ANTITRUST POLICY

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Antitrust policy and the economic analysis of related issues in the food channel have attracted the attention of agricultural economists since the passage of the Sherman Antitrust Act in 1890. In this paper we endeavor to provide some information on the actual operation of antitrust policies in the food system and the more general economy during the 1980's. Mergers and acquisitions restructured many American industries during the decade. This review of actual conduct is a fitting prologue for our subsequent discussion of the federal merger guidelines and federal policy on price discrimination. Thus, this paper is organized into two sections. The first section reviews actual antitrust and merger activity during the 1980's. The second section provides a review of the recent federal merger guidelines and the evolution of the price discrimination laws.

The Merger Wave of the 1980's

Corporate mergers, takeovers, raids and leveraged buyouts increased from 1,565 in 1980 to 4,323 by 1986, with a cumulative total of 26,671 over the 1980 to 1988 period. The annual value of corporate deals skyrocketed from an estimated $33 billion in 1980, to $227 billion in 1988; the number of mega-deals valued at $1 billion or more leaped from three in 1980 to forty-two in 1988. All told, more than one trillion dollars were expended on corporate deals during the 1980's (Adams and Brock 1989a, pp. 11-12).

Debt fueled this deal-mania: Annual issues of corporate debt escalated 400 percent between 1980 and 1986 (from $42 billion to $212 billion); outstanding corporate debt more than doubled (from $829 billion in 1980 to $2.1 trillion by 1990). Junk debt jumped even more dramatically: Annual issues of junk bonds spurted 2,150 percent between 1980 and 1986 (from $2 billion to more than $45 billion); total junk debt outstanding leaped 580 percent (from $30 billion in 1980 to $204 billion by 1989) (Brimmer). Interest payments matched this explosion of debt: More than half of all corporate earnings were consumed by interest payments during the 1980's, compared with just 16 percent over the postwar era prior to 1970 (Gertler and Hubard).

Economic Consequences

The devastating economic consequences of this corporate deal-mania are at least four-fold.

Increased Market Concentration

One clear consequence of corporate merger-mania has been a dramatic increase

in market concentration, and a correspondingly sharp deterioration in the competitive structure of the American economy, as consolidations fused together many of the very largest firms in the same industries.

In oil, for example, six of the eight largest corporate mergers in American industrial history involved petroleum companies, with total oil mergers amounting to some $90 billion. Some of these consolidations included Chevron's (fifth largest oil firm) acquisition of Gulf Oil (sixth largest oil firm) in a record-breaking $13 billion deal, as well as its acquisition of Tenneco's Gulf of Mexico operations; Occidental Petroleum's (twelfth largest oil firm) acquisition of Cities Service (nineteenth largest) and Midcon (one of the nation's largest gas pipeline operators); Mobil's (second largest) acquisition of Superior Oil (largest independent explorer and producer of oil and natural gas); Marathon's purchase of Texas Oil & Gas Co. (another leading independent producer); Exxon's purchase of Texaco's huge Canadian oil operations; and Amoco's purchase of Tenneco's Rocky Mountain Oil and gas operations (Adams and Brock 1990, p. 7A).

In food production and processing, horizontal consolidation proceeded at an equally torrid pace: General Foods, for example, acquired Oscar Meyer meats in 1981, and Entenmann's bakery products in 1982. Then, in 1985, General Foods (including Oscar Meyer and Entenmann's) was bought by Philip Morris in a $5.6 billion deal. Three years later, Philip Morris acquired food processing giant Kraft and combined it with General Foods. In meat packing, ConAgra has become the nation's second largest producer by acquiring Armour, Northern States Beef, Monfort, E.A. Miller and Swift meat packers; it also has employed corporate acquisitions to become the nation's second largest pork producer, second largest poultry processor, largest lamb producer and largest seafood processor. As a result, concentration in meat packing has skyrocketed, with the combined market share of the four largest packers leaping form 28 percent in 1975 to more than 70 percent by 1988 (U.S. General Accounting Office; Western Organization of Resource Council's Factsheet; Weiner).

