SPRING 2002 • Volume 16 • Number 2

ANTITRUST

A Fresh Look at the Agencies

Antitrust in Wartime

BY RICHARD M. STEUER AND PETER A. BARILE III

IN THE 1930s AND 1940s AMERICA lunged from Depression to war. September 11, coming on the heels of an economic downturn, seemed to telescope the same challenges and emotions into the space of months rather than years. Antitrust impulses of the earlier era, long dormant, quickly reemerged as American industry struggled to cope with the crisis.

Airlines, stricken first by softening travel budgets and then by a freeze on flying, pleaded for relief from antitrust enforcement.[1] They asked the government for both financial assistance and permission to coordinate schedules and route reductions.[2]

Pharmaceutical manufacturers, faced with sudden demands for accelerated and expanded production of critical goods, appealed for antitrust flexibility.[3] In response, both the House and Senate passed legislation to provide limited antitrust immunity in coordinating responses to bioterrorism under the supervision of the Secretary of Health and Human Services.[4]

Advocates dusted off the Supreme Court's 1933 decision in *Appalachian Coals*,[5] while lobbyists scaled Capitol Hill, urging emergency legislation reminiscent of earlier wartime lawmaking. The Nation needed the keenest application of all of its statutes and regulations, the antitrust laws among them.

Whether to bend, or even to suspend, the antitrust laws in a time of crisis is no easy question, but America's experiences in the First and Second World Wars—the largest conflicts since passage of the Sherman Act—provide instructive precedents. Both World Wars were preceded by periods of vigorous antitrust enforcement. Both times antitrust policy accommodated wartime priorities as necessary, while enforcement was maintained to combat conduct that threatened the economy. The lessons that emerge are that, first, antitrust will not stand in the way of a war effort if it is applied with suitable flexibility; second, if it becomes necessary to suspend antitrust enforcement to some degree, such enforcement can be successfully reinstated at war's end; and, third, war should not and need not excuse opportunism.

Today, with the benefit of more sophisticated analysis than was available in any earlier war, flexibility should be easier than ever to achieve, making outright suspension of antitrust enforcement less urgent. Such guideposts as the National Cooperative Research and Production Act,[6] the Competitor Collaboration Guidelines[7] and the Merger Guidelines[8] reflect years of experience and deliberations, and provide a road map for assessing industry arrangements in even the most complex circumstances. Earlier generations of antitrusters had to find their way without these tools, yet their efforts remain enlightening to this day in understanding the types of judgments that need to be made in wartime.

Richard M. Steuer is Chair of the Antitrust Practice Group of Kaye Scholer LLP, a member of the Council of the ABA Section of Antitrust Law, and former Chair of the Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York. Peter A. Barile III is an associate at Kaye Scholer's New York office.

World War I

Prelude to War. America entered World War I during a period of antitrust prominence, when support ran high for trustbusting. In the 1912 Presidential campaign, candidates Taft, Wilson, and Roosevelt all ran on party platforms that ballyhooed the strengthening of the antitrust laws. The groundbreaking Clayton Act and the FTC Act were adopted in 1914, just before the outbreak of hostilities.[9]

Antitrust in the Arsenal of War. In what may have been the most direct application of the antitrust laws in the history of warfare, the Wilson Administration used criminal antitrust prosecutions to thwart clandestine efforts by German agents to disrupt the flow of war materiel from U.S. factories to countries fighting against Germany.[10] In an era when federal prosecutors had fewer law enforcement tools available to them than today,[11] the government successfully prosecuted these agents under Section 1 of the Sherman Act for instigating strikes and walkouts by employees of arms makers and transportation companies,[12] as well as for planning to blow up arms and transportation facilities.[13]

Relaxing Antitrust Enforcement. Antitrust enforcement against Americans was a different story. In 1918, Attorney General Gregory observed that the "natural laws of trade" could not be counted on to regulate markets in such times. He reported that antitrust enforcement had been narrowed during the war "by direct intervention of the Government itself in industry, trade, and transportation," and took the position that "direct governmental action" was consistent with the goals of antitrust.[14] The narrowing of antitrust manifested itself in several ways:

