Michigan Law Review

Volume 64 | Issue 5

1966

Antitrust and the Consumer Interest

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ANTITRUST AND THE CONSUMER INTEREST

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PUBLIC control of business in the United States has proceeded, in most sectors of the economy, on the assumption that free, open competition in the market should be the primary regulator. It is felt that consumer welfare will be maximized by such an organization of the economy. Courts, governmental agencies, and, to a certain extent, private agencies have performed the role of ensuring that free markets are not displaced by other, less desirable alternatives.

I. Pluralistic Competition: The Traditional Goal

Decision-making in the public control of business has generally proceeded in the light of the teachings of economists concerning the forms of competition. Perfect conditions of competition are said to include a market with many actors, both buyers and sellers, who have perfect knowledge and mobility and who deal in undifferentiated items. A relatively pure form of competition is expected to exist even where market actors have neither perfect knowledge nor perfect mobility.[1] Less pure forms of competition result from a certain amount of product differentiation and a resulting quantum of control—perhaps unexercised control—over price. It is generally agreed that as the number of sellers decreases in a given market and as the degree of product differentiation in that market increases, there is an increasing probability that an impure form of competition is regulating market action. It is usually assumed that there is a direct correlation between the degree to which competition in the market in fact approaches the ideal of highly pluralistic competition and the likelihood of satisfaction of consumer wants at the lowest attainable price.[2]

A. *Concern Over the Number of Sellers—A Case of Misplaced Emphasis*

Of all the foregoing indicators of competition, the easiest to observe in actual operation is the number of sellers in a given market.

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1. See, *e.g.*, Chamberlin, The Theory of Monopolistic Competition 3-10 (7th ed. 1956).

2. Obviously there is no generally applicable definition of competition. "What is 'inter-industry' competition to one man is 'late-stage monopoly capitalism' to another." Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 Va. L. Rev. 413, 430 (1964).

It should come as no surprise if an agency concerned with maintaining competition in an oligopolistic market performs its task in large part on the basis of a nose count of sellers.[3] In two recent bank merger decisions, the Supreme Court not only determined the number of sellers in the relevant market, but in large part also used this count as the basis for its decisions to interfere and forestall permanent marketing combinations in those markets. In *United States v. First Nat'l Bank & Trust Co.* (the *Lexington Bank* case),[4] the Court refused in a specific setting to permit a six-seller market to be reduced to a five-seller market, and in its earlier opinion in *United States v. Philadelphia Nat'l Bank,*[5] it identified the general market setting in which it would assume that the loss of even one seller as a result of a merger would constitute, actually or potentially, a substantial lessening of competition in that market.

Concern over the number of sellers in a market obviously represents, among other things, a desire that buyers be provided with a wide choice among *sellers* in the market. However, the existence of a wide range of *transaction opportunities* is a better guide to the functioning of competition in a market than the mere existence of a large number of sellers. The operation of a cartel illustrates this point. A market characterized by many sellers operating as a cartel offers the consumer no real choice of transaction opportunities because no seller is functioning as an independent economic unit; rather, the managements of the several units have pooled their firms' decision-making operations and have substituted the group or cartel decision for their independent decisions. In the cartel situation, the consumer has no real choice because the cartel has programmed its members to give a uniform response to a buyer's invitation to enter into a transaction.

Predictably, where the cartel decision supplants decisions of the individual member firm in such matters as the number of products to be produced,[6] the price to be charged,[7] or the allocation of transaction possibilities among sellers[8] (by division of customers or terri-

3. "It is the basic premise of [§ 7 of the Clayton Act] . . . that competition will be most vital 'when there are many sellers, none of which has any significant market share.'" United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964) (Douglas, J., quoting from United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963)).

4. 376 U.S. 665 (1964).

5. 374 U.S. 321 (1963).

6. *Cf.* Timkin Roller Bearing Co. v. United States, 341 U.S. 593, 596 (1951).

7. *Cf.* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

8. *Cf.* White Motor Co. v. United States, 372 U.S. 253 (1963); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899).

tories), free competition is considered by the courts to have been displaced as a matter of law.

Another situation where a large number of sellers in a market may give a false appearance of real choice among transaction opportunities is a market in which consumers, because of physical or temporal limitations, can consider the goods or services of only a few of the sellers. A submarket can illustrate such a situation, to the extent that it does not involve a problem solely of market definition. In *Brown Shoe Co. v. United States*,[9] the Supreme Court emphasized the fact that well-defined geographic submarkets, such as specific cities and their environs, may exist within broad markets.[10] For example, there may be numerous shoe retailers in a particular section of the country but only one having an outlet in a particular town. Thus, when shoes are needed by consumers in that town and transportation to other towns is not feasible, the consumers involved have no effective choice of transaction partners.[11]

Situations also occur where consumers are confronted with a large number of sellers in a given market but find it impractical to give consideration to more than one or two sellers as potential transaction partners. Impulse items provide one example. A consumer wishing to buy an item costing less than one tenth of one per cent of his weekly income will be likely to buy it at the most convenient location rather than to go out of his way to make a conscious choice among sellers. Even a prospective buyer who is willing to shop for a particular item may not have available the means to test and choose among the large number of products presented for his choice. In fact, his inadequacy to deal with a bewildering array of merchandise may cause him to act irrationally rather than choosing rationally from a limited sample of the products available.[12]

On the other hand, it is not always clear that the presence of only a limited number of sellers in a market means that consumer choices are unacceptably limited. In fact, if there exist potential sellers capable of easy and speedy entry into the market, even a single seller may provide a consumer with an adequate choice of transaction opportunities. Most newsstands provide an example. A typical newsstand serves a distinct market area, perhaps a single block, in which it is the only seller. However, it provides an adequate choice

9. 370 U.S. 294 (1962).

10. *Id.* at 336.

11. See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922), where the Court recognized that small towns often cannot support more than one distributor of a particular line of products.

