Federal Trade Commission

COMPETITION, COMPETITIVENESS AND PRODUCTION
JOINT VENTURES

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before the

ASSOCIATION OF PUBLIC CORPORATIONS
"Who Will Own Corporate America?"

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The views expressed are those of the Commissioner and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

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Thank you. I am delighted to be here. The program tonight is entitled "Who will own Corporate America?" Not surprisingly, I do not profess to have the answer to this provocative question. We could approach the task of forecasting who will own corporate America from any number of perspectives -- the various macroeconomic and trade policies of the United States and those of other countries, tax policy, the national rate of savings, the perceived security of foreign investments in this country, political developments in the United States and abroad, and other influences on the economy and the economic power of the United States.

As a commissioner on the Federal Trade Commission my job is to enforce the antitrust laws and that is the perspective I want to bring to the question.[1] At this point, I should note that the views I express today are my own, and are not necessarily the views of the Federal Trade Commission or any other commissioner.

Let me begin by comparing two similar sounding terms: "competition" and "competitiveness." The antitrust laws are

[1] The Federal Trade Commission enforces Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45. In this discussion I use the term "antitrust laws" to include the Commission's enforcement of Section 5 and not as it is defined in 15 U.S.C. § 12.

designed and intended to protect and promote competition. "Competitiveness" is the word we see reported when business and Congressional leaders ponder the future success of American enterprise in a global market. The two words are similar, but can the concepts that they represent coexist? I believe they can. Indeed, my premise is that true competition will enhance this country's competitiveness in a world market.

An important underlying premise of antitrust law is that competition among firms will promote the interests of consumers. Consumers benefit when competition spurs corporate efforts to increase efficiency and innovate in bringing goods and services to the market. The same process makes American firms better able to compete with foreign rivals. Put another way, it improves their competitiveness. In short, the antitrust laws, properly interpreted, do not necessarily clash with U.S. competitiveness.

Failure to enforce the antitrust laws may undermine both competition and competitiveness. Although some antitrust actions in the 1960's seem to have reflected a fear of corporate size alone, the focus of antitrust cases is market power or the power to control output and set prices, rather than size alone. Price fixing and other forms of collusion injure consumers now, and probably also in the long run, by reducing pressure to innovate and cut costs, which in turn weakens the competitiveness of U.S. business.

As we attempt to peer into the 1990's and beyond, two questions emerge regarding the antitrust laws and the future

ownership of business in the United States: first, how the antitrust laws affect foreign acquisition of the stock or assets of American firms, and second, how the antitrust laws affect the ability of firms in the United States to compete with foreign rivals. The first question involves how the government reviews mergers and acquisitions under the antitrust laws, and the second relates to the effect of antitrust more generally on the ability of domestic firms to compete in the broad arena of international trade. Both bear on the question of who will own corporate America in the 21st Century.

I. Antitrust Analysis of Mergers with International Implications

Recently a number of proposals have been made to change the antitrust laws with the goal of improving U.S. competitiveness. Before turning to those proposals, let me take a moment and sketch how the antitrust laws apply to mergers with international implications.

An initial issue is how much weight the Commission gives to the fact that an acquiring firm is foreign in assessing the acquisition of a domestic company. The simple answer is "none."

In reviewing a merger, whether it is domestic or international, the only question for the FTC under Section 7 of the Clayton Act is whether in any relevant market in the United States "the effect of the acquisition may be substantially to lessen competition . . . ." The Commission's merger analysis involves predicting whether the merger is likely to give the

firms power to control output and set prices. In making this evaluation, we look at the actual state of competition in the industry in question. We consider the influence of foreign as well as domestic competition. If foreign firms do or can compete in the relevant market in the United States, their actual or anticipated presence may be enough to assure us that the merger will not harm competition.

Another question is whether the Federal Trade Commission considers the ability of United States companies to compete internationally in applying the merger laws. Although international competitiveness is not a formal defense after a merger has been challenged, in deciding whether to proceed against a merger, the Commission does consider whether it will produce efficiencies not otherwise available to the merging companies.[2]

To recap briefly: in reviewing proposed mergers or acquisitions under the antitrust laws, if the acquiring party is foreign, no consideration is given to that fact, but we do consider the influence of foreign competition on the market in question, and we do consider whether the resulting firm will be more efficient and therefore more competitive. Again, if carried out properly, the review of proposed mergers and acquisitions under the antitrust laws should not impede the competitiveness of

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[2] Federal Trade Commission, Statement of the Federal Trade Commission on Horizontal Mergers (June 14, 1982).

firms in the United States. This is also true when we consider joint ventures, which I would like to discuss next.

II. Antitrust Legislation To Promote U.S. Competitiveness

As foreign firms have become increasingly dominant in both American and world markets, some business leaders have argued that firms in the United States need to cooperate in order to face competition from abroad. Two entirely different and to some extent inconsistent solutions have been proposed. One group argues for increased government involvement in guiding the economy. They assert that the United States government should establish a national industrial policy to protect or promote particular industries. Some have urged, for example, that the United States should sponsor a domestic high definition television industry.[3] The other school of thought advocates greater cooperation among businesses with less government interference. Often, the arguments from this school are cast in terms of repealing or modifying portions of the antitrust laws.

I mention the "industrial policy" approach only to point out that in terms of the degree of government involvement, it represents the opposite of reducing antitrust liability. Yet the same perceived competitiveness problems have been used to justify entirely different roles for the government. I am going to discuss only the second proposal to improve U.S. competitiveness

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[3] See "Panel Urges U.S. Strategy On Chips," Washington Post, November 9, 1989, at D-1; S. 952, 101st Cong., 1st Sess. (May 9, 1989).

by modifying the antitrust laws to allow greater cooperation among businesses without government intervention.

Not everyone sees relaxation of the antitrust laws as the solution to America's industrial problems. For example, Tom Peters, author of "In Search of Excellence," recently warned against the growing public infatuation with and "public support for consortia of sluggish big firms to pursue innovation, and industrial policy that favors the entrenched over the upstart." [4]

Congress is now considering whether to change the antitrust laws to make special provision for production joint ventures. Encouraging the formation of legitimate joint ventures is worthwhile. Joint ventures can be efficient, not only for firms involved in research and development, but also for other enterprises. Some potential advantages of joint ventures include the pooling of complementary skills or assets, achieving economies of scale or scope, sharing risks that may be too great for a single firm, or pooling the purchases of supplies or services.

At least five bills have been introduced in Congress to reduce or eliminate the risk of challenge under the antitrust laws for production joint ventures.[5] The bills generally fall

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[4] Tom Peters, "Peters on Excellence," in <u>Washington Business Journal</u>, October 16, 1989.

[5] H.R. 423, 1st Sess., 101st Cong. (Jan.3, 1989)(Wyden); H.R. 1024, 1st Sess., 101st Cong. (Feb. 21, 1989)(Boucher and Campbell); H.R. 1025, 1st Sess., 101st Cong. (Feb.21, 1989)(Edwards); H.R. 2264, 1st Sess., 101st Cong. (May 8,
(continued...)

into two categories. One category is modeled on the Export Trading Company Act of 1982.[6] These are sometimes called the certification bills. Under this model, the parties planning a production joint venture could seek affirmative government certification of the venture. The government agencies would review the venture for competition problems, and if none are found, issue a certificate providing antitrust immunity. This approach provides certainty to the parties, but it would require significant early government involvement in reviewing and approving the venture. Of course, the legislation could be drafted to provide more or less scrutiny.[7]

Most of the other legislative proposals are modeled on the National Cooperative Research Act of 1984, which protects collective scientific research and the development of basic engineering techniques.[8] These proposals, which are sometimes called the notification bills, would extend the National Cooperative Research Act, which applies to research and development, to production and sale of the product. Under the notification approach, parties contemplating a production joint

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[5](...continued) 1989)(Fish); S. 1006, 1st Sess., 101st Cong. (May 16, 1989)(Leahy and Thurmond).

