THE CRITERION OF ECONOMIC PERFORMANCE IN THE ANTITRUST POLICIES OF THE UNITED STATES AND THE EUROPEAN ECONOMIC COMMUNITY

by Alex P. Jacquemin

Document de travail CRIDE 3/69

THE CRITERION OF ECONOMIC PERFORMANCE IN THE ANTITRUST POLICIES OF THE UNITED STATES AND THE EUROPEAN ECONOMIC COMMUNITY

by Alex P. Jacquemin*

"It is 1978 and by this time every company west of the Mississippi will have merged into one giant corporation known as Samson Securities. Every company east of the Mississippi will have merged under an umbrella corporation known as the Delilah Company.

It is inevitable that one day the chairman of the board of Samson and the president of Delilah would meet and discuss merging their two companies . . . .

. . . The Anti-Trust Division of the Justice Department studied the merger for months. Finally the Attorney General made this ruling. "While we find some drawbacks to only one company being left in the United States, we feel the advantages to the public far outweigh the disadvantages.

"Therefore, we're making an exception in this case and allowing Samson and Delilah to merge."

Art Buchwald, Washington Post, June 2, 1966

In recent years, there has been a growing concern among students of antitrust policy about the so-called conflict between competition and efficiency. On the one hand, competition is considered as desirable for its economic as well as its social and political values; on the other, efficiency is considered a prime goal of antitrust law.

In cases where business conduct has the sole effect of lessening competition without producing economies, or of increasing efficiency without harming competition, there is no conflict. In some cases, however, conflict inevitably arises. The object of this article is to analyze the situation where efficiency and market power consequences

---

*The author is Assistant Professor of Economics at the University of Louvain (Belgium) and Visiting Assistant Professor of Business, Government and Society at the University of Washington. He is much indebted to S. Marcus and J. McGee for helpful comments on earlier drafts of this paper. He wishes to acknowledge a special debt to D. Hermann and P. Graham who, nevertheless, refuse to share responsibility for any remaining errors or imperfections.

coexist, and to consider possible solutions by comparison between the American antitrust conception and the principles inherent in the Rome Treaty of the European Economic Community.

I. The Two Approaches

In this perspective, it is generally supposed that there is a substantial difference between the two approaches, in that the American tradition condemns a priori any combination or agreement increasing market power, regardless of any possible beneficial effects, whereas the Common Market distinguishes between that which is beneficial to the public interest and that which is detrimental.

"The difference lies not so much in what is being restricted, but in why there is a need to restrict. Though this distinction is theoretical in nature, it should cause court decisions in the respective systems to vary. Whereas a United States court must look solely at the facts in a given case, the E.E.C. Commission must look solely to the effects; and while the former need only determine that a monopoly exists for public policy to be violated, the latter must determine that the public has been harmed by the existence of a monopoly."[1]

In contrast to the Common Market philosophy, which is to encourage cartels or monopolies beneficial to the economy, the American National Committee studying the American antitrust laws said that indeed "these

---

[1]Rishe, M., Antitrust Philosophy of the Common Market - Restraint on Prohibition, DePaul Law Review, Autumn 1967, No. 1. See also Joliet, R., The Rule of Reason in Antitrust Law, American, German and Common Market Laws in Comparative Perspectives, Faculte de Droit de Liege, 1967, p. 113; and Edwards, C., Control of Cartels and Monopolies, an International Comparison, Oceana, 1967, p. 152.

laws are concerned with undue restraints of competition, with monopolization or attempts to monopolize, and with certain practices deemed essentially injurious to competition. Such conduct cannot be excused by proof it represents progressive managerial policy or, if defendant is a monopoly, it has been a good one, has performed acceptable social service, or even benefited the consuming public."[1]

The judicial application of the American statutes conforms to such principles. According to recent decisions of the United States Supreme Court, "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 . . . . Such is beyond the ordinary limits of judicial competence."[2]

Some cases seem to indicate not only that economies cannot be used as a defense, but that those efficiencies could be used affirmatively in attacking the merger, because they are a threat to "the protection of viable, small, locally-owned business." The Supreme Court's Brown Shoe and Procter & Gamble decisions seem indeed to base a finding of illegality upon the existence of new efficiencies.

---

[1]Report. P. 338.

[2]U.S. v. Philadelphia National Bank, 374 U.S. 312 (1963).

[3]See Brown Shoe v. U.S., 370 U.S. 294 (1962); Procter & Gamble-Clorox v. U.S. (1967).

Concerning restraints of trade, the development of per se rules[1] and a narrow interpretation of the rule of reason[2] have resulted in the rejection of any distinction between "good and bad cartels."

On the other hand, the different European conception is explicitly formulated in Articles 85 and 86 of the Rome Treaty. Article 85 (3) formulates four tests according to which a restrictive agreement may be justified:

1. The agreement must contribute to improvement of production or distribution, or to technological or economic progress.

2. The public must share in the benefits of the improvement.

3. The restriction must be indispensable for the achievement of these results.

4. The restriction may not be such as to afford the enterprise involved the possibility of eliminating competition with respect to a substantial proportion of the commodity concerned.

The Commission has applied such an exemption chiefly in the cases of exclusive dealing agreements, especially exclusive distribution of

---

[1] See e.g., United States v. Socony Vacuum Oil Company, 310 U.S. 150 (1940). But see Appalachian Coals Inc. v. U.S. 288 U.S. 344 (1933) (where cartels justified on an efficiency basis).

