Trusting antitrust

The enforcement of antitrust laws has become a central concern for many industries since Judge Thomas Penfield Jackson ordered Microsoft to split into two companies. While the order was stayed pending appeal, the Supreme Court seems destined to ultimately rule on the matter. Also, last week, officials at Sprint and WorldCom maintained that their merger is still viable, despite a Justice Department lawsuit and the companies' withdrawal of their merger application in the face of European Commission objections.

The celebration of America's birthday offers an opportunity to reflect on the changing role of governance. From the Declaration of Independence through the Articles of Confederation and the Constitution and the Bill of Rights, the role of the federal government steadily increased. (The Constitution reserved regulation over interstate commerce exclusively for the federal government.)

Government attitude toward large businesses has changed along with shifts in public sentiment. Railroads are an example. Initially, public policy supported the development of railroads, especially as they helped the United States fulfill its "manifest destiny" to expand from coast to coast.

Railroads largely drove American financial development. At its peak, railroad market capitalization represented 90% of the value of the New York Stock Exchange. Not only did railroads exert exceptional power in their own right, they also helped develop the early industrial giants in America. Communications, mining and steel were all industries created by demand from railroads.

Then suddenly railroads had too much power. Just as early American financial history provides a study of the railroad industry, it presents us with lessons in regulatory history. The Interstate Commerce Commission was the very first regulatory agency. Railroad retirement, labor and liability laws were precedents for subsequent legislation that covered the rest of the population.

The ICC was formed as a result of a rise in populism, much of it led by farmers. In addition to the ICC, the first antitrust legislation was passed.

While it may be too early to predict the final results of the Microsoft case, antitrust action has spread into transportation. The government is currently bringing action against American Airlines for predatory pricing against startup airlines. The evidence is compelling. Upon the appearance of new airlines (e.g., Vanguard, SunJet and Western Pacific), American slashed fares - only to raise them when the competitor exited the market.

Noteworthy is that the government has not brought a predatory pricing case in 20 years - the burden of proof is simply too high. (In 1993 the Supreme Court concluded that aggressive cost-cutting often helped consumers.) Since then plaintiffs have failed in every pricing case pursued.

Antitrust is a transportation issue today also because of changes contained in the Ocean Shipping Reform Act. The antitrust immunity granted under OSRA may no longer apply to the manner in which shipping companies perform their actions. Traditionally, steamship lines had antitrust immunity to set rates collectively in conferences. Conferences did not make the transition to post-OSRA shipping because confidential contracts made it impossible to enforce collective action.

The antitrust immunity enjoyed by conferences morphed into discussion agreements, designed to set "voluntary" price targets. There is question as to whether the protection enjoyed by these groups was intended, and House Judiciary Committee Chairman Henry Hyde, R-Ill., has professed his desire to eliminate it.

This may not be necessary. Discussion agreements seem to be weakening. As the traditional May 1 signing date for trans-Pacific import contracts approached, voluntary guidelines were fading in the face of supply and demand. One ship line lamented "cave-ins" while a shipper rejoiced in "an avalanche" of deals. In the absence of government intervention, supply and demand seem to be doing fairly well. Even the much-publicized export rate increases seem to be more smoke than substance.

The Federal Maritime Commission and the Maritime Administration believe that the antitrust immunity contained in OSRA - despite its potential problems - should be preserved for the present. The thinking is that poor industry financial results would be even worse if lines couldn't cooperate, and that the subsequent industry shakeout would reduce competition and hurt U.S. businesses. (This seems to be a position of accepting less competition today in order to prevent having even less in the future.)

To many, the beauty of anti-trust is in the eye of the beholder. As Supreme Court Justice Potter Stewart once opined about pornography "I know it when I see it, and the [item] involved in this case is not that."

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