THE REMEDIES AT LAW: The Competitive Approach

THE COMPETITIVE APPROACH offers four fundamental theoretical advantages: prices are set at an economically desirable level, the level needed to bring forth the supply required to meet the existing level of demand; there is a constant downward pressure on costs, as less efficient producers must either modernize to meet the competition of their lower-cost rivals or go out of business; a constant stimulus is provided for the discovery and development of new products and processes; and resources automatically move out of industries where they have become redundant and into those where they are needed. For the regulatory and ownership approaches, attaining a "fair and equitable" price is within the area of possibility; the other three are difficult or impossible of attainment.

As its extraordinary efforts to control the market attest, petroleum is very definitely not one of those industries from which competition has been precluded by the requirements of technology or any other inherent barrier to entry. Despite the diminishing domestic supply, the operations of OPEC, and the majors' control over refined products, the potential for competition has been heightened by a number of recent developments. For one thing, the nationalization of concessions and the growth of "participation" arrangements has placed the international majors in what for them is the novel role of buyers. OPEC, by its successful drive for participation and nationalization, has created a fissure in the mutuality of interests inherent in the old "equity" arrangements, opening up a Pandora's box of possible conflict with oligopsonistic buyers. As long as refined product prices continue to be controlled by the majors, the prospects for such competition seem remote, even though a lower price for crude would widen profit margins, giving rise to at least some pressure for lower input prices. But the principal source of competitive pressures is the extraordinary margin between price and costs—a margin that is probably exceeded by no other major industry, except possibly drugs. Although the margin is at its peak...

J. M. Blair, *The Control of Oil*  
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in foreign crude, the domestic majors have raised the umbrella of refined product prices to such heights as to yield generous profits at considerably lower prices. The temptation to undercut will be particularly strong for those lesser majors who are well supplied with their own captive crude as well as for independent refiners able to obtain domestic oil. The objective of public policy, therefore, should be to take advantage of the industry's potential for competition, such as it is, by a sophisticated use of the three thrusts of antitrust: against collusion, against monopolistic acts and practices, and against existing concentration.

While the objectives of antitrust are, admittedly, long-range in character, arising from the maintenance of a free, open, and competitive economy, near-term benefits can sometimes be realized by directing action against an industry's Achilles heel, which in petroleum is the control of crude. Specifically, the thrust of the law against collusion should be directed toward ending the concerted restriction of crude production; the thrust against monopolistic practices, toward forcing the majors to share more of their crude with independent refiners; and the thrust against existing concentration, toward breaking up the majors' vertically integrated structures. Only the last would necessitate new legislation. The first could probably be attained under existing law, and so also might the second, though new legislation would be preferable.

THE CONCERTED RESTRICTION OF PRODUCTION

If during 1950–72 the international majors had not been able to closely gear foreign production to a predetermined industry growth rate, surpluses of "distressed oil" would inevitably have developed, resulting in lower prices to buyers everywhere, including the United States. The remarkable success of the international majors in so precisely limiting output over so long a period raises the question, certainly of more than routine interest to the Justice Department and the Federal Trade Commission, of whether it was achieved through at least an implied "agreement, arrangement, or understanding" in violation of Section 1 of the Sherman Act, or a "planned common course of action" in violation of Section 5 of the Federal Trade Commission Act.

The illegality of collusive restrictions of production has been well established. As early as 1902, the Circuit Court of Appeals in Gibbs vs. McNeeley held illegal a program designed to fix prices for red cedar shingles by shutting down mills and otherwise curtailing output whenever supply exceeded demand. The court stated: