# Deregulation and Antitrust Reform

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Traditionally, regulatory and antitrust policies have been uneasy partners. Most regulatory programs permit or require coordinated actions among firms that otherwise would be antitrust violations. This is true not only for economic regulation, which regiments price and entry, but also for healthy, safety, and environmental regulation, which regiment product design or production methods across firms.

In the Reagan Administration, we are attempting to reconcile antitrust and regulatory policy. We have been quite successful, at least at the level of intention. Economic efficiency is the keystone of our interpretation and application of the antitrust laws, and it is the keystone of our regulatory reform efforts as well. President Reagan's Executive Order 12291 on regulation requires that all government rules be justified by economic evidence before they are issued. The Order's "cost-benefit" standard is often described as if it were some kind of accounting or arithmetic test. In fact, it in an economic test. We do not tote up columns of numbers and let the sum determine policy. We ask why a government rule is needed in the first place; why private markets are functioning improperly; why liability standards or voluntary industry standards are askew; why entrepreneurs are ignoring opportunities for gain identified by government bureaus; and whether a mandatory rule is likely to improve, on balance, on private arrangements.

We have not always been successful. Since the New Deal, the Agriculture Department has operated a regulatory program for certain varieties of produce under which growers get together, sometimes on a monthly basis, and decide how much of the harvest will "flow to market." USDA types up their decisions and sends them over to the *Federal Register* and the next day they are the law of the land. When the routing slip was changed to allow OMB to review these rules under the President' Executive Order, we were appropriately appalled. The Agriculture economists said not to worry; they had a cost-benefit analysis showing that, let's say, withholding a fifth of the almond crop was good economics. We said the analysis simply could not be right: enough was known about the workings of the price system to support a per se rule against such rules. At this point, the Congress put an end to the entire discussion, passing an appropriations rider excusing OMB from reviewing marketing order rules for the rest of this year.

The interesting antirust issues arise when economic controls such as these are successfully lifted. I think we have been almost entirely consistent in urging that: (1) in competitive markets, regulatory restrains on price, output and entry should be removed as promptly as circumstances permit; and (2) the antirust laws

should then be applied exactly as they are in unregulated markets.

We have worked to secure affirmative votes of the Motor Carrier Rate-Making Study Commission on removal of antitrust exemptions for the trucking industry (last summer), and for the bus industry (this week). The Administration is strongly urging the Interstate Commerce Commission to remove all motor carrier antitrust immunities.

We have resisted, so far successfully, efforts to transfer airline merger authority from the Justice Department to the Transportation Department, following abolition of the Civil Aeronautics Board next January.

We will soon issue our proposals for restructuring federal financial regulation, which would consolidate in the Department of Justice review of competition issues in merger agreements.

In these and other cases, the greatest barrier to good deregulation policies is bad antitrust policies. Increasingly, it is the issue of antitrust immunity that is paramount when the critical deregulation decisions are made. When regulated industries come to favor, or at least become reconciled to, removal of federal regulatory controls, they nevertheless resist being plunged into the unfamiliar waters of antitrust liability.

When deregulated firms argue simply that they have met from time immemorial to agree on their rates and should be permitted to continue this friendly practice, it has proven relatively easy to oppose their desires for continued antitrust immunity on the merits.

The tough issues, however, arise when traditional practices that have grown up under regulation are not clearly antitrust violations, or probably are violations according to prevailing but unsound antitrust doctrines.

These issues first arose in the case of joint-line rate-making in the deregulated transportation industries. We have made it as clear as we possibly can that there is no antirust issue whatsoever in the case of A-to-B / B-to-C joint-line rate-making among airlines, railroads, and motor carriers. Nevertheless, the carriers still can make a plausible argument that the treat is there—that through private litigation, or according to the antirust doctrines of a future Justice Department, or in the context of complex factual situations melding partially competing joint and single lines, they might be held liable for conduct we think is lawful and economically benign. Needless to say, when these arguments are presented in political forums, they are not finely distinguished from clear anticompetitive conduct such as industry-wide agreements on general rate increases.

The most recent episode in the antirust immunity drama concerns the Civil Aeronautics Board’s decisions in the Competitive Marketing Investigation, and

the closely-related issue of regulation airline computer reservation systems, as the CAB is proposing to do this week. A year ago, the CAB decided to remove the antirust immunity of the conference agreements under which the airlines and ticket agents agree to do business exclusively with each other, and set certain terms of service at the ticket marketing level. With the removal of antitrust immunity, the exclusive-dealing clauses will be dropped, and Sears or Ticketron or you or I will be free to negotiate with individual airlines to market their tickets. Bills have been introduced in both Houses to overturn the CAB decision and reinstate a decision of an administrative law judge under which exclusivity would remain and the *government* (no one knows exactly who) would regulate entry into the marketing of airline tickets.

The Administration is strongly opposed, but even in the Senate the bill has discouragingly wide support. In supporting the CAB's decision, we have made it clear that while there are aspects of the conference agreements, in particular the exclusive-dealing clauses, that are clear antitrust violations, there are other aspects, such as accreditation and service standards, that are not. To the extent the service standards are in fact good for consumers, they will survive the open entry and free competition antirust liability will bring. We also regard the problems in the airline computer reservation systems as artifacts of the current marketing restrictions—problems that would be cured much more promptly and effectively by open competition than an additional layer of government rules.

At the same time, it is clear that this is a market where some unilateral, vertical agreements, perhaps including pricing agreements, could be economically efficient. But there is no way we can guarantee, especially following the Supreme Court's *Monsanto*[1] decision, that some efficient arrangements currently undertaken in this industry would not be proscribed along with the exclusive-dealing arrangements. This one problem—the result of an errant antitrust doctrine—may mean that we end up getting legislation continuing to provide blanket antirust exemption for ticket marketing. If so, then the social costs of this doctrine will include the continuation of highly anticompetitive arrangements in a major industry, a new program of federal entry controls over the business of selling airline tickets, and a permanent new set of government rules specifying the design of software programs for computer reservation systems.

Faced with prospects such as these, the Administration's policy will remain that competitive markets should be deregulated and subject to the same general laws as those that were never saddled with government controls. At the same time, we will continue to urge that the antirust laws have been applied to expansively from an economic point of view, sometimes with highly perverse results. It may be small solace to the newly deregulated industries, but we hope that as deregulation continues, and the courts and Congress are confronted with a new array of fact situations illustrating the inefficiencies of certain antitrust doctrines, the prospects for general antirust reform will grow brighter.

[1] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464 (1984).