12. *Cf.* CLARK, COMPETITION AS A DYNAMIC PROCESS 75-76, 241-42 (1961).

of transaction opportunities to its customers because its failure to perform as if effectively limited by competition, as by arbitrarily raising prices (even slightly), will be likely to cause another seller to invade its territory at once. Such potential competition adequately serves the public need for competitively determined prices in both markets and submarkets.

A second illustration of a few sellers providing an adequate choice of transaction opportunities to consumers arises when large firms produce competing lines or competing products within a line.[13] Meat packers, for example, sell a variety of cuts from a variety of animals, all cuts competing with one another. Food packers often distribute a variety of products under different brand-names and at different prices.[14] Large shoe manufacturers provide another example, since they frequently organize into separate, competing selling divisions through which various brands and types of shoes are marketed. In durable goods markets, the same seller as a matter of course provides economy, standard, and deluxe models of his product, thereby offering consumers three distinct transaction possibilities.

B. *Buyer's Conscious Limitation of Transaction Opportunities—The Requirements Contract*

The preceding examples include instances where consumers are indifferent to a large number of sellers in a market because they find that their needs for transaction opportunities are served adequately by a few. There are still other situations where the correlation between the number of transaction partners and the welfare of particular buyers is very slight. In fact, certain types of buyers, including many who buy for resale, need to limit their choice of transaction partners severely, even to one, for long periods of time.

In *Tampa Electric Co. v. Nashville Coal Co.*,[15] the electric company contracted to purchase its total requirements of coal for a period of twenty years from a single source, thereby foregoing a series of choices among other transaction partners for that period. The Supreme Court sustained this limitation, pointing out that the contract resulted in economic advantage to the buyer.[16] The Court also noted that the requirements contract guaranteed a constant flow

13. See, *e.g.*, OXENFELDT, INDUSTRIAL PRICING AND MARKET PRACTICES 372-75 (1951).
14. See Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964), *cert. granted*, 34 U.S.L. WEEK 3117 (U.S. Oct. 11, 1965).
15. 365 U.S. 320 (1961).
16. *Id.* at 334.

of coal to the utility's boilers for a period long enough to permit long-term planning to meet the needs of the utility's customers.[17] Thus, the buyer's decision to substitute an assured supply of coal for unlimited choice of transaction partners was considered permissible, especially where an offsetting benefit to the utility and to its customers was apparent. However, to achieve the end of protecting the consumer interest in the transaction, the Court had to engage in manipulative definition of the relevant market.[18]

Permitting decisions by buyers to limit their freedom of choice of transaction partners, by entering exclusive dealing arrangements or by agreeing to purchase requirements for a substantial period of time from a single seller, is fully consistent with reliance upon competition as the market regulator. The basic function of competition is to provide buyers with freedom of choice among transaction partners *to the end that buyers realize their values.* This is a freedom which includes the right to decline periodic exercise of choice, where such a course of conduct is desirable for the purpose of value realization.[19]

II. Emphasis on Consumer Interest: A Recommended Approach

The above situations demonstrate the invalidity of the assumption that highly pluralistic competition should in all cases be the ideal model for purposes of public control of business. The thesis of this article, however, does not stop at this point. It is submitted that the ideal of economic action for purposes of antitrust control should be a system which: (1) provides means for consumers to realize their values through choice among the widest possible range of products and services; (2) results in goods and services being offered by suppliers with the greatest economy of means and at prices determined by effective competition, which is not necessarily highly pluralistic competition; and (3) produces a framework where the ultimate goal is the development of the consumer as an individual and a personality instead of satisfying the marginal wants of the economists' abstract model of a buyer. Antitrust control should be concerned with the consumer interest. The structure of the market is only one aspect of the problem of achieving that goal, and attainment of the economists' goal of a perfect market structure should not be reached

17. *Ibid.*

18. See text accompanying notes 52 and 53 *infra.*

19. Good reasons for declining periodic exercise of choice might include, in addition to an assured source of supply, a promise of an exclusive franchise or the benefits to be derived from integration into a dealer system including accounting and advertising direction, employee training programs, group insurance, and other similar benefits.

at the expense of the consumer. Accordingly, the issues for antitrust control should be: Do the questioned market relationships provide adequate means for consumer value realization by innovation, market research, choice of products and services, efficient use of means, and price reductions corresponding to savings in costs? Is there sufficient competition to ensure that this kind of market performance will be maintained? Would compulsory movement toward a more pluralistic market structure result in any substantial improvement in market performance from the standpoint of the foregoing criteria?

Antitrust control is thus confronted with the question whether the interests of consumers will be better served by restructuring markets which have few sellers or by permitting such markets to operate in a concentrated state. Two kinds of consumption in today's organization of industry force such a posing of alternatives for decision: government consumption and the consumption of the "affluent" consumer.

Government is at present a "super consumer" which wants space conquered, poverty eliminated, and racial economic inequality eradicated. Such wants are different both in degree and in kind from the consumer wants which direct the classical economic competitive model. No combination of consumers having the requisite wealth, other than the federal government, could be expected to agree to exchange it for pictures of Mars. However, such demands are being made by the super consumer. Moreover, the "super demands" of government are calling for the combination of quantities of men, materials, and machines into producing units which would not otherwise come into being. For example, the federal government, through its Chief Executive, recently announced that the United States will parallel its lunar landing program with a program exploring the military potential of men in space.[20]

It seems apparent that the demands of the Government for such items as manned orbiting laboratories are capable of satisfaction only by producing units the output of which will appear in the somewhat distant future. Such units have vast reservoirs of specialists and vast accumulations of capital, and are directed by professional managers with due regard for the interests of consumers, labor, stockholders, and the public. Producing units of this sort were labeled "metrocorporations" by Richard Eells.[21] Fragmentation of industry so as to leave no seller with an organization capable of satis-

20. Wall Street Journal, Aug. 26, 1965, p. 2, col. 2.

21. See generally EELLS, THE MEANING OF MODERN BUSINESS: AN INTRODUCTION TO THE PHILOSOPHY OF LARGE CORPORATE ENTERPRISE (1960).

fying the demands of the super consumer is politically and economically unacceptable, particularly when those demands fall in the category of defense. Similarly, to require the super consumer to deal always with multiple sources of supply seems unacceptable, if to do so is inefficient or not in accord with the preferences of the super consumer.

A setting in which a super consumer demands, among other things, the immediate bridging of space and the systematic elimination of poverty signals evolution from an economy of scarcity toward an economy based on affluence and having an increasing and substantial number of individual consumers possessed of varying degrees of affluence. With respect to the latter group of constantly expanding affluent consumers, each with an expanding capacity to demand satisfaction of non-physical needs,[22] the economic and social task for the community will become more one of responding to individual desires and less one of producing from scarce resources a series of basic goods in sufficient quantity. In other words, if the affluent consumer in a competitive economy appears in sufficient numbers, he is less likely to be perceived by producers as simply a unit in a homogeneous mass; he is more likely to be perceived in terms of his individual personality.

The adjustment of the economy to the needs of such a society will demand something more than Adam Smith's ideal of many sellers—small business units—in a market as the optimal mode of economic organization. Production on a small scale cannot satisfy many of the demands of space-age consumers responding to stimuli from laboratories producing new advances in technology and new scientific discoveries. Some of the demands generated by affluent space-age consumers, whether for natural gas, communications satellites, computers, or atomic kitchen, will, like the demands of the super consumer, be capable of satisfaction only by producing units with the capacity of a metrocorporation.

This is not, of course, to suggest that smaller producing units designed to fulfill small segments of demand will not remain a vital force in the future. Similarly, those persons charged with preserving to the economy the benefits of competition must continue to be concerned with the structure of markets. However, the foregoing observations should suggest that conceivably the nature of the demands of the affluent consumers of the future, along with the nature of the demands of the super consumer, require the presence in

22. See, *e.g.*, United States v. Von's Grocery Co., 1965 CCH TRADE REG. REP. ¶ 71324 (S.D. Cal. 1964), *prob. juris. noted*, 282 U.S. 806 (1965).

the market of super producers. It is also suggested that agencies charged with maintaining competition should adopt a perspective in addition to that of the neo-classic model of highly pluralistic competition in order that an opportunity might be preserved for the timely growth and development of such super producers.

III. The Supreme Court's Continuing Insistence on Pluralistic Competition

If recent Supreme Court pronouncements provide a guide, the trend in the enforcement of competition is toward increasing and exclusive reliance upon a pluralistic model of a competitive market —one with many sellers, preferably independent and locally owned— against which to measure challenged marketing arrangements. In the *Brown Shoe* case, for example, the Supreme Court construed section 7 of the Clayton Act to prohibit a merger of two corporations the result of which was an enterprise both manufacturing shoes and selling a large portion of its output through wholly owned or controlled retail outlets.[23] The merger was condemned as reflecting an undue tendency toward concentration of economic power in the hands of a few sellers in the markets for men's, women's, and children's shoes.

The shoe industry, at the time the Court was analyzing it, had over eight hundred shoe manufacturers; it thus had a market structure "as close to pure competition as is possible outside a classroom model."[24] Nevertheless, the Court was convinced that the number of competitors was being systematically reduced by a series of mergers. Apparently the Court became convinced that a market structure comprising eight hundred manufacturers of shoes is economically more desirable than one involving any lesser number, although it would seem that as few as fifty competitors would provide a market structure in which competition would be an effective regulator.

The Court also relied upon a pluralistic norm in analyzing the vertical aspects of the Brown Shoe acquisition. There, too, a trend among shoe manufacturers to acquire control of existing retail outlets was given as the basis for invalidating the acquisition. The Court emphasized the fact that the merger created "a large national chain which is integrated with a manufacturing operation,"[25] and pointed out that "the retail outlets of integrated companies, by eliminating

23. See 370 U.S. at 297.
24. Bork & Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363, 371 (1965).
25. 370 U.S. at 344.

wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers."[26] Thus the Court recognized that the effect of its decision was to deny consumers the benefit of lower prices resulting from the economies of vertical integration, in favor of retention of businesses which would otherwise be excluded as the result of price competition.

The *Philadelphia Bank* case further illustrates a tendency on the part of the Supreme Court to rely predominantly upon a pluralistic concept of competition to evaluate the economic consequences of challenged business growth. In that case the Court announced that combinations of sellers having an aggregate market share of thirty per cent were presumed to be economically unacceptable.[27] The record before the Court indicated rather clearly that the merger of the two banks involved would be beneficial to one class of customers—those who sought commercial banking services in regional, national, and international markets. On the other hand, the majority of the customers served by the two banks were motivated in their demand for banking services in considerable measure by shopping convenience in the area in which the banks were located. The merger did not diminish the amount of banking facilities, since the new institution continued to provide deposit account facilities to all consumers desiring them, as had each of the merged institutions. Moreover, a choice among a substantial number of competitors still remained.

For one group, the loss of one potential partner for banking transactions was more than offset by the prospect of dealing with one bank with loan limits nearly double the limit of either of its two predecessors.[28] For the other group, there were no additional usable services forthcoming from the resulting bank which were not provided prior to the merger by both of the two combining banks, and there was no evidence that the character of such banking services would be changed as a result of the merger. The Court, consistent with the express language in the Clayton Act invalidating

26. *Ibid.*

27. See 374 U.S. at 364-65.

28. Lending limits are both actual and psychological barriers to banking transactions. Of course a bank must observe its limit, but "smaller" banks may hesitate to approach their limits with any single customer or small group of customers, because to do so would tie up a disproportionate percentage of funds in a few customers. In addition, customers, in borrowing, apparently prefer not to approach a bank's limits; thus, a client with a need to borrow $5 million would prefer to deal with a bank with $10 million limits rather than a bank with $5 million or $6 million limits. Brief for Appellees, pp. 70-78, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

conduct having anticompetitive effects in any line of commerce in any section of the country,[29] and consistent with the Court's own policy dating from *Brown Shoe* of analyzing the effects of market action in sub-markets, ignored the gains to large customers accustomed to dealing regionally, nationally, and internationally, and invalidated the merger because of presumed effects in the four-county area in which the banks involved had offices. The Court also ignored the beneficial effects upon the economy of the community which such regional, national, and international growth, as well as growth in assets of the bank, might produce.[30] "We are clear," said the Court, "that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[31] This is indeed an extraordinary confession.