In grocery retailing, more than 100 mergers occurred among retailers between 1980 and 1987, worth $25 billion ($7.5 billion in 1987 alone), with the ten largest grocery chains accounting for 60-80 percent of these mergers annually (Cotterill).

In airlines, an eruption of anticompetitive mergers during the 1980's – Northwest/Republic, Texas Air/Continental/Eastern/People Express, Delta/Western, TWA/Ozark, American/Air Cal, USAir/Piedmont – notoriously concentrated control of the American industry in a handful of giants, produced fortress hub monopolies at major cities across the country, and inflicted flight frequency cutbacks, service deteriorations and fare hikes on the flying public (Adams and Brock 1989a, pp. 99-106).

In cable television, a massive merger movement during the 1980's concentrated horizontal and vertical control in the hands of a few giant firms which, in turn, have exercised their market power to jack up rates and throttle competition. In 1986 alone, the number of cable system mergers had a combined value of $8.6 billion – an amount greater than the combined sum spent on all cable mergers over the preceding decade. By 1988, horizontal cable consolidations reached an even higher level

of $12.2 billion. Tele-Communications Inc. (TCI), America's largest cable firm, spent nearly $3 billion acquiring more than 150 local cable operations between 1984 and 1987; the Time-Warner consolidation of 1989 combined the nation's second and fifth largest operators of local cable systems. At the same time, these cable giants have been vertically integrating into the control of programming by acquiring substantial ownership stakes in most of the country's largest program producers and distributors. As a result, a handful of giants now control the industry and throttle competition at will (Adams and Brock 1989b, pp. 79-87).

And banking has most recently become the scene of a furious corporate feeding frenzy with a number of the nation's very largest banks merging with one another: Bank of America's $4 billion acquisition of Security Pacific; NCNB's $4.6 billion acquisition of C&S/Sovran; and the $2.7 billion consolidation between Manufacturers Hanover and Chemical Bank. Once again, the result is a substantial increase in concentration: At the national level, the 100 largest banks have increased their combined share of the field by a hefty 20 percent (representing a transfer of $350 billion in assets), while in many states, the top five banks have come to control 40 percent or more of total assets, deposits, and loans – this despite overwhelming evidence that banks suffer debilitating diseconomies of scale once they exceed a modest size (U.S. Congress; Boyd and Graham, pp. 3-15).

Little wonder that in the light of mergers in these and other industries (including telecommunications, tires, appliances, steel, hospitals, department store retailing and computer software), *Business Week* now calls the 1980's the "Age of Consolidation" of American Industry.

Record Rates of Bankruptcy

A second consequence of the dealmania of the 1980's has been an all-time, record breaking rate of corporate bankruptcy and default. The annual number of corporate bankruptcies skyrocketed 538 percent between 1986 and 1990. The annual value of corporate assets entering bankruptcy proceedings soared 540 percent, from $13 billion to $83 billion; assets of firms filing for bankruptcy in 1990 were fifty times greater than ten years earlier. Default rates on corporate debt escalated in similar fashion, from $5 billion in 1988 to triple that amount by 1990 (Adams and Brock 1991, p. 104, Sherman, p. 123).

Junk bonds, in particular, lived down to their name: The value of junk bond defaults leaped from $12 billion in 1989 to $25 billion in 1990, with the default rate reaching levels as high as 24 to 38 percent. According to some analysts, 25 percent of leveraged buyouts (LBOs) conducted in 1985 and 1987 had defaulted on their debts by 1991; the default rate for LBOs conducted in 1986 reached 40 percent (White 1991, p. B2; Winkler, p. C20; Stein, p. A10; Mitchell, p. R6; Kaplan and Stein).

The collapse of the credit worthiness of American corporations is also reflected in the ratio of downgrades to upgrades in corporate bond quality by the independent bond rating agencies: from approximately 1:1 during the 1970's, to 2:1 during the 1980's, and reaching an astronomical 5:1 level in 1990 – this before the recent recession set in (Grant, p. 431).

Exacerbation of Current Malaise

The fallout of a decade of corporate deals continues to compound the country's recessionary woes. Consumers – fearing layoffs by firms "restructuring" to atone for the follies of the 80's – are loath to spend. Banks and financial institutions, traumatized by the collapsed corporate deals in which they invested, are paranoid about lending.

