seldom be used.

2. Revise the Merger Guidelines to make this defense more available. With respect to airline merger guidelines, DOT would extend the exception to situations where a company was not failing but faced financial difficulties or limited expansion possibilities.

3. Use statements by the Attorney General or Antitrust Division officials to broaden the defense to cover sick as well as nearly dead companies.

Problems

1. Soft on big business tag and the type of criticism which accompanied the guarantee to Lockheed.

RECIPROCITY

Present Policy

The Department investigates and challenges by civil suit systematic reciprocity on an industry-wide basis, so as to ensure equal treatment and to prevent business injury to individual companies from unfair competition. "Reciprocity effect," the tendency of a firm to channel its purchases to a company to which it sells, is not challenged independently, but is one basis for challenging large conglomerate mergers.

A working paper prepared by Professor Stigler for the Task Force dismisses reciprocity as more talked about than practiced and seldom anti-competitive in effect.

Issues

1. Is systematic reciprocity such an economically significant practice as to warrant large industry-wide investigation?

2. Is the channeling of purchases to increase sales, when no compulsion is used, a practice that should be eliminated or that should concern government?

3. Is "reciprocity effect" a valid antitrust concern or an impediment to otherwise essentially pro-competitive mergers?

4. Is reciprocity in fact pro-competitive because it is one way of making price exceptions in an otherwise rigid price structure?

Options

1. Cease the use of "reciprocity effect" as an element in the challenge of conglomerate mergers through direction to the Attorney General. Revision of Merger Guidelines may be an effective way to remove "reciprocity effect" as an issue.

2. Direct enforcement to individual cases of blatant systematic reciprocity involving compulsion and cease industry-wide investigations. May even express interest to prosecute such cases criminally to take emphasis away from toning down of enforcement zeal against reciprocity in general.

3. Do nothing and let present industry-wide investigations run their course.

Problems

1. Repudiation of a key McLaren policy supported heretofore by the Attorney General.

2. Companies already hit on an industry-wide basis may complain of discrimination.

TERRITORIAL EXCLUSIVES (FRANCHISES)

Present Policy

The Department will usually pursue by civil action efforts by sellers to control either the territory in which or the persons to whom a purchaser-customer may resell. The Department does not consider "location" and "primary responsibility" clauses illegal by themselves, recognizing a manufacturer's interest in having his goods distributed efficiently. The policy is less stringently applied to new entrants.

Issues

1. Is the present policy against territorial exclusives economically justified?

2. Is legislation necessary to clarify the rights of franchisors in regard to territorial restrictions?

Options

1. Do nothing and let case law develop narrowing the area of permissible conduct.

2. Propose legislation which would clarify the rights of franchisors in establishing territories for franchisees.

3. Have Division publish guidelines for territorial exclusives.

Problems

1. Inevitable anti-consumer criticism because territorial exclusives would tend to rigidify prices for the products involved.

2. Legislation giving franchisees more rights to unrestricted operation has been proposed in recent years (Senator Hart).

3. Established case law would restrict the use of the guidelines approach.

4. Any toning down of opposition to territorial restrictions would be a reversal of the cumulative policies of this and recent administrations.

PATENT PROCUREMENT AND LICENSING

Present Policy

The Department will challenge by criminal action patents fraudulently procured. It also seeks to challenge validity by civil suit on bases other than fraud, such as non-invention, obviousness, etc. The Department will challenge by civil suit patent and know-how licensing practices which lack legitimate justification in protecting the patentee's rights and adversely affect competition beyond the claims of the patent. The Department believes that antitrust law is applicable to all aspects of the patent system which is viewed as an exception to general competitive rules.

Issues

1. Should antitrust law be applicable to patent licensing and technology licensing agreements?

2. Should the Antitrust Division challenge the validity of patents other than on grounds of fraudulent procurement?

3. Is legislation necessary to clarify the rights of patentees in the licensing of their patents?

4. Is legislation necessary to clarify or establish parameters for the licensing of unpatented technology?

5. What steps, if any, should be taken to conciliate the breach between Commerce and Justice in the patent area?

6. Is present antitrust policy impeding U.S. attempts to compete in the international marketplace?

Options

1. Do nothing and let the courts develop the law on a case-by-case basis.

2. Support Commerce position in favor of presently pending legislation (Scott amendments) which would codify rights of patentees in licensing their patents.

3. Support Justice position in opposition to presently pending legislation.

4. Support legislation that would allow U.S. exporters of unpatented technology to restrict its use territorially and otherwise.

5. White House statement to the effect that Administration will do everything it can to encourage U.S. technological innovation to advance U.S. competitive position in the world marketplace.

