N.I.E.S.R STUDENTS' EDITION 2

The Antitrust Laws of the U.S.A.

A Study of Competition Enforced by Law

Third Edition

A. D. Neale and D. G. Goyder

THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA

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and D. G. GOYDER

WITH A FOREWORD BY

ABE FORTAS

THIRD EDITION

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE

LONDON NEW YORK NEW ROCHELLE

MELBOURNE SYDNEY

Published by the Press Syndicate of the University of Cambridge
The Pitt Building, Trumpington Street, Cambridge CB2 1RP
32 East 57th Street, New York, NY 10022, USA
296 Beaconsfield Parade, Middle Park, Melbourne 3206, Australia

First edition 1960
Second edition 1970
Reprinted 1974, 1976, 1977
Third edition 1980

Printed in the United States of America
Typeset by Photo Graphics, Inc., Baltimore, Maryland
Printed and bound by The Book Press, Brattleboro, Vermont

British Library Cataloguing in Publication Data

Neale, Alan Derrett
The antitrust laws of the United States of America. –
3rd ed. – (Economic and social studies; 19).
1. Antitrust law – United States
I. Goyder, D G II. Series
343'.73'072 KF1649 80-40661

ISBN 0 521 23569 3 hard covers
ISBN 0 521 28044 3 paperback

FOREWORD

The institution of antitrust in the United States has long been regarded as peculiarly a native product, like our popular music. Strangers to our culture, exposed to the gyrations and massive impact of antitrust, have generally responded with bewilderment and disbelief. At most, they have dimly perceived the shape and power of antitrust. They have seen it as a remarkable compound of law, economic philosophy, cultural commitment and social religion. But the mechanics and the dynamics of this peculiar institution have been largely beyond the ken of the foreigner.

A. D. Neale, a British civil servant, is the exception to this generality. He has mastered the strange language of this peculiar American institution, and he has penetrated to the heart of its meaning. His purpose in studying American antitrust was to write an account of its actual working for the benefit of British businessmen and lawyers, but his accomplishment surpasses this objective. He has set down a solid analysis and a highly perceptive evaluation of American antitrust from which Americans themselves will derive much profit.

I know of no other single volume which covers the entire field of antitrust so comprehensively and so well. In about 500 pages, Mr Neale sharply analyses the case-law and the statutes in each area of antitrust. He has an instinct for the jugular of a case. He senses the difference between a ripple and a current in the vast stream of the law, and he is able, with remarkable sensitivity, to trace the particulars of antitrust development to their abiding source: to America's 'distrust of all sources of unchecked power'; to our ambivalent attitude towards 'big business', which he aptly sums up as our 'romantic view of the achievements and efficiency of large industrial organizations', coupled with our 'suspicious view of their power'.

Antitrust in the United States is not, in the conventional sense, a set of laws by which men may guide their conduct. It is rather a general, sometimes conflicting, statement of articles of faith and economic philosophy, which takes specific form as the courts and governmental agencies apply its generalities to the facts of individual cases in the economic and ideological setting of the time. It is for this reason that

both knowledge of past decisions and a sense of the animating theory of antitrust are essential to understanding. In Mr Neale's short book, American as well as British businessmen, lawyers and economists will find a sound guide through the wilderness of antitrust precedents, and a perceptive index to its philosophy.

Washington, November 1959 ABE FORTAS

PREFACE TO THE THIRD EDITION

It is encouraging after twenty years to find that this book continues to have value on both sides of the Atlantic as a single-volume compendium of the subject for the not-too-specialized reader. It can continue to be of use only if kept up-to-date. Since the second edition was prepared in the late 1960s there have been some important developments in the law on mergers and acquisitions under section 7 of the Clayton Act, some interesting cases involving non-American companies and illustrating the vexed question of the legitimate reach of United States jurisdiction, and an exponential growth in treble-damage actions among other additions to the case-law of which the reader will need to be aware. On this occasion, therefore, some sections have been re-written quite extensively, with some old material cut to make way for new and, as we hope, keep the book comprehensive without making it significantly longer.

Over the same period there has been a rapid development in Europe in the case-law under the anti-monopoly provisions of the Treaty of Rome. While it was not practical for us to analyse these cases at the length or in the depth accorded to the American cases, it seemed to us that this development had gone to a point where a comparative chapter, illustrating the similarities and the differences between the two bodies of law, could be of value to the general reader. This has led us to redesign Part II of the book, shortening the chapter which assesses the United States antitrust system and following it with a completely new chapter illustrating the European experience and leading to some conclusions from the comparison of the two systems about achieving the various possible objectives of an anti-monopoly policy.

For this edition an improved index of cases with citations has been prepared and we are indebted for this to Mr Wayne Koonce who has also made helpful comments on the text. As on previous occasions the officers of the National Institute of Economic and Social Research have provided us with all necessary support and our special thanks are due to Miss Gillian Little who prepared the text for publication.

NATIONAL INSTITUTE OF ECONOMIC AND SOCIAL RESEARCH
December 1979

A.D.N.
D.G.G.

PREFACE TO THE FIRST EDITION

I believe there is room on this side of the Atlantic for a book about the antitrust laws of the United States. Increased activity by United Kingdom business in the United States market and increased contacts with American firms have drawn more British companies into uncomfortable proximity with antitrust litigation, and the beginnings of a corpus of case-law under the Restrictive Trade Practices Act of 1956 may make it useful and interesting to have available the means for comparing the United Kingdom decisions, as they appear, with the established lines of antitrust doctrine.

The opportunity to enlarge on an initial interest in this topic came to me as a result of the privilege of being awarded a Commonwealth Fund Fellowship in 1952, and I must record my debt to the officers of the Fund for their help in facilitating my programme of study in the United States and for many personal kindnesses.