In a series of cases coming before the Court after the *Philadelphia Bank* case, determinative significance was attached to the number of actual or potential competitors in the market. In *United States v. El Paso Natural Gas Co.*,[32] the Court invalidated an acquisition of one natural gas supplier by another and ordered divestiture, without ever indicating how many sellers were actual or potential competitors for the "new increments of demand" in the expanding California market for the industrial and household use of gas.[33] The record clearly indicated that the two merged firms were in fact effective competitors for business in the California market, and apparently

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29. Clayton Act § 7 provides in part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ." 38 Stat. 731, as amended, 15 U.S.C. § 18 (1964).

30. Some relevant economic factors pointing to the propriety of analyzing bank mergers in light of regional markets include the fact that the price of money is determined regionally within a national context, and that most borrowers have little bargaining power over the rate of interest. A third factor is the advantages which a large bank offers to a region and community from the standpoint of the amount and character of its services. There is in this sense a community interest which should not be ignored (although it has been) in bank merger cases.

31. 374 U.S. at 371.

32. 376 U.S. 651 (1964).

33. Apparently designating the number of competitors was difficult. The district court felt that El Paso had no competition from non-California producers. The Government felt that there were four potential competitors, apparently because in the period after the acquisition four companies were seeking certificates of public convenience and necessity to supply the California market. The appellees, while not conceding that El Paso itself was an effective actual competitor for the California market, pointed out that there were in existence many more than four firms that would like to supply the California market and therefore many more potential competitors than the four companies pointed out by the Government. See Brief for Appellees, pp. 34-37, United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

the elimination of this competition—the reduction of the number of sellers by one—was in itself deemed an unacceptable threat to the continued functioning of the competitive mechanism in the market involved.[34]

The decisions in *United States v. Penn-Olin Chemical Co.,*[35] *United States v. Aluminum Co. of America,*[36] and the *Lexington Bank* case were similar to the result in *El Paso.* In *Penn-Olin* the Court vacated a judgment against the Government in a case where the latter had shown, at best, that two potential competitors had entered a market jointly. The joint venture at most reduced the total number of potential competitors by two, while adding one actual competitor to the market. Of course, a threat to competition could be found in such circumstances if there had been an extremely small number of actual and potential sellers, but the Government presented no information concerning the total number of competitors.

In the *Lexington Bank* case, on the other hand, market statistics were gathered and made available. These statistics indicated that the challenged activity was a merger by the largest and fourth largest banks in a six-bank market. The Court nevertheless chose to emphasize that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act."[37] The decision, in terms of statutory language, was that the union of the two banks amounted to an unreasonable restraint of trade. This is something more than a probable substantial lessening of competition, and also represents something more than the Court said occurred in *Penn-Olin.*

The remaining case in this series, *Alcoa,* involved vertical integration achieved through the acquisition in 1959 of the Rome Cable Corporation by Alcoa. Alcoa produced aluminum, and both companies manufactured aluminum conductor. In the year prior to

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34. In *El Paso,* as in the *Philadelphia Bank* case, another government agency not directly charged with maintaining competition had approved the transaction prior to the Supreme Court's contrary action. In *Philadelphia Bank* the Comptroller of the Currency, acting under the Bank Merger Act of 1960, 73 Stat. 463 (1959), 12 U.S.C. § 215 (1964), approved the merger, reasoning that an adequate number of banks remained in Philadelphia after the merger to serve the local area so that local customers were not deprived by the merger of the benefits of competition and that the beneficial effects of the consolidation upon international and national competition more than justified its approval. In *El Paso* the Federal Power Commission had approved the acquisition as being in the public interest.

35. 378 U.S. 158 (1964). On remand, the district court dismissed the complaint. United States v. Penn-Olin Chem. Co., 246 F. Supp. 917 (D. Del. 1965).

36. 377 U.S. 271 (1964).

37. 376 U.S. at 671-72.

the merger, Alcoa was the leading producer of aluminum conductor with 27.8 per cent of the market; Rome captured 1.3 per cent of the market that year. In 1959, there were more than twenty-nine producers of aluminum conductor, but by 1963 this number, for practical purposes, had been reduced to about twenty-three.[38] In the latter year, five of the six producers of aluminum ingot also produced aluminum conductor, and the sixth was considering acquiring facilities for the production of conductor.[39] Finally, in 1963 Aluminium, Ltd., a Canadian corporation, announced the acquisition of Central Cable, one of the largest independent producers of conductor; this merger capped a series of acquisitions of independent conductor producers by such ingot producers as Anaconda, Olin, Kaiser, Alcoa, and Reynolds. Accordingly, it seemed clear that the bulk of conductor production in the future would be by integrated producers.

In the face of evidence that, as a result of the merger, Rome was functioning quite efficiently as a distributor for Alcoa—as part of a metrocorporation—and in the face of clear evidence that the role of the independent could not be competitively meaningful in a market already dominated by integrated producers, the Court nevertheless reassigned to Rome (to its undoubted displeasure) the task of buying from Alcoa, Reynolds, and Kaiser the aluminum with which to make conductor to sell in competition with these three integrated producers. In justification, the Court restated that "it is the basic premise . . . that competition will be most vital 'when there are many sellers, none of which has any significant market share.' "[40] Similarly, the Court concluded that "Rome seems to us the prototype of the small independent that Congress aimed to preserve . . . ."[41] The achievement of the economies of vertical integration for the benefit of consumers was ignored. The competitive effectiveness of Alcoa was temporarily diminished by the loss of a distributing arm, which was remolded into the form of an independent producer of uncertain competitive effectiveness and facing problems of higher cost in a market dominated by integrated producers.[42]

The Supreme Court, in sum, seems clearly committed to a policy

38. See Brief for Appellant, pp. 18-24, United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

39. *Id.* at 23 n.17.