1. Collaboration Among Competitors Supporting the War Effort. During World War I, collaboration among competitors was encouraged to facilitate wartime production needs, and "antitrust ceased to be an obstacle" to such efforts.[15] The Lever Act of 1917 afforded the President power to regulate the distribution, export, import, purchase, and storage of food. In wielding this power, the Wilson Administration, with Herbert Hoover as its Food Administrator, relied on coordinated "action by the trades to regulate and police themselves [as] one of the fundamental principles of wartime economic control."[16]

2. Price Fixing as a Governmental Policy. During the war, mandatory price fixing was imposed by the government but private price fixing was prosecuted vigorously. Outright price controls were established by the federal gov-

ernment under the auspices of the Price Fixing Committee of the War Industries Board to prevent profiteering and ward off inflation.[17] Other restraints imposed for the purpose of facilitating the war were challenged under the antitrust laws but withstood such attack and were upheld as reasonable.[18]

At the same time, the Wilson Administration issued thirteen indictments for criminal conspiracies involving price fixing and the resulting inflation of the prices of necessities.[19] Indeed, during World War I, Section 9 of the Lever Act supplemented the antitrust laws with stiffer penalties for conspirators in the trade of "necessaries."[20]

3. Suspension of Major Antitrust Cases. At the onset of World War I, several major antitrust cases were pending before the Supreme Court, including *United States Steel*, *Eastman Kodak*, *American Can*, and *International Harvester*. President Wilson was of the opinion that if his administration were "to vindicate the law, [it] would disorganize industry."[21] The decision therefore was made to suspend these cases until after the war was over.[22] Attorney General Gregory consulted with Chief Justice White, whom Gregory later reported to have been "delighted."[23] Most major antitrust cases were suspended until the war's end.[24]

World War II

Prelude to War. As with World War I, the United States entered World War II at a high water mark in antitrust. The regulatory regime of the National Recovery Administration recently had been declared unconstitutional and Congress had enacted a series of statutes in the late 1930s—the Public Utility Holding Company Act, the Robinson-Patman Act, the Miller-Tydings Act, and the Wheeler-Lea Act—that would influence antitrust law for decades to come. The budget of the Antitrust Division quadrupled in the late 1930s, and Thurman Arnold's appointment to head of the Division brought renewed vigor to antitrust enforcement.[25] In 1938, the Temporary National Economic Committee was convened to study the antitrust laws and chart the Nation's future antitrust policy.[26]

Once World War II began, "competition policy would once again take a back seat to defense needs and war production."[27] With the war effort "blunt[ing] antitrust enforcement generally,"[28] antitrust was put into "cold storage."[29] But just before the country entered the war, the government launched some powerful antitrust measures against international cartels that held the keys to strategic products.

Antitrust Enforcement Against International Cartels. Prior to Pearl Harbor, "the Antitrust Division was functioning at a record pace in the number of proceedings instituted under the [Sherman Act]."[30] As part of the government's vigorous pre-war enforcement effort, the Roosevelt Administration obtained consent decrees and/or no contest pleas in several cases concerning agreements between American companies and German companies to divide world markets or otherwise eliminate competition for military optical instruments, magnesium, synthetic rubber and high octane aviation gasoline.[31] According to Wendell Berge, head of the Antitrust Division in 1944, "[t]hese cartel arrangements, although eventually discovered through antitrust investigation and dealt with by decrees, [ ] irretrievably deprived the Nation of reserves of capacity and skill for the war effort."[32] Without these enforcement efforts, however, such damage might have been worse.

Limited Antitrust Exposure During World War II. Once war was declared, several mechanisms were put into place to permit activity that otherwise might have been challenged under the antitrust laws:

1. Formal Immunization. Most directly, the Roosevelt Administration initiated a policy of formal antitrust immunization. Under this policy, actions taken by industry in compliance with specific requests made by a public authority and approved by its general counsel, after the general character of the activity had been cleared with the Department of Justice, would not be viewed by the Department as constituting a violation of the antitrust laws so long as the war agencies found such action to be a proper delegation of Governmental function and justified by the war effort.[33]

"Most directly, the Roosevelt Administration initiated a policy of formal antitrust immunization."