[2] The standard adopted in the Standard Oil of New Jersey case (1911) "permits the courts to decide whether conduct is significantly and unreasonably anti-competitive in character or effect; it makes obsolete once prevalent arguments, such as, whether monopoly arrangements would be socially preferable to competition in a particular industry, because, for example, of high fixed cost, or the risks of "cutthroat" competition or other similar unusual conditions." Report of the Attorney General's National Committee to Study the Antitrust Laws, 11 (1955).

foreign goods.[1]

Mergers are in no way prohibited. One explanation of this attitude is that, in a market which is not yet integrated, a merger is considered _a priori_ favorable to the public interest.[2] The only limit would come from Article 86 which condemns abuses of a dominant position.[3] But neither the existence nor the attempt to build dominant positions is forbidden. Monopolization as such is not outlawed, whether by internal growth or by mergers, but only the abuse of a monopoly position. "To what extent the acquisition of other enterprises by an enterprise in a dominant position constitutes abuse of its position within the meaning of Article 86 depends on the market situation in each individual case. But the more an enterprise in a dominant position approaches _monopoly_ by merging with another enterprise . . . the more probability there is that such a merger will constitute an abuse.[4]

---

[1] _Blondel_, decision of July 8, 1965, Official Journal of the European Communities 2194 (1965); _Hummel-Isbecque_, decision of September 17, 1965, Official Journal of the European Communities 2581 (1965); _Jallate_, decision of December 17, 1965, Official Journal of the European Communities 37 (1960). For an exclusive technical cooperation, see _A.C.E.C.-Berliet_, decision of July 17, 1968, Official Journal of the European Communities L201/9 (1968). In those cases, the Commission has considered that such agreements reduced difficulties arising from distance, language barriers, and differences of law; facilitated service after sale, maintenance of inventories of spare parts, adaptation of goods to local peculiarities; made the goods available more regularly and easily . . .

[2] See H. von der Groeben, _Competition Policy as Part of Economic Policy in the Common Market_, address to the European Parliament, June 16, 1965.

[3] It is admitted that Article 85 does not apply to mergers.

[4] H. von der Groeben, _op. cit._, p. 17-18.

II. Proposals for Change

Efforts have recently been made to relax the principles of the American antitrust policy and to concede that a substantial restraint of competition, through mergers and perhaps even through restrictive agreements, could be justified if it is shown that they bring about economic benefits for the public.[1]

Some economists and lawyers have indeed advocated a more extensive use of the efficiency standard as a defense of mergers.[2] This standard might also be applied to restrictive agreements.

Such a proposal has found its expression in the 1966 Bank Merger Act providing a public interest exception which may give legality to mergers which would be illegal if judged solely by Clayton Act standards.[3]

---

[1] Although the maintenance of competition is an essential policy of the United States, it is well known that there are some departures from that policy. Measures requiring the moderation of competition have been adopted to prevent waste in the exploitation of natural resources, to protect workers, farmers, and small businessmen, to exclude outsiders from state, local or national markets. So, in a sense, the idea that competition may not be the best tool to serve the public interest has never been absent from the American tradition. See Clair Wilcox, Public Policies Toward Business, Irwin, 1966, Part VI.

[2] Williamson, O.E., "Economies as an Antitrust Defense - the Welfare Tradeoffs," American Economic Review, March 1968; Bork and Bowman, "The Crisis in Antitrust," Columbia Law Review, March 1965.

[3] Section 5 of the 1966 Merger Act states that: "The responsible agency shall not approve: (1) any proposed merger which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize the business of banking in any part of the United States, or (2) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly weighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served."

Congress now seems willing to allow a court or agency to make economic value judgments in weighing the "public interest benefits" of a merger.

One possible explanation of these developments is that the belief in competition as an end in itself is declining at the same time that there is emerging a theory that holds, as in the European approach, that it is sometimes better to sacrifice the competitive process in order to obtain better public performance. We propose to examine the meaning of such a possible change and see whether the efficiency defense may, actually, have real importance for the antitrust policies of the United States or the Common Market. To begin with, we should analyze the legal and judicial approach to the efficiency defense and see how strictly it has been applied in the U.S. and the E.E.C. Afterwards, we shall examine what such a defense implies, from an economic point of view.

III. The Legal Constraint

In its first application of the new Bank Merger Act, the United States Supreme Court has attempted to give meaning to the public interest concept by indicating the requirements of the defense.[1]

First, the burden of proof is on the party seeking to invoke the exception.

Second, several requirements must be met.

a. The beneficial consequences of the merger must be specifically described by the merging banks.

"It is, for example, not enough merely to show that a merger will result in a greater lending capacity. Defendants

---

[1] U.S. v. Provident National Bank, and U.S. v. First City National Bank of Houston, 386 U.S. 361 (1967), and U.S. v. Third National Bank, 88 S. Ct. 882 (1968).

must establish what beneficial consequences a higher lending capacity will have as well as what value their benefits will have to the community."[1] Such specifications may be very hard to satisfy.

b. The beneficial consequences must clearly outweigh any adverse competitive effects.[2] For defendants to prove that this is the case, "they must show that the economic benefits to the community are greater than the harmful consequences of a possible misallocation of resources, of a possible rise in bank charges, and of a possible curtailment of bank services. But exactly how are defendants to measure these harmful consequences of less competition, and if they cannot measure them, how are they to prove that the economic benefits of the merger clearly outweigh them?"[3]

c. The benefits must be obtainable only through mergers: "If the gains in better service outweighed the anti-competitive detriment and <u>if the merger was essential to secure this net gain to the public interest</u>, the merger should be approved."[4] Again, proving that those benefits are not obtainable by any other feasible alternative to merger is a very heavy burden, especially in regard to the alternative possibility of internal expansion.

---

[1] 88 S. Ct. 882 (1968), at 892, and F. Edwards, Bank Mergers and the Public Interest: A Legal and Economic Analysis of the 1966 Bank Merger Act, working paper, Columbia University, Graduate School of Business, 1968.

[2] 88 S. Ct. 882 (1968), at 893.

[3] F. Edwards, <u>op</u>. <u>cit</u>., p. 45.

[4] 88 S. Ct. 882 (1968), at 893. Emphasis added.

must establish what beneficial consequences a higher lending capacity will have as well as what value their benefits will have to the community."[1] Such specifications may be very hard to satisfy.

b. The beneficial consequences must clearly outweigh any adverse competitive effects.[2] For defendants to prove that this is the case, "they must show that the economic benefits to the community are greater than the harmful consequences of a possible misallocation of resources, of a possible rise in bank charges, and of a possible curtailment of bank services. But exactly how are defendants to measure these harmful consequences of less competition, and if they cannot measure them, how are they to prove that the economic benefits of the merger clearly outweigh them?"[3]

c. The benefits must be obtainable only through mergers: "If the gains in better service outweighed the anti-competitive detriment and <u>if the merger was essential to secure this net gain to the public interest</u>, the merger should be approved."[4] Again, proving that those benefits are not obtainable by any other feasible alternative to merger is a very heavy burden, especially in regard to the alternative possibility of internal expansion.