40. 377 U.S. at 280 (quoting from United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963)).

41. *Id.* at 281.

42. Obviously Alcoa has the resources to increase its conductor operations by capital expansion, and, if the record in the case is to be believed, it will probably do so. As the other ingot producers integrate forward and bring competitive pressures to bear upon one another, Rome Cable will be squeezed. If Rome is neither acquired by another ingot producer nor in a position to integrate backward, it is conceivable that

of measuring challenged marketing arrangements against a highly pluralistic competitive norm. The utilization of sub-markets as foci for analysis in *Brown Shoe* and *Alcoa*,[43] the refusal, in *Philadelphia Bank*, to permit economic gains in some markets to offset a mere reduction of the number of firms in another as a result of the merger, the emphasis on the elimination of competitors as the criterion of legal control in *El Paso*, *Alcoa*, and *Penn-Olin*, and the mechanistic approach of *Philadelphia Bank* all indicate the advent of a period of regulation of competition based on the mechanical application of a norm of highly pluralistic markets.

Moreover, the Court's resort to this norm, coupled with its evident determination to weed out potentially anticompetitive activities in their incipiency and its tendency to measure the effects of such activities in narrow lines of commerce or in submarkets, indicates an atmosphere hostile to the growth and development of the metrocorporation, even under conditions of effective competition. The mechanistic interdiction of corporate growth denies consideration of economic justifications for market activity in general, when they are offered in opposition to the ideal of the fragmented market. In addition, reliance by the Court, especially in the *Philadelphia Bank* opinion, upon the formula that Congress intended to maintain competition by maintaining large numbers of small, independent sellers, indicates that the Court is inclined to take an inflexible position with regard to economic regulation, on the theory that it is the inexorable terms of a statute it is applying rather than an economy it is regulating.

IV. Effect of the Supreme Court Decisions on Other Tribunals

The impact of the decision by the Supreme Court to rely heavily on a norm of highly pluralistic competition is of course magnified because of the Court's position of leadership among the govern-

it will be pressured out of the field. The net result of the Supreme Court decree may be to deny Rome shareholders an opportunity to liquidate their investment at a time when adequate compensation was available, to deny to Rome management an opportunity to upgrade Rome's performance by joining a metrocorporation, and to deny the use of the Rome assets to the persons most eager and able to exploit them. *Cf.* Oppenheim, *Small and Big Business: Orientation of Antitrust Points and Counterpoints*, 39 U. Det. L.J. 155, 162 (1961); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313 (1965).

43. See Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962), where the court emphasized that *Brown Shoe* permits the utilization of sub-markets and does not require resort to the outer limits of markets definable in terms of product characteristics or end uses. See also Ekco Prods. Co. v. FTC, 347 F.2d 745 (7th Cir. 1965). In the latter case the court upheld an FTC order of divestiture running against the principals in a conglomerate merger, although there were no markets in which the acquired and acquiring companies actually competed prior to the acquisition.

mental bodies concerned with economic regulation. In fact, the major impact of the *Brown Shoe* and *Philadelphia Bank* opinions in future litigation will occur in the lower federal courts and in the decisions of the Federal Trade Commission. Two cases will suffice to illustrate this point.

In *Reynolds Metals Co. v. FTC*,[44] the Commission dissolved a vertical integration by ordering divestiture by Reynolds of Arrow Brands, a converter of aluminum foil which sold to florist supply houses. The Court of Appeals for the District of Columbia Circuit affirmed, relying upon the *Brown Shoe* concept of sub-markets to find that florist foil formed a product sub-market in the general market for converted aluminum foil. This definitional exercise enabled the court to distinguish eight converters of foil for the florist trade from among two hundred converters of foil for other uses.

Arrow sold about one third of the foil purchased by florist supply houses in 1956. The acquisition of Arrow by Reynolds foreclosed Reynolds' competitors from serving Arrow as a customer, though the facilities of Arrow continued to serve Arrow's customers. The court stated:

> The truer picture of anticompetitive effect emerges [when one views the post-acquisition posture of the eight converters of foil for the florist trade]. . . . Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the "deep pocket" or "rich parent" for one of the florist foil suppliers in a competitive group when previously no company was very large . . . opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.[45]

The court concluded by noting that the FTC had adequately demonstrated the likelihood of a harmful effect by showing that after the acquisition Arrow had in fact provided foil at lower prices.

The decision seems quixotic. The court protected the public from the ravages of efficiency by preserving competition in a market which could well be eliminated entirely from the standpoint of efficient use of resources. Foil converters merely buy large rolls of foil from producers, break the rolls down into small lots, and sell the product to small purchasers. Converters came into existence only because in the early stage of developing the market for foil, foil producers preferred not to sell in small lots. If the foil producers had decided in the beginning to sell in small lots, the need for con-

44. 309 F.2d 223 (D.C. Cir. 1962).
45. *Id.* at 229-30.

verters would never have arisen. Eventually Reynolds began backtracking and preparing to supply all users of foil, both large and small. However, when it did so by acquiring the assets of Arrow and eliminating the converter's profit margin from the price of foil to small users, it was found to be acting illegally. Of course, if Reynolds duplicates Arrow's facilities there will be no illegality. There will be only a needless waste of resources and a needless denial to Arrow of the proceeds of the sale of its business.

