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LEGAL ISSUES OF MARKET DOMINANCE

A COMPARATIVE STUDY

by

HELMUT GOTTLIEB

A Thesis Submitted to the Graduate Faculty
of the University of Georgia in Partial Fulfillment
of the
Requirements for the Degree

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A COMPARATIVE STUDY

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Introduction

In the 18th century when economics began to develop, most economists suggested a laissez faire economy. The belief was, as Adam Smith pointed out, that the economy was self-regulating through the operation of an "invisible hand", that individuals would work toward their own self-interest and with that also maximize the welfare of others.

This is also the basic idea of the free market economy under which we understand an economic system that dispenses with any official control and instead entrusts control of the interplay of economic forces to a mechanism -the market price system- which discharges its control functions automatically. In reality it turned out that a free market economy constitutes a system that although incompatible with economic power, engenders economic power and cannot get rid of it of its own volition. Consequently special laws had to be enacted either to liberate the free market economy from economic power or to place the holders of economic power under the control of the state and thus prevent them from abusing their dominant position. "Unrestrained interaction of competitive forces" is still supposed to result in "the best allocation of the economic resources, the lowest

prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of the democratic political and social institutions" (1). Today it is a fact that any nation which operates a free market economy, also has an antitrust legislation.

In the United States doctrines opposing monopolies and restrictive trade practices were originally the exclusive developments of state courts and varied from jurisdiction to jurisdiction. In the second half of the 19th century the pattern of industrial organization in America changed rapidly. Large parts of trade and industry came under the control of industrial "trusts". The fear of "undue limitation on competitive conditions" (2) finally led to the enactment of the Sherman Act in 1890 (3). This Act was intended as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade" (4). It basically supplemented diverse state rules, made violators subject to criminal prosecution and intensified private enforcement by providing treble damages to persons injured by violations of the Act.

In 1914, the Clayton Act (5) was passed by Congress which improved the availability of effective remedies and quoted certain practices which were supposed to be anticompetitive. Section 2 of the Clayton Act was amended in 1936 by the Robinson-Patman Act (6). With the Federal Trade Commmission Act (7), broad authority was delegated to an administrative

agency, the Federal Trade Commission, the authority to enforce Section 5 of the Act prohibiting "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce (amended in 1975) and the authority to investigate and report on economic problems and corporate activity. In 1974 the Antitrust Procedures and Penalties Act (8) reformed the Justice Department's consent decree procedures and raised criminal penalties for violations of the antitrust laws.

In Austria the first systematic regulation in the field of antitrust was intoduced in 1951 with the Cartel Act which also included provisions concerning monopolies, oligopolies and mergers etc. The legislator adopted a middle course between the two extremes of furthering or prohibiting cartel formation. Fundamental changes were brought about by the 3rd Cartel Amending Act in 1959. Besides that, the Act against Unfair Competition of 1923 (9) and Article 879 of the General Civil Code of Austria (10) were and are still used by the courts as instruments to attack anticompetitive practices. The present Cartel Act (11) in force was passed in 1972 by Parliament to adjust the Austrian antitrust legislation to Article 85/1 and Article 86 of the Rome Treaty (12), and thus to implement the Agreement between the European Economic Community and the Republic of Austria from January 1st, 1973. In order to secure the undisturbed implementation, Art.23/1 of the Agreement lays down that the following are incompatible with the proper functioning of

the Agreement in so far as they may effect trade between the Community and Austria:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods.

(ii) abuse of one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof.

(iii) any public aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods.

From the beginning the European Economic Community pointed out that the emphasis of the interpretation of the Agreement would be on the Community's side (13). This explains also the strong influence of European Community antitrust developments on the Austrian practice, and the inclusion of Commission and Court of Justice of the European Communities viewpoints to the examined problems in the thesis which mainly deals with the Austrian and U.S. legislation.

Chapter I of the study will focus on the current approach to the delimitation of the relevant market, the determination of market concentration and the legal requirements for a challenge of market dominating

enterprises. In Chapter II because of the interdependency between monopoly and antimerger policy the present legal situation of mergers shall be analyzed. Finally the theories of the problem of the jurisdictional reach of the antitrust laws will be considered (Chapter III).

Notes to Introduction

(1) Nothern Pacific Railway Co. v. United States, 356 U.S. 1,4 (1968)

(2) see Standard Oil Co. v. United States, 221 U.S. 1, 51-59 (1911)

(3) 15 U.S.C. paras. 1-7

(4) Northern Pacific, supra note 1, at 4

(5) 15 U.S.C. paras. 12-17

(6) 15 U.S.C. paras. 13, 13a, 13b

(7) 15 U.S.C. paras. 41-58

(8) 15 U.S.C. para. 16

(9) "Gesetz gegen den unlauteren Wettbewerb", UWG 1923, as amended in 1971, BGBl 1971/74.

(10) Article 879/1 of the General Civil Code of Austria:

"A contract which violates a legal prohibition or public morality (gute Sitten) is null and void".

(11) "Gesetz mit dem Bestimmungen ueber Kartelle und Vorschriften zur Erhaltung der Wettbewerbsfreiheit erlassen werden". KartG., BGBl.1972/460

All references in the study under the term "Cartel Act" will be made to the above mentioned code.

(12) The Annexes to the verbatim report of the National Assembly of the 13th legislative session point out that very clearly.
473 Blg. NR 13.GP, p.23 et seq.

(13) see Collection of the Agreements concluded by the European Communties, Vol.1, Bilateral agreements, EEC-Europe, 1958-1972, p.143; "Declaration by the European Economic Community concerning Art.23/1 of the Agreement

Chapter 2: Dominant Market Position

A. General Remarks

Originally the fourth amendment to the Cartel Act of 1951 embodied provisions regulating market-dominating enterprises by making them subject to notification and registration. The new 1972 Cartel Act contains a similar rule but linked with a supervision of abuse practices of market dominating enterprises. This has its origin in the implementation of the Agreement between Austria and the European Economic Community. The criteria are very similar to Art.86 Treaty of Rome.

A general clause covers all undertakings which have no competitors or are not subject to any substantial competition (Sec.40/1/1)(1). In extending and specifying this provision, Sec.40/1/2 (2) connects market domination with certain requirements of market structure and shares of the market. If a participating enterprise is a dependent or dominating undertaking, the enterprises thus related are considered a single enterprise for the purpose of computing market shares (3). The Act thus considers that the

existence of legally independent undertakings might, from an economic viewpoint, be different.

The main reason for the introduction of the registration duties and the supervision of abuse practices upon market dominating enterprises was the close connection to competition restraining agreements.

The monopolist is not exposed to competition, neither actual nor potential, and the counterpart in the market is wholly dependent for the goods and services concerned (4). Legally equal to monopolies are undertakings which "have the power to act independently which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power is not necessarily derived from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners, it is enough that as a whole they be strong enough to ensure to those undertakings an overall independence of behavior, even if there are differences in intensity in their influence in the different partial markets" (5). The key element is the power to act independently.

Commission and Court of Justice of the European Communities for example introduced the term of 'effective' competition where the conduct of an enterprise is determined by competition and thus consider an enterprise as being in a dominant position if it is able to avoid 'effective' competition (6). This was also one of the factors the court focused on in the recent Michelin decision: "A dominant position under Art.86 Treaty of Rome means a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers" (7).

Basically the reason for the lack of competition is without any relevance. But, as the Coca Cola case (8) shows, the owner of a trade mark, copyright or patent does not have a monopoly within the meaning of the Cartel Act as long as he doesn't go beyond the limits of the Trade Mark Protection Act (9) and acts in a way which can be seen as inherent to the trade mark.

B. Definition of Market Dominating Enterprises in the Cartel Act

I) Sec.40 Cartel Act and Art.86 Treaty of Rome

An enterprise is market dominating within the meaning of the Federal Act if:

1. in respect of certain goods or services, it is exposed to no competition or to insignificant competition; or
2. if its share of the total domestic market exeeds 5%, and:
   a) its entire domestic market is supplied by no more than two or three enterprises, or
   b) it is among the four largest enterprises, which conjointly account for at least 80% of the total domestic market.

The relevant provision of the Treaty of Rome of the European Economic Community (Art.86) states that any improper exploitation by one or more undertakings of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall be prohibited, insofar as trade between Member States could be affected by it. The following practices, in particular, shall be deemed to amount to improper exploitation:

a) the direct or indirect imposition of any unfair purchase

or selling prices or of any other unfair trading conditions;

b) the limitation of production, markets or technical development to the prejudice of consumers;

c) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a commercial disadvantage;

d) making the conclusion of a contract subject to the acceptance by the other party of the contract of additional obligations which by their nature or according to commercial practice have no connection with the subject of such contract.

The Austrian as well as the EEC (10) provisions distinguish two kinds of dominance, one that is based on a monopoly by one enterprise and another one that is based on an oligopoly by two or more undertakings.

II) Market Domination through Oligopolies

Under the Austrian regulation (Sec.40/1/2) a market share of at least 5% on the domestic market is required for an oligopolistic position. Two variants restrict this rule:

Section 40/1/2a lays down that the domestic market has to be supplied by only two or three enterprises which means that two enterprises, each having a 50% share of the

market, or three enterprises each with between 30% and 40% shares of the market, are considered as being market dominating ipso iure. The oligopolistic interdependence is very distinct because of the narrowness of the oligopoly and the tendency to a collective domination of the market. But this subparagraph also covers market structures where an enterprise with an outstanding market share of 80% and more compets with two other undertakings with negligible shares (e.g. 6% or 7%).

Under Section 40/1/2b a dominant position is established if an undertaking is one of the four biggest suppliers (or users) on the domestic market with a combined share of 80% or more. A minimum share of 5% is not required. A participant with 71% market share is also covered by the provision, if the following enterprises only have 4%.

III) Market Dominance because of the Lack of Substantial Competition (Monopoly or Partial Monopoly)

Section 40/1/1 states that an enterprise is considered to dominate the market, if there is no or no substantial competition for a particular type of goods or commercial services. Basically this provision is formulated as a general clause intended to cover cases not subject to the other regulations. In addition to that, Sec.40/1/1 is applicable to regional partial markets also. The wording is

very similar to Sec.22/1/1 of the German Law Against Restraints of Competition (11) as well as to the criteria of Art.86 Treaty of Rome.

An enterprise has no competition if it is a monopolist and offers a particular product or service exclusively. This has to be proved in reference to the delimitation of the relevant market. The criterion 'no substantial' competition was at first especially aimed to make cases of price leadership in oligopolies subject to the Cartel Act (12); cases in which price competition didn't regulate supply and demand any more and which should therefore be covered by the Act without regard to other aspects.

But price competition is also jeopardized if an undertaking with considerable market share doesn't change its high price policy on the basis of special preferences of buyers (13). After all market dominance often results from the ability to control production and marketing for a substantial part of a commodity. In the question of the delimitation of the terms 'no substantial' or 'no' competition, the Austrian courts and the scholars follow mainly the interpretation of the EEC authorities which is due to the similarity of the provisions and the regulations in the Agreement between Austria and the EEC (Art.23).

IV) The Importance of Market Shares for the Determination of Market Dominance

It has turned out that the market share of an enterprise is the most important and most often used criterion for determining the term 'dominance' by the courts. Besides that especially the turnover, advantages in technical and commercial know-how, ability to innovation, advantages in access to supply and outlet markets, the position and market power of the competitors, the conduct of the entrepreneur and the barriers of access to the market were taken into consideration (14).

Relatively high shares of the market are supposed to be strong indicators for market dominance but are not necessarily decisive alone. For the determination of the market structure, only the shares of enterprises on the same economic level can be considered. It might well be that one and the same undertaking participates in two or more markets. Sole importers and producers of competing products are doing business on the same economis level whereas this has to be denied for wholesalers and retailers. The work of agents is attributed to the business of their prinipals. But since there is no absolute size of share beyond which a market position can be described as being 'dominant', the results are not uniform.

In United Brand (15) the Court of Justice found a share of 40% to 45% sufficient enough to have won a market

position which could be described as being 'dominant'. But the court also stated that this percentage would not permit the conclusion that the enterprise automatically controlled the market: control must be determined with regard to the strength and number of competitors. It is necessary that on the whole of the relevant market the said percentage represents grosso modo a share several times greater than that of its competitors. However an elimination of all opportunity for competition in order to be in a dominant position is not required. With this judgement the European Court basically acknowledged the market share as the main criterion for the delimitation of the term 'dominance' but asked at the same time for additional aspects indicating the strong market position.

This decision has been confirmed most recently in the Michelin case in which the court approved the reasoning of the Commission that the market share of Michelin on the market in new replacement tires for heavy vehicles of 57 to 65 percent compared with the market shares of Michelin's main competitors amounting to 4 to 8 percent would constitute a valid indication of Michelin's preponderant strength in relation to its competitors (16).

In another case the Commission of the European Communities (17) attributed the dominant position of an enterprise on the vitamin market to the fact that it had for each vitamin a considerable market share ranging from 95% for vitamin B6 and H to 47% for vitamin A whereas the second

producer had only about half this share. Besides that the enterprise in question produced a far wider range of vitamins than its competitors which was very important since the requirements of many users extended to several groups of vitamins and the respective enterprise was able to employ a sales and pricing strategy which was far less dependent on the conditions of competition in each market than that of other manufacturers. All that put the undertaking into a position in which it enjoyed such a complete freedom of action in the relevant markets enabling it to impede effective competition within the common market that it had a dominant position in such markets. As important indication for the leading position the Commission also took into consideration the fact that the enterprise in question was the world's largest producer of all vitamins, that the firm had technological and commercial advantages not possessed by its competitors.

The court in the Hoffmann- La Roche judgement (18) confirmed once more the opinion in the foregoing decisions concerning the criteria for market dominance by stating that the existence of a dominant position may derive from several factors which, taken seperately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares. Nevertheless a substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the

structure of these markets, especially as far as production, supply and demand are concerned.

Shares of more than 80% are so large that they are in themselves evidence of a dominant position (19). In this case no other aspects have to be proved. However, a certain size of market share beyond which an enterprise can be qualified as being dominant has not been acknowledged by the Commission and the Court of Justice.

On the other hand, the Court of Justice observed that shares of only 5% or 10% are not sufficient enough for a dominant position unless exceptional circumstances obtain (20). In such cases number and importance of competitors within the common market and outside, as well as the intensity of competition between the enterprises may have considerable weight.

The whole volume of the market, and with that the prerequisite for the distribution of the market shares, can be measured by value or quantity. There is no general rule for the application which favors one of the possibilities: The Commission of the European Communities based the decision in the Continental Can case (21) on the criterion of value and in the Chiquita judgement (22) on quantity. A calculation on the basis of value might give a distorted impression of the real market structure in cases where the price policy of an enterprise doesn't reflect its economic strength. This method favors enterprises charging prices below average and disadvantages those, selling at a high

price level by attributing them a higher share although its economic-financial situation might be weak.

V) The Problem of the Delimitation of the Relevant Product Market

The concept of the relevant product market is an idea which has been developed especially in American antitrust case-law, not in connection with the concept of a dominant position but mainly in connection with Sec.2 of the Sherman Act and Sec.7 of the Clayton Act which prohibit the monopolization or attempted monopolization of a section of trade and also mergers leading to a sustantial lessening of competition on the danger of the formation of a monopoly "in any line of commerce in any section of the country". Owing to the nature of the danger to be averted, it is indeed essential in order to establish whether there is a danger of monopoly to define the product market in question. Then the relevant product market is an element of the conduct to be resisted. In the application of Art.86 Treaty of Rome to mergers the concept may fulfil a similar function by enabling a risk of monopoly to be identified. In this regard it can also be referred to the court's judgement in the Continental Can case (23).

Basically for the application of Sec.40 et seq. Cartel Act and Art.86 Treaty of Rome it is not required to

determine the relevant product market; it might implicitly be required by the nature of the alleged abuse, especially where there is a danger of monopoly. In this respect it is an element of the concept of 'abuse'. And after all it may be an important tool for determining the existence of a dominant position of one or more undertakings. But this function doesn't have the character of an independent element of prohibition which must be established every time, Sec.40 et seq. or Art.86 are applied. Since Sec.40 et seq. Cartel Act and Art.86 Treaty of Rome don't prohibit a dominant position per se but only an abuse of a dominant position, the concept of the relevant product market is also indirectly dependent on the alleged abuse. The link between the two emerges plainly in the general definitions given by the Court of Justice in Hoffmann-La Roche (24) of the concepts of dominant position (last subparagraph of paragraph 38) and abuse (last subparagraph of paragraph 91) (25).

Sec.40/1/2 itself doesn't contain a definition or rule for the delimitation of the relevant market. But there is no doubt that the criteria of Sec.40/1/1 and Sec.41 (26) apply which, in contrast to Sec.36d Cartel Act 1951, where the order of the customs tariffs was relevant, focus on the qualification of commodities and services "which under the given market conditions, supply the same demand". The Explanatory Remarks on the Cartel Bill to Sec.41 mention in reference to the delimitation of the relevant market,

differences in the way of delivery, the terms of delivery, packaging, service and trademark, and point out that these differences wouldn't change the main features which are important for the satisfaction of demand. Since the Act delimits the market by the concept of 'ability of commodities or services to meet the same demand' the method of interchangeability from the viewpoint of the requiring person is decisive. And interchangeability is dependent on the features, price and intended purpose. The courts already accepted clearly the relevance of substitutability (28); so in a case where the Cartel Court argued with price differences between normal and electric toothbrushes for the adoption of seperate markets for these products (29). The same criterion was used for the distinction of two markets for razors with razor-blades and electric shavers (30).