And over-leveraged corporations, saddled with staggering debt loads, are virtually precluded from undertaking the new private investment projects desperately needed to help pull the economy out of recession: They are too leveraged to borrow for new investment in plant, equipment and product development, and the crushing interest payments required to service their debt loads continue to siphon off corporate cash flows which otherwise would be available for internally funding new investment projects.

Daunting Opportunity Cost

More damaging to the American economy over the longer run is the massive opportunity cost inflicted by a decade of corporate deals.

The vast sums spent shuffling paper shares during the 1980's are, at the same time, vast sums that were *not* directly invested in new plants, new research projects, new product commercialization or the development and implementation of new state-of-the-art manufacturing techniques. In 1986, for example, corporate America spent more on mergers and acquisitions ($204 billion) than it did for R&D ($56 billion) and net new plant investment ($81 billion) *combined*. More generally, the trillion dollars devoted to corporate deals during the decade of the 80's represents a trillion dollars *not* plowed directly into the nation's industrial base.

To put it in historical context, during the 1950's American firms invested $3 in plant and equipment for every $1 paid out in interest to service their debts. During the 1980's, that relationship was dramatically reversed: American firms invested $.60 for every $1 paid out in interest. Similarly, during the 1950's American firms allocated $.70 for R&D for every $1 spent servicing interest expenses; during the 1980's, that ratio plummeted 70 percent (to $.22 for every $1 of interest) (Bartlett and Steele, p. 32).

But, while corporate America devoted itself to the sterile art of the deal, its toughest foreign rivals poured their funds into new plants, new products and new R&D: During the 1985-88 period, Japanese firms increased their expenditures for factories, equipment and research and development by an estimated 150 percent – compared with an increase of only 23 percent by U.S. firms. By 1988, annual Japanese corporate investment exceeded that of American firms in absolute dollar amounts, despite the fact that the U.S. economy is some 40 percent larger than that of Japan. On a per capita basis, Japanese firms out-vested American firms by a daunting two-to-one margin (Rappoport, pp. 91-92; Sanger, p. 1).

Obviously, the challenge of closing this industrial-technological gap will be even more difficult, require even more effort and take even longer – another legacy of a decade of corporate deals.

Federal Antitrust Policy Review

The relaxation of antitrust enforcement during the 1980's was executed under the guise of advances in economic theory calling for new, more complicated economic analysis. Over the years the federal agencies have used merger guidelines to provide a well-established record on how they will evaluate proposed mergers that may have anticompetitive consequences.

The 1982 and 1984 merger guidelines were the most elaborate guidelines provided prior to the recent issuing of the 1992 merger guidelines. In this section we will discuss primarily the 1992 merger guidelines highlighting the salient points of their merger analysis (Department of Justice). When useful we will refer to the 1982 and 1984 guidelines and changes that have been made from them.

The first activity antitrust authorities engage in when evaluating a proposed merger is defining the relevant geographic and product markets. The 1992 merger guidelines contain a very elaborate and detailed explanation of how antitrust markets can and should be identified. These guidelines represent an advance and clarity over the 1982 and 1984 guidelines which were the first guidelines to suggest particular techniques for the measurement of the cross price elasticity of demand. Cross price elasticities of demand are the fundamental economic benchmark for determining whether particular products compete with each other or whether particular geographical areas are a part of the same market.

The standard approach in the guidelines focuses upon the impact of a statistically significant and non-transitory increase in price upon demand behavior of consumers. SNIP analysis has been used by the Justice Department and the Federal Trade Commission (FTC) as follows. If you are considering whether two products are in the same antitrust market, elevate the price of the first product by 5 or 10 percent and determine whether or not consumers will switch from the first product to the second product. If consumers do switch from the first to the second product, then the second product is in competition with the first and should be included in the product market definition. Continue to do this price analysis until finding a set of products on which the price can be increased 5 or 10 percent and not cause consumers to switch to other products. This provides a set of products and the appropriate geographic area for the delineation of an antitrust market.