2. Industry Committee Guidelines for Collaboration. The formation of industry committees for the facilitation of wartime production at the behest of government war agencies was permitted by the Justice Department under specified guidelines.[34] Such committees generally were allowed if they were formed pursuant to a war agency plan to increase production and prevent inflation, were representative of the industry, and would not determine industry policy or coerce anyone to comply with a war agency order.[35]

3. Small Firm Pooling. Wartime antitrust policy also allowed for smaller firms to pool their resources to compete collectively for war related projects. Such pools required approval from the War Production Board and the Smaller War Plants Corporation prior to formation.[36] By 1944, over 200 such small firm war production pools were in operation.[37]

4. Antitrust Veto Power by the Secretaries of War and Navy. A March 1942 agreement among the War, Navy, and Justice Departments provided that "upon receipt of a request from the Secretary of War or Navy stating that in his opinion [an] investigation or prosecution would seriously interfere with the war effort, the Attorney General would [ ] abide by the decision and defer activity in the particular matter or . . . appeal to the President."[38] The statute of limitations was to be tolled until the end of the war for postponed cases. Over thirty cases were postponed on this basis.[39]

5. Prosecution of Major Antitrust Cases. By no means were all antitrust cases postponed or deferred, however. In a 1944 letter to Secretary of State Cordell Hull, President

Photo: © Photodisc

Roosevelt wrote, "The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the Constitution."[40] Instead of putting its major antitrust cases to "sleep," as did the Wilson Administration, the Roosevelt Administration persisted with its prosecution of high-profile litigations. Despite the new veto power and formal immunization that were available, as well as the general antitrust relaxation, the Roosevelt Administration prosecuted two of the highest profile Section 2 cases in antitrust jurisprudence during World War II—*Alcoa*,[41] and *American Tobacco*.[42] The Second World War thus marked a time of selective prosecution and relaxation, as the government distinguished between collaborative practices that it found necessary to winning the war and those it found destructive to the economy.

Implications for Analysis Today

The experience of the World Wars teaches that in times of national emergency some companies need to combine or engage in collaborative practices in order to meet the demands of the crisis while other companies may try to take advantage of the situation to avoid competition simply for their own profit. The history of those wars shows that even without the benefit of today's more sophisticated analytical techniques, the antitrust laws have proven realistic enough in their application to permit necessary collaboration and realignment without opening the floodgates to unnecessary collusion and profiteering.

In recent years, that same pragmatism has been reflected, even without crisis, in the business review letters,[43] Competitor Collaboration Guidelines, and Horizontal Merger Guidelines of the Department of Justice and Federal Trade Commission. Adherence to that guidance, with the added perspective of past wartime experience, should result in even more predictable and reliable judgments being made than in past wars with respect to collaborative purchasing, selling, production, and research.

Joint Purchasing. The need to suspend the normal rules of antitrust in the purchasing of critical supplies was recognized as early as World War I.[44] Today, even under normal economic conditions, companies are permitted to engage in joint purchasing if collectively they do not account for too great a percentage of overall purchases of a product and such activity provides greater efficiency.[45] If there is a need for joint purchasing of the raw materials for a vaccine, an antidote, or a new type of weapon, such activity is likely to pass muster without changing the rules.

The Competitor Collaboration Guidelines establish a 20 percent safe harbor for joint purchasing, but allow for higher percentages if reasonable, and genuine exigencies of war would plainly fit. However, the Guidelines also provide a template for analysis, and even in times of national emergency, companies that propose to engage in joint purchasing accounting for over 20 percent of the market should be able to demonstrate that (1) they would achieve real efficiencies; (2) they could not achieve those efficiencies by splintering into a larger number of groups; (3) they would avoid the exchange of competitively sensitive information to the extent possible; (4) if feasible, group members would be permitted to make direct purchases outside the group and participate in other groups; and (5) the economic health of suppliers would not be unnecessarily impaired. Those rules should be observed even in times of war unless duly suspended by authorized bodies, but they should not stand in the way of necessary collaborative purchasing.