[6] 15 U.S.C. §§ 4001 et seq.

[7] H.R. 1024, 1st Sess., 101st Cong. (Feb. 21, 1989)(Mr. Boucher and Mr. Campbell) sets forth in great detail the manner in which the administering agencies should conduct the review of the proposed joint ventures. Most of the other bills leave the agencies more leeway to develop their own analysis.

[8] 15 U.S.C. § 4301(6).

venture would not obtain advance approval from the government, but would simply notify the relevant agencies of their proposal. Like the NCRA, the bills would require the agencies and courts to identify any actual anticompetitive effects and, if there are any, to weigh the potential gains against the harm. These bills would limit potential damages to single actual damages.

An important initial question about any of these bills is whether legislation is needed at all, and if so, whether these bills will accomplish the goal of promoting the competitiveness of United States industries. Companies contemplating a legitimate joint venture should not hesitate to proceed for fear of a government challenge under the existing antitrust laws. Although both antitrust agencies are committed to prosecuting illegal cartel behavior, both have clearly indicated that production joint ventures that are output enhancing (and therefore are not vehicles for price fixing or collusion) do not violate the antitrust laws.

In 1984, the Commission accepted a consent order with General Motors that permitted GM and Toyota to establish a joint venture to produce automobiles in Fremont, California.[9] That order authorized the joint manufacturing venture, but placed limits on its operation. The joint production was limited in duration and in the products manufactured. The limits imposed were not greatly different from those proposed by the parties, who believed that the efficiencies of the venture could be fully

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[9] In re General Motors Corp., 103 F.T.C. 374 (1984).

realized within those limits. In addition, GM and Toyota were not permitted to discuss prices, costs and marketing projections or plans unnecessary for the efficient operation of the venture.

Although restrictions like these may be imposed to protect against anticompetitive collusion, the Commission action clearly indicates that production joint ventures are permitted, even between leading firms. Since the GM/Toyota order, the Commission has left unchallenged a number of other joint production ventures that have been reported to the government under the Hart-Scott-Rodino premerger notification procedures.

The Justice Department also has indicated that legitimate joint production ventures are not barred by the antitrust laws. Both the current Assistant Attorney General of the Antitrust Division and his immediate predecessor have sought to allay concerns about the antitrust treatment of production joint ventures.[10]

Consistent with leading decisions of the Supreme Court, the Justice Department's Guidelines for International Operations, which were released in November 1988, state that joint ventures are analyzed under the Rule of Reason. A capsule summary of the analysis should give you comfort that joint ventures will not be

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[10] Antitrust and International Competitiveness in the 1990's, remarks of James F. Rill before the Annual Meeting of the Section of Antitrust Law, American Bar Association, August 7, 1989; The Justice Department's Antitrust Enforcement Guidelines for International Operations--A competition Policy for the 1990's, remarks by Charles F. Rule, before the International Trade Section and Antitrust Committee of the District of Columbia Bar, November 29, 1988.

challenged unless they pose a serious threat to competition. Under the Guidelines, the initial issue is whether any anticompetitive effects are likely in the market in which the venture operates, or in other markets. If no anticompetitive effects are detected, the venture raises no concern. If a potential competition problem is identified, the next question is whether the efficiencies to be achieved by the venture outweigh the risk to competition.

A particularly important part of this analysis is the determination whether there are likely anticompetitive effects in the joint venture market. If the parties to the venture do not, and are not likely to, compete in the joint venture market, then the enforcement authorities can quickly conclude that there is no competitive risk in this market. If the parties are actual or potential competitors, the task is somewhat more complicated. The relatively clear and predictable safe harbors that apply to mergers also apply to joint ventures. If the parties to the venture represent a small portion of the capacity or sales in a market, it is likely that they will be able to proceed.