During the 1980's, this analysis was applied in a fairly restrictive fashion. As Pitofsky documents the Justice Department generally used a 10 percent SNIP when determining geographic and product markets (Pitofsky, p. 1819). Consider for a moment an industry such as food retailing. A ten percent increase in the price of food in a local retail market is in fact an exorbitant price increase when compared to the after-tax profit of supermarket chains. After tax profit of supermarket chains is generally one and one-half to two percent of sales. Thus, a ten percent increase in price represents a five-fold increase in the after tax profits of the firms involved in the market. Clearly one needs to use a smaller SNIP to evaluate particular industries and markets, especially those industries and markets in which there is a high sales-to-asset turnover ratio such as food retailing.

During the 1980's, federal agency analysts often justified, and in practice

used, a ten percent increase in price on the basis of a welfare analytic standard. They reasoned that a one or a two percent increase in price represents a relatively insignificant loss in consumer welfare, therefore, those particular mergers and those particular industries do not represent the area where antitrust enforcement assets should be allocated (Morris). Rather they would go after industries in which there is a very significant impact via a ten percent increase in price *ex post.* Again, this is a normative judgment on the part of agency staff as to what constitutes an acceptable gain or loss in consumer welfare. Two or three percent increase in the price of food, which is bought frequently and is essential for a satisfactory lifestyle, may very well, in the long run, have more serious welfare consequences than a ten percent increase in the price of a product consumers purchase infrequently.

There is a second major problem with the application of the SNIP price analysis for the definition of antitrust markets. Pitofsky and Scherer and Ross explain, and I think accurately, that if the market is already noncompetitively structured, then the firms may very well be jointly maximizing profits. This means they are at a position on the market demand curve where further price increases would not occur because they would not maximize profits and, moreover, further price increases would move the firms into the elastic portion of the market demand curve, i.e., generate substantial increases in supply of the product by potential entrants that will enter the industry or fringe firms that will expand production and effectively enter the oligopolistic core of the industry.

Pitofsky describes this problem as the cellophane fallacy. In other words, if firms are already pricing noncompetitively, one would not expect them to increase price after the merger, and, if one does a synthetic SNIP price analytic increase, one would find additional firms that would enter this noncompetitively structured industry. Thus, under the federal market definition procedure, one would broaden the definition of the industry beyond what it should be for antitrust analysis. We will come back to this later when examining the issue of competitive effects after a merger. In fact, the cellophane fallacy has wider implications for the analysis of competitive effects than simply those discussed by Pitofsky and others as they relate to the definition of geographic or product markets.

Once one has defined an appropriate geographic and product antitrust market, the merger guidelines continue the analysis by asking whether, after the merger, there will be a substantial likelihood that competition will be lessened. In other words, one needs to assess the competitive effects of the merger.

During the 1980's, many economists, especially those associated with the Miller FTC, argued for an economic welfare approach to the analysis of competitive effects. They maintained that, even if prices were increased after the merger, this was acceptable if the profits generated by the merger for the merged firm are greater than the losses in consumer surplus. They argued for a total economic welfare approach to merger analysis rather than a consumer price approach to welfare analysis.

In 1989 and 1990, under the Bush administration, the federal antitrust authorities, under the leadership of James F. Rill,

Assistant Attorney General for Antitrust in the Justice Department, and Kevin Arquit, Chief of the Bureau of Competition in the Federal Trade Commission, reaffirmed that the appropriate standard for merger analysis is whether the merger has impact on the price level in the industry. If a merger enables firms to exercise market power to maintain prices above competitive levels then, in fact, the merger is presumed to be illegal. However, firms do have the opportunity to mount an efficiency defense or other defenses such as failing firm defenses in the face of this price standard for competitive effects. In other words, firms may be able to argue that, although prices do go up, they are generating substantial economic efficiencies and these should be factored into the judicial review process.

A general review of the case law over the last twenty-five years, however, indicates that the efficiency defense has produced very few credible economic analyses of economies of scale and scope that have carried the day to allow mergers that were otherwise price enhancing.