While I was in Washington I was kindly given working space in the Federal Trade Commission and received every assistance from the Commission's Librarian. I was greatly helped and encouraged by the friendly interest and willingness to discuss their work of officials both in the Federal Trade Commission and the Department of Justice, who are too numerous to be acknowledged individually. I must, however, record my special indebtedness to Professor Corwin D. Edwards, at that time head of the Bureau of Industrial Economics in the Commission, who guided me at the outset and has subsequently read substantial parts of the manuscript and made many illuminating comments and corrections; and to Mr Sigmund Timberg, formerly a Special Assistant to the Attorney General in the Antitrust Division of the Department of Justice, who has, with the greatest kindness and tolerance, read nearly all the draft and suggested many improvements. I must also thank Mr George E. Frost of Chicago, who kindly read and gave me good advice about the chapter on the patent cases. For whatever errors and misjudgments remain, I am, of course, solely responsible.

The writing of the book would not have been possible without the generous help of my employers, the Board of Trade, in allowing me to be seconded to the National Institute of Economic and Social Research for a period sufficient to enable the bulk of the drafting to be done.

This in turn was made possible by a grant received from the Government under the Conditional Aid Scheme for the use of counterpart funds derived from United States economic aid which I acknowledge with gratitude. As a public servant I must make it clear that all the judgments expressed in the book are entirely personal and in no way represent the views of the Board of Trade or of H.M. Government generally.

The National Institute of Economic and Social Research made available to me their facilities, and the officers of the Institute have shown me much kindness, besides relieving me of the administrative chores of publication. I must mention my particular gratitude to Miss Alison Clarke, who took charge so efficiently of the tasks of preparing the manuscript and reading the proofs, and to Miss Janet Telfer, who did the bulk of the typing.

NATIONAL INSTITUTE OF ECONOMIC AND SOCIAL RESEARCH

A.D.N.

April 1960

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INTRODUCTION

BACKGROUND AND DEFINITIONS: THE AIM AND SCOPE OF ANTITRUST

1. *Object of the study*

The antitrust laws of the United States of America are unique in scope of content and rigour of enforcement. In the period since the Second World War many industrial countries – often with American encouragement – have adopted legislation dealing with monopolies and restrictive business agreements, and have begun to develop a body of case-law under their statutes. In the European Economic Community a clear commitment to the protection of the competitive process is embodied in Articles 85–90 of the Treaty of Rome, and considerable progress has been made in establishing both substantive legal principles and administrative machinery to implement these Articles. But it is still true that in no other country is there such an elaborate and comprehensive body of law on the subject as has developed in the United States in the ninety years since the Sherman Act was passed.

It has been widely conceded that over this same period the United States has been pre-eminent in the power and drive of her industry and commerce. It is natural, therefore, to infer some connection between industrial success and the existence of this special body of law. Connection is, of course, more than conjunction: *post hoc* is not always *propter hoc*. Even the most ardent of American 'trust busters' would hardly claim that these laws are the sole or even the main cause of their country's high place in economic achievement. But many well-qualified observers in the United States do, in fact, believe that the antitrust laws make an important contribution to economic health. Given the desire in most countries to improve industrial performance, this is at least a good reason for getting to know something about the antitrust laws and the way they work.

The measures taken in Britain and elsewhere in the European Economic Community in the postwar period have indeed reflected a consensus of opinion that, notwithstanding the need for large-scale production, private arrangements which suppress competition may go

too far and require to be checked.[1] Competition between firms is accounted a principal virtue of private economic activity, operating as a stimulus to improved methods and as a safeguard against indifference to the wishes of consumers. It would seem inconsistent, therefore, to allow competition to be freely impaired, even eliminated, by private agreements between firms or by the acquisition of private monopoly power.

Even if it is accepted that there may be situations in which, for example, rationalization of production in larger units should be promoted and competition may justifiably be lessened or restrained, it seems questionable whether the job of deciding which these situations are and what form of restraint to adopt should be left to those upon whom competition is expected to exercise a salutary influence. Yet all this raises large questions. Who else is fitted to decide the proper occasions for limiting competition? By what criteria are these decisions to be made? By what legal or administrative processes are they to be enforced?

The answers to these questions being worked out under British and other national legislation and, on the European scene, through the regulations of the European Commission and the decisions of the European Court are bound to differ from those which have been adopted across the Atlantic, reflecting important differences between European and United States political and economic philosophy and circumstances. But the existence in the United States of a well-established system of law which purports to be a comprehensive and successful solution of the problem still claims attention.

Some in Europe would see advantages in moving closer towards the type of blanket prohibition embodied in the Sherman Act; others would believe strongly that such a policy would be disastrous here. Yet others would express more cynical views: how can these laws make much difference when great multinational corporations like General Motors, Exxon, International Business Machines, du Pont and others appear to enjoy without hindrance assets greater than those of many a sovereign state? Which view of the matter is to be believed? The object of this

[1] In the United Kingdom jurisdiction over such arrangements is in the hands of the Director General of Fair Trading, who has general responsibility for the maintenance of competition under the terms of: (a) the Fair Trading Act (1973) under which, *inter alia*, specified practices, mergers or monopoly situations can be referred to the Monopolies and Mergers Commission; and (b) the Restrictive Trade Practices Act and Resale Prices Act (1976), consolidating measures under which restrictive agreements have to be registered with the Director General, who can then bring them before the Restrictive Practices Court for a ruling on their validity. There is a statutory presumption that such agreements are contrary to the public interest unless they can be shown to justify exemption on the grounds of being able to pass through certain limited 'gateways'.