Ekco Products Co. v. FTC[46] is the second example of the impact in the lower courts of the Supreme Court's announced preference for pluralism in competition. In that case Ekco, a large diversified enterprise of the sort which is a potential entrant in many markets, acquired the McClintock Company. Ekco had no familiarity with McClintock's business of manufacturing and distributing commercial meat-handling equipment; the Court of Appeals for the Seventh Circuit therefore characterized the merger as conglomerate. Throughout most of its history, McClintock had had a virtual monopoly position. After the acquisition, McClintock began receiving some competition, but eventually it bought out its most effective competitor, which, it must be stated, probably entered the field improvidently and certainly left it willingly.

With respect to McClintock, the main impact of the acquisition was to relieve it and its management of a stifling loan agreement, to place it in a financial position to be creative and innovative, and, as the court tirelessly emphasized, to permit it to buy out its most effective competitor. The overall effect of the acquisition, however, was that a small business severely hampered with chronic cash shortages was given a degree of financial independence and a resulting flexibility in meeting the changing demands of space-age consumers by joining forces with a larger, diversified organization; yet divestiture was ordered.[47]

V. Deceptive Bases Underlying General Prohibitory Rules

As Professor Turner has pointed out, general norms such as the thirty per cent rule of *Philadelphia Bank,* the rule that it is illegal to foreclose a substantial share of the market, or, for that matter, the rule that effective competition requires a fragmented market are justified if one can conclude that the consequences of being wrong about the probable results of applying such rules are less serious than

46. 347 F.2d 745 (7th Cir. 1965).

47. For a contrary analysis in a somewhat similar situation, see Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 315 (N.D. Ill. 1965).

the consequences of adopting no rule whatever.[48] It seems clear that the Court has in fact made the judgment that unyielding and early application of a pluralistic norm to marketing arrangements to halt the development of "unacceptable" market structures will benefit the general public, even though in concrete cases it may not benefit consumers.

In addition, several other justifications for general prohibitory rules are occasionally offered. First, it is felt that a liberal dose of pluralism by present governmental policy makers (judges) will avoid a need for economic planning in the future.[49] Second, it is said willingness on the part of the Court to halt a trend before it starts is in some sense a necessary reaction to the judiciary's traditional reluctance to break up market power once it is acquired.[50] Third, it is assumed decision-making under general prohibitory rules requires less evidence and consequently less of the time of government attorneys, so that a wider enforcement of the antitrust laws becomes possible. A related justification is thought to be that general prohibitory rules infuse a desirable increment of certainty and predictability into antitrust enforcement.

The notion that pervasive interference by courts to preserve fragmented markets serves not only an economic goal but also the higher social goal of preserving a self-policing system free of an abundance of supervisory political machinery is built on the premise that, absent early interference, the inevitable economic progression in an initially free society is from competition to monopoly, to regulation, and finally to socialization. It seems highly probable, however, that in reality most markets are at present self-policing systems and that the pattern of structural changes is both multi-directional and reciprocating, in the sense that price competition gives way to parallel pricing, which in turn gives way to competition in innovation, which leads in turn to new price competition in the new products. Or the appearance of price parallelism may induce entry by a diversified or vertically integrated corporation, resulting in cost cutting and price competition. In the event that the progression ever leads to monopoly, duopoly, or an unacceptable form of oligopoly, *then* interference by the courts to break up firms and fragment markets is justified.

48. See Turner, *supra* note 42, at 1319-20.

49. See Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965).

50. See generally Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964). Cases evidencing judicial hesitancy to break up firms include: United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); United States v. Aluminum Co. of America, 91 F. Supp. 333 (S.D.N.Y. 1950).

It appears probable, however, that the number of instances in which self-policing systems break down completely is slight and that the resources of the courts and the agencies are more than adequate to the task of handling those cases. The net result of withholding interference until the competitive regulator breaks down completely would be an enlargement of individual liberty, in the sense that market forces are permitted to function without governmental interference until it becomes quite clear that the self-policing market forces have been overcome, in which case there should be intervention of control to restore them.

The justification for general prohibitory rules based on notions that antitrust enforcement will be rendered less time-consuming and more predictable is even more illusory, for in the cases that signal the decision to rely on a pluralistic norm there are equally probative indicators which suggest that the key to Supreme Court action rests with the definition of the relevant market in which challenged activity will be measured.[51] The power to define the relevant market is in most cases one that can be exercised with considerable latitude. Indeed, by resorting to an expansive definition of relevant markets, the Court has left open the possibility of justifying, in a particular case, a market arrangement which departs from the pluralistic model.

In the *Tampa Electric* case, it will be recalled,[52] the buyer wished to obligate itself by a requirements contract to deal with a single source of coal for a period of twenty years in order to reduce market risk in the supply and price of its basic raw material and thereby protect its capital investment and the consumers' interest. The total consumption of coal in peninsular Florida was about 700,000 tons per year—a quantity which approximated the 1959 requirements of Tampa Electric. The effect of the contract was to preclude over seven hundred coal producers who could serve that region from competing for nearly fifty per cent of the Florida market during a period of twenty years. The lower courts ruled that the contract foreclosed competition from a substantial share of the Florida market for coal and hence was unenforceable as a violation of the antitrust laws.[53]

In view of its own rule that it is illegal per se to foreclose com-

51. Resort to mechanical rules of the type announced in *Philadelphia Bank* will provoke increased attention to market definition by attorneys in counseling and litigation and by courts. See Blake, *Mergers and United States Anti-Trust Law*, 12 INT'L & COMP. L.Q. 78, 85, 94 (Supp. No. 6, 1963).