"Wartime antitrust policy also allowed for smaller firms to pool their resources to compete collectively for war related projects."

Joint Selling. The Supreme Court's assent to a joint marketing arrangement during the Depression in *Appalachian Coals* is one of very few decided cases on joint selling. More instructive have been recent administrative actions distinguishing between efficiency-enhancing arrangements and ostensible joint sales programs that really amount to boycotts.

"Of course, there must be a legitimate and demonstrable need for any relaxation of antitrust enforcement in order to preserve a sector of the economy. Times of crisis should not become occasions for wholesale abandonment of antitrust policy any more than they should be opportunities for war profiteering."

If the demands of war require competitors to collaborate in order to sell their products to either the government or the public—for example, in providing security measures that may affect the means by which goods or services are offered—this guidance will be very valuable.

Even without war or economic crisis, the government has allowed a significant number of joint selling arrangements to proceed where it could be demonstrated that the program was necessary to create legitimate efficiencies.[46] Joint selling remains highly suspect where the intent is nothing more than to confront buyers with a uniform price, but there is substantial room for flexibility, even in peacetime, where joint selling is necessary to provide a customer or customers an alternative that none of the sellers could offer without forming a group, such as making products available at more locations in less time than any one supplier could achieve. Where the customer is a government agency or contractor, and that alternative is needed for the country's war effort, such a justification becomes that much more compelling.

Joint Production. Joint production potentially can create enormous efficiencies and save significant amounts of money. When a customer needs a product sooner or in greater quantities or more economically than any one manufacturer can provide, joint manufacturing may be the answer. For this reason, even in normal times, projects such as the joint venture between General Motors and Toyota have won government approval,[47] and Congress signaled its support for joint production by passing the National Cooperative Production Amendments of 1993.[48] The Competitor Collaboration Guidelines take a hospitable approach as well. Under these Guidelines, so long as joint production creates genuine efficiencies and is not a mask for price fixing or market division, it usually should be permissible. If joint production also fills a need for wartime supply, making output faster, cheaper and better, it should satisfy these guidelines easily.

Joint Research and Development. Joint research and development ordinarily is considered the easiest type of strategic alliance to justify under the antitrust laws. Congress recognized the value of joint R&D in the National Cooperative Research Act of 1984,[49] and the Competitor Collaboration Guidelines reinforced this message with a special safe harbor for R&D alliances. If joint R&D is legitimately critical to a war effort, there should be little fear of antitrust consequences under these existing standards.

Conclusion

The sophisticated analytical approaches available today reduce the need to jettison normal antitrust rules in time of war. Instead, it should be possible simply to apply the existing rules in the pragmatic manner that already is reflected in modern enforcement.

At the same time, history teaches that when required, it is possible to suspend the normal application of the antitrust laws in times of national emergency without sacrificing antitrust policy forever. While America's competition policy is important to the country's long-term economic strength and everything such strength enables the country to accomplish, there can be no economic strength without freedom from armed attack. If suspending the ordinary rules of competition becomes necessary to defend that freedom, notwithstanding the pragmatism embodied in today's rules, there is ample precedent for doing so.

Experience shows that the sectors of the economy most likely to seek relief from the antitrust laws concern war materiel, which in past conflicts primarily concerned strategic goods for combatants, such as metals and rubber. In 21st Century warfare, such goods are more likely to be vaccines and antidotes, but the guiding principles remain the same. As described above, even in normal times collaboration among competitors generally is permitted when necessary to create a new product that otherwise would not exist or to meet a demand that no competitor could meet alone. Properly applied, that same principle should satisfactorily address the need for competitors to collaborate in order to meet the demands of a nation at war. It may be appropriate to amplify this guidance in times of emergency through speeches or directives, to get the message across, but wholesale rewriting of the rules should not be necessary.