This is the juncture at which agricultural economists and other economists can provide very real input into the antitrust process. Analyses of the impact of changes in industry structure, through mergers and other kinds of strategic activities, upon industry price and efficiency levels certainly is germane for the judicial review process. The problem that one often encounters, however, is that mergers have to be decided on a fairly quick time schedule and, thus, complex economic analysis cannot be completed in a timely fashion to contribute to the overall merger process (White 1989, p. 85). Thus, there is need for an ongoing economic research program that analyzes the actual industry performance and is more or less on the shelf and readily available to antitrust agency staff for inclusion in merger enforcement activities.

During the 1960's and the 1970's the FTC and the Justice Department did regularly conduct empirical studies of industries and contributed to our knowledge about how industries actually operate. However, during the 1980's these agencies have focused most of their economic resources upon theory building and the generation of numerous hypotheses that could be tested by empirical research but have not been.

Another major section of the competitive effects component of the merger guidelines and merger analysis involves the issue of entry. During the mid 1980's, under the leadership of the Miller FTC, federal agency staff essentially adopted the Stigler definition of barriers to entry. According to Stigler, a barrier to entry is a cost borne by an entrant that was not borne by established firms at some earlier point in their history (Marion, p. 188). Thus, an economy of scale advantage by a large established firm is not, according to Stigler, an entry barrier nor does it contribute to strategic behavior that could generate an entry barrier. These established firms in their earlier history were smaller and, in fact, did suffer from the same diseconomies of scale that a potential entrant faces today. This wide-open definition of entry barriers was adopted and a few mid-1980's cases – most notably a waste management case in Houston wherein a merger generated a very, very large market share for trash haulers in the Houston area – were allowed on the basis of a Stiglerian analysis of entry conditions that found entry was readily available, open, free and easy. Thus, according to the no-

tion of a contestable market, this merger did not provide any possibility for the elevation of price.

Under the Bush administration, Rill and Arquit retreated from the promotion of the Stiglerian analysis of entry. Rill and Arquit reiterated that entry or the lack of entry is a significant problem in industry when entry is not likely, timely or sufficient to thwart a competitive price increase (Rill; Arquit). This focus upon the analysis of timeliness, likelihood and efficiency reestablishes the traditional or mainstream notion of barriers to entry, i.e., barriers to entry are any established feature of an industry that hinders the ability of fringe or external firms when they wish to expand supply and compete with an oligopolistic core that is enjoying super-competitive profits. Bruce Marion provides an excellent review of profits the Stiglerian barrier to entry definition, the mainstream definition and the impact of these upon antitrust analysis.

The 1992 merger guidelines provide an additional distinction regarding entry analysis and entry barriers. The guidelines describe two types of entry: uncommitted and committed. Uncommitted entry does not involve some cost and therefore allows firms to shift in and out of the market in a fairly rapid fashion. Uncommitted entry usually occurs within a matter of months if not days in response to a competitive price increase. Thus, uncommitted entry is included by the Justice Department and the FTC when they analyze and define geographic or product markets. A firm that can readily expand supply to meet the needs of consumers facing a price increase by some established firms is a firm that is in the market for market share computations.

On the other hand, committed entry is the traditional entry of industrial organization theory. Committed entry involves sunk costs that may not be recuperated when the potential entrant subsequently wishes to exit the industry. Committed entry generally takes more time and resources and involves a fairly substantial effort on the part of the potential entrant to establish a foothold or become a competitive factor in the market entered. Thus, the 1992 merger guidelines advanced the concept of entry barrier analysis and the analysis of committed entry to a level of importance that is commensurate with the analysis of the competitive interaction among established firms.

This advance in importance within the merger guidelines is consistent with the new theories of the 1980's regarding contestability and the importance of potential competition. However, there has been very little empirical analysis of entry barriers and actual entry conduct in the food industries or, for that matter, in the entire U.S. economy.

