

POLICY ROUNDTABLES

Abuse of Dominance and Monopolisation

1996

Introduction

The OECD Competition Committee debated abuse of dominance and monopolisation in February 1996. This document includes an analytical note by Ms. Sally Van Siclen for the OECD Secretariat, written submissions from Ms. M. Janow and Mr. A. Fels, contributions from Canada, the European Commission, Germany, Ireland, Italy, Japan, Portugal, Spain, Sweden, the United Kingdom, the United States and BIAC, as well as an aide-memoire of the discussion.

Overview

The competition laws of many OECD countries contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power. Some laws also contain the concept of “joint dominance”, distinct from multiple firms acting pursuant to an agreement.

Topics covered include how observed conduct, notably exclusionary conduct, interacts with finding whether a firm has a dominant position; economic dependency; abusive conduct; whether abuse of dominance can give rise to market access problems; and appropriate relief.

Related Topics

Remedies and Sanctions in Abuse of Dominance Cases (2006)
Competition on the Merits (2005)
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FOREWORD

This document comprises proceedings in the original languages of a roundtable on Abuse of Dominance which was held by the Committee on Competition Law and Policy in February 1996. It is published as a general distribution document under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series named "Competition Policy Roundtables."

PRÉFACE

Ce document rassemble la documentation, dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur "l'abus de position dominante" qui s'est tenue en février 1996 dans le cadre du Comité du droit et de la politique de la concurrence. Il est mis en diffusion générale sous la responsabilité du Secrétaire général de l'OCDE afin de porter à la connaissance d'un large public, les éléments d'informations qui ont été réunis à cette occasion.

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BACKGROUND NOTE

(by Sally Van Siclen)

The competition laws of many OECD countries contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power.[1] These concepts are variously called "abuse of dominant position" or "monopolisation" or "misuse of market power," or some similar term. Competition laws may also contain a related concept, called "joint dominance" in some jurisdictions, which involves multiple firms but which is a distinct concept from firms acting pursuant to an "agreement." Typically, an analysis of an abuse of dominance involves two distinct parts, determining the status of the firm or firms and then evaluating the behaviour.[2]

This note will briefly examine some of these concepts. The first part will discuss the similarities of the various definitions of dominant position or monopoly. The second part concerns some of the conduct that is condemned. The third part discusses remedies and the last part is a conclusion.

Before turning to definitions of specific legal concepts, however, the economic concept of "dominance" should be discussed. A useful definition would anticipate the objective of the competition law and policy that will use it. One possible definition is, "circumstances in which single firm strategies may" -- or, perhaps, "are likely to" -- "have adverse effects on welfare." (Ordover and Saloner, p. 539) This definition anticipates a welfare maximisation objective without clarifying the relative weights of static and dynamic efficiencies.

An alternative is the definition of dominant position provided by the European Court of Justice: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers" (*United Brands v Commission*, Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429). This definition contains two elements -- an ability to prevent effective competition and an ability to behave independently of three sets of market actors. While the definition cannot be taken as its dictionary meaning -- even a pure monopolist must take into account the alternative opportunities of its customers -- it could perhaps mean that such a firm's strategies do not change much with changes in the strategies of the other market actors. This might anticipate an objective like "equalisation of bargaining power."

A better understanding of just what the legal standards try to measure would improve, in turn, the legal standards themselves. We turn now to those standards, bearing in mind the economic concept(s) and objective(s) towards which they are employed.

Definitions

This section contains a discussion of the status of the firms with which we are concerned in this note, i.e., the definitions of "dominant position." Despite the broad similarity of terms and concepts, distinct concepts appear to be involved. It is perhaps useful first to suggest commonalities.

Determining whether a firm has a dominant position is done with reference to a defined market. That is, the firm has a dominant position or is a monopoly or has power only with respect to a market.[3] Except in cases of price discrimination, a market has two dimensions -- geographic and product -- and the geographic extent of a market can be as small as a few kilometres or the entire world. Market definition in an abuse of dominance case is slightly different from that in a merger case because the dominant firm may already be pricing at the monopoly profit-maximising level.[4] Some commentators suggest examining the physical properties of possible substitutes, as well as observable differences in end uses or consumer preferences and switching costs and institutional barriers. Other commentators suggest asking whether a possibly dominant firm would act differently if one of its possible competitors were removed. If it would, then they supply the same relevant market; if not, they do not. Yet other commentators recommend using the "competitive price" rather than the prevailing market price as the reference price for market definition, but this is difficult to implement and answers an irrelevant question, i.e., what would be the relevant market if relative prices were substantially different. In instances of price discrimination, each set of customers receiving distinct prices constitutes a distinct market. The definition of the relevant market matters greatly to the subsequent analysis.[5]

Having defined the relevant market(s), the firm's status is evaluated according to various criteria. "Market share" seems to be an almost universally applied criterion, although the details of measurement are undoubtedly different.[6] The use to which the criterion is put may differ, variously creating, e.g., safe harbours, a refutable presumption of dominance or a refutable presumption of non-dominance. Also, the interpretation of particular values of market share differs.

The following commentators suggest the variations in interpretation of values of market shares that exist among jurisdictions. Whish (p. 294) says that the Commission of the EU has taken the view that a dominant position can generally be taken to exist when a firm has a market share of 40-45 per cent, and cannot be ruled out in the range 20-40 per cent. By contrast, Hovenkamp (p. 106) says that courts in the United States "consistently find market shares of 80-90 per cent and higher to be sufficient to conclude that the defendant is a monopolist. They also consistently find market shares of less than 50 per cent to be insufficient. A majority of courts are reluctant to find sufficient monopoly power when the market share is less than 70 per cent." Other American commentators (ABA, pp. 213-214) say that a market share of over 70 per cent is almost always sufficient to support a refutable inference of monopoly and that a market share of less than 40 per cent virtually precludes a finding of monopoly.

A second almost universally applied criterion is an evaluation of barriers to entry. As noted earlier by the Committee (OECD, 1994, p. 12):

> While significant differences continue to exist among jurisdictions, academics and competition policy practitioners with respect to the identification and treatment of entry barriers, the analysis of barriers among antitrust jurisdictions is increasingly focused on:
>
> -- sunk costs (particularly in association with economies of scale and scope and product differentiation -- with the latter often related to advertising or marketing expenditures or to patents, trademarks or other intellectual property);
>
> -- government erected statutory or regulated barriers (e.g. in relation to international trade barriers, mandatory standards, industrial incentives and other policy interventions);

-- the possibly use of strategic behaviour by incumbents to discourage entry (including raising rivals and own cost)...

Other criteria that may be applied include the existence of barriers to expansion by rival firms, other firms' market shares, the existence of large buyers, access to capital in instances of alleged predation (Competition Authority, para. 6.29), degree of vertical integration, and the occurrence of abuse (apparently under the assumption that the concept of abuse is well-defined and using the contrapositive argument that if there had been no dominance then there could have been no abuse).

Despite having certain elements in common -- attention to market share and to entry barriers -- there appear to be several distinct concepts in this category. "Dominant position" in the Canadian sense may or may not -- the case law is sparse -- differ from a "dominant position" in a European Union sense. "Monopolisation" in the United States is not equivalent to European Union "dominant position," seeming at least to require a much higher market share. Corresponding legal concepts in other jurisdictions presumably also vary. The long-term effect of judges enforcing two sets of competition laws (in EU Member countries) and plaintiffs and complainants citing other jurisdictions' jurisprudence may be convergence towards one or more standards.

Joint dominance is yet another distinct category of concepts which are applied in the European Union, Canada, Australia and various countries in transition. The commentary on these concepts is not large so the discussion here is necessarily sparse. There is a sense that joint dominance is intended to deal with the "oligopoly problem," i.e., independent firms' strategic interaction. (Whish, p. 281) The distinction -- perhaps evidentiary -- between an agreement and abuse of a joint dominant position might be clarified. A related question is how to distinguish between firms in a joint dominant position and other firms which are competitors.[7]

Given the differences between co-ordinating separate firms and co-ordinating within a single firm, and assuming that joint dominance is distinct from an agreement, the market share indicia of joint dominance may not be the same as the market share indicia of single-firm dominance. For example, one might expect that the minimum market shares would be higher for joint dominance and that other criteria that relate to reaching and monitoring an agreement, however implicit, would be important. Commentary appears to be silent on these matters, however. The relationships of other concepts, "complex monopoly" in the British sense, "substantial degree of market power" (single and joint) and the various "joint dominant positions" will, it is hoped, become clearer in the course of discussion.

Conduct: Abusive? Anticompetitive?

Holding a dominant position, jointly dominant position, a monopoly or a position of substantial market power is generally not abusive or illegal. However, some behaviour by such firms is. The definition of what is abusive, or at least what is illegal, should depend on the objective of the law. As noted above, if economic efficiency is the main objective, then welfare-reducing actions should be considered to be abusive. If, alternatively, fair trading is the main objective then, e.g., taking advantage of a better bargaining position may be considered abusive. Other possible objectives -- pluralism, promotion of small business, etc. -- would each imply a set of actions that hamper their achievement and therefore that would be abusive given that objective.

While it is tempting to divide behaviour by dominant firms into two types, exploitation and interference with the competitive process (e.g. raising entry barriers), this may be misleading. Rather, the effect of a particular behaviour depends on the environment in which it is engaged in. For example, "price

discrimination" can be exploitative -- of the buyers who pay the higher price -- and interfere with entry -- for the entrant who sees his new customers lured away with "special offers" by the incumbent. The effect of price discrimination on welfare is, in general, ambiguous. Hence, if the objective of the competition law is economic efficiency, then the law's treatment of price discrimination must be finely tuned or accept significant errors.

Further, a firm's strategy typically consists of a bundle of interacting behaviours -- e.g., maximum resale price maintenance and exclusive territories agreements with distributors -- so separating out a particular behaviour from the bundle of behaviours and analysing it may result in finding a harmful effect where there is none or finding no harmful effect where one exists. Finally, when a market cannot be perfectly competitive and is not fully contestable, there is no basis in economic theory for, in general, believing that entry is preferable. Therefore, rules against entry-deterring conduct may not be beneficial. (Ordover and Saloner, p. 590)

Indeed, it is difficult to devise legal rules for determining anticompetitive conduct in strategic environments. Some commentators react by suggesting that no behaviour, even by dominant firms, be prohibited in the belief that any advantages which are not related to superior skill and efficiency will be quickly eroded. Other commentators react by suggesting a series of filters and that any conduct that passes through the filters would be dealt with by simple but admittedly error-prone rules. Finally, other commentators react by suggesting "a detailed investigation of the purpose and effects of specific acts under the Rule of Reason." (Ordover and Saloner, pp. 579-580, quoting Comanor and Frech)

Pricing behaviour[8]

Excessive pricing by a dominant firm is illegal under some laws but not others.[9] An important question is the definition of "excessiveness" and how the definition relates to costs, profits and degree of uncertainty. For example, can "excessive" costs result in "excessive" prices without a finding of "excessive" profits? Is "excessive" relative to the price under perfect competition with free entry and no uncertainty, i.e., minimum average cost, or relative to price in a perfectly contestable market, or relative to price that maximises total efficiency subject to all costs being covered, so-called Ramsey prices? Finally, does excessive pricing by a dominant buyer have a corresponding concept of excessively low prices offered by a dominant buyer?

Price discrimination is also illegal under some competition laws. Price discrimination can be expressed as charging a different price for the same product or the same price for different products, where "product" can mean the bundle of delivery services, after-sales maintenance, terms and conditions of payment, etc. A commonly seen form of price discrimination is second-degree, in which prices differ according to the number of units purchased and buyers are all offered the same schedule. Willig (1978, cited in Varian, p. 610) has shown that typically there will exist two-part pricing schemes that Pareto dominate (make all economic actors better off) non-discriminatory monopoly pricing. But a profit-maximising monopoly will not necessarily choose such a scheme. Third-degree price discrimination -- charging a different buyer a different price, but the price is constant for each unit sold to a given buyer -- may enable otherwise unserved markets to be supplied, thereby increasing consumer welfare. A necessary condition for third degree price discrimination to increase total welfare is for the quantity supplied to increase. However, in general, the welfare effect of price discrimination is ambiguous.

Another class of price discrimination is loyalty discounts, i.e., charging a customer a lower price if it buys only from the particular seller. This can have the effect of raising switching costs -- a new supplier must compensate the buyer for the higher price it is charged by the initial seller for units already

purchased, as well as offer lower prices on the subsequent units.

The analysis of price discrimination in intermediate goods markets differs in two respects from that in final goods markets. First, buyers' demands for the product are interdependent, so price discrimination can affect downstream competition. Second, buyers often have the option to vertically integrate upstream, so price discrimination can affect production efficiency. (Varian, p. 623) Katz (1987)

If there is no vertical integration, then price discrimination in the intermediate goods market results in lower output and lower welfare than in the absence of price discrimination. Katz (1987) showed that vertical integration may occur only if price discrimination is forbidden. If there are economies of scale in production of the intermediate good, then price discrimination prevents vertical integration that decreases production efficiency.

A price squeeze, that is, a vertically integrated firm charging its downstream competitors an input price that is "too high" relative to the price it charges downstream consumers, may be abusive. It may also be difficult to distinguish a price squeeze from competition. (Bureau of Competition Policy, p. III-10)

Raising rivals' costs

A form of abusive behaviour may be raising the costs of other competitors, thereby improving one's own competitive position. For example, a firm may invoke regulatory procedures -- environmental permitting, land-use laws, etc. -- as a means of slowing or discouraging entry or expansion by its rivals. In discussing this sort of conduct, two economists posit three conditions that must be met for a firm to find it feasible and profitable to place its rivals at such a disadvantage. First, the value of the exclusion must be greater to the excluding firm than to the rival. Second, the rivals must not be able to find substitute suppliers which would restore their competitiveness. Third, the excluding firm must have some market power. (Ordover and Saloner, p. 566)

Refusal to deal and boycotts

A refusal to deal can either be made by a single firm or upon agreement among firms not to deal with someone else (a boycott).[10] One type of case is when a single firm refuses to supply an input to a downstream competitor where the refusing firm does not have market power in the downstream market. Some commentators argue that the firm may be engaging in monopoly leveraging. The economic view of this argument is provided below at the discussion of tying.

A closely related and overlapping kind of refusal to deal case involves an *intent* to create or maintain a dominant position. The precise legal test for intent is extremely important; alternatively expressed, the business justifications that are successful defence are important. These are discussed more generally below. A relevant test is whether the refusal to deal creates a high probability that the firm will gain a dominant position in the otherwise competitive market.

Collective refusals to deal (boycotts) can arise in a variety of cases, such as self-regulation and access to joint venture facilities. Under at least one jurisdiction, standards set in self-regulation must generally be objective and reasonably related to their purpose, and may be judged by their effect on excluded persons -- does the group have market power? -- and the procedures by which standards are enforced. Refusal of access to joint venture facilities can be a refusal to deal. While some joint venture

facilities might be an "essential facility," addressed elsewhere, others may not meet that test but may be "dominant" in a relevant market. Similar dynamic efficiency effects may be felt in mandating dealing in this situation as in an essential facilities situation: A joint venture may be discouraged from making risky investments if it must later admit all who wish to join. Similarly, exclusion of firms from one joint venture may have a greater incentive to form their own joint venture, thereby increasing competition in the products of joint ventures. Whether this is an efficient outcome depends on the cost structure of the joint venture activity and the subsequent competition.

Anticompetitive use of intellectual property rights

Any evaluation of allegedly abusive use of intellectual property rights must take into account the public policy reasons for IPRs.[11] In Canada, for example, holders are protected from charges of abuse of dominance, except that the exercise of such rights in ways contrary to the purposes contemplated in the statutes is not protected. Examples of possibly abusive practices related to IPRs are "patent pooling, covenants not to challenge the validity of patents and agreements to collect royalties following the expiration of a patent." (Bureau, pp. IV-18-21)

Vertical agreements

Vertical restraints are agreements between enterprises at two levels of production or sales.[12] An agreement between a brewery and pubs that the pubs will not sell beer made by any other brewery is an example of a vertical agreement. For ease of exposition but without prejudice to actual cases, the upstream activity is called "manufacturing" and downstream is called "distribution." It is commonly held that, when one party to a vertical agreement has a dominant position, then it can use that agreement to abuse its position. Note, though, that at least one commentator would question the value of the market structure screen provided here -- that the firm be dominant -- in assessing the welfare effects of vertical agreements.[13] He argues that market structure is but one factor, along with "the market's information structure, risk characteristics (e.g. size of sunk investments), and the degree to which parties become locked-in to one another (e.g. the amount of transaction-specific capital)," to consider in an analysis.

There are two primary ways in which vertical restraints can be used to abuse a dominant position, market foreclosure and reduction in competition in a market. Market foreclosure means that entry into a market is made more difficult or more costly.

Exclusive dealing agreements can result in market foreclosure. Exclusive dealing agreements imply that the manufacturer's competitors are denied access to certain downstream distributors. If such tying-up of downstream firms is practised on a wide scale and with contracts of long duration, and if distribution has economies of scale and scope, then it is more costly for new manufacturers -- who presumably operate at smaller scale -- to get their products on the market. Where entry into distribution at sufficient scale is relatively easy, a system of exclusive dealing agreements would not significantly raise barriers to entry by manufacturers. If distributors are of different qualities, then an incumbent manufacturer may sign exclusive dealing contracts with the best ones, which prevents the entrant from using them. On the other hand, "better" distributors may be able to charge the manufacturer more than "worse" distributors can for the privilege of exclusivity. Other things being equal, dealers will choose to distribute the market leader's product over that of a new entrant. (Katz 1989, pp. 706-708) If entering manufacturers must enter both levels at once, their entry costs are likely to be higher both because of higher capital risk (the probability of failed entry at each level is likely to be correlated) and because it makes greater managerial demands.

When there are multiple similar or parallel vertical agreements, these may affect competition. On the other hand, they may be a symptom of asymmetries of information, uncertainty, and transaction-specific sunk costs. Parallel resale price maintenance may make upstream collusion easier, as retail prices are easier to monitor than wholesale prices. The addition of exclusive dealing agreements to the resale price maintenance reduces the incentives to engage in secret wholesale price cutting. Exclusive territories that largely correspond among upstream competitors can facilitate collusion -- only retailers in a particular territory have to reach an agreement - and might facilitate collusive price discrimination.

"Leveraging" through tying

Some commenters have argued that tying -- conditioning the sale of one product on the sale of another -- can enable a dominant firm to "leverage" its market power in one input market into a second input market. This view had been criticised, the argument being that the dominant firm could not further increase its profits by engaging in leveraging. More recently, it has been shown that, under certain conditions (including specific assumptions about demand, a monopoly in a market "blocked" to entry and less-than-perfect competition in the second market), tying of products may create a credible threat that the incumbent will react aggressively to the entry of a competitor in the second market. (Katz, p. 709, describing Whinston (1987)).

If the dominant firm is subject to price or profit regulation in the market in which it is dominant, then it may tie an unregulated product to a regulated profit, extracting profits otherwise forbidden it by charging the monopoly price of the bundle.

Defence against an allegation of abuse

One key issue in the discussion is, What constitutes a defence against an allegation of abuse? Leaving aside instances in which a firm is not in a dominant position or an action is never abusive, and leaving aside who has the burden of proof, what, conceptually, constitutes a valid defence of a possibly abusive action by a dominant firm? There are various possible tests, again depending on the objective of the competition law. One is, is the refusal "customary" in that industry? Such a rule might be appropriate where there is a "fair trading objective" if "custom" is established where firms have approximately equal bargaining power, or where there is an efficiency objective and transaction-specific sunk investments were made. Another possible test is, does harm to competitors outweigh the gain to the refusing firm, or to downstream consumers? These two standards may be appropriate if the injured firms were small businesses, the dominant firm is not, and the preservation of small business is an objective. A third possible test is, is the refusal profitable only if the refusal prompts the competitor to exit from the market? This test may be appropriate if the maximisation of static, but not dynamic, efficiency were the objective. There is are many other possible tests, each limited by the objective of the law and their practical implementation.

International effects

To this point, the discussion has implicitly assumed an objective of maximising total welfare or maximising "competition." If, instead, the incidence of welfare or "competitive" effects of conduct differed between countries and if the objective of competition authorities were to maximise national welfare, would the response change? This issue, as well as the differing perspectives of trade and

competition officials, is addressed in the corresponding note by Ms. Janow, consultant to the Trade Secretariat.

Remedies

A variety of remedies may be available. These may include monetary remedies, i.e., fines and damages, prohibiting the behaviour in the future, specifying future contract terms and conditions, or some sort of structural reform, from specifying the sale of assets to asking other parts of government to change regulatory or trade policy. Possibilities and circumstances vary greatly, rendering a brief discussion inadequate.

A question in devising a remedy in a specific case is, What is the objective of the remedy? One possibility is to move markets as close as possible to a condition of "perfect competition," i.e., numerous competitors in every market and free entry. However, where there are economies of scope or scale, implementing such an objective may serve to diminish productive efficiency and, over the long run, diminish incentives to innovate and make other sunk investments. The alternative may be changes in regulatory regimes, which may bring its own costs. Where a product can be traded internationally, reductions in trade barriers may diminish the dominance of a firm.

Behavioural remedies may also create costs, unless there already exists an appropriate regulatory agency to enforce such remedies. Otherwise, either the court system or the competition authority may have to act as a regulator which the behavioural remedies are in place. Behavioural remedies might act to reduce, directly, exploitative abuse in a market -- e.g., guidelines on pricing -- or reduce barriers to entry, e.g., mandatory access to facilities or changing the terms of exclusive contracts.

There seems to be no obvious general relationship between behavioural and structural remedies. One might argue that, other things being equal, behavioural remedies are less risky because they are more easily reversible. On the other hand, sunk investments made under the assumptions of the behavioural remedy are not reversible and they incur on-going monitoring costs. Structural remedies might include "de-merger." It is not clear whether the standard for the outcome of a "de-merger" should be the same as for the outcome of a merger, i.e., "de-merger" outcomes might be held to a looser market power standard than are merger outcomes. This different standard may be appropriate when the competition authority is uncertain about economies of scale, scope and vertical integration. Other possible structural remedies include mandatory licensing.

Conclusion

Abuse of dominance and similar legal concepts vary from jurisdiction to jurisdiction in a variety of dimensions. This variation may reflect variations in competition policy objectives or they may reflect differences in how firms attain their market positions. In most countries, finding an abuse of dominance involves several distinct steps: defining the relevant market, determining whether the firm is dominant by considering its market share, barriers to entry and other characteristics, and evaluating whether the behaviour was abusive in terms of the objective of the competition law. There are, however, differences among the concepts of dominant position, both in terms of differences in interpretation of degree of the same variables -- e.g., a market share of 40 per cent *ceteris paribus* is interpreted differently -- and in terms of which variables are utilised to make that evaluation. There are also differences in the treatment of specific conduct, given a dominant position, which, as noted above, may reflect differences in objectives

and market environment. There are also some interesting omissions. For example, there seems to be little explicit account taken of the information structure of the markets and uncertainty of demand which, *a priori*, one might imagine to be important in an evaluation of behaviour that may raise entry barriers and, with respect to information, of a jointly dominant position. Remedies of an abuse of dominance are tailored to specifics of each case and may take into account existing regulatory structures and trade and other public policies. Duration and reversibility may play an important role in the choice between behavioural and structural remedies. Finally, instances where differing effects of dominance are felt in differing countries may, because of different policy tools and possibly different perspectives, induce different remedies in the competition and trade communities.

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NOTES

1. The present roundtable is the latest in a series held under the rubric of the Convergence Project of the Committee on Competition Law and Policy. Past roundtables have examined market definition, entry barriers, vertical agreements and horizontal agreements among others. While the present roundtable discussion is the first substantive discussion of this important topic, the Committee has already said (OECD, 1994, p. 15) that, "Although convergence in the area of abuse of dominance and monopolization is not as advanced as in other areas of competition law, consensus is emerging that the main thrust of these provisions is to protect the process of competition rather than the viability of individual competitors."

2. To avoid unnecessary verbiage, the term "dominant position" will be used in the remainder of the paper to mean one or all of the single firm positions that roughly correspond to "dominant position" or "monopoly" in specific jurisdictions. "Joint dominance" and "abuse of dominance" is similarly used. The term "firm" will be used to include, also, State entities acting in commercial roles and subject to competition law evaluation.

3. Market definition has been previously addressed by the Committee. (OECD, 1994, pp. 11-12)

4. Recall that one can define a relevant market for merger evaluation purposes by asking, for successively larger sets of products, whether a hypothetical monopolist would find it profitable to raise the prices of those products. If a price increase would be profitable, then the set of products constitutes a relevant market. If a price increase would not be profitable (because too many buyers would switch to buying substitute products), then that set of products is not a relevant market. Consider the case of an *actual* monopolist. An actual profit-maximising monopolist will have already raised prices of the products in the relevant market to the profit-maximising prices. Therefore, a hypothetical profit-maximising monopolist would not raise prices above those already prevailing in the market. Hence, the set of products sold by the actual monopolist logically cannot be found to be a relevant market under the above definition.

   An extensive discussion of market definition in the context of abuse of dominance cases at pp. II-6-12 of "Reference Document on Abuse of Dominance," vol. 1, Bureau of Competition Policy, Canada.

5. For example, Boscheck (p. 138) points out, "[A] range of industry-specific characteristics drive the definition of the relevant market and thus ultimately affect the competition standard for assessing sectoral rivalry, company strategies, and the degree of relative market power achieved or sustained through them."

6. For homogeneous products, market share can be measured *inter alia* by unit sales, value of sales, unit production and production capacity. For heterogenous products, some adjustment can be made to account for the differences in closeness of substitution with the products of competitors in the relevant market. (For example, one can measure the percentage of auctions where each pair of firms submitted the winning and second bids.) Where market shares vary or change over time, some account can be taken of those variations. Some firms may use some of their production internally, complicating the measurement of market share.

7. In its Twenty-Fourth Report on Competition Policy, the Commission of the EU cites the European Court of Justice in *Almelo* as considering whether "links" among firms were sufficiently strong for there to be a joint dominant position. (para. 456)

8. Predatory pricing, not addressed in this note, is extensively discussed in *Predatory Pricing*, OECD (1989).

9. For example, the European Court of Justice recently found that a "firm" in an administratively-established dominant position had abused its dominant position through charging fees that were disproportionate to the value of the services. (*Case C-323/93 Societé Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077)

10. The topic of essential facilities is dealt with in a separate note for a separate roundtable discussion. Refusals to deal in order to enforce a vertical agreement, e.g., refusing to sell to a second distributor in an exclusive distribution territory, is ignored here.

11. The Committee has considered some related issues in *Competition Policy and Intellectual Property Rights*, OECD (1989).

12. Vertical agreements are extensively discussed in *Competition Policy and Vertical Restraints: Franchising Agreements*, OECD (1993).

13. "To date, much of the policy debate has been conducted in terms of asking whether a given practice is pro- or anticompetitive, and thus whether a given practice should be banned or not. I believe that this approach is misguided on at least two counts. First, welfare effects may have nothing to do with "competition," per se. Some vertical restraints (e.g. tying) can arise, and have welfare consequences, even when both levels of the supply chain are monopolized. Second, the type of answer sought is the wrong one. On theoretical grounds, at least, any given restraint may be good or bad. Theory along (or theory coupled with a handful of examples) is not going to answer a question of the form: Should resale price maintenance be per se illegal?

"...The key to policy design is to develop workable rules by which to identify observable market conditions under which given practices are socially desirable. In attempting to accomplish this goal, the courts and many economists...have focused on the degree of market concentration as the critical condition. This aspect of market structure is concentrated on in the belief that a vertical agreement is unlikely to have "anticompetitive" effects when it is among parties having a low combined market share either upstream or downstream.

"While this work...is a beginning, it is essential that the analysis be expanded to include factors such as the market's information structure, risk characteristics (e.g. size of sunk investments), and the degree to which parties become locked-in to one another (e.g. the amount of transaction-specific capital). It also is essential that this work identify means of isolating the effects of vertical restraints in comparison with alternative institutional and contractual arrangements." (Katz 1989, p. 714)

NOTE DE REFERENCE

(par Sally Van Siclen)

On trouve dans le droit de la concurrence de nombreux pays de l'OCDE la notion d'exploitation par une seule entreprise de puissance sur le marché ou de recours à des méthodes impropres pour obtenir ou conserver une puissance sur le marché.[1] Divers termes sont utilisés à cet égard, notamment "abus de position dominante", "monopolisation" ou "utilisation indue de puissance sur le marché". Le droit de la concurrence peut aussi faire référence à une notion voisine, appelée "domination conjointe" dans certaines juridictions, qui met en cause de multiples entreprises mais qui désigne une situation différente de celle où il y a "accord" entre entreprises. Généralement, l'analyse d'un abus de position dominante comporte deux volets distincts, tout d'abord déterminer le statut de l'entreprise ou des entreprises puis évaluer leur comportement.[2]

Dans la présente note, on examinera brièvement certains de ces concepts. La première partie passe en revue les points communs et les similitudes des différentes définitions de la position dominante ou du monopole. La deuxième porte sur certains aspects de ce comportement jugés répréhensibles. La troisième examine les mesures palliatives alors que la dernière présente les conclusions.

Toutefois, avant de passer à la définition de concepts juridiques spécifiques, la définition économique de "domination" doit être examinée. Pour qu'elle soit utile, toute définition doit anticiper l'objectif du droit et de la politique de la concurrence qui l'utilisera. Une des définitions possibles est la suivante : "situation dans laquelle les stratégies d'une seule entreprise peuvent avoir" -- ou “auront vraisemblablement" -- des effets négatifs sur le bien-être". (Ordover et Saloner, p.539). Cette définition anticipe un objectif de maximisation du bien-être, sans préciser les poids relatifs des efficiences statistiques et dynamiques.

Une autre définition de la position dominante est donnée par la Cour européenne de justice : "position de puissance économique détenue par une entreprise qui lui donne le pouvoir de faire obstacle au maintien d'une concurrence effective sur le marché en cause en lui fournissant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, de ses clients et, finalement, des consommateurs" (United Banks v Commission, Cas 27/76 (1978] ECR 207 1978]1 CMLR 429). Cette définition contient deux éléments : la capacité d'empêcher une concurrence effective et la capacité de se comporter de façon indépendante à l'égard de trois groupes d'acteurs sur le marché. Si la définition ne peut être prise au sens littéral -- même un monopoleur pur doit tenir compte des différentes possibilités offertes à ses clients -- on peut toutefois en déduire que les stratégies d'une telle entreprise ne changent pas beaucoup quelles que soient les modifications apportées aux stratégies des autres acteurs sur le marché. Cela pourrait conduire à anticiper un objectif comme "l'égalisation du pouvoir de négociation".

Une meilleure compréhension de ce que les concepts juridiques essayent d'appréhender améliorerait à son tour les définitions elles-mêmes. Nous allons maintenant examiner ces définitions, compte tenu des concepts et objectifs économiques qu'elles sont censées servir.

Définitions

La présente section contient un examen de la situation des entreprises qui nous intéresse ici, à savoir celle d'une "position dominante". Malgré la large similitude des termes et des concepts, différentes notions semblent être en cause. Il est peut-être utile tout d'abord de dégager les points communs.

Pour déterminer si une entreprise occupe une position dominante, il faut se placer sur un marché bien particulier. En effet, l'entreprise n'occupe une position dominante, n'exerce un monopole ou n'exerce un pouvoir que pour ce qui est d'un marché.[3] Sauf dans les cas de discrimination par les prix, un marché a deux dimensions -- la dimension géographique et la structure par produits --, et son étendue géographique peut se limiter à quelques kilomètres ou couvrir l'ensemble du monde. La définition du marché dans un cas d'abus de position dominante est légèrement différente de celle retenue dans le cas de fusion parce que l'entreprise dominante peut déjà fixer des prix, à un niveau de maximisation des profits du monopole[4]. Certains analystes proposent d'examiner les propriétés physiques des éventuels substituts, les différences observables dans les utilisations finales ou les préférences des consommateurs ainsi que les coûts du transfert vers d'autres produits et les barrières institutionnelles. D'autres analystes pensent qu'il faut se demander si une entreprise pouvant exercer une position dominante agirait différemment si l'un de ses concurrents potentiels était éliminé. Dans l'affirmative, elles opèrent sur le même marché pertinent ; dans la négative, elles n'opérent pas sur le même marché. Pourtant, d'autres analystes recommandent d'utiliser le prix de concurrence plutôt que le prix de marché en vigueur comme référence pour la définition du marché, mais cela est difficile à mettre en oeuvre et ne donne une réponse qu'à une question sans intérêt, c'est-à-dire quel serait le marché pertinent si les prix relatifs étaient sensiblement différents. Dans le cas de discrimination par les prix, chaque série de clients devant acquitter des prix distincts constitue un marché distinct. La définition du marché pertinent a une grande importance pour l'analyse qui suit.[5]

Après avoir défini le(s) marché(s) pertinent(s), la situation d'une entreprise est évaluée en fonction de divers critères. La part de marché semble être un critère presque universellement accepté, encore que les aspects détaillés de sa mesure soient de toute évidence différents.[6] L'utilisation qu'on peut faire de ces critères varie, aboutissant indifféremment à des "safe-harbours", une présomption réfutable de domination ou une présomption réfutable de non domination. En outre, l'interprétation des valeurs particulières de la part du marché diffère.

Les analystes ci-après soulignent les variations observées dans l'interprétation des valeurs des parts de marché entre les différentes juridictions. Whish (p.294) note que la Commission de l'UE a considéré que l'on peut généralement estimer qu'il y a position dominante lorsqu'une entreprise à une part de marché de 40-45 pour cent et que l'existence d'une telle position ne peut-être exclue lorsque cette part est de 20-40 pour cent. En revanche, Hovenkamp (p. 106) note que les tribunaux des Etats-Unis "observent régulièrement que des parts de marché de 80-90 pour cent et plus, sont suffisantes pour conclure que l'entreprise incriminée est un monopoleur. Ils considèrent aussi de façon habituelle que des parts de marché de moins 50 pour cent ne sont pas suffisantes pour arriver à une telle conclusion. Une majorité des tribunaux sont réticents à estimer qu'il y a un pouvoir de monopole lorsque la part du marché est inférieure à 70 pour cent." D'autres analyses américaines (ABA, pp. 213-214) estiment qu'une part de marché de plus de 70 pour cent est presque toujours suffisante pour déduire de façon réfutable l'existence d'un monopole et qu'une part de marché de moins de 40 pour cent exclut pratiquement toute possibilité de monopole.

Le deuxième critère presque universellement admis est l'évaluation des barrières à l'entrée. Comme le Comité l'a noté précédemment (OCDE, 1994, p. 12) :

> S'il existe toujours des différences de vues importantes entre pays, spécialistes et praticiens quant à la définition et au traitement des obstacles à l'entrée, l'analyse de ceux-ci se concentre de plus en plus sur les points suivants :
>
> -- les coûts irrécupérables (surtout s'ils sont associés à des économies d'échelle ou de gamme et à la différenciation des produits -- cette dernière étant souvent liée aux dépenses de publicité ou de marketing, ou encore aux brevets, marques commerciales et autres formes de propriété intellectuelle) ;
>
> -- les obstacles d'ordre juridique et réglementaire dressés par les Etats (par exemple les obstacles au commerce international, les normes techniques, les incitations en faveur de l'industrie et autres interventions publiques) ;
>
> -- le comportement stratégique des entreprises en place cherchant à décourager les entrées, même si cela augmente les coûts de leurs concurrents et les leurs ;

Parmi les autres critères qui peuvent être appliqués, on peut citer l'existence d'obstacles à l'expansion d'entreprises rivales, les parts de marché des autres entreprises, l'existence de gros acheteurs, l'accès au capital dans les cas de comportements supposés d'éviction (Autorité de la concurrence, para. 6.29), le degré d'intervention verticale et l'existence d'un abus (apparemment dans l'hypothèse où le concept d'abus est bien défini et en utilisant l'argument contradictoire selon lequel s'il n'y avait pas eu de position dominante il n'y aurait pas pu y avoir d'abus).

Malgré certains éléments communs --intérêt porté à la part de marché et aux obstacles à l'entrée-- il semble que plusieurs concepts soient en cause ici. La "position dominante" dans l'optique du Canada diffère parfois -- la jurisprudence est rare -- de la "position dominante" telle qu'on l'entend dans l'Union européenne. Aux Etats-Unis, la "monopolisation" n'est pas équivalente à la "position dominante" de l'Union européenne, car elle semble exiger au moins une part de marché beaucoup plus grande. Les concepts juridiques correspondants dans les autres juridictions varient aussi sans doute. L'effet à long terme de l'application par les juges de deux législations différentes en matière de concurrence et de la mise en avant par les plaignants et les entreprises mises en cause de la jurisprudence d'autres juridictions pourrait être la convergence vers une ou plusieurs normes.

La domination conjointe correspond encore à une autre catégorie distincte de concepts qui sont appliqués dans l'Union européenne, au Canada, en Australie et dans divers pays en transition. Les études consacrées à ces concepts ne sont guère nombreuses, de sorte que leur analyse sera ici nécessairement limitée. D'après certains, la domination conjointe vise à faire face au "problème de l'oligopole", c'est-à-dire l'interaction stratégique d'entreprises indépendantes. (Whish, p. 281) La distinction -- peut être évidente -- entre un accord et l'abus d'une position dominante conjointe pourrait être clarifiée. La question qui se pose à cet égard est de savoir comment faire la distinction entre des entreprises occupant une position dominante conjointe et les autres entreprises qui sont en concurrence.[7]

Compte tenu des différences entre la coordination entre entreprises distinctes et la coordination au sein d'une même entreprise et en supposant que la domination conjointe est distincte d'un accord, les parts de marché caractéristiques d'une domination conjointe ne seront peut-être pas les mêmes que celles indiquant la domination d'une seule entreprise. Par exemple, on peut s'attendre que les parts de marché minimales soient plus importantes en cas de domination conjointe et que les autres critères concernant la

conclusion et la surveillance d'un accord, même s'ils sont implicites, soient aussi importants. Les analystes semblent toutefois passer ces questions sous silence. Les relations entre les autres concepts, "monopole complexe" dans l'optique britannique, "degré important de puissance sur le marché" (entreprise unique et entreprise conjointe) et les divers types de "position dominante conjointe" deviendront, on l'espère, plus claires au fil du débat.

Comportement : Abusif ? Anticoncurrentiel ?

Détenir une position dominante, une position dominante conjointe, un monopole ou une puissance sur le marché importante n'est généralement pas considéré comme abusif ou illégal. Toutefois, certains comportements d'entreprises dans de telles situations sont eux considérés comme illégaux. La définition de ce qui est abusif, ou du moins, de ce qui est illégal, dépend des objectifs de la loi. Comme on l'a noté plus haut, si l'efficience économique est le principal objectif, les actions tendant à réduire le bien-être devraient être considérées comme abusives. Autrement, si la loyauté dans les relations commerciales est le principal objectif, on peut, par exemple, considérer comme abusif de tirer parti d'une meilleure position de négociation. Pour les autres objectifs possibles -- pluralisme, promotion des petites entreprises, etc. -- on peut envisager pour chacun une série d'actions qui font obstacle à leur réalisation et pourraient par conséquent être considérées comme abusives.

S'il est tentant de diviser le comportement des entreprises dominantes en deux types, exploitation et ingérence avec le processus concurrentiel (par exemple augmentation des obstacles à l'entrée), une telle façon de procéder pourrait être trompeuse. En fait, l'effet d'un comportement particulier dépend de l'environnement dans lequel il a lieu. Par exemple, "une discrimination par les prix" -- peut conduire à exploiter les acheteurs qui paient le prix plus élevé et constituer un obstacle à l'entrée pour les entreprises qui voient ces nouveaux consommateurs attirés par les "offres spéciales" de l'entreprise en place. L'effet de la discrimination par les prix sur le bien-être est en général ambigu. Ainsi, si l'objectif du droit de la concurrence est l'efficience économique, le traitement dans ce droit de la discrimination par les prix doit être modulé finement ou bien alors, une marge d'erreur importante doit être acceptée.

En outre, la stratégie d'une entreprise consiste généralement en un ensemble de comportements interactifs -- par exemple les prix de vente imposés et les accords d'exclusivité territoriale avec les distributeurs -- de sorte que la séparation d'un comportement de l'ensemble des comportements et son analyse pourraient aboutir à mettre en évidence un effet négatif lorsqu'il n'y en a pas ou à trouver qu'il n'y a pas d'effet négatif lorsqu'il y en a un. Enfin, lorsqu'un marché ne peut être parfaitement concurrentiel et n'est pas totalement contestable, il n'existe pas dans la théorie économique de fondement pour estimer qu'en général l'entrée est préférable. En conséquence, les règles destinées à lutter contre les comportements faisant obstacle à l'entrée ne sont pas toujours bénéfiques (Ordover et Saloner, p. 590).

De fait, il est difficile de mettre au point des règles juridiques pour déterminer un comportement anticoncurrentiel dans un environnement stratégique. Certes, d'après certains analystes, aucun comportement, même ceux des entreprises dominantes, ne peut être interdit sous le prétexte que certains avantages qui ne sont liés ni à des compétences ni à une efficience de qualité supérieure seront rapidement érodés. D'autres estiment, cependant, qu'il doit exister une série de filtres, tout comportement passant au travers de ces filtres étant assujetti à des règles simples mais sujettes à l'erreur. Enfin, d'après d'autres analystes, il faudrait réaliser "une étude détaillée des objectifs et des effets d'actions spécifiques dans l'optique de la règle de raison." (Ordover et Saloner, pp. 579-580, citant Comanor et Frech)

Comportement en matière de prix[8]

La fixation de prix excessifs par une entreprise dominante est illégale dans certaines juridictions mais pas dans d'autres.[9] Il est important de se demander ce que l'on entend par "excessifs" et comment cette définition peut être reliée aux coûts, aux profits et au degré de risque. Par exemple, des coûts "excessifs" peuvent-ils résulter en des prix "excessifs" sans qu'il y ait profits "excessifs" ? L'adjectif "excessif" s'applique-t-il à des prix appliqués dans une situation de concurrence parfaite avec entrée libre et sans risque, c'est-à-dire des prix correspondant aux coûts moyens minimums, ou bien s'applique-t-il à des prix dans un marché parfaitement contestable, ou bien encore à des prix qui maximisent l'efficience totale sous réserve que tous les coûts sont couverts (c'est-à-dire les prix de Ramsey) ? Enfin, à la fixation de prix excessifs par un acheteur dominant correspond-il un concept de prix excessivement faibles offerts à un acheteur dominant ?

La discrimination par les prix est également illégale dans certaines législations sur la concurrence. Elle peut consister à appliquer un prix différent pour le même produit ou le même prix pour des produits différents, le "produit" pouvant être un ensemble de prestations, des services d'entretien après-vente ou des conditions de paiement, etc. Une forme assez commune de discrimination par les prix s'exerce au second degré, c'est-à-dire lorsque les prix diffèrent en fonction du nombre d'unités achetées et que tous les acheteurs se voient offrir le même barème. Willig (1978, cité dans Varian, p. 610) a montré qu'en général il existe des systèmes de double prix qui, d'après Pareto, sont indissociables de la fixation de prix de monopole (et améliorent le bien-être de tous les acteurs économiques). Cependant, un monopoleur visant à maximiser ses profits ne choisira pas nécessairement un tel système. La discrimination par les prix au troisième degré -- appliquer un prix différent à un acheteur différent, alors que le prix est constant pour chaque unité vendue à un acheteur donné -- permettra peut-être de desservir des marchés jusque-là non desservis, améliorant ainsi le bien-être des consommateurs. Une condition nécessaire pour que la discrimination par les prix au troisième degré augmente le bien-être total est que la quantité fournie augmente. Cependant, en général, l'effet sur le bien-être de la discrimination par les prix est ambigu.

Une autre catégorie de discrimination par les prix est celle opérée par l'intermédiaire des rabais de fidélité, c'est-à-dire l'application aux clients d'un prix plus faible s'ils n'achètent qu'auprès d'un vendeur particulier. Cela peut avoir pour effet d'augmenter les coûts de transfert vers un nouveau produit -- un nouveau fournisseur devra compenser l'acheteur pour le prix plus élevé qu'il a payé au vendeur initial les unités déjà achetées et offrir aussi des prix plus faibles sur les unités ultérieures.

L'analyse de la discrimination par les prix sur les marchés de biens intermédiaires diffère à deux égards de celle observée sur les marchés de biens finaux. Premièrement, les demandes des acheteurs pour le produit sont interdépendantes, de sorte que la discrimination par les prix peut affecter la concurrence en aval. Deuxièmement, les acheteurs ont souvent l'option de s'intégrer verticalement en amont, de sorte que la discrimination par les prix peut affecter l'efficience de la production (Varian, p. 623).

Katz (1987) a montré que lorsqu'il n'y a pas d'intégration verticale, la discrimination par les prix sur le marché des biens intermédiaires se traduit par une baisse de la production et une baisse du bien-être par rapport à une situation où il n'y a pas de discrimination par les prix. Il a aussi été montré que l'intégration verticale peut intervenir seulement si la discrimination par les prix est interdite. En cas d'économies d'échelle dans la production du bien intermédiaire, la discrimination par les prix empêche alors l'intégration verticale qui diminue l'efficience de la production.

Un étranglement par les prix, c'est-à-dire l'application par une entreprise intégrée verticalement d'un prix trop élevé (par rapport au prix qu'elle applique aux consommateurs en aval) pour les biens de production vendus à des concurrents en aval, peut être abusif. Il sera peut-être aussi difficile de faire une

distinction entre un étranglement par les prix et la concurrence (Bureau de la politique de concurrence, p. III-10).

Augmentation des coûts des entreprises rivales

Une forme de comportement abusif peut consister à augmenter les coûts des autres concurrents, améliorant ainsi sa propre position concurrentielle. Par exemple, une entreprise peut invoquer des procédures réglementaires -- permis liés à l'environnement, lois sur l'utilisation des sols, etc. -- pour ralentir ou décourager l'entrée ou l'expansion d'entreprises rivales. Lorsqu'ils ont examiné ce type de comportement, deux économistes ont défini les trois conditions qui doivent être remplies pour qu'une entreprise juge possible et profitable d'imposer un tel désavantage aux entreprises rivales. Premièrement, la valeur de l'exclusion doit être plus grande pour l'entreprise qui exclut que pour l'entreprise rivale. Deuxièmement, les entreprises rivales ne doivent pas être en mesure de trouver d'autres fournisseurs qui rétabliraient leur compétitivité. Troisièmement, l'entreprise qui exclut doit avoir une certaine puissance sur le marché (Ordover et Saloner, p. 566).

Refus de traiter et boycott

Le refus de traiter peut être le fait d'une seule entreprise ou d'un accord entre entreprises, qui refusent de traiter avec quelqu'un d'autre (boycott).[10] Il y a par exemple refus de traiter lorsqu'une seule entreprise refuse de fournir un intrant à un concurrent en aval et lorsque l'entreprise qui refuse n'a pas une puissance sur le marché sur le marché en aval. Certains analystes avancent que l'entreprise peut essayer d'étendre son pouvoir de monopole : on donnera plus loin le point de vue des économistes sur cette question lorsqu'on parlera de la question de l'établissement d'un lien.

Un autre type de refus étroitement lié au précédent concerne l'intention d'établir ou de maintenir une position dominante. Une définition juridique précise de l'intention est extrêmement importante ; inversement, les justifications économiques qui constituent une défense efficace sont importantes. Elles sont examinées de façon plus générale ci-après. Un des aspects de la définition tient à la question de savoir si le refus de traiter crée une forte probabilité que l'entreprise obtiendra une position dominante sur un marché autrement concurrentiel.

Les refus collectifs de traiter (boycott) peuvent intervenir dans plusieurs cas, comme l'autorégulation et l'accès aux installations d'une co-entreprise. Dans au moins une juridiction, les règles fixées dans le cadre d'une autorégulation doivent être généralement objectives et raisonnablement liées à leur but et peuvent être jugées par leurs effets sur les personnes exclues -- le groupe a-t-il une puissance sur le marché ? -- et par les procédures au moyen desquelles les normes sont appliquées. Le refus d'accès aux installations d'une co-entreprise peut être assimilé à un refus de traiter. Si certaines installations de co-entreprises constituent peut-être des "installations essentielles", dont on parlera ailleurs, d'autres ne répondent pas à ce critère mais permettent d'exercer une position dominante sur un marché pertinent. Les mêmes effets d'efficience dynamique peuvent être observés dans le cas d'une situation mettant en cause des installations essentielles : une co-entreprise peut être dissuadée de procéder à des investissements risqués si elle doit par la suite accepter tous ceux qui veulent se joindre à elle. De même, les entreprises exclues d'une co-entreprise peuvent être davantage incitées à constituer leur propre co-entreprise, ce qui accroît la concurrence sur les marchés des produits concernés. Pour déterminer s'il s'agit d'un résultat efficient, il faut observer la structure des coûts de l'activité de la co-entreprise et la concurrence qui en découle.

Utilisation anticoncurrentielle des droits de propriété intellectuelle

Toute évaluation d'une utilisation supposément abusive des droits de propriété intellectuelle doit tenir compte du bien-fondé de ces droits.[11] Au Canada, par exemple, ceux qui détiennent des droits de propriété intellectuelle ne peuvent être accusés d'abus de position dominante, l'exercice de ces droits d'une manière contraire aux objectifs envisagés dans les lois n'étant cependant pas protégé. Les exemples de pratiques potentiellement abusives liées aux droits de propriété intellectuelle sont "les communautés de brevets, les accords de non contestation de la validité des brevets et les accords visant à percevoir des redevances après l'expiration d'un brevet (Bureau, pp. IV-18-21).

Accords verticaux

Les restrictions verticales sont des accords entre entreprises au niveau de la production ou des ventes.[12] Un accord entre un fabricant de bière et des bars en vertu duquel ces derniers ne vendront pas de bière produite par une autre entreprise constitue un accord vertical. Pour plus de clarté mais sans préjuger des cas pouvant se présenter dans la réalité, l'activité en aval est appelée "fabrication" et l'activité en amont est appelée "distribution". Il est communément admis que lorsqu'une partie à un accord vertical exerce une position dominante, elle peut alors utiliser cet accord pour exploiter de façon abusive sa position. Il faut noter toutefois qu'au moins un analyste met en cause la valeur du critère relatif à la structure du marché qui s'applique ici -- l'entreprise doit avoir une position dominante -- pour évaluer les effets sur le bien-être des accords verticaux.[13] Le même analyste avance que la structure du marché n'est qu'un facteur, à côté de la structure du marché sur le plan de l'information, des caractéristiques du risque (c'est-à-dire l'ampleur des investissements irrécupérables) et du degré d'imbrication des parties (par exemple du fait du capital investi).

Les restrictions verticales peuvent être utilisées essentiellement de deux manières pour exploiter abusivement une position dominante : le verrouillage du marché et la réduction de la concurrence sur un marché. Le verrouillage du marché signifie que l'entrée sur ce marché est beaucoup plus difficile et plus coûteuse.

Les accords d'exclusivité peuvent aboutir à un verrouillage du marché. Ces accords supposent que les concurrents du fabricant peuvent se voir refuser l'accès à certains distributeurs en aval. Si l'établissement d'un lien avec les entreprises en aval est pratiqué sur une grande échelle et sur la base de contrats de longue durée et si la distribution bénéficie d'économie d'échelle et de gamme, il est alors plus coûteux pour les nouveaux fabricants -- qui opèrent vraisemblablement sur une plus petite échelle -- de faire parvenir leurs produits sur le marché. Lorsque l'entrée dans un système de distribution sur une échelle suffisante est relativement simple, un réseau d'accords d'exclusivité n'augmentera pas sensiblement les obstacles à l'entrée des fabricants. Si les distributeurs sont de qualité différente, le fabricant déjà en place peut signer des contrats d'exclusivité avec les meilleurs d'entre eux, ce qui empêchera les nouvelles entreprises de les utiliser. En outre, les "meilleurs" distributeurs seront sans doute en mesure de faire payer plus cher aux fabricants le privilège d'exclusivité que les distributeurs moins bons. Toutes choses égales par ailleurs, les négociants choisiront de distribuer le produit du leader du marché et non celui de la nouvelle entreprise (Katz 1989, pp. 706-708). Si les nouveaux fabricants doivent pénétrer les deux niveaux en même temps, leurs coûts d'entrée seront vraisemblablement plus importants à la fois en raison du risque plus élevé (la probabilité d'un échec à l'entrée à chaque niveau sera vraisemblablement corrélée) et parce que la gestion pose des problèmes plus difficiles.

Des accords verticaux multiples identiques ou parallèles peuvent affecter la concurrence. D'une part, il peut en résulter des asymétries d'information, des incertitudes et des coûts non récupérables

spécifiques aux transactions. Des prix de vente imposés parallèles peuvent faciliter la collusion en aval, car les prix de détail sont plus faciles à suivre que les prix de gros. L'association d'accords d'exclusivité et de prix imposés réduit les incitations à procéder en secret à des réductions de prix de gros. Des zones d'exclusivité se correspondant dans une large mesure entre les conncurrents en amont peuvent encourager la collusion -- seuls les détaillants dans une zone particulière doivent s'entendre -- et pourraient faciliter une discrimination par les prix.

Extension du pouvoir de marché par l'établissement d'un lien

Certains analystes ont avancé qu'assujettir la vente d'un produit à la vente d'un autre peut permettre à une entreprise dominante d'étendre sur un second marché le pouvoir qu'elle exerce sur un marché donné. Cette vue a été critiquée, l'argument étant que l'entreprise dominante ne peut plus accroître ses profits en étendant son pouvoir de marché. Plus récemment, il a été montré que, dans certaines conditions (y compris certaines hypothèses spécifiques concernant la demande, un monopole sur un marché interdit à l'entrée et une concurrence moins que parfaite sur un deuxième marché), l'établissement d'un lien entre des produits peut faire craindre de façon crédible que l'entreprise en place réagira agressivement à l'entrée d'un concurrent sur le second marché. (Katz, p. 709, décrivant Whinston (1987)).

Si l'entreprise dominante est assujettie à des réglementations en matière de prix ou de profit sur le marché sur lequel elle a cette position, elle peut alors lier un produit non réglementé à un profit réglementé, obtenant des profits autrement interdits en appliquant le prix de monopole à l'ensemble.

Défense contre une allégation d'abus

Un élément clé dans ce débat tient à la question de savoir quelle est la défense possible contre une allégation d'abus ? Laissant de côté les cas où une entreprise n'est pas dans une position dominante ou les actions qui ne représentent jamais un abus et laissant aussi de côté la question de savoir à qui revient la charge de la preuve, on peut se demander, en théorie, quels sont les moyens de défense possible contre une éventuelle action abusive par une entreprise dominante ? Plusieurs possibilités existent, qui dépendent là encore de l'objectif du droit de la concurrence. L'une d'entre elles revient à déterminer si le refus est "coutumier" dans ce secteur ? Un tel critère sera peut-être approprié lorsque l'objectif est d'assurer la loyauté des relations commerciales, lorsque le caractère coutumier est établi et lorsque les entreprises ont à peu près le même pouvoir de négociation, ou bien encore lorsque l'objectif recherché est l'efficience et lorsque des investissements irrécupérables liés aux transactions ont été réalisés. Un autre critère possible tient à la question de savoir si les dommages causés aux concurrents sont supérieurs aux gains obtenus par l'entreprise qui refuse, ou par les consommateurs en aval. Ces deux critères peuvent être appropriés si les entreprises touchées sont des petites entreprises, si l'entreprise dominante n'est pas de petite taille et si la préservation des petites entreprises est un objectif. Un troisième critère possible est lié à la question de savoir si le refus n'est profitable que s'il incite le concurrent à sortir du marché. Ce critère peut être approprié si la maximisation de l'efficience statique, et non dynamique, est l'objectif. Il existe un grand nombre d'autres critères pouvant être appliqués, chacun étant déterminé par l'objectif du droit de la concurrence et les possibiltés de mise en oeuvre dans la pratique.

Effets internationaux

A ce stade, on est implicitement parti de l'hypothèse d'un objectif de maximisation du bien-être total ou de maximisation de la "concurrence". En revanche, si l'incidence des effets sur le bien-être ou sur

la concurrence de certains comportements n'est pas la même suivant les pays et si l'objectif des autorités de la concurrence est de maximiser le bien-être national, la réaction sera-t-elle différente ? Cette question, ainsi que les points de vue différents des responsables du commerce et de la concurrence, font l'objet de la note de Mme Janow, consultant auprès de la Direction des échanges.

Mesures palliatives

Diverses mesures palliatives sont envisageables. Il peut s'agir de mesures monétaires, c'est-à-dire des amendes et des dommages, de l'interdiction de ce même comportement à l'avenir, de la définitionn des termes des contrats futurs, ou d'un effort de réforme structurelle, pouvant aller de la vente d'actifs à la modification de la politique réglementaire ou de la politique commerciale.

Lorsqu'on cherche une mesure palliative dans un cas particulier la question que l'on doit se poser est quel est l'objectif recherché ? On peut, par exemple, essayer d'introduire sur le marché une situation proche de la "concurrence parfaite", c'est-à-dire un grand nombre de concurrents sur chaque marché et une entrée libre. Cependant, lorsqu'il y a des économies d'échelle, la mise en oeuvre d'un tel objectif peut conduire à diminuer l'efficience productive et, à long terme, réduire les incitations à innover et à réaliser d'autres investissements irrécupérables. On peut aussi envisager de modifier les régimes réglementaires, ce qui comporte ses propres coûts. Lorsqu'un produit peut faire l'objet d'échanges au niveau international, les réductions des barrières à l'entrée peuvent diminuer la domination d'une entreprise.

Les mesures palliatives visant les comportements peuvent aussi avoir des coûts, sauf s'il existe déjà un organisme réglementaire compétent pour les mettre en oeuvre. Autrement, le système judiciaire ou les autorités responsables de la concurrence peuvent avoir à agir comme organisme de réglementation. Les mesures palliatives visant les comportements peuvent contribuer à réduire, directement, l'exploitation abusive d'un marché -- c'est le cas, par exemple, des directives en matière de fixation des prix -- ou bien réduire les obstacles à l'entrée, c'est le cas, par exemple, de l'accès obligatoire aux installations ou de la modification des termes des contrats d'exclusivité.

Il semble qu'il n'y ait pas de relation générale évidente entre les mesures palliatives visant les comportements et les mesures palliatives de type structurel. On peut penser que, toutes choses étant égales par ailleurs, les premières sont moins risquées car elles sont plus facilement réversibles. En revanche, les investissements irrécupérables qu'elles suscitent ne sont pas réversibles et supposent des coûts de suivi permanents. Parmi les mesures palliatives de type structurel figure notamment le démembrement. Il est difficile de dire si les critères appliqués pour juger du résultat d'un démembrement doivent être les mêmes que ceux appliqués pour juger du résultat d'une fusion, le critère de puissance sur le marché appliqué dans le premier cas pouvant être moins strict. Cette différence d'évaluation peut s'imposer lorsque l'autorité de la concurrence a des doutes quant aux économies d'échelle, aux économies de gamme et à l'intégration verticale. Parmi les autres mesures palliatives de type structurel qui sont envisageables, on peut citer l'agrément obligatoire.

Conclusion

L'abus de position dominante et les autres concepts juridiques similaires varient d'une juridiction à l'autre dans une plus ou moins grande mesure. Ces variations peuvent tenir à des différences dans les objectifs de la politique de la concurrence ou peuvent refléter des différences dans la façon dont les entreprises obtiennent leur position sur le marché. Dans la plupart des pays, pour mettre en évidence un abus de position dominante, il faut passer par plusieurs étapes distinctes : définir le marché pertinent,

déterminer si l'entreprise est dominante en étudiant sa part de marché, les obstacles à l'entrée et d'autres caractéristiques et chercher à savoir si le comportement est abusif du point de vue de l'objectif du droit de la concurrence. Il existe toutefois des différences entre les concepts de position dominante, qui tiennent tant à des différences dans l'interprétation de la valeur de certaines variables -- par exemple une part de marché de 40 pour cent est interprétée différemment toutes choses égales par ailleurs -- qu'aux variables qui sont utilisées pour procéder à cette évaluation. Il existe aussi des différences dans le traitement de certains comportements d'entreprises dominantes, qui, comme on l'a noté plus haut, peuvent tenir à des différences dans les objectifs et l'environnement du marché. Il y a aussi certaines omissions intéressantes. Par exemple, il semble que l'on tienne peu compte expressément de la structure des marchés sur le plan de l'information et de l'incertitude de la demande qui, a priori, sont des éléments que l'on aurait imaginé importants dans toute évaluation de comportements pouvant conduire à une aggravation des obstacles à l'entrée et, pour ce qui est de l'information, à une position dominante conjointe. Les mesures palliatives face à un abus de position dominante sont adaptées à chaque cas particulier et peuvent tenir compte des structures réglementaires existantes et des autres politiques publiques dans le domaine des échanges et les autres domaines. La durée et la réversibilité peuvent jouer un rôle important dans le choix entre les mesures palliatives visant les comportements et les mesures de type structurel. Enfin, les cas où les effets de la domination sont ressentis dans différents pays peuvent, en raison d'instruments d'action différents et sans doute de perspectives différentes, appeler des mesures palliatives différentes de la part des responsables des échanges et de la concurrence.

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NOTES

1. La présente table ronde est la dernière d'une série tenue dans le cadre du projet sur la convergence du Comité du droit et de la politique de la concurrence. Les tables rondes précédentes ont été consacrées, entre autres, à la définition du marché, aux barrières à l'entrée, aux accords verticaux et aux accords horizontaux. Si l'actuelle table ronde est la première occasion d'examiner quant au fond ce sujet important, le Comité a déjà observé ce qui suit (OCDE, 1994 : "Quoique la convergence en matière d'abus de position dominante et de monopolisation n'ait pas progressé autant que dans d'autres domaines de la législation de la concurrence, il se dégage un consensus selon lequel l'essentiel de ces dispositions vise à préserver le processus de concurrence plutôt que la viabilité des concurrents individuels."

2. Afin d'éviter d'accorder trop d'importance à des questions de terminologie, l'expression "position dominante" sera utilisée dans le reste du présent document pour désigner l'une ou l'ensemble des positions d'une entreprise correspondant à peu près à "une position dominante" ou "un monopole" dans certaines juridictions. Les expressions "domination conjointe" et "abus de position dominante" sont utilisées indifféremment. Le terme "entreprise" sera utilisé pour désigner également les entités publiques qui jouent un rôle commercial et dont les activités intéressent le droit de la concurrence.

3. Le Comité s'est déjà penché sur la question de la définition du marché (OCDE, 1994, pp 11-12).

4. Il faut se souvenir que pour définir un marché pertinent à des fins d'évaluation d'une fusion, on cherche à savoir, pour des séries de produits de plus en plus importantes, si un monopoleur hypothétique jugerait rentable d'augmenter les prix de ces produits. Si une augmentation des prix est rentable, la série de produits constitue alors un marché pertinent. Si une augmentation des prix n'est pas rentable (parce qu'un trop grand nombre d'acheteurs se tourneraient vers des produits de substitution), cette série de produits n'est pas un marché pertinent. Considérons le cas d'un monopoleur réel. Un monopoleur réel cherchant à maximiser ses profits aura déjà augmenté les prix des produits sur le marché pertinent pour les porter jusqu'au niveau de profit maximum. En conséquence, le monopoleur hypothétique cherchant à maximiser ses profits n'augmenterait pas les prix au-dessus des niveaux déjà observés sur le marché. Dans ces conditions, la série de produits vendus par le monopoleur réel ne peut logiquement être considéré comme un marché pertinent en vertu de la définition ci-dessus.

   On trouvera une longue analyse de la définition du marché dans le contexte de l'abus de position dominante dans les pages II.6-12 de "Reference Document on Abus of Dominance", Vol. 1, Bureau de la politique de concurrence, Canada.

5. Par exemple, Boscheck (p.138) souligne : "Un éventail de caractéristiques spécifiques à un secteur conditionne la définition du marché pertinent et détermine en fin de compte le degré de concurrence à partir duquel seront évaluées les relations de rivalité existant au sein du secteur, les stratégies des entreprises et l'importance du pouvoir de marché relatif que ces stratégies permettent d'acquérir ou de maintenir."

6. Pour des produits homogènes, la part de marché peut être mesurée entre autres par les ventes unitaires, la valeur des ventes, la production unitaire et la capacité de production. Pour des produits hétérogènes, certains ajustements peuvent être opérés pour tenir compte des différences dans le degré de substituabilité des produits des concurrents sur le marché pertinent. (Par exemple, on peut mesurer le pourcentage d'appels d'offre dans lequel chaque paire d'entreprises a présenté l'offre qui l'a emporté et l'offre qui est venue juste derrière). Si les parts de marché varient avec le temps, il faut tenir compte dans une certaine mesure de ces variations. Certaines entreprises peuvent utiliser une partie de leur production au niveau interne, ce qui complique la mesure de la part de marché.

7. Dans son 24ème rapport sur la politique de la concurrence, la Commission de l'UE cite la Cour européenne de justice dans le cas Almelo, la Cour ayant examiné la mesure dans laquelle les liens entre les entreprises étaient suffisamment forts pour qu'il y ait une position dominante conjointe (para. 456).

8. Les prix d'éviction, qui ne sont pas examinés dans la présente note, font l'objet d'un examen attentif dans “Prix d'éviction”, OCDE (1989).

9. Par exemple, la Cour européenne de justice a récemment statué qu'une "entreprise" dans une position dominante établie administrativement avait exploité abusivement cette position en appliquant des tarifs qui n'avaient pas de relation avec la valeur des services (C-323/93 Société Civile Agricole du Centre d'Insémination de la Crespelle contre Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne [1994] ECR I-5077).

10. Ce thème est traité dans une note distinte pour une autre table ronde. Les refus de traiter visant à mettre en oeuvre un accord vertical, c'est-à-dire le refus de vendre à un deuxième distributeur dans une zone de distribution exclusive, ne sont pas pris en compte ici.

11. Le Comité a examiné certaines questions connexes dans “Politique de la concurrence et droits de propriété intellectuelle”, OCDE (1989).

12. Les accords verticaux sont longuement examinés dans “Politique de la concurrence et restrictions verticales : les accords de franchise”, OCDE (1993).

13. “Jusqu'ici, une grande partie des débats ont tourné autour de la question de savoir si une pratique donnée est pro-concurrentielle ou anticoncurrentielle et par conséquent autour de la question de savoir si une pratique donnée doit être ou non interdite. J'estime que cette approche est erronée pour au moins deux raisons. Premièrement, les effets de bien-être n'ont peut-être rien à voir avec la "concurrence" en soi. Certaines restrictions verticales (par exemple l'établissement d'un lien) peuvent apparaître et avoir des conséquences sur le bien-être, même lorsque les deux niveaux de

la chaîne de l'offre sont monopolisés. Deuxièmement, le type de réponse recherché n'est pas le bon. Du point de vue théorique du moins, toute restriction peut être bonne ou mauvaise. La théorie seule (ou la théorie associée à quelques exemples) ne permet pas de répondre à une question posée comme suit : les prix imposés devraient-ils être considérés comme illégaux ?

Pour l'élaboration des politiques, l'essentiel est de mettre au point des règles utilisables qui permettent de mettre en évidence des conditions du marché observables dans lesquelles certaines pratiques sont socialement souhaitables. C'est dans cette optique que les tribunaux et un grand nombre d'économistes ont considéré comme d'une importance critique le degré de concentration du marché. L'intérêt porté à cet aspect de la structure du marché est fondé sur la conclusion qu'un accord vertical n'aura probablement pas un effet "anticoncurrentiel" lorsqu'il lie des parties qui ont une part de marché combinée faible, soit en amont soit en aval.

Si ces travaux ne font que commencer, il est indispensable que l'analyse soit élargie de façon à inclure des facteurs comme la structure du marché sur le plan de l'information, les caractéristiques du risque (par exemple l'ampleur des investissements non récupérables) et le degré d'imbrication des parties (montant du capital investi par transaction). Il est aussi indispensable que ce travail mette en évidence les moyens d'isoler les effets des restrictions verticales par rapport aux autres arrangements institutionnels et contractuels." (Katz 1989, p 714).

INTERNATIONAL PERSPECTIVES ON ABUSE OF DOMINANCE

(by Merit E. Janow,* Consultant to the OECD Secretariat)

Executive Summary

This paper focuses on an important and well-established feature of national competition laws: namely, the prohibitions on monopolization or single firm abuse of market power. It reviews the following questions:

-- How do different jurisdictions define dominance?
-- What range of conduct may be seen as abusive?
-- Under what circumstances can abuse of dominance raise problems of an international or transborder nature?
-- How might trade policy and competition policy perspectives differ with respect to these circumstances?

Section II of this paper discusses the first two of these questions. To summarize section II, although single firm abuse of market power is a central concern of competition laws in most jurisdictions, monopolies are not illegal in the jurisdictions examined herein--i.e., in the U.S., the E.U. or Japan.

In analysing a case, both United States and European Community law require that there be a finding of market power in relation to a defined market. For the U.S. and the E.C., market share is a common proxy or first screen. However, there are significant differences as to the level of shares that can be considered problematic-- high shares are required in the United States whereas lower levels could suffice in the European Union.

The jurisprudence on monopolization in Japan is very limited, but it appears that in the cases to date, Japanese authorities have found illegal monopolization in circumstances where market shares can be closer to European levels than American.

Neither the Sherman Act, the principal U.S. antitrust statute applicable to monopolies examined herein, nor Japan's Anti-Monopoly Act enumerate the specific types of conduct that can be seen as problematic. In contrast, Article 86 of the Treaty of Rome includes a non-exhaustive list of offenses.

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Turning to offenses, Section II also discusses substantive areas where E.C. and U.S. approaches overlap. For example, raising prices and limiting production are classic abuses of market power which both U.S. and E.C. law prohibit. In European Community law, there are other bases for finding abuse, such as excessive pricing, which have no U.S. analogy. Price discrimination and tying arrangements specifically enumerated in the Treaty of Rome provisions could prove to be violations of Section 2 of the Sherman Act, but they are not statutorily linked to being a monopolist under U.S. law and are contained in other features of U.S. law[1]. Refusals to deal may be prohibited under U.S. law, but some E.C. cases go further in finding a duty to deal than does U.S. law. In this way, although one can identify core conduct that is likely to be condemned in a number of jurisdictions, there remain many areas of considerable divergence among jurisdictions.