Somewhat different are cases involving industries threatened by the economic disruptions caused by hostilities, including businesses that suffer serious losses due to government shutdown or disruption in demand. While peacetime bailouts and easing of antitrust requirements sometimes have been criticized as simply delaying the inevitable demise of companies that have fallen victim to the laws of supply and demand,[50] war is different. There usually is no expectation that the disruptions caused by war will continue beyond the end of the war, and it is important to preserve as much of the economy as possible, particularly infrastructure, in order to assure as rapid a recovery as possible. If the temporary relaxation of antitrust during times of crisis is needed to facilitate the preservation of threatened industries, such relaxation would be consistent with the goal of assuring a vibrant economy in which competition can flourish in the long run.

Of course, there must be a legitimate and demonstrable need for any relaxation of antitrust enforcement in order to preserve a sector of the economy. Times of crisis should not become occasions for wholesale abandonment of antitrust policy any more than they should be opportunities for war profiteering. The history of American antitrust policy in

times of war has been a mixture of flexibility where necessary, and staying the course of enforcement where possible. The hard part, of course, is differentiating between the two when time is short, the stakes are high, and the pressure of opinion from all quarters is intense.

History demonstrates that these choices can be made, and that a free and competitive economy will survive, although this does not make the choices any easier for those shouldering that responsibility. Fortunately, sound guidance already is in place, which should help make these decisions less difficult. Antitrust has proven to be both pragmatic and resilient, which is exactly what is required in times of war. ■

[1] *See, e.g.*, Stephen Labaton, *Airlines and Antitrust: A New World. Or Not*, N.Y. TIMES, Nov. 18, 2001, at 1.

[2] *See* Paulo Prada & Geoff Winestock, *Airlines Get Bailout Packages*, WALL ST. J. EUROPE, Sept. 24, 2001, at 1; John D. McKinnon et al., *U.S. Moves Toward Aid Pool of $40 Billion*, WALL ST. J., Sept. 14, 2001, at A3.

[3] *See, e.g.*, S. 1715, 107th Cong. (2001) (proposed Bioterrorism Preparedness Act of 2001).

[4] *See id.* § 401. The House and Senate bills were being reconciled in Congress at the time of this writing.

[5] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[6] 15 U.S.C. §§ 4301 et seq.

[7] Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000).

[8] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992).

[9] Indeed, Professor Kovaleff has reported that "several critics [of the FTC] have noted wryly that within hours of the birth of the Federal Trade Commission, World War I began." Theodore P. Kovaleff, *Historical Perspective: An Introduction, in* I THE ANTITRUST IMPULSE 12 (Theodore P. Kovaleff ed., 1994).

[10] Thomas K. Fisher, *Antitrust During National Emergencies: I*, 40 MICH. L. REV. 969, 988–89 (1942) (discussing cases).

[11] *Cf.* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, in* CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY 53, 54 (Leonard Orland ed., 1995).

[12] United States v. Rintelen, 233 F. 793 (D.C.N.Y. 1916), *aff'd*, Lamar v. United States, 260 F. 561 (2d Cir. 1919). For a discussion of the case, see Fisher, *supra* note 10, at 988–89.

[13] United States v. Bopp, 230 F. 723, 232 F. 177, 237 F. 283 (D.C. Cal. 1916). In *Bopp*, federal prosecutors also charged defendants with conspiracy to commit an offense against the United States, and organizing a military expedition against a friendly power. For a discussion of the case, see Fisher, *supra* note 10, at 989.

[14] Fisher, *supra* note 10, at 995 n.68 (quoting REPORT OF THE ATT'Y GEN. 60–61 (1918)).

[15] Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921–1933: An Early Phase of a Continuing Issue*, 74 IOWA L. REV. 1067, 1068 (1989).

[16] *Id.* at 1068–69 (internal quotation marks and citation omitted).

[17] Fisher, *supra* note 10, at 991–92. Of course, this two-sided policy largely reflected the difference between maximum price fixing (to prevent price gouging) and minimum price fixing, although today horizontal maximum price fixing without a government directive still would be subject to per se illegality under *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 (1982). *Cf.* State Oil Co. v. Khan, 522 U.S. 3, 19 (1997) (distinguishing between maximum and minimum vertical price fixing).