Cotterill and Haller provide a very useful conceptual framework for proceeding to do this kind of analysis. They analyze the entry conduct of the top twenty U.S. supermarket chains into local supermarket retailing areas. Their methodological framework imbeds a traditional established firm's structure profit relationship within a system of equations that incorporates potential competition and the impact of potential competition upon the conduct and performance of established firms. Prior analyses of market share profit or market share price performance among established firms that found a positive relationship to exist in these important dimensions suggest that entry barriers do

exist. Entry barriers are necessary to generate these share price or share profit relationships. Otherwise, contestability would thwart the ability of firms to increase price and profits. One can factor into this model the possibility of scale economies or efficiencies generating profits as well as profits being generated from market power effects due to price elevation. As Cotterill and Westgren argue more sophisticated models, such as this one, that allow for the incorporation of firm-specific as well as industry effects are really necessary to provide policy guidance.

One final major point concerns the application of the Clayton Act Section Seven merger standard as a guideline for assessing the competitive effects of a proposed merger. Return to the question of the cellophane fallacy and the status of competition prior to the merger as well as the status of competition after the merger. The Section Seven merger guideline standard declares illegal mergers that offer a substantial probability or likelihood that competition will be lessened.

Traditionally the analysis has focused upon a competitive industry that is faced with a merger that will move the industry toward noncompetitive performance. In fact, the federal merger guidelines are exclusively predicated upon this notion of industry changes. However, in many industries, prior to the merger the industry is noncompetitively structured and the industry is exercising market power. Over time, in such noncompetitively structured industries, competitive forces may surface and shift the industry back toward a competitive performance norm. If a merger thwarts an outbreak of competitive activity or tends to substantially lessen the likelihood of an outbreak of competitive activity, i.e., chiseling or deviation from a collusive or other form of noncompetitive pricing arrangement, then the merger is also illegal. Note that, in this situation, one should not ask whether, after the merger, the industry or the merged firm will be able to raise price five or ten percent above where it is currently pricing. In fact, prior to the merger the industry is pricing at the noncompetitive level and, quite possibly, at the joint-profit-maximizing level. But for the merger, there may very well be the development of competitive pricing in the industry. Given the rapid increases in concentration and the restructuring of food industries during the 1980's, it is this prior structural configuration we are often faced with when analyzing the competitive impacts of proposed merger.

Shifting now to the Robinson-Patman Act and the analysis of price discrimination, we have relatively few comments oriented toward the issue of classes of trade and their impact upon price discrimination in the food industries. By way of prologue, the Robinson-Patman Act has generally been considered to be an economic dinosaur that is on its way out. However, during the 1980's there has been a renewed interest on the part of industry participants as well as theoreticians in the issue of price discrimination. The Robinson-Patman Act and the issue of price discrimination are probably as important today or quite possibly even more important than they have been at any time during the past twenty-five years.

There are two general kinds of price discrimination. Primary line price discrimination occurs when a food manufacturer discriminates upon the price for its particular product and this discrimination has an

impact upon competition with other food manufacturers. Secondary line price discrimination again involves discrimination on price, for a manufactured food product, for example; however, the impact of this price discrimination is analyzed at the retail level and determines whether the price discrimination gives one retail competitor an advantage over another.

The following comments primarily address the issue of secondary line price discrimination. When analyzing whether price discrimination exists and whether it is unlawful, there are three steps one must generally take. The first step is to determine whether a price differential exists between goods of like form and quality. The second step, once a price differential has been established, is to determine whether that price differential is justified by the cost serving different retail buyers. If the price differential is not cost justified, then one proceeds to the third step and analyzes whether the existing price differential generates antitrust injury to the competitive process at the retail level.

Antitrust injury is the term of art that says price discrimination must not only harm a competitor it must also harm the competitive process. The classic example of antitrust injury is price discrimination that allows the benefited buyer to lower the price to such a level that other buyers are driven from the market, resulting in an increase in concentration and power for the favored buyer. Other less extreme examples of antitrust injury would include the use of the revenues generated from the favored price treatment to engage in significant nonprice competitive activities, such as advertising or promotion, to restructure the industry to the advantage of the favored competitor.