The other theory which focuses on the physical-technical similarity of different products which embraces not identical commodities under an 'institutional group-concept' to the same functional market and where the combination is determined by the production process, didn't find the acknowledgement of the legislator and the courts.

The method of substitutability leads to the very substantial question to what extent functional interchangeability is required. A 'certain commodity' in the sense of Sec.40 et seq. Cartel Act asks for essential features which distinguish a product in meeting the demand from other ones (31). One point is the intended purpose, not

only the actual utilization but especially the possibilities of usage (32). Related to a special commodity the market and the market shares have to be defined for each possibility of usage. The products belonging to the same relevant market don't have to be useable for the same purpose completely, without any difference at all (33). After all it is certainly possible that the seller of a commodity dominates the market for the possibility of usage 'A', but not for'B' and 'C' in cases where a product meets two or more demands. In the Continental Can case (34) the Court of Justice reasoned that one can not differentiate among fish cans, meat cans, and others, like vegetable cans, based on the contents which later fill them, if the cans themselves are not different. They must have special features which make them suiteable only for a specific type of contents. Special features which make one product more attractive to consumers can be an indication for an own market, especially if this commodity excludes the others, but not necessarily. On the other hand if consumers use two or more products for the same purpose the existence of the same relevant market is very likely. But in this case the use must be more than occasional and not of minor significance, as the Commission of the European Communities pointed out (35).

Like the Austrian courts, the Commission and Court of Justice on principle delimitate the relevant product market by the criterion of interchangeability of commodities from the viewpoint of the consumers or more general, from the

viewpoint of the counterpart on the market. The issue of delimitation of the relevant market and of interchangeability of products and its extent had already often been subject to discussion before the courts and the contours of rules become visible.

Part of the market are all products which the consumer considers equal as to quality, price and use (36). This may include that under special cirumstances spare parts of a product establish an own market. The Court of Justice found that this would be the case on the level of independent undertakings which specialize in the maintenance and repair of cash registers, in the reconditioning and the sale of used machines and the renting out of machines.

For the market of the supplier it is decisive that there is a seperate distinct demand. Here it was obvious that these undertakings required spare parts for their various activities and it turned out that there was a specific demand for the applicant's spare parts since those parts were not interchangeable with those of other models.

If a product is only theoretically interchangeable with others or a change of the price or quantity doesn't cause perceptible changes in the prices or the available quantities of other commodities, the Court of Justice and the Commission deny the belonging to a certain market.

In order to be regarded as constituting a distinct market, the products in question must be individualized, not only by the mere fact that they are used for packaging

certain products, but by particular characteristics of production which make them specifically suitable for this purpose. Therefore, the Court of Justice stated, a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by simple adaptation, with sufficient strength to create a serious counterweight (37).

If a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may, according to the circumstances, belong to seperate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition. But this finding does not justify the conclusion that such a product together with all the other products which can replace it as far as concerns the various uses to which it may be put and with which it may compete, forms one market.

The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned (38).

One method of measuring the degree of exchangeability is the so-called cross-price-elasticity which has already been applied by Court of Justice and by the Commission in several cases. "The degree of 'substitutability' is determined by the requirements expressed by demand and may be indicated by the cross-elasticity of demand in relation to the price" (39).

Generally said this concept measures the influence, a change in price of one product has on the demand of other products. The higher the differences, the more interchangeable the products are and the more likely a common market is. Although Court and Commission always ask for a 'significant' extent of interchangeability (40) in order to consider products belonging to a certain market, the actual necessary degree of interchangeability has never been defined exactly and will have to be proved for each case seperately.

Although the criterion of 'substituteability' has found broad recognition for the delimitation of the relevant market, the court argued in the Continental Can case under the aspect of 'functional interchangeability', and refered to the 'special characteristics' of production by stating: "In order to be regarded as constituting a distinct market, the products in question must be individualized, not only by the mere fact, that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose"

(41). On this basis, a dominant position on the market for light metal containers for canned meats and fish is not shown so long as it has not been proved that competitors in other areas of the market for light metal containers cannot, by making a simple adjustment, step into that market with sufficient strength to provide a serious counterbalance. Therefore special markets for meat and fish cans are only acknowledged by the court if it is impossible for the manufacturers of light metal packaging materials to start competing with some strength in the meat and fish can business by simple production changes.

The reference to the so-called "physico-technical industry concept", placing all producers of technically or physically similar commodities in one group, leads to unsatisfactory results. Nevertheless the term 'simple adjustment in production' may be seen as an indication for a potential interchangeability of products. The easier adjustments in production are feasible the higher the degree of interchangeability and the higher the probability of a common market for the products in question.

Also important is the viewpoint of the Court of Justice and the Commission in the Grundig cases (42) where it was held that Grundig products were so highly individualized by their trademark that they found an own market. It was pointed out that sole distribution agreements especially, which devide up the market for a special product among certain enterprises and prohibit the export into another

territory, normally limit the relevant product market to the commodities with this brand (43). This means that the relevant market includes the goods of the same manufacturer which seems to be a doubtful result (44). However, the defense of intra-brand competition in the Coca-Cola and Grundig decisions by the Austrian Cartel Court (45) expresses the application of the same principle.

C. The Concept of Abuse

I) When is the Conduct of a Dominant Enterprise Deemed 'Abusive'?

Austrian as well as EEC law doesn't challenge a dominant position on the market as such but only the 'abuse' of a dominant position.

The concept of abuse in Sec.46 of the Cartel Act corresponds almost entirely to Art.86 Treaty of Rome. Neither Sec.46 nor Art.86 define the term 'abuse', but give only an indication of what is considered as being abusive by a not exhaustive enumeration of prohibited abuses: The abuse may, in particualr, consist in:

1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.
2) limiting production, markets or technical development to the prejudice of consumers.

3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Austrian courts always refer in the interpretation of Sec.46 to the experience with Art.86 in the European Communities because of the almost identical regulations. This is especially important since the practice of application of this Section by the Austrian courts is very limited up to now (46). Since the incorporation of the supervision of abusive practices of market dominating enterprises into the Cartel Act, the practice of the courts and the Commission has elaborated and added other possible abuses to the enumeration in Art.86:

a) price cutting aimed at eliminating a competitor lacking the financial resources to support a long period of sales below cost price.

b) similar price cutting to force a merger on an unwilling victim, or a merger on unfavourable terms.

c) and finally refusal to supply in some concerns (47).

Basically there are a number of reasons under which an entrepreneur is entitled to refuse to supply another undertaking, if for example, the counterpart has a doubtful financial standing or an entrepreneur might already

have established a distributor for his products in a certain area in which trade is limited to a degree that two distributors cannot succeed. Nevertheless, there may be situations in which refusal to supply on the part of the dominant firm constitutes abuse.

If an enterprise X is the dominant supplier of raw materials which are manufactured by company Y, owned by X, X may refuse to supply Y's competitors on the market. If there are no other valid grounds for the refusal, the abusive character of this conduct is very likely.

The legislators of Sec.46 and Art.86 failed to define the term 'abuse' and the expression 'abuse of a dominant position' in paragraph 1 of the norms.

Before the Court of Justice in the Continental Can decision (48) formulated its position, the interpreters of Art.86/1 focused on two different theories.

Professor Mestmaeker (49) considered it mandatory that Art.86 should be considered as one of the instruments to further the goal of undistorted competition.

Art.86 ought be made to serve the protection of both competition and competitors, next to the protection of consumers which does directly follow from the text of Art.86. Art.3f, 85 and 86 have to be seen as part of one system and Art.86 cannot be interpreted in an isolated manner (50). If we want to protect consumers effectively without being forced to fall back on regulation of industry, it is not avoidable to protect the competitive structure

itself; but in order to protect competition, it is necessary to protect competitors.

A narrower viewpoint was taken by Professor Joliet who distinguished two methods of dealing with market power. In his opinion, competitive structures should be preserved by prohibiting the creation, maintenance and expansion of market power or by governmental control and regulation of its exercise. Art.86 would only regulate the exercise of monopolistic market power vis-a-vis consumers but not cover exclusionary practices directed against competitors.

Finally the Court of Justice in the Continental Can decision followed Mestmaeker's broader view and the theory of the systematic interpretation of Art.3f, 85, 86 taken as a whole: "On different levels Art.85 and 86 pursue the same purpose of maintaining workable competition in the Common Market" (51). This judgement was also confirmed in the Zoja case (52) where the court found that:" The prohibitions of Articles 85 and 86 had to be interpreted and applied in the light of Art.3f of the Treaty, which provides that the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted". Therefore the term 'abuse' in Art.86 and also in Sec.46 Austrian Cartel Act can be defined as a market behavior unduly damaging consumers, the competitive process or other market participants.

Nevertheless the freedom of any enterprise to compete has to be recognized as a principle protected by the cartel

legislation. But this freedom must be balanced with the interest of other undertakings not to be hurt seen against the background of the necessities for workable competition which means the structure and behaviour to make the market function properly. If there is a damage to competitive processes, it doesn't have to be proved seperately that the damage was undue. Basically any damage to 'workable competition' is undue, only damages caused by one participant to another market participant may only be considered to be undue after an evaluation in the light of the value of workable competition (53). This has especially been elaborated by the Court of Justice in the second decision in the BRT/Sabam/Fonior case where the court had to deal with the question how far certain conditions imposed by a nationwide copyright organization through the imposition of unfair conditions might violate Art.86: "on order to judge the unfairness of the conditions it is necessary to take into account all interests involved in order to obtain the equilibrium between maximum freedom for the authors, composers and publishers to dispose of their work and the efficient management of their rights by an enterprise, membership of which is for them in practice unavoidable" (54). Only a not justifiable limitation in terms of more efficient management is therefore considered undue and abusive.

The broadened interpretation was confirmed once more in the Hoffmann-La Roche judgement (55). 'Abuse' is seen as

an objective term which comprises every conduct of a dominant enterprise which might adversely affect the structure of a market in which competition is weakened.

II) The Question of the 'Causal Relation' between the Dominant Position and its Abuse

Art.86 prohibits "any abuse by one or more undertakings of a dominant position...". The question arises if the law requires a causal nexus between 'abuse' and the dominant position. The wording of Art.86, taken literally, gives a strong indication in this direction. It would not be logical only to have a dominant position, and an abuse. A link between these two terms may have to be established.

The court of Justice in the Continental Can decision held that a causal nexus is not necessary because enforcement of a strong position in the market might be abusive irrespective of the means employed (56).

This viewpoint might be true for one kind of 'abuse of a dominant position', in cases in which the act itself can only be performed by someone in a dominant position. But even in these situations of neutral conduct there is a causality between dominance and effects. Monopolistic pricing can only be done by a monopolist, by someone who has the power to impose inequitable prices. But without being in

a dominant position, an enterprise doesn't have the opportunities to act like a monopolist.

Besides that there are other cases to be taken into consideration where the act complained of can be performed by anyone; but the effect would not occur if the enterprise were not dominant.

Basically it can be said that if abuse had been committed by a certain act that there must be causality between the act and dominance, because Art.86 requires that one or more enterprises (as the acting entities) are in a dominant position and that their conduct, their acting, which finally results from this position, was made possible by the dominance. This becomes especially clear in paragraph 2 where the legislator enumerated some typical kinds of abusive behaviour. e.g. An effective imposition of unfair purchase or selling prices or other unfair trading conditions requires a superior position on the relevant market. 'Abuse' has to be seen as an objective term. The subjective intentions of the acting entity have not to be proved by the judicial authorities. It is even not necessary that the dominant enterprise was aware of the abuse or the facts establishing abuse; So held by the Commission (57):

> "considérant que l'objéction de la GEMA selon laquelle elle ignortait les charges effectives pesant sur les fabricants allemands, n'est pas fondée; que, en effect, la discrimination est un élément constitutif d'infraction objectif qui n'implique pas la culpabilité; que le propos délibéré on la negligence intervienment seulement pour l'application de l'article

15 paragraphe 2 du reglement no.1, mais non pour celle de l'article 3".

However, although subjective circumstances may not establish 'abuse', they may aggravate or exonerate abusive conduct (58).

III) Sec.46 Cartel Act, Art.86/2a Treaty of Rome

Abuse by Price and Terms of Business

Para.2a lays down that direct or indirect imposition of any unfair purchase or selling prices or of any unfair trading conditions are considered as being abusive. The legislator covered with this provision both, abusive pricing from the side of the supplier as well as from the side of the purchases. The term 'price' is interpreted in a broad way, including rebates on large quantities, discounts etc. Up to now the courts failed to elaborate precise standards for the determiantion of 'unjustified' prices. In most cases they referred to the economic equivalence of the value of the goods or services supplied and pointed out that together with other factors, the imposition of a price which is excessive in relation to the economic value of the service provided would cause abuse (59). The economic value is found by a review of the entrepreneur's costs. Therefore 'price abuse' is measured by the difference between costs and price. The higher the difference the more likely the abusive character is. But the results of the application of this

method are to a large extent dependent on the costs which are to be taken into account.

The view of the Commission that a justification of the price has to be seen in relation to the costs specific to the products or performance (60) doesn't give much information. It is still in dispute in which cases nonrecurring costs may be added and which kinds of fixed costs. Although it is true that Commission and courts require a high disparity between price and costs for the application of para.2a, which makes the incertainty to a certain degree tolerable, the judicial authorities ought to define legal terms in a more intelligible way for reasons of better accessibility to the law.

Generally price abuses are controlled by the lack of justification criterion, sometimes by a comparison with fictitious competing prices. If all counterparts of a dominant enterprise charge lower prices for a comparable product, it may be seen as an indication for price abuse but can also be a result of differences in costs.

Hitherto the courts only had to deal with cases where a dominant enterprise charged overly high prices but not with issues of dumping.

Under Austrian law this question would be covered by Sec.46 Cartel Act as well as Sec.1 of the Law Against Unfair Competition (differences result in the course of law and the different legal effects), whereas the Treaty of Rome only provides Art.86.

In a free market economy, enterprises are basically free in quotation. They may also sell products below cost. But this kind of competition becomes abusive and illegal, if an entrepreneur systematically undercuts prices without regard to own losses in order to oust competitors out of the market.

The same principles applying to prices are valid for trading conditions (62). The unfairness is proved by weighing the interests of all participating parties. A dominant enterprise acts abusively if it imposes unfair conditions in dealing with its customers.

The question sometimes arising before the court is the issue whether the enforcement of the unfair prices or the unfair conditions by the dominant enterprise is a constitutive element. On the one hand the wording of Art.86 shows in this direction, on the other hand the achievement of the obviously intended purpose of this Section, -the control of the conduct of dominant enterprises,- would be jeopardized. For example in cases where customers just accept abusive prices or conditions because of the significant market position of the counterpart (63). Here the dominance alone is the decisive factor and the term itself includes a kind of indirect force. Although the courts didn't take position yet, it would be unlogical to ask for more pressure than already inherent in the dominant position.

IV) Abuse by Restraint of Sales (para.2b)

"the limitation of production, markets or technical development to the prejudice of consumers".

A limitation of production and/or technical development may have various reasons. Reasonable rationalization of an enterprise can never constitute a violation of law. It will always be of decisive importance to give sufficient evidence of the aim to distort competition.

Generally exclusive dealing contracts, termination of supply or special competition clauses are used as instruments to restrain competition. In the Zoja case (64) an enterprise in a dominant position in the market for raw materials, refused to supply a competitor for an undertaking, wholly owned by Zoja, which was doing business in the same branch. Zoja was found to have acted abusively and to have violated Art.86/2b Treaty of Rome.

Even more important in practice than the limitation of production or of technical development is the limitation of distribution. In principle, abuse can affect or impair competition on the market of the dominant enterprise or on the markets of other economic levels. With exclusive dealing contracts retailers can be obligated to purchase from the dominant enterprise only. This excludes other competitors from the market or prevents or complicates access into the market. The European Court of Justice always saw an abuse in

such contracts (65). It may also be that the dominant enterprise binds its suppliers for a certain period of time to sell their products to or through him only (66). Similar effects are caused by the so-called competition clauses imposed on wholesalers or dealers which for example prohibit sales of other manufacturers' products (67).

But these contractual obligations are different from the duties legally imposed upon commercial agents who are incorporated into the dominant enterprise.

The agent sells in the name and for the account of a producer or association of producers and is therefore treated as an auxiliary organ forming an integral part of the latter's undertaking. The agent must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking. In these circumstances incompatibility with Art.86 is not simply due to the fact that the principal forbides such an auxiliary to trade without his consent in products which might compete with his own products. As purchases from a 'trade representative' are in fact direct purchases from his principal the fact that the latter forced wholesalers to apply to its representatives and not to itself can neither be an abuse nor evidence thereof. This enables the undertaking to establish a kind of own sales organization.