Problems

1. Commerce and Justice have taken diametrically opposed positions in hearing on pending Patent Revision bill and Scott amendments on patent licensing.

2. Dangers of anti-consumer tag because of bulk of patent cases pending are against drug companies and previously indicted electrical firms. Note recent speeches of Ralph Nader and Senator Hart at Conference on Inventors and Non-Technical Barriers to Innovation.

PRICE DISCRIMINATION

Present Policy

The Antitrust Division defers to the Federal Trade Commission for enforcement of the Robinson-Patman price discrimination statute, primarily because of its distaste for the statute. The FTC recently announced a review of enforcement policies under Robinson-Patman. Government cases in recent years have been few in number.

The Stigler Report and most other recent reports severely critize Robinson-Patman and call for its substantial revision. This coincides with present Antitrust Division views.

Issues

1. Should Robinson-Patman be repealed or at least substantially revised?

2. Does active enforcement of this Act actually deprive the consumer of the benefits of competition by promoting a rigid price structure?

Options

1. Do nothing until present FTC study of Robinson-Patman enforcement is completed.

2. Recommend legislation revising the law.

3. Recommend repeal of Robinson-Patman.

Problems

1. No significant problems. Repeal would raise criticism, but revision would have wide support of Antitrust Bar.

OLIGOPOLY

Present Policy

The Department has not been able to develop a satisfactory theory upon which to proceed against oligopolies in the absence of some abuse of monopoly power.

The Stigler Report recommends against a course of pursuing the break-up of oligopolies except in the presence of clear evidence of collusion and noncompetitive pricing. It expresses confidence that the courts will order structural remedies when lesser remedies are likely to be unavailing.

Issues

1. Should the oligopolies which exist in a number of important industries be broken up?

2. Should legislation be proposed which would facilitate the breaking up of oligopolies?

3. Are oligopolies so similar that set rules can be applied to them all?

4. Does the existence of an oligopoly mean that prices and profits will be higher and innovation slower?

5. Does oligopoly automatically mean less vigorous competition?

Options

1. Do nothing and rely upon new technology, foreign competition and new entrants such as conglomerates to bring more competitive structure to present oligopolies.

2. Recommend legislation such as the Concentrated Industries Act of the Neal Report to establish the mechanisms and formulas for breaking up concentrated industries.

3. Attempt under theories proposed by some scholars to deconcentrate oligopolies by use of present Section 2 of the Sherman Act.

Problems

1. No real problems if continue present policy of doing nothing to break up concentrated industries.

2. Tremendous business opposition to any program to break up oligopolies.

VERTICAL MERGERS

Present Policy

The Department will challenge under the strict limiting provisions of the Merger Guidelines all vertical mergers involving any appreciable market share held by either party.

The Stigler Report unanimously attacked an extensive and vigorous policy against vertical mergers, stating: "Vertical mergers should not be forbidden as a class."

Issues

1. Should the policy regarding vertical mergers remain rigid and negative?

2. Are most vertical mergers noncompetitive in effect?

3. Is the policy against vertical integration mergers impeding the movement to a more economical allocation of resources and capital in the American economy?

Options

1. Revise the standards of the Merger Guidelines to reflect a less rigid policy toward vertical mergers.

2. Do nothing with effect that large vertical mergers will not take place or be attempted.

3. Seek legislation to override the rather rigid case law in the vertical merger area.

4. Declare a moratorium or challenges to at least moderate size vertical mergers while legislation pending.

Problems

1. Rigid, established case law predating this Administration which cannot be overruled by a mere revision of Merger Guidelines.

2. Danger of pro-big business criticism since vertical merger policy is no longer considered a "gray area."

HORIZONTAL MERGERS

Present Policy

The Justice Department will challenge all horizontal mergers of any appreciable size particularly in concentrated industries. Merger Guidelines set forth market percentage tests for challenge.

The Stigler Report would make Merger Guidelines less stringent in this area.

Issues

1. Are present policies which border on a per se rule too stringent?

2. Should market-share percentages be the sole test for evaluating horizontal mergers?

3. Are market definition criteria reasonable?

4. Is present policy unnecessarily impeding the ability of U.S. firms to compete in the world marketplace?

Options

1. Do nothing, extending the almost total bar on horizontal mergers.

2. Revise Merger Guidelines to lower market-share percentages and modify market definition criteria for horizontal mergers.

3. Propose legislation to exempt certain mergers in the national interest.

Problems

1. Long established case law against horizontal mergers

2. Pro-bigness criticism.

COMPETITION IN REGULATED INDUSTRIES

Present Policy

(1) The Antitrust Division participates in regulatory proceedings requiring an accommodation of the purposes of the antitrust laws and purposes of the regulatory statutes and has sought to play such a role in important regulatory proceedings raising competitive issues, such as entry, mergers and common control, and restrictive practices.