During the 1980's this traditional analysis of a secondary line price discrimination case was expanded in a very important way by the contributions of Frank Easterbrook, a University of Chicago legal and economic scholar who is now a federal judge. Easterbrook suggests that manufacturers can set up classes of trade when dealing with retail customers and that the prices offered these different classes of trade do not necessarily have to be narrowly justified by cost differences. As long as there is "free and easy entry" between the two particular classes of trade, manufacturers can quote prices for each class of trade as they wish. If the price for one class of trade drops dramatically relative to another, and that drop is not due to differences in cost, then buyers will switch from the disadvantaged class to trade to the advantaged class of trade, thereby reestablishing an economically efficient distribution system.

This adaptation of the contestability ultra-free-entry concept to price discrimination law during the 1980's presented manufacturers with a powerful new defense in price discrimination cases. As many of us know, this expansion of the price discrimination defense to include classes of trade has had major consequences for the organization of the food system. Many large food manufacturers now offer substantially different prices to mass line merchandisers and discounters such as Wal-Mart and Sam's Wholesale Club as opposed to the prices they offer more traditionally organized supermarket chains.

Stories abound about mass merchandisers selling products at retail prices below the wholesale invoice price of grocery retailers. In many instances the large mass merchandisers are offered jumbo packs or large cases of products suggesting

there are possible cost justifications for lower prices to these merchandisers. However, the classes-of-trade argument also supports their contention that, so long as there are no entry barriers and retailers have the opportunity to shift into these kinds of merchandising or distribution systems, i.e., large superwarehouse stores, then any price differentials that materialize – rather than being evidence of price discrimination and illegal conduct – are, in fact, efficiency signals to the system that generate the appropriate responses and produce a more efficient distribution sector.

On the bottom line, all of this analysis hinges upon whether or not there is free and easy entry between these sectors. To date we have very little analysis of entry conditions and entry barriers in retailing – with the exception of the Cotterill and Haller piece on grocery retailing – that reports there is not free or contestable entry in retail grocery markets. Given recent theories of strategic entry deterring behavior and the type of empirical analysis presented by Cotterill and Haller, one is cautioned from quickly concluding that, because "anybody can open a retail store," entry into the distribution sector is easy and free. The distribution sector that serves today's consumers is an exceedingly complex and sophisticated system with very large retail units assembled in very large distribution firms that cannot readily be disciplined by fringe firm entry with 1950's small-store technology.

In closing, we have one final insight concerning price discrimination law. Today, retailers who receive discriminatory price advantages from manufacturers, for whatever reason, are very sophisticated in their response. One of us was recently involved in a price discrimination case in the gasoline industry in which the favored retailer did not use the price discrimination to harm the competitors in the market. In fact, the favored competitor exercised price leadership and raised prices in the market so, if anything, other competing firms benefited from the conduct of the favored retailer. Thus, we have the exact opposite of the traditional criticism of Robinson-Patman, i.e., harm to competitors does not necessarily harm competition. In this case we have no harm to competitors but we have harm to competition. The competitors enjoyed price increases; however, the consumers paid higher prices for their gasoline as a consequence of the price discrimination and the resulting perverse strategic response by the favored buyer. In our estimation, this type of conduct should also be proscribed by the antitrust laws. The problem that exists at present is that, unless this behavior injures the other competitors, there is no antitrust injury that generates recoverable damages by other competitors in the system.

Summary and Conclusions

We have briefly reviewed the impact of the merger wave upon the organization and performance of the U.S. economy during the 1980's. We have explained recent changes and problems with the application of the antimerger and price discrimination laws in the United States and highlighted the nature of the problems, the types of analyses the antitrust agencies regularly undertake and the pitfalls that occasionally surface in the application of the antitrust laws.

Rather than dismissing these laws as antiquated and outdated applications of a uniquely American industrial policy that no longer fits in a globally competitive world, we believe the antitrust laws continue to

provide very important and basic rules of the competitive game for American industry. They are not the complete answer to improving the competitiveness of American industry. Industrial policy is certainly wider and more complex than an anti-merger or price discrimination policy. Nonetheless, there remain very substantial and important research questions in the antitrust economic and policy area that beg for empirical as well as theoretical analysis. Hopefully this paper will contribute to increased research by agricultural economists on antitrust issues.

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