52. See text accompanying note 15 *supra*.

53. Tampa Elec. Co. v. Nashville Coal Co., 168 F. Supp. 456 (M.D. Tenn. 1958), *aff'd*, 276 F.2d 766 (6th Cir. 1960).

petitors from any substantial share of a market, it appears that the Supreme Court should have affirmed the nullification of the contract. However, the Court noted the importance of the interest of the utility company in having the assurance of a steady and ample supply of coal for a long term. The Court apparently was unable to give effect to this interest under any formal rule of law other than by shifting the relevant market from that of competition among sellers generally for Florida coal consumers to that of competition among coal producers in Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio, and Illinois—the states in which the coal for Florida buyers originated. Only in this way could a contract covering a *substantial* fifty per cent of the market consisting of coal consumed in peninsular Florida be identified as an innocuous arrangement extending to an *insubstantial* 0.77 per cent of coal produced and sold in the Appalachian area market.

It is unfortunate that the Supreme Court should be caught in a vise of unrealistic rule formulation from which it can extricate itself only by such manipulative techniques in selecting the relevant market. Indeed, the pervasive rule that it is illegal per se to preclude competitors from any substantial market prevented the Court from concentrating on the heart of the problem before it—the real economic or marketing interests involved. Only by shifting the view of the relevant market from that of competition for buyers in Florida to that of competition among sellers in the Appalachian coal region and adjacent areas could the desirable marketing situation be allowed to survive the strictures of the Court-made law.

In *Times-Picayune Publishing Co. v. United States,*[54] a firm holding a monopoly in a morning newspaper market used this power to compel advertisers to buy space in its evening newspaper by selling advertising only when it was placed in both publications. Obviously, this requirement could be viewed as a foreclosure of competing newspapers from access to a substantial share of the market. From the standpoint of sales of newspapers, there are two separate markets: morning and evening. By evening, a morning newspaper is virtually waste paper; no one will buy it. For this reason, the publisher's "unit" advertising plan restrained purchasers of advertising space from exercising free choice, since it represented a use of the monopoly power in the morning newspaper market to exert leverage in the evening market. Nevertheless, in holding for

54. 345 U.S. 594 (1953).

the defendant the Court ignored the abuse of power in the morning newspaper market and held that the relevant market was that of advertising space in both morning and evening newspapers, in which the *Times-Picayune* enjoyed only forty per cent of the sales.[55] The interests of buyers of advertising space were simply overlooked, since the methodology applied was one of searching for a rule of decision in "market" terms rather than marketing relationships and consumer interest.

Obviously, to the extent judicial decisions in this area turn primarily on market definition,[56] they will also turn on non-economic criteria. Thus, the acquisition by DuPont of a block of General Motors stock was illegal because it foreclosed competition in the market for automobile finishes and fabrics,[57] despite the fact that manufacturers of finishes and fabrics for other purposes would appear to be potential short-run competitors.

Moreover, judicial definitions of markets are casuistic. The judicial process has not yet had, and will not have even in the far future, an opportunity to reduce the general concept of "relevant market" to a tool which is workable in even a small percentage of the instances to which it applies. In the resulting system for maintaining competition, the acceptability of a particular form of market activity turns on the definition of the market in terms of time, space, product, or service. The flexibility provided by this system has permitted the Supreme Court to rule that an acquisition by a food processer of a manufacturer of dehydrated onion and dehydrated garlic (a merger which the FTC regarded as a restraint on competition in both the dehydrated onion and dehydrated garlic markets) could be measured in light of the market for dehydrated onion *and* garlic.[58] This system has also permitted courts to rule both that interindustry competition between glass and metal containers is sufficient to warrant treating as a relevant market the combined glass and metal container industries and all end uses for which they compete,[59] and that Alcoa's control of the aluminum market could be deter-

55. Compare United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), where the Court recognized the leverage which dominance in the market for first-run moving pictures makes possible in exploiting the second-run market.

56. Many commentators suggest that the cases often turn exclusively on market definition. See Blake, *supra* note 51; Handler & Robinson, *The Supreme Court vs. Corporate Mergers*, 71 FORTUNE 165, 174 (Jan. 1965); Lanzillotti, *Market Structure and Antitrust Vulnerability*, 8 ANTITRUST BULL. 853, 859 (1963).

57. See United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

58. See FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

59. See United States v. Continental Can Co., 378 U.S. 441 (1964). See also Handler & Robinson, *supra* note 56, at 174.

mined in terms of the production of virgin aluminum without considering secondary or reclaimed material.[60]

The significance of market definition is nowhere better illustrated than in the *Philadelphia Bank* opinion. In that case the Court had determined that commercial banking was the product market in which to measure the challenged acquisition, although institutions other than commercial banks provide many similar services. In defining the geographic limits of this market, the Court recognized that the area in which the banks had their offices did not correspond exactly to the area of competition, for although small depositors and borrowers were likely to find themselves confined to their neighborhood by the nature of the banking business and their own lack of mobility, large borrowers and depositors often transacted banking business at locations other than their home community.[61] The Court also noted:

> [T]hat in banking the relevant geographical market is a function of each separate customer's economic scale means simply that *a workable compromise must be found: some fair intermediate delineation* which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.[62]

In other words, there *had* to be a market which was *the* market for decision-making purposes, and that market was to be defined on the basis of a "workable compromise" or "some fair intermediate delineation." Apparently the possibility of a market analysis which would reveal the best means of promoting the consumer and community interest did not occur to the Court, which permitted the outcome to turn on the impact of the merger upon only one class of consumers served by the bank.

Market definition is an extremely flexible tool in the hands of a court—so flexible, in fact, that the apparent certainty and predictability of result which might be expected to flow from the mathematical measure of the *Philadelphia Bank* case is rendered meaningless by the unpredictable discretion of a judge. Market

60. See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). *But see* the district court opinion on the remedy, United States v. Aluminum Co. of America, 91 F. Supp. 333, 358 (S.D.N.Y. 1950).

61. See 374 U.S. at 359 n.36, 360 n.37, 361.

62. *Id.* at 361. (Emphasis added.)

definition is a requisite of antitrust analysis, but it should proceed in as scientific and dispassionate a manner as possible, without becoming a manipulative instrument for the covert achievement of some other unexpressed goal. The totality of the market impact of questioned marketing arrangements should be examined, and the tendency of such arrangements to promote economical utilization of resources and the consumer interest should be weighed. Finally, the reasoning processes of the judge should be open, explicit, and directly related to the problem which he considers crucial.