---

[1] 88 S. Ct. 882 (1968), at 892, and F. Edwards, Bank Mergers and the Public Interest: A Legal and Economic Analysis of the 1966 Bank Merger Act, working paper, Columbia University, Graduate School of Business, 1968.

[2] 88 S. Ct. 882 (1968), at 893.

[3] F. Edwards, <u>op</u>. <u>cit</u>., p. 45.

[4] 88 S. Ct. 882 (1968), at 893. Emphasis added.

In brief, the actual application of the Bank Merger Act indicates that, if the public interest defense for mergers were extended to every industry and if Section 7 of the Clayton Act were modified to include such a provision, the judicial interpretation would be probably so restrictive that no substantial change would occur.

In fact, such an interpretation adopted by the United States Supreme Court reflects a policy substantially similar to that embodied in the E.E.C. Treaty. With respect to Article 85 (3), four tests are required from the defendant to exempt agreements in restraint of competition.

The first two conditions state that the arrangement has to contribute towards improving the production or distribution of goods or promoting technical or economic progress, and to reserve to users a "fair share" in the resulting benefits. They correspond to that part of the Bank Merger Act requiring that "the merger is so beneficial to the convenience and needs of the community to be served that it would be in the public interest to permit it."[1]

A third test is that the agreement must not enable the enterprise to eliminate competition with respect to a substantial portion of the goods. In other words, the probable realization of a monopolistic position shall prevent the exemption of a cartel enforcement under Article 85 (3). This requirement is close to the proof demanded by the

---

[1] House Banking and Currency Committee, Report No. 1221, 89th Congress, 2d Session, January 24, 1966.

United States Court, that possible public interest benefits of a bank merger outweigh an adverse competitive effect.[1]

A final test of Article 85 is that the restriction is indispensable to an improvement; this is identical to the U.S. test that the proposed merger be "essential to secure this net gain to the public interest."

Without pushing the analogy too far, the general perspective seems pretty much the same in both systems,[2] and it appears that the exemption under Article 85 (3) is theoretically as hard to obtain as the exception in the case of a bank merger in the U.S. A commentator of the E.E.C. decision in the Grunding-Consten Case[3] has indeed noted that "dispensations under 85 (3) will be very difficult if not impossible to obtain."[4]

It is true that the E.E.C. Commission has granted the exemption in some cases. But in so doing, it has avoided a real confrontation between competitive effects and public benefits, in granting or denying exemptions solely on the basis of the language of the contract provisions and in not requiring a strict proof of the four tests. If, on its face, some clauses do not appear and others do appear, the agreement may be saved. It is even possible that by amending the terms after a first rejection, approval

---

[1]It may be stricter in the sense that a very substantial reduction of competition may not be admitted even if important benefits result. It is less strict in the sense that it does not require a clear outweighing of benefit as compared to less of competition.

[2]Article 86 which forbids abuses of a dominant position in the Common Market or any substantial part thereof, makes no provision for exemption in the case of activities that promote technical or economic progress or improve production or distribution. But if there is a possibility that an agreement might qualify for exemption under Article 85, yet be subject to prohibition under Article 86, the precedent type of activities are not likely to be often considered abusive.

[3]Decision of September 23, 1964, CCH Common Market Reporter, § 2743.

[4]Nerves, "The European Commission's First Major Antitrust Decision," 20 Business Law, 431, 436 (1965).

can be obtained.[1] The only evidences used are some vague presumptions.[2] A general expression of such a conception is Regulation No. 19/65 which empowers the Commission to grant exceptions to classes of bilateral exclusive dealing arrangements and licensing agreements, on the basis of Article 85 (3), but without the necessity of examining specifically whether the required tests are satisfied.[3]

The impression gained from comparing the actual legal and judicial approach to the "efficiency defense" in the E.E.C. and the U.S. is, then, that in both countries few anti-competitive practices would be sustained by such a defense when rigorougly examined. We may wonder whether that conclusion depends upon the degree of the legal constraint or is a reflection of the actual state of economic science. In other words, is it theoretically possible to prove that in some cases a substantial restriction of competition is necessary to improve the market performance?

---

[1]Of a total of 31.550 agreements that have been notified, some 1.170 have been disposed of because they have been amended to comply with the Regulation. See Press Release from the Commission of the European Communities, July 1968, CCH Common Market Reporter, § 9248.

[2]See A.C.E.C.--Berliet, Official Journal of the European Communities No. L201/9. Commission Decision of July 17, 1968, CCH Common Market Reporter, § 9251. "An evaluation of the share of the profit reserved for consumers can only be based on probabilities in the case of agreements that have not yet produced their effects. However, there is sufficient probability that the expected results will be achieved more quickly because of the joint research--and it is not likely that unfair sales prices or other unfair conditions will be imposed on /the Consumer/. Thus it may be assumed that the condition set forth in Article 85, paragraph 3, under which a fair share of the profit resulting from the agreement must be reserved for the consumers, is at present fulfilled."

[3]Official Journal of the European Communities, March 6, 1965.

IV The Economic Constraint

1. Efficiency and Competition

The need to sacrifice some competition in order to obtain more efficiency implies that such a benefit cannot result from existing competition or from an increase in competition. But the principle is that competition provides society with the maximum output that can be obtained, given the actual resources, or more precisely, reduces prices to marginal costs, i.e., makes prices equal to the worth of resources necessary to do the job. It is thus necessary to find cases where this principle does not apply; we have the classical list of "market failures": important economies of scale, external effects, public goods, natural resources.

Usually, those problems are solved by excluding the corresponding activities from the market system and by using devices other than antitrust, such as public regulation and policies of subsidy and taxation. But in the unregulated area, the value of competition is supposedly intact. Indeed, it is difficult to prove that in this unregulated sector, a decrease in competition is often required for better performance.

Concerning mergers, it is generally recognized that in the U.S. the actual level of concentration is high enough to realize the economies of scale, and that the risk of serious economic loss by opposing a merger is very low.[1] This statement is reinforced when we recall that an increase

[1] For a general analysis see J. Bain, "Advantages of the Large Firm: Production, Distribution, and Sales Promotion," Journal of Marketing, October 1955.

In Statistical Cost Analysis, McGraw-Hill, 1960, J. Johnston concludes that the long-run average cost curve is generally flat; beyond a certain minimum scale, a plant cannot produce significant economies of scale. This minimum scale is the most often already reached.

See also T. Saving, "Estimation of Optimum Size of Plant by the Survivor Technique," Quarterly Journal of Economics, November 1961.

Concerning the existence of multiplant economies, Blair states that the evidence tends to be negative, in "Economic Concentration," Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Part 4, "Concentration and Efficiency," 1965, p. 1555. See also W. Mueller, "Planning, Regulation and Competition," Hearings before Subcommittees of the Select Committee on Small Business, 1967, p. 18.

in a firm's absolute size is compatible with a constant or decreased degree of concentration if the industry itself is growing, and that a merger is not the only way to incr⌄ase the firm's absolute size.[1]

In the E.E.C, the problem is different because European enterprises have to adjust to the dimensions of the Common Market and to face increasingly the competition from large-scale foreign business. Nevertheless, it does not mean that a substantial reduction of competition is then required to achieve economies of scale.

First, the size of European business cannot simply be compared to the dimensions of American enterprise because U.S. business is generally oversized; what we need is to determine the dimension required to achieve economies of scale. Such a size is not a priori incompatible with a sufficient degree of competition.

Second, in some sectors the dimension already achieved seems able to support these economies.[2]

As has been pointed out, "even if the Commission's position, that further concentrations are desirable, be granted, adequate defenses should be made available in case the tide swings too far."[3] The problem of restrictive practices may be considered in the light of two complementary arguments.

---

[1]A statistical study by S. Reid concludes that the "profit-related variables" strongly favor the "internal growth group of firms" when compared with the "merger type group," in Mergers, Managers, and the Econcomy, McGraw-Hill, 1968, p. 193.

[2]See C. Layton, Trans-Atlantic Investments, The Atlantic Institute, 1966, who refers to the chemical, the motor vehicle, and electrical industries.

[3]H. de Jong, "Concentration in the Common Market," Common Market Law Review, 1966-67.

First, many of these practices, especially the restrictive agreements, are not necessary to obtain the desired beneficial results, such as specialization of output or exclusion of the incompetent. Competition would more effectively provide these results. This has to be understood in Europe where "price-fixing, allocation of goods, quota systems, and joint purchase or sale may all be accepted either as direct aid to good performance, or as inducements to participate in other programs that are believed to provide such aid."[1]

Second, even if these "restrictive" practices might be permitted on the basis of public benefits, it does not mean that they will really harm competition because they may only seem bo be restrictive and may in fact express competitive behavior. This is especially true for the so-called "abusive trade practices."

As L. Telser states, "few trade practices are abusive under all circumstances. Sometimes a given practice is not only compatible with competition but may actually enhance it."[2] And he concludes: "Blanket prohibitions against such practices might harm competition more than would monopoly."

A consequence of this observation is that the per se rule is sometimes very dangerous. Therefore, it would be better to consider the possibility of recognizing that in certain cases certain practices do not substantially restrain competition.

---

[1] C. Edwards, "Control of Cartels and Monopolies," Oceana, 1967, p. 152.

[2] L. Telser, "Abusive Trade Practices: An Economic Analysis," Law and Contemporary Problems, No. 3, Summer 1965, p. 504.
A similar conclusion is reached by J. McGee in his analysis of the Robinson-Patman Act, in "Some Economic Issues of Robinson-Patman Land," Law and Contemporary Problems, Summer 1965, p. 530.

2. Efficiency and Consumer Welfare

Efficiency may be defined as the satisfaction of consumer's desires at minimum cost. If this definition is accepted, its realization requires two conditions.

a. To justify a restriction of competition by an increase in efficiency, it is required that the efficiency effect be translated into a sufficient increase in quantity and/or quality of goods in the economy so that society enjoys a net benefit from the new situation. It must then be proved that, even though they will face a degree of reduced competition as a result of their conduct, the firms in question will offer lower prices, better quality or services, than in the more competitive situation. And this effect cannot be limited to a moment in time; it must be guaranteed that it will be maintained over years. The probable duration of the increased market power must be compared with the probable duration of the beneficial effects.

b. Satisfaction of the consumer cannot be wholly expressed by a narrow conception of efficiency. If a restriction of competition does not result in lower prices, it does not mean that the restriction has no effect on the consumer welfare. It is necessary to examine whether the new situation does or does not produce better or new services, better or new products, a higher rate of innovation or technological progress, and a better quality of advertising and sales promotion.[1]

---

[1]The sole efficiency concept includes not only the allocation of resources among industries, but also the degree of internal use of actual resources and the amount expended by the firm on alternative uses.

In other words, the range of public performance is very broad and it is impossible to reduce consumer welfare to the price-quantity realtionship.[1] It would be too easy to say that other aspects are "deviations from consumer welfare," for example, that "progress will occur even without special consideration by the law."[2] On the contrary, such aspects are an important part of consumer welfare and may sometimes be better realized through a merger or even a restraint of trade.[3] Once it is recognized that in a case where consumer welfare and market power consequences coexist, the balance may be in favor of the consumer welfare effect, it is difficult to understand why, in theory, such a justification would be rejected if the beneficial effect takes the specific form of a better quality of the product, but accepted when it takes the form of a lower price. It even seems that the first form may be much more important for the consumer.

---

[1]Especially a comparison in static, partial equilibrium, two-dimensional terms, between the "dead-weight" loss from monopoly power and the "cost-savings" from better efficiency, cannot express the net welfare effect for the consumer.

[2]R. Bork, "The Goals of Antitrust Policy," Papers and Proceedings of the A.E.A., May 1967, p. 251.

[3]An illustration is the application of the public interest defense in the merger of the First City National Bank of Houston. The Comptroller of the Currency refers to the following benefits for the Houston community: "The resul'ing bank will be able to offer more comprehensive automative services; . . . the development of a substantial international department; the creation of a new department to handle equipment leasing financing . . ." Cited by F. Edwards, op. cit., p. 30. This "broader banking services" defense is as plausible a public interest defense as the defense based on price behavior of actual services.

We conclude that an efficiency defense, to have meaning, must correspond to the concept of the consumer welfare defense (or the market performance defense).[1]

But once the multidimensional character of the consumer welfare is admitted, it appears that its estimation cannot rely on scientific judgment.

First, the evidence obtainable would generally be ambiguous. "Predatory price-cutting is not readily to be distinguished from vigorous competition, monopolistic overcapacity from prudent anticipation of demand, deliberate suppression of technology from a wise decision to reject an inferior process, an unpromising product, or an improvement whose immediate adoption would be premature."[2]

Second, even if the evidence were clear, its welfare implications are obscure. The recent Procter and Gamble case is an example. If it is true that advantages afforded by a merger which reflect simply greater efficiency "ought not to be a basis for holding the merger illegal," it is still not obvious that advantages in the form of increased advertising should be permitted as a defense. We agree that "to the degree that Procter and Gamble rests on suspicion of advertising, as it clearly did at the Commission level, we seem faced with an incipient policy of governmental intervention in an economic and social process";[3] but it would also be true that in accepting an increase in advertising as a defense, the Court would be equally engaged in the same incipient policy.

---

[1]Market performance is considered as including efficiency in production and marketing units, equity in price to cost relations, and technical progress.

[2]Clair Wilcox, op. cit., p. 323.

[3]R. Bork, "The Supreme Court Versus Corporate Efficiency," Fortune, August 1967, p. 156.

Generally, the value system of the society determines whether, on balance, allocating a larger percentage of resources to activities which result in technological change, production variation, and changing consumer taste, than would be the case under less "imperfect" competition, contributes more to consumer welfare than the losses resulting from the static inefficiencies of the reduced competition.[1] A valuable theoretical standard of consumer welfare which is applicable to the real world simply does not exist.

Third, if there is no clear economic evidence on determinants of market performance, the only available presumptions concerning the relationship between an industry's structure and its performance indicate that the conflict between inefficiencies due to reduced competition, and some other positive market performances, is not the general case.

Indeed, the rate of profit and the discretionary pricing power of firms seem positively related to the degree of concentration,[2] the level

---

[1]See for example K. Cohen and R. Cyert, Theory of the Firm, Prentice-Hall, 1965, Chapter 18; R. Bishop, Monopolistic Competition and Welfare Economics, in Monopolistic Competition Theory: Studies in Impact, edited by R. Kuenne, Wiley, 1967, P. 263. Bishop shows that to bring into a Pareto-optimal relationship a single monopolistically competitive industry with the rest of the economy (considered as universally purely competitive without externalities), requires the Utopian assumption that an omniscient administrator can levy, costlessly, just the appropriate, nondistorting lump-sum taxes. But this implies in turn that the administrator, in restricting product variety, does not respect the consumers' demand-expressed preferences.

[2]See J. Bain, "Relation of Profit Rate to Industry Concentration," Quarterly Journal of Economics, August 1951; V. Fuchs, Integration, Concentration and Profits in Manufacturing, Quarterly Journal of Economics, May 1961; Kasuo Sato, "Price-Cost Margins and Behavior for Profit Margins," Yale Economic Essay, Fall, 1961. One of the rare challenges of that conclusion has been made by G. Stigler, in Capital and Rates of Return in Manufacturing Industries, Princeton, 1963, but has been refuted by R. Kilpatrick, Stigler on the Relationship between Industry Profit Rates and Market Concentration, Journal of Political Economy, Sept. 1968.

of barriers to entry,[1] and the degree of product differentiation.[2] Besides, we have seen that it is doubtful that costs can be lowered by grouping plants together under a unique management. On the contrary, in many concentrated U.S. industries, the largest firms probably would not lose much efficiency if public policy should ever see fit to divide them up.[3]

In the same way, the internal inefficiency of the firm and the probability of an organizational slack seem to increase when the competitive pressure is relaxed and the size raised.[4]

Concerning the effect of market structure on progress, research, and innovation, it is recognized that, at least in the U.S., most firms in principal oligopolistic industries are large enough to be outside the range of obvious disadvantage from small-scale research,[5] and, more

---

[1] See, for example, H. Mann, "Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries, 1950-1960," Review of Economics and Statistics, August 1966; Kamerschen, "Ownership and Control and Profit Rates," A.E.R., June 1968.

[2] W. Comanor and T. Wilson, Advertising Market Structure and Performance, Review of Economics and Statistics, November 1967.

[3] R. Caves, American Industry: Structure, Conduct, Performance, Prentice-Hall, 1967, p. 110.

[4] See O. Williamson, "Managerial Discretion and Business Behavior," A.E.R., December 1963, Part II; and O. Williamson, "Hierarchical Control and Optimum Fi m Size," Journal of Polit. Econ., April 1967.

[5] R. Caves, op. cit., p. 104.

important, that there is no systematic relationship between the degree of market power and inventive success.[1]

The consequence of this state of economic science is that "what we know about the determinants of market performance represents a few islands of knowledge protruding from a sea of ignorance."[2] It seems then unreasonable to favor the market power of a firm on economic grounds, when we ignore so much of the overall impact[3] and when what we know is favorable to competition.

In a recent article, O. Williamson presents an "appropriately qualified tradeoff test" between extended economies and market power yielded by a merger. But his analysis gives the impression that he is offering a conceptual device which is more or less an empty box. If all his "qualifications" are seriously taken into account, it appears indeed that the device cannot be usefully applied, except as a result of a drastic change in the role of antitrust laws, and that more research is required from the economists, not from the Court.

---

[1] See F. Scherer, "Firm Size, Market Structure, Opportunity and the Output of Patented Inventions," American Economic Review, December 1965; E. Mansfield, Industrial Research and Technological Innovation, Norton, 1968, p. 198.

[2] R. Caves, op. cit., p. 113.

[3] It is unnecessary to recall the "second best" problem: the results obtained by a partial equilibrium model may differ strongly from those yielded by a general equilibrium model. In a study by Ferguson, the proposed solution is to define a "macroeconomic" conception of the workable competition: the objective is no more to increase the degree of competition in a specific industry, but to judge this degree of competition according to some general public goals such as growth, stability of prices, full employment. That approach is very close to the E.E.C. conception and its effort to integrate Planning and Competition. See C. Ferguson, A Macroeconomic Theory of Workable Competition, Duke University Press, 1968.
In the same way, once the consumer welfare is placed in a dynamic context, "the inadequacy of the necessary conditions for an optimum position is apparent." E. Mishan, "A Survey of Welfare Economics," The Ec. Journal, No. 278, 1960.

Among his qualifications for a cost-benefit analysis of a merger, Williamson points out the necessity to take into account:

--the inference and enforcement expense needed to prove the existence of economies. This will be especially costly for many dimensions, such as the technological progress argument which is of a "highly conjectural nature" but which is "nevertheless, potentially of such significance that to dismiss them may run the risk of serious error,"[1] or such as the managerial discretion argument for which "the dispute concerns not so much the direction of the effect as its quantitative significance."[2] It is hard to argue that the net benefit of accepting the efficiency defense, which is the present value of the stream of its total gain minus its total cost, will exceed the net benefit which could be obtained by employing elsewhere the resources absorbed by such a defense.

--the shape of the time stream of benefits and costs that a merger produces. But Williamson adds: "It is an easy step from the suggestion that a proposed merger should be delayed until maximum net gains are realized to the proposition that the enforcement agencies should "arrange" optimal firm pairing."[3]

--the income distribution effects. He notes that "the transfer involved could be regarded unfavorably not merely because it redistributes income in an undesirable way (increases the degree of inequality in the size

---

[1] *Op. cit.*, p. 29.

[2] *Op. cit.*, p. 31.

[3] *Op. cit.*, p. 26.

distribution of income) but also because it produces social discontent . . . Distinguishing social from private costs in this respect may be the most fundamental reason for treating claims of private efficiency gains skeptically."[1]

--the political significance of control over wealth. He admits that "the necessary political judgment, ideally, is one for Congress."

Through this analysis, it appears that to know and to evaluate such requirements would imply some kind of state ownership or control, beyond the scope of the antitrust policy.

---

[1] *Op. cit.*, p. 28.

V. Implications for the Policy Making Process

Commenting upon the opposition between the goals of consumer welfare and small business welfare, R. Bork argues persuasively that "a court is not the proper institution, either by equipment, responsiveness to the electorate, or specialization of function, to write ab initio detailed specifications of political compromise between conflicting and incommensurable values. I am at a loss why anyone thinks courts should dictate the terms of a compromise in antitrust . . . ."[1] And he refers to Judge Taft's statement that "a reasonable price test forces judges to 'set sail on a sea of doubt' with no guide 'except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition.'"[2] His conclusion is then that consumer welfare should be the only goal.

But we may wonder why Bork does not apply this argument to the tradeoff between restriction of competition and increase of consumer welfare. Once we question the general principle that the competitive process is the best tool to achieve high performance, it has indeed been shown that we cannot escape the use of vague public interest defenses which the Court has no intelligent way of applying. The ultimate consequence would be to recognize that the Court must make political choices. Not only would it be admitted that efficiency in supplying

---

[1] R. Bork, A.E.R., op. cit., p. 246.

[2] Op. cit., p. 247.

consumer welfare should be a defense, but, through a logical corollary, the test of legality should itself be based on efficiency.

As a result, "a government could take corrective action against inflexible prices, high prices, functionless product differentiation, planned obsolescence, extravagant fancification of products, wasteful packaging, wasteful advertising, or any other type of business behavior it thought detrimental to an efficient economy."[1] Such an approach would give full effect to "the underlying belief, which, according to S. Marcus, many economists hold, that antitrust should be an instrument of economic planning and not a policeman."[2]

As it has been said, if the qualifications proposed by Williamson in his tradeoff solution are closely examined, it appears indeed that they would require a continued and detailed supervision of American business, a far cry from the automatic safeguards of competition.

At this point, a comparison with the E. E. C. system is again useful. Superficially, it may seem that the European legislation is less strict than the American in making provision for exemption in the case of activities that promote technical or economic progress or improve production or distribution (Article 85 (3)), and in containing no provision that explicitly challenges the power of enterprises. The abuse of dominant position, not its existence per se, is forbidden (Article 86). The

---

[1] C. Edwards, "Control of the Single Firm: Its Place in Antitrust Policy," Law and Contemporary Problems, Summer 1965, No. 3, p. 470.
[2] S. Marcus, Competition and the Law, Wadsworth, 1967, p. 150.

limitation of production, marketing, or technical development to the prejudice of consumers is especially prohibited.

Our interpretation to the contrary is that such vague and general exemptions and prohibitions will entail judgments involving substantial administrative discretion[1] and will potentially require the detailed evaluation of total conduct. On the one hand, the European Commission will need informaton on the organization of production and distribution, the policy of diversification, advertising, the R. and D. budgets, the description of financial participation and the fluctuations in the assets and the relative profit from the various operations and plants of the firm. Such requirements already appear in cases where exemptions have been granted on the basis of Article 85 (3). The Commission has often adopted a system of "provisional validity" (3 to 5 years) and has required detailed reporting during and at the end of the period: those data are not concerned with calculating from outside the real impact of the given conduct on market conditions or on consumer welfare, but with controling closely the policy of the firm.[2]

---

[1] A. Jacquemin, "L'entreprise et son pouvoir de marché," P. U. F., 1967, p. 216.

[2] See, for example, Transocean Marine Paint Association, decision of July 20, 1967, Official Journal of the European Communities, No. 163/10, (1967), <u>CCH Common Market Reporter</u>, § 9188. "It appears advisable to tie in obligations with the decision, in accordance with Article 8, paragraph 1, of Regulation No. 17. These obligations should make it easier for the Commission to determine whether or not there is reason for it, as provided for in Article 8, paragraph 3, to revoke or amend this exemption or to prohibit certain practices by the enterprises concerned." The members of the association must then "reveal any changes that might occur in the membership of the association. . .all decisions of the administrative board and all arbitration rulings. . .insofar as they concern

On the other hand, deciding whether users get a "fair share of the benefit," whether the agreement does contribute to technical progress, and whether the restrictions are indeed indispensable cannot be purely objective.

Such discretionary requirements seem to be readily accepted in Europe where the economic organization has never been considered as a self-adjusting competitive process. To cope with defects in performance by rational programs of control has seemed easier than to do so by competition. In fact, it has been suggested that the European Commission, which according to the Treaty is at one time a legislature, at another time a governmental or an enforcement agency, could become the Planning Agency of the Common Market, in establishing a European order of priorities for important investments and ensuring that the necessary capital would be available to carry them out at the required speed.[1]

The antitrust policy thus becomes integrated into public policy with respect to investment, credit, taxation, and the great corporations become coordinated by some form of permissive planning.

It has been specifically noted that "the grant of exemptions (under 85 (3)) could be coordinated with Common Market programming. Thus, if

---

(cont.) the application or interpretation of the provisions of the agreement. . . make an annual report to the Commission on the activities of the association and of its present members, and of any new members, showing separate information on the production and sale of Transocean and other marine paints manufactured by the members...indicate the volume of deliveries for which they are mutually bound to pay commissions. . ."

[1] R. Marjolin, Vice President of the European Commission, in SEDEIS Bulletin, No. 839, suppl. 1, cited by A. Shonfield, Modern Capitalism, Oxford University Press, 1965, p. 147.

the Community were especially in need of rationalization agreements in certain areas, an exemption for cooperative arrangements in those areas might be more easily obtainable."[1]

In the same perspective, it has been recognized that the focus on abuses of dominant position in Article 86 "does not mean that the Treaty is necessarily more lenient with respect to concentrated economic power. Experience in Holland and elsewhere indicates that an abuse provision permits price control and other direct regulatory measures which in the United States are rarely invoked, even against regulated utilities."[2]

In American terms, even if the performance criterion is not used by the Court but by the antitrust agencies, there is the danger of a further transfer of policy-making authority from Congress to those agencies.

VI. A Tentative Policy Recommendation

A tentative recommendation concerning the use of a performance criterion in American and E.E.C. antitrust policies can be inferred from the preceding analysis.

A. The U.S. Policy

There is no real problem of choice when proposed business conduct tends only to lessen competition, will only result in efficiencies, or

---

[1]Antitrust Developments in the European Common Market, Report of the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary United States Senate, 88th Cong., 2d Sess., 1964, p. 18.

[2]Ibid., p. 19. According to the Holland Economic Competition Act of 1956, direct measures expressly authorized are orders to the person or persons holding the economically "dominant position" (1) proscribing activities tending to compel others to pursue specific market practices; (2) requiring supply of specified goods or services to designated persons for cash at customary prices and terms; (3) stipulating provisions regarding price; (4) directing terms of delivery, service, and payment . . . .

has virtually nothing to do with one of these effects. This is recognized as the general case.[1] But once the conduct is a mixed case producing both efficiencies and market power consequences, we may conclude that the Court should not accept economies as a defense to illegality.[2]

On legal grounds, it has been shown how heavy and costly the burden of proof would be imposed by the alternative approach.

On economic grounds, several arguments have been presented.

First, cases in which any harmful effects of a decrease in competition are offset by the favorable effects of the conduct are considered as exceptions, not the rule. Maintaining the general principle underlines a strong presumption that the eventual economic losses will not be important.

Second, the enforcement agencies will generally select those cases which should be prosecuted, taking into account, at least implicitly,

---

[1] D. Dewey, "Mergers and Cartels: Some Reservation about Policy," A.E.R. Proceedings, May 1961, p. 257; O. Williamson, *op. cit.*, admits: "Most mergers produce neither significant price nor efficiency consequences, and where this is true the analysis of this paper has limited relevence." P. 33. For restraints of trade, see p. 14.

[2] On the other hand, conduct resulting in greater efficiency should not be held illegal on that basis alone. Efficiency *per se* is not under attack.

some of the possible economies,[1] even if such selection may imply political choices.

Third, we may refer to what Professor Reich calls a central myth according to which "the decision makers combine expert knowledge and professionalism with judicial bearing. The tools they use for decisions are science and reason. At the core of the myth is its cardinal point: decisions are not primarily choices between values."[2]

Indeed, those who ask for a more tolerant application of antitrust laws, in the name of efficiency, do not seem to realize that if a substantial restriction of competition is accepted on such a basis, another device, necessarily more interventionist than competition, will be required to regulate the American business world. Thus, the defenders of a freer market economy may turn out to be the best allies of those who, with Galbraith, consider that competition will be replaced by

---

[1]The recent merger guidelines of the Department of Justice (May 1968) state that "unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency) because, amont other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger." A similar attitude is adopted for vertical and conglomerate mergers, but stressing the argument that the economies can normally be realized through other means.

[2]Reich, "The Law of the Planned Society," Yale Law Journal, 8 July, 1966.

planning, and antitrust law by direct regulation with regard to the requirements of large-scale production, invention, and innovation.[1]

This leads to a fourth argument against the use of a market performance defense. Competition is justified not only on the basis that it is the best tool to achieve an optimum allocation of resources, but also because of its broad political implications. It is generally argued that competition disperses economic private power, decision-making, responsibility, and initiative--which is desirable from the standpoint of the viability of democratic institutions. Competition increases popular loyalty to the image and credibility of the free-enterprise system. It reduces the danger of governmental regulation of business that is not only inefficient but also inconsistent with some economic freedoms. From this point of view, Machlup states: "While I accept that certain anti-oligopoly policies curtail certain economic freedoms, I believe that these policies also restore or strengthen some economic freedoms, and, on balance, _may_ be working for, rather than against a free society. This implies that I accept also . . . that the exercise of oligopoly positions may be economically harmful and may reduce the scope and the degree of freedom, as both valid and significant."[2]

Actually, the American society still accepts the notion that values such as efficiency, welfare, equality, freedom, progress, are built into competition. Trying to present a decrease of competition as

---

[1] _The New Industrial State_, Hamilton, London, 1967. P. 184 to 197.

[2] F. Machlup, "Oligopoly and the Free Society," _Antitrust Law and Economics Review_, July-August 1967, p. 14. See also the classical study of M. Friedman, "Capitalism and Freedom," _University Press of Chicago_, 1962.

something required to reach those values may have deep unforeseen effect on the social attitudes. Such a transformation would be at the level of a political judgment, beyond the limits of judicial competence.

This does not solve the problem of the limits of the competitive process. Our point of view is that if a real mutation is wanted in the domain of competitive policy, it cannot be realized at the judicial level but through some ad hoc "planning agency" expressing the will of the Congress. The search for new laws to make the best possible accommodation of planning and liberty is to be preferred to making such choices surreptitiously.[1] Still, one may wonder whether the U.S. will find it necessary to change its policies so drastically as to declare such principles openly.

B. The E.E.C. Policy

A first recommendation for the E.E.C. antitrust policy is the necessity to rely more on the use of a reasonable test in applying 85 (1), than on the public benefits exemption provided by 85 (3).

In fact, a move in that sense is perceptible. Originally, the Commission has concentrated on exclusive dealing agreements, and has based its decisions on the use of restrictive terms in the contract. These types of restraints on trade have been considered as per se violations of Article 85 (1). But, as it has been shown, many apparent restrictive practices have no substantial anticompetitive effect, and

---

[1] "Once we recognize that the antitrust laws and the competition are not going to provide us with this system of wage and price restraints, then economists . . . are going to bring their energies to bear on how this system of restraint can be administered by the Government with a minimum of damage to the economy, with a minimum of damage to incentives, with a minimum of bureaucratic apparatus, but with a maximum of efficiency." J.K. Galbraith, in "Planning, Regulation and Competition," Hearings before Subcommittee of the Select Committee on Small Business, United States Senate, June 29, 1967.

may even promote competition. The per se approach based on administrative regulation and subject only to the exemption provision of Article 85 (3) has then resulted in a deluge of registrations of agreements which are often harmless.[1] To avoid the heavy burden of examining closely those individual agreements to see whether it qualifies for the complex exemption under 85 (3), we have already indicated that the E.E.C. Commission, in some specific cases, has declared inapplicable the provision of Article 85 (1), under Article 85 (3), but without requiring a real proof of the four tests, and also on the basis of Article 85 (3), has granted general exemptions to classes of agreements responding to certain criteria, without examining at all if the tests are satisfied.[2] Besides, the Commission has promulgated a notice which indicates that in the view of the Commission, some specific groups of agreements do not restrict competition and are not prohibited by Article 85 (1).[3]

A recent evolution seems nevertheless more promising. After the European Court of Justice has disapproved the underlying theory that every restraint of trade in the technical sense is prohibited by Article 85 (1),[4] the Commission itself has adopted a "rule of reason." The already mentioned notice tells us that "the Commission holds the view that cooperation among enterprises does not come under Article 85 of the E.E.C. Treaty . . . in the cases where the market position of

---

[1]Regulation 17 provides the mechanisms for application for exemptions under Article 85 (3) and for a system of negative clearances in those cases where parties are uncertain as to the applicability of Article 85(1).

[2]See p. 10.

[3]Notice of the Commission of the European Communities, 23 July 1968, CCH Common Market Reporter, No. 9248.

[4]See Societe Technique Miniere V. Meschineubau Ulm GmbH, June 30, 1966, CCH Common Market Reporter, § 8047.

enterprises cooperating with each other is in the aggregate too weak to lead, through the agreement between them, to an appreciable restraint of competition in the Common Market and . . . impair trade between the Member States."[1] A recent application of such an interpretation of 85 (1) is the SOCEMAS case where an important argument of justification was that the activity of SOCEMAS in the E.E.C. countries (other than France) was not on a sufficiently large scale to entail appreciable restraints of competition.[2]

It finally appears that by originally relying on the public benefits exemption which required a complex judgment of political nature, and by refusing to take into account the anticompetitive significance of the agreement, the Commission has been forced into bureaucratic paralysis. Rather than trying then to give a very biased form to the "efficiency defense" offered by 85 (3), we may hope that the Commission will pursue the policy of a more "reasonable" interpretation of Article 85 (1).[3]

A second requirement is the necessity to apply the antitrust policy to every type of restraint of competition. More than exclusive dealing agreements, horizontal agreements and mergers are indeed very important

---

[1] CCH Common Market Reporter, No. 9248.

[2] SOCEMAS, Commission Decision of July 17, 1968, CCH Common Market Reporter, § 9250.

[3] In that sense, Advocate General K. Roemer has considered that it would be artificial to apply Article 85 (1) on the basis of purely theoretical considerations, and then to grant an exemption pursuant to Article 85 (3), if a more detailed analysis would have revealed in the first place that the agreement under attack did not substantially restrain competition. See the submissions of Advocate General K. Roemer, cited by Joliet, Op. cit., p. 161.

for the future of the Common Market.[1] The idea that those combinations are beneficial to market performance involves the danger of developing strong oligopolistic markets which, once created, are very hard to transform. It is what has happened with the American Antitrust Policy which did not develop a strong antimerger policy until after World War II. "It is necessary to remember that it is easier to prevent the constitution of monopoly positions than to remedy their behavior and to shackle their growth."[2]

Finally, as has been discussed before, the nature of the exemption provided by Article 85 (3), as well as the nature of Article 86 lead to the necessity to harmonize the general public policies of the Common Market Authorities with its antitrust policy, so that the latest one could be limited to its specific role.

* * *

In conclusion, the role of Antitrust, in the E.E.C. as well as in the U.S., must be limited to attacks upon those structures and conduct which induce market power.

In trying to judge cases on the basis of their contribution to market performance, Courts take a serious risk of becoming involved in

---

[1]The Eight General Report of E.E.C. Commission (March 1965) indicates that out of the 37.542 cases notified up to March 31, 1965, only 395, or about 1 per cent involved horizontal restrictions. Until now, no merger has been attacked.

[2]J. Houssiaux, Preface to A. Jacquemin, "L'entreprise et son pouvoir de marche," <u>Op. cit</u>., p. IX.

planning policy. The acceptance of such a perspective probably would be quite different in the U.S. than in the E.E.C., because of the substantial contrast between the antitrust philosophies of each.

On the one hand, the proposition of an "economic performance" defense in the U.S. does not express in principle a distrust of the competitive process: it has been proposed to liberalize the antitrust policy and to allow a freer functioning of the market forces, but not to pave the road towards planning.

On the other hand, such a defense is, in the Common Market, closely related to a distrust towards the competitive process as being capable of realizing the best performance. By accepting it, the European Authorities claim at the same time the right of detailed and continuous evaluation of any total conduct pattern of the firms and in so doing, to introduce some kind of Common Market programming.

Our own conception is that Antitrust Policy is not the right tool for such an objective. Courts must simply analyze combinations or agreements on the basis that, to escape the ban of the law, the consequent reduction of competition must not be significant. The premise of this policy thus remains that competition is the best way to serve the public interest and that the legality of conduct depends on the degree of its anticompetitive effect. To question such a premise requires a different level of governmental policy.

This conclusions does not completely avoid the problem of evaluating some performance criteria which are implicit in the standards of market power. In examining the extent of anticompetitive effect, a performance approach may appear. However, this aspect will be used, not to determine whether it serves or disserves the public good, but to calculate indirectly the competitive conditions and the underlying structures and conduct.

Judicial decisions will thus have a greater opportunity to avoid political compromise between "conflicting and incommensurable values."

* * *