Fidelity rebates are presumed abusive if they deter customers from dealing with competing manufacturers (68), especially in cases where the disadvantage of losing the

rebate surpasses the advantage of being able to buy cheaper goods. Such rebates limit other manufacturers' distribution. The mere danger of a denial of the fidelity rebate is sufficient enough for a violation of para.2b if it prevents the customer from buying elsewhere (69). From the point of view of the Commission (70) abuse may always exist, if the dominant supplier offers economic incentives for exclusive purchase from him.

The courts had already to deal with some cases where the dominant enterprise restricted the use of the sold products or obliged his customers to sell goods only to certain enterprises. Such limitations are likely to limit markets to the prejudice of consumers within the meaning of Art.86/2b because they give other undertakings no chance or restrict their opportunities to compete (71). The way in which distribution obligations are enforced is not relevant; even without contactual bindings the requirements may be fulfilled.

V) Abuse by Discrimination (para. 2c)

"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"

The prohibition of discrimination in this provision presupposes equivalent engagements in commercial transactions. Therefore, the involved parties have to be in comparable positions. This is the case, if they compete with each other-, so long as they are producing the same or equal products or if they are in similar positions on the level of distribution. As decisive factor, the Commission found especially relevant the similarity of specific, individual transactions (72) which may be proved by taking into consideration the similarity of goods or services and the extent of difference of their essential characteristics. Manufacturers and importers are, with regard to distribution, acting on the same economic level. Basically it can be said that the term 'equivalence' doesn't require identity. There may exist peripheral differences.

In order to violate para.2c the dominant enterprise has to apply unequal conditions to equivalent considerations which have to be proved to be unjustified. The justification depends on the circumstances of the specific case. The reasons must be casual, artificial or arbitrary. Any differences in treatment which may result ought to be objectively based and their choice may not have a

discriminatory effect. In any event, it is abusive to treat a regular, long-standing and substantial customer in a way which is clearly discriminatory by comparison with other customers (73). A dominant enterprise can not justify different prices by the fact that it has adapted its prices to what each part of the market could bear. Such a policy of differing prices constitutes an abuse of a dominant position, in that the dominant enterprise is applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (74).

Art.86/2c doesn't impose a duty upon dominant enterprises to conclude contracts with other undertakings. But if they enter into contracts, the application of unequal conditions must be justified.

The disadvantage to other parties (as mentioned on para.2c) can be seen in the difference in terms so that a seperate investigation in this concern doesn't seem to be necessary.

The interpretation of para.2c is in accordance with American anti-trust law which defines 'discrimination' as 'unjustified differentiation'.

VI) Tying Arrangements (Art.86/2d)

"subjecting the conclusion of contracts to the condition that the other parties to them accept additional goods or services which are not related to the subject matter of the contract either by their nature or by commercial custom".

This provision limits the freedom of a dominant enterprise to contract in the sense, that it can't make the conclusion of a contract dependent on the acceptance of unrelated purchases by the counterpart. But tying clauses are not prohibited if they may have a connexion with the subject of the contract by their nature or according to commercial practice.

VII) The Legal Consequences of Monopolies

As alredy pointed out, neither the Austrian Cartel Act nor the European Economic Communities' regulations condemn monopolies or more generally enterprises in a dominant position as such but only the abuse of this position. Sec.42/1 Austrian Cartel Act only imposes the duty to register upon these undertakings within three months after having attained the dominant position. The registration itself has to contain detailed information about the volume of domestic sales and the market share of the enterprise in

question. The criteria for the determination of market volume and market share are still in dispute. The Cartel Court asks in a very general way to apply the criterion which gives the best idea of the market power of the registering enterprise. The literature intensively criticizes Sec.42 because of its ineffectiveness and refers to the system established in the US-antitrust legislation as well as to the norms in the European Communities and the Federal Republic of Germany.

The primary intention of the registration in the cartel register is the supervision of abuse. Under Sec.46 abusive conduct is not threatened with legal disadvantages as under Art.86 Treaty of Rome or Sec.22 German Law Against Restraints of Competition (75), but the Cartel Court is authorized after having procured the Joint Committee for Cartel Matters (Sec.94/1/4), to prohibit the conduct. The legal proceedings have to be instituted on the application of a party. As a result of the wording of Sec.46 the Cartel Court can only prohibit a certain bahaviour but doesn't have the power to force the enterprise to act positively, e.g. to oblige an undertaking to contract (76) With the prohibition by the Cartel Court, additional receipts of enterprises from excessive prices are confiscated by the federal government. Wilful or negligent abusive conduct despite of the prohibition by the court has consequences under criminal law. A liability for damages is imposed upon the dominant

enterprise if the abusive conduct is incompatible with the restraining order by the court.

The main instrument of the authorities of the European Communities to enforce the antitrust provisions in the Treaty of Rome was established with Regulation 17. Under Art.3 of Regulation 17 the Commission may, upon application or upon its own initiative, by decision require enterprises or associations of enterprises to bring an infringement of Art.86 to an end. Entitled to make an application are the Member States or natural or legal persons who claim a legitimate interest. But before taking a decision, the Commission may address to the undertakings concerned recommendations for termination of the infringement. The Commission is not obliged to go this route. Recommendations are not binding although they have some weight. This instrument has only been used once by the Commission in 1963. More important are cease and desist orders as well as fines. Fines are not substitutes for an order to terminate the infringement. The objective of this procedure is not, in contrast to the imposition of fines under Art.15/2, to punish an abusive act that occured in the past, but to avoid abusive conduct in the future. If recommendations are not followed the Commission can issue a decision. In ex officio cases, where the Commission became active without application, the Commission is free to render a decision. Otherwise the parties have a right that the Commission puts an end to the illegal conduct. A decision,

but not a recommendation, may be contested before the Court of Justice (Art.173) (77).

D. Monopolization Under U.S. Laws

I) Introduction

Sherman Act Sec.2 lays down: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the Several States or with foreign nations, shall be deemed guilty.....".

It is often said that American antitrust policy tends more to be an attack upon positions of market power (78) rather than to control the conduct of monopolies or the use of their power. But the wording of the Sherman Act provisions doesn't indicate this conclusion. The Act doesn't prohibit a 'monopoly' but to 'monopolize'. Monopolies as such are not illegal per se.

If we follow Judge Hand's view in Alcoa, the Sherman Act's aim would be "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other (79). Thus Judge Hand focuses more on the size of the company relative to its competitors as a factor for determining the illegality of a dominant market position

(80). Abusive conduct as a prerequisite for a violation of Sec.2 of the Sherman Act would not be required. Instead, the mere pursuit of normal business practices which have the effect or the purpose of securing and perpetuating a market dominating position are deemed to make a monopoly illegal (81). But even this viewpoint doesn't encompass the entire situation. This view still requires a kind of conduct which is intended to maintain monopoly power. This is also in accordance with the viewpoint of the Supreme Court in Grinell: "The offense of monopoly under Sec.2 of the Sherman Act has two elements:

1) the possession of monopoly power in the relevant market and

2) the wilful acquisistion or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" (82).

II) How to Prove Monopoly Power

The term 'monopoly power' has been defined by the literature and the courts for several times. Kaysen and Turner for example consider an enterprise to have monopoly power if "a firm can behave persistently in a manner different from the behaviour that a competitive market would

enforce on a firm facing otherwise similar cost and demand conditions" (83).

The Supreme Court in American Tobacco held "that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so" (84). However, in contrast to horizontal merger cases under Sec.7 of the Clayton Act, for which the Supreme Court had ruled that "undue" market shares are prima facie evidence of a violation (85), the Court has not yet explicitly established such a prima facie rule for monopolization cases (86).

It is true that an often used criterion, as in both Austria and the EEC, is the determination of the market share as indicator for market power. Although it might be that very high market shares are accepted as sufficient proof of a monopolistic position on the relevant market, in most cases it is not the only factor to be taken into consideration. The ease of entry, the number of competitors, the course and flexibility of prices, trade customs relating to price competition, the level of profits and other economic criteria may be decisive elements also (87).

III) The Delimitation of 'Market Concentration'

Judge Hand in Alcoa pointed out that the control of 90% of the market would be enough to constitute a monopoly, but that it would be doubtful whether sixty-four percent would be enough. Thirty-three percent, however, are certainly not (88). Other courts followed to focus on the market share. In duPont the court unanimously held that 75% of the relevant market consisting of the cellophane business would have constituted monopoly power if the relevant market had been so defined. But since the market consisted of all wrapping materials of which du Pont only controlled less than 20 percent, a monopolization would not have taken place (89).

In International Boxing Club "the power of the combine to exclude competitors in the championship field is graphically shown by their promotion of 25 out of 27 fights in all divisions, a total of 93% during the two-and-one-half-year period ending with the filing of the amended complaint" (90). Whereas in Grinell, 87% of the national market was held to have constituted a monopoly. On the other hand no monopoly power was found in industries where a firm controlled 50% and 64% of their respective market (91). In both of these cases one large producer and a number of smaller ones competed but none of which produced a high enough percentage of total output to influence the price. But the largest producer was the price leader. The Supreme Court observed that "the fact that competitors may see

proper, in the exercise of their own judgement, to follow the prices of another manufacturer does not establish any suppression of competition or show any sinister domination" (92). Therefore mere imitation of prices is not enough evidence of power.

Although the Supreme Court never expressly retreated from the position in the Harvester case it is more likely today that as far as it concerns price leadership, a 64% share on the market would be sufficient for an application of Sec.2 of the Sherman Act. Nevertheless, it is impossible to define precisely the percentage of market necessary to establish a monopoly, because each market differs considerably. The percentage depends on the nature of the market involved. This was also recognized by the Supreme Court: "We do not undertake to prescribe any set of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed" (93).

The determination of the market share will normally serve as a prime criterion for the elaboration of the market position of an enterprise. In few cases it will provide sufficient evidence. In some cases, it may be even true that 'heavy reliance on market share statistics is likely to be an inaccurate or misleading indicator of 'monopoly power'in a regular setting. In many regulated industries, each purveyor of service, regardless of absolute size, is in a

monopoly position with regard to its customers. Indeed, while a regulated firm's dominant share of the market typically explains why it is subject to regulation, the firm's statistical dominance may also be the result of regulation. For these reasons the size of a regulated company's share should constitute, at most, a point of departure in assessing the existence of monopoly power. Ultimately, that analysis must focus directly on the ability of the regulated company to control prices or exclude competition -an assessment which, in turn, requires close scrutiny of the regulatory scheme in question-" (94). Finally, we can conclude that the measurement of monopoly power will depend on a full evaluation of the market and its functioning, to determine whether an enterprises' power is sufficiently great to be deemed market dominating.

Although it has been held that absolute success in excluding competition from a market is not an essential element of proof of monopoly power (95) the Supreme Court regards the ease of entry for competitors as well as the possibility to eliminate or exclude competition from the market as a decisive or at least strong indication for monopoly power (96).

> "In most general terms, the height of the barrier to entering an industry determines how far above a defined competitive level established firms can persistently raise their selling prices without attracting new competition. If the barrier to entry is low, they can only slightly exeed a competitive selling price without setting in course the potentially corrective effects of

> the entry of more competitors; if it is very high, they can perhaps attain a fully monopolistic price, substantially above the competitive cost level without inducing entry; if it is moderate, they can only raise their prices some moderate amount above the competitve level without inducing new entry and its possible effects on industry price and output. In sum, the condition of entry places some sort of a limit or ceiling on the degree to which established firms can exceed a competitive level of price (move in the direction of monopolistic output restriction and price raising) without inducing potentially corrective repercussions" (97).

The percentage of market share may give some indication of market strength. But even considerable shares of market may not confer massive power, especially the ability of price-fixing. Up to now the courts didn't pay too much attention to the 'entry barriers' factor although its indicative character is not in dispute. Judge Hand in Alcoa observes that the producer of a large proportion of supply has complete control within certain limits. By raising the price he reduces the amount which can be marketed, -as always, or almost always, happens- he may invite the expansion of the small producers who will try to fill the place left open (98). As Judge Hand admits, there is an inevitable lag in this but nevertheless the large producer will be in a strong position to check such competition and to impose substantial handicaps upon potential competitors.

In United Shoe Machinery v. United States (99) the market share was estimated to be between 75 and 90 percent but was not considered by the court the only factor supporting United's predominant position. In this case the court paid much attention to the entry barriers (100).

The Attorney General's National Committee Report attributed some importance to the development of industry. The rate of growth of the industry or market "is often important in determining the significance to be attached to other factors, and particularly to numbers and reasonable opportunity for entry" (101). This makes it important to observe the performance of enterprises with substantial market shares and their ability in a growing market to maintain or enlarge their percentage on the market proportionally to smaller undertakings. "Progressive growth of the economy and its individual markets is virtually a concentration-reducing force, which in general can be counteracted only if the larger firms in an industry or in the economy can themselves grow with the same rapidity" (102). It is more difficult to hold a position in a rapidly expanding industry than in a stable one (103), but if a large enterprise already possesses such a degree of strength which enables it to keep the percentage , in other words if it has already gained as 'absolute size', it gives evidence of a high degree of market power.

IV) The Delimitation of the Relevant Market in Reference to Sec.2 of the Sherman Act

As already mentioned above the concept of the relevant product market is mainly an idea which has been developed in

American antitrust case-law. In Austria and the EEC this term is particularly used in connexion with the concept of market dominance.

A deep analysis and the elaboration of certain criteria for the delimitation of the relevant product market began with the principles described in the Cellophane case (104). Here the cross-elasticity of demand test became at the first time one of the main issues the court had to deal with. The use of this test by the Supreme Court, however, is traceable to the Times-Picayune Publishing Co. case (105) where the court suggested in a footnote that the relevant market should be drawn narrowly to exclude products whose cross-elasticities of demand are small (106). In the Cellophane case duPont was accused of having violated Sec.2 of the Sherman Act by monopolizing trade in that product. Evidence indicated a 75% participation of duPont on the U.S. cellophane market. The defendent argued that cellophane was only a part of the extensive market of flexible wrapping materials on which duPont's share was around 20 percent. Justice Reed found it "apparent that duPont's power to set the price of cellophane had been limited only by the competition afforded by other flexible packaging materials (107). DuPont justified its viewpoint "that cellophane was not unique for the purposes for which it was sold and that the competition of other materials had forced duPont constantly to reduce its cellophane prices and otherwise deprived duPont of the freedom of action which monopoly

implies (108). The Supreme Court concluded from the evidence that small price changes already caused considerable changes in demand. "The determination of the competitive market from commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another" (109). On the grounds of this functional interchangeability test the court considered cellophane as 'reasonably interchangeable' with flexible wrapping materials and estimated duPont's share at 17.9%. But delimitation of the relevant market merely based on the interchangeability test would encompass an infinite range of substitute products and thus would have to be narrowed by the cross-elasticity of demand which will serve as the decisive criterion for the determination of 'reasonableness'. The elasticity of demand measures the changes in quantity purchased per unit of time to the changes in price with which they are associated (110). The more intensive the reaction on price changes the higher the degree of substituteability and the more effective competition is among the products concerned.

DuPont had been strongly criticized. Turners concerns refered to the non-consideration of costs in the 'reasonable interchangeability' test. He concluded that "these substitutes should be excluded where the government shows that at prices producing a high cross-elasticity, the alleged monopolist has a substantial cost advantage" (112). In his opinion one must focus on the issue of whether a

particular margin of advantage is big enough to constitute monopoly power for the purpose of the Sherman Act (113). Failure to focus on this issue would lead to a finding of monopoly wherever a producer, though having a cost advantage sufficient to exclude competition, chose to price his product high enough to create a 'high cross-elasticity of demand' and thus to permit substitutes to compete (114).

The cross-elasticity of demand within the 'reasonable interchangeability' test has nevertheless been applied by the courts for several times and became a general accepted method for delimitating the relevant product market.

The Justice Department's Guidelines (115) point out that "the Department will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed a 'small but significant and non-transitory ' increase in price. If the price increase would cause so many buyers to shift to other products that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Department will add to the product group the product that is the next best substitute for the merging firm's product and ask the same question again. This process will continue until a group of products is identified for which a hypothetical monopolist could profitably impose a 'small but significant and non-transitory' increase in price. The Justice Department will generally consider the relevant product market to be

the smallest group of products that satisfies this test". These recently published Guidelines by the Justice Department clearly approve the cross-elasticity test as the decisive criterion for determining the relevant product market. Although these rules concern the product market for mergers under Sec.7 of the Clayton Act they give some indication of the general viewpoint of the Justice Department in this field. But they still do not consider the concerns or suggestions Professor Turner made for an improvement of the 'reasonable interchangeability' test. In following the Guidelines a monopolist -who is, as the Supreme Court held somebody who has the "power to raise prices or to exclude competition when it is desired to do so" (116)-, would still be able to fix his price at a level at which his cost advantage is considerable and the cross-elasticity of demand very high. This means the monopolist is free to determine the relevant product market in such a way that his market share appears very low but his profits are very high. In such a case the monopolist is charging an ideal price for him without running the risk of being sued for a violation of the Sherman Act because his market share doesn't indicate sufficient market power. However, Sec.2 of the Sherman Act is intended to cover all monopoly situations and it may be seen as a continuing lack that neither the judiciary authorities nor the legislator attached importance to this problem hitherto.

In International Boxing Club (117) the Supreme Court had to deal with the question of whether championship boxing contests are part of the market of all professional boxing events or if these special championship contests are characterized by certain features which justify the adoption of an own relevant product market. The court confirmed the Cellophane test and saw a seperate, identifiable market for championship boxing contests on the basis of following facts: there was a higher rate of television rights for championship fights, higher profits for championship programs, considerable differences in the revenues from movie rights, substantial differences in the number of television viewers and higher prices for tickets of championship fights (118). In addition to these findings numerous representatives of the broadcasting, motion picture and advertising industries testified to the general effect that a "particular and special demand exists among radio broadcasting and telecasting [and motion picture] companies for the rights to broadcast and telecast [and make and distribute films of] championship contests" (119). This led to the conclusion that champion boxing matches constitute a relevant submarket of the market of all professional boxing fights. The lower court's finding that there was no reasonable interchangeability for the same purpose between the different kinds of events in question was affirmed.

While the court in International Boxing Club didn't see any impediment in defining the relevant market on the basis

of 'reasonable interchangeability' alone, even for the submarket of championship contests, the Supreme Court in Brown Shoe Co v. United States (120) accepted this test for the broader market but identified the submarket by applying following seven tests:

1) industry or public recognition of the submarket as a seperate economic entity;
2) the products peculiar characteristics and uses;
3) unique production facilities;
4) distinct customers;
5) distinct prices;
6) sensitivity to price changes, and;
7) specialized vendors.

Although the courts exercised restraint in applying these tests, they found some recognition in United States v. Aluminium Co. of America (121) and F.T.C. v. Procter & Gamble Co. (122).

Basically courts focused on the Cellophane test and narrowed the relevant market, found by applying the method of reasonable interchangeability, with the concept of cross-elasticity of demand (123).

Some courts, however, considered the concept of cross-elasticity of supply (124). Although the court in Twin City Sportservice Inc. v. Charles O. Finley & Co. (125) admitted that two products with a high degree of substitutability in use should be considered in the same market, it stated: "A like analysis applies when the market

is viewed from the production rather than the consumption standpoint; the degree of substitutability in production is measured by cross-elasticity of supply. Substitutability in production refers to the ability of firms in a given line of commerce to turn their productive facilities toward the production of commodities in another line because of similarities in technology between them. Where the degree of substitutability in production is high, cross-elasticity of supply will also be high, and again the two commodities in question should be treated as part of the same market" (126). While the majority of the decided cases in which the rule of reasonable interchangeability applies is employed with the 'use' side of the market, the courts have not been unaware of the importance of substitutability on the production side as well (127).

The significance of the factor of cross-elasticity of supply was recently confirmed in ILC Peripherals v. IBM (128). The court first refered to the above cited statement from Twin City Sportservice and then concluded from the fact that there was "potential competition from manufacturers of comparable non-IBM plug compatible products" (129) that the relevant product market should not be limited to IBM plug compatible devices. The costs for the adoption of products from other manufacturers for the use on IBM machines "were within the means of even small manufacturers". Therefore the cross-elasticity of supply was high which increased the acceptance of the broader market.

The cross-elasticity of supply was considered equal to the cross-elasticity of demand in U.S. v. American Telephone & Telegraph Co. (130). The court found that "supply cross-elasticity no less than demand cross-elasticity, is an important factor in the definition of economic markets" (131).

The cross-elasticity of demand is nevertheless the general accepted concept for specifying the relevant product market under the 'reasonable interchangeability' test, but it is "well-established that under certain circumstances markets may be aggregated on a basis other than economic substitutability" (132). As the wording of the court's finding already indicates, the concept of cross-elasticity of supply is applicable but is more the exception than the rule.

V) What is Required to Make Monopoly 'Monopolization'?

Under Austrian and European Economic Community law the illegality of monopolies, or better market dominating enterprises, is proved on grounds of abusive conduct. Although, as pointed out in the introduction, American antitrust laws are often seen as an instrument to attack market power as such it may be observed that it is well-established law today that monopoly power in the

economic sense does not by itself constitute unlawful monopolization (133).

Following Professor Mason the "Sherman Act was aimed at two targets: 'unreasonable' market power (a situation) and 'unfair' -exclusionary, restrictive, oppressive- practices (a type of conduct)".

> "Opinions differed then -as they differ now- on which was the main target and on the reciprocal relationship between power and practices. But neither target has, for long, been out of sight. One can, of course quote Senator Hoar to the effect that oppressive practices was the wrong to be remedied, while monopoly achieved without benefit of such practices was unobjectionable. Equally valid and prestigeful testimony, however, supports the view that the principal evils to be remedied were those huge agglomerations of capital, the trusts" (134).

But even Professor Mason himself admitted that the law has been greatly modified over the years.

It is difficult to find the line between simple possession of monopoly power in an economic sense, e.g. as a result of a patent, or franchise, or because the market is so small that only one firm can exist, and the intended acquisition or maintenance of monopoly power (135). The process of the elaboration of certain types of conduct and circumstances which constitute illegal 'intent' is not completed.

In Alcoa, Judge Hand stated that the mere existence of a monopoly does not mean that 'Alcoa' monopolized. Monopoly may have been thrust upon it (136). A market may be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply

the whole demand. After all, as Judge Hand observed, a single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry (137). A successful competitor who prevailed under competitive circumstances should not be turned upon when he wins. The court expressly refered to U.S. v. United States Steel Corporation where Justice McKenna for the majority said: "The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that its possible" (138).

This confirms that mere size is not considered to be an offense against the Sherman Act. But size always carries with it an opportunity for abuse that is not to be ignored (139). In Alcoa, however, evidence showed that the size didn't only offer an opportunity for abuse, but it 'utilized' its size for 'abuse'. Alcoa didn't succeed in convincing the court that it was only a "passive beneficiary of a monopoly following upon an involuntary elimination of competitors by automatically operative economic forces" (140). Alcoa was always prepared to supply increases in demand for ingot. Nothing compelled it to keep doubling and

redoubling its capacity before others entered the field. Refering to the exclusion of competitors from the market, the court rejected a narrow interpretation of 'exclusion' as limited to maneuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary'(141), and concluded that such a limitation would emasculate the Act. In its view the active seeking of monopoly power causes monopolization. In order to fall within Sec.2 the monopolist must have both the power to monopolize, and the intent to monopolize (142). Alcoa's monopolistic intent is shown by the fact that no other company succeeded in entering the market within the past 25 years although technology of this industry was widely known but that on the other hand Alcoa's output had increased 800 percent (143).

Professor Rostow characterizes the Alcoa judgement by saying: "While presumably the Act, as a criminal statute, is inapplicable where such a degree of market power exists by inadvertance, an intent to keep the power will be freely inferred from its continued existence under normal circumstances" (144). The 'thrust upon' defense would in fact be limited only to cases where the achievement of power was due to "forces lying outside its control" (145). Nevertheless, in practice it will be very difficult to prove that an enterprise did not achieve market power because of skill, foresight and industry, but the burden of proof is on

the defendent. Judge Hand never described more specifically what he meant by 'thrust upon' but made a defense under such a justification possible.

The court in American Tobacco (146) approved the 'thrust upon' defense by pointing out that Sec.2 of the Sherman Act would not be violated if monopoly power were necessarily acquired because a defendant was the original entrant into a new market, or had made a new discovery that carried the power with it. This viewpoint indicates already that patents, trademarks or copyright as a product of 'skill, foresight or industry' may be decisive arguments for the defense. Of course, if a patent is obtained by fraud on the United States Patent Office, a violation of Sec.2 may be considered if the elements of monopoly power and purposeful acquisition or maintenance of that power are established (147).

Judge Wyzanski in United Shoe Machinery qualified the Alcoa doctrine: "...the defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technical efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of the law (including patants on one's own inventions, or franchises granted directly to the enterprise by a public authority)"

(148). This viewpoint appears much broader than the 'thrust upon' doctrine because it doesn't only shelter monopolists who acquire or maintain their position without any action on their part but also cases of legal licenses or situations where the powerful market position is a result of efficient policy, as for example low profit margins maintained permanently and without discrimination.

Judge Wyzanski's ruling also indicates a change in the analysis. -Under his new approach it is not the issue of deliberateness but the methods of acquiring and maintaining the monopoly which are subject to discussion. The court finally found that "the evidence does not show that United Shoe's control is due entirely to excusable causes" (149). Even if power was lawfully acquired, United Shoe could not indulge in practices that unnecessarily raised the barriers of growth or entry of competitors (150). Any conduct which goes beyond the scope of excuses described above,is likely to be treated as exclusionary.

Both doctrines in Alcoa as well as in United Shoe, illustrate the difficulties one has to face in dealing with monopoly power under Sec.2 of the Sherman Act. On the one hand it is not compatible with the principles of a free-market economy to punish a competitor who has been successful, on the other hand considerable market power is always the danger inherent of an abuse of the position.

It seems that recent decisions concede more freedom of action to monopolists. In Telex Corp. v. IBM the court did

not accept the requirement that the 'thrust upon' shorthand would mean that the events or acts must be entirely involuntary. To do so would permit the defendant corporation to do nothing whatever by way of change in marketing (151). This means that an excuse would be available to the defendant under the broadened 'thrust upon' doctrine even if some intent to acquire or maintain a monopoly can be proved which is a remarkable change to the basic idea of the theory in Alcoa, where the court tried to exempt only innocently acqired monopoly power from the application of a criminal provision.

The court in Berkey Photo Inc. v. Eastman Kodak Co. found that the 'thrust upon' phrase, as an operative rule of law, was not sufficient (152). It stated that: "A large firm does not violate Sec.2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity -more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. There are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power" (153). With this ruling Judge Kaufmann expressed his opinion that

an enterprise with a dominant position that is established for efficiency considerations should be able to take advantage of these efficiences in the monopolized market or in any other market. A monopolist must be free to compete, utilizing the most efficient means of doing so. On the basis of this viewpoint the court held that Kodak, with monopoly power in film, did not use that power to monopolize the camera market when it refused to predisclose new film technology to competing camera maufacturers. The secrecy which accompanied the intoduction of new film was normal competitive behaviour, because exactly the same conduct would have been engaged in by a non-monopolist (154). The same standard is utilized in Grason Electric Co. v. Sacramento Municipal Utility District (155).

It is noticeable that especially in these recent cases the determination of 'exclusionary conduct' has been more frequently determined under the aspect of efficiency (156). In E.I. duPont de Nemours & Co., Alcoa maintained its monopoly by implementing a plan to expand its production capacity to capture substantially all of the anticipated increase in demand and thus prevented others from entering the market. The Commission, however, found Alcoa's actions "consistent with its own technological capacity and market opportunities" (157) and therefore reasonable. The case would have been different if duPont had attempted to build excess capacity or to expand temporarily as a means of deterring entry (158). Since the position was maintained

through repeated additions to capacity over a long period of time, duPont did not act unreasonably.

In summarizing we can observe that all formulations of the standard to distinguish between conduct that is properly competitive and conduct improperly directed to the acquisition or retention of monopoly power, have evaluated the exclusionary effect of the conduct at issue and balanced its 'evils' against the 'virtues' of rewarding successful competitors (159). Four types of conduct have become main targets of allegations of improper acquisition or maintenance of monopoly power: predatory pricing, refusals to deal, leveraging, and new product introduction and innovation (160).

Monopoly power bound with a certain course of conduct directed towards the acquisition and maintenance of this power causes monopolization. The relevant course of conduct, however, has changed since the development of Judge Hand's doctrine in Alcoa to significant respects. 'Monopolization' today stands on a narrower ground than in the early cases.

Notes to Chapter 2

(1) Sec.40/1/1: An enterprise shall be deemed to dominate the market within the meaning of this Federal Act,

1) if, in respect to certain goods or services, it is exposed to no competition or to insignificant competition;

(2) Sec.40/1/2: or, if its share of the total domestic market exceeds 5%, and:

a) the entire domestic market is supplied by no more than two or three enterprises, or

b) it is among the four largest enterprises, which conjointly account for at least 80% of the total domestic market.

(3) "Law Against Restraints of Competition" from January 1, 1958; Federal Gazette I, p.1081;

(4) Commission, June 2, 1971, OJL 134/15, 21; [1971] C.M.L.R.D35 GEMA-I; Dec.14, 1972, OJL299/51, 54; [1973] C.M.L.R.D50 Zoja CSC-ICI; Dec.19, 1974, OJ 1975 L 29/14, 16 General Motors; April 19, 1977, OJL 117/1, 9 ABG.

(5) Commission Dec.9, 1971, OJ 1972 L 7/25, 35; [1972] C.M.L.R.D11 Continental Can.

(6) Case No.40-48/73;50/73;54-56/73;111/73;113/73;114/73; Dec. 16, 1975, [1975] ECR 1663 (1996)-CMR 8334, European Sugar Industry ("suiker Unie"); Case No.40/70, Feb. 18, 1971, [1971] ECR 69 (84)-CMR 8101, Sirena/EDA; Case No.78/70, June 18, 1971, [1971] ECR 487 (501) - CMR 8106, Deutsche Grammophon;

(7) Case No.322/81, Nederlandische Banden - Industrie Michelin N.V. v. EC Commission, [1985] C.M.L.R. 282;

(8) Coca-Cola, KOG Jan.23, 1978, Okt. 4/77 (KartG Kt 169/75)

(9) Markenschutzrecht 1970;

(10) The abbreviation 'EEC' in the study is used for European Economic Community.

(11) see note 3.

(12) 473 BlgStProtNR XIII GP, p.36;

(13) BGH, WUW/E BGH 1445 (Valium);

(14) Gleiss/Hirsch, Rdz.32 et seq. to Art.86; Mailaender in: Gemeinschaftskommentar, Rdz.38 et seq. to Art.86;

(15) Case No.27/76, Feb.14, 1978, [1978] ECR 207 (280), United Brand;

(16) see note 7;

(17) Commission, June 9, 1976, OJ L 223/27, 35, Vitamins;

(18) Feb. 13, 1979, [1979] ECR 461, 520, Hoffmann-La Roche;

(19) Hoffmann-La Roche, loc.cit. note 18, at p.527, 529;

(20) Case No. 26/76, Oct.25, 1977, [1977] ECR 1875, Metro/SABA;

(21) Commission, Dec.9, 1971, OJ 1972 L 7/25, 33; [1972] C.M.L.R.D11, Continental Can;

(22) Commission, Dec.17, 1975, OJ 1976 L 95/1, Chiquita;

(23) Case No.6/72, Feb.21, 1973, [1973] ECR 215, Continental Can;

(24) Hoffmann-La Roche loc.cit. note 18;

(25) Nederlandische Banden loc.cit. note 7, Opinion of Advocate General Mr. Pieter Ver Loren Van Themaat;

(26) see text of Sec.40/1/1 in note 1;
Sec.41: 'certain goods or services' shall mean all goods or services which, under the market conditions prevailing, serve to satisfy the same needs;

(27) 473 BlgStProtNR XIII GP, p.36;

(28) KOG, OeBl 1974, p.47,48;

(29) KOG, Okt 31/73;

(30) KOG, OeBl 1974, p.49;

(31) KOG, OeBl 1974, p.143; KOG, OeBl 1975, p.21;

(32) Gleiss/Hirsch, Rdz.71 to Art.85, remarks to the Continental Can decision of the Court of Justice;

(33) United Brand, loc.cit. note 15, at p.282, 283;

(34) Continental Can, loc.cit. note 23, at p.248, 249;

(35) Commission, Dec.1, 1976, OJ L 357/ 40,41 Miller;

(36) May 27, 1970, OJC 64/1 et seq./Art.2/1a of the Group Exemption for Specialization Cartels;
Reg.2779/72 of Dec.21, 1972, OJL 292/23 et seq.;

(37) Continental Can, loc.cit note 23, p.248;

(38) Hoffmann-La Roche, loc.cit. note 18, at p.516;

(39) Case No.19/77, Feb.1, 1978, [1978] ECR 131, 136, Miller International Schallplatten;

(40) Chiquita, loc.cit. note 22, at p.11, 12;

(41) Continental Can, loc.cit. note 23, at p.248, 249;

(42) Commission, Sept.23, 1964, [1964] C.M.L.R. 489, Grundig/Consten;

(43) See: Belke, Relevanter Markt, p.242 et seq.; Thiesing, p.365;

(44) Gleiss/Hirsch Rdz.75 to Art.85; Case No.56/64 and 58/64, July 13, 1966, [1966] ECR 299 (322, 391) - C.M.R. 8046, Grundig/Consten;

(45) KOG, OeBl. 1978, p.78, 81; and OeBl. 1978, p.82;

(46) compare: KG, OeBl.1974, p.18 = Schoenherr/Dietrich IV, No.131, Staerkevertrieb; KOG, OeBl 1977, p.17, OeMV;

(47) Continental Can, loc.cit. note 23, at p. 246;

(48) Id. at p.246;

(49) Mestmaeker, "Die Beurteilung von Unternehmungszusammenschluessen nach Art.86 des Vertrages ueber die Europaeische Wirtschaftsgemeinschaft", in: Probleme des Europaeischen Rechts, Festschrift fuer Walter Hallstein, Frankfurt a. Main 1966, p.322 et seq.

(50) Text in Treaty of Rome, Art.3f, 85, 86;

(51) Continental Can, loc.cit. note 23, at p.244;

(52) Case 7/73, March 6, 1974, [1974] ECR 223 (252, 254), Zoja;

(53) Common Market Law Review 1976, p.65 by Vogelenzang;

(54) Case No.127/73, March 27, 1974, [1974] ECR 313, Sabam/Fonior;

(55) Hoffmann-La Roche, loc.cit. note 18, at p.541;

(56) Continental Can, loc.cit note 23, at p.246;

(57) Commission, June 2, 1971, OJL 134/15, 26, GEMA-I;

(58) Sugar, loc.cit. note 6, at p.2004;

(59) Case No.26/75, Nov.13, 1975, [1975] ECR 1367, 1379, General Motors;

(60) Commission, Dec.19, 1974, OJ 1975 L 29/14, 16, General Motors;

(61) "Gesetz gegen unlauteren Wettbewerb", 1923, as amended in 1971 BGBl.1972/74;

(62) Case No.155/73, April 30, 1974, [1974] ECR 409 (431), Sacchi;

(63) Hoffmann-La Roche, loc.cit. note 18, at p.551;

(64) Case No.7/73, March 5, 1974, [1974] ECR 223, 252, C.M.R.8209, Zoja;

(65) Sugar, loc.cit. note 6, at p.2015, 2016;

(66) Commission Bull.4/1980, No.2125 SEITA;

(67) Sugar, loc.cit. note 6, at p.2015, 2016;

(68) Hoffmann-La Roche, loc.cit. note 18, at p.461, 540;

(69) Commission, Jauary 2, 1973, OJL 140/17 D65, European Sugar Industry;

(70) Comp. Rep. EC 1977/12;

(71) United Brands, loc.cit. note 15, at p.295;

(72) Chiquita, loc.cit. note 22, at p.14 et seq.;

(73) Commission, April 19, 1977, OJL 117/1, ABG;

(74) <u>Chiquita</u>, loc.cit. note 22, at p.14, 15;

(75) see note 3;

(76) KG, OeBl.1977, p.17, 20;

(77) see also: Deringer, <u>The Competition Law of the European Communities</u>, Commerce Clearing House Inc., p.269 et seq.;

(78) Mason, <u>Schumpeter on Monopoly and The Large Firm</u>, in: Economic Concentration and the Monopoly Problem, p.92 (1957);

(79) <u>United States v. Aluminium Co. of America</u>, 148 F.2d. 416, 429 (2d Cir. 1945); cited as '<u>Alcoa</u>' below;

(80) Kaysen and Turner, <u>Antitrust Policy</u>, 107 (1959);

(81) Bain, <u>Industrial Organization</u>, 503-507 (1959);

(82) <u>United States v. Grinell Corp.</u>, 384 U.S. 563, 570-571 (1966);

(83) Carl Kaysen and Donald F. Turner, <u>Antitrust Policy, An Economic and Legal Analysis</u>, Cambridge, Mass.: Harvard University Press, 1959, p.75;

(84) <u>American Tobacco v. United States</u>, 328 U.S. 781, 811 (1946);

(85) <u>United States v. Philadelphia National Bank</u>, 374 U.S. 321 (1963);

(86) OECD Guide to Legislation on Restrictive Business Practices Sec. 2, p.22;

(87) Id. at p.22;

(88) <u>Alcoa</u>, loc.cit note 79, at p.424;

(89) <u>United States v. E.I. duPont de Nemours & Co.</u>, 351 U.S. 377, 434;

(90) <u>International Boxing Inc. v. United States</u>, 358 U.S. 242, 249 (1959);

(91) <u>United States Steel Corp. v. United States</u>, 251 U.S. 417 (1920);

<u>United States v. International Harvester Co.</u>, 274 U.S. 693 (1927);

(92) <u>United States v. Int. Harvester Co</u>, 47 S.Ct. 748, 754 (1927);

(93) <u>United States v. Columbia Steel Co.</u>, 334 U.S. 495, 527-528 (1948);

(94) <u>MCI Communications Corp. v. American Tel. & Tel. Co.</u>, 708 F.2d. 1081, 1107 (7th. Cir. 1983);

(95) <u>Woods Exploration & Producing Co v. Aluminium Co. of America</u>, 438 F.2d. 1286 (5th Cir. 1971);

(96) see: <u>United States v. American Tobacco</u>, 221 U.S. 106; 31 S.Ct. 632, 55 LE 663 (1911);

(97) Bain, <u>Industrial Organization</u>, at p.242 (1959);

(98) <u>Alcoa</u>, loc.cit. note 79, at p.425;

(99) <u>United States v. United Shoe Machinery Corp.</u>, 110 F.Supp. 295; 347 U.S 521;

(100) Id. especially to pricing policy (at 325-329); marketing practices (at 314-325); accumulation of patents (at 332-33);

(101) Attorney General National Committee , Antitrust Report p.328 (1955);

(102) Bain, loc.cit note 81, at p.181;

(103) Attorney General National Committee Antitrust Report at p.329 (1955);

(104) United States v. E.I. duPont de Nemours & Co. loc.cit. note 89;

(105) Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953);

(106) Id. at 612;

(107) Id. at 391-392;

(108) Gesell, Legal Problems Involved in Proving Relevant Markets, 2 Antitrust Bull. 463, 464 (1957);

(109) Id. at 393;

(110) L.A. Sullivan, Antitrust, Hornbook Series, West Publishing Company, p.54;

(111) Turner, Antirust Policy and the Cellophane Case, Harvard Law Review 281 (1956-57); Stocking & Mueller, The Cellophane Case, 45 Am.Econ.Rev. 291 (1955);

(112) Id. at 309;

(113) Id. at 309;

(114) Id. at 302;

(115) Trade Regulations Report No.655, June 18, 1984, part II, p.34;

(116) American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946); also: United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956); Standard Oil Co. v. U.S., 221 U.S. 1 (1911);

(117) International Boxing Club of N.Y. v. U.S., 358 U.S. 245 (1959);

(118) Id. at 250-251;

(119) Id. at 251;

(120) Brown Shoe Co. v. U.S., 370 U.S. 294; 82 S.Ct. 1502, 8 LE 2d 510;

(121) U.S. v. Aluminium Co of America, 377 U.S. 271; 84 S.Ct. 1283, 12 LE 2d 314 (1964);

(122) F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 571; 87 S.Ct. 1224, 18 LE 2d 303 (1967);

(123) see: Edward J.Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 117 (3d Cir.1980) cert. denied, 451 U.S. 911 (1981);

Columbia Metal Culvert Co. v. Kaiser Aluminium & Chem. Corp., 579 F.2d 20, 29-30 (3d Cir.) cert. denied 439 U.S. 876 (1978);

Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F.Supp. 841, 849 (n.D.Cal. 1979), aff'd, 658 F.2d 1256 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982);

(124) Kaiser Aluminium & Chem. Corp. v. F.T.C., 652 F.2d 1324, 1330 (7th Cir. 1981) "cross-elasticity of supply, or production flexibility among sellers is another relevant factor... in defining a product market";

Spectrofuge Corp. v. Beckmann Instruments, Inc., 575 F.2d 256, 280 (5th Cir.), cert. denied, 440 U.S. 939

(1979); cert. denied, 440 U.S. 939 (1979);

Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 691 (9th Cir.), cert. denied 429 U.S. 940 (1976);

Telex Corp. v. IBM, 510 F.2d 894, 916-917 (10th Cir.), cert. denied, 425 U.S. 802 (1975) "cross-elasticity requires that relevant market not be limited to peripherals plug compatible with IBM's CPU", reversing 367 F.Supp. 258, 338-339 (N.D.Okla. 1973), (substitutability rejected);

(125) Twin City Sportservice Inc. v. Charles O. Finley & Co., 512 F.2d 1264 (9th Cir. 1975) after remand 676 F.2d 1291 (9th Cir. 1982), cert. denied 103 S.Ct. 364 (1982);

(126) Id. at 1271;

(127) Id. at 1271;

(128) ILC Peripherals v. IBM, 458 F.Supp. 423 (Cal 1978), aff'd per curiam (9th Cir.1980) 636 F.2d 1188;

(129) Id. at 429;

(130) U.S. v. American Telephone & Telegraph Co., 524 F.Supp. 1336 (D.D.C.1981);

(131) Id. at 1375;

(132) Id. at 1375-1376;

(133) U.S. v. Grinell, 384 U.S. 562, 571; Byarns v. Bluff City News Co., 609 F.2d. 853; Mid Texas Communications Systems v. AT&T, 615 F.2d 1372 (5th Cir.), cert. denied 449 U.S. 912 (1980); Cowley v.

Braden Industries, Inc., 613 F.2d 751 (9th Cir.) cert. denied 446 U.S. 965 (1980);

(134) Mason, Preface to Kaysen and Turner (Antitrust Policy (1959), at xiii;

(135) Antitrust adviser 2nd ed. McGraw - Hill Book Company;

(136) Alcoa, loc.cit. note 79, at p.429;

(137) Id. at 430;

(138) United States v. United States Steel Corp., 251 U.S. 417, 40 S.Ct. 293, 64 L. Ed. 343, 8 A.L.R.1121;

(139) United States v. Swift & Co., 286 U.S. 106, p.116; 52 S.Ct. 460, 463, 76 L.Ed 999;

(140) Alcoa, loc.cit. note 79, at p.430;

(141) Id. at 431;

(142) Id. at 432;

(143) Id. at 430;

(144) Rostow, Monopoly Under the Sherman Act: Power or Purpose?, 43 ILL.L.Rev. 762 (1949);

(145) Mason, loc.cit. note 78, at note 359;

(146) United States v. American Tobacco Co., 328 U.S. 781, 786 (1946);

(147) Antitrust adviser 2nd Ed. McGraw Hills, Inc. 1971, p.66;

see also: Walker Process Equipment Inc. v. Food Maxchinery & Chemical Corp. 382 U.S. 172 (1965), 86 S.Ct. 347, 15 LE 2d 247;

(148) *United States v. United Shoe Machinery Co.*, 110 F.Supp. 295 (D.D.Mass. 1953);

(149) Id. at 430;

(150) Kaysen and Turner, loc.cit. note 80, at p.21-22;

(151) *Telex Corp. v. IBM*, 510 F.2d 894, 927 (10th Cir.), cert. denied, 423 U.S. 802 (1975);

(152) *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d. 263, 274;

(153) Id. at 276; see also *Continental Cablevision v. American Elec. Power Co.*, 1983 - 2 Trade Cas. (CCH) para.65.593, at 68.694 (6th Cir. 1983);

(154) Antitrust Law Institute 25th 1984, p.592-593;

(155) *Grason Electric Co. v. Sacramento Municipal Utility District*, 1983 - 2 Trade Cas. para. 65.650 (E.D.Pa.);

(156) see also *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973);

(157) *E.I. duPont de Nemours*, loc.cit. note 89, at p.751;

(158) Id. at 751;

(159) Id. at 751;

(160) ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) at 125; see: *Berkey Photo*, loc.cit note 152, at p.273-274, 276; *E.I.duPont de Nemours*, loc.cit. note 89, at p.739;

Chapter 3: Concentration

A. General Aspects of Concentration

The issues of monopoly and antimerger policy are to a large extent interdependent. It may be observed that countries where the antitrust legislation is based on an abuse control are much more liberal in the treatment of mergers than countries which try to regulate the achievement of market power as such.

The main feature of concentration is the disproportionate growth of economic elements. Thus we can distinguish different types of concentration dependent on the economic criterion taken into consideration. The different forms may influence each other, but need not necessarily do so. Competition is only affected via the element 'enterprise' which is the direct link to the market. Basically concentration may be caused by internal growth or external growth. For antitrust legislative purposes, only the second aspect is of importance. External growth means the merging together of undertakings to a new economic unit. This immediately indicates the difference between cartels and concentration: cartels don't question the economic

independence of the participating enterprises whereas concentration shifts the decision making power of the merging undertakings to the new economic unit although they still may plan independently but only within the scope of the fixed market strategy of the new company (1). Cartels only bind conduct in a certain way whereas concentration changes the internal structure of an enterprise (2). Cartels realize restraints of competition as such, concentration of enterprises cause competition restraining effects only as a consequence of the changed structure.

Merger may occur in different ways:
as a complete fusion of two or more firms in an economically and juridically new enterprise, as the creation of a joint venture or the formation of a combine (firms remain juridically independent but become economically dependent) or by taking over a part of the shares of another enterprise.

Concentration is often seen as an instrument to enable progress in productivity (3). Even the commentaries on the EEC merger problem favour a concentration of European industries to ensure successful competition with the big U.S. companies. This seems to be true especially for mergers of small enterprises to efficient units but would be highly undesireable for medium-sized or big firms.

Generally it is argued that growth of firms would result in an improvement of profitability, an acceleration of technical progress and a reduction of production costs.

Detailed studies (4) show that only in extreme cases -as for instance in the steel industry - the number of enterprises should not be less than eight to ten but that in most industries some larger numbers of units are appropriate. But it also turned out that there is no link between size and profitability beyond five million dollar assets. A review of U.S. experiences found that small and medium-sized firms are at least as creative as large enterprises in the field of research and development whereas highly-concentrated industries seem very modest in promoting technical progress (5). Smaller firms are more open to new ideas from independent inventors and tend to develope them into new products. Large enterprises introduce them into the market after a long period of time. For the United States it seems to be true that small and medium sized enterprises of several industries were very efficient in the research and development area; thus the results do not even justify the conclusion that mergers should be promoted in Europe for reasons of innovation.

Another very important factor are the effects of mergers on competition and finally on the market and the consumers. Competition is considered to be a communicator of changes in the level of supply and demand. The problem is not to produce given products and services at given marginal costs but to determine which new products and services will satisfy consumer demands (6). Competition is an instrument to organize the economic process in order to achieve supply

covering all requirements at lowest costs and prices, while encouraging technical progress (7). The interests of the consumers have to be seen in low prices and high quality. The range in which the enterprise is free to set its price is limited by its own costs, its target rate of profit, the prices of competitors (this is only an important criterion for the firm in cases of workable competition) and the demand cross-elasticity of the consumers.

Product differentiation and the introduction of new products into the market are measures basically intended to cause the consumers to regard these products as better but will only be undertaken as long as other enterprises challenge the position by their activities.

These aspects alone make it already desireable to regulate concentration by law and to establish a merger control.

The next sections are not intended to be an intensive study of the merger problem but shall give an overview of the present legislation in the area of market concentration in Austria, the EEC and the United States.

B. Market Concentration in the Cartel Act

The provisions dealing with mergers (Sec.49 et seq.) were incorporated in the Cartel Act in 1972. The Act specifies five variants:

1) the acquisition of another enterprise in its entirety, or of a significant part thereof, especially by merger or absorption;
2) the acquisition of shares in another enterprise, if this results in a participation of at least 25%;
3) agreements which provide for the takeover or management of operating units of other enterprises;
4) steps which result in a situation where one-half or more of the members of the executive bodies or supervisory councils of two or more enterprises are the same persons;
5) any other connection between enterprises which enables an entrepreneur to exert directly or indirectly a dominating influence on another enterprise.

Sec.51 states that the participating enterprises combined must have shares on the domestic market of at least 5% in order to be subject to registration which indicates that the effects on the market rather than the nationality of the involved undertakings is the decisive factor. This means that the foreign enterprises are also subject to the provisions of the Cartel Act regulating mergers. If an American producer of commodity X who exports his product to Austria, acquires a domestic enterprise involved in the same business, the transaction has to be in accordance with Sec.49 et seq. Cartel Act (8). The same is valid in cases where two or more foreign enterpises without Austrian participation merge, provided they hold shares on the domestic market (9). If an Austrian enterprise acquires a

foreign undertaking, it is important that the acquired firm already exported to Austria or was supposed to export in the near future (10).

For the acquisition of an enterprise the Act particularly points out merger and reorganization. The technique of transfer is without any importance (11). Only the result is decisive.

In regard to the acquisition of assets to a significant extent, it is disputed at what point the acquisition is 'significant'. The Federal Supreme Court of the Federal Republic of Germany stated to the same problem in Sec.23 of the German Law Against Restraints of Competition that not only these assets are to be considered significant which appear sufficiently large in relation to the vendor's total assets, but also those assets which have a function of their own such as a particular plant even if the acquired assets only represent an insignificant portion of the assets of the selling enterprise (12). This definition may be taken into consideration for the interpretation of Sec.49/1 et seq. also.

Sec.49/2 includes the acquisition of shares by means of which 25% of the voting capital stock of another enterprise is obtained, into the merger concept of the Cartel Act. In the computation of shares which are owned by an enterprise, those shares which belong to related enterprises have to be included. If a trustee is interposed, the shares will be counted as they would belong to the trustee to the extent he

is entitled to vote. Still in dispute is the question of if two or more enterprises, where one controls the others, each acquire combined shares amounting to an interest of 25% or more in another enterprise have to be deemed as being merged with regard to the determination of the existence of an obstructive minority. If we affirm the question we have to add the shares of the joint enterprise and its existing and new shareholders to the extent such shareholders are participating with at least a 25% interest, for determining whether a reporting obligation and supervision of abuse exists. With regard to the purpose of Sec.49/2 Cartel Act to control market power, and the parallel provision in the German Law Against Restraints of Competition (13) which expressly regulates this problem ("Acquisition of shares of another enterprise if such shares alone, or together with other shares already belonging to the enterprise...") (14), Sec.49/2 Austrian Cartel Act will have to be interpreted in this way also.

With a transfer contract, the owner of an enterprise transfers the operation of his enterprise to another entrepreneur without having the right to instructions, whereas with an enterprise management agreement another enterprise only assumes the obligation to operate the undertaking for the own account and at the own risk (15). The treatment of such contracts as elements of concentration is due to the instruction rights of the operating enterprise.

Sec.49/5 is designed to assure that other transactions which result in a dominating influence of one enterprise over another may also be considered mergers.

The Cartel Court found that a dominating influence would not exist where the possibility to exercise real entrepreneurial functions continues to exist (16). Besides that the ability to dispose over the enterprise, the competence for the raising of capital and investments as well as the ability to independent decisions concerning the personal are decisive criteria for the interpretation of the phrase 'exercise a dominating influence...'. A supply agreement between a mineral oil company and the owner of a gasoline station is not considered to be merger although disputes concerning such contracts are resolved before the labor court (17).

The geographical effects of the dominating influence over another enterprise are without any importance for the realization of Sec.49/5 (18). Subject to this provision is dominating influence which is exercised 'directly or indirectly'. 'C' is indirectly dependent on 'A', if 'B' is dependent on 'A' and 'C' on 'B'.

Mergers are to be registered in the cartel register within one month (Sec.50). The court is authorized to prohibit abusive conduct resulting from an abusive exploitation of the market dominating position by merged enterprises but can't avoid the establishment of a dominant position by merger.

Similar problems arose in the European Economic Community. The main antitrust provisions of the Treaty of Rome, Art.85 and Art.86, regulate the abusive exploitation of a dominant market position and restraints of competition but are not applicable to a prohibition of mergers. Nevertheless it is obvious that mergers can affect competition. Art.3f Treaty of Rome states that "the activities of the Community shall include ... the institution of a system ensuring that competition in the Common Market is not distorted". This gave rise to a decision of the Court of Justice in which this above - mentioned aim of the EEC and Art.86 were combined in order to prohibit mergers of enterprises of a certain size (19). In the Commissions' study "the Problem of Mergers in the Common Market" (20) it already pointed out that the merger between a dominant enterprise and another one which results in a restraint or elimination of competition has the same consequences as described in art.86/c and may therefore violate the Treaty of Rome.

This doctrine was applied for the first time in the Continental Can decision, where the Commission found Art.86 applicable because the merger strengthened the dominant enterprise to a degree that the remaining actual or potential competition in a substantial part of the Common Market in practice was eliminated (21). The Court of Justice did not only confirm the Commission's viewpoint but further developed it by stating that one could not assume that the

Rome Treaty in Art.86 permitted that any serious chance of competition is eliminated (22). According to this doctrine, EEC law would not only impose a supervision of abuse upon merging enterprises but Art.86 would serve as an instrument to forbid the establishment of mergers of a certain size. Contrary to most municipal laws, EEC norms don't define the term 'merger'. Nevertheless the practice mentions especially participation of one enterprise in another, acquisition of the majority share of foundation of a joint susidiary, acquisition of the capital assets, partly or totally fusing two or more legally independent enterprises into a new one. But the application of Art.86 to mergers always requires a dominant position of one participating enterprise and as a result of merger an increasing market power.

A strengthening doesn't necessarily mean a higher market share, it can also be the result of increased financial powers or other resources, or in case of an already existing monopoly or oligopoly, a reduction of chances for a revival of competition. A mere addition of the market positions of the participating enterprises can be irritating. Combined economic and financial power may strengthen the market position even to a higher degree (23).

The court of Justice found that abuse in conduct exists if only such enterprises remain in the market whose business conduct depends entirely upon the dominant enterprise (24). This is an indication that a high degree of dominance has to

be reached for an application of Art.86, although there are no firm and reliable standards for measuring it.

After the development of the Continental Can doctrine, the Commission elaborated a "Proposal Regulation on the Control of Mergers" in which the Commission suggested only to cover mergers by the antitrust legislation above a certain absolute criteria size, either a total turnover by the participant enterprises of more than 200 million units of account or a market share of the participants as offerers in at least one Member State of 25%. The draft has already been discussed by the Council but has not become law yet.

C. The Treatment of Mergers in U.S. Legislation

I) General Remarks

In the United States Sec.7 of the Clayton Act (25), as amended in 1950, prohibiting any corporation "where in any line of commerce in any section of the country, the effect of such acquisition may be to substantially lessen competition, or the tend to create a monopoly".

In 1980, the coverage of Sec.7 was expanded to firms engaged "in any activity affecting commerce", and to apply to acquisitions by or from individuals as well as corporations (26). Until that time, Sec.7 only applied to corporations engaged in the flow of interstate commerce, and

did not apply to firms engaged only in local activities though those activities may have affected interstate commerce (27).

Also new is the possibility of an application to acquisitions by or from individuals and to the formation of a corporation by two individuals.

One of the main motivations for the 1950 amendment was Congress' "fear of ... a rising tide of economic concentration in the American economy" caused by "unchecked corporate expansion through mergers" (28). The amended statute should prohibit monopolistic tendencies in their incipiency, "before they matured into Sherman Act transgressions" (29). Sec.7 requires "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future" (30). This means that proof of an actual impairment of competition is not necessary, the judicial authorities will have to investigate the possible affects of the merger on competition in the future. On the other hand Congress recognized the positive effects some mergers may have on competition. A merger between two small companies in order to enable them to compete more effectively with larger corporations dominating the relevant market should not be impeded by the provision (31), nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive

factor in the market (32). However, the "stimulation to competition" is interpreted in a narrow way.

In Philadelphia Bank, the Supreme Court stated that a merger is not saved from illegality simply "because, on some ultimate reckoning of social or economic debits or credits, it may be deemed beneficial" (33). The court did not find that the merger had positive effects on the economic development in its geographical area and that it would enable the new firm to compete with larger undertakings on another market (34).

In another case, the Supreme Court found that possible economies of scale "cannot be used as a defense to illegality" (35).

Of great importance for the practice are the Merger Guidelines issued by the Justice Department which are of some help to elaborate the standards for determining which corporate acquisitions or mergers will be opposed under Sec.7 of the Clayton Act. In addition to that the Federal Trade Commission issued a Statement Concerning Horizontal Mergers (36) and already pointed out that it would give "considerable weight" to the Department of Justice Merger Guidelines. Both, the Guidelines of the Justice Department and the Statement by the Federal Trade Commission have not the Status of a law although the courts sometimes refer to them (37).

Nevertheless they give accurate information of the present viewpoint of the Justice Department and the Federal

Trade Commission to special problems concerning mergers. The next paragraph shall illustrate the Department's approach to the delimitation of the relevant market and the concentration problem in the case of horizontal mergers.

The 1968 guidelines have been entirely replaced by new guidelines issued on June 14, 1982. Two years later, the Department of Justice revised its 1982 Merger Guidelines in order to "make antitrust enforcement more effective by providing more and clearer guidance in this difficult area" (38).

II) How to Define the Relevant Product Market?

The definition of the relevant markets have always been one of the main issues in Sec.7 cases. "Delimitation of the relevant market is a necessary predicate to finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition'. Substantiality can be determined only in terms of the market affected" (39).

At first the Guidelines of 1982 established more precise standards for a delimitation of the relevant markets in seeking to identify a group of products such that "a hypothetical firm that was the only present and future seller of those products could raise price profitably".

Beginning point is a provisional product market, including all products which are, from the customers point of view, good substitutes at prevailing prices. The question one has to ask is, to what extent buyers of products already included in the market would be likely to shift to other products as a result of a "small but significant and non - transitory" price increase. The Guidelines apply the so-called 'five-percent' test saying that one has to observe the shifts to other products within one year after a price increase of 5%. The expansion of the provisional market will be continued until it satisfies the condition that a hypothetical firm in the market could raise price profitably.

The new 1984 Guidelines make clear that the five percent test is not an inflexible standard that will be used regardless of the circumstances of a given case (40). The Justice Department sometimes may postulate a price increase much larger or smaller than five - percent depending on the industry involved (41). In essence the above described test is a recognition of the substitutability method.

Besides that the 'elasticity of supply' may apply in cases where firms are able to shift fairly readily into the production and sale of that product which is especially dependent on the cost and speed of shift.

III) How is Concentration Determined?

The Justice Department indicates that it will focus on the post - merger concentration and the increase in concentration caused by the merger (42). For measuring market concentration the so-called Herfindahl - Hirschmann Index was adopted. The index is calculated by summing the squares of the individual market shares of all the firms included in the market under the standards set forth in Sec.II of the Guidelines. According to this concept a post-merger HHI of less than 1000 indicates an unconcentrated market structure, whereas a market with a HHI between 1000 and 1800 is moderatly concentrated and a HHI above 1800 gives evidence of a highly concentrated market. The 1984 revision points out that the Department will not, except in extraordinary circumstances, take action against mergers with a HHI below 1000. For the region between 1000 and 1800 a generalization seems to be more difficult, but the Department is likely to sue if the increase in the HHI is more than 100 points (43) unless the consideration of the factors discussed in Sections 3.2, 3.3, 3.4, and 3.5 indicate that the merger is not likely substantially to lessen competition. For mergers with a HHI of more than 1800 the Merger Guidelines lay down that in situations where the HHI increase exceeds 100 and the post-merger HHI substantially exceeds 1800, even a consideration of the factors discussed in Sections 3.2, 3.3, 3.4, 3.5 will

barely support the argument that the merger is not likely to substantially lessen competition, whereas an increase in the HHI of more than 50 points will only be challenged if the consideration of the factors in Sections 3.2, 3.3, 3.4, and 3.5 show substantial impact on competition.

The new Guidelines improved the earlier version for the determination of the significance of concentration and market share data in adding some factors which are intended to give information about the economic prospects of enterprises (44).

The determination of percentages on the market may give a rough idea about the market structure, but doesn't analyze the actual economic situation. Foreign enterprises, for example, may be subject to quotas which limit their opportunities on the U.S. market to a significant extent or the changes in the exchange rates may have some impact on the import policy. A firm's chronic financial weakness may indicate a decrease of its future competitive significance. Section 3.4 enumerates a variety of additional factors which "affect the liklihood that merger will create, enhance, or facilitate the exercise of market power" (45). They include

1) the degree of product heterogeneity or homogeneity;
2) the degree of difference between the products and locations in the market and the next best substitute;
3) similarities and differences in the products and locations of the merging firms;

4) information about specific transactions and buyer market characteristics;
5) the ability of smaller fringe sellers to increase sales;
6) conduct of firms in the market;
7) market performance;

IV) Efficiencies:

An important development in the Guidelines of 1982 was the concession that efficient mergers of American industries should not be challenged. Whereas the wording in the 1982 Guidelines seemed to indicate that efficiency claims would only be considered in 'extraordinary cases' (46), the revisers tried to make clear that efficiency claims will be given appropriate weight in all cases "in which they are established by clear and convincing evidence". The Department will consider various types of efficiencies including economics of scale, better integration of production facilities, plant specialization and lower transportation costs.

V) Merger Notification

Sec.7a of the Clayton Act makes, before realization, certain securities or asset acquisitions subject to

notification to the Assistent Attorney General in charge of the Antitrust Division and the Federal Trade Commission.

The provision applies to the acquisition of 15 percent or more of the securities or assets or of more than 15 million dollars worth of securities or assets by a person engaged in a business in or affecting commerce if a person with total assets or annual net sales of 100 million dollars or more acquires securities or assets of either a manufacturing company with total assets or annual net sales of ten million dollars or more or a non-maufacturing company with total assets of ten million dollars or more on a person with total assets or annual net sales of ten million dollars or more acquires securities or assets of a company with total assets or annual net sales of 100 million dollars or more.

The provision contains in Sec.7a/c a number of excemptions and besides that the Federal Trade Commission is authorized to establish further excemptions.

If notification is required, realization of the acquisition has to be deferred until 30 days after the Federal Trade Commssion and the Assistent Attorney General have received notice, except a waiting period of 15 days applies to this deferral. The waiting period may be terminated or extended for further 10 days in the case of cash tender offers or 15 days in the case of other acquisitions.

VI) Conclusion

It appears that the Austrian and EEC approach to mergers is even more lenient than their policy toward monopolies. Mergers are not judged on themselves but on their results and their behaviour. The regulations are not intended to prohibit mergers but to control them. This has often been criticized and is seen as an important weakness: We are able to attack the abuse of a dominant position but we are not able to avoid the establishment of monopolies through external growth. The laws provide provisions to prohibit cartels but not to prohibit the much more intensive form of mergers.

In the United States the judicial authorities may challenge mergers as such. The law allows a pre-merger control and increases its effectiveness through the obligation of merger notification. The main goal is the maintenance of 'workable competition'. Whereas under European law the immediate impact of the merger upon competition has to be judged, Sec.7 of the Clayton Act requires a prediction of its impact in the future. Section 7 appears as an effective supplementation to Section 2 of the Sherman Act.

Notes to Chapter 3

(1) Robert Liefmann, _Kartelle, Konzerne, Trusts_, 8th ed., Stuttgart 1930, p.275 et seq.;

(2) so: Mestmaeker, _Wettbewerbsrecht_, p.400;

(3) critical remarks: Lenel, _Unternehmenswachstum_, p.492 et seq.;

(4) _Le probleme de la concentration dans le mache commun_, EEC, Collection Etudes, Serie Concurrence No.3, Bruxelles 1966, p.7 et seq.;
J.S. Bain, _Barriers to New Competition_, 1956, Chap.3;
H.W. DeJong, Economic concentration Hearings before the Subcommittee on Antitrust and Monopoly of the Committee;

(5) Especially: Daniel V. DeSimone in the Hearings, esp. p.1096 et seq.;

(6) F.A. Hayek, _Der Sinn des Wettbewerbs_, in: Individualismus und wirtschaftliche Ordnung, Erlenbach - Zuerich, 1952, p.139 et seq.;

(7) Peter C. Canellos and Horst S.Silber, _Concentration in the Common Market_, in: Common Market Law Review 1970, p.6;

(8) KOG, OeBl. 1975, p.71, 72; also BGH, WUW/E BGH 1613;

(9) see: Straberger, _Unternehmenszusammenschluesse_, p.5;

(10) KOG, Schoenherr/Dietrich IV, No.120 (p.291); KOG, OeBl. 1975, p.42;

(11) Langen/Niederleithinger/Schmidt Rdz.9 to Art.23;

(12) WUW/E BGH 1377 et seq., Zementmahlanlage;

(13) Law Against Restraints of Competition, BGBl. 1974 part I, p.869;

(14) Id. at Art.23/2/2/2;

(15) Kastner, Gesellschaftsrecht, p.242;
Haemmerle/Wuensch II, p.533;
Langen/Niederleithinger/Schmidt, Rdz.21b to Art.23;

(16) KOG, OeBl.1974, p.91, 92; also KOG, OeBl.1975, p.149, 150;

(17) Wahle, Tankstelleninhaber;

(18) contrary KOG, OeBl. 1975, p.149, 150;

(19) Case No.6/72, Feb.2, 1973, [1973] ECR 215 - C.M.R.8171, Continental Can;

(20) Competition, No.3, 1966;

(21) Continental Can, loc.cit. note 19, at p.245;;
Gleiss/Hirsch Art.86 Rdz.103;

(22) Id. 245, 246;

(23) Commission, Dec.9, 1971, OJ 1972 L 7/25, 38, [1972] C.M.L.R.D11,Continental Can;

(24) Continental Can, loc.cit. note 19, at p.246;

(25) 15 U.S.C. para.18;

(26) Act of Sept.12, 1980, Publ.L.No. 96-349 Para.6/a, 94 Stat.1157 (codified as amended at 15 U.S.C. para.18 (1982);

(27) ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) Footnote 4 on page 148; see: U.S. v. American Builing Maintenance Industries,422 U.S. 271, 283 (1975);

(28) Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962);

(29) Dominik T. Armentano, Antirust and Monopoly, p.230;

(30) U.S. v. Philadelphia National Bank, 374 U.S. 321, 362 (1963);

(31) As to small companies, see H.R. Hearings on H.R. 2734, at 41, 117; S. Hearings on H.R. 2734, at 6, 51; 95 Cong.Rec. 11486, 11488, 11506; 96 Cong.Rec. 16436; H.R.Rep.No. 1191, 81 Cong., 1st Sess. 6-8; S.Rep.No. 1775, 81st Cong; 2d Sess. 4; see also Brown Shoe Co. v. U.S., 370 U.S. 294, 319;

(32) As to mergers with failing companies: Hearings on H.R. 2734, at 115, 134-135, 198; 96 Cong.Rec. 16435, 16444; H.R.Rep.No. 1191, 81st Cong., 1st Sess. 7; S.Rep.No. 1775, 81st Cong., 2d Ses. 7; International Shoe Co. v. F.T.C., 280 U.S. 291, 302 (1930); Citizen Publishing Co. v. U.S., 394 U.S. 131, 138 (1969); U.S. v. Greater Buffalo Press, Inc., 402 U.S. 549, 555 (1971);
Section 7 does not proscribe some mergers between 'small companies', and does not ordinarily forbid a merger where one of the companies involved has such depleted resources that it faces the clear probability

of a business failure and where its only practical alternative is to sell to the acquiring competitor.

(33) Philadelphia Bank, loc.cit. note 30, at p.371;

(34) see also: Ford Motor Company Co. v. U.S., 405 U.S. 562, 569-70 (1972);
The acquisition by a large automobile comapany of a spark plug manufacturere does not make the latter company a 'more vigorous and effective competitor' to larger spark plug companies.

(35) F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967);

(36) F.T.C. Statement Concerning Horizontal Mergers, Trade Reg.Rep. (CCH) para.73 (extra ed. No. 546, June 16, 1982); The Federal Trade Commission has also issued merger enforcement policies applicable to the cement industry, the dairy industry, and the retail distribution of food products based,in part, upon that agency's experience in analyzing and prosecuting mergers in those particular industries.
2 Trade Reg.Rep. (CCH) para.4532 (1978) (dairy industry guidelines); 2 Trade Reg. Rep. (CCH) para.4525 (1967) (food products mergers); 2 Trade Reg. Rep. (CCH) para. 4520 (1967) (cement industry guidelines);

(37) see: e.g. F. & M. Schaefer Corp. v. C. Schmidt & Sons, 597 F.2d 814, 817 & n.5 (2d Cir. 1979(; Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 524-25 (3d Cir. 1969), cert. denied, 396 U.S. 1009 (1970);

U.S. v. Tracinda Inv. Corp., 464 F.Supp. 660, 664-65 (C.D. Cal 1979);

(38) Statement of the Attorney General William F.Smith to the new Guidelines;

(39) *U.S. v. E.I. duPont de Nemours and Co.*, 353 U.S. 586, 593 (1967);

(40) U.S. Justice Department: Statement accompanying release of revised merger guidelines June 14, 1984, p.5;

(41) Guidelines Sec. 2.11;

(42) Guidelines 1984, p.18 para. 3.0;

(43) Guidelines 1984, Sec.3.11b;

(44) see: Guidelines 1984, Sec. 3.2 et seq.;

(45) Guidelines 1984, Sec.3.4;

(46) Statement accompanying release of revised merger guidelines p.14-15;

Chapter 4: The Extraterritorial Applicability of Antitrust Laws

I) The Extraterritorial Applicability of the Cartel Act

According to Sec.4 of the Cartel Act the Austrian Cartel law applies also to cartels which have been realized abroad but effect the domestic market. For example, if an Austrian and a Swiss entrepreneur conclude a contract in Switzerland in which the Swiss party to the contract agrees not to undercut prices charged by the Austrian entrepreneur on the domestic market, such an agreement would be ineffective as a cartel by contract (Sec.1/1/1) as long as not registered (1). The same is valid if both parties are foreign entrepreneurs. Insofar Sec.4 is repugnant to Sec.35/1 Austrian International Private Law Act which lays down that contracts are governed by the law that the parties agreed upon. But the main purpose of the Cartel Act, the maintenance of competition, can only be attained if all restraints of competition are covered which have impact on the domestic market. Such effects may also be the result of contracts or other arrangements which -in application of International Private Law- would have to be judged under

foreign law. And above all foreign laws generally don't regulate restraints of competition effecting the Austrian market. But even if such agreement falls within the scope of Sec.4, it doesn't mean that it is governed in all other respects by Austrian law. If the contract is declared null and void in part, the validity of the other, under Cartel Act irrelevant provisions, is subject to the foreign law which applies under the general rules (2) of the Austrian International Private Law Act. The Austrian legislator followed with Sec.4 the 'theory of effects' for delimitating the applicability of the legislation on restrictive business practices and embodied thereby a rule which had already been adopted by the most important industrial countries.

Generally public international law recognizes that each State shall determine the scope of applicability of its laws and include within such scope any action taken abroad, whether or not the authors of such action are its nationals or persons resident on its territory, provided there exists between such acts and its territory a link which reasonably justifies such application (3). The problem is thus to determine whether the restrictive effects on the domestic market are sufficient for applying national laws and what kind of link between such acts and national territory is necessary to justify such application.

In the ICI v. Commission case (4) the European Court of Justice intensively discussed this problem. Advocate General Mayras pointed out (5) that the application of the

'theory of effects' in his view, would be subject to three conditions: restriction of competition on the national market must be direct and immediate, its effects must be reasonably predictable and the effect has to be substantial. In fact, in the European Community and the United States the 'effect' doctrine has regularly been applied. The Commission of the European Communities for example stated in the Grosfillex - Fillistorf case (6) where a French manufacturer of plastic goods had appointed the Swiss firm Fillistorf as the exclusive distributor of its products in Switzerland with the prohibition to resell the commodities in the EEC Market, that this restriction of competition wouldn't have an appreciable effect within the Common Market. In connection with the importation of Japanese products into the Community, the Commission (7) pointed out that "... the fact that a number or all of the enterprises parties to an agreement have their head offices outside the Community does not affect the applicability of this provision, if the effects of agreements, decisions or concerted practices extent to the territory of the Common Market".

One of the most important decisions by the Court of Justice dealing with the 'effect' doctrine is the judgement in the Beguelin case (8). The court had to deal with following facts: In 1967 the Belgian company, Beguelin Co., entered into an agreement with the Japanese firm Oshawa whereby the latter appointed it exclusive distributor for Belgium and its subsidiary, Beguelin Import Co. France,

exclusive dealer for France of pocket gas cigarette - lighters bearing the trade-mark 'WIN' and made by the Japanese firm. The undertaking, Gebrueder Marbach, has a similar exclusive dealing agreement in respect of German territory. In 1969, GL Import - Export, Nice, imported about 18.000 WIN-lighters into France. These had first of all been despatched to Hamburg for Gebrueder Marbach and were afterwards forwarded and cleared through costums in France. The Beguelin enterprises brought action before the French courts and asked to stop these imports on the grounds of unlawful and unfair competition. The defendants argued that the exclusive distribution contract was invalid because it conflicted with Art.85 of the Rome Treaty. The court found that "the fact that one of the enterprises party to the agreement was established in a third country did not prevent this provision from being applied once the agreement produced its effects on the territory of the common market".

II) The Theory of 'Effects' in the United States

In the United States the Clayton Act applies the criterion of effects for price discrimination, "where commodities are sold for use, consumption or resale within the United States or any Territory thereof, ... or other place under the jurisdiction of the United States (Art.2)", and exclusive dealership agreements (Art.3), whereas the

Sherman Act of 1890 governs international cartels but doesn't define the criterion for the application. The Webb - Pommerene Act exempts the formation and operation of associations of businesses engaged solely in export trade from the prohibitions on concerted action contained in the Sherman Act; this exemption is based upon the theory that there is no restraint of trade within the U.S., and that the export association doesn't artificially or intentionally enhance or depress prices within the U.S. The place where the agreements are concluded is irrelevant, the only important place is where their effects are felt.

The case law confirms the statutes. Especially '<u>Alcoa</u>' (9) may be seen as a landmark case in formulating the 'effects' test for the applicability of U.S. antitrust laws on foreign conduct and finally for determining the reach of jurisdiction of U.S. antitrust laws.

The Aluminium Company of America (Alcoa) and Aluminium Limited, a Canadian enterprise but wholly owned by Alcoa, were charged of having violated Sec.1 of the Sherman Act by having entered into an unlawful conspiracy in restraint of interstate and foreign commerce particularly in bauxite aleumina, aluminium and products, manufactured therefrom. Action was brought before the Southern District Court of New York which found itself to have jurisdiction over Aluminium Limite, because it "actively and continuously engaged in transacting the business for which it was incorporated, through its principle executive officers and a permanent

organization in the Southern District of New York" (10) but finally decided that Limited's acts abroad as a member of a foreign cartel were not subject to the jurisdiction of U.S. courts. The Court of Appeals reversed. As it turned out before the court, a Swiss corporation (the 'Alliance') had been created by several European enterprises and Limited, with the main function to allocate the amount of aluminium to be produced on a quota basis. The shares of 'Alliance' were taken up by the participants proportional to their relative annual capacities. This corporation fixed a quota of production from time to time for each share according to which it would buy any products, a stockholder couldn't sell. Apart from that, each member was free to sell at any price. The first agreement from 1931 didn't include imports into the United States in member's quotas. Such imports were first taken into account when the agreement was amended in 1936, at the same time the system of unconditional quotas was replaced by a system of royalities. The shareholder, having exeeded its quota, had to pay a royalty to 'Alliance' proportional to the excess. The royalities were then distributed to the stockholders according to their shares.

The court now discussed very intensively the issue of jurisdictional reach of the Sherman Act. The question arose if Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it and if so whether Congress intended to impose the liability and whether the U.S. Constitution permitted it to do so. Judge

Learned Hand pointed out that it is settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consquences within its borders which the state reprehends (11).

Basically there are two situations possible: "There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in, for example, Europe or in South America, may have repercussions in the United States if there is trade between the two" (12). In refering to the international complications which are to be expected if such agreements are treated as being unlawful, the court concluded that Congress certainly did not intend the Sherman Act to cover them. To the problem if such agreements intend to include imports into the United States and it appears that they have had effect upon them, the court stated that: "That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose beween these alternatives; but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have

had some effect upon them. Where both conditions are satisfied, the situation certainly falls within such decisions as United States v. Pacific & Artic R. & Navigation Co. (13), Thomsen v. Cayser (14) and United States v. Sisal Sales Corp (15)".

Thus some effect upon U.S. trade is required for an agreement concluded outside U.S. territory to be a violation of U.S. laws. In the case in question there was no doubt about the intention of Limited's stockhaolders to restrict imports into the United States but the court didn't have sufficient evidence that the company really did so. Judge Hand pointed out (16) that a situation where the intention is obvious, the burden of proof would shift to the defendant to prove that it did not affect the trade.

The agreements of 1931 and 1936 would have been illegal if they had been concluded in the United States and since they were intended to affect U.S. trade and in fact did so, they also have to be deemed illegal under U.S. antitrust laws if they were concluded abroad. The affect on U.S. trade was proved on the basis of the influence upon prices. The court referred to the Sacony-Vacuum Oil case (17), where it had been found that "an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was unlawful as an agreement expressly to fix prices" (18). For this reasons the agreement of 1936 had violated Sec.1 of the Sherman Act. The lower court's finding that the 1936

agreement did not "materially affect ... foreign trade or Commerce of the United States" (19) was rejected.

The _Alcoa_ judgement is especially significant in two respects. It was the first time that a U.S. court applied the theory of effects for the determination of the jurisdictional reach of an U.S. antitrust law rather than deciding the issue on the basis of conduct having taken place within the U.S., and it was the first time that conduct by foreign enterprises, effected abroad, although limited by the domestic reference points as mentioned above, was judged by U.S. antitrust standards. It is important to point out that the agreement had to be intended to effect U.S. trade and must actually have had some effect on the trade. Although it is a general accepted rule that persons are presumed to intend the normal consequences of their acts, it can be concluded from the circumstances of the case and the issues in question that Judge Hand applied a higher degree of intent.

The agreement of 1936 expressly included imports into the United States and thus gave a strong indication of the intentions. However, in the _Incandescent Lamp_ case (20) the court did not hesitate to find the proper intent, despite the fact that the parties had not included the U.S. market in their agreement. Some foreign companies concluded the so-called Phoebus agreement which set up a quota system with the effect that each participant attained a dominant position in its own market. But neither the United States

was included in the agreement nor were U.S. companies involved as paricipants. Nevertheless the court found that General Electric Company and its U.S. subsidiary IGE used the agreement through their ownership of foreign parties to the agreement to attempt to monopolize the U.S. market. Philips, A Dutch company and one of the defendants, argued that an application of the Sherman Act would only be in accordance with the law in the case in question if there was a willful intention to restrain trade, the action had or having a direct and substantial effect upon U.S. trade and if such effect was at least one of the main purposes of the action (21). The court relied on Judge Learned Hand's criteria in Alcoa: 1) the agreement has to be intended to effect U.S. trade and 2) at least some actual effect is necessary.

"Philips knew full well that its activities, though with parties other than General Electric, were dictated by it. If it did not know, it should have known, particularly after 1933, that they were a substantial contibution to the sheme whereby the domination of General Electric lamps would be perpetuated and competition thwarted" (22). In proving the actual effect on U.S. trade, the court refered to the glass agreements where, among other things, Philips procured an annual stipend for ten years to refrain from the use of its United States patents in glass, and to refrain from agreements with IGE and Corning.

For the determination of the necessary intent the court cited U.S. v. Griffith (23): "It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements" (24).

U.S. courts have little difficulty applying American law to its citizens, even if transactions were taken abroad. In Pacific Seafarers (25), the court expressly pointed out that only U.S. nationals were involved and in the Timberlane case (26) the court found an application of American laws to American citizens raising fewer problems than application to foreigners (27). But there can be no doubt that foreign companies also engaged in domestic business have to comply with American law. There would be no justification for treating foreign enterprises in a different -in this concern in a better way- than domestic undertakings. "As long as foreign companies are concerned which do business within the United States the jurisdiction of U.S. courts is beyond dispute (28).

A. Neale therefore thinks that the broad area in which the jurisdiction of the American courts is thus unchallengeable (29) might be thought sufficient to accomplish the aims of antitrust in respect to American commerce with foreign nations (8). This conclusion seems to disregard the important fact, that U.S. antitrust

legislation can also be jeopardized by transactions abroad without participation of U.S. nationals. It is in fact true that a state must have at least minimal points of contact in order to be authorized under International Law to impose legal duties upon foreign citizens or foreign entities.

Besides that we also have to take into consideration that a legal system is only effective if enforceable. Even if we apply American antitrust law to foreign companies for transactions abroad and condemn them for violation of U.S. law, an enforcement without the agreement of the foreign government would disregard the sovereignty of other nations. However, efforts to coordinate national enforcement have been made by the Organization for Economic Cooperation and Development (OECD) and the United Nations Committee on Trade and Development (UNCTAD) (31).

Although I wouldn't agree that the area where the extent of jurisdiction of U.S. courts is unchallengable would be sufficient to accomplish the American antitrust aims, the extraterritorial scope of U.S. antitrust law is most doubtful, when the restraints concerned are carried out solely in foreign market transactions (32). It is noteworthy that the courts didn't have to deal with cases up to now where jurisdiction was only based on 'effects' on trade of transactions of foreigners abroad. The courts always gave evidence of connections to American companies or to restraints on domestic commerce (33).

III) Restatement of the Foreign Relations Law of the United States

The new draft of the Foreign Relations Restatement in Tentative Draft No.2 provides special rules for antitrust cases:

1) agreements made in the United States, and conduct or agreements carried out predominantly in the United States;
2) agreements made outside of the United States, and conduct or agreement carried out predominantly outside of the United States, if a priciple purpose is to interfere with U.S. trade and there is "some effect' on such trade;
3) any other agreement or conduct if it has a "substantial effect" on U.S. trade and the exercise of jurisdiction is not "unreasonable" under Sec.403(2) and (3), (34).

In Sec.403 to which Catagory (3) refers, it is mentioned that the 'effets principle' has not been a major source of controversy when it has been invoked to support regulation of activities abroad by foreign nationals because of their economic impact in the regulating state. In such cases, in particular, the evaluation in the light of the considerations set forth in Subsection (2) is called for (35). The determination of 'unreasonableness' requires a consideration of a number of factors, like in Timberlane (36). But in the Foreign Trade Antitrust Improvements Act of 1982 on the other side, the House Report indicates very

clearly that the direct and substantial effects test with the Restatement's forseeable concept added, will be the test for foreign trade activities in the future also (37). Catagory (3) of the new draft seems to consider the theory of effects as accepted in Alcoa with the intensity of 'some effect', although it was actually required, as in the later cases, that substantial or significant effect on U.S. trade had taken place. In Catagory (3), however, the revisers expressly used the term 'substantial effect' as one of the elements.

The revision doesn't seem to have improved very much Sec.18 of the Restatement (Second) which states that the effect within the territory to be substantial, that it occurs as a direct and forseeable result of the conduct outside the territory, and that the prescribing of a rule of law with a view to preventing or regulating such effect is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems (38).

The Justice Department's viewpoint was laid down in the Antitrust Guide for International Operations from 1977: "U.S. law in general, and the U.S. antitrust laws in particular, are not limited to transactions which take place within our borders. When foreign transactions have a substantial and forseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place ... to use the Sherman Act to restrain or punish an overseas

conspiracy whose clear purpose and effect is to restrain significant commerce in the U.S. market is both appropriate and necessary to effective U.S. enforcement" (39).

IV) The 'Rule of Reason' as Criterion for the Determination of the Reach of U.S. Antitrust Regulations as Defined in the Timberlane case.

In the Timberlane case (40) the court had to deal with an alleged conspiracy, in Honduras by the Bank of America and others, to prevent the plaintiffs from shipping lumber to the United States. The defendants obtained a court-ordered attachment of the assets of the Honduran subsidiaries of the plaintiffs because of outstanding debts. A judicial officer was appointed who took charge of the property. This finally caused the plant to go out of business. As a result only entities financed by the Bank of America controlled the export market for Honduran lumber afterwards. The District Court discussed the complaint stating, that the Act of State doctrine prevents U.S. courts from judging Honduran government acts, and denying in general jurisdiction over the dispute because of the lack of direct and substantial effect on U.S. commerce. The Court of Appeals deemed the 'direct and substantial' effects test as inadequate to establish jurisdiction over foreign acts and adopted a 'rule of reason' test instead. His three - part jurisdictional

rule of reason test goes back to the suggestions of Professor Brewster (41). "A tripartite analysis seems to be indicated.