Section II also identifies common and divergent policy goals that underpin U.S., E.C. and Japanese competition laws. Judicial interpretations of monopolization under U.S. antitrust laws have undergone significant changes over time. In the last several decades, economic efficiency has become a central principle of interpretation in U.S. cases. This efficiency focus means that courts often weigh the competitive effects of the practice under examination in light of the performance and efficiency features that may accompany the practice.

In the E.U., concern about single market integration, protection of competitors, and the viability of smaller businesses have at times been a more central concern to E.U. authorities than economic efficiency alone.

As noted, Japanese law aimed at monopolies has limited jurisprudence. Although there are some points of commonality between U.S., E.U., and Japanese law, it is noteworthy that Japanese law also incorporates the notion of "contrary to public interest". Although this is an area where even Japanese law experts disagree, it appears that this concept include concerns that are not fully reflected under either U.S. or E.U. law.

Section III of this paper posits two scenarios where abuse of dominance can raise problems of an international nature. It then discusses how such conduct might be treated under competition and trade perspectives. It also discusses the jurisdictional reach of U.S. antitrust and trade laws.

The first scenario could arise if a dominant firm undertakes actions that block foreign competitors from its domestic market through a variety of exclusionary practices--e.g., by tying up distribution channels or requiring affiliated buyers to refuse to deal with foreign sources of supply. Depending on the nature of the restraint, section III discusses whether the restraint is or is not likely to be viewed as problematic from a competition perspective.

Section III also examines how the same facts might be viewed from a trade policy perspective. Traditionally, trade policy has focused on access to markets and hence a central concern of trade policy has been the actions of governments--not firms--that distort trade and access to markets. In the United States, domestic trade law has been embellished to expand certain unilateral self-help mechanisms such as section 301 to reach private restraints under certain circumstances: namely, government toleration of systematic anticompetitive practices abroad that adversely effects U.S. interests. Thus, section III also discusses the scope of bilateral as well as multilateral remedies to market access problems that are seen as stemming from private anticompetitive conduct.

The second scenario discussed herein could arise if a firm engages in exclusionary practices at home and predatory pricing practices abroad. The treatment of such practices under competition versus trade policy perspectives differ markedly. Taking U.S. antitrust law as an example, U.S. courts are increasingly skeptical about predatory pricing claims in antitrust actions. Price predation can also be a cause of action under anti-dumping law as well. The substantial differences in procedure and substantive focus of competition versus trade law marks this area as one area where trade versus competition perspectives can lead to very different outcomes.

There has been extensive scholarship on the treatment of predation under trade and competition perspectives. This paper does not try to offer approaches that might reconcile such differences in perspective.

The scenarios discussed herein suggest that single firm conduct can have international effects, and further, that a market access (or trade policy) perspective versus a market entry (or competition policy) perspective can lead to different conclusions about appropriate remedies or even the need for remedial action.

Introduction

Most industrialised countries that have enacted competition laws have prohibitions against monopolization or single-firm abuse of a dominant position (hereinafter "abuse of dominance").[2] There has been extensive scholarship on national differences with respect to the exercise and focus of such laws against abuse of dominance.[3]

This paper will attempt to provide an overview of a portion of that scholarship with the aim of reviewing the following questions:

-- How do different jurisdictions define dominance?
-- What range of conduct may be seen as abusive?
-- Under what circumstances can abuse of dominance raise problems of an international or transborder nature?
-- How might trade policy and competition policy perspectives differ with respect to these circumstances?

This paper concludes with a few observations on the remedies available to address the international dimensions of abuse of market power[4].

Differences in National Competition Laws and Policies

How do different jurisdictions define dominance and what types of conduct may be seen as abusive?

It is important to note that the possession of economic power is not condemned in the European Union, the United States, the United Kingdom, or Japan, by way of a few examples. Bigness is not unlawful. Rather, some abusive conduct by the monopolist or dominant firm is required. A classic form of exploitation of market power would be raising prices above competitive levels and reducing output.[5]

Such areas of general commonality notwithstanding, there are substantial points of difference between jurisdictions. The ensuing discussion will point up similarities and differences that emerge from a comparison of U.S., E.U. and Japanese law, as a backdrop against which we can evaluate some practices of a dominant firm that can raise international problems.

U.S. Law

In the United States, Section 2 of the Sherman Act, which dates back to 1890, is the primary legislation addressing monopolization or attempts to monopolize. On its face, it provides little guidance to determine when a firm is a monopolist or attempting to monopolize a market for antitrust purposes.[6]

The judicial interpretation of monopolization under Section 2 of the Sherman Act has evolved over time, and indeed the application of U.S. antitrust law overall has changed quite significantly in the course of the last three decades. By the end of the 1950s and through the 1960s, the U.S. Supreme Court was applying antitrust law to protect the "viability of small and middle-sized businesses, to preserve the freedom of action of independent business people, and to disperse economic and political power".[7] Beginning in the 1970s, and greatly influenced by the scholarship and philosophy of the Chicago School, a guiding principle of interpretation in U.S. antitrust cases became economic efficiency.[8]

In United States v. Grinell Corp., the U.S. Supreme Court held that illegal monopolization involves two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power, as distinguished from "growth or development as a consequence of a superior product, business acumen, or historic accident".[9]

As a methodological matter, courts examine whether the firm has substantial market power in relation to some well-defined product and geographic market.[10] Defining the relevant market is a critical part of the analysis. In recent years, the degree of market power needed to find monopolization has varied. A 90 per cent market share has been deemed sufficient to support an inference of monopoly power, and courts have rarely found such power when the market share was below 70 percent.[11]

Market shares are used as one index or screen of market power, but other factors such as barriers to entry, availability of substitutes, the number and size of competitors, and the nature of the product are also considered in determining whether or not a firm has substantial market power. Market power is therefore established in light of a review of the various competitive pressures at work in the market under examination.

Attempting to monopolize is its own distinct offense from monopolization, although in practice the distinction often blurs. The elements of "attempt" include a specific intent to control prices or destroy competition; predatory or anticompetitive conduct directed toward an unlawful purpose; and a dangerous probability of success. [12]

In distinguishing between monopolization and "attempt" cases, one U.S. expert put it this way: "the power showing in attempt cases is less, but the conduct requirement is greater. By contrast, any practice that will support a charge of attempt will also support a charge of illegal monopolization, provided that the higher market power requirements of the latter offense are met." [13]

U.S. law is now relatively permissive towards the unilateral conduct of even those firms having substantial market power. The reasoning is that vigorous competition is to be encouraged, "even if the conduct disadvantages competitors and increases a firm's dominance".[14] The mere possession of significant market share has not, in and of itself, been viewed as anticompetitive. Significant market share may have been achieved as a result of efficiency and vigorous competition, not through monopolistic practices. There is a recognised tension between the need to encourage innovative and efficient performance that can result in market power on the one hand, and on the other hand to ensure that firms with such market power do not engage in abusive conduct that facilitates the acquisition or preservation of monopoly power. Given this tension, U.S. courts have tended to focus more on the economic effects of particular business practices than on scale alone.

Under what circumstances have the monopolization provisions of Section 2 been applied? The following discussion summarizes U.S. law in a few areas.

Although the right of firms to chose their customers is seen as a fundamental feature of freedom of trade,[15] under certain circumstances courts have imposed upon them a duty to deal. For example, under the "essential facility" doctrine, if a firm controls a facility that cannot practically or reasonably be duplicated, and if access to such a facility by the firm's competitors is necessary for competition, and if the firm that controls that facility can provide access, such access must be provided.[16]

A further variant of this doctrine states that a firm in a monopoly position has a duty to deal when it is engaged in practices designed to impose greater costs on its competitors than on itself.[17]

U.S. courts have also deemed firms to have a duty to deal under the "leveraging theory." This doctrine may apply when a firm has sought to extend its dominance into a second market without having developed a competitive basis for achieving that dominance.[18] The liability stems from the "abuse" of economic power already held in the first market. [19]

According to one U.S. antitrust expert, U.S. cases suggest that a refusal to deal may be permissible if the decision is one of choosing one's customers and deciding how best to service them; it is impermissible if "its effect is to lessen competition and thereby raise prices to consumers or otherwise degrade the price/service package offered to them."[20]

Fidelity discounts and exclusive dealing arrangements are other areas in which U.S. courts examine the competitive effects. These may be condemned if they are seen as unnecessarily excluding rivals or maintaining or increasing market power and are not ways of meeting consumer demands.[21]

E.U. Law

The provision under European Union law analogous to Section 2 of the Sherman Act is contained in Article 86 of the Treaty of Rome. Article 86 is concerned not with monopoly power but with the possession of a "dominant position". In contrast to the Sherman Act, the Treaty of Rome identifies several examples of conduct that could be viewed as abusive. For example, the statute identifies offenses such as the imposition of excessive prices, limiting production, applying dissimilar conditions to equivalent transactions, and tying unrelated articles. The range of conduct that has been found to be abusive is not limited to the examples enumerated in the statute[22]. Unlike current U.S. law, E.U. law incorporate values other than efficiency. Values such as fairness, opportunity, and legitimacy are heeded under E.U. law, and it pays special attention to the viability of small and medium-sized businesses[23]. This may reflect the interest in using Community-wide law to address the economic fragmentation of Europe and thus to foster the further economic integration of Europe and trade between the member states.[24]

E.U. law tends to find dominance at lower levels than does U.S. law.[25] According to some scholars, dominance can be taken to exist when a firm has a market share of 40-45 percent, and cannot be ruled out even at 20-40 percent market share levels[26].

European Union law also requires that dominance is determined in relation to a defined relevant market. One European scholar notes that the relevant market must be analysed from several different perspectives: the product market, the geographical market, and the temporal market.[27] In United Brands v. Commission, the European Court of Justice (ECJ) stated that the review of dominance hinges on whether the firm has the economic strength in the relevant market "which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of

its competitors, customers and ultimately of its consumers."[28] If the firm's market share is not overwhelming, other factors indicative of market power may be examined--e.g., relative market share; relations of the market leader with competitors, suppliers and customers; time scale over which the leading position has been enjoyed; the possession of material technology; and barriers to entry.[29]

What are some of the areas of conduct that could be found abusive under E.U. law?

E.U. law imposes some constraints on the dominant firm that are often broader and certainly are different from those imposed under U.S. law. For example, it includes a constraint against excessive pricing.[30] Although several cases of excessive pricing brought before the ECJ were ultimately quashed for insufficient evidence, the ECJ has suggested that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is...an abuse."[31]

Professor Eleanor Fox argues that there is no analogue in U.S. antitrust law to this E.U. prohibition against excessive prices. U.S. law is based instead on the principle that price should be established by market forces, unless Congress has established some particular regulatory scheme where it has determined that markets cannot function. Indeed, current U.S. antitrust thinking might argue that if a firm attains a monopoly position by virtue of its own competitive strengths and then sets prices at monopoly levels, such high prices may invite new or existing firms to become players in the market.[32] By contrast, the Treaty of Rome provides a duty to limit excessive pricing.

European scholars have taken exception to what is sometimes characterised as a uniquely American assessment of how markets operate. One expert notes:

> Contrary to much U.S. sentiment, the view that a company enjoys a dominant market position only because it has been revealed to be more efficient by the competitive process, and that its price and non-price policies will be welfare-improving, is not considered to be the general case.[33]

Such differences in philosophical and analytical starting points give rise to many substantive variances in the application of E.C. versus U.S. laws. For example, the duty to continue dealing with existing customers has in several European cases been much broader than comparable doctrines in the United States. In Commercial Solvents, the ECJ held that it was an abuse to refuse to supply an existing customer that would by that refusal be eliminated from the market. [34] The Court found Commercial Solvents' refusal to sell certain raw materials to an existing customer to be an abuse of dominance, because a firm with a dominant position in raw materials cannot eliminate the competition of its customer "just because it decides to start manufacturing" the end product in competition with its former customers.[35]

In the case of United Brands, the ECJ asserted that a dominant firm cannot "stop supplying a longstanding customer who abides by regular commercial practices, if the orders placed by that customer are in no way out of the ordinary."[36]

The duty to deal may not be confined to instances involving existing customers; a refusal to supply a new customer can be deemed an abuse where it is based on the nationality of the customer.[37] A central concern of these cases is the protection of the trading partners of the dominant firm.

A doctrine analogous to the U.S."essential facilities" doctrine is also being developed under E.U. law. One scholar has described the doctrine as follows: a dominant firm "which both owns and controls a facility or

infrastructure to which competitors need access in order to provide services to customers, cannot refuse access to such competitors or grant them access only on terms less favourable than those it gives its own operations."[38]

A variety of discriminatory practices have been prohibited because of possible foreclosure effects. By this logic, loyalty rebates, predatory price cutting, and various forms of discounting intended to keep imports out of a dominant firm's territories may all be reached by Article 86. [39]

Japanese Law

Japan's Anti-Monopoly Act (AMA), which was introduced in 1947, contains provisions aimed at private monopolies. It also has a separate provision aimed at addressing a "monopolistic situation", which is conceptually a somewhat different problem than private monopolies and appears to have no analogue in the United States or Europe. We shall briefly describe these two strands of the AMA.

With respect to the first strand, under the AMA private monopolization is defined as a practice that can be undertaken by a single firm or several firms.[40] The jurisprudence in this area is quite limited. There have been only six monopolization cases in Japan's postwar history. And in those cases, the market shares of the firms have ranged from 30 percent up to 80 percent.[41]

The statute does not elucidate the specific conduct that is deemed problematic but states the offense as one where firm or firms "exclude or control the business activities of other entrepreneurs thereby restricting competition substantially, contrary to the public interest, in any particular field of trade."

In general, the prohibition is aimed at conduct that could establish, maintain or strengthen, the monopoly position of a firm or firms in relation to a defined market.[42]

Exclusion or control can take various forms. According to experts, a firm that engages in predatory pricing that discriminates on the basis of geographic distribution or customers, or that sells below cost to drive out competitors, may be held to have engaged in "exclusion" under this provision of the AMA. Restrictive contracts that deny access to market channels may be held to be exclusion if the result is the substantial reduction of competition in the relevant market.[43]

"Control" has encompassed a broad range of conduct. For example, it can be achieved by acquisition of stock, interlocking directorates, or control of subcontractors or distributors. And such control can be direct or indirect[44].

There does not appear to be a precise definition of "substantial restraint of competition." In one case, the Tokyo High Court stated that "substantial restraint of competition means that competition has diminished so much that a particular entrepreneur or a group of entrepreneurs can to some extent freely determine price, quality, quantity and other terms of business...and the situation has come into being wherein the control of the market by such entrepreneur or group of entrepreneurs is possible."[45] Factors that go into the assessment of a substantial restraint of competition include the nature of the business, the conditions of the market and the manner of competition in the market.

The meaning behind the terms "contrary to public interest" is an area where experts in Japanese competition law appear to disagree. Some experts suggest that this phrase has the same content as "substantial restraint of competition". Thus, if conduct meets the latter test it satisfies the requirement of the former. The rationale for this interpretation is that the AMA is premised on the notion that the AMA is primarily aimed at ensuring free competition in a market. Another theory, however, suggests that "contrary to public interest" is a

broader concept than simply competitive markets, and includes other policy goals such as the "balanced development of the national economy, the protection of consumers, the prevention of economic depression, and the mitigation of trade conflicts".[46]

The second strand of the AMA that pertains to monopolies is the provision that deals with "monopolistic situations". This was a later amendment to the AMA that appears to be aimed at providing Japanese enforcement authorities with the legal basis for restructuring a market when conditions warrant.[47] According to Professor Mitsuo Matsushita, for example, this provision was added to the AMA in 1977 to cope with situations where a monopoly has been formed but not yet prohibited.

The law stipulates that two criteria must be met: first a market structure requirement, and second, undesirable market performance.

To meet the market structure requirement, the size of the market must be larger than one hundred billion yen during the preceding one year; a firm must hold 50 percent or more of the shares in that market if it is a single firm, or 75 percent or more if two firms; and entry into the market must be extremely difficult.[48]

The conditions that suggest undesirable market performance are broad. Experts suggest that such conditions includes price inflexibility, excessive profits, and excessive selling costs and overhead by the firm or firms[49].

As of this writing, there have been no cases brought under this provision of Japanese law.[50] However, as a matter of law, if the JFTC believes that a monopolistic situation exists, it has the authority to order the firm or firms to take whatever measures that the JFTC deems necessary to restore competition in the market, including the transfer of part of the firms business. The Act stipulates strict pre-conditions before remedial measures may be undertaken and also contains various procedural safeguards[51]. One Japanese scholar argues that although this provision of the AMA is likely to be extremely difficult to apply in practice, " a monopolistic situation may be stopped even if the concerned entrepreneur has not engaged in unfair or illegal conduct".[52] The FTC regularly prepares a list of industries that satisfy the market structure test and is said to pay close attention to developments in these industries. Although this provision of Japan's AMA appears to be unique and potentially a very powerful tool for enforcement officials, as noted earlier, it has yet to be exercised.[53]

Trade and Competition Perspectives on International or Transborder Problems

Under what circumstances can abuse of dominance raise problems of an international nature? Is market power and its abuse an issue simply for national competition authorities or is it a matter of international concern?

Perhaps a useful exercise we can undertake in attempting to answer these questions is to identify circumstances in which the actions of a dominant firm could have international effects and then to ponder how competition as well as trade policy considerations may apply to those circumstances. The following discussion identifies two scenarios. They are presented very briefly. Of course, in practice, much would turn on specific facts not contained within these scenarios.

Scenario A: Denial of Market Access by a Dominant Firm

A dominant firm (or firms) could undertake actions blocking foreign competitors from its domestic market and thereby denying access to such markets. For example, a dominant firm might tie up distribution

systems that cannot be duplicated, or require that financially linked or beholden buyers refuse to deal with foreign sources of supply. Under these circumstances, the actions of a dominant firm can result in market foreclosure or the reduction in competition within a market. Thus the injury is both to customers in the home market of the dominant firm and to exporters seeking access to that market.

Alternatively, the dominant firm could in theory deny market access to foreign firms by barring them from a facility necessary to sell in that market. Or the dominant firm could be a state monopoly or former monopoly that implicitly or explicitly refuses to procure from foreign sources.

How might these various actions by a dominant firm be examined under competition or trade perspectives?

Competition Policy Perspectives

Single firm conduct is a more murky area of competition policy than cartel conduct and it is an area where there are substantial differences across jurisdictions. There is likely to be little or no pro-competitive justification for competitors to agree with each other that their distributors should not deal with their competitors. However, there may be efficiency reasons for a firm acting unilaterally to choose an exclusive distribution system.

Vertical arrangements by a firm with substantial market power may be permitted under U.S. law if the arrangement has pro-competitive or efficiency features that could not have been achieved through other less exclusionary means. Although resale price maintenance remains a per se offense in many countries, vertical restraints are often permitted unless such restraints adversely affect interbrand, not intra-brand, competition. Other non-efficiency arguments, for example that the vertical restraint excludes or disadvantages medium size businesses, are unlikely to be persuasive under U.S. antitrust law.[54] But as we have seen, European doctrines may deem non-efficiency factors as persuasive.

If the firm provides a facility that cannot be duplicated, the exclusion may be prohibited under an essential facilities doctrine that is available in at least several jurisdictions. This doctrine may apply even if the dominant firm is an authorised monopoly but judged nonetheless to have engaged in abusive conduct.

When the relevant market is national, the conduct of the dominant firm will naturally be viewed as a matter of primary concern for national competition authorities applying local law. Under many circumstances, national authorities are best situated to remove artificial barriers that facilitate exploitation or exclusion. The enforcement of national competition laws is correspondingly likely to be a significant, although not the only, tool to address such exclusionary or abusive conduct, if such laws are vigorously enforced and if the conduct falls within the ambit of domestic law. But an obvious problem that is causing international policy disputes is the uneven or even discriminatory record of enforcement of competition laws in some jurisdictions.

Indeed, the lack of vigorous competition policy enforcement has already become a source of international dispute. In part to address this perceived problem of inadequate enforcement of foreign competition laws, the Sherman Act permits a claim against foreign anticompetitive conduct that harms U.S. consumer or export interests if certain conditions are met.[55] For example, courts usually require that the defendants conduct have a direct, substantial and reasonably foreseeable effect on U.S. commerce. Needless to say, commentators and officials in many non-U.S. jurisdictions argue that the reach of the Sherman Act should be limited to actions occurring on U.S. soil or those actions that have direct effects on U.S. consumer interests.

Under the facts posited in this fictional scenario 1, the foreign firm may not be limited to seeking redress from local laws. It could seek redress from its own competition or trade laws. Under U.S. law, the availability of this "effects" doctrine may offer some recourse to those seeking redress for exclusionary conduct abroad that harms U.S. export interests. However, this self-help mechanism has not yet proven itself fully responsive to the market access problems that are perceived to stem from the lack of enforcement of foreign competition laws. The reasons here are many and complex, but suffice it to say that there are evidentiary, jurisdictional, sovereignty, political, and other obstacles that are likely to arise in the course of litigating such a claim. Such obstacles are also likely to limit the practical availability of the effects doctrine. And although the U.S. effects doctrine has received a lot of attention both at home and abroad in recent years, few cases have addressed outbound, as against inbound, trade[56].

Trade Policy Perspectives

While the Sherman Act has rarely been used to reach conduct abroad that harms U.S. export interests, facts comparable to those posited in this scenario have led to a number of bilateral trade policy disputes, especially involving the United States and Japan.

Unlike competition policy that focuses on the actions of firms, with the exception of antidumping and safeguard measures, trade policy finds it raison d'être in the actions of foreign governments that thwart access to markets. And, of course, the long history of multilateral and bilateral trade negotiations that have characterised the postwar period have reduced many of the barriers to market access imposed by governments. Although it is now widely acknowledged that removal of government barriers to trade are not sufficient to create fully open and contestable markets in the face of private restraints, international or domestic trade rules have not yet developed disciplines to cover "purely" private restraints imposed by firms that affect access to markets.

A significant exception to the general proposition that private restraints fall outside of the ambit of established trade policy rules is found in U.S. domestic trade law. Specifically, section 301 of the 1974 Trade Act, as amended, provides a cause of action against those business practices, supported by government actions, that could be deemed "unreasonable" practices.

Practices that can be reached by the definition of "unreasonable" in section 301 are very broad. In general, these include practices that are not necessarily inconsistent with the international legal rights of the United States but are deemed otherwise unfair and inequitable and can include foreign government toleration of anticompetitive conduct that restricts U.S. exports.[57]

When conducting a formal 301 investigation, the Office of the U.S. Trade Representative engages in fact-finding and consultations with the foreign government about the alleged barriers to market access. In contrast to an antitrust investigation which will review barriers to market entry, the scope of inquiry in a trade market access case is broader and different from that undertaken in an antitrust claim and often hinges on the perceived "unfairness" or discriminatory impact of the foreign conduct. No single or uniform methodology is employed in the review of a claim of unfairness.

Further, although the petitioner has a burden of persuasion and is obliged to provide evidence of the practices that have given rise to the claim of unfairness, the evidentiary standards are less defined in a section 301 market access case as compared with an antitrust case. Negotiation rather than adjudication is a hallmark of the 301 process. If the foreign government is prepared to enter into negotiations with the U.S. government, as a practical matter (although not as a matter of law) the burden of persuasion can soon shift to the foreign government.

When one examines the record of bilateral agreements reached between the United States and Japan, one sees that a number of the resulting agreements have included commitments by the Japanese Government to vigorously enforce its competition laws, in general and with respect to specific sectors, along with commitments to proactively encourage imports and facilitate the development of more competitive market environments.[58] In other words, these agreements often include competition policy features but have also included broader measures whereby the Japanese Government assumes some responsibility for encouraging the development of more open markets.

Single firm conduct has surfaced in a number of bilateral disputes as the perceived cause of anticompetitive market foreclosure or "unfairness".[59]

The Section 301 petition filed by the Eastman Kodak Company in May of 1995 is the first formal petition filed and accepted by the USTR that is centrally based on an allegation that a foreign government (in this case Japan) engaged in unreasonable practices inclusive of toleration of systematic anticompetitive practices. The case is also relevant to this discussion because of the significant market shares (70 percent each) held by both the petitioner, Kodak, and its major Japanese rival, Fuji, in their respective home markets.

The petition alleges that once formal barriers to trade had been lowered, the Japanese Government implemented "liberalisation countermeasures" designed to facilitate the creation of a market structure in the consumer photographic market that would block Kodak from gaining more of the Japanese market. Further, it alleges that Kodak's major competitor, Fujifilm then established a lock on the Japanese distribution system and, with its affiliated distributors, set up vertical and horizontal arrangements with distributors that Kodak believes to be anticompetitive. More directly relevant to this discussion, however, is the petition's allegation that if the case were to be litigated under U.S. law, Fuji's distribution and rebate system would be deemed an abuse of Section 2 of the Sherman Act under the doctrine of the "essential facility", and Fuji engaged in acts that were aimed at establishing or retaining its monopoly.[60]

Despite the availability of the Sherman Act to reach outbound trade, the petitioner chose instead to pursue a trade case. Kodak's petition did not detail the reasons behind this choice, however, its spokespersons have suggested that at least a part of the reason stems from the fact that its complaint would take the Sherman Act into unchartered territory. More importantly, Kodak argues that it is experiencing market access problems that stem from the actions of the Japanese Government itself, hence Kodak's decision to seek relief under U.S. trade as against antitrust laws.[61]

Fujifilm, in its rebuttal of Kodak's petition, has rejected all of Kodak's factual and legal claims. For example, it rejects the argument that Fuji controls the local distribution system and maintains distributor loyalty through anticompetitive rebate programs. With respect to Kodak's antitrust arguments, Fujifilm takes issue with Kodak's market definition. It argues that Kodak has failed to establish the elements of an essential facilities claim, that Fujifilm has not established unlawful exclusive dealing arrangements and that, if anything, Kodak's own arrangements are exclusionary! The Japanese Government, for its part, has refused so far to enter into negotiations with the U.S. Trade Representatives Office on this case, arguing that the issues raised by the Kodak petition are primarily matters for consideration by the Japan Fair Trade Commission under Japanese law.

As this case is still pending, our purpose here is not to assess the facts as alleged and rebutted by the affected parties. The relevant point is that Scenario 1 and the perceived gaps in coverage between trade and competition laws are not merely abstract academic problems but ones giving rise to very current trade disputes. The handling of the Kodak-Fuji case may prove extremely important in that it could set a precedent regarding the methodology and availability of U.S. trade law remedies to perceived market access barriers stemming from private and hybrid private-public restraints. For such reasons, it is a case worth careful examination from both trade and competition perspectives.

Finally, this first scenario (and indeed even the Kodak-Fuji dispute) raises the obvious question whether or not the WTO as currently structured offers a vehicle for addressing the private conduct of a firm that forecloses access to a market. Although the GATT (and now the WTO) primarily deals with government policies, it is conceivable that firm practices that are not inconsistent with the WTO but that nevertheless nullify or impair an existing concession could give rise to a "non-violation" complaint under the WTO, if certain conditions are present.

As scholars have noted, for anti-competitive practices to be the subject matter of a non-violation complaint under the GATT/WTO, a number of conditions would most probably have to be met: first, the measure must be applied by the government; second it must alter the competitive conditions that were established by other GATT/WTO undertakings or tariffs; and third, the measures taken must be ones that could not have been reasonably anticipated at the time the tariff or other concessions were made.[62]

The gaps in coverage implied by these conditions are considerable. For example, purely private practices that restrict access to markets and that do not have some degree of government involvement or support are unlikely to be found actionable under the WTO rules. And of course, competition policy as such is not substantively addressed under the WTO rules, although certain competition related features have been included in some of the new areas negotiated under the Uruguay Round.[63] Thus, although it is conceivable that under certain circumstances private conduct, supported by the local government, might be actionable under the existing GATT/WTO framework, existing multilateral rules will offer meaningful remedies only under highly specialised circumstances. It is for this very reason that the issue of expanding multilateral disciplines to include business practices is the subject of vigorous debate around the world.

Scenario B: Leveraging into Export Markets and Price Predation

The actions of a dominant firm can also have significant effects across geographical jurisdictions when a dominant firm uses its market power in one market as a means of leveraging its international activities. A second scenario can therefore arise if a firm is able to support its activities abroad through exclusionary practices in its home market and predatory pricing practices abroad.

Competition Policy Perspectives

A classic variant of price predation occurs when a dominant firm sells it products at reduced prices with the intent of eliminating competition and increasing the firm's market power so as to then raise prices above competitive levels. However, this is a particularly complex and murky area of law and economics, and one where competition and trade perspectives often evaluate these practices differently.

For example, U.S. courts are increasingly skeptical about predatory pricing claims in antitrust actions. When viewed from an efficiency lens, the immediate consequence of such conduct is lower prices and lower prices benefit consumers. Consumer harm arises, at least in theory, if after succeeding in driving out competitors through predatory pricing, the seller then raises prices. If there are no other artificial barriers to entry, theory would suggest that even in this scenario former or other competitors may then reenter the market and bring prices back up to competitive levels. This is an area in which U.S. antitrust law has generally been more concerned with protecting the competitive process than protecting firms or competitors.

For example, in the case of E.I. Du Pont de Nemours and Company, the FTC dismissed a case which alleged that Du Pont was seeking to monopolize the titanium dioxide market through pricing at levels where it

could earn profits but its rivals (who had less efficient production technologies) could not. In that case the FTC noted that antitrust policy should not constrain firms from becoming more efficient and passing on the benefits of that efficiency to consumers.[64]

Recent U.S. antitrust cases suggest that predation is exceedingly hard to prove.

Predatory practices were a central part of the allegations made in the famous case of Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation [65]. In that case the U.S. Supreme Court rejected the argument that the Japanese firms were engaged in a predatory pricing cartel. The Court's theory was that predatory pricing reflects an investment that must be recouped through monopoly pricing at a subsequent point in time. In Matsushita, the Court reasoned that given the duration of the alleged cartel--over twenty years--and the unlikelihood of its recouping its losses by collusively raising prices once the cartel was successful, the Court was skeptical about the predatory cartel theory.

U.S. courts have focused not on whether there are price differences between home and foreign markets but rather on the extent to which the predator's price fall below cost. Expert opinion remains divided when it comes to establishing the appropriate level of costs that should be used as a basis for a finding of predation.[66]

A subsequent U.S. case, Brooke Group v. Brown and Williamson Tobacco, suggests that even a showing of below-cost pricing is unlikely to suffice unless the plaintiff can show a capability for "recoupment" of costs[67].

Home-country foreclosure that could in theory give rise to price predation strategies abroad have not been a central focus of U.S. antitrust authorities or courts. And, as the cases just cited illustrate, U.S. courts are skeptical about price predation claims.[68]

Trade Policy Perspectives

While the factors identified in Scenario 2 raise many difficulties from a competition law perspective, the same factors could well give rise to a successful antidumping claim. It might also be actionable under section 301 of the 1974 Trade Act, as amended.

Antidumping laws are aimed at reaching what are seen as unfair or inequitable trade practices by foreign firms that harm domestic competitors. In this sense, antidumping laws are concerned not only about the competitive process but also the perceived inequities of certain business practices employed by foreign firms as they effect competitors in a domestic market.

The early theoretical rationale for antidumping law was developed in the seminal writings of Jacob Viner[69], who argued that antidumping measures may be needed to protect domestic consumers from predatory dumping--e.g., when a foreign firm deliberately prices product low enough to drive existing firms out of business, establish a monopoly position in the foreign market, and exploit its market power to raise prices and recoup its losses. In theory, as noted in the competition discussion above, although domestic competitors may be harmed by low prices, consumers may gain when the dumped products prices are low but will be worse off if the firm then raises prices at a latter stage. Predatory pricing does not require an international setting to arise but it could arise in that context[70].

There are, of course, a variety of reasons why a firm may choose to dump its product abroad[71].

International trade law imposes constraints on certain pricing practices, for example where there is price discrimination (e.g., pricing a product at different levels in different markets) and price predation (pricing a product below its cost of production).

As a general matter, dumping rules require an examination of price differences between home and foreign markets. This requires an assessment of whether the imports are sold at less than fair value (i.e., dumped), and if so by what margin, and to what extent such dumping has caused or threatened to cause material injury to a domestic import-competing industry producing a "like" product.

In the revised rules on dumping that emerged from the Uruguay Round, dumping is defined as offering product for sale in an export market at a price below "normal value", which in turn is defined as the price charged by a firm in its home market in the ordinary course of trade. Prices at less than average total costs are considered not to be in the ordinary course of trade. If there are no sales in the domestic market, the highest comparable price charged in third markets, or the exporting firm's estimated costs of production plus a reasonable amount for profit, administration selling and other expenses is used to determine normal value.

In the U.S., many antidumping cases involve price-to-price comparisons between the home market and the U.S. market and do not require a showing of below cost sales. If the home market prices cannot be determined, U.S. authorities (as well as multilateral rules) compare prices with a constructed cost of the goods. In antidumping cases where costs are an important feature of the case, the law tends to use average total costs, while in antitrust cases the courts may use marginal or average variable costs.[72]

There are numerous differences in methodology and focus as between competition and antidumping laws--e.g., in the way that markets are defined, the injury standards that are applied[73], and the competitive conditions in the industry that are examined, among other features.

As a final note, it is possible that the same facts posited in this scenario could give rise to a section 301 claim if the foreign firm is seen as benefitting from government support or toleration of systematic anticompetitive conduct that creates barriers to market access that provides the operating conditions for its low-price sales abroad.

State Enterprises and Authorised Monopolies

The following comment offers a few modest observations about the challenges to competition and trade policy raised by state enterprises and authorised monopolies. It also briefly notes some recent and important developments under the WTO to address abusive conduct exercised by authorised monopolies in service sector markets.

As many scholars of competition law and policy have noted, the practices of state enterprises as well as authorised monopolies are an important and very complex area of law and policy. Generally speaking, competition laws of many jurisdictions also apply to state enterprises or authorised monopolies.

In other words, even authorised monopolies or quasi-monopolies cannot engage in unfettered anticompetitive conduct. Many countries have developed complex rules to address the conduct of such enterprises. U.S. antitrust law provide a variety of federal and state exemptions from antitrust laws. For example, the so-called "state action doctrine" immunises some private action that is taken pursuant to articulated state government policies and that is actively supervised by the state. In this sense, the immunised conduct must be the product of deliberate state intervention and not merely the product of an agreement among private parties.[74]

According to one expert, the EU has largely rejected such a state action doctrine because competition policy maintains a "constitutional" status in the EU, in contrast to a legislative status in the United States. [75]

It is beyond the scope of this comment to discuss the legal doctrines that limit the application of competition laws to government encouraged or authorised firm conduct that could free domestic firms from competition law constraints. Nor can this discussion examine how such doctrines been applied in different jurisdictions. However, identifying the availability of such doctrines and their application domestically and in the context of international activities are an important feature of any thorough examination of the broad scope of competition policies as they affect monopolies or dominant firms.

Service sector markets are also relevant to this discussion because many service industry markets have been subject to high degrees of domestic regulation[76] by national authorities. Further, in numerous service sector markets, the service providers have been authorised monopolies or quasi-monopolies.

Barriers to trade in services have in some instances been explicit and discriminatory (e.g., prohibitions on the practice of law by foreign lawyers, restrictions on the ownership and establishment of financial institutions, restrictions on foreign ownership of some broadcasting rights, and restrictions on investment). In other instances, and more relevant to this discussion, barriers may be explicit and non-discriminatory. In the latter category for example, domestic regulations covering national monopolies (e.g., in the telecommunications and railway sectors) have often severely limited new market entrants, whether foreign or domestic and have structured the nature of competition that occurs within a market.

For a variety of domestic and international reasons (e.g., technological developments, domestic regulatory reform initiatives, increasing product differentiation), the last two decades have seen liberalisation of the constraints on domestic competition in service industries and the growth in international trade in services[77]. Indeed, a significant number of developed and developing countries have embarked on ambitious programs of deregulation, privatisation, and liberalisation of trade and investment regimes. Trade in this sector is not a trivial matter, throughout the last decade, trade in services grew faster than trade in merchandise goods.[78]

The conclusion of the General Agreement on Trade in Services (GATS) in the context of the Uruguay Round of Multilateral Trade Negotiations is the first agreement providing some multilateral disciplines to cover trade in services. The GATS " is designed to reduce or eliminate governmental measures that prevent services from being freely provided across national borders or that discriminate against locally-established service firms with foreign ownership."[79]

The GATS contains a set of general rules and principles (e.g., most-favoured-nation treatment); specific commitments (e.g., market access, national treatment) that are bound in the schedules of individual members; it contains an undertaking that members will periodically enter into negotiations with the goal of achieving higher levels of liberalisation; it also contains dispute settlement and enforcement obligations, and a series of annexes and attachments related to sectoral matters and implementation of the GATS[80], among other measures.

Importantly for this discussion, the GATS contains two broad and potentially far-reaching provisions aimed at addressing those commercial practices of service providers that could adversely impact competition in a market. Specifically, Article VIII provides that monopoly service suppliers must not act in a fashion inconsistent with the Most Favoured Nation obligation under the Agreement or their scheduled commitments[81]. Similarly, where a domestic monopolist is competing in the supply of a service over which it does not have monopoly rights, the GATS obliges WTO member governments to ensure that such firms do not abuse their monopoly positions in respect of that market where they do not hold a monopoly position.[82] Under Article VIII, the Council for Trade in Services is identified as the forum whereby a WTO member has the right to request

specific information concerning the conduct of a monopoly service supplier if so requested, and further obliges WTO members to notify the Council if it intends to extend additional monopoly rights. Article VIII also applies to formal or informal authorisations of a small number of service suppliers that "substantially prevents competition among those suppliers in its territory".[83]

In Article IX on Business Practices, the GATS recognises that in addition to monopolistic conduct as identified in Article VIII, other business practices of service suppliers may restrict competition and trade in services. The Agreement does not specify the conduct that can give rise to such concerns. However, it requires mandatory consultations regarding alleged restrictive business practices if requested by another WTO member government.

Concluding Observations

The first part of this paper sought to highlight some areas of similarity and of divergence in competition laws aimed at single firm conduct that may be abusive.

Single firm abuse of market power is a central concern of competition laws. Yet there is substantial disagreement among experts, and considerable divergence among jurisdictions about the range of practices that should be condemned. Competition experts are likely to agree that competition laws should constrain firms with substantial market power from exercising that power in a manner that controls prices, limits production and keeps out competitors. However, when one looks beyond the confines of such core conduct, there is considerable disagreement among experts on the competitive effects of other practices--e.g., vertical restraints--employed by a dominant firm in a single market or across international boundaries.

The substantive differences between U.S. and E.C. law, for example, suggest that attempts to attain a unified international approach to single firm conduct is likely to be at best difficult and arguably not clearly necessary. The scenarios discussed herein suggest that single firm conduct can have international effects, and further, that a market access (or trade policy) perspective versus a market entry (or competition policy) perspective can lead to different conclusions about appropriate remedies or even the need for remedial action.

Clearly, it would also prove difficult to reach international (or even domestic) agreement in areas where trade and competition policy remedies may conflict--e.g., in price predation cases that can give rise to antitrust or antidumping claims.[84]

A number of proposals have surfaced in recent years to enhance the role of competition policy disciplines in the context of unfair trade laws, to create new causes of action for international predation which might recognize gaps coverage in antitrust actions,[85] to pro-actively seek expanded co-operation between competition enforcement authorities,[86] or to establish expanded international disciplines for competition policy[87]. These alternatives, among others, need to be more fully considered, including but not limited to circumstances involving the conduct of firms with substantial market power.

NOTES

1. For example, Section 1 of the Sherman Act, Section 3 of the Clayton Act, and the Robinson-Patman Act.

2. "Monopolization", or "attempts" to monopolize, are terms found in the Sherman Act; the counterpart doctrine in the EC is found in provisions dealing with "abuse of dominance". The terms are used interchangeably in this introduction. Substantive differences are discussed in more detail in the body of this paper.

3. See for example, Richard Whish, Competition Law, 3rd ed. (London: Butterworths, 1993); D.M. Raybould & Alison Firth, Comparative Law of Monopolies, (London: Graham & Trotman 1994); Eleanor Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness", 61 Notre Dame L. Rev. 981 (1986). The comparison of U.S. and E.C. law contained herein draw heavily from these extensive scholarly treatments.

4. The main body of this paper does not examine the problems associated with abuse of dominance by state owned or authorized monopolies. Nor does it discuss merger law. For a brief discussion of the former issue, see the attached Addendum.

5. A firm may raise or maintain prices above competitive levels by restricting its own output or it could raise prices or prevent prices by falling by raising its rivals' costs thereby causing them to restrict output. See T. Krattenmaker, R. Lande, and S. Sallop, " Monopoly Power and Market Power in Antitrust Law" in Revitalizing Antitrust in its Second Century, edited by H. First, E. Fox and R. Pitofsky, (New York: Quorum Books 1991) at 7.

6. Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any or part of the trade or commerce among the several states, or with foreign nationals, shall be deemed guilty of a felony..." 15 U.S.C.A. Section 2 (1982).

7. E. Fox, supra note 3.

8. Few concepts in antitrust law are entirely without controversy. Even the notion of "consumer welfare" and its core concerns remains debateable. For some, consumer welfare is primarily a matter of economic efficiency and thus the harm that the law should address is the allocative inefficiency that accompanies excessive market power. Others argue that the Congressional intent of consumer welfare is a broader notion that economic efficiency. For a more complete review of these alternative perspectives, see T. Krattenmaker, et. al., supra note 5.

9. 384 U.S. 563 (1966) at 570-71.

10. In U.S. v. E.I. du Pont de Nemours & Co. monopoly power was defined as "the power to control prices or exclude competitors". 351 U.S. 377 (1956).

11. In the famous Alcoa case, Judge Learned Hand stated that a market share of 90 percent is "enough to constitute a monopoly; it is doubtful whether 60 or 64 percent would be enough and certainly 33 percent is not." U.S. v. Aluminum Co. of America, 148 F2d 416 (1945).

12. See, Swift & Co. v. U.S., 196 U.S. 375; Spectrum Sports, Inc. v. McQuillan, U.S. 113 S. Ct 884. What constitutes illegitimate intent is a complex matter that appears not to be fully settled in the case law. Finding specific anticompetitive intent raises the hazard of being over inclusive and deterring competition on the merits. Being under inclusive carries with it the possibility of injury both to consumers and competitors. According to a summary of the case law, the following kinds of intent have been found sufficient: "intent to achieve monopoly power or to acquire sufficient power to control prices; intent to exclude competition; or intent to perform the specific act fulfilling the conduct requirement of the attempt offense." See Herbert Hovenkamp, Federal Antitrust Policy, (Minn: West Publishers 1994).

13. H. Hovenkamp, Id. at 260.

14. See, Eleanor Fox & J. Ordover, "Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action, prepared for Columbia University Law School Conference on Multilateral Trade Regimes in the 21st Century, November 3-4, 1995. Despite the relative permissiveness of U.S. law in some respects, U.S. courts and enforcement officials continue to pursue anticompetitive conduct by dominant firms. See, U.S. v. Microsoft, CCH section 71,096 [1995] where Microsoft was prohibited under the terms of a consent decree from using certain unfair vertical contracting practices.

15. See, U.S. v. Colgate & Co., 250 U.S. 300 (1919) an old U.S. case where the Supreme Court held that the Sherman Act does not restrict the right of a firm to exercise its own discretion with regard to its trading partners.

16. See, MCI Communications Corp v. AT&T Co. 708 F.2d 1081 (7th Cir. 1983). Here the defendant, by refusing to connect MCI facilities to local distribution facilities controlled by AT&T affiliates, was found to have monopolized the long-distance telephone communications market. This refusal prevented MCI from offering competing long-distance services. The Seventh Circuit restated the essential facilities doctrine under which a monopolist controlling an essential facility maybe obliged to make the facility available to competitors. The Court identified four elements for such a finding: (1) the monopolist must control an essential facility; (2) a competitor must be unable practically or reasonably to duplicate the essential facility; (3) the competitor must have been denied the use of the facility; and (4) it must have been feasible for the monopolist to provide the facility. The essential facilities doctrine is not without controversy in the United States. Professor Philip Areeda has suggested that cases do not provide a consistent rationale for the doctrine. See, Philip Areeda, "Essential facilities: An Epithet in Need of Limiting Principles," Antitrust Law Journal Vol. 58 (1990). Another antitrust expert describes this doctrine as one of the "most troublesome, incoherent and unmanageable of bases for Sherman section 2 liability". See, H. Hovenkamp, supra note 12 at 272.

17. See, E. Fox, supra note 3 and Aspen Skiing v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847 (1985). In that case, the U.S. Supreme Court affirmed a Tenth Circuit decision that the Aspen Skiing Company, which owned three out of four mountains at the Aspen skiing resort and refused to cooperate in the sale of a ticket to the owner of the fourth mountain ticket was obliged to continue offering access to this facility. U.S. antitrust experts continue to debate how broadly the principle established in this case should be applied. Some have suggested, for example, that a duty to deal with pre-existing joint venturer or co-venturers makes sense but it makes less sense if the Aspen case were to create an altogether new obligation to deal where there was no pre-existing business arrangement.

18. See for example, Berkey Photo v. Eastman Kodak Co. 603 F.2d 263; White & White Inc. v. American Hospital Supply Corp, 723 F. 2d 495 (6th Cir. 1983) and Kerasotes Michigan theaters v. National Amusements Inc., 854 F. 2nd 135 (6th Cir. 1988). In the latter case, the Sixth Circuit held that it was not necessary "that the party attempting to leverage its monopoly power from a given market into a second market possess monopoly power or dominant market position in that second market. As the Second Circuit stated: '[A] firm violates section 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market.... there is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it any more palatable. Social and economic effects of an extension of monopoly power militate against such conduct." It goes on to amplify that when " the sole purpose for such an agreement is to extend a business' dominance from one market into a second market, without having to achieve that dominance in the second market by developing a superior product or as the result of other legitimate competitive advantages" it is impermissible.

19. See, H. Hovenkamp, supra note 12 at 284.

20. See E. Fox, supra note 3.

21. E. Fox, supra note 3. There have also been numerous cases aimed at reaching certain manipulatory business practices undertaken by a firm with substantial market power--e.g., tying arrangements, predatory research and development practices, predatory pricing etc.

22. Article 86 of the Treaty of Rome states: "Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between the Member States. Such abuse may, in particular, consist in :
    (a) directly or indirectly imposing unfair purchase price or selling prices or other unfair trading conditions;
    (b) limiting production, market or technical development to prejudice of consumers;
    (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive advantage;
    (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." Treaty Establishing the European Economic Community, March 25, 1957, Art. 86.

23. E. Fox, supra note 3.

24. In this sense, the provision in the Treaty of Rome that are aimed at objectives other than economic efficiency may reflect a perceived need to offer some protection to smaller enterprises as Europe moves toward a more integrated European-wide market. Such non-economic values were more evident in U.S. antitrust law when the United States was at an early stage of integration of its national economy.

25. In United Brands v. Commission, the Commission found United Brands to hold a dominant position at 45% of the bananas old in Benelux, West Germany, Denmark and Ireland. In the Hoffmann-La Roche and Micheline Nederlandsche cases, the ECJ concluded that the respective companies had achieved a dominant position where its market share was in the 40 to 60 percent range.

26. R. Whish, supra note 3 at 263.

27. Id. at 249.

28. Importantly, even a statutory monopoly is not immunized under Article 86. See, R. Whish, Id. at 260.

29. See, D.M. Raybould & A. Firth, supra note 3 at 504.

30. See, General Motors and United Brands. In General Motors Continental, although the Court found no abuse in that case, the Court of Justice held that a firm could abuse its dominant position by charging a price "which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favorable level of prices applying in other sales areas in the Community." 1 CMLR 95 [1976] at 109. In United Brands, the Court also held that the Commission had failed to prove that prices were excessive but reaffirmed the principle of General Motors that a price that has no reasonable relation to the economic value of the product supplied would be an abuse. 1 CMLR 429 [1978] at 502.

31. Id.

32. See, E. Fox, supra note 3 and Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

33. See, Alexis Jacquemin, "Abuse of Dominant Position and Exclusionary Practices: A European View", supra note 6 at 261.

34. See Instituto Chemioterapico Italiano SpA and Commerical Solvents Corporation v. E.C. Commission, CMLR 1 [1974] and E. Fox supra note 4.

35. Commerical Solvents Id. at 340.

36. Similarly in a case called Telemarketing, the Court held that a firm holding a dominant position cannot "reserve to itself...an ancillary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition from such undertaking". A European lawyer has noted that there is even some suggestion in recent cases that the Commission could impose an affirmative duty on a dominant company to insure that competition is created and maintained in all markets over which they have influence. It is possible, notes this lawyer, that this interpretation might apply to a duty to share intellectual property rights with third parties in order to enable them to create a new product for which there is substantial consumer demand, even though the new product might compete with the intellectual property owner's existing product. See, Romano Subiotto, "The Right to Deal with Whom one Pleases under EEC Competition law: A small Contribution to a Necessary Debate", 6 ECLR [1992].

37. See, R. Whish supra note 3 at 277.

38. Id. at 277.

39. See Id. 276 and Hoffman La Roche & Co AG v. Commission, where the ECJ held that the company had abused its dominant position by entering into exclusive purchasing agreements with some of its customers and also by offering fidelity rebates or discounts "conditional on the customer's obtaining

all or most of its requirements, whether the quantities be large or small, from the undertaking in the dominant position.

40. Private monopolies are defined as "..such business activities by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." See, Antimonopoly Act, Art. 2 para. 5.

41. See, H. Iyori and A. Uesugi, The Antimonopoly Laws and Policies of Japan, (New York: Federal Legal Publications) 1994 at 102.

42. Id. at 100.

43. Mitsuo Matsushita and Thomas Schoenbaum, Japanese International Trade and Investment Law(1989) at 151. In the 1956 Snow Brand case, two manufacturers of dairy products conspired with a financial institution and a farmers' cooperative. The financial institution issued loans to dairy farmers on the condition that they agreed not to supply milk to competitors of the two manufacturers. Id. à 151.

44. In the case of Toyo Seikan, the firm had a market share of 50 percent when it acquired the majority of stock in four other companies, resulting in a market share of 75 percent. Toyo sought to restrict the geographic territory of one of the firms whose stocks it had acquired. This was seen as a case of direct control. Id at 151. Indirect control arose in the case of Noda Soy Sauce. In this case, the leading manufacturer of soy cause directed retailers to charge a specified retail price. Because of the structure of this market, smaller firms were apparently left with no choice but to enforce retail prices at the same level. The JFTC held that the retail prices maintained by Noda had the effect of giving it "indirect control" over the pricing decisions of its competing firms. Experts apparently do not see this as prohibition on parallel pricing. Rather, the case stands for the proposition that the dominant firm that enforces resale price maintenance through coercion which in turn causes its weaker competitors to follow suit may have exercised prohibited indirect control over a market. Id. à 152.

45. See, Mitsuo Matsushita, "Private Monopolization and Monopolistic Situations" in Zentaro Kitagawa, ed., Doing Business in Japan (1994) at ix 2-13 section 2.06.

46. See, M. Matsushita and T.Schoenbaum, supra note 43 at 147.

47. Section 2-7 defines the term monopolistic situation. Section 8-4 of the AMA addresses monopolistic situations. Section 8-4 states that the JFTC may "order the entrepreneur concerned, in accordance with the procedures as provided for in Division II...to transfer part of his business or to take any other measures necessary to restore competition with respect to such goods or services: provided that the foregoing shall not apply to cases where the Commission finds that such measures may reduce the scale of business of the said entrepreneur to such an extent that the costs required for the supply of goods or services which such entrepreneur supplies will rise sharply, undermine its financial position and make it difficult for the entrepreneur to maintain its international competitiveness or where other alternative measures may be taken which the Commission finds sufficient to restore competition with respect to such goods or services". Chapter III-II, Section 8-4 (1) AMA.

48. See, M. Matsushita, supra note 45.

49. Id. at IX 2-21 section 2.09.

50. Excessive profits are profits that "must far exceed the standard profit rate of the class of business, determined by cabinet order, to which the entrepreneur belongs". What comprises excessive selling cost and overhead is far from clear, but it appears to require a comparison with standard practices in the industry. The standard profit rate is to be determined by averaging profit data in the field of business. See, Iyori and Uesugi, supra note 38.

51. Id. at 197.

52. M. Matsushita, supra note 45.

53. In light of the pending Kodak-Fuji section 301 dispute discussed herein, it is interesting to note that photographic color film has been on the list of industries that satisfy the market structure requirement of Section 84.

54. See, E. Fox and J. Ordover, supra note 14.

55. If there is a conflict of laws between U.S. law and foreign law, courts often undertake a balancing of foreign and U.S. interests is undertaken.

56. Put another way, the very reasons why the application of antitrust laws to conduct occurring abroad that adversely affects U.S. export interests may be desirable--namely because it is analytically rigorous and subject to high standards-- may render it unlikely to yield results except in exceptional circumstances of egregious conduct where the evidence is overwhelming.

57. As part of the implementation of the Uruguay Round, this provision of section 301 was further embellished. In the Statement of Administrative Action (SAA) that accompanied the bill implementing the Uruguay round, the SAA noted that "...the Administration will enforce vigorously the "toleration of..anticompetitive activities" provision in section 301 when appropriate to address foreign anticompetitive behavior. The practices covered by the provision include, but are not limited to, toleration of cartel-type behavior or toleration of closed purchasing behavior (including collusive coercion of distributors or customers) that precludes or limits U.S. access in a concerted and systematic way." The USTR is obliged to look at a variety of information in evaluating a foreign government's toleration of such practices and it is also obliged to "take into account whether the anticompetitive activities are inconsistent with the foreign country's own laws, how systematic and pernicious those activities have been, and their degree of effect on U.S. domestic or foreign commerce". See, Statement of Administrative Action, H.R. Doc., No. 103-316, 103d Cong., 2d. Sess., 656-895 (1994). Any number of foreign, especially Japanese, commentators have been especially critical of this aspect of U.S. trade law because it permits U.S. trade officials to evaluate a foreign country's enforcement of its own laws.

58. Examples include the U.S.-Japan bilateral agreements reached in the glass, semiconductor, automotive, paper and construction industries as well as the bilateral Structural Impediments Initiative.

59. In the context of U.S.-Japan trade disputes, examples include allegations of exclusionary business practices exercised by Japan's strongest glass, automotive and telecommunication firms.

60. See, Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper, Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade

Act of 1974, as Amended. May 1995 and Rewriting History: Kodak's Revisionist Account of the Japanese Consumer Photographic Market, Wilkie Farr & Gallagher for Fuji Photo Film, July 31, 1995.

61. It is interesting to note that if Kodak has pursued an anti-trust based action, the issue of defining the relevant geographic market would have been an extremely relevant part of the analysis. For example, antitrust analysis might ask whether the relevant market was Japan or the global market for photographic film. If the former market definition was adopted there might be a greater likelihood that Fuji Film could be seen as a monopolist, if the latter, Fuji Film might be seen as having less market power than Kodak.

62. See, Bernard M. Hoeckman and Petros C. Mavroidis, "Competition, Competition Policy and the GATT" in The World Economy, Vol 17 March 1994 at 141.

63. See for example the TRIMS accord as well as the discussion of GATS in the Addendum hereto.

64. See, Edward M. Graham, "Competition Policy in the United States" at 27 in C. Green and D. Rosenthal, ed. Competition Regulation within the APEC Region Forthcoming. For an excellent overview of the competition treatment of price predation in different jurisdictions see, Predatory Pricing (Paris: OECD 1989).

65. In a very interesting recent article on the lessons from Matsushita, Professor Harry First argues that the Supreme Court's recoupment/investment theory failed to recognize that perhaps the cartel's key objective was not profit in the U.S. market but rather to maintain profits in the home market. See, Harry First, "An Antitrust Remedy for International Price Predation: Lessons from Zenith v. Matsushita" Pacific Rim Law & Policy Journal, Vol. 4, No. 1 (1995) at 211.

66. Id. Also, in the European case of AKZO, the ECJ held that where prices were below average variable cost predation had to be presumed. When prices were above average variable costs but below average total costs the firm would be guilty of predatory prices if the prices were fixed in the context of a plan which is aimed at eliminating a competitor. See, AKZO Chemie v. Commission and R. Whish, supra note 3 at 531.

67. See, Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation 113 S. Ct. 2578 (1993).

68. One American scholar has suggested that the current U.S. case law may fail to adequately consider the factors that can lead to international price predation. For this reason, he suggests the possibility of establishing a cause of action for international predation which would include showing a blocked home market and pricing below average total cost. H. First, supra note 65 at 241.

69. See, Jacob Viner, Dumping: A problem in International Trade. 1923.

70. There remains considerable controversy about the frequency with which firms employ international predatory pricing as a means of creating a monopoly.

71. Jeffrey Garten, the recently retired Under Secretary of Commerce, has argued in a number of public speeches that closed home markets, anticompetitive practices in the exporter's home market permitting below cost sales, and government subsidization are among the conditions that give rise to dumping. He has also argued that competition laws can work in tandem with antidumping laws but are not a substitute for antidumping laws. He has suggested that sole reliance on US antitrust laws is of

questionable effectiveness in addressing problems that arise outside the United States. And further that the time limits that tend to operate under the Sherman Act do not provide adequate relief for cases that require urgent attention.

72. Harvey Applebaum, ""Relationship of Trade Laws and the Antitrust Laws" in The GATT, the WTO and the Uruguay Round Agreements Act, Practicing Law Institute 1995 at 543.

73. Antidumping laws require a showing that the unfair practice caused or threatened to cause material injury. Such injury must be more than immaterial or de minimis. Most statutes, as well as WTO provisions on dumping, provide a list of indicators to determine the impact of dumped imports on the domestic industry. Under the Uruguay Round agreement, when examining the impact of the dumped imports on the domestic industry the investigators must evaluate all relevant economic factors including actual and potential decline in sales, profits, output, market share, productivity, return on investments or capacity utilization; factors affecting domestic prices,; the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments. Agreement on Implementation of Article VI of GATT 1994 Part I Article 3 section 3.4.

74. See, Coverage of Competition Law and Policies Overview. Working Party of the Trade Committee, Working Party No. 1 of the Committee on Competition law and Policy.

75. See, Coverage of Competition Laws and Policies: Overview, Working Party of the Trade Committee, Working Party No. 1 of the Committee on Competition Law and Policy. (Paris: OECD 2 October 1995). See also a series of cases in 1991 whereby the ECJ addressed the relationship of Article 90(1) with Article 86, in Hofner & Elser v. Macrotron; Merci Convenzionale Porto di Genova v Siderurgica Gabrielli and ERT v. Dimotiki. These cases discuss alleged anticompetitive conduct of private undertakings given exclusive concessions. With respect to the anticompetitive conduct of state entities as such, these would be subject to the rules of Article 85 and 86 itself. For a more detailed discussion of these matters under EU law see also, R. Whish, supra note 3.

76. See, Regulatory Reform, Privatization and Competition Policy (Paris: OECD 1992).

77. See, Michael J. Trebilcock & Robert Howse, The Regulation of International Trade (London: Routledge Press, 1995) at 215.

78. Bernard Hoeckman & Pierre Sauve, Liberalizing Trade in Services, (Washington D.C.: World Bank Discussion Paper) at 4.

79. See, Statement of Administrative Action, H.R. Doc., No. 103-316, 103d Cong., 2d. Sess. 297.

80. Hoeckman & Sauve, supra note 78.

81. See, Article VIII (1) of the GATS.

82. See, Trebilcock & Howse, supra note at 232 and GATS Article VIII:2

83. See, Article VIII 5 (b) of the GATS.

84. At least two regional arrangements have eliminated the applicability of dumping laws with respect to intra-regional trade. Examples include the Australia-New Zealand CER and the European Union.

Although some antitrust experts in the United States have called for the elimination of antidumping remedies as between NAFTA member countries, this proposal has not been uniformly welcomed.

85. See Bernard Hoekman & Petros Mavroidis, "Antitrust Based Remedies and Dumping in International Trade", International Bank for Reconstruction and Development. August, 1994 and H. First, supra note 65.

86. There are, of course, numerous initiatives along these lines well underway. One need only look at the bilateral arrangements that have been formed in recent years between the United States and Canada and between the U.S. and the EC, by way of two examples. See, also the Department of Justice press release of July 16, 1994 regarding Microsoft. The Assistant Attorney General for Antitrust stated that the Microsoft investigation represented the "first coordinated effort of two enforcement bodies in initiating and settling an antitrust enforcement action."

87. See, E. Fox and J. Ordover, supra note 14.

L'ABUS DE POSITION DOMINANTE DANS UNE OPTIQUE INTERNATIONALE

(par Merit E. Janow*, Consultante auprès du Secrétariat de l'OCDE)

Synthèse

La présente note traite d'une caractéristique importante et bien établie des lois nationales de la concurrence, à savoir l'interdiction de la monopolisation ou de l'utilisation abusive par une entreprise individuelle de son pouvoir sur le marché. Elle s'organise autour des questions suivantes :

- Comment les différentes juridictions définissent-elles la position dominante ?
- Quelles catégories de comportements peuvent-elles être considérées comme abusives ?
- Dans quelles conditions l'abus de position dominante peut-il poser des problèmes d'ordre international ou transfrontières ?
- En quoi ces conditions pourraient-elles être jugées différemment du point de vue de la politique commerciale et du point de vue de la politique de la concurrence ?

La section II de la note tente de répondre aux deux premières de ces questions. Pour résumer la conclusion qui s'en dégage, on peut dire que bien que l'utilisation abusive par une entreprise individuelle de son pouvoir sur le marché est au centre des préoccupations du droit de la concurrence dans la plupart des pays, les monopoles ne sont pas illégaux dans les juridictions examinées ici, c'est-à-dire aux États-Unis, en Union européenne ou au Japon.

Pour les tribunaux des États-Unis comme pour ceux de l'Union européenne, la constatation de l'existence d'un pouvoir sur le marché se fait par rapport à un marché déterminé. Dans les deux cas, la part de marché constitue un indice ou un premier critère commun. Néanmoins, on constate de sensibles différences quant au niveau à partir duquel on estime qu'une part de marché pose un problème -- ce niveau est relativement élevé aux États-Unis et plus faible dans l'Union européenne.

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La jurisprudence japonaise en matière de monopolisation est très limitée, mais il semble que dans les dossiers traités à ce jour, les autorités japonaises aient conclu à l'existence d'une monopolisation illégale pour des parts de marché plus proches de la norme européenne que de la norme américaine.

Pas plus la Loi Sherman, principal texte antitrust des États-Unis applicable aux monopoles examinés ici, que la Loi antimonopole du Japon n'énumèrent les types précis de pratiques que l'on peut juger source de problèmes. En revanche, l'Article 86 du Traité de Rome comporte une liste non exhaustive de délits.

S'agissant des délits, la Section II examine également des problèmes de fond sur lesquels l'approche retenue par l'Union européenne rejoint celle des États-Unis. Ainsi, le relèvement des prix et la limitation de la production sont des abus classiques de pouvoir sur le marché que le droit des États-Unis comme le droit européen interdisent. Les textes de la Communauté européenne retiennent d'autres critères pour conclure à l'existence d'un abus, tels que l'application de prix excessifs, qui n'ont pas leur équivalent aux États-Unis. La discrimination par les prix ainsi que les arrangements instituant des liens, qui sont spécifiquement cités dans le Traité de Rome, pourraient être considérés comme des violations à la Section 2 de la Loi Sherman, mais ces mesures ne figurent pas dans la définition officielle des monopoles inscrite dans le droit des États-Unis et sont reprises dans d'autres dispositions[1]. Les refus de fournir un produit ou un service peuvent être interdits par la loi américaine, mais dans certaines affaires européennes, la définition de l'obligation de fournir est plus large que celle donnée dans le droit des États-Unis. Ainsi, si l'on peut déterminer les pratiques essentielles susceptibles d'être condamnées dans un certain nombre de juridictions, il n'en reste pas moins nombre de domaines dans lesquels on constate de larges différences d'un pays à l'autre.

La section II identifie en outre les objectifs communs et divergents qui sous-tendent les législations de la concurrence aux États-Unis, dans l'Union européenne et au Japon. Les interprétations faites par les tribunaux de la monopolisation au regard de la législation antitrust des États-Unis ont sensiblement évolué avec le temps. Depuis plusieurs décennies, l'efficience économique est devenue l'un des principaux critères retenus. Cela signifie que les tribunaux apprécient souvent les aspects compétitifs de la pratique examinée au regard des performances et des gains d'efficience que ladite pratique peut permettre.

Dans l'Union européenne, les préoccupations concernant l'intégration dans le marché unique, la protection des concurrents et la viabilité des petites entreprises ont parfois été plus importantes que la seule efficience économique.

La jurisprudence japonaise en matière de monopoles est, on l'a vu, limitée. Bien qu'il existe un certain nombre de points communs entre les législations des États-Unis, de l'Union européenne et du Japon, il y a lieu de noter que le droit japonais prend également en compte la notion de pratiques "contraires à l'intérêt public". Bien que ce soit là un domaine dans lequel même les avis des juristes japonais divergent, il semble que ce concept recouvre des préoccupations qui ne sont pas pleinement prises en compte par le droit des États-Unis ou le droit communautaire.

La section III de la note propose deux scénarios dans lesquels l'abus de position dominante peut soulever des problèmes de caractère international. Elle analyse ensuite la façon dont ces pratiques pourraient être traitées du point de vue de la politique de la concurrence et de la politique commerciale, avant d'examiner la portée des législations antitrust et commerciale des États-Unis.

Le premier scénario est celui dans lequel une entreprise dominante entreprend des actions qui empêchent l'accès de son marché intérieur à des concurrents étrangers, et ce, au moyen de diverses

pratiques d'exclusion, en liant par exemple les mécanismes de distribution ou en exigeant des acheteurs affiliés qu'ils refusent de s'approvisionner auprès de fournisseurs étrangers. On tente de déterminer à la section III si la limitation risque ou non, selon sa nature, d'être considérée comme posant un problème du point de vue de la concurrence.

Par ailleurs, la section III examine la façon dont les mêmes faits pourraient être considérés du point de vue de la politique commerciale. Traditionnellement, la politique commerciale est axée sur l'accès aux marchés et l'une de ses principales préoccupations est donc les actions menées par les gouvernements -- et non par les entreprises -- qui faussent les échanges et l'accès aux marchés. Aux États-Unis, le droit commercial interne a été élargi pour incorporer certains mécanismes d'auto-assistance unilatéraux tels que la section 301 pour viser les pratiques anticoncurrentielles systématiques mises en oeuvre à l'étranger et préjudiciables aux intérêts des États-Unis. En conséquence, la section III examine également la portée des solutions bilatérales et multilatérales aux problèmes d'accès aux marchés dont on considère qu'ils résultent de pratiques privées anticompétitives.

Le deuxième scénario est celui dans lequel une entreprise prend des mesures pratiques d'exclusion sur le marché intérieur, et pratique des prix d'éviction à l'étranger. Les remèdes possibles sont très différents selon que l'on se place du point de vue de la politique de la concurrence ou du point de vue de la politique commerciale. Si l'on prend pour exemple la législation antitrust des États-Unis, les tribunaux des États-Unis accueillent avec de plus en plus de scepticisme les plaintes de prix d'éviction dans les affaires antitrust. L'éviction par les prix peut être également un motif de plainte au titre de la loi antidumping. Les profondes différences de procédure et d'analyse du droit de la concurrence et du droit commercial font que l'on peut aboutir à des résultats très différents selon la perspective que l'on retient. Il existe une abondante littérature sur le traitement de l'éviction du point de vue de la politique commerciale et du point de vue de la politique de la concurrence. L'auteur de la présente note n'a pas cherché à proposer des approches de nature à gommer ces différences.

Il ressort des scénarios présentés ici que le comportement d'une entreprise individuelle peut avoir des répercussions internationales et que l'on peut, en outre, aboutir à des conclusions différentes quant aux remèdes adéquats, ou même quant à la nécessité de chercher des remèdes, selon que l'on se place dans l'optique de l'accès aux marchés (perspective de la politique commerciale) ou dans celle de l'entrée sur un marché (politique de la concurrence).

Introduction

La plupart des pays industrialisés ayant adopté une législation de la concurrence interdisent la monopolisation ou l'abus par une entreprise de sa position dominante sur le marché (abus de position dominante)[2]. Il existe une abondante littérature sur les différences nationales concernant la mise en oeuvre et l'objectif des textes législatifs interdisant l'abus de position dominante[3].

Dans la présente note, on tentera de faire un rapide tour d'horizon d'une partie de ces travaux afin d'examiner les questions suivantes :

- Comment les différentes juridictions définissent-elles la position dominante ?

- Quelles catégories de comportements peuvent-elles être considérées comme abusives ?

- Dans quelles conditions l'abus de position dominante peut-il poser des problèmes d'ordre international ou transfrontières ?

- En quoi ces conditions pourraient-elles être jugées différemment du point de vue de la politique commerciale et du point de vue de la politique de la concurrence ?

On trouvera en conclusion quelques observations sur les remèdes que l'on peut apporter aux effets internationaux de l'abus de position dominante[4].

Différences des lois et politiques nationales de la concurrence

Quelles définitions donnent les différentes juridictions de la position dominante et quels types de conduite peuvent être jugés abusifs ?

Il importe de noter que pas plus l'Union européenne que les États-Unis, le Royaume-Uni ou le Japon, pour ne donner que quelques exemples, ne condamnent la possession d'un pouvoir économique. La puissance n'a rien d'illégal. Ce qui est condamnable, c'est l'exercice abusif d'un monopole ou d'une position dominante. Une forme classique d'exploitation du pouvoir sur le marché est de faire monter les prix au-delà des niveaux compétitifs et de réduire la production[5].

En dépit de ces éléments communs, il existe des différences importantes entre les juridictions. Dans l'analyse qui suit, on tentera de mettre en lumière les similarités et les différences qui se dégagent d'une comparaison des textes législatifs des États-Unis, de la Communauté européenne et du Japon, et c'est dans cette perspective que nous tenterons d'évaluer certaines pratiques d'entreprises dominantes qui sont susceptibles de créer des problèmes internationaux.

Droit des États-Unis

Aux États-Unis, la Section 2 de la loi Sherman, qui date de 1890, est le texte de base concernant la monopolisation ou les tentatives de monopolisation. A première vue, ce texte ne permet guère de déterminer à quel moment une entreprise constitue un monopole ou tente de monopoliser un marché aux fins de l'adoption de mesures antitrust[6].

L'interprétation juridique de la monopolisation telle qu'elle est définie à la Section 2 de la loi Sherman a évolué au fil du temps, et l'application de la loi américaine antitrust s'est très sensiblement modifié au cours des trente dernières années. A la fin des années 50 et tout au long des années 60, la Cour Suprême utilisait la législation antitrust pour protéger "la viabilité des petites et moyennes entreprises, préserver la liberté d'action des entrepreneurs indépendants et disperser le pouvoir économique et politique"[7]. A partir des années 70, essentiellement sous l'influence des travaux théoriques et empiriques de la Chicago School, l'efficience économique est devenue un principe fondamental pour l'interprétation des affaires mettant en cause des mesures antitrust[8].

Dans l'affaire États-Unis v. Grinell Corp., la Cour Suprême des États-Unis a estimé que la monopolisation illégale comportait deux éléments : (1) la possession d'un pouvoir de monopole sur le marché considéré, et (2) l'acquisition ou le maintien volontaire de ce pouvoir, par opposition à "une expansion ou un développement dû à l'existence d'un produit de qualité supérieure, à un sens aigu des affaires ou à un accident historique"[9].

Sur le plan méthodologique, les tribunaux examinent si l'entreprise concernée a un important pouvoir sur le marché par rapport à un marché de produits ou un marché géographique bien défini[10]. La définition du marché devant servir de référence est un élément critique de l'analyse. Ces dernières années, le degré de pouvoir sur le marché nécessaire pour qu'il y ait monopolisation a varié. Une part de marché de 90 pour cent a été jugée suffisante pour établir l'existence d'un pouvoir de monopole, et les tribunaux ont rarement conclu à l'existence d'un tel pouvoir lorsque la part de marché était inférieure à 70 pour cent[11].

Les parts de marché sont l'un des indices ou critères utilisés pour mesurer le pouvoir sur le marché, mais d'autres facteurs tels que les obstacles à l'entrée, l'existence de substituts, le nombre et la taille des concurrents, et la nature du produit sont également pris en cause pour déterminer si une entreprise dispose ou non d'un important pouvoir sur le marché. On se fonde en conséquence sur une analyse des différentes pressions compétitives qui s'exercent sur le marché considéré.

La tentative de monopolisation constitue un délit différent de la monopolisation, encore que la distinction s'estompe souvent dans la pratique. La "tentative" recouvre une volonté délibérée de contrôler les prix ou de détruire la concurrence, un comportement d'éviction ou anticoncurrentiel en vue d'un objectif illégal, et une probabilité dangereuse de succès[12].

S'agissant de la distinction entre monopolisation et "tentative" de monopolisation, un expert américain indique que "le pouvoir est moins évident dans les cas de tentative, mais les méthodes utilisées sont plus nettes. En revanche, une pratique qui relève d'une tentative relèvera également d'une monopolisation illégale si le pouvoir sur le marché est effectivement plus important"[13].

La législation des États-Unis est désormais relativement laxiste même à l'égard de la conduite unilatérale d'entreprises disposant d'un pouvoir relativement important sur le marché. Le principe de base est qu'il faut encourager une intense concurrence, "même si la conduite concernée désavantage les concurrents et renforce la position dominante d'une entreprise"[14]. La simple possession d'une importante part de marché n'est pas en soi considérée comme anticoncurrentielle. Elle peut être le résultat de l'efficience et d'une concurrence intensive, et non pas de pratiques monopolistiques. On reconnaît la difficulté de faire la part entre la nécessité d'encourager un comportement efficient et novateur qui peut aboutir à la possession d'un pouvoir sur le marché et la nécessité de veiller à ce que les entreprises ayant obtenu un tel pouvoir n'aient pas de pratiques abusives facilitant l'acquisition ou le maintien de pouvoir de monopole. Du fait de cette difficulté, les tribunaux américains se sont généralement préoccupés davantage des effets économiques de pratiques commerciales considérées que de la seule dimension de l'entreprise.

Dans quelles conditions les dispositions de la section 2 concernant la monopolisation ont-elles été appliquées ?

Bien que le droit des entreprises de choisir leurs clients soit considéré comme un aspect fondamental de la liberté du commerce[15], les tribunaux ont décrété dans certaines conditions l'obligation de traiter. Ainsi, selon le principe de la "facilité essentielle", si une entreprise contrôle une facilité qui ne peut être pratiquement ou raisonnablement reproduite, si l'accès des concurrents de l'entreprise à cette facilité est nécessaire pour que la concurrence s'exerce, et si l'entreprise qui contrôle cette facilité peut en assurer l'accès, cet accès doit être assuré[16].

Selon une autre variante de ce principe, une entreprise en position de monopole a le devoir de traiter lorsqu'elle a recours à des pratiques visant à imposer des coûts plus élevés à ses concurrents qu'à elle-même[17].

Les tribunaux américains ont également estimé qu'il était du devoir des entreprises de traiter conformément à la théorie de l'effet de levier. Cette doctrine peut s'appliquer lorsqu'une entreprise cherche à élargir sa position dominante sans avoir les moyens compétitifs d'y parvenir[18]. Le délit résulte de "l'abus" du pouvoir économique déjà détenu sur le premier marché[19].

Selon un expert américain des problèmes antitrust, les affaires de ce type traitées aux États-Unis font apparaître que le refus de traiter peut être admis si le but est de choisir ses clients et de décider le meilleur moyen de les servir ; en revanche, une telle conduite n'est pas admissible si "elle a pour effet de réduire la concurrence et d'augmenter par là même les prix demandés à la clientèle ou de dégrader d'une autre manière l'ensemble prix/services qui leur est offert."[20]

Les remises de fidélité et les arrangements de distribution exclusive sont d'autres pratiques dont les tribunaux des États-Unis examinent les effets sur la concurrence. Elles peuvent être condamnées si l'on constate qu'elles excluent des rivaux sans que cela soit nécessaire ou qu'elles préservent ou renforcent le pouvoir exercé sur le marché et qu'elles n'ont pas pour objectif de satisfaire les demandes des consommateurs[21].

Droit de l'UE

L'Article 86 du Traité de Rome prévoit, pour la Communauté européenne, des dispositions analogues à celles de la section 2 de la loi Sherman. Ce texte traite non seulement du pouvoir de monopole mais aussi de l'exploitation d'une "position dominante". A la différence de la loi Sherman, le Traité de Rome donne plusieurs exemples de conduite que l'on peut considérer comme abusive. Sont ainsi considérés comme des délits l'imposition de prix excessifs, les limitations de la production, l'application de conditions inégales à des transactions équivalentes, et le fait de lier des opérations n'ayant pas de rapport entre elles. L'éventail de pratiques jugées abusives ne se limite pas aux exemples énumérés dans les textes[22]. A la différence du droit en vigueur aux États-Unis, la législation européenne fait intervenir d'autres valeurs que l'efficience, telles que l'équité, l'opportunité et la légitimité, et elle accorde une attention particulière à la viabilité des petites et moyennes entreprises[23]. La raison en est peut-être le souci d'utiliser le droit communautaire pour faire face à la fragmentation économique de l'Europe et pour favoriser ainsi la poursuite de l'intégration économique de l'Europe et les flux commerciaux entre les Etats membres[24].

Le seuil retenu par le droit communautaire pour conclure à l'existence d'une position dominante est plus bas que celui des États-Unis[25]. Selon certains experts, on peut considérer qu'il y a position dominante lorsqu'une entreprise détient une part de marché de 40 à 45 pour cent, et l'on ne peut exclure l'existence de position dominante même avec des parts de marché de 20 à 40 pour cent[26].

Par ailleurs, toujours selon le droit communautaire européen, la position dominante est définie par rapport à un marché donné, et, selon un expert, le marché de référence doit être analysé de plusieurs points de vue : marché de produits, marché géographique et marché temporel[27]. Dans l'affaire United Brands v. Commission, la Cour a estimé que pour déterminer s'il y a ou non position dominante, il faut voir si l'entreprise concernée dispose sur le marché considéré d'une force économique "lui permettant d'empêcher l'exercice d'une véritable concurrence sur le marché en question en lui donnant la capacité de se comporter dans une large mesure indépendamment de ses concurrents, de ses clients et, au bout du compte, des consommateurs"[28]. Si la part de marché de l'entreprise n'est pas prédominante, d'autres facteurs témoignant du pouvoir détenu sur le marché peuvent être considérés, par exemple la part relative de marché, les relations de l'entreprise dominante sur le marché avec ses concurrents, fournisseurs et

clients, la durée de la période pendant laquelle l'entreprise considérée a occupé une position dominante, la possession de technologie matérielle, et les obstacles à l'entrée[29].

Quelles sont quelques-unes des pratiques qui pourraient être jugées abusives au regard du droit communautaire ?

Le droit communautaire impose aux entreprises dominantes des contraintes souvent plus larges et certainement différentes de celles qui découlent de la législation des États-Unis. Il contient ainsi une clause à l'encontre de la formation de prix excessifs[30]. Bien que plusieurs cas de prix excessifs portés devant la Cour européenne de justice aient été en fin de compte rejetés pour manque de preuve, la Cour a estimé que "l'application d'un prix qui est excessif parce qu'il n'a pas de relation raisonnable avec la valeur économique du produit fourni constitue un abus"[31].

Selon le Professeur Eleanor Fox, cette disposition du droit communautaire européen à l'encontre des prix excessifs n'a pas d'équivalent dans la loi antitrust américaine. Le droit des États-Unis en la matière est fondé sur l'idée que le prix doit être établi par le jeu des forces du marché, à moins que le Congrès ait mis en place un mécanisme réglementaire particulier lorsqu'il a constaté que les marchés ne peuvent fonctionner. De fait, selon l'actuelle théorie antitrust aux États-Unis, on pourrait considérer que si une entreprise acquiert une position de monopole grâce à sa puissance compétitive et qu'elle fixe ensuite les prix à des niveaux de monopole, ces prix élevés peuvent inciter de nouvelles entreprises ou des entreprises existantes à intervenir sur le marché[32]. En revanche, le traité de rome prévoit le droit de limiter la formation de prix excessifs.

Des experts européens se sont élevés contre ce que l'on considère parfois comme une analyse strictement américaine du mode de fonctionnement des marchés. L'un d'eux fait l'observation suivante :

Contrairement à ce que beaucoup pensent aux États-Unis, l'idée selon laquelle une entreprise ne bénéficie d'une position dominante que parce que le jeu de la concurrence a montré qu'elle était plus efficiente et que ses politiques en matière de prix et dans d'autres domaines contribuent à améliorer le bien-être général, n'est pas systématiquement reconnue[33].

De telles différences des bases de raisonnement philosophique et analytique se traduisent par nombre de divergences sur le fond dans l'application du droit communautaire par rapport au droit des États-Unis. Ainsi, l'obligation de continuer à traiter avec les clients existants a été beaucoup plus largement appliquée dans différentes affaires européennes que dans le droit des États-Unis. Dans l'affaire Commercial Solvents, la Cour européenne de justice a conclu que le fait de refuser d'approvisionner un client existant qui, du fait de ce refus, serait éliminé du marché, constituait un abus[34]. La Cour a estimé que le refus de Commercial Solvents de vendre certaines matières premières à un client existant constituait un abus de position dominante, parce qu'une entreprise occupant une position dominante sur le marché des matières premières ne peut supprimer la concurrence de son client "pour la simple raison qu'elle décide d'entreprendre la fabrication" du produit final, concurrençant ainsi ses anciens clients[35].

Dans l'affaire United Brands, la Cour européenne de justice a décrété qu'une entreprise occupant une position dominante ne peut "arrêter de fournir un client de longue date qui respecte les pratiques commerciales normales, si les commandes passées par ce client ne sortent en rien de l'ordinaire[36].

L'obligation de traiter ne se limite pas nécessairement aux affaires faisant intervenir des clients existants ; le refus de fournir un nouveau client peut être considéré comme un abus lorsqu'il est fondé sur la nationalité du client[37]. La protection des partenaires commerciaux de l'entreprise dominante est le souci constant que l'on retrouve dans toutes ces affaires.

Une doctrine analogue à celle des "installations essentielles" des États-Unis est également en train de voir le jour dans le cadre du droit européen. Un expert en a donné la description suivante : une entreprise dominante "qui possède et contrôle tout à la fois une installation ou une infrastructure à laquelle les concurrents ont besoin d'avoir accès pour pouvoir fournir leurs services à leurs clients ne peut refuser l'accès à ses concurrents ou ne le leur accorder qu'à des conditions moins favorables que celles qu'elle applique à ses propres activités"[38].

Diverses pratiques discriminatoires ont été interdites en raison de leurs effets possibles de forclusion. Selon ce raisonnement, les remises de fidélité, les baisses de prix abusives et diverses formes de vente au rabais destinées à écarter les importations du territoire de l'entreprise dominante sont autant de mesures susceptibles d'être visées par l'Article 86[39].

Droit du Japon

La loi anti-monopole adoptée au Japon en 1947 contient des dispositions visant les monopoles privés. Elle contient également une disposition distincte relative aux "situations monopolistiques", concept qui recouvre une situation assez différente de celle des monopoles privés et qui ne semble avoir d'équivalent ni aux États-Unis ni en Europe. Nous décrirons rapidement ces deux volets de la loi anti-monopole.

S'agissant des monopoles privés, la loi anti-monopole définit la monopolisation privée comme une pratique qui peut être le fait d'une ou plusieurs entreprises[40]. La jurisprudence dans ce domaine est très limitée. Depuis la fin de la guerre, les tribunaux japonais n'ont été saisis que de six affaires de monopolisation. Et, dans chacun de ces cas, les parts de marché des entreprises concernées s'établissaient entre 30 et 80 pour cent[41].

La législation ne précise pas la conduite spécifique jugée contestable mais considère qu'il y a délit lorsque la (ou les) entreprise(s) "exclut ou contrôle les activités d'autres chefs d'entreprise, provoquant de ce fait, à l'encontre de l'intérêt public, une forte restriction de la concurrence dans un domaine particulier".

En règle générale, l'interdiction vise les pratiques susceptibles d'établir, maintenir ou renforcer la position de monopole d'une ou de plusieurs entreprises sur un marché déterminé[42].

L'exclusion comme le contrôle peuvent prendre diverses formes. Selon les experts, une entreprise qui fixe des prix d'éviction, qui effectue une discrimination en fonction de critères géographiques ou de la nature de ses clients, ou qui vend en dessous des coûts pour éliminer les concurrents peut être considérée comme ayant procédé à une "exclusion" aux termes de la disposition pertinente de la loi anti-monopole. Les contrats restrictifs qui refusent l'accès aux mécanismes d'approvisionnement des marchés peuvent également être considérés comme une pratique d'exclusion si le résultat est une réduction sensible de la concurrence sur le marché concerné[43].

Le "contrôle" couvre un large éventail de pratiques, telles que, l'acquisition d'actions, des prises de participation croisées, ou encore le contrôle de sous-traitants ou de distributeurs. Ce contrôle peut en outre être direct ou indirect[44].

Il n'existe, semble-t-il, pas de définition précise de l'expression "restriction substantielle de la concurrence". Dans un cas précis, la Haute Cour de Tokyo a estimé que "la restriction substantielle de la concurrence signifie que la concurrence a été réduite au point qu'un chef d'entreprise particulier ou un groupe de chefs d'entreprise peut dans une certaine mesure déterminer librement le prix, la qualité, la

quantité et les autres modalités des opérations commerciales...et que l'on assiste à une situation dans laquelle il est possible à ce chef d'entreprise ou groupe de chefs d'entreprise de contrôler le marché"[45]. Parmi les critères permettant de déterminer les restrictions substantielles de la concurrence figurent la nature de l'opération concernée, les conditions du marché et la façon dont la concurrence s'exerce sur ce marché.

Quant à la définition de l'expression "contraire à l'intérêt public", les avis des exégètes du droit de la concurrence japonais paraissent diverger. Certains considèrent que cette formule a le même contenu que la "restriction substantielle des échanges". En conséquence, si la pratique concernée répond à ce dernier critère, elle répond également au premier. Cette interprétation est fondée sur l'idée que la loi anti-monopole a pour objectif premier d'assurer la libre concurrence sur un marché. Selon une autre théorie, cependant, la formule "contrairement à l'intérêt public" est un concept qui va au-delà de l'existence de marchés simplement compétitifs et qui couvre d'autres objectifs tels que "le développement équilibré de l'économie nationale, la protection des consommateurs, la prévention des récessions économiques et l'atténuation des différends commerciaux"[46].

Le deuxième volet de la loi anti-monopole qui traite des monopoles est la disposition consacrée aux "situations monopolistiques". Le but est, semble-t-il, de donner aux autorités japonaises chargées de faire appliquer la loi une base juridique pour restructurer un marché lorsque les conditions le justifient[47]. Selon le Professeur Mitsuo Matshushita par exemple, cette disposition a été ajoutée à la loi anti-monopole en 1977 pour faire face aux situations dans lesquelles un monopole a été constitué mais n'a pas été encore interdit.

Les experts considèrent que deux critères doivent être satisfaits : premièrement, la structure du marché doit répondre à certaines règles, et deuxièmement le fonctionnement du marché doit être défectueux.

En ce qui concerne le premier de ces critères, le marché doit avoir dépassé 100 milliards de yen pendant l'année précédente ; une entreprise doit détenir 50 pour cent ou plus de ce marché s'il s'agit d'une entreprise unique, ou 75 pour cent ou plus s'il y a deux entreprises ; enfin, il faut que l'entrée sur le marché soit rendue extrêmement difficile[48].

S'agissant du fonctionnement défectueux du marché, la définition en est très large et couvre, selon certains experts, un manque de flexibilité des prix, des profits excessifs, et des coûts de vente et des frais généraux de l'entreprise ou des entreprises excessifs[49].

Les tribunaux japonais n'ont eu à connaître d'aucune affaire relevant de cette disposition du droit japonais[50]. Néanmoins, légalement parlant, si la JFTC estime qu'il existe une situation monopolistique, elle est habilitée à ordonner à l'entreprise ou aux entreprises concernées de prendre toutes les mesures qu'elle juge nécessaires pour rétablir la concurrence sur le marché, y compris le transfert d'une partie des activités de l'entreprise. La Loi définit un certain nombre de conditions préalables strictes qui doivent être satisfaites avant que des mesures correctrices puissent être prises et elle prévoit également différentes sauvegardes sur le plan de la procédure[51]. De l'avis d'un spécialiste japonais, bien que cette disposition de la loi anti-monopole soit probablement très difficile à appliquer dans la pratique, "il est possible de mettre un terme à une situation monopolistique même si le chef d'entreprise concerné ne s'est pas livré à des pratiques déloyales ou illégales"[52]. La FTC établit à intervalles réguliers une liste des branches d'activité qui répondent au critère concernant les structures du marché et suit, semble-t-il, très attentivement l'évolution dans ces secteurs. Bien que cette disposition de la loi anti-monopole japonaise semble être un instrument unique en son genre, et potentiellement très puissant, au service des autorités chargées de faire appliquer les textes, les tribunaux n'ont, on l'a vu, jamais été saisis à ce titre[53].

Problèmes internationaux ou transfrontières du point de vue des échanges et du point de vue de la concurrence

Dans quelles conditions l'abus de position dominante peut-il poser des problèmes de caractère international ? Le pouvoir détenu sur un marché et son utilisation abusive relèvent-ils simplement des autorités nationales de la concurrence ou posent-ils un problème au plan international ?

Pour tenter de répondre à ces questions, il est peut-être utile de déterminer les conditions dans lesquelles l'action d'une entreprise dominante peut avoir des répercussions internationales, avant de voir comment des considérations touchant la concurrence et la politique commerciale peuvent intervenir dans les cas de ce genre. L'analyse qui suit s'organise autour de deux scénarios très rapidement exposés. Il est évident que, dans la pratique, bien des choses dépendront d'éléments spécifiques qui ne sont pas pris en compte dans ces scénarios.

Scénario A : Refus d'accès au marché par une entreprise dominante

Une entreprise (ou des entreprises) dominante peut prendre des mesures interdisant à des concurrents étrangers d'intervenir sur le marché local et leur refusant donc l'accès à ces marchés. Ainsi, une entreprise dominante peut mettre au point des systèmes de distribution qui ne peuvent être reproduits, ou exiger des acheteurs auxquels elle est financièrement liée qu'ils refusent de traiter avec des sources d'approvisionnement extérieures. Dans ces conditions, l'action de l'entreprise dominante peut aboutir à la forclusion d'un marché ou à une réduction de la concurrence sur ce marché. Le préjudice est donc double, puisqu'il concerne à la fois les clients du marché intérieur de l'entreprise dominante et les exportateurs cherchant à accéder à ce marché.

L'entreprise dominante pourrait aussi en théorie refuser l'accès du marché aux entreprises étrangères en leur interdisant d'utiliser une installation nécessaire à la vente sur ce marché. Ou bien encore, l'entreprise dominante pourrait être un monopole d'Etat ou un ancien monopole se refusant implicitement ou explicitement à s'approvisionner auprès de sources étrangères.

Du point de vue des règles de la concurrence ou des règles commerciales, comment peut-on analyser ces différentes actions d'une entreprise dominante ?

Analyse du point de vue de la politique de la concurrence

La conduite d'une entreprise isolée est plus complexe, au regard du droit de la concurrence, que la conduite d'une entente, et c'est un domaine où l'on constate d'importantes différences selon les juridictions. Plusieurs entreprises concurrentes qui s'entendent pour que leurs distributeurs ne traitent pas avec des concurrents étrangers peuvent difficilement justifier leur attitude au nom de la concurrence. En revanche, une entreprise agissant unilatéralement peut prétendre être guidée par un souci d'efficience pour opter pour un système de distribution exclusive.

Les arrangements verticaux conclus par une entreprise disposant d'un important pouvoir sur le marché peuvent être autorisés au regard du droit des États-Unis s'ils bénéficient à la concurrence ou à l'efficience plus que ne l'auraient permis d'autres moyens moins exclusifs. Bien que la fixation des prix de revente reste un délit en soi, les restrictions verticales sont souvent autorisées à moins qu'elles n'aient un effet négatif sur la concurrence intermarques et non pas intramarque. D'autres arguments n'ayant pas trait à

l'efficience, le fait par exemple que la restriction verticale exclut ou désavantage des entreprises moyennes, n'ont guère de chances d'être retenus dans le cadre de la loi antitrust des États-Unis[54]. Néanmoins, comme nous l'avons vu, ils sont susceptibles de l'être par les tribunaux européens.

Si l'entreprise offre une facilité qui ne peut être reproduite, l'exclusion peut être interdite en invoquant la thèse des facilités essentielles, retenue dans plusieurs juridictions. Cette thèse peut s'appliquer même si l'entreprise dominante est un monopole autorisé mais dont on estime néanmoins qu'il utilise abusivement le pouvoir dont il dispose.

Lorsque le marché concerné est un marché national, la conduite de l'entreprise dominante relèvera naturellement au premier chef des autorités nationales de la concurrence chargées d'appliquer le droit local. Dans nombre de cas, les autorités nationales sont les mieux placées pour lever les obstacles artificiels qui facilitent l'exploitation ou l'exclusion. L'application du droit national de la concurrence peut également être un instrument important, quoique pas le seul, pour remédier à des pratiques d'exclusion ou d'utilisation abusive, si ce droit est appliqué strictement et si la conduite incriminée relève du droit local. Néanmoins, un problème évident est l'application inégale ou même discriminatoire du droit de la concurrence dans certaines juridictions.

De fait, le manque de rigueur dans l'application de la politique de la concurrence est d'ores et déjà une source de différend au plan international. En partie pour résoudre ce problème d'application inadéquate des législations de la concurrence étrangère, la loi Sherman autorise à porter plainte contre des pratiques étrangères anticoncurrentielles qui portent préjudice aux intérêts des exportateurs des États-Unis si certaines conditions sont réunies[55]. Ainsi, les tribunaux exigent habituellement que la conduite de l'entreprise concernée ait un effet direct, substantiel et raisonnablement prévisible sur le commerce des États-Unis.

Dans les conditions prévues par ce premier scénario fictif, l'entreprise étrangère n'est pas contrainte de demander réparation devant les juridictions locales. Elle peut également invoquer son propre droit commercial ou son propre droit de la concurrence. Aux termes de la législation des États-Unis, l'existence de cette théorie des "effets" peut être utile à ceux qui demandent réparation d'une conduite d'exclusion à l'étranger préjudiciable aux intérêts des exportateurs américains. Néanmoins, ce mécanisme d'auto-assistance n'est pas encore parfaitement adapté à la solution des problèmes d'accès aux marchés qui résultent, pense-t-on, de l'application insuffisante du droit étranger de la concurrence. Les raisons en sont multiples et complexes, et nous nous bornerons à dire que des obstacles d'ordres divers (preuves, juridictions, souveraineté, politiques) sont susceptibles de surgir en cours de procédure. Par ailleurs, bien que la théorie américaine des effets ait fait l'objet de nombreuses analyses tant aux États-Unis qu'à l'étranger ces dernières années, elle n'a guère été évoquée dans le cas d'exportations[56].

Analyse du point de vue de la politique commerciale

Bien que la loi Sherman ait été rarement utilisée à l'encontre de pratiques menées à l'étranger préjudiciables aux intérêts des exportateurs américains, des faits comparables à ceux retenus dans ce scénario ont suscité un certain nombre de différends commerciaux bilatéraux, notamment entre les Etats-Unis et le Japon.

A la différence de la politique de la concurrence qui est axée sur les mesures prises par les entreprises, à l'exception des mesures antidumping et de sauvegarde, la politique commerciale trouve sa raison d'être dans les actes des gouvernements étrangers qui faussent l'accès aux marchés. Les limitations

"strictement" privées affectant l'accès aux marchés étrangers ne sont généralement pas considérées comme relevant des règles commerciales intérieures ou internationales.

Il est une exception importante à la proposition générale. Il s'agit des pratiques qui bénéficient du soutien du gouvernement et qui pourraient être qualifiées de "déraisonnables" aux termes de la section 301 du Trade Act 1974 des Etats-Unis, tel qu'il a été amendé.

Les pratiques couvertes par cette définition sont extrêmement diverses. Il s'agit en général de pratiques qui ne sont pas nécessairement incompatibles avec les droits juridiques internationaux des Etats-Unis mais que l'on juge par ailleurs déloyales et inéquitables et qui peuvent aller jusqu'à la tolérance par un gouvernement étranger de pratiques anticoncurrentielles limitant les exportations des Etats-Unis[57].

Lorsqu'il mène une enquête formelle au titre de la section 301, le Bureau de l'U.S. Trade Representative procède à des demandes d'informations et à des consultations avec les gouvernements étrangers quant aux barrières supposées à l'accès aux marchés. A la différence des enquêtes antitrust qui examinent les obstacles à l'entrée aux marchés, l'enquête menée dans ce cas particulier est plus large et porte sur le caractère prétendument "déloyal" de la pratique étrangère. Il n'existe pas de méthodologie unique ou uniforme pour examiner les plaintes de pratiques déloyales.

De plus, bien que ce soit au plaignant qu'il incombe d'apporter la preuve des pratiques l'ayant conduit à déposer sa plainte, les normes concernant les preuves sont moins précise dans un cas d'accès aux marchés que dans un cas antitrust. La section 301 privilégie la négociation par rapport aux décisions. Si le gouvernement étranger est disposé à engager des négociations avec le Gouvernement des Etats-Unis, il peut concrètement (mais non juridiquement) se trouver rapidement contraint de fournir la charge de la preuve.

Si l'on examine les différents accords bilatéraux conclus entre les Etats-Unis et le Japon, y compris ceux dans lesquels les Etats-Unis ont invoqué la section 301 et les autres dans lesquels il ne l'a pas invoquée, on constate que dans un certain nombre de ces accords, le Gouvernement japonais s'est engagé à appliquer strictement sa législation sur la concurrence, de manière générale et à propos de secteurs déterminés, en même temps qu'il s'engageait à encourager activement les importations et à faciliter le développement de conditions plus concurrentielles sur les marchés[58].

Les pratiques d'entreprises isolées sont apparues dans un certain nombre de différends bilatéraux comme étant la cause d'exclusion anticoncurrentielle des marchés ou de pratiques "déloyales", et, dans plusieurs affaires, il a été fait état de pratiques d'achat discriminatoires de la part de monopoles publics ou d'anciens monopoles[59].

La plainte au titre de la Section 301 déposée par Eastman Kodak Company en mai 1995 est la première plainte officielle acceptée par l'USTR qui soit essentiellement fondée sur l'allégation de pratiques déraisonnables de la part d'un gouvernement étranger (en l'occurrence le Japon) et notamment de la tolérance de pratiques anticoncurrentielles systématiques. Cette affaire est également intéressante ici en raison de l'ampleur des parts de marché (70 pour cent chacun) détenues par le plaignant Kodak et par son principal rival japonais Fuji sur leurs marchés intérieurs respectifs.

D'après la plainte, à partir du moment où les barrières officielles aux échanges ont été abaissées, le Gouvernement japonais aurait mis en oeuvre "des contre-mesures à la libéralisation" destinées à structurer le marché de la photographie grand public de manière à empêcher Kodak de se faire une plus large place sur le marché japonais. De plus, le principal concurrent de Kodak, la société Fujifilm, aurait

alors fait main basse sur le système de distribution japonais et, avec ses filiales distributrices, conclu des arrangements verticaux et horizontaux jugés anticoncurrentiels par Kodak. Néanmoins, ce qui est plus directement intéressant ici, c'est le fait que les auteurs de la plainte estimaient que si l'affaire devait être jugée selon la loi américaine, le système de distribution et de rabais de Fuji serait considéré comme constituant une violation à la Section 2 de la loi Sherman concernant la théorie de "l'installation essentielle", Fuji s'étant par ailleurs lancée dans des actions qui visaient à établir ou conserver son monopole[60].

Bien que la loi Sherman puisse s'appliquer au commerce d'exportations, le demandeur a préféré déposer sa plainte devant un tribunal commercial. La plainte de Kodak n'expliquait pas les raisons de ce choix, mais les porte-parole de la société ont laissé entendre que l'une d'entre elles au moins était le fait que cette affaire n'avait pas de précédent jugé en fonction de la loi Sherman. Surtout, la société Kodak fait valoir qu'elle connaît des problèmes d'accès aux marchés résultant de mesures prises par le Gouvernement japonais lui-même, d'où la décision de Kodak de se réclamer du droit commercial des Etats-Unis plutôt que des lois antitrust[61].

Fujifilm, dans sa réfutation de la plainte déposée, a rejeté tous les arguments factuels et juridiques avancés par Kodak. S'agissant des arguments antitrust, Fujifilm conteste la définition du marché donnée par Kodak. La société japonaise fait valoir que Kodak n'a pas réussi à réunir les éléments nécessaires pour invoquer la théorie des "installations essentielles", qu'elle-même n'a pas souscrit d'arrangements illégaux de distribution exclusive et que ce sont en fait les propres arrangements de Kodak qui aboutissent à une exclusion de ses concurrents.

Cette affaire n'étant pas encore réglée, nous n'avons pas ici l'intention d'apprécier les faits allégués et réfutés par les deux parties concernées. Ce qui nous intéresse, c'est que le Scénario 1 et les failles supposées entre le champ d'application du droit de la concurrence et celui du droit commercial ne sont pas simplement des problèmes abstraits mais sont effectivement à l'origine de différends commerciaux très actuels. La façon dont l'affaire Kodak-Fuji sera réglée pourrait constituer un précédent extrêmement important, tant du point de vue de la portée et de la méthodologie de la Section 301 dès lors qu'il s'agit de pratiques étrangères anticoncurrentielles, que du point de vue de l'évolution des méthodes utilisées pour traiter des problèmes qui résultent de restrictions à la fois privées et publiques. C'est là un cas qui mérite d'être attentivement examiné à la fois du point de vue commercial et du point de vue de la concurrence.

Enfin, ce premier scénario (et même en fait le différend Kodak-Fuji) soulève la question évidente de savoir si l'OMC sous sa forme actuelle permet de s'attaquer à la conduite privée d'une entreprise qui interdit l'accès à un marché. Bien que le GATT (et désormais l'OMC) se préoccupe au premier chef des actes des gouvernements, on peut concevoir que les pratiques privées relèvent également de l'OMC, mais que néanmoins le fait d'annuler ou de compromettre une concession existante puisse susciter une plainte en situation de non-isolation conformément à l'OMC si certaines conditions sont réunies.

Comme l'ont noté les juristes, il faudrait très vraisemblablement qu'un certain nombre de conditions soient réunies pour que des pratiques anticoncurrentielles puissent faire l'objet d'une plainte en situation de non-isolation dans le cadre du GATT/OMC : premièrement, la mesure doit être prise par le gouvernemen ; deuxièmement, il faut qu'elle modifie les conditions de la concurrence instituées par d'autres engagements ou droits de douane GATT/OAC ; troisièmement, il faut que la mesure prise n'ait pu être raisonnablement anticipée au moment des concessions tarifaires ou autres[62].

Les lacunes que ces conditions impliquent au niveau du champ d'application sont loin d'être négligeables. Ainsi, les plaintes concernant des pratiques exclusivement privées qui limitent l'accès aux

marchés et qui ne bénéficient d'aucune participation ou d'aucun soutien du gouvernement n'ont guère de chances d'être recevables au regard des règles de l'OMC. De plus, la politique de la concurrence en tant que telle n'est pas visée par les dispositions de l'OMC, bien que certaines caractéristiques touchant à la concurrence soient couvertes par certains des nouveaux domaines négociés lors du cycle d'Uruguay[63]. Ainsi, bien qu'il soit possible que, dans certaines conditions, un comportement privé, soutenu par une autorité locale, puisse faire l'objet d'une plainte recevable dans le cadre actuel du GATT/OMC, les règles multilatérales existantes n'offriront de véritables remèdes que dans des conditions extrêmement précises. C'est la raison pour laquelle l'extension des disciplines multilatérales aux pratiques commerciales fait l'objet de sévères discussions partout dans le monde.

Scénario B : Extension d'influence sur les marchés d'exportations et éviction par les prix

Les actions d'une entreprise dominante peuvent également avoir d'importants effets sur plusieurs juridictions géographiques lorsque l'entreprise utilise le pouvoir dont elle dispose sur un marché pour étendre le champ de ses activités internationales. On peut concevoir un deuxième scénario si l'entreprise est en mesure de soutenir ses activités à l'étranger par des pratiques d'exclusion sur son marché intérieur et des pratiques abusives en matière de prix à l'étranger.

Analyse du point de vue de la politique de la concurrence

Une variante classique de l'éviction par les prix consiste pour une entreprise dominante à vendre ses produits à des prix réduits avec l'intention d'éliminer la concurrence et d'accroître son pouvoir sur le marché pour pouvoir ensuite porter ses prix au-dessus des niveaux de ceux de ses concurrents. Néanmoins, c'est là un domaine particulièrement complexe du droit et de l'économie, et ces pratiques sont souvent jugées différemment selon qu'on les considère du point de vue de la concurrence ou du point de vue commercial.

Les tribunaux des Etats-Unis sont ainsi de plus en plus prudents face aux plaintes d'éviction par les prix dans les affaires antitrust. Si l'on se place du point de vue de l'efficience, la conséquence immédiate d'une telle pratique est d'abaisser les prix, et des prix plus faibles sont avantageux pour le consommateur. Celui-ci se trouve lésé, du moins en théorie, si, après avoir réussi à exclure ses concurrents par cette méthode, le vendeur relève ensuite ses prix. En l'absence d'autres obstacles artificiels à l'entrée, on serait théoriquement amené à penser que même dans le cadre de ce scénario, les anciens concurrents ou d'autres concurrents peuvent alors entrer à nouveau sur le marché et ramener les prix à des niveaux compétitifs. C'est là un domaine dans lequel les tribunaux chargés d'appliquer la législation antitrust des Etats-Unis se sont généralement inquiétés davantage de préserver le jeu de la concurrence que de protéger les entreprises ou les concurrents.

Ainsi, dans l'affaire E.I. Du Pont de Nemours et Compagnie, le FTC a rejeté une plainte selon laquelle Dupont aurait cherché à monopoliser le marché du dioxyde de titane en fixant ses prix à des niveaux qui lui permettaient de dégager des bénéfices, ce qui n'était pas le cas de ses concurrents (dont les techniques de production étaient moins efficientes). Dans ce cas particulier, le FTC a noté que la politique antitrust ne devait pas décourager les entreprises de devenir plus efficientes et de répercuter les bénéfices de cette efficience sur les consommateurs[64].

De récentes affaires relevant de la loi antitrust des Etats-Unis donnent à penser que l'éviction par les prix est de plus en plus difficile à prouver.

Les pratiques d'éviction étaient au centre des arguments avancés dans le cadre de la fameuse affaire Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation[65]. Dans ce cas particulier, la Cour Suprême des Etats-Unis a rejeté l'argument selon lequel les entreprises japonaises avaient constitué une entente en vue de procéder à une éviction par les prix. La théorie de la Cour a été que l'éviction par les prix constitue un investissement qui doit être récupéré ultérieurement par la formation de prix de monopole. Dans l'affaire Matsushita, la Cour a estimé qu'étant donné la durée d'existence de l'entente supposée (plus de vingt ans) et le fait qu'il était peu probable qu'elle ait récupéré ses pertes en relevant ses prix après avoir obtenu le résultat qu'elle souhaitait, il était difficile de conclure à l'existence d'une entente en vue d'éviction.

Les tribunaux américains ont cherché principalement à déterminer non pas s'il existait des différences de prix entre le marché national et les marchés étrangers, mais plutôt la mesure dans laquelle le prix de l'entreprise procédant à l'éviction était inférieur au coût. L'opinion des experts reste partagée lorsqu'il s'agit de déterminer le niveau adéquat des coûts qu'il faudrait utiliser comme point de départ pour conclure à l'existence d'une éviction[66].

Il ressort d'une affaire ultérieure aux Etats-Unis, Brooke Group v. Brown et Williamson Tobacco, que même lorsqu'il est manifeste que les prix sont établis en dessous des coûts, cela ne suffit généralement pas à moins que le plaignant puisse prouver qu'il y a possibilité de "récupérer" les coûts[67].

La forclusion du pays d'origine qui peut théoriquement susciter des stratégies d'éviction par les prix n'a pas retenu spécialement l'attention des autorités ou tribunaux antitrust des Etats-Unis. Et, ainsi qu'il ressort des affaires que nous venons d'évoquer, les tribunaux américains témoignent d'un certain scepticisme à l'égard des plaintes d'éviction par les prix[68].

Analyse du point de vue de la politique commerciale

Bien que les facteurs identifiés au Scénario B soulèvent de nombreuses difficultés du point de vue du droit de la concurrence, ces mêmes facteurs pourraient bien assurer la recevabilité d'une plainte antidumping. Cette plainte pourrait également être recevable dans le cadre de la section 301 du Trade Act de 1974, tel qu'amendé.

La législation antidumping vise à remédier à ce que l'on considère comme des pratiques commerciales déloyales de la part d'entreprises étrangères, pratiques qui portent préjudice à leurs concurrents locaux. De ce point de vue, elle s'intéresse non seulement au jeu de la concurrence mais aussi à l'inéquité apparente de certaines pratiques utilisées par les entreprises étrangères, qui affectent leurs concurrents dans un marché intérieur.

La base théorique sur laquelle est fondé le droit antidumping a été posée dans les travaux novateurs de Jacob Viner[69], qui a considéré que des mesures antidumping pouvaient être éventuellement nécessaires pour protéger les consommateurs locaux de pratiques d'éviction -- par exemple lorsqu'une entreprise étrangère fixe délibérément les prix de ses produits à un niveau suffisamment bas pour contraindre les entreprises existantes à cesser leurs activités, acquérir une position de monopole sur le marché intérieur et mettre à profit le pouvoir dont elle dispose sur ce marché pour relever les prix et récupérer ses pertes. En théorie, comme on l'a vu à propos de la politique de la concurrence, bien que les concurrents locaux puissent être pénalisés par le faible niveau des prix, les consommateurs peuvent être avantagés lorsque les prix sont bas mais seront désavantagés si l'entreprise relève ses prix à un stade ultérieur. L'éviction par les prix ne se produit pas nécessairement dans un contexte international mais peut se produire dans un tel contexte[70].

Les raisons pour lesquelles une entreprise peut choisir de vendre au rabais son produit à l'étranger sont naturellement très diverses[71].

Le droit commercial international impose des contraintes à certaines pratiques de formation des prix, par exemple lorsqu'il y a discrimination au niveau des prix (prix différents pour un même produit en-dessous de son coût de production).

En règle générale, les règles applicables au dumping exigent l'examen des différences de prix entre le marché local et les marchés étrangers. Il faut pour cela déterminer si les importations sont vendues à un prix inférieur à leur juste valeur (autrement dit, vendues au rabais) et si tel est le cas, avec quelle marge, et dans quelle mesure ce dumping a causé ou menace de causer un préjudice matériel à une industrie locale concurrençant les importations et produisant un produit "similaire".

Aux termes des règles révisées concernant le dumping issues des négociations d'Uruguay, le dumping est défini comme l'offre d'un produit à la vente sur un marché d'exportation à un prix inférieur à sa "valeur normale", laquelle est à son tour définie comme le prix pratiqué par une entreprise sur son marché national au cours d'opérations commerciales normales. Les prix inférieurs aux coûts moyens totaux sont classés dans cette catégorie. En l'absence de ventes sur le marché intérieur, on utilise le prix comparable le plus élevé pratiqué sur des marchés tiers, ou les coûts estimés de production de l'entreprise exportatrice majorés d'un montant raisonnable pour les bénéfices, les frais d'administration et autres frais pour déterminer la valeur normale.

Aux Etats-Unis, la plupart des affaires antidumping font intervenir des comparaisons de prix entre le marché local et le marché américain et il n'est pas nécessaire de prouver que les ventes se font à un prix inférieur au coût. Si les prix du marché local ne peuvent être déterminés, les autorités américaines (ainsi que les règles multilatérales) comparent les prix avec un coût estimé ("construit") des produits en cause. Dans les affaires antidumping où les coûts jouent un rôle important, le législateur tend à se référer aux coûts totaux moyens, tandis que dans les affaires antitrust, les tribunaux peuvent utiliser les coûts variables marginaux ou moyens[72].

Il existe de nombreuses différences de méthodologies et de préoccupation entre le droit de la concurrence et le droit antidumping -- ne serait-ce qu'en ce qui concerne la définition, les normes retenues en matière de préjudice[73], et les conditions concurrentielles de la branche d'activités considérée.

Il est enfin possible que la situation supposée dans le présent scénario puisse faire l'objet d'une plainte au titre de la section 301, si l'on estime que l'entreprise étrangère bénéficie du soutien de son gouvernement ou si celui-ci tolère une conduite systématiquement anticoncurrentielle qui créé des obstacles à l'accès au marché et qui lui assure les conditions d'exploitation qui lui permettent de vendre à bas prix à l'étranger.

Entreprises publiques et monopoles autorisés

On trouvera dans les paragraphes qui suivent quelques observations prudentes sur les problèmes que posent les entreprises contrôlées par l'Etat et les monopoles autorisés aux autorités chargées de la politique de la concurrence et de la politique commerciale. Nous évoquerons en outre rapidement quelques faits nouveaux importants récemment intervenus dans le cadre de l'OMC concernant la lutte contre les pratiques abusives des monopoles autorisés sur les marchés des services.

Comme l'ont constaté bon nombre de spécialistes du droit et de la politique de la concurrence, les pratiques des entreprises d'Etat ainsi que des monopoles autorisés soulèvent des problèmes importants et très complexes sur ces deux plans. En règle générale, le droit de la concurrence retenu dans nombre de juridictions s'applique aussi aux entreprises d'Etat ou aux monopoles autorisés.

En d'autres termes, même les monopoles autorisés ou les quasi-monopoles ne peuvent avoir en toute liberté des pratiques anticoncurrentielles. Plusieurs pays ont mis au point des règles complexes visant ces entreprises. La loi antitrust des Etats-Unis prévoit tout un éventail d'exemptions au niveau fédéral et au niveau des Etats. Ainsi, la "doctrine de l'action de l'Etat" autorise certaines mesures privées adoptées conformément à la politique déclarée du gouvernement d'un Etat et étroitement surveillées par l'Etat en question. De ce point de vue, la pratique autorisée doit être le produit d'une intervention délibérée de l'Etat et non pas simplement le produit d'un accord entre des parties privées[74].

Selon un expert, l'Union européenne a largement rejeté cette doctrine dans la mesure où la politique de la concurrence bénéficie d'un statut "constitutionnel" au niveau européen, alors qu'elle n'a qu'un statut législatif aux Etats-Unis[75].

Il n'entre pas dans le cadre de notre propos d'examiner les doctrines juridiques qui limitent l'application du droit de la concurrence à la conduite d'entreprises encouragées ou autorisées par le gouvernement et qui sont susceptibles de faire échapper les entreprises locales aux contraintes des textes. Nous n'examinerons pas davantage la façon dont ces doctrines ont été appliquées par différentes juridictions. Néanmoins, il est essentiel d'identifier les doctrines de ce type et de déterminer leur application au plan interne et dans le contexte d'activités internationales si l'on veut examiner dans le détail l'ensemble des politiques de la concurrence affectant les monopoles ou les entreprises dominantes.

Les marchés du secteur des services méritent également de retenir l'attention à cet égard, bon nombre d'entre eux étant assujettis à une stricte réglementation interne par les autorités nationales[76]. Qui plus est, sur nombre de marchés de l'industrie des services, les prestataires de services ont été des monopoles ou des quasi-monopoles autorisés.

Les obstacles aux échanges de services ont été parfois explicites et discriminatoires (interdictions d'exercer faite aux juristes étrangers, restrictions imposées à l'acquisition et la création d'institutions financières, restrictions à l'acquisition par des intérêts étrangers de certains droits de radiodiffusion, ou encore restrictions à l'investissement). Dans d'autres cas, et ceci rentre davantage dans notre propos, les obstacles peuvent être explicites et non discriminatoires. Dans cette dernière catégorie, on peut citer les réglementations internes concernant les monopoles nationaux (par exemple dans les secteurs des télécommunications et des chemins de fer) qui ont souvent étroitement limité l'accès de nouveaux entrants, qu'ils soient nationaux ou étrangers, et qui ont déterminé la nature de la concurrence à l'intérieur du marché considéré.

Pour plusieurs raisons internes et internationales différentes (par exemple l'évolution technologique, des initiatives locales de réforme réglementaire, la différenciation croissante des produits, etc.), les deux dernières décennies ont été marquées par la libéralisation des contraintes qui limitaient la concurrence interne dans les industries de services et freinaient le développement des échanges internationaux de services[77]. Le fait est qu'un nombre non négligeable de pays développés et en développement se sont lancés dans de vastes programmes de déréglementation, de privatisation et de libéralisation des échanges et des investissements. On ne saurait minimiser l'importance des échanges dans le secteur des services lorsque l'on sait qu'au cours de la dernière décennie, ils ont augmenté plus vite que les échanges de marchandises[78].

L'Accord général sur le commerce des services (GATS) conclu dans le cadre des Négociations commerciales multilatérales d'Uruguay est le premier accord définissant un certain nombre de règles multilatérales applicables aux échanges de services. Le GATS “a pour but de réduire ou de supprimer les mesures gouvernementales qui empêchent la libre fourniture de services au-delà des frontières ou qui introduisent une discrimination à l'encontre des entreprises de services contrôlées par des capitaux étrangers et exerçant à l'intérieur des frontières nationales”[79].

Le GATS contient une série de règles et principes généraux (traitement de la nation la plus favorisée, par exemple), ainsi que des engagements spécifiques (accès aux marchés, traitement national, etc.) qui sont consolidés dans les listes des différents membres ; il prévoit l'engagement pour les membres de procéder périodiquement à des négociations en vue d'élever progressivement le niveau de la libéralisation ; il contient également des obligations de règlement des différends et d'exécution des obligations, ainsi qu'une série d'annexes et d'addendums portant sur des problèmes sectoriels et sur la mise en oeuvre du GATS[80].

Il convient tout particulièrement de noter pour notre analyse que le GATS prévoit deux clauses générales qui pourraient avoir d'importantes retombées visant les pratiques commerciales des fournisseurs de services susceptibles de nuire à la concurrence sur un marché. Plus précisément, l'Article VIII dispose que les fournisseurs monopolistiques de services ne doivent pas agir d'une manière incompatible avec l'obligation de traitement de la nation la plus favorisée prévue par l'Accord ou avec leurs engagements spécifiques[81]. De même, lorsque le fournisseur monopolistique d'un Membre entre en concurrence pour la fourniture d'un service se situant lors du champ de ses droits monopolistiques, le GATS oblige les gouvernements membres de l'OMC de faire en sorte que ce fournisseur n'abuse pas de sa position monopolistique sur le marché considéré[82]. L'Article VIII désigne explicitement le Conseil du commerce des services comme l'enceinte dans laquelle un membre de l'OMC est en droit de demander des renseignements spécifiques sur la conduite d'un fournisseur de services disposant de monopole, et oblige en outre les membres de l'OMC à notifier au Conseil leur intention d'accorder des droits monopolistiques supplémentaires. L'Article VIII s'applique également aux autorisations formelle ou informelles accordées à un petit nombre de fournisseurs de services qui "empêchent substantiellement la concurrence entre ces fournisseurs sur [son] territoire"[83].

Dans l'Article IX sur les pratiques commerciales, le GATS reconnaît qu'outre les conduites monopolistiques identifiées à l'Article VIII, d'autres pratiques commerciales des fournisseurs de services peuvent limiter la concurrence et restreindre le commerce des services. L'Accord ne précise pas la conduite qui peut donner lieu à de telles craintes mais exige la tenue de consultations concernant les pratiques commerciales prétendument restrictives si la demande en est faite par un autre gouvernement membre de l'OMC

Conclusions

Dans la première partie de cette note, on a tenté de mettre en lumière certains points de similitude et de divergence des législations relatives à la concurrence visant les conduites éventuellement abusives d'une entreprise isolée. L'abus par une entreprise isolée du pouvoir qu'elle exerce sur le marché est une préoccupation que l'on retrouve dans toutes les législations sur la concurrence. Néanmoins, les avis des experts et l'interprétation des juridictions diffèrent sensiblement quant à l'éventail de pratiques qu'il convient de condamner. Il est probable que les experts des problèmes de concurrence s'accorderont largement à penser que le droit de la concurrence doit empêcher les entreprises disposant d'un important pouvoir sur le marché d'exercer ce pouvoir de manière à contrôler les prix, limiter la production et exclure les concurrents. Néanmoins, au-delà de ces pratiques spécifiques, les avis des experts divergent

sensiblement quant aux effets exercés sur la concurrence par d'autres pratiques -- telles que les limitations verticales -- utilisées par une entreprise dominante sur un marché unique ou par delà les frontières.

Il ressort par exemple des différences de fond entre le droit des Etats-Unis et le droit de la Communauté européenne que les efforts visant à établir une règle internationale unifiée à l'égard de la conduite d'une entreprise isolée risquent d'être au mieux difficiles et sans doute pas véritablement nécessaires. Les scénarios discutés dans les paragraphes qui précèdent donnent à penser que la conduite d'une entreprise isolée peut avoir des effets internationaux et, par ailleurs, que les conclusions concernant les remèdes à y apporter ou même la nécessité d'y remédier peuvent être très différentes selon que l'on se place dans la perspective de l'accès au marché (c'est-à-dire la perspective de la politique commerciale) ou dans celle de l'entrée sur le marché (c'est-à-dire la perspective de la politique de concurrence).

Il va de soi qu'il serait sans doute aussi difficile de parvenir à un accord international (ou même interne) dans des domaines où les solutions proposées par la politique commerciale et par la politique de la concurrence sont contradictoires -- ainsi, dans les cas d'éviction par les prix qui peuvent donner lieu à des plaintes antitrust ou antidumping[84].

Dans le contexte d'examens du droit commercial et de la concurrence allant au-delà de l'abus de position dominante et de ses effets internationaux, de nombreuses propositions ont été faites ces dernières années pour faire face aux problèmes qui apparaissent dans le même contexte où la contestabilité des marchés est devenue une préoccupation nationale et internationale. Ainsi, des propositions ont été faites pour développer le rôle de la politique de la concurrence dans le contexte des pratiques commerciales déloyales, pour définir de nouveaux chefs d'accusation en cas d'éviction internationale[85], pour rechercher activement une intensification de la coopération entre les autorités chargées de faire appliquer les règles de la concurrence[86], ou pour mettre sur pied des disciplines internationales concernant la politique de concurrence[87]. Ces propositions et d'autres encore doivent être examinées de manière plus poussée.

NOTES

1. Par exemple, Section 1 de la loi Sherman, Section 3 de la loi Clayton, et loi Robinson-Patman.

2. La "monopolisation" ou "les tentatives" de monopolisation sont des termes utilisés dans la loi Sherman ; la formule correspondante dans la CE figure dans les dispositions traitant de "l'abus de position dominante". Ces différents termes sont utilisés indifféremment dans la présente introduction. Les différences de fond sont discutées plus en détail dans le corps du document.

3. Voir par exemple Richard Whish, Competition Law, 3rd ed. (London: Butterworths, 1993); D.M. Raybould & Alison Firth, Comparative Law of Monopolies, (London: Graham & Trotman 1994); Eleanor Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness", 61 Notre Dame L. Rev. 981 (1986). La comparaison faite dans le présent document entre les législations des États-Unis et de la Communauté européenne s'inspire très largement de ces travaux.

4. On ne traite pas ici les problèmes particuliers liés à l'abus de position dominante par des monopoles appartenant à l'Etat ou autorisés par lui, pas plus que l'on ne discute des textes relatifs aux fusions. La première de ces questions est abordée de façon succincte dans l'Addendum qui précède.

5. Une entreprise peut faire monter ou maintenir les prix à des niveaux supérieurs aux niveaux compétitifs en limitant sa propre production ou elle peut faire monter les prix ou les empêcher de baisser en alourdissant les coûts que doivent supporter ses rivaux, les contraignant par là même à limiter leur production. Voir T. Krattenmaker, R. Lande, et S. Sallop, "Monopoly Power and Market Power in Antitrust Law", in Revitalizing Antitrust in its Second Century, publié par H. First, E. Fox et R. Pitofsky (New York: Quorum Books 1991), at 7.

6. Selon la Section 2 de la loi Sherman : "Toute personne qui monopolise ou tente de monopoliser, ou qui s'associe ou conspire avec une ou plusieurs autres personnes pour monopoliser une part quelconque des échanges ou du commerce entre les différents Etats, ou avec des ressortissants étrangers, est déclarée coupable de conduite illégale..." 15 U.S.C.A. Section 2 (1982).

7. E. Fox, supra note 3.

8. Peu de concepts de la législation antitrust échappent totalement à la controverse. Même la notion de "bien-être des consommateurs" et les préoccupations qui la sous-tendent restent discutables. Pour certains, le bien-être des consommateurs est essentiellement une question d'efficience économique, et donc le délit que la loi doit condamner est l'inefficience en matière d'affectation de ressources qui accompagne un pouvoir excessif sur le marché. Pour d'autres en revanche, le bien-être des consommateurs tel que l'a conçu le Congrès est un concept plus large que l'efficience économique. On trouvera une analyse plus détaillée de ces points de vue opposés dans T. Krattenmaker, et. al., supra note 5.

9. 384 U.S. 563 (1966) à 570-71.

10. Dans l'affaire U.S. v. E.I. du Pont de Nemours & Co., le pouvoir de monopole a été défini comme "le pouvoir de contrôler les prix ou d'exclure la concurrence". 351 U.S. 377 (1956).

11. Dans la fameuse affaire Alcoa, le Juge Learned Hand a déclaré qu'une part de marché de 90 pour cent est "suffisante pour constituer un monopole ; il n'est pas certain que ce soit le cas avec une part de marché de 60 ou 64 pour cent, et une part de marché de 33 pour cent ne constitue manifestement pas un monopole." U.S. v. Aluminum Co. of America, 148 F2d 416 (1945).

12. Voir Swift & Co. v. U.S., 196 U.S. 375, Spectrum Sports, Inc. v. Mcquillan, U.S. 113 S. Ct 884. Il semble que la jurisprudence n'ait pas réellement tranché le problème complexe de la définition d'une "intention illégitime". En concluant à l'existence d'une intention anticoncurrentielle, on risque d'élargir par trop la portée du délit. Mais un jugement plus prudent risque de se traduire par un préjudice aussi bien pour les consommateurs que pour les concurrents. Selon un résumé de la jurisprudence, les types suivants d'intention ont été jugés suffisants : "intention d'obtenir un pouvoir de monopole ou d'obtenir un pouvoir suffisant pour contrôler les prix ; intention d'exclure la concurrence ; intention d'accomplir l'acte correspondant à la définition du délit envisagé". Voir Herbert Hovenkamp, Federal Antitrust Policy (Minn: West Publishers 1994).

13. H. Hovenkamp, Id. à 260.

14. Voir Eleanor Fox et J. Ordover, "Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action, prepared for Columbia University Law School Conference on Multilateral Trade Regimes in the 21st Century, November 3-4, 1995. Malgré le laxisme relatif de la législation américaine à certains égards, les tribunaux et les autorités chargés de faire respecter les textes aux États-Unis continuent de poursuivre les comportements anticoncurrentiels des entreprises dominantes. Dans l'affaire U.S. v. Microsoft, CCH section 71, 096 [1995], il a été interdit à Microsoft d'utiliser certaines pratiques déloyales de sous-traitance verticale aux termes d'un arrêt.

15. Voir U.S. v. Colgate & Co., 250 U.S. 300 (1919). Dans cette affaire déjà ancienne, la Cour Suprême a estimé que la loi Sherman ne limitait pas le droit d'une entreprise de juger de la conduite à tenir à l'égard de ses partenaires commerciaux.

16. Voir, MCI Communications Corp v. AT&T Co. 708 F.2d 1081 (7ème Cir. 1983). On a estimé dans ce cas précis qu'en refusant de connecter les installations de MCI aux réseaux locaux contrôlés par des filiales d'AT&T, le défendeur avait monopolisé le marché des télécommunications à longue distance, empêchant MCI d'offrir des services à longue distance concurrents. La Septième Circonscription a réaffirmé la théorie des facilités essentielles selon laquelle un monopole contrôlant une installation essentielle peut être contraint d'en accorder l'accès à ses concurrents. La Cour a fondé sa conclusion sur quatre éléments : (1) le monopole doit contrôler une facilité essentielle ; (2) un concurrent doit être dans l'incapacité de reproduire pratiquement ou raisonnablement la facilité essentielle ; (3) le concurrernt doit s'être vu refuser l'accès à cette facilité ; et (4) le monopole aurait été en mesure de fournir cette facilité. La théorie des facilités essentielles n'échappe pas à la controverse aux Etats Unis. Le professor Philip Areeda a suggéré que la pratique n'apporte pas un soutien sans faille à la doctrine. Voir Philip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles", Antitrust Law Journal Vol. 58 (1990). Un autre expert en matière anti trust décrit la doctrine comme "l'une des bases de poursuites au titre de la Section 2 de la loi Sherman soulevant le plus de complications, d'incohérences et difficultés de mise en oeuvre". Voir H. Hovenkamp, supra note 12 à 272.

17. Voir E. Fox, supra note 3 and Aspen Skiing v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847 (1985). Dans cette affaire, la Cour Suprême des États-Unis a confirmé une décision de la 10ème circonscription obligeant l'Aspen Skiing Company, qui possédait trois des quatre sommets de la station de ski d'Aspen et refusait de vendre un droit d'accès en coopération au propriétaire du quatrième sommet a été contraint de continuer d'offrir l'accès à cette installation. Les experts de la concurrence aux Etats Unis continuent de débattre de la portée qu'il convient de donner à l'application de ce principe. Certains ont ainsi suggéré que l'obligation de traiter avec un (ou des) partenaire(s) dans une entreprise conjointe préexistante paraissait logique mais que tel ne paraitrait pas le cas si l'affaire Aspen devait créer de toute pièce une obligation de traiter dans des situations où ne préexistait aucun arrangement commercial.

18. Voir par exemple, Berkey Photo v. Eastman Kodak Co. 603 F.2d 263 ; White & White Inc. v. American Hospital Supply Corp, 723 F. 2d 495 (6th Cir. 1983) and Kerasotes Michigan theaters v. National Amusemets Inc., 854 F. 2nd 135 (6th Cir. 1988). Dans cette dernière affaire, la Sixième Circonscription a estimé qu'il n'était pas nécessaire que "la partie qui cherche à étendre son pouvoir de monopole d'un marché donné à un deuxième marché ait un pouvoir de monopole ou une position dominante sur ce deuxième marché. Ainsi que l'a noté la Deuxième Circonscription : "une entreprise commet une infraction à la section 2 en utilisant le pouvoir de

monopole dont elle dispose sur un marché pour obtenir un avantage compétitif sur un autre marché, même si elle ne tente pas de monopoliser ce deuxième marché... Il n'y a aucune raison d'autoriser l'exercice d'un tel pouvoir au détriment de la concurrence, pas plus sur le marché contrôlé que sur tout autre marché. Le fait que la concurrence sur le marché visé ne soit pas supprimée mais simplement faussée ne rend pas la chose plus admissible. Les effets économiques et sociaux d'une extension du pouvoir de monopole rendent une telle conduite condamnable." La Cour poursuit en insistant sur le fait que "lorsque le seul objectif d'un tel accord est d'étendre la position dominante d'une entreprise à un autre marché sans que ce résultat soit obtenu par la mise au point d'un produit de qualité supérieure ou du fait d'autres avantages compétitifs légitimes", cette conduite n'est pas admissible.

19. Voir H. Hovenkamp, supra note 12 à 284.

20. Voir E. Fox, supra note 3.

21. Voir E. Fox, supra note 3. De nombreuses affaires ont concerné certaines manoeuvres d'entreprises disposant d'important pouvoir sur le marché, par exemple, des arrangements instituant des liens, des pratiques d'éviction en matière de R.D., des prix d'évictions, etc.

22. L'Article 86 du Traité de Rome dispose ce qui suit : "Est incompatible avec le Marché commun et interdit, dans la mesure où le commerce entre Etats membres est susceptible d'en être affecté, le fait pour une ou plusieurs entreprises d'exploiter de façon abusive une position dominante sur le marché commun ou dans une partie substantielle de celui-ci. Ces pratiques abusives peuvent notamment consister à :

(a) imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transaction non équitables ;

(b) limiter la production, les débouchés ou le développement technique au préjudice des consommateurs ;

(c) appliquer à l'égard de partenaires commerciaux des conditions inégales à des prestations équivalentes, en leur infligeant de ce fait un désavantage dans la concurrence ;

(d) subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats." Traité instituant la Communauté économique européenne, 25 mars 1957, Article 86.

23. E. Fox, supra note 3.

24. De ce point de vue, les dispositions du Traité de Rome qui visent des objectifs autres que l'efficience économique répondent peut-être au souci d'assurer une certaine protection aux petites entreprises à mesure que l'Europe progresse vers la création d'un marché européen plus intégré. De telles valeurs non économiques apparaissaient plus clairement dans le droit antitrust des États-Unis lorsque ce pays en était au début de l'intégration de l'économie nationale.

25. Dans l'affaire United Brands v. Commission, la Commission a considéré que United Brands occupait une position dominante, avec 45 pour cent du marché de la banane au Bénélux,

en Allemagne occidentale, au Danemark et en Irlande. Dans les affaires Hoffmann-La Roche et Micheline Nederlandsche, la Cour européenne de justice a conclu que les sociétés concernées avaient atteint une position dominante avec des parts de marché comprises entre 40 et 60 pour cent.

26. R. Wish, supra note 3 à 263.

27. Id. à 249.

28. Il importe de souligner que même un monopole statutaire n'échappe pas aux dispositions de l'Article 86. Voir R. Wish, Id. à 260.

29. Voir D.M. Raybould & A. Firth, supra note 3 à 504.

30. Voir les arrêts General Motors et United Brands. Dans l'affaire General Motors Continental, la Cour de justice a estimé, bien qu'elle n'ait pas conclu à l'existence d'un abus dans ce cas précis, qu'une entreprise pouvait utiliser abusivement sa position dominante en imposant un prix "excessif par rapport à la valeur économique du service fourni, ce qui a pour effet de freiner les importations parallèles en neutralisant les prix éventuellement plus favorables pratiqués dans d'autres régions de vente de la Communauté". 1 CMLR 95 [1976] à 109. Dans l'affaire United Brands, la Cour a également considéré que la Commission n'avait pas apporté la preuve d'un niveau de prix excessif mais a réaffirmé le principe défini dans l'affaire General Motors, à savoir qu'un prix n'ayant pas de relation raisonnable avec la valeur économique du produit fourni constituait un abus. 1 CMLR 429 [1978] à 502.

31. Id.

32. Voir E. Fox, supra note 3 et Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

33. Voir Alexis Jacquemin, "Abuse of Dominant Position and Exclusionary Practices: A European View", supra note 5 à 261.

34. Voir Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. E.C. Commission, CMLR 1 [1974] et E. Fox supra note 4.

35. Commercial Solvents Id. à 340.

36. De la même façon, dans l'affaire Telemarketing, la Cour a conclu qu'une entreprise occupant une position dominante ne peut "se réserver une activité annexe qui pourrait être exécutée par une autre entreprise dans le cadre de ses activités sur un marché voisin mais distinct, avec la possibilité de supprimer toute concurrence de cette entreprise". Un juriste européen a noté que dans certaines affaires récentes, les jugements rendus laissent même entendre que la Commission pourrait imposer à une entreprise occupant une position dominante l'obligation de veiller à ce que la concurrence s'exerce et soit maintenue sur tous les marchés sur lesquels elle exerce une influence. Il est possible, note ce juriste, que cette interprétation puisse s'appliquer à l'obligation de partager les droits de propriété intellectuelle avec des parties tierces afin de leur permettre de créer un nouveau produit pour lequel il existe une forte demande des consommateurs, quand bien même le nouveau produit pourrait rivaliser avec le produit existant du propriétaire des droits de

propriété intellectuelle. Voir Romano Subiotto, "The Right to Deal with Whom one Pleases under EEC Competition law: A small Contribution to a Necessary Debate", 6 ECLR [1992].

37. Voir R. Whish supra note 3 à 277.

38. Id. à 277.

39. Voir Id. 276 et Hoffman La Roche & Co AG v. Commission : la Cour européenne de justice a estimé que la société avait abusé de sa position dominante en concluant des accords d'achat exclusif avec certains de ses clients et en offrant en outre des remises de fidélité ou des rabais "sous réserve que le client se procure la totalité ou la majeure partie de ses approvisionnements, qu'il s'agisse de grandes ou de petites quantités, auprès de l'entreprise occupant la position dominante.

40. La définition du monopole privé est la suivante : "activités industrielles ou commerciales grâce auxquelles un chef d'entreprise, soit individuellement, soit en association ouverte ou cachée avec d'autres chefs d'entreprise, soit encore de quelque autre manière, exclut ou contrôle les activités d'autres chefs d'entreprise, provoquant de ce fait, contrairement à l'intérêt public, une forte réduction de la concurrence dans un domaine particulier". Voir Antimonopoly Act, Art. 2, para. 5.

41. Voir H. Iyori and A. Uesugi, The Antimonopoly Laws and Policies of Japan, (New York : Federal Legal Publications) 1994 p. 102.

42. Id. à 100.

43. Mitsuo Matsushita et Thomas Schoenbaum, Japanese International Trade and Investment Law (1989) at 151. Dans l'affaire Snow Brand de 1956, deux producteurs de produits laitiers avaient conclu une entente secrète avec une institution financière et une coopérative d'agriculteurs. L'institution financière accordait des prêts aux agriculteurs à condition qu'ils acceptent de ne pas fournir de lait aux concurrents des deux fabricants. Id. à 151.

44. Dans l'affaire Toyo Seikan, l'entreprise avait une part de marché de 50 pour cent lorsqu'elle a acquis la majorité du capital de quatre autre sociétés, portant ainsi sa part de marché à 75 pour cent. Toyo a cherché à limiter le territoire géographique de l'une des entreprises dont il avait acquis les actions. On a parlé dans ce cas précis de contrôle direct. Schoenbaum et Matsushita p. 151. Un contrôle indirect a été exercé dans l'affaire Noda Soy Sauce. Dans ce cas particulier, le principal fabricant de sauce soja demandait aux détaillants d'appliquer un prix de vente précis. Du fait de la structure de ce marché, les petites entreprises n'avaient apparemment pas d'autres possibilités que d'appliquer des prix de détail identiques. La Cour compétente a estimé que les prix de détail pratiqués par Noda avaient pour effet de lui donner un "contrôle indirect" sur les décisions de prix des entreprises concurrentes. Les experts n'ont apparemment pas considéré qu'il s'agissait là de l'interdiction de la formation de prix parallèles. Il semble en fait que l'entreprise dominante qui exige par voie de coercition la fixation des prix de revente à un niveau déterminé, contraignant par là même ses concurrents plus faibles à l'imiter, a probablement exercé un contrôle indirect interdit sur un marché. Id. à 152.

45. Voir Mitsuo Matsushita, "Private Monopolization and Monopolistic Situations" in Zentaro Kitagawa, ed. Doing Business in Japan (1994) at ix 2-13 section 2.06.

46. Voir M. Matsushita et T. Schoenbaum, supra note 43 à 147.

47. La section 2.7 définit l'expression "situation monopolistique". La section 8.4 de la loi anti-monopole vise les situations monopolistiques. Elle dispose que la JFTC peut "ordonner au chef d'entreprise concerné, conformément aux procédures prévues à la Division II..., de transférer une partie de ses activités ou de prendre toute autre mesure nécessaire pour rétablir la concurrence concernant les biens ou services en cause : étant entendu que cette disposition ne s'applique pas aux cas où la Commission estime que ces mesures peuvent réduire l'échelle des activités dudit entrepreneur au point d'alourdir fortement les coûts nécessaires à la production des biens ou des services que ce chef d'entreprise fournit, de compromettre sa situation financière et de lui rendre difficile de préserver sa compétitivité internationale, ou encore lorsque d'autres mesures de remplacement peuvent être prises que la Commission juge suffisantes pour rétablir la concurrence concernant les biens et services concernés". Chapitre III-II, section 8.4 (1) AMA.

48. Voir M. Matsushita, supra note 45.

49. Id. à IX 2-21 section 2.09.

50. Les profits excessifs sont des profits qui "dépassent, et de loin, le taux de profit type de la catégorie d'activité qu'exerce le chef d'entreprise". Quant à savoir ce que l'on entend par coûts de vente et frais généraux excessifs, il semble bien, pour autant que l'on puisse en juger, que ce soit par référence aux pratiques types du secteur d'activité concerné. Le taux de profit type est déterminé en faisant la moyenne des données relatives aux profits dans le secteur d'activité concerné. Voir Iyori et Uesugi, supra note 38.

51. Id. à 197.

52. M. Matsushita, supra note 45.

53. A la lumière du différend Kodak-Fuji section 301 qui n'est pas encore réglé, il est intéressant de noter que les fabricants de pellicules photographiques en couleur figurent sur la liste des branches d'activité qui répondent au critère de la structure du marché prévu à la Section 84.

54. Voir E. Fox et J. Ordover, supra note 14.

55. Si le droit américain et le droit étranger sont en contradiction, les tribunaux s'efforcent souvent de ménager au mieux les intérêts des deux parties.

56. En d'autres termes, les raisons mêmes qui rendent souhaitables d'appliquer la législation antitrust à des pratiques exercées à l'étranger et ayant un effet préjudiciable pour les exportateurs américains -- sa rigueur analytique et les critères retenus -- peuvent l'empêcher de donner des résultats sauf en cas de pratiques exceptionnellement choquantes.

57. Dans le cadre de la mise en oeuvre des accords d'Uruguay, cette disposition de la section 301 a été encore précisée. Dans le Statement of Administrative Action (SAA) qui accompagnait le projet de loi mettant en oeuvre les accords issus des négociations d'Uruguay, il était noté que "l'Administration appliquera strictement la clause de la Section 301 concernant la `tolérance d'activités anticoncurrentielles' pour réagir le cas échéant à des comportements anticoncurrentiels

étrangers. Les pratiques visées par cette disposition couvrent, entre autres, la tolérance de comportements assimilables à des ententes ou la tolérance de pratiques d'achat fermé (y compris la contrainte collusoire de distributeurs ou de clients) qui empêchent ou limitent l'accès des Etats-Unis de manière concertée et systématique". L'USTR est tenue d'examiner toute une série d'informations pour évaluer la tolérance d'un gouvernement étranger à l'égard de telles pratiques, et elle est également obligée de "vérifier si les activités anticoncurrentielles sont incompatibles avec les propres lois du pays étranger, dans quelle mesure ces activités ont été systématiques et pernicieuses, et à quel degré elles ont affecté le commerce intérieur ou extérieur des Etats-Unis". Voir Statement of Administrative Action, H.R. Doc., No. 103-316, 103d Cong., 2d. Sess., 656-895 (1994).

58. On peut en donner pour exemples les accords bilatéraux conclus entre les Etats-Unis et le Japon dans les secteurs du verre, des semi-conducteurs, du papier et des industries du bâtiment ainsi que le Programme bilatéral concernant les obstacles structurels.

59. Dans le cadre des différends commerciaux entre les Etats-Unis et le Japon, il a ainsi été reproché aux principales entreprises japonaises dans les secteurs du verre, de l'automobile et des télécommunications, de recourir à des pratiques d'exclusion.

60. Voir, Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper, Memorandum in Support of a Petition Filed Pursuant to Section 301 of the Trade Act of 1974, as Amended. Mai 1995.

61. Il est intéressant de noter que si Kodak avait engagé une action antitrust, la définition du marché géographique concerné aurait revêtu une importance déterminante. Ainsi, dans le cas d'une analyse antitrust, on aurait pu se demander si le marché à prendre en compte était le marché japonais ou le marché mondial de la pellicule grand public. Si l'on avait retenu la première définition, il est probable que l'on aurait considéré que Fujifilm disposait d'un pouvoir de monopole, alors qu'avec la seconde définition, on avait sans doute conclu que le pouvoir de Fujifilm sur le marché était moindre que celui de Kodak.

62. Voir Bernard M. Hoekman et Petros C. Mavroidis, "Competition, Competition Policy and the GATT", in The World Economy, Vol 17, March 1994 à 141.

63. Voir, par exemple, l'accord sur les mesures concernant les investissements et liées au commerce ainsi que les paragraphes consacrés au GATS dans l'Addendum joint.

64. Voir Edward M. Graham, "Competition Policy in the United States" à 27, dans C. Green et D. Rosenthal, ed. Competition Regulation within the APEC Region (à paraître). Les traitements réservés et les différentes jurisdictions à l'éviction par les prix ont été analysés dans "Prix d'éviction" (Paris, OCDE, 1989).

65. Dans un récent article fort intéressant sur les leçons à tirer de cette affaire, le Professeur Harry First fait valoir que la théorie dédommagement/investissement de la Cour Suprême négligeait le fait que l'objectif premier de l'entente n'était peut-être pas de réaliser des bénéfices sur le marché des Etats-Unis mais plutôt de préserver les bénéfices sur le marché national. Voir Harry First, "An Antitrust Remedy for International Price Predation: Lessons from Zenith v. Matsushita" Pacific Rim Law & Policy Journal, Vol. 4, No. 1 (1995) à 211.

66. Id. De même, dans le cas européen de AKZO, la Cour européenne de justice a conclu que lorsque les prix étaient inférieurs au coût variable moyen, il y avait présomption d'éviction. Lorsque les prix étaient supérieurs au coût variable moyen mais inférieurs aux coûts totaux moyens, l'entreprise pouvait être déclarée coupable de prix d'éviction si les prix étaient fixés dans le contexte d'un projet visant à éliminer un concurrent. Voir AZKO Chemie v. Commission et R. Whish, supra note 3 à 531.

67. Voir Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation 113 S. Ct. 2578 (1993).

68. Selon un expert américain, la jurisprudence actuelle des Etats-Unis ne prend peut-être pas correctement en compte les facteurs susceptibles d'aboutir à une éviction internationale par les prix. Il suggère en conséquence de définir le délit d'éviction internationale en prenant en compte des facteurs tels qu'un marché intérieur fermé et la formation de prix en dessous des coûts moyens totaux. H. First, supra note 65 à 241.

69. Voir Jacob Viner, Dumping: A problem in International Trade. 1923.

70. La question de la fréquence avec laquelle les entreprises ont recours à des pratiques internationales d'éviction par les prix pour créer un monopole reste très controversée.

71. Jeffrey Garten, ancien Sous-Secrétaire au commerce qui a récemment pris sa retraite a cité dans plusieurs discours publics, parmi les conditions conduisant à un dumping, l'existence de marchés locaux fermés, des pratiques anticoncurrentielles sur le marché local de l'exportateur autorisant des ventes en-dessous des coûts, et les subventions accordées par les gouvernements. Il a également fait valoir que le droit de la concurrence peut agir parallèlement à la législation antidumping mais ne peut pas la remplacer. Selon lui, le recours exclusif à la législation antitrust aux Etats-Unis est sans doute d'une efficacité douteuse s'agissant de régler les problèmes qui se posent à l'extérieur des Etats-Unis, et les délais prévus ne sont pas adaptés aux cas où il est nécessaire d'assurer une protection rapide.

72. Harvey Applebaum, "Relationship of Trade Laws and the Antitrust Laws" dans The GATT, the WTO and the Uruguay Round Agreements Act, Practicing Law Institute 1995 à 543.

73. La législation antidumping exige que la preuve soit faite que la pratique déloyale a causé ou menacé de causer un préjudice matériel. Ce préjudice doit être plus qu'immatériel ou de minimis. La plupart des textes officiels, ainsi que les dispositions de l'OMC concernant le dumping, comportent une liste d'indicateurs permettant de déterminer l'incidence d'importations au rabais sur l'industrie locale. Conformément au texte de l'accord issu des négociations d'Uruguay, l'examen de l'incidence des importations faisant l'objet d'un dumping sur la branche de production nationale concernée comportera une évaluation de tous les facteurs et indices économiques pertinents y compris les suivants : diminution effective et potentielle des ventes, des bénéfices, de la production, de la part de marché, de la productivité, du retour sur investissements, ou de l'utilisation des capacités ; facteurs qui influent sur les prix intérieurs ; importance de la marge de dumping ; effets négatifs, effectifs et potentiels, sur le flux de liquidités, les stocks, l'emploi, les salaires, la croissance, la capacité de se procurer des capitaux ou l'investissement. Accord sur la mise en oeuvre de l'Article VI de l'Accord général sur les tarifs douaniers et le commerce de 1994, Partie I, Article 3, section 3.4.

74. Voir champ du droit et de la politique de la concurrence - Aperçu général. Groupe de travail du Comité des échanges - Groupe de travail numéro 1 du Comité du droit et de la politique de la concurrence, 1995.

75. Voir Champ d'application du droit et de la politique de la concurrence, Aperçu général, Groupe de travail du Comité des échanges, Groupe de travail N° 1 du Comité du droit et de la politique de la concurrence (Paris : OCDE 2 octobre 1995). Voir également une série d'affaires datant de 1991 à propos desquelles la Cour européenne de justice a examiné la relation entre l'Article 90(1) et l'Article 86 dans Hofner & Elser v. Macrotron ; Merci Convenzionale Porto di Genova v. Siderurgica Gabrielli et ERT v. Dimotiki. Ces affaires ont trait à des pratiques prétendument anticoncurrentielles d'entreprises privées bénéficiant de concessions exclusives. En ce qui concerne la conduite anticoncurrentielle d'activités publiques en tant que telles, elle relèverait des dispositions de l'Article 85 et 86. Pour une analyse plus détaillée de ces questions au regard du droit de l'Union européenne, voir également R. Whish, supra note 3.

76. Voir Réforme réglementaire, privatisation et politique de la concurrence (Paris : OCDE 1992).

77. Voir Michal J. Trebilcock & Robert Howse, The Regulation of International Trade (London: Routledge Press, 1995) at 215.

78. Bernard Hoekman & Pierre Sauvé, Liberalizing Trade in Services (Washington D.C.: World Bank Discussion Paper) at 4.

79. Voir Statement of Administrative Action, H.R. Doc., No. 103-316, 103rd Cong., 2d. Sess. 297.

80. Hoekman & Sauvé, supra note 78.

81. Voir Article VIII(1) du GATS.

82. Voir Trebilcock & Howse, supra note 82 at 232 et Article VIII:2 du GATS.

83. Voir Article VIII (b) du GATS.

84. Au moins deux arrangements régionaux ont supprimé lapplicabilité des règles antidumping au commerce intrarégional. Il s'agit de l'Accord entre l'Australie/Nouvelle-Zélande et de l'Union européenne. Bien que certains spécialistes des problèmes antitrust des Etats-Unis aient recommandé la suppression des mesures antidumping entre les pays membres de l'ALENA, cette proposition a reçu un accueil mitigé.

85. Voir Bernard Hoekman & Petros Mavroidis, "Antritrust Based Remedies and Dumping in International Trade", Banque internationale de reconstruction et du développement, août 1994, et H. First, supra note 65.

86. De nombreuses initiatives dans ces directions sont déjà bien engagées. Qu'il suffise de considérer les arrangements bilatéraux conclus ces dernières années entre les Etats-Unis et le Canada et la CE à titre d'exemples. Voir aussi le communiqué de presse du Ministère de la justice du 16 juillet 1994 concernant Microsoft. L'Assistant Attorney General for Antitrust a estimé que l'enquête concernant Microsoft représentait "le premier effort coordonné de deux organes chargés d'appliquer les textes pour engager et régler une affaire antitrust."

87. Voir, E. Fox et J. Ordover, supra note 14.

CANADA

MARKET DEFINITION IN ABUSE OF DOMINANT POSITION CASES UNDER THE CANADIAN COMPETITION ACT*

I. Introduction

The subject of market definition is a key step in the development of most competition law cases. In addition to providing the general context for analysis of a case, typically the specification of the relevant product and geographic markets contributes directly to the assessment of competitive effects. It often has an important bearing on the application of specific statutory elements and the overall disposition of a case.[1] Nonetheless, as is widely recognized by practitioners, market definition is also a challenging step in antitrust analysis, which has often been handled unsatisfactorily.[2]

Market definition raises particularly challenging issues in abuse of dominant position (or monopolization) cases. In such cases, the prospective price increase (hypothetical monopolist) tests that are conventionally employed in delineating markets in merger cases are generally not suitable, at least without appropriate modification. The need for a modified approach relates to the different time frame in abuse cases (typically, such cases, unlike mergers, are at least partially retrospective rather than prospective in nature). This often calls for differing presumptions regarding prevailing market conditions and the meaning to be attached to evidence regarding the availability of substitutes.[3]

In addition to relevant economic literature, several recent cases under the abuse of dominant position provisions of the Canadian *Competition Act* provide insights into market definition in abuse cases. These provisions, which were adopted in 1986, are a key element of competition law and policy in Canada. They provide remedies to deal with a broad range of business practices that can restrict competition.[4] The abuse provisions are civil in nature and embody a flexible, case-by-case approach.[5] Recent decisions by the Competition Tribunal in several cases under these provisions, including three contested cases and a consent settlement, have highlighted their viability and effectiveness as a tool for dealing with monopolistic conduct.[6]

The elaboration of sound approaches to market definition in abuse of dominant position cases is a matter of more than academic interest. In the 1990s, there has been a resurgence of abuse of dominant position/monopolization cases in Canada and the U.S., in comparison to the period of relative inactivity in this area in the 1980s.[7] Arguably, many of the key challenges for competition policy in the coming years will be in this area. For example, abuse of dominance/monopolization may have an important role to play in addressing competition issues in high technology and other industries involving intellectual property rights and/or standardization issues. In such industries, assessment of the competitive and welfare effects

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of exclusionary practices is particularly challenging.[8] Abuse of dominance/monopolization may also be relevant to issues regarding trade liberalisation and access to markets.

This paper reviews key aspects of the recent decisions of the Competition Tribunal relating to market definition in abuse of dominance cases in the context of relevant economic literature. The paper is structured as follows. Section II discusses the role of and approach to market definition in abuse of dominance cases, in light of the nature of such cases and related economic theoretical considerations.[9] A key observation is that, in abuse cases, markets should normally be defined with reference to the specific anti-competitive practices dealt with in the case.[10] Section III discusses the general principles that have been articulated by the Competition Tribunal with respect to market definition in abuse cases. Section IV examines the specific findings of the Tribunal regarding the relevant product and geographic markets in the three contested cases under the Canadian abuse provisions to date, namely the *NutraSweet*, *Laidlaw* and *A.C. Nielsen* cases. Section V provides concluding remarks.

II. Conceptual Aspects of Market Definition in Abuse of Dominance Cases

This section of the paper outlines some key conceptual issues relating to market definition in abuse of dominance cases. In particular, subsection (1) briefly reviews the role of market definition in competition law cases generally. Subsection (2) provides relevant background on general principles relating to the concept of market power. Subsection (3) explains the concept of a relevant antitrust market and its use in evaluating market power in antitrust cases. Subsection (4) discusses several factors that affect the application of this concept in abuse of dominant position cases. Subsection (5) outlines some suggested analytical steps for delineating markets in abuse cases.

(1) The Role of Market Definition in Competition Law Cases

Definition of the relevant product and geographic markets plays a central role in the development of most competition law cases. From an economic standpoint, definition of the relevant markets can substantially facilitate assessment of the competitive effects of business practices or transactions. From a legal standpoint, it may also be required in connection with specific statutory provisions.[11] The choice of relevant product and geographic markets often has an important bearing on the application of related statutory elements and the overall disposition of cases.[12]

It should be emphasised that market definition in antitrust cases is not an end in itself. Rather, it is a tool that can be helpful in analysing the competitive effects of business practices or transactions that are under examination in particular cases. More specifically, the purpose of market definition is to assist in determining whether market power can be or is being exercised.[13] In this regard, it is helpful to briefly review the concept of market power and certain basic conditions that must be present if it is to be exercised.

(2) The Meaning and Determinants of Market Power

Generally speaking, the concept of market power refers to the ability of a firm (or a group of firms acting jointly) to profitably maintain prices above competitive levels for a significant period of time.[14] The qualifier "profitably" is important -- it denotes the fact that in order to exercise market power, a firm must be in a position to raise prices without losing sales so rapidly that the price increase is unprofitable and must be rescinded (as would be the case in a competitive market). In addition to higher

than competitive prices, the exercise of market power can be manifested through reduced quality of service or a lack of innovation in the relevant market(s).[15]

The ability of an individual firm or group of firms acting jointly to exercise market power is a function of the firm(s)' elasticity of demand. More specifically, the market power that may be exercised by the firm is inversely related to its individual elasticity of demand.[16] The firm's elasticity of demand, in turn, depends on factors such as: (i) the elasticity of demand for the industry as a whole; (ii) the elasticity of supply by any competitive fringe firms in the market; and (iii) the market share of the firm(s) whose conduct is being evaluated.[17]

The direction and significance of these relationships may be summarised as follows: First, the firm's elasticity of demand is directly related to the industry elasticity of demand -- the higher the latter, the higher will be the former. The existence of good substitutes for an industry's outputs would generally imply a high elasticity of demand and would therefore limit the market power of participating firms in an industry.

The second relationship concerns the influence of other firms in the market (the competitive fringe) on the exercise of market power by a particular firm. Specifically, the higher the elasticity of supply by the fringe at a given price, the higher will be a particular firm's elasticity of demand, and therefore the lower its ability to exercise market power.

Finally, there is an inverse relationship between the market share of a (dominant) firm and its individual elasticity of demand. In other words, the higher a firm's market share, the lower will be its individual elasticity of demand and therefore the greater will be its ability to exercise market power.[18] This relationship can assume particular importance in abuse cases. Specifically, as a (dominant) firm's market share tends to unity (i.e., as it becomes a true monopolist), the firm's individual elasticity of demand will tend to the corresponding elasticity for the industry as a whole. As discussed below, the above conditions provide the analytical focus for key aspects of market definition and related competitive analysis.[19] In particular, the importance of substitutes is implicated directly in the concept of a relevant antitrust market.

(3) The Concept of a Relevant Antitrust Market

The concept of a relevant antitrust market is specifically intended to assist in the analysis of market power issues. In broad terms, it involves the delineation of a range of product and geographic space within which market power can be exercised. Generally, this involves identifying the range of close substitutes for a product and the range of geographic space within which consumers will readily turn to alternative suppliers of the product.

More specifically, a relevant antitrust market is constructed by beginning with arbitrarily narrow ranges of products and geographic space and asking whether attempts to exercise market power within such "candidate markets" would be defeated by substitution to other products or suppliers located in a broader geographic area. If so, then these products or alternative suppliers are included in the relevant antitrust market.[20] The relevant market is the smallest group of products and the smallest geographic area in relation to which sellers can profitably impose a small but significant and non-transitory increase in prices above competitive levels. The basis for this approach is that additional products/suppliers in other locations should be included to the extent that they would prevent the successful exercise of market power.

The concept of a relevant antitrust market may be contrasted with the classical concept of an economic market. The latter concept encompasses the complete set of suppliers and demanders whose trading establishes the price of a good.[21] This approach is appropriate for many purposes of neoclassical

analysis. Unlike that of relevant antitrust markets, however, it has no specific connection to the purposes of antitrust analysis.[22]

Relevant antitrust markets can be smaller or larger than the corresponding classical economic markets. An antitrust market would be smaller, for example, if there is a substantial competitive fringe that does not constrain prices but is willing to sell at the market determined price. An antitrust market could be larger, on the other hand, where due to an absence of entry barriers, firms from outside an industry would enter quickly in response to a significant price increase.[23]

Broadly speaking, the principles governing the delineation of relevant antitrust markets are common to abuse of dominance (or monopolization) and merger cases. Like merger cases, such cases are fundamentally concerned with the issue of whether conditions permitting the exercise of market power are present. Moreover, these conditions are essentially the same in all types of cases - i.e., they relate to the market demand elasticity for the relevant products, the market share of (dominant) firms and the role of fringe suppliers or potential entrants. Nonetheless, as discussed below, the appropriate application of market definition principles can differ importantly in the context of abuse of dominance as distinct from merger cases.

(4) Special Considerations Applying to Market Definition in Abuse of Dominance Cases

While the definition of relevant markets in abuse cases reflects the same underlying economic principles as in merger cases, the application of these principles occurs in a different context. To begin with, in merger analysis, delineation of the relevant market is usually based on hypothetical future price increases that could be imposed by the merging firms above prevailing levels.[24] This is known as the "hypothetical monopolist" approach.

In contrast, in abuse cases the time frame for analysis generally is at least partly retrospective rather than prospective. That is, such cases typically relate to a lessening of competition that has already occurred rather than a lessening that may occur as a result of a proposed transaction.[25] In fact, in (well founded) abuse cases, it is quite likely that a substantial degree of market power has already been exercised in the market for a significant period of time. This will have important implications for presumptions regarding prevailing price levels and the meaning to be attached to evidence regarding the availability of substitutes in the market.

To appreciate this, it is helpful to recall some basic implications of consumer demand theory and the economics of competition and monopoly.[26] In particular, it is important to note that the elasticity of market demand for a product can vary extensively depending on the prevailing price level (and, implicitly, the market structure) in an industry. In a competitive industry, it is entirely possible for prices to be set at a level where the (market) demand is inelastic (i.e., the elasticity is less than one). Indeed, identifying such situations is a key focus of merger investigations, since they provide a setting in which market power can potentially be created or augmented through a merger or other arrangement such as a cartel. The standard approach to market definition in merger cases assists directly in this process, by identifying ranges of product and geographic space for which readily substitutable alternatives do not exist.

In contrast, it is widely recognized that monopolies or (less categorically) dominant firms with market power will generally price in the elastic range of the demand curve for their product(s). The reason is that, at any point in the inelastic range of the curve, total revenue can be increased if output is reduced and price is raised. Within the elastic range, any further increases in the price of a product will result in significant substitution by consumers away from the product. According to the normal approach applied

in merger cases, this would generally be taken as evidence that the relevant antitrust market should be delineated more widely. Such evidence of substitutability is, however, entirely consistent with the exercise of market power within a properly defined market in an abuse of dominant position case, since it is a natural consequence of operating within the elastic range of the demand curve.[27]

The fallacy of defining antitrust markets based on evidence of substitutability at supra-competitive prices was first discussed in the context of critical commentary on the U.S. *Cellophane* case,[28] and is sometimes referred to as the *Cellophane Trap* or *Cellophane Fallacy*.[29] The *Cellophane* case involved an allegation that the du Pont de Nemours Company had monopolised the supply of cellophane in the U.S. in violation of section 2 of the *Sherman Act*. In assessing this allegation, the U.S. Supreme Court defined the relevant market as consisting of a broad range of flexible wrapping materials, including waxed paper and other materials, rather than merely cellophane. This was based on the Court's finding that these products were perceived as reasonably interchangeable by consumers.

The critical consensus is that the Supreme Court erred in defining the market so broadly in the *Cellophane* case. In particular, it failed to recognise that consumer willingness to substitute alternative products *at a monopoly price* is fully consistent with the exercise of market power by the monopolistic firm.[30] As a result, it failed to appreciate the extent of market power being exercised by the du Pont Company.[31]

(5) Possible Analytical Steps For Delineating Markets in Abuse Cases

The antitrust literature has not identified a simple widely-applicable methodology for abuse or monopolization cases comparable to the hypothetical monopolist approach that is routinely used in merger cases.[32] Nonetheless, it is possible to identify a number of analytical procedures or steps which may be helpful, depending on the facts in each case.

To begin with, in abuse cases, delineation of the relevant product and geographic markets should take into account explicitly the impact of alleged exclusionary practices, which typically are at the heart of the case.[33] Such practices may include predatory pricing, exclusionary contractual provisions, the pre-emption of scarce facilities, the adoption of product specifications or standards that tend to thwart the entry of competitors, anti-competitive vertical margin squeezing and many other practices.[34] Relevant markets delineated for the purpose of assessing such practices should consider explicitly the substitution effects that may have already taken place as a result of the practices. Such markets may differ strikingly from the markets that would be useful in assessing merger cases, even where the same industries are involved.[35]

In principle, if sufficient information is available, the relevant demand elasticities can be evaluated directly by substituting in the price that would prevail under competitive conditions. In practice, however, the information necessary for this procedure (including the competitive price) is unlikely to be available. Attempting to estimate the competitive price would introduce additional complexities and uncertainties.[36]

As a result, in most cases, definition of the relevant product market in abuse of dominance cases is likely to be based on functional characteristics of a product and related evidence of consumer behaviour. This may include evidence such as the physical characteristics of the product, the uses to which the product are put, and evidence about behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices.

In addition, other factors such as switching costs and parallel price movements that indicate substitutability may be relevant.[37] Similarly, delineation of the relevant geographic market is likely to be based on practical factors such as transportation costs and perishability that limit the ease with which products can be moved across geographic space.[38] The limitation of this approach is that it tends to portray substitutability in absolute rather than relative terms.

The different conceptual focus of abuse of dominant position as opposed to merger cases will also imply differences in related aspects of antitrust analysis. For example, a key step in merger analysis is the identification of actual suppliers present in the relevant market. In abuse cases, suppliers who would have otherwise been present in the market may have been excluded as a result of exclusionary practices by the dominant firm(s).[39]

Finally, in some cases, it may be preferable to look for direct evidence of the exploitation of market power (e.g., abnormally high prices or profits in an economic sense) rather than focusing on market definition *per se*. In addressing a monopolization scenario, one might look for historical evidence of a decline in output or excessive price increases following implementation of alleged exclusionary practices. It should be noted that the use of such evidence entails its own significant problems of interpretation and reliability.[40] Nonetheless, it could be a relevant factor in some cases.

III. The Overall Approach of the Competition Tribunal to Market Definition in Abuse Cases

The Competition Tribunal's decisions in the three contested cases to date under the Canadian abuse of dominant position provisions, namely the *NutraSweet*, *Laidlaw* and *Nielsen* cases, provide further practical guidance regarding many of the conceptual and other issues discussed in the preceding section of the paper. To begin with, its decisions recognise that the appropriate approach for defining relevant markets may vary depending on the nature of an antitrust case and the applicable statutory provisions.[41]

With regard to abuse cases, in *NutraSweet*, the Tribunal observed that "The need to identify a relevant product arises in paragraph 79(1)(a), which refer[s] to substantial or complete control of 'a class or species of business.'"[42] It further noted that "Paragraph 79(1)(c), which refers to a substantial lessening of competition in a 'market', also requires identification of a relevant product."[43] In making these basic observations, the Tribunal emphasised that it had in mind an *economic* concept of a product market, the identification of which requires careful consideration of possible substitutes.[44]

Regarding the geographic dimension of the relevant market, in *NutraSweet*, the Tribunal indicated that "geographic market definition represents an attempt to determine the extent of the territory where there is competition and in which prices for a product tend toward uniformity."[45] This statement appeared to endorse a classical rather than an antitrust-oriented approach to geographic market definition as outlined in Section II.

In the *Laidlaw* case, however, the Tribunal took a much more explicitly market power-oriented approach, framing the issue to be addressed as:

> what are the boundaries of the geographic area within which competitors must be based if they are to provide effective competition to [the respondent] Laidlaw. Effective competition means that the competitor provides a significant restraint on Laidlaw's ability to raise prices above the competitive level.[46]

This clearly represents an antitrust rather than a classical approach to delineation of the relevant geographic market, in that it refers directly to the issue of whether alternative suppliers exercise a significant restraint on the respondent's ability to raise prices. The Tribunal's articulation of this principle also takes account of the appropriate time frame for analysis in an abuse case, in that the issue is framed in a present rather than a prospective sense.

At a general level, it is also evident that the Tribunal has taken a *pragmatic* approach to issues of market definition in abuse of dominant position cases, consistently relating market definition to the evaluation of the competitive effects of the business practices under examination in the cases, and the critical issue of whether market power can be exercised.[47] As noted in Section I above, in several cases, the Tribunal has indicated that the specific approach to market definition can vary depending on the nature and purpose of the section. Furthermore, in *NutraSweet*, the Tribunal went so far as to point out that "It really matters little ... whether the relevant product is defined as 'aspartame' or 'high intensity sweeteners' so long as the limited extent to which other high intensity sweeteners constrain aspartame prices is kept in mind."[48] This statement recognises that ultimately it is the assessment of substitution possibilities and their implications for market power rather than the particular market boundaries selected that are relevant to the analysis of the competitive effects of the practices challenged in an abuse case.

In the *Laidlaw* case, the Tribunal also dealt specifically with the issues outlined in Section II above regarding the *Cellophane Fallacy* and the need for a different approach to market definition in abuse of dominance as opposed to merger cases. In *Laidlaw*, the respondent based key elements of its argument on the assertion that definition of the relevant product markets should be based on the conceptual test in the Director's *Merger Enforcement Guidelines* (i.e., the hypothetical monopolist approach). Under this approach, the relevant geographic markets would have been defined broadly, possibly militating against a finding that Laidlaw enjoyed a dominant position in the market at least in certain areas.[49]

In contrast, based on the arguments developed in Section II above, the Director took the position that in an abuse case, the hypothetical monopolist approach based on prevailing price levels was generally inappropriate. Rather, the Director argued that the determination of the geographic boundaries of the market should be based principally on the past and present conduct of the customers and providers of service. Furthermore, the Director argued that although different evaluative criteria may be relevant for determining the dimensions of the product and geographic markets in different cases, the logic of the scholarly arguments relating to the *Cellophane Fallacy* applies equally to both dimensions of the market.

In the result, the Tribunal held conclusively in favour of the Director's position regarding this aspect of the case. It stated that:

> indeed, as counsel for the Director argues, it is not obvious that a significant non-transitory price increase test for determining market boundaries is useful in an abuse of dominant position case. In an abuse of dominant position case it is not the *potential* dominant position or the increase in dominance of a firm which is at issue. The respondent firm is alleged already to *have* a dominant position in the relevant market. The market definition issue relates to an existing situation rather than a prospective one.[50]

Thus, in the *Laidlaw* case, the Tribunal has recognized explicitly the existence of the *Cellophane Fallacy*, and shown an appreciation of the underlying economic issues.

In sum, in its decisions in the three contested abuse of dominance cases in Canada to date, the Competition Tribunal has shown considerable sophistication in its treatment of market definition issues. It has emphasised the essential relationship between market definition in competition law cases and the

analysis of market power, and recognized the economic issues relating to the *Cellophane Trap*. The specific findings of the Tribunal regarding the product and geographic markets in these three cases are reviewed in the next section of the paper.

IV. The Relevant Product and Geographic Markets in Recent Competition Tribunal Decisions in Abuse Cases

This section of the paper examines the specific findings of the Competition Tribunal with respect to the relevant product and geographic markets in the *NutraSweet, Laidlaw* and *A.C. Nielsen* cases. The cases highlight the importance the Tribunal attaches to the functional characteristics of products and the actual behaviour of consumers and suppliers in defining relevant markets in abuse cases. In many respects, the Tribunal's deliberations provide practical illustrations of the principles discussed in the preceding parts of this paper.

(1) The Nutrasweet Case

The *NutraSweet* case dealt with a series of contractual and other exclusionary practices relating to the sale of an intense sweetener, aspartame, in Canada. A key allegation by the Director of Investigation and Research in this case was that the NutraSweet Company had employed its well-known trademark to foreclose competition in the market for aspartame by paying a substantial allowance to customers who displayed its logo, while also requiring all those displaying the logo to use exclusively NutraSweet brand aspartame. The remedial order issued by the Competition Tribunal in the case prohibited NutraSweet from continuing to offer discounts for the display of its logo and from engaging in other acts, such as offering its customers meet-or-release or "most-favoured-customer" clauses, which were deemed to be anti-competitive.

The Relevant Product Market

The definition of the relevant product market was a critical issue in the *NutraSweet* case. In defining the relevant market, it was necessary to consider whether aspartame was sufficiently distinct from other sweeteners to justify its being treated as a separate product or as part of a broader class of sweeteners. The factors considered by the Tribunal in making this determination included taste, caloric content, other physical characteristics, safety concerns, price differences, and users' response to price changes.[51] Ultimately, the factors which had a determining weight in defining the market were principally related to physical properties, the distinct end uses of alternative products and institutional barriers to the use of potential substitutes.

The Tribunal first addressed the basic question of whether caloric sweeteners (such as sugar) and high intensity sweeteners are substitutes. Regarding caloric sweeteners and high-intensity sweeteners, the Tribunal indicated that on the basis of physical characteristics, they form two broad classes of sweeteners. The latter have a sweetness by weight that is many times that of the former (30 to 300 times). Notwithstanding this property, the Tribunal noted that the demand for sweeteners is determined at times by factors other than sweetness. Thus, in products which require bulking agents, the bulking property of caloric sweeteners is more important than the sweetness property. The importance of this physical characteristic can be seen in the use of caloric sweeteners vs. high intensity sweeteners in products that require bulking agents, like baking products. Based on these factors, the Tribunal determined that sugar should not be included in the relevant market.

Evidence relating to the physical properties of these products was supplemented with evidence regarding the end uses for the products. Two end uses of sweetener consumption were considered: table-top[52] and industrial sales.[53] Regarding table-top sales, the Tribunal found that consumers prefer all sweeteners rather than aspartame in direct consumption.[54] As far as industrial sales were concerned, the Tribunal found that most sales of aspartame were to the carbonated soft drink industry in contrast with the limited sales of all sweeteners to the carbonated soft drink industry.[55]

The Tribunal also attached considerable importance to the role of health regulations as an institutional barrier affecting product substitutability. At the time of the case, existing Canadian health regulations did not permit other intense sweeteners to be used as a food additive, apart from aspartame.[56] Consequently, the Tribunal ruled that other intense sweeteners could not be considered as being in the same product market as aspartame in respect of its use as a food additive.

The Tribunal then went on to consider whether the use of other intense sweeteners as a non-food additive had a constraining influence on the price of aspartame. At the time of the proceedings, apart from aspartame, two high-intensity sweeteners had obtained approval in Canada for table-top purposes - saccharin and cyclamates.[57] While it was less expensive than aspartame on a sweetness equivalency basis, the Tribunal noted that saccharin was perceived by some consumers as suffering from an unpleasant aftertaste and was also associated with possible health risks. The use of cyclamates, the other approved high-intensity sweetener, was also affected by consumer perceptions regarding possible health concerns. Furthermore, the Tribunal noted that sales of high intensity sweeteners constitutes a very small proportion of table top sales.[58] On this basis, the Tribunal concluded that the use of these two approved high intense sweeteners was unlikely to exercise a constraining influence on the overall market price of aspartame.

As part of its assessment of the relevant product market, the Tribunal considered the possibility of entry into the market by two new high-intensity sweeteners, sucralose and alitame. It noted, however, that at the time of the case no country had granted approval to these new products. Acesulfame-k, which had not at that time been approved for use in Canada, was not viewed as raising health concerns. However, there was only limited capacity to produce it and this capacity was less than two percent of the total capacity dedicated to the production of aspartame.[59]

The Tribunal also considered several other factors relating to definition of the relevant product market. These included information relating to measures of cross elasticities of demand between aspartame and other products, market shares and advertising. In its analysis of these factors, the Tribunal focused on whether the price of potential substitutes constrained the price of aspartame. The two categories of potential substitutes considered were other high intensity sweeteners (for example, saccharin) and caloric sweeteners (for example, sugar).

Evidence supposedly related to the cross-price elasticity of demand between aspartame and sugar was presented by an expert witness for the respondent.[60] The evidence related to changes in the relative prices of aspartame and sugar and the percentage share of diet drink sales to total carbonated soft drink sales in Canada for the period 1984 to 1988. Using this data, the estimated average cross-elasticity between sugar and aspartame was argued to be equal to 0.14.[61]

Drawing on arguments advanced by the Director, the statistical evidence introduced by the respondent's expert was criticised by the Tribunal on two grounds. First, the Tribunal questioned whether the measure was an estimate of a substitution effect (i.e., users' response to price differences) or some other effect since the prices of diet and regular soft drinks were held equal over the period. The Tribunal stated: "...it is unclear what the measured "cross-elasticity" represents since the claimed effect of the price change is so indirect."[62] Second, the Tribunal noted that the estimation omitted important variables. The

Tribunal stated: "It is perfectly clear that the demand for diet products is greatly affected by life-style. No attempt was made to allow for this factor, nor could it have been, given the limited number of available observations."[63]

The respondent's expert witness also submitted estimates relating to the cross-elasticity between aspartame and cyclamates using the sales of table-top brands containing cyclamates and aspartame. An estimate of 0.35 was obtained, indicating a greater degree of indirect price competition than in the case of aspartame and caloric sweeteners used in soft drinks. The Tribunal, however, found no reason to believe that this estimate was more reliable than that regarding aspartame and sugar. In this regard, it stated that:

> The evidence does not support a conclusion that the changes in the relative shares of brands containing aspartame and cyclamates were due solely or primarily to what was happening to the prices of those ingredients. For example, consumers' perception of the safety of the two ingredients will obviously influence their relative sales.[64]

Regarding trends in the market shares of diet drinks and regular drinks, the Tribunal stated:

> The growth in sales of diet drinks has been much faster than that for regular drinks over a long period pre-dating the introduction of aspartame (as shown by the data filed for the United States between 1972 and 1988): the growth rate in the diet segment was well over two and one-half times that for regular drinks between 1972 and 1982, before aspartame was a factor, ... The fact that there was continued growth after aspartame was introduced and its price was falling does not in any way support a finding that the growth in the diet segment can be attributed to the fall in the price of aspartame.[65]

Similarly, regarding the table-top brands containing cyclamates and aspartame, the Tribunal held that "The evidence does not support a conclusion that the changes in relative shares of brands containing aspartame and cyclamates were due solely or primarily to what was happening to the prices of those ingredients."[66]

The Tribunal also considered the implications of evidence regarding the advertising of aspartame and sugar in Australia. In this regard, it stated: "While these advertisements indicate that the sugar associations believe that they can affect the demand for sugar (and aspartame) by discrediting the origin of aspartame, they do not affect the conclusion that substitution between diet and regular products is primarily life-style rather than price related."[67]

To sum up, the Tribunal found that:

> ...there is no evidence of direct competition between aspartame and caloric sweeteners and very weak evidence of indirect competition between diet and full-caloric products. There is, in comparison, some direct competition from other currently approved high-intensity sweeteners serving the diet market. None by itself, however, is a good substitute in large market segments.[68]

On this basis, Tribunal concluded that the relevant product market was aspartame. This finding was important for the Tribunal's overall conclusions regarding the case, since it also found that the NutraSweet Company was essentially the sole supplier of aspartame in Canada.

The Relevant Geographic Market

The extent of the relevant geographic market was also an important consideration in the *NutraSweet* case. The Director took the position that the relevant geographic market was Canada. This position was based on: (i) evidence of substantial price differentials between Canada and other geographic areas; (ii) the separate treatment of Canada in the respondent's marketing arrangements; and (iii) the distinct Canadian regulatory scheme for food additives.[69] In contrast, the respondent took the position that the relevant geographic market was world-wide. This view was based on perceptions that: (i) transportation costs for aspartame were low; (ii) tariff and non-tariff barriers were low; and (iii) there were minimal requirements for specialised infrastructure for distribution.[70]

In approaching this question, the Tribunal stated that:

> the critical question [is] whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas.[71]

It further stated that the respondent's contention regarding the ease of entry into distribution "should be qualified by noting that the mere existence of the NutraSweet logo, its history and its use ... is one of the conditions of entry faced by new distributors."[72] The Tribunal also noted the importance of country specific clauses in the respondent's multi-country contracts. Again, this highlights the important relationship between the behavioural context and the delineation of the relevant antitrust markets in abuse cases.

Finally, the Tribunal indicated that:

> the most important test of the operation of this [i.e., the impact of behavioural barriers to entry] and other factors in segregating the Canadian market from the rest of the world where there is competition (i.e., except for patent-protected areas) is in the prices actually paid.[73]

The Tribunal noted that NutraSweet's average prices in Europe were 10 percent higher than Canadian prices in 1987, six percent higher in 1988, and 13 percent lower in 1989.[74] Furthermore, evidence that Canadian prices were higher than European prices in 1987 but lower in 1989 supported the view that Europe should not be included as part of the relevant geographic market. Summing up this evidence, the Tribunal observed that:

> Country-specific clauses in multi-country contracts along with these average price differences indicate that market conditions in Canada, which include the marketing practices of NSC [NutraSweet Company], can and have produced prices that differ significantly from those in other regions of competition.[75]

On this basis, the Tribunal concluded that it was reasonable to treat Canada as a separate geographic market for the purposes of evaluating the effects of NutraSweet's marketing practices.

(2) The Laidlaw Case

The *Laidlaw* case dealt with a series of contractual and other practices engaged in by the respondent, Laidlaw Waste Systems, Inc., in the supply of commercial waste collection services in local markets on Vancouver Island in the province of British Columbia. The particular practices which were the

focus of the case included: (i) a series of acquisitions of competing businesses on Vancouver Island by Laidlaw; (ii) alleged restrictive provisions in Laidlaw's contracts with its customers, including automatic self-renewal ("evergreen") clauses, "right of first refusal" and "right to compete" clauses;[76] and (iii) apparent threats of "sham" litigation.[77]

The geographic dimension of the relevant product market was a central issue in the *Laidlaw* case. The Tribunal's handling of this issue illustrates key aspects of its approach to market definition in abuse cases. In particular, the decision illustrates: (i) the practical importance of the *Cellophane Fallacy* and the Tribunal's appreciation of the underlying issues; and (ii) the Tribunal's emphasis on pragmatic factors such as technical aspects of service delivery, regulatory constraints and the past and present behaviour of firms.

The Relevant Product Market

In contrast to the *NutraSweet* case, the relevant product market was not extensively debated in the *Laidlaw* case. Both parties accepted that the relevant product was a specific category of waste collection and disposal service: "lift-on-board" or front end service provided to (mainly commercial) customers who retain bins on their premises.[78] Such service was distinguished from two other types of waste collection service: (i) the collection of garbage which has been placed in bags or cans, usually at curbside; and (ii) the collection of garbage placed in very large containers which are transported to a dump site for emptying.

In adopting this definition of the relevant market, the Competition Tribunal emphasised that each category of waste collection service serves a distinct group of users.[79] In particular, curbside service is used by residential customers, small apartment buildings and businesses that generate only small volumes of garbage. Large container service is required by major industrial facilities or construction projects which generate large volumes of waste. Lift-on-board service is used primarily by businesses such as restaurants and office buildings that generate relatively modest amounts of garbage. The Tribunal also noted that each type of waste collection service is provided with a distinct type of truck. In general, the trucks cannot easily be switched from one category of service to another as they involve distinct technical configurations.[80]

The Tribunal also noted that customers using lift-on-board service may be distinguished according to their size and methods of purchasing the product.[81] Some customers require no more than one bin for service, and typically obtain service through a standard form commercial contract. Others, either because of their volume of service or because they are public entities, seek service through a process of public tender. However, since no argument was presented that the relevant product market should be distinguished because of the size or method of purchasing, the Tribunal made no distinction on this basis.[82]

The Relevant Geographic Market

The specific issues before the Tribunal concerned the extent of several local markets for lift-on-board service on Vancouver Island. The Director contended that three such markets could be identified: the three areas that fell within a 50 kilometre radius of "hubs" employed by the respondent in (i) the Cowichan Valley (Duncan) area; (ii) the City of Nanaimo; and (iii) the District of Campbell River. In contrast, the respondent took the position that two wider geographic markets should be considered: (i) a market embracing both the Cowichan Valley Regional District *and* the Nanaimo Regional District (i.e., an area roughly co-extensive with the first and second markets identified by the Director); and (ii) the eastern

portion of the Comox-Strathcona Regional District area including the District of Campbell River (i.e., the third market identified by the Director) and several additional communities.[83]

This debate over the extent of the geographic markets carried considerable significance for the case. The respondent's contention particularly regarding the scope of the second geographic market that it postulated (i.e., the eastern portion of the Comox-Strathcona Regional District) had direct implications for the threshold element of control. As indicated by the Tribunal "If they [the disputed areas] are [part of the relevant geographic market], then Laidlaw's share of that market is probably below 50 per cent and no *prima facie* finding of dominance would arise. If they are not, then Laidlaw's market share is considerably higher."[84]

As noted in Section III, the resolution of this issue turned importantly on arguments relating to the *Cellophane Fallacy*. The respondent grounded its argument on the hypothetical monopolist approach, arguing that any attempt by it to raise prices significantly *above prevailing levels* would be overwhelmed by new competition from alternative suppliers in the above-noted two markets. The Director argued essentially that the respondent's position was subject to the *Cellophane Fallacy*, in that it overlooked the possibility that Laidlaw was already operating in the elastic portion of the demand curve. In this context, evidence that a *further* increase in prices would induce substitution toward alternative suppliers was consistent with the Director's case.

As noted in Section III, the Tribunal accepted the Director's position regarding the *Cellophane Fallacy* at the level of principle. It further reasoned that:

> With respect to the use of Laidlaw cost and revenue information in the Cowichan Valley (Duncan) - Nanaimo areas, if ... Laidlaw is without effective competition in those areas, then there is no reason to assume that the revenue figures which have been provided are ones which would exist if Laidlaw were constrained by a competitive market ("the cellophane fallacy"). Accordingly, an analysis of the incremental costs, which a provider of the service could sustain and still compete effectively in the remote market, based on such figures is not persuasive.[85]

The Tribunal also attached importance to various government regulations regarding the use of dump sites that limited the extent of the geographic markets. The evidence indicated that the regional districts have by-laws that require that only solid waste from certain areas be dumped in the various landfill sites. In the Comox-Strathcona Regional District, the use of dump sites was restricted to their residents. In particular, the Pigeon Lake disposal site located in the Courtney-Comox-Cumberland area only accepted refuse collected in those municipalities; the Campbell River dump was only open to residents of the District of Campbell River and specific surrounding electoral areas; and the dump site at Sayward was limited to refuse collected from the vicinity of that village. However, these regulations were not deemed to prevent a hauler operating on different days in different areas using the appropriate dump site. In addition, the Tribunal noted that arrangements could be made with dump site operators for the dumping of small volumes which had been collected outside their area.[86]

The Director's position regarding the matter of geographic market delineation also relied heavily on evidence respecting the past and present behaviour of the providers of lift-on-board service in the areas in question.[87] This evidence generally supported a conclusion that the outer boundaries of a local market for lift on board waste collection service are within 50 kilometres or less from a hauler's hub of operation. Such hubs are generally located in close proximity to a substantial population centre and a disposal site.[88] Evidence regarding the business of a number of other waste collection companies that had previously operated in this area was consistent with this general conclusion. Further, the Tribunal noted that in a written submission to the Competition Bureau regarding another matter, the respondent described the

business as "...generally local in nature essentially defined by political jurisdictions and transportation economics. They tend to cluster around metropolitan areas."[89]

In reviewing this evidence, the Tribunal noted that:

> Evidence respecting past and present players in the market must of course be considered carefully. The conduct may result from characteristics particular to those players ... rather than being evidence of the actual geographic scope of possible effective competition. In this case, however, the evidence of the historical and present conduct of what might be called the small collection and disposal participants in the market is buttressed by other evidence.[90]

The respondent attempted to argue that since its operation serviced some areas from other hubs, these areas were all one market. It pointed to the fact that it serviced Duncan once a week with a truck sent from Nanaimo, thereby suggesting that the two areas constituted one market.[91] The Tribunal considered, however, that this conduct could be characterised as cost minimisation by a company that operates in two adjacent markets, one of which has excess capacity.

In the result, the Tribunal accepted the proposition that "when assessing the boundaries of the geographic market, the place at which the trucks are parked is relevant as a hub."[92] It also accepted that the extent of local geographic markets for lift-on-board service was generally confined to a radius of 50 kilometres around each hub. In light of these and the other factual considerations noted above, the Tribunal concluded that the District of Campbell River was not part of a wider geographic market including the Courtney-Comox-Cumberland area.

(3) The A.C. Nielsen case

The *A.C. Nielsen* case involved allegations that a division of the D&B Companies of Canada known as Nielsen Marketing Research (formerly operated by the A.C. Nielsen Company) had engaged in a series of anti-competitive acts related to the supply of electronic scanner-based market tracking services in Canada. The specific anti-competitive acts which were the focus of the case included Nielsen's entering into exclusive purchasing contracts for scanner data with retailers, the provision of financial inducements for exclusive access to such data and the Company's use of long term exclusive contracts for the supply of scanner-based market tracking services to manufacturers of consumer packaged goods. A key issue in the case was whether the relevant market included only electronic scanner-based market tracking services (as was contended by the Director of Investigation and Research) or whether it also included other types of market tracking services such as those based on in-store audits, warehouse withdrawal information and in-home sampling of households or consumers (as the respondent argued).

The Relevant Product Market

The Tribunal began its analysis of the relevant product market with a general review of the nature and types of market tracking services. Market tracking involves collecting data, over time, on product movement to produce an estimate of total market size and direction of growth for each product category being tracked and or to indicate the relative performance or market share of a particular brand or item within the product category. Market tracking services assist consumer-goods manufacturers to screen, plan, test and evaluate their individual brands and marketing programs. Three types of methods are used to collect data for market tracking services: store audit; warehouse withdrawals; and scanner data. Such services may also be distinguished from consumer panel data, which are based on

representative samples of households in a particular geographic region, and from "key accounts" data which are retailer-specific.

In evaluating the degree to which these products could be considered to be substitutes, the Tribunal considered the functional characteristics, intended uses and relative prices of the various types of market tracking services.[93] It attached particular importance to differences in the timeliness, detail, accuracy, reliability and cost of collection of the various products as well as the extent to which the various products allowed cross-analysis of product movement data with "causal data" relating to specific marketing initiatives.

The Tribunal focused initially on the question of whether audit or warehouse shipment-based tracking services are close substitutes for scanner-based tracking services. Evidence on the characteristics of these services provided by various packaged goods manufacturers indicated that scanner data are superior to the other types of data in several respects. In particular, scanner-based data are highly accurate, available quickly, and record consumer purchases directly rather than recording a surrogate of shipments to stores. Further, such data are based on actual retail prices by transaction, track product movement out to the stores for frequent time periods (a week or possibly less) and provide detail on each product down to the item level. Evidence on the characteristics of these services also indicated that buyers regard services based on retail scanner data as superior because they integrate causal data much more successfully than services based on other data sources.

The evidence also indicated that scanner data are generally preferable in that they are based on a weekly database as compared to a sixty-day database for audit data. In addition, the Tribunal noted that scanner data are more accurate as there are fewer opportunities for human error in comparison to audit data. This was also reflected in Nielsen's international studies which rated scanning as the 'most reliable data collection technology' and the fact that the company was to gradually replace audit and warehouse shipment data with scanner data.

The Tribunal then examined the issue of whether tracking services based on consumer panel data should be considered as acceptable substitutes for scanner-based services. It determined that consumer panel data are sufficiently inferior to scanner data for purposes of market tracking that they are not in the same market as scanner data.[94] This reflects significant differences in coverage, the number of variables that can be tracked in combination, the period (weekly vs. monthly) over which data can be provided and the level of detail of the data. The Tribunal also noted that consumer panel data are used principally to provide consumer diagnostics as opposed to general market tracking services.

On the matter of relative prices, the evidence of one manufacturer introduced by the respondent indicated that using panel data for tracking purposes could be one-third less expensive than buying scanner data. The Tribunal considered this to be further confirmation that the two products were not in the same market.[95]

Finally, the Tribunal also considered but, unlike its decision in *Laidlaw*, did not rely on, the potential relevance of the Cellophane Fallacy in the *Nielsen* case. It affirmed that this concept can provide a justification for excluding from relevant antitrust markets those products which are "apparent substitutes" at higher than competitive prices. The Tribunal considered, however, that it was not necessary to apply this concept to the facts in *Nielsen*, since, taking account of all the facts, other data sources were not even apparent substitutes for scanner data in market tracking services.[96]

In sum, based primarily on the functional characteristics of various data sources, the Tribunal concluded that the relevant product market for this application was scanner-based market tracking services,

as alleged by the Director.[97] This determination was clearly important for the Tribunal's overall conclusions in the case, since Nielsen was the sole supplier of such services in Canada.

The Relevant Geographic Market

Unlike the *Laidlaw* case, the relevant geographic market did not pose an issue under the *Nielsen* case. Since the data relevant to the provision of market tracking services referred to Canada rather than United States or other countries, the respondent did not dispute that the relevant market was Canada as alleged by the Director. The conclusion that the relevant market was Canada and not some specific region within Canada was supported by finding that very few customers bought regional data alone and that the sale of such data would not be sufficient to maintain the company in business.

In sum, the Tribunal's decisions regarding the relevant product and geographic market in the *NutraSweet*, *Laidlaw* and *A.C. Nielsen* cases embody a pragmatic approach to market definition in abuse of dominance cases. In many respects, this approach is consistent with and draws on the economic principles discussed in Section II of this paper. In particular, the decisions recognise that markets in abuse cases must be defined with reference to the alleged conduct of the respondent firms. They also highlight the Tribunal's reliance on practical indicia of the extent of product and geographic markets such as the functional characteristics and end uses of products.

V. Concluding Remarks

This paper has reviewed various lessons to be learned regarding market definition in abuse of dominant position cases from relevant antitrust literature as well as the decisions of the Canadian Competition Tribunal in three recent contested abuse cases. The discussion shows that the Tribunal's approach to market definition is consistent with key implications of the relevant literature. For example, the Tribunal's decisions have clearly recognized the differing time frame for analysis in abuse of dominant position as distinct from merger cases, and the resulting implications for conventional assumptions regarding the meaning to be attached to evidence regarding the availability of substitutes in the market (i.e., the issues relating to the Cellophane Fallacy which are discussed in section II of this paper). Overall, the Tribunal's approach to market definition emphasises practical considerations such as the physical characteristics of products, distinct end uses, patterns of consumer behaviour and other factors, in addition to econometric analyses of price responsiveness, where such evidence is available.

These findings augur well for the future development of competition law and policy in Canada. In the past decade, antitrust scholars and practitioners have been extensively concerned with refining analytical approaches used in merger enforcement. While merger issues will undoubtedly continue to be of critical importance, arguably, many of the key challenges for competition policy in the coming decade will be in the area of abuse of dominance or monopolization. The analysis in this paper suggests that these issues can be satisfactorily addressed within the basic framework that has been articulated by the Competition Tribunal in its decisions to date under the abuse provisions.

NOTES

1. For a useful discussion of the general importance of market definition in antitrust analysis, see Gregory J. Werden, "The History of Antitrust Market Delineation," *Marquette Law Review*, vol. 76, Fall 1992, pp. 123-215.

2. According to Pitofsky, "... no aspect of antitrust enforcement has been handled nearly as badly as market definition." Robert Pitofsky, "New Definitions of Relevant Market and the Assault on Antitrust," *Columbia Law Review*, vol. 90, no. 7, November 1990, pp. 1805-1864.

3. Misapplication of conventional assumptions regarding merger analysis in the context of abuse of dominant position or monopolization cases is sometimes discussed under the rubric of the "Cellophane Trap" or "Cellophane Fallacy." For discussion, see Sections II and III, *infra*. Of course, the Cellophane Trap can also arise in merger cases. See note 31, *infra*, and accompanying text.

4. The abuse of dominant position provisions of the Canadian *Competition Act* may be viewed as a hybrid of the European concept of abuse under Article 86 of the *Treaty of Rome* and the U.S. law on monopolization under section 2 of the *Sherman Act*. Like the European article, the Canadian abuse provisions incorporate a threshold element of market dominance or control which must be present before the provisions are applicable. On the other hand, in contrast to the European law, the Canadian provisions are focused principally on exclusionary conduct that harms the competitive process as opposed to the mere charging of high prices or other manifestations of exploitation of consumers. In this respect, the Canadian provisions have more in common with the U.S. law on monopolization. For background on the Canadian abuse provisions, see Bruce C. McDonald, "Abuse of Dominant Position," *Canadian Competition Policy Record*, vol. 8, no. 1, March 1987, pp. 59-75, and R.D. Anderson and S.D. Khosla, "Reflections on McDonald on Abuse of Dominant Position," *Canadian Competition Policy Record*, vol. 8, no. 3, September 1987, pp. 51-60.

5. Prior to 1986, the then-existing Canadian competition statute, the *Combines Investigation Act*, incorporated a criminal provision dealing with monopoly. This provision was ineffective, due among other factors to the criminal burden of proof and the wording of the provision which required the Crown to show that a monopoly was operated "to the detriment of the public." See McDonald, *id*.

6. The three contested cases are: *Canada (Director of Investigation and Research) v. The NutraSweet Co.* (1990) 32 C.P.R. (3d) 1 (Competition Tribunal, October 4, 1990), *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992) 40 C.P.R. (3d) 289 (Competition Tribunal, January 20, 1992) and *Canada* (*Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* (1996) 64 C.P.R. (3d) 216 (Competition Tribunal, August 30, 1995) (hereinafter the *A.C. Nielsen* case). In all three cases, the Tribunal found in favour of the key allegations of the Director of Investigation and Research and issued remedial orders relating to the respondents' conduct. One additional contested matter, the *Teledirect* application, is currently pending before the Tribunal. This deals with tied selling and other anti-competitive practices in the production and marketing of telephone directory advertising in local markets. In addition to the contested cases, in January 1995 the Tribunal approved a negotiated settlement by Consent Order in a case relating to alleged joint anti-

competitive conduct in the sale and marketing of non-local Yellow Pages advertising matters. As well, on December 14, 1995, the Director of Investigation and Research applied for approval of another major consent settlement in a case relating to abusive conduct in the provision of shared electronic funds transfer services across Canada. The specific fact situations and anti-competitive practices dealt with in the three contested cases decided to date (*NutraSweet*, *Laidlaw* and *Nielsen*) are discussed in detail in Section IV of this paper.

7. The Canadian cases are cited in the preceding footnote. Major U.S. monopolization cases decided recently include the *Microsoft* and *Kodak* matters.

8. See Jeffrey Church and Roger Ware, *Network Industries, Standardization and Competition Policy* (Paper prepared for the Canadian Competition Bureau, July 1996).

9. In addition to abuse cases, the principles discussed in this paper may be relevant to market definition in other conduct-oriented cases, including price fixing and other cartel cases, as well as tied selling, exclusive dealing and other types of civil cases. For discussion of Canadian and U.S. law on tied selling, see R.D. Anderson and S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Tied Selling in the U.S. and Canada," *Canadian Competition Policy Record*, vol. 6, no. 1, March 1985, pp. 1-14.

10. As Salop points out, "In post-Chicago antitrust analysis, market definition and market power are not discussed in a vacuum, but rather in the context of the plaintiff's allegations of anticompetitive conduct. According to this approach, the relevant market can only be defined once the plaintiff's theory is known". Steven C. Salop, "Kodak as Post-Chicago Law and Economics," *Charles River Associates Perspective*, April 1993, p. 3. This observation has particular implications for abuse and other conduct-oriented cases. For discussion, see Section II(5), *infra*.

11. For example, in Canada, definition of the relevant product market is required in connection with both the threshold element of substantial or complete control of a class or species of business throughout Canada or an area thereof in paragraph 79(1)(a) of the *Competition Act* and the test of lessening of competition substantially in a market in paragraph 79(1)(c) of the *Act*.

12. At the most obvious level, a narrow definition of the relevant market will tend to result in higher market shares for incumbent firms - a factor which is often important in establishing the existence of market power and a substantial lessening of competition. On the other hand, the importance of particular market boundaries that may be assigned in the process of market delineation should not be over-stated. As elaborated in Sections II and III of this paper, ultimately it is the assessment of substitution possibilities and their implications for market power rather than the particular market boundaries selected that is relevant to the analysis of competitive effects.

13. "Market delineation in antitrust is a means to an end rather than an end in itself. Markets are tools used to aid in the assessment of market power-related issues." Gregory J. Werden, "Four Suggestions on Market Delineation," *Antitrust Bulletin*, vol. 37, Spring 1992, pp. 107-21, at p. 108.

14. For background, see William M. Landes and Richard A. Posner, "Market Power in Antitrust Cases," *Harvard Law Review*, vol. 94, no. 5, March 1981, pp. 937-996, at p. 937.

Mathematically, market power is sometimes expressed using the Lerner Index (L), where L=(P-MC)/P and P and MC are respectively, the price and marginal cost of firm(s) whose conduct is under examination.

15. See Director of Investigation and Research, *Merger Enforcement Guidelines* (March 1991).

16. That is, L=1/E, where L is the Lerner index of market power and E is the elasticity of demand facing a firm.

17. Landes and Posner, *supra*, note 14, at pp. 944-52.

18. It should be noted that the relationship between a firm's market share and its elasticity of demand depends significantly on how this interacts with the industry demand and supply elasticities. Therefore, the share of total industry output accounted for by individual firms, by itself, can be an unreliable indicator of market power.

19. Certain other variables can also facilitate the exercise of market power. These include the nature and extent of change and innovation in the market, barriers to entry by new competitors, the degree of transparency and the value and frequency of transactions in the market. See Director of Investigation and Research, *Merger Enforcement Guidelines* (March 1991), p. 10. These variables normally are not subsumed in market definition analysis, but rather are considered as related factors that influence the competitive environment.

20. The concept of a relevant antitrust market has been developed principally with reference to merger cases. See *Merger Enforcement Guidelines*, *id.*, and Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (April 2, 1992), reprinted in *Antitrust and Trade Regulation Report*, vol. 62, no. 1559, April 2, 1992, Special Supplement. Important differences in the application of this concept in the context of abuse of dominant position or monopolization cases are discussed in Section II(4), below.

21. See Pablo T. Spiller and Cliff J. Haung, "On the Extent of the Market: Wholesale Gasoline in the Northeastern United States," *Journal of Industrial Economics*, vol. 35, 1986, pp. 131-45.

22. This point is made effectively in David T. Scheffman and Pablo T. Spiller, "Geographic Market Definition under the U.S. Department of Justice Merger Guidelines," *Journal of Law and Economics*, vol. XXX, 1987, p. 17, and in Spiller and Haung, *id*.

23. Scheffman and Spiller, *id*.

24. See *Merger Enforcement Guidelines*, *supra*, note 15, and Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (April 2, 1992), reprinted in *Antitrust and Trade Regulation Report*, vol. 62, no. 1559, April 2, 1992, Special Supplement. The development of this approach is discussed in Werden, *supra*, note 1.

25. The differing time frame for analysis of abuse of dominant position and merger cases is reflected in the relevant provisions of the *Competition Act*. In particular, section 79 pertaining to abuse of dominant position refers to situations involving a practice of anti-competitive acts which "has had, is having or is likely to have the effect of lessening competition substantially." In contrast, section 92 pertaining to mergers is applicable where the Competition Tribunal finds that a

merger "prevents or lessens or is likely to prevent or lessen competition substantially." For related discussion, see Anderson and Khosla, *supra*, note 4.

26. See, generally, Steven T. Call and William L. Holahan, *Microeconomics* (Belmont, Ca.: Wadsworth, 1980).

27. "Because every monopolist faces an elastic demand at its profit-maximizing output and price, there is bound to be some substitution of other products for its own when it is maximizing profits, even if it has great market power." Landes and Posner, *supra*, note 14.

28. *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953); aff'd 351 U.S. 377 (U.S. Sup. Ct. 1956).

29. The relevant critical commentary comprises George W. Stocking and Willard F. Mueller, "The Cellophane Case and the New Competition," *American Economic Review*, vol. 45, 1955, pp. 29-63, Donald F. Turner, "Antitrust Policy and the Cellophane Case," *Harvard Law Review*, vol. 70, 1956, pp. 281-318, Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976), at pp. 127-29, and Landes and Posner, *supra*, note 14, at pp. 960-61.

30. "Reasonable interchangeability at the current price but not at a competitive price level, far from demonstrating absence of monopoly power, might well be symptomatic of that power; this elementary point was completely overlooked by the Court." Posner, *id.*, p. 128.

31. Although the *Cellophane* case was a monopolization case, it should be emphasized that the *Cellophane Fallacy* can arise in merger as well as abuse of dominant position or monopolization cases. In particular, it may arise if the parties to a merger already possess significant market power. In such a case, any further increase in prices may well induce significant substitution away from products produced by the parties -- but this may, nonetheless, be consistent with a significant enhancement of market power.

32. Clearly, it is not sufficient to simply look for markets in which we observe high (in absolute terms) market demand elasticities, since, in addition to markets subject to effective monopolization, this would also identify markets that are effectively competitive.

33. Salop, *supra*, note 10.

34. Such practices are sometimes described under the rubric of "raising rivals' costs." See Roger Ware, "Understanding Raising Rivals' Costs: A Canadian Perspective," *Canadian Competition Record*, vol. 15, no. 1, March 1994, pp. 9-20. Of course, the existence of genuinely exclusionary practices is a statutory element to be independently verified and not an assumption to be taken at face value in abuse cases. Therefore, the relevance of markets defined to take account of exclusionary practices must, ultimately, be established in conjunction with the exclusionary effects of such practices.

35. As an example, Salop contrasts the market that would be useful in assessing a possible merger of banks offering Visa and Mastercard services with the market that would be relevant to the alleged exclusion from the Visa system of a member desiring to offer a low-priced card. While the former would probably include new card offerors who would enter if the price of credit card

services rose significantly, in his view, such potential entrants should be excluded from the latter. The reason is that firms that would enter only at a higher price would not be a factor in facilitating a reduction of prices below current levels. See Salop, *supra*, note 10.

36. Werden, *supra*, note 1, at pp. 203-204.

37. See *Merger Enforcement Guidelines*, *supra*, note 15, pp. 10-14.

38. Other practical considerations that may be relevant include foreign competition, shipment patterns, price correlation between the relevant products in different geographic areas, non-recoverable local set-up costs, and the behavior of buyers and producers.

39. See the Australian case of *Queensland Wire Industries Pty. Ltd. v. The Broken Hill Proprietary Co. Limited* (1989), *Australian Trade Practices Reports*, no. 40-925, pp. 50,000-50,025.

40. See Franklin M. Fisher and John J. McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," *American Economic Review*, vol. 73, no. 1, March 1983, pp. 82-97.

41. As discussed below, in *Laidlaw*, the Tribunal recognized explicitly the problems associated with application of prospective price increase tests in abuse cases. The general point that the application of market definition principles can vary depending on the type of case and the particular fact situation was also recognized in the Tribunal's decision in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, a case under the refusal to deal provision of the *Competition Act*. In its decision in the latter case, the Tribunal noted that the approach employed in defining markets *"may be entirely different"* depending on the particular context and purpose at hand [emphasis added]. (p. 10).

42. *NutraSweet*, *supra*, note 6, p. 9.

43. *NutraSweet*, *supra*, note 6, p. 9. In the past, the parallel use of the terms "market" and "class or species of business" in the Canadian abuse provisions has given rise to extensive debate regarding their interpretation. On the basis of previous jurisprudence, it was argued that the element of a class or species of business could be interpreted differently from that of the relevant market. The Tribunal's decision in the *Nielsen* case appears to have resolved the controversy. In particular, in *Nielsen* the Tribunal ruled categorically that class or species of business is synonymous with the relevant product market. See *Nielsen*, *supra*, note 6, at p. 232.

44. Underscoring this point, in framing the key market definition issue in *NutraSweet*, the Tribunal indicated that "it is necessary to consider the degree to which aspartame [the sweetener produced by the NutraSweet Co.] is significantly distinct from other sweeteners in order to decide whether it should be treated as a separate product or as part of a broader class of sweeteners." *NutraSweet*, *supra*, note 6, p. 10.

45. *NutraSweet*, *supra*, note 6, p. 21.

46. *Laidlaw*, *supra*, note 6, p. 316.

47. "It is the Tribunal's view that it is necessary that the overall purpose of a section be kept in mind when dealing with the elements which the legislative scheme requires to be specifically addressed." *NutraSweet, supra*, note 6, p. 10.

48. *NutraSweet, supra*, note 6, p. 20.

49. Counsel for the respondent did not overlook the arguments relating to the *Cellophane Fallacy*, but argued that it did not apply because the case was concerned with the product and not the geographic boundaries of the market and that a different set of evaluative criteria was relevant for defining the geographic market. *Laidlaw, supra*, note 6, p. 318.

50. *Laidlaw, supra*, note 6, p. 320.

51. *NutraSweet, supra*, note 6, p. 10.

52. Table-top sales refer to the purchase of sweeteners by households and restaurants for direct consumption by individuals.

53. Industrial sales refer to sales of a sweetener as a food additive (i.e., product used as an ingredient in food and beverages).

54. Table-top sales of aspartame in 1988 were only 3 and 4 percent of total sales for Canada and the U.S., respectively.

55. Sales of aspartame to the carbonated soft drink industry of aspartame were 85 and 84 percent of total industrial sales in Canada and U.S. countries for 1988.

56. *NutraSweet, supra*, note 6, pp. 12-15.

57. One of these, saccharin, could be sold for table-top use in Canada solely in drug stores.

58. *NutraSweet, supra* , note 6, p. 11.

59. Subsequent to the Tribunal judgment, two intense sweeteners - sucralose and splenda - were approved for use in Canada. These sweeteners are expected to provide a significant degree of competition for aspartame. See "New artificial sweetener ready to challenge NutraSweet," *Calgary Herald*, April 4, 1991, p. E3 and "New sweetener gets green light: Redpath's Splenda cleared to battle aspartame in Canada's low-calorie market," *The Globe and Mail*, September 12, 1991, p. B5.

60. *NutraSweet, supra*, note 6, p. 16.

61. *NutraSweet, supra*, note 6, p. 16.

62. *NutraSweet, supra*, note 6, p. 16.

63. *NutraSweet, supra*, note 6, p. 17.

64. *NutraSweet, supra*, note 6, p. 18.

65. *NutraSweet*, *supra*, note 6, p. 17.

66. *NutraSweet*, *supra*, note 6, p. 18.

67. *NutraSweet*, *supra*, note 6, p. 18.

68. *NutraSweet*, *supra*, note 6, p