VI. Summing Up

A. *Constructive Nonintervention*

When the interests of an industry, as well as the maintenance of pluralistic competition, demand consideration by regulatory agencies, the result is frequently the creation of specialized agencies such as the Interstate Commerce Commission and the Federal Communications Commission. The interests of labor and of corporate stockholders are safeguarded by other equally specialized administrative agencies. However, the peculiar province and function of antitrust regulation is to secure the consumer interest, and the ultimate value of such regulation is maximum consumer welfare.[63] If a particular market situation is providing substantial consumer value realization, then there is no basis for interfering on the ground that it does not reflect highly pluralistic competition, unless it can be clearly demonstrated that such interference will result in consumer or other values superior to those currently provided. Where the challenged marketing arrangement is the result of corporate growth by acquisition or merger, indications that increased value realization is likely to be provided include the achievement of economies of vertical integration, the achievement of a corporate structure which enables the production of a diverse but related group of better, or less costly, products, and the development of an organization which permits research, innovation, efficiencies in production and marketing, and intelligent, informed decision making—the achievement, in short, of corporate growth which is capable of better market performance and greater consumer satisfaction.

The foregoing justifications for corporate acquisitions and mergers are stated in terms of consumer-want satisfaction, and are

63. As Professor Bork has pointed out, if competition were the ultimate value, policy would require the atomization of society to the point of forbidding partnerships. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 832 (1965).

similar to the performance justifications listed by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*[64] Such standards of performance permit a particular market or marketing arrangement to be evaluated not in terms of the abstract proposition that a market populated with many small sellers will lead to maximized consumer welfare, but rather in terms of the pragmatic proposition that a particular arrangement has increased, is increasing, or will increase consumer welfare. This method of evaluation requires that if a particular marketing arrangement is performing well, it should be permitted to continue to operate; it also requires that the application of an abstract postulate of economic theory be withheld until the arrangement fails to provide the desired consumer satisfactions. Moreover, this method requires that, until it falters, the agencies charged with maintaining competition should be content with increasing value realization, and should withhold the question whether present consumer satisfaction is at the optimum level.[65]

B. *Suggestions for Positive Regulation*

In the final analysis, it is not markets which should be the primary concern of those charged with maintaining competition, but instead the performance of business organizations in maximizing consumer values. The goal of maximizing consumer values is in turn one which can be defined in concrete terms only when it is placed in context with a number of other goals. Indeed, the goal should not be *maximum* value realization, but rather *optimum* value realization.

The ideal system for purposes of antitrust regulation is one that seeks to achieve an optimum combination of two variables. The first of these variables is the action of business organizations in searching for consumer values, in shaping their products and services to enable the realization of consumer values, and in reducing costs and passing the benefit on to consumers. The second variable is the character of competition in the relevant market. There should be no insistence that an oligopolistic market be changed to a pluralistic market when current performance by sellers in the market is marked by innovation, efficiency, and orientation to the interests of consumers. While the maintenance of competitive

64. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

65. To judge the defects of a marketing arrangement and neglect its virtues, and to judge its defects by what would supposedly happen under perfect competition, "is not only not feasible but is, in terms of a present-day economy, meaningless." CLARK, COMPETITION AS A DYNAMIC PROCESS 214 (1961).

markets remains a *sine qua non* of public control, this goal cannot be conceived in mechanistic terms as a complete end in itself. Instead, the search must be for the optimal practical combination of performance in promoting consumer value realization and growth of personality on the one hand, and free competition in free markets on the other hand. Decisions should be made on the basis of a balancing of the totality of interests of consumers in the several markets and sub-markets affected, and should not turn solely on the impact of arrangements in a single sub-market affecting merely a small minority of consumers. Means other than condemning arrangements in their entirety should be found for protecting the interests of those consumers.

C. *Conclusion*

The assumption that all is well with the world when competitive markets are preserved ignores the reality that the vitality of the American economy is a product of many forces and that its preservation and growth cannot be left to so simple a formula. The extraordinary accomplishments of the American economy are a product of the pragmatic philosophy of the American way of life: means are judged by their consequences. The metrocorporation—a mechanism for value realization by important segments of our society, not merely by its "owners"—is the dominant actor in our economic life. Markets are more frequently oligopolistic than not, at least for the bulk of our national production of manufactured goods. This kind of an economy was brought into being and continues to develop because it provides the kind of world that we want. We like the satisfactions it brings to labor, stockholders, management, and consumers, as well as to the public at large.

To attempt to establish the model of highly pluralistic competition as the ideal model for purposes of public policy and decision making is to substitute a crude symbolic representation for a complex reality. Moreover, the model shunts to the periphery of vision the realities of corporate performance and consumer values. We do not necessarily need the large corporation that is a jerry-built structure of enterprises selected for tax advantages or bargain-basement acquisition costs. However, we do need metrocorporations (1) embodying a diversity of enterprises that possess a common unity or mission and an ability to add strength to one another, (2) having the goal of growth by serving the consumer and other group interests which take part in its system of action, and (3) serving as potential entrants in a multitude of markets, including markets having significant barriers to entry for ordinary firms.

The antitrust laws should not be used to strike down corporate growth resulting in greater efficiency and creativity in serving consumers, so long as effective competition remains. Until recently, competitors were allowed to achieve through merger the economies of vertical integration and mass production, together with the benefits in innovation flowing from research of the magnitude which only large-scale enterprise can support. The image of our economy as one of business organizations so structured and managed as to serve the consumer interest to the greatest possible degree, yet subject to competition in free markets, should be the ideal image for antitrust law enforcement. Such a structure of competition has greater importance for consumers and, indeed, for the vitality and growth of our economy, than the goal of fragmenting competitors into large numbers of small units.