[18] *E.g.*, Fosburgh v. California & Hawaiian Sugar Co., 291 F. 29, 35–36 (9th Cir. 1923) (vertical restraint on resale of sugar undertaken at suggestion of Food Administration official without the capacity to order same reasonable in light of exigencies of war and intent of party).

[19] Fisher, *supra* note 10, at 993.

[20] *Id.*

[21] *Id.* at 996.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See* Milton Handler, *Forward: New Perspectives*, *in* 1 ANTITRUST IN TRANSITION xxiii (Milton Handler ed., 1991). As recalled by Professor Handler, "[s]hortly after [Arnold's] appointment the fur began to fly." *Id.*

[26] National Archives and Records Administration, Records of Temporary National Economic Committee, *available at* http://www.nara.gov/guide/rg144.html.

[27] Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1392 (1998).

[28] William E. Kovacic, Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration, 74 IOWA L. REV. 1105, 1117 (1989).

[29] Louis B. Schwartz, *Cycles of Antitrust Zeal: Predictability?, in* I THE ANTITRUST IMPULSE 475 (Theodore P. Kovaleff ed., 1994).

[30] Fisher, *supra* note 10 at 1186.

[31] Wendell Berge, *Antitrust Enforcement in the War and Postwar Period*, 12 GEO. WASH. L. REV. 371, 372–73 (1944).

[32] *Id.* at 373.

[33] *Id.* at 377.

[34] *Id.*

[35] *Id.* at 378–79 (citing Press Release, Department of Justice (Apr. 29, 1941)).

[36] *Id.* at 379.

[37] *Id.* at 380.

[38] *Id.* at 382.

[39] *Id.* at 383 n.29.

[40] HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY i (1955).

[41] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[42] American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[43] *E.g.*, Containers America LLC, Business Review Letter, 6 Trade Reg. Rep. (CCH) ¶ 44,100 at 43,525 (Dep't of Justice Mar. 8, 2000).

[44] *See supra* notes 17–18 and accompanying text.

[45] *E.g.*, Textile Energy Ass'n, No. 98-9, Business Review Letter, 6 Trade Reg. Rep. (CCH) ¶ 44,098, at 43,492–94 (Sept. 4, 1998) (group of textile manufacturers allowed jointly to purchase electrical energy); California Large Electric Power Purchasing Ass'n, No. 97-16, Business Review Letter, 6 Trade Reg. Rep. (CCH) ¶ 44,097, at 43,468–69 (Nov. 20, 1997) (group of cement and steel manufacturers allowed jointly to purchase electrical energy); Association of Independent Television Stations, Inc., No. 95-3, Business Review Letter, 6 Trade Reg. Rep. (CCH) ¶ 44,095, at 43,363–65 (Mar. 7, 1995) (group of independent television station operators permitted to exchange information on the purchase of television ratings services).

[46] *E.g.*, Olympus America, Inc. and C.R. Bard, Inc., No. 01-6, Business Review Letter, 6 Trade Reg. Rep ¶ 44,101, at 43,551 (Aug. 29, 2001); Containers America LLC, Business Review Letter, 6 Trade Reg. Rep. ¶ 44,100 (Mar. 8, 2000). *Cf.* BMI v. CBS, 441 U.S. 1 (1979).

[47] General Motors Corp., 103 F.T.C. 374 (1984).

[48] Pub. L. 103-42, 107 Stat. 117 (*codified* at 15 U.S.C. §§ 4301 et seq.) (amending National Cooperative Research Act of 1984).

[49] Pub. L. 98-462, 98 Stat. 1815 (*codified* at 15 U.S.C. §§ 4301 et seq.).

[50] *See, e.g.*, Paul E. Tsongas, *Did the Chrysler Bailout Work?*, N.Y. TIMES, Aug. 2, 1983, at A19 (stating that bailouts "create an unworkable system that reward[s] mismanagement and inefficiency" but also that "there may be circumstances when a bailout is in the national interest").