In any event, the parties may be able to justify the venture on efficiency grounds, which may be easier than in merger cases. When the Commission considers efficiencies in merger cases, we ask whether the claimed efficiencies are real or just a rationalization for an anticompetitive merger. In a production joint venture, the parties may collaborate in an effort that they could not undertake alone. Economists might say they are

expanding output in a procompetitive fashion. This kind of efficiency is likely to be more readily apparent than efficiencies incidental to a merger.

Nonetheless, it should be clearly understood that a cartel will not be permitted to operate under the guise of a joint venture. When competitors act together in a joint venture, there is always a concern that they may share prices, costs, and marketing information. In planning a joint venture, care should be taken to minimize these risks.

I wonder whether many firms contemplating a legitimate joint venture have been forced to give up their plans because of antitrust. Given the Government's enforcement posture, one might ask whether the proposed legislation on production joint ventures is truly necessary. A frequently cited concern is that federal enforcement policies do not necessarily protect joint venturers from the risk of a private treble damages action. Certainly, a cautious lawyer should warn a client about the possibility of a private suit, but it is unclear how often this possibility has caused firms to back away from plans to form a joint venture. The Antitrust Section of the American Bar Association recently prepared a report on production joint ventures. Based on an informal poll of members of the private bar, the Antitrust Section found only one instance in which a joint venture would have been pursued if legislation had been in place.

Although I do not know how frequently production joint ventures are established in the United States, periodically we

see reports of them in the Wall Street Journal and other media, and a number of them have been reported to the government under the Hart-Scott-Rodino notification procedures. Fear of antitrust liability possibly has inhibited the formation of other ventures, but concrete examples of ventures that fail for antitrust reasons are scarce indeed.

Consider one highly visible example. U.S. Memories is a consortium of major semiconductor firms, including IBM, DEC, National Semiconductor, Hewlett-Packard, Intel, AMD, and LSI Logic, to produce computer memory chips. I understand that proponents of the legislation are using U.S. Memories as a prime example of why protective legislation is needed. Yet according to press reports, the venture's president and CEO has denied that U.S. Memories needs any special exemption from the existing law.[11] Although I have no access to the internal situation of U.S. Memories, the October 28th issue of The Economist reported problems with the venture because the price for DRAMs fell from $30 last year during a shortage to $9 this year when chips are plentiful. I mention this not as a statement of fact but to suggest that it may be premature, at least, to assign the blame for any problems to antitrust.

The rallying cry of promoting United States competitiveness has allure, but it begs the question whether greater protection from the antitrust laws for production joint ventures will

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[11] "New U.S. Memory Chip Consortium Disclaims Potential Antitrust Problems," BNA Antitrust & Trade Regulation Report, October 26, 1989, at 571.

actually promote U.S. competitiveness. The list of companies that have filed notices under the National Cooperative Research Act, which provides antitrust protection for research and development joint ventures, includes the names of several major foreign firms that have become household words. I do not oppose joint ventures between U.S. and foreign companies, which, in an increasingly global economy, should be expected. But they too raise a question about the premise that greater protection from the antitrust laws will cause American firms to join together to compete against foreign rivals. What we may see instead is American firms collaborating with foreign firms to compete against other American firms.

As promised, I have not answered the question "Who will own Corporate America?" Many influences affect the strength of our economy. Shifts in macroeconomic or trade policies or some of the other economic phenomena or policies to which I alluded earlier may very well have effects, either positive or adverse, on the ability of U.S. business to compete in a world market. New legislation may well be needed on one or more of these fronts to ensure our competitiveness. But in considering proposals to change the antitrust laws, we would do well to keep in mind that antitrust enforcement is synonymous with protecting competition which, in turn, should promote competitiveness. At the least, a healthy degree of skepticism is in order when changes in the antitrust laws are urged as a panacea for problems faced by U.S. business.

My concern is that the fear of foreign competition may lead to changes in the antitrust laws that may not ultimately serve the goal of U.S. competitiveness and may even be counter-productive. In the long run, competition among firms in the United States is likely to produce companies that are efficient, profitable and serve the consumer well. Those are precisely the firms that are most likely to succeed in competition with foreign firms.