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# Antitrust Economics: Selected Legal Cases and Economic Models, by Eugene M. Singer

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# BOOK REVIEW

ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS. By Eugene M. Singer. Englewood Cliffs, New Jersey: Prentice-Hall Inc. 1968. Pp. viii, 276. $8.95.

The relationship between economics and antitrust is characterized by the ambivalence of collision, coexistence, and unbridgeable hiatus.[1] For example, the definitions assigned by economists to words such as "competition," "monopoly," and "price discrimination" may be useless or misleading in the implementation of antitrust statutes. Economists rely heavily upon static theoretical models, distilled from a priori assumptions, and antitrust endeavors, within a predetermined adversary framework, to accommodate the crosscurrents and dynamic realities of the marketplace to the public weal.[2] The two fields have different objectives. Economics is multidimensional in scope and is related to such diverse subjects as national productivity, the direction of business growth, and the allocation of resources. Antitrust focuses on the relatively narrow problem of effectively using statutory sanctions to preserve "the more or less automatic mechanism of marketplaces."[3]

On the other hand, the measuring and analytical techniques of the economist have proven to be valuable aids in extracting relevant facts from the voluminous record that characterizes the antitrust suit. "Economic theory has provided us with much of what little sophistication we now possess in identifying and measuring market power and in comprehending the interdependence, and its significance, of large powerful firms."[4] Furthermore, the generality and opaqueness of the antitrust statutory vocabulary invites assis-

[1] It has been argued that antitrust has little relevance to the functioning of the American economy. J. GALBRAITH, THE NEW INDUSTRIAL STATE 184-88 (1967); Dewey, *Competitive Policy and National Goals: The Doubtful Relevance of Antitrust*, in PERSPECTIVES ON ANTITRUST POLICY 62-87 (A. Phillip ed. 1965).

[2] Economists complain that antitrust enforcement touches form but ignores substance. For example:

> Too often the law . . . regards various vigorous forms of competition that tend to reduce the discrepancy between price and marginal cost as crimes rather than benefits. The legal mind is not so much concerned with the distortion of prices, which it has no means of measuring, as it is with the methods by which prices are set. P. SAMUELSON, ECONOMICS 503 (7th ed. 1967).

[3] Turner, *The American Antitrust Laws*, 18 MODERN L. REV. 244 (1955).

[4] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV 226, 227 (1960). Bok cautions that "neither can we succumb to the economists who bid us enter the jungle of 'all relevant factors' telling us very little of the flora and fauna that abound in its depths, but promising rather vaguely that they will do their best to lead us safely to our destination." *Id.* at 227.

tance, particularly from those familiar with the vagaries of the marketplace.

Whatever the dimensions and thrust of the tensions between the two fields, it is apparent that economic theory is becoming an increasingly dominant influence on antitrust. *Antitrust Economics: Selected Legal Cases and Economic Models* sheds light on this trend in two ways. First, the author's presentation and analysis of economic models exposes those areas of theoretical rigidity and indefinitiveness which are pertinent to antitrust. Secondly, he discusses some instances in which economic theory has difficulty in furnishing antitrust with definite answers and guidelines.

The work product of the economist originates in the rarefied atmosphere of a priori model construction. After an introductory discussion of "pure competition" and "pure monopoly," Dr. Singer examines models associated with monopoly and oligopoly. It is the contemporary ring of his inquiry into oligopoly theory and the types of concentration classification indexes that arouses the most interest.

The recognition that most markets are composed of few sellers rendered the old assumptions of pure monopoly and competition obsolete. The impact of this recognition cannot be underestimated, for "[n]o sooner had oligipoly been recognized as something different from either competition or monopoly than it was on its way to replace competition as the principal assumption by which the industrial economy was interpreted."[5]

Oligopoly theory is concerned with the competitive effects flowing from the manner and intensity with which firms act and react to the moves of competitors. Most economists consider an oligopolistic market structure as being competitively unhealthy. J. M. Clark notes that "prevailing theories tend to stress the simplified model of 'interdependence,' and the conclusion that this situation leads of inherent necessity to a monopolistic result" in the sense of price and output policies aimed at maximum profit for the industry as a whole.[6] Singer's presentation of modelistic theory specifically focuses on this conclusion. Dr. Singer presents four models that imply interdependence and industry price equilibrium: the Von Stackelberg model, where each firm endeavors to become a price leader on the assumption that the other firm will be a follower; the Game Theory model, which describes the effects of various lead-

[5] J. GALBRAITH, AMERICAN CAPITALISM 41 (Sentry ed. 1956).

[6] J. CLARK, COMPETITION AS A DYNAMIC PROCESS 52 (1961).

ership-follower strategies; the Dominant Firm model, where the dominant firm "sets a price, [and] allows minor firms to sell what they wish, and supplies the remainder of the quantity demanded";[7] and the Barometric Price Leader model, where price changes are initiated by a leader in response to changes in market demand and cost situations.

It is also true, however, that the models incorporate a rigidity and selectivity of foundational assumption that casts doubt as to whether oligopoly theory accurately and invariably mirrors reality. Although it is not Singer's objective to reconcile antitrust interpretation with oligopoly theory, the difficulty in analyzing and defining concrete market behavior in terms of a priori models becomes apparent through the author's discussion. Indeed, mere description is sufficient to illustrate the elusiveness of theoretical omniscience. As Singer demonstrates, and as Professor Bernhard recently pointed out, "[a] theory of the behavior of firms in oligopolistic industries that will give an exact answer about the price-and-output decisions of the firms can be formulated only if one is willing to make assumptions which are all too clearly unrealistic."[8]

Singer also exposes a pragmatic problem in the application of oligopoly theory. How is oligopoly in the concrete recognized? The standard analytic tools for making this inquiry — concentration indexes — are anything but exact. Moreover, economists differ as to methods of measurement as well as in units of measurement.[9]

In reviewing Part II of the book, *Antitrust in a Single Product Context* (those areas in which economic theory fails to provide antitrust with guidelines), the book's format becomes sufficiently relevant to warrant description. The author utilizes a method of selective juxtaposition. Within each of the three main parts of the book, chapters devoted exclusively to economics are juxtaposed with concise analytical summaries of pertinent and complementary antitrust cases. This methodology is particularly effective in Part III, *Antitrust in a Multiple Product Context*, which encompasses perhaps the

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[7] E. SINGER, ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 91 (1968).

[8] Bernhard, *Competition in Law and in Economics*, 12 ANTITRUST BULL. 1099, 1113 (1967).

[9] Another problem is classification. What concentration percentage is needed to produce the consequences associated with oligopoly? Kaysen and Turner admit that "[n]either economic theory nor experience provides a definite number of firms or a size of market share they must jointly hold" for mutual interdependence to exist. C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 27 (1965).

most perplexing form of activity now confronting antitrust enforcement — the conglomerate merger.[10]

The conglomerate merger poses formidable problems of competitive effect measurement. The merger of firms who are not competitors and who have had no prior buyer-seller contact cannot be successfully analyzed in terms of immediate increases in concentration or in levels of market foreclosure. The difficulty in developing new antitrust criteria is compounded by the absence of a background of definitive research by economists. Professor Narver describes the predicament in the following terms:

> Economic theory provides considerable insight into the effects of horizontal and vertical mergers on competition. But it offers much less help in the analysis of conglomerate mergers. Indeed, economists have yet to agree on a satisfactory general definition of the essential aspects of conglomerate mergers and an adequate description of their effects on competition.[11]

Diversification implies the power to shift firm assets and managerial expertise among markets in an advantageous manner. It is the concept of subsidization, and its resultant consequences on market structure, that courts consider to be the crucial issue in conglomerate merger cases.[12] To Dr. Singer, conglomerate power and subsidization are elements of the more spacious multiple product problem area. Through the effective juxtaposition of the theoretical models and case law of tying arrangements, vertical integration, reciprocity, and price discrimination, the author accomplishes two things: first, he indicates the wide range of problems that are directly, and tangentially connected with conglomeration; secondly, he relates these problems to conglomerate power within the context of familiar analysis.

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[10] According to the Federal Trade Commission statistics, the frequency of the conglomerate merger is increasing. "[These] statistics show that conglomerate mergers increased from about 58% of all mergers involving large manufacturing and mining companies in the 1948-1953 period to more than 71% of all mergers involving such companies in the 1960-1966 period . . . . During the same period, horizontal mergers declined from 31% to 13% . . . ." ANTITRUST DEVELOPMENTS 1955-1968, at 83 n.57 (1968) (A Supplement to the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955).

One area in which diversification has taken a sharp upward turn has apparently aroused little interest. "[T]he American university today resembles a conglomerate corporation . . . . The university may own a press, a ball park, a couple of hotels, some ships, and — for complete diversification — an amusement park." Ridgeway, *Universities as Big Business*, HARPER'S, Sept. 1968, at 29. The potential for antitrust prosecution in this area raises some interesting policy and balancing of interest problems. Perhaps a new exemption to antitrust enforcement will be carved out for universities.

[11] J. NARVER, CONGLOMERATE MERGERS AND MARKET COMPETITION 1-2 (1967).

[12] See discussion of cases collected in *id.* at 77-103.

Another point emphasized by Dr. Singer, which is frequently ignored, is that the deep-pocket theory is not indigenous to diversification. Indeed, subsidization is a fact of life to the single firm. "[T]here is no reason why a single company cannot dip into its cash reserves and consume its capital structure by selling at or below cost, and thereby simulate the same system of subsidization alleged to exist in the most conglomerate merger cases."[13] Subsidization power does not, in itself, imply anti- or procompetitive consequences.

There are additional points raised by Dr. Singer that deserve comment. He states that the "use of the term 'cross-elasticity' of demand by the Supreme Court marks a high point in the use of theoretical economic concepts in judicial antitrust opinions."[14] This comment understates the extent to which economic theory has been absorbed into the mainstream of antitrust cognition. The economic treatise is now cited as frequently, and with the same respect, as case precedent.[15] The theory of oligopoly, along with its accouterments, barriers to entry, potential competition, and product differentiation, are now inevitable focal points in Supreme Court opinions. The Court's antitrust decisional methodology can best be described as theoretical mechanism. By invoking theory with its built-in a priori conclusions, the Court avoids the thorny complexities of relating facts to "probable" competitive effects.

This technique raises questions of juridical propriety.[16] The by-products of theoretical mechanism — abruptness, automatic conclusions, and the dearth of explication — leave both the practitioner and the businessman disoriented in their efforts to chart a reason-

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[13] E. SINGER, *supra* note 7, at 269.

[14] *Id.* at 56.

[15] Bain, Macklup, and Mason, all economists, have become authorities alongside prior judicial precedent and legislative history. The economic assumptions of the Court have been based on the current finds of these and other economists, and a rule of law is required to be more consistent with economic theory than with past precedent. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts — From Economic Theory to Legal Policy,* 19 STAN. L. REV. 285, 298 (1967).

For a study in judicial reliance on economic theory, see United States v. Philadelphia Bank, 374 U.S. 321 (1963).

[16] Milton Handler, practitioner and academician, said:

> The crux of the matter is that theory is no substitute for proof, and assumption is not the equivalent of fact. Economic theory, if accepted for what it is, can be a valuable tool in the hands of lawyers. But we do not advance legal science if we place untried theories on the pedestal of infallibility and foreclose inquiry into the underlying pertinent facts. A jurisprudence which ignores the facts inevitably loses contact with life itself. Handler, *The Twentieth Annual Antitrust Review — 1967,* 53 VA. L. REV. 1667, 1680 (1967).

ably safe path through the statutory labyrinth of trade regulations.[17] In addition, there is some doubt as to the quality of the nexus between economic theory and commercial reality. In a recent product extension merger case, *FTC v. Proctor & Gamble Co.*,[18] Mr. Justice Harlan queried: "[I]t seems to me that there is a serious question whether the state of our economic knowledge is sufficiently advanced to enable a sure-footed administrative or judicial determination to be made a priori of substantial anticompetitive effect in mergers of this kind."[19]

The analysis of the tying arrangement is excellent in its concise delineation and juxtaposition of the economic and legal issues. Courts consistently attach the per se violation label to the tie-in. Yet, as the author points out, their reasoning does not follow the mechanical application inherent in the per se rule. Evidence of "leverage" in the market for the tying product is examined. As Dr. Singer suggests, the dilution of per se in this instance has ample basis in economics and antitrust policy.

Economics is a field of immense range. Its perimeter is so encompassing that the seepage of peripheral irrelevancies into antitrust can be taken for granted. Perhaps the primary achievement of *Antitrust Economics: Selected Legal Cases and Economic Models* is that it weeds out the surplusage, leaving economic judgments that bring antitrust problems into more intelligible and disciplined focus.

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[17] The failure of the Supreme Court to furnish satisfactory exploration for decisional conclusions has generated recent critical commentary. *See* Kurland, *The Court Should Decide Less and Explain More*, N.Y. Times, June 9, 1968, § 6 (Magazine), at 34; Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528 (1968).

[18] 386 U.S. 568 (1967).

[19] *Id.* at 587 (concurring opinion).

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