As acknowledged above, the antitrust laws require in the first instance that there be some effect -actual or intended- on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes.

Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws ... Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States -including the magnitude of the effect on American foreign commerce- are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extraterritorial authority" (42).

Referring to the second factor, the court found that the actions took place in Honduras and the most direct economic effect was probably on Honduras. There has been no indication of any conflict with law or policy of the Honduran government. Therefore the dismissal by the district court cannot be sustained on jurisdictional grounds. The Court of Appeals in applying the 'rule of reason' test balanced the domestic factors and considerations of comity. It evaluated seven issues: conflicts with the law or policy

of the foreign country; the nationality or domicile of the individuals; the situs of the business or corporations; the degree to which enforcement could be expected to bring about compliance; the impact on the U.S. relative to the effects on other countries; the extent to which there was an intent to harm American commerce; the forseeability of the result within the U.S. as compared to conduct elsewhere (43).

This balancing approach was adopted in later cases and in Mannington Mills, Inc. v. Congoleum Corp. (44) supplemented with some more factors: Degree of conflict with foreign law or policy; nationality of the parties; relative importance of the alleged violation of conduct here compared to that abroad; availability of a remedy abroad and the pendency of litigation there; existence of intent to harm or affect American commerce and its forseeability; possible effect upon foreign relations if the court exercises jurisdiction and grants relief; if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; whether the court can make its order effective; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; whether a treaty with the affected nations has addressed the issue (45). In a recent decision the Tenth Circuit Court of Appeals (46) approved Timberlane once more by stating that the plaintiff has to show that the challenged activity had an actual

effect on United States commerce (47) and that upon this showing the court has to decide whether the effects on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify the assertion of extraterritorial authority (48).

V) Conclusion

One of the main differences between the Alcoa and the Timberlane test seems to be that Timberlane in the tripartite analysis requires some effect on American foreign commerce but considers intended effect to be sufficient for jurisdiction of U.S. courts whereas Alcoa also asks for actual effects on U.S. commerce. It is not quite clear why American courts should have any interest to impose U.S. antitrust laws upon foreign enterprises if they are only faced with intended effects. The problems arising from an extraterritorial application of domestic regulations seem to be too difficult. In addition, international law allows extraterritorial jurisdiction only if the case in question is within the reasonable scope of a nation's regulatory power (49). It is obvious that extraterritorial antitrust jurisdiction is much easier to justify vis-a-vis foreign countries on the basis of actual effect on domestic commerce or even a little bit stronger, on the basis of substantial effect. The viewpoint of the court in National Bank of

Canada (50), however, to focus on 'anticompetitive' effects, would be an unnecessary burden on the courts to determine the jurisdiction only, without having had the opportunity to discuss the substance of the case. The approach of the court in *Mannington Mills* (51), to consider the various factors only after the prove of substantial effect on U.S. commerce, appears more practicable.

VI) Enforcement Measures Outside the U.S.

As a general rule the Restatement (Second) of Conflict of Laws (1971) lays down: "A state has power to exercise judicial jurisdiction to order a person, who is subject to its judicial jurisdiction, to do an act or to refrain from doing an act in another state" (52). But the comments to this provision also make it clear that "only in a most extreme situation will a person be ordered to do an act in a state which is contrary to that state's criminal law". Such an order is not considered to be conducive to the maintenance of harmonious relations between the states involved. Up to now U.S. court orders and decrees have included injunctions against acts abroad which would violate U.S. antitrust laws (53), divestiture of stockholdings in foreign corporations (54), ordering the transfer of foreign patent and trademark rights (55), and enjoining the exercise of foreign patent and trademark rights (56).

In the ICI case (57) the court ordered the defendants , the American company DuPont, ICI and others to perform in away which wouldn't have been in compliance with British law but finally avoided to place the parties in a position where they had to violate foreign law.

The British nylon patents were originally issued to DuPont which concluded extensive manufacturing and marketing agreements in accordance to which DuPont licensed the patents to Imperial Chemical Industries (I.C.I). I.C.I in its turn sublicensed exclusively and irrevocably thé patents to British Nylon Spinners (B.N.S.) which was owned 50 percent by the British corporation, Courtlands Inc., and 50 percent by I.C.I. Later DuPont assigned the patents to I.C.I. The court decreed that I.C.I. should refrain from exercising its rights under the patents since the enforcement of those rights will serve to continue the effects of wrongful acts it has committed within the United States affecting the foreign trade of the United States (58). In answer to it, British Nylon Spinners sued I.C.I. successfully for performance of the license contract before a British court which stated:

> "There is no doubt that it is competent for the courts of the particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders in personam against one such party -directing it, for example, to do something or the refrain from doing something in another country affecting the other party to the action. As a general proposition, that would not be open to doubt. But I have already stated

> that the Plaintiffs in this case (unlike Imperial Chemical Industries) are neither subjects nor nationals of the United States; nor are they otherwise subject to his jurisdiction" (59).

Since there had not been brought any further suit in any American court, I.C.I. performed according to the British judgement.

In the Holophane case (60) the district court ordered the American defendant to use 'reasonable' efforts to promote the sale and distribution of its products in foreign countries, although obligated by, -under foreign law legal-, contracts not to participate in these markets. The government expressly made clear that it wants to have 'reasonable efforts' not to be interpreted as including activities which would violate the judgement of a foreign court. The Solicitor General supplemented this interpretation by pointing out that 'reasonable' in this context would only include "such acts as do not affirmatively violate a foreign statute, regulation or ordinance, or the valid judgement of a competent foreign court" (61). The Supreme Court affirmed the order.

The question of foreign law with respects to antitrust judgements requiring the defendant to perform in a certain way in foreign countries was also argued in the Swiss Watchmakers case (62) where the U.S. sued Swiss and American companies for having unreasonably restrained the American trade in Swiss watches, watch parts and watch machinery. The conduct of the Swiss defendants was in conformity with a 'collective convention' regulating the production, sale and

export of watches and watch parts. The U.S. court ordered the defendants to amend this convention and to reorganize the Swiss watch industry in Switzerland, although the convention didn't violate Swiss law. After strong protests by the Swiss government the judgement had to be modified.

Previously, it could be said that the issue of conflicts between antitrust judgements and foreign law did not cause much troubles. Today though, the courts generally recognize and provide for limitations on their power by decree to dictate conduct in foreign countries.

As far as it concerns the enforcement of foreign court decisions in the United States, Professor Lorenzen (63) stated that they will not be enforced a) if not final, b) if the court entering the judgement did not have jurisdiction of the person or subject matter, c) if its enforcement would be contrary to the public policy of the forum, d) if the judgement is penal in nature, or e) if the courts of the country where the judgement was entered refuse to enforce a judgement of the courts of the forum.

VII) Antitrust Enforcement and Foreign Policy:

The judicial authorities in the United States, of course, realize the problems that antitrust cases often raise in comity with foreign nations. There are fourteen published diplomatic protests against the extraterritorial application

of U.S. antitrust laws (64). Some States have already enacted legislation in order to avoid an extraterritorial application of the laws to activities performed within their own territory, among them the Netherlands, Belgium, Denmark, France, India, Norway and the United Kingdom (65).

For this reason there are always consultations between the Justice department and the State Department as well as the Defense Department (66).

In the Justice Department the Foreign Commerce Section in the Antitrust Division coordinates antitrust cases and establishes contacts with other agencies, international organizations and foreign governments. Consultation by the Justice with the State Department is especially the duty of the Office of Business Practices.

Notes to Chapter 4

(1) OGH, Schoenherr/Dittrich III, No.91, p.309;

(2) OGH, Schoenherr/Dittrich III, No.91, p.310;

(3) Restrictive Business Practices of Multinational Enterprises, OECD, 1977, p.38;

(4) Case No.48/69, Reports of cases before the court 1972 - 5;

(5) Court of Justice Law Reports, 1972 - 5, p.695;

(6) Official Journal of the European Communities, N 58 of 9th April 1964, p.915-6/64;

(7) Official Journal of the European Communities, N. C 111/17, 21st Oct. 1972;

(8) Court of Justice Law Reports 1971 - 6, p.949, Judgement of Nov.25th, 1971;

(9) *United States v. Aluminium Co. of America*, 148 F.2d. 416 (2d. Cir. 1945);

(10) Id. at p.419;

(11) Id. at p.443;

(12) Id. at p.443;

(13) *United States v. Pacific & Artie R. & Navigation Co.*, 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742;

(14) *Thomsen v. Cayser*, 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597;

(15) <u>United States v. Sisal Sales Corp.</u>, 274 U.S. 268, 47 S.Ct. 597, 71 L.Ed. 1042;

(16) <u>Alcoa</u>, loc.cit. note 9, at p.443, 444;

(17) <u>United States v. Socony Vacuum Oil Co.</u>, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940);

(18) <u>Alcoa</u>, loc.cit. note 9, at p. 445;

(19) Id. at p.445;

(20) <u>United States v. General Electric Co.</u>, 82 F.Supp. 753 (D.N.J. 1949);

(21) Id. at p.884-891;

(22) Id. at p.891;

(23) <u>United States v. Griffith</u>, 334 U.S. 100, at p.105, 68 S.Ct. 941, at p.944;

(24) Id. at p.891;

(25) <u>Pacific Seafarers Inc. v. Pacific Far East Line Inc.</u>, 404 F.2d. 804 (D.C. Cir. 1968) cert. denied, 395 U.S. 1093 (1969);

(26) <u>Timberlane Lumber Co. v. Bank of America N.T. & S.A.</u>, 549 F.2d. 597 (9th Cir. 1977);

(27) Id. at p.612;

(28) A. Neale, <u>The Antitrust Laws of the USA</u>, 2d ed., 1970, at p.361;

(29) Id. at p.361;

(30) Id. at p.361;

(31) Markert, <u>Recent Developments in International Antitrust Cooperation</u>, 13 Antitrust Bull. 355, 370 (1968);

(32) Rahl, Common Market and American Antitrust: Overlap and Conflict, 1970, at p.80-89;

(33) United States v. Timken Roller Bearing Co., 341 U.S. 593, 71 S.Ct. 971; United States v. General Electrical Co., 82 F.Supp. 753 (D.N.J. 1949); United States v. Imperial Chem. Indus. Ltd., 100 F.Supp. 504 (D.N.Y. 1951);

(34) Restatement (Revised) of the Foreign Relations Law of the United States, Tentative Draft No.2, para 415 (1981) ;

(35) Id. para. 403 (1981) Reporters Notes;

(36) Timberlane, loc.cit. note 26;

(37) H.R. Comm. on the Judiciary, H.R.Rep.No.97-686, 97th Congress, 2d Sess.6-7 (1982), reprinted in Antitrust & Trade Reg.Rep. (BNA) No.1076, (Aug.5, 1982) at p.7-8, 13;

(38) Restatement (Second) of the Foreign Relations Law of the United States para.18b (1965);

(39) Antitrust Division, U.S. Dept. of Justice, Antitrust Guide for International Operations, p.6-7 (1977), reprinted in BNA, Antitrust & Trade Reg.Rep.No.799 (1977) and Trade Reg.Rep. (CCH) No.226, pt.II (1977);

(40) Timberlane, loc.cit. note 26;

(41) K.Brewster, Antitrust and American Business Abroad, 1958, p.446;

(42) Timberlane, loc.cit. note 26, p.613;

(43) The Court of Appeals for the Second Circuit followed similar Guidelines: In the matter of the Grand Jury Subpoena Addressed to First National City Bank, 396 F.2d. 897, 901-902 (2d Cir. 1968);

(44) Mannington Mills Inc. v. Congoleum Corp., 595 F.2d. 1287 (3rd Cir. 1979);

(45) Id. at p.1297-1298;

(46) Montreal Trading Ltd. v. Amax Inc., 661 F.2d. 864 (10th Cir. 1981) cert. denied, 105 S.Ct. 1634 (1982);

(47) Id. at p.869;

(48) Id. at p.869;

(49) Restatement (Second) of Conflicts of Laws para.9, Comment d (1971);

(50) National Bank of Can. v. Interbank Card. Assn. & Bank of Montreal, 666 F.2d. 6 (2d Cir. 1981);

(51) Mannginton Mills, loc.cit note 44;

(52) Restatement (Second) of Conflicts of Laws para.53 (1971);

(53) Timken Roller Bearing v. U.S., 341 U.S. 593, 71 S,Ct. 971, 95 L.Ed. 1199 (1951); U.S. v. Imperial Chem. Ind. Ltd, 100 F.Supp. 504 (S.D.N.Y.1951);

(54) U.S. v. National Lead Co., 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947); U.S. v. Aluminium Co. of America, 91 F.Supp. 333 (S.D.N.Y. 1950);

(55) U.S. v. Minnesota Min. & Mfg. Co., 92 F.Supp. 537 (D.Mass. 1950);

(56) _U.S. v. National Lead_, loc.cit. note 54; _U.S. v. Minnesota Min. & Mfg.Co_, loc.cit note 55; see: Fugate, _Foreign Commerce and Antitrust Laws_, at p.3.16; also I.L.A.,_Tokyo Conference_, p.328, 407-415, 522-524;

(57) _United States v. Imperial Chem. Indus. Ltd._, 105 F.Supp.215;

(58) Id. at p.228;

(59) _British Nylon Spinners Ltd. v. Imperial Chem Indus. Ltd._, 2 All E.R. 780, 782-783 (C.A.) [1952];

(60) _Helophane Co. v. U.S._, 119 F.Supp. 114 (S.D.Ohio 1954);

(61) Letter to clerk of the Supreme Court, Nov.8, 1956;

(62) _U.S. v. The Watchmakers of Switzerland Information Center Inc._, (S.D.N.Y.1962), 1963 Trade Cas. para. 70.600 at 77.457;

(63) Lorenzen, _The Enforcement of American Judgements Abroad_, 29 Yale L.J. 188,268 (1926);

(64) Brewster, loc.cit. note 41, at p.46-51; _National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations_, 12-15 (1957), a preliminary report by the Special Committee on Antitrust laws and Foreign Trade of the Association of the BAr of the City of New York. also: I.L.A. _Tokyo Conference_, p.565-592;

(65) D.Swann, _Competition and Consumer Protection_, 1979, p.250-251; OECD, _Restrictive Business Practice of Multinational Enterprises_, sec.157; ILA Buenos Aires Conference p.339, and p.360-369, and New York

Conference p.143-145; ILA The Hague Conference p.178-180;

(66) Report of the Attorney General's Committee to Study the Antitrust Laws, p.97 (1955).

Chapter 5: Conclusion

I. It appears that the Austrian and the EEC laws, in contrast to the United States norms on enterprises in a dominant market position, reflect different economic policies.

Whereas American law tends to favor the self-regulating mechanism of the market and tries to preserve competition by challenging the acquisition and maintenance of monopolistic market positions, the European approach focuses on the conduct of market dominating enterprises and prohibits all forms of monopolistic exploitation of the market.

Section 2 of the Sherman Act, however, only covers monopolies but does not consider oligopolistic market structures which are, under European law, subject to regulation. It is generally acknowledged that oligopoly, as an imperfect form of monopoly, has the same consequences, but with diminished force (1). A solution of this problem may be seen in the development of new case law which charges each independent member of an oligopolistic industry with monopolization but without any charge of conspiracy or combination (2).

The imposition of registration duties upon market dominating enterprises under Sec.42/1 Austrian Cartel Act

reflects legislative efforts to facilitate market supervision and to control abuse. Because the application for registration must be filed by the entrepreneur and the criteria for the determination of market volume are still in dispute, this system has proved ineffective.

Although the legal treatment of monopolies and market dominating enterprises in Europe and in the United States reflects different economic policies, the criteria for the determination of market dominance and the delimitation of the relevant product market show a high degree of similarity.

II. The issues of monopoly and antimerger policy are to a large extent interdependent. Whereas American law allows pre-merger control and requires prediction of future impact on competition, European law does not judge mergers themselves, but rather their results and the merged parties' conduct; thus under European law the immediate impact of the merger upon competition has to be shown. But this system has a critical weakness: It allows to attack the abuse of a dominant position but it does not enable the juridical authorities to avoid the establishment of monopolies through external growth.

In U.S. antitrust law, Section 7 of the Clayton Act appears to be a more effective supplement to American anti-monopoly policy.

III. The 'theory of effects' as decisive criterion for the extraterritorial applicability of antitrust laws, is an important development in United States legislation and case law. Landmark cases, such as _Alcoa_ or _Timberlane_, in formulating the 'effects' test for the applicability of municipal antitrust law to foreign conduct, set an example for similar approaches in Austrian and EEC law.

Notes to Chapter 5

(1) Galbraith, <u>The New Industrial State</u>, p.185-187 (1967);

(2) Rahl, <u>Statement in International Aspects of Antitrust</u>, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., Part I, p.391 (1966);

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