(2) The Justice Department also continues to file suits against anticompetitive acts of regulated firms which remain subject to the antitrust laws except where Congress has clearly created an exemption or where an exemption must be implied to make the regulatory scheme function effectively.

The Stigler Report strongly urged more competition in regulated industries through: (a) easier entry, and (b) more freedom in price competition.

Issues

Many of the issues with respect to competition in the regulated industries are being dealt with by separate task forces. Some of the questions include the following:

1. Should pricing competition be brought to regulated industries, primarily transportation? (This is being considered in transportation deregulation proposals.)

2. What should be the proper criteria for mergers in the airline industry?

3. What should be the Administration position relating to multi-media ownership, particularly ownership of TV stations by newspapers?

4. Should there be more competition in brokerage rates on the stock exchanges? (Senator Williams has requested a Antitrust Division position on this issue.)

RESALE PRICE MAINTENANCE

Present Policy

The Department prosecutes by civil suit all resale price maintenance arrangements except where they are specifically protected by state Fair Trade laws. The Department has recommended repeal of the Federal statutes exempting state Fair Trade agreements from the antitrust laws.

Issues

1. Is current policy too narrow to encompass the variety of effects, which may flow from resale price maintenance?

2. Would repeal of the Fair Trade exemption reduce consumer prices without significantly damaging the reputation of brand name manufacturers?

3. Is restriction of intra-brand price competition necessarily bad in the face of inter-brand competition?

Options

1. Recommend the repeal of the Fair Trade exemption.

2. Support legislation which would allow resale price maintenance in non-Fair Trade states.

3. Do nothing, allowing the Division to construe any exemption to the rule against resale price maintenance narrowly.

Problems

1. Considerable amount of case law against resale price maintenance.

2. Recommending repeal of Fair Trade would engender strong opposition of groups such as Retail Druggists and established stores.

August 20, 1971

MEMORANDUM FOR: JOHN D. EHRLICHMAN

FROM: JAMES B. LOKEN

THROUGH: PETER M. FLANIGAN

SUBJECT: Antitrust Policy Study

The President is understandably concerned about the impact of federal antitrust laws and enforcement policies on his economic objectives and the reactions of our supporters in the business community to the Administration's antitrust activities. Based on the experience of our office, it is clear that a sizeable number of businessmen believe that the federal antitrust agencies (Justice and FTC) unduly harass the private sector and blindly pursue a nineteenth-century economic philosophy that does not meet the needs of today's economy.

The working group chaired by Bud Krogh and now Lew Engman has completed an exhaustive compilation of background materials and preliminary agency comments, has selected major areas of antitrust policy concern, and has raised specific issues and options with respect to each policy area. My views have been requested as to the issues and options to be further explored and the appropriate method of study and implementation.

In my opinion, the question of which antitrust issues should be further studied cannot be divorced from the question of what course of action the President is politically prepared to take to achieve, or attempt to achieve, antitrust reform. Given the scope and complexity of the antitrust laws, it seems essential to avoid an endless theoretical analysis of antitrust reforms we would like to see take place. Such wheel spinning may inevitably occur if we lose sight of the fact that a President's unilateral ability to achieve antitrust reform is severely circumscribed by powerful institutional and external factors:

(i) Final interpretation of the vague antitrust statutes has historically been the function of the federal courts through case-by-case adjudication. This results in ad hoc, uncoordinated policy making which is often immune from Executive Branch influence or review.

(ii) Government enforcement policy is litigation-oriented and is carried out, concurrently, by an independent regulatory agency and by a Division of the Department of Justice which views itself as an independent prosecutor, not as one component of an economic policy-makingaapparatus.

(iii) By Congressional design, antitrust enforcement is also placed in the hands of private plaintiffs who are not limited by Executive Branch enforcement policies and whose economic interests lie in constant expansion of antitrust prohibitions.

(iv) The heads of key Congressional subcommittees, Senator Hart, Congressmen Celler and Patman, are champions of vigorous antitrust enforcement and would strongly resist, in a partisan fashion, attempts by the President to "water down" our antitrust statutes.

(v) Ralph Nader and other consumerists have recently launched a campaign to mobilize the consumer-lobby behind even stronger antitrust attacks against Big Business. A publicized effort in the opposite direction poses at least some political risk of confrontation.

There are three general techniques by which the Administration could attempt to influence specific antitrust law and policy: by internal persuasion and/or directive to the antitrust enforcement agencies, by public announcement of changes in antitrust enforcement policy, and by request for statutory reform. I think it useful to examine the likely impact of each in light of the above constraints.

1. Internal Reform. This is politically the least sensitive alternative. The President would concentrate on reversing the Antitrust Division's traditional independence and on persuading key FTC personnel to follow Administration economic policies in the FTC's enforcement activities. There would be some adverse publicity caused by leaks, and perhaps by resignations "under fire," but public awareness would be scanty and serious political confrontation could probably be avoided.

ADMINISTRATIVELY CONFIDENTIAL

Under this alternative, heavy emphasis should be placed on the procedures as well as the substance of antitrust enforcement. In this regard, Jim Lynn's memo of April 1, which focused on the decision-making process within the Antitrust Division, seems particularly useful; not surprisingly, Dick McLaren's reply was evasive and inadequate.

Beyond questions of enforcement procedure, there are inherent limitations on the effectiveness of this technique which should lead us to ignore policy areas that might otherwise be of great concern. To be effective, internal reform should probably be limited to areas

(i) where the statutory framework is vague or ambiguous,

(ii) where the case law is undeveloped or uncertain,

(iii) where private lawsuits are rare or do not have great impact, and

(iv) where changes in enforcement policy need not be publicly communicated to be effective.

Obviously, these are severe restraints. Based on my experience, I would place in this category conglomerate mergers, joint research and development ventures, competition in regulated industries, and possibly some aspects of foreign commerce. Since the main effect of such reform would be to dry up government-initiated litigation, the impact would be spotty and hard to evaluate.

2. Publicized Enforcement Policy Changes. As you know, a major component of antitrust enforcement consists of policy pronouncements through speeches, Antitrust Division business review letters, and FTC trade regulation rules, handy vehicles for communicating internal reform to the public. Moving to the public arena obviously complicates the politics of antitrust reform. Changes must be rationalized, Antitrust Division resignations and FTC polarization become more likely, and our trust-busting opposition in the Congress is given an excuse to mobilize.

On the other hand, there are major gains in effectiveness. First, the business community is informed of government enforcement policy and can plan accordingly. Second, the courts become aware of Executive Branch rethinking and, to the extent they are influenced, private litigation is less apt to undermine the reforms. My best guess is that, assuming no statutory backlash from the Congress, publicized policy changes could have a meaningful impact on foreign commerce, territorial exclusives and related problems, patent licensing, and at least to some extent price discrimination (Robinson-Patman).

In addition, public announcement of an institutional change in the decision-making apparatus whereby the Antitrust Division would no longer exercise sole authority for antitrust enforcement policy would have a substantial impact on sophisticated businessmen and their lawyers.

3. Legislative Initiative. With the possible exception of a law permitting free exchange of pollution control technology among competitors, I do not believe legislation shrinking the antitrust laws can be obtained unless it is presented as part of a sweeping Presidential program regarding "Competition in the 70's" which would tie antitrust initiatives (legislative and otherwise) to broader economic goals.

Such a program could be evolved. For example, the fight against inflation may dictate changes in the labor antitrust exemption, oligopoly pricing, rigid Robinson-Patman Act prohibitions on price competition, and resale price maintenance schemes. Adequate protection of U.S. industries abroad may necessitate a fresh look at antitrust and foreign commerce, plus realistic merger policies. And ensuring the U.S. lead in new technology may require reasonable incentives through patent licensing.

This kind of major initiative would be attacked as pro-business. Moreover, it would have to be balanced and objective and thus would inevitably gore special business interests (oligopolies like oligopoly pricing, labor likes its exemption, small business likes Robinson-Patman and resale price maintenance, etc.). And I doubt that antitrust reform would generate widespread interest and support from the general public.

There are enough signs that our current antitrust laws are unsuited to today's economic problems to justify preparation of a major reform package for possible unveiling in 1973. For the short term, however, the only possible medium for release of such a program would be the expiration of the wage-price freeze when the President will be expected to reveal a broad economic game plan.

Under these circumstances, I believe the President must decide whether there is any reasonable chance he will wish to make antitrust reform a part of his post-freeze economic package. If so, a crash program to prepare appropriate initiatives is needed. If not, then it seems to me that the immediate problem is to decide whether publicized internal reform is politically acceptable at this time and to focus attention on those antitrust issues of highest priority which can be affected by the type of internal action we are prepared to take.

cc: Lew Engman

MEMORANDUM

Anti-Trust

THE WHITE HOUSE

WASHINGTON

August 17, 1971

FOR KEN COLE

Ehrlichman has unleashed Engman on the anti-trust study. Engman is hopeful to have something by Monday, the 23rd of August, for John to review.

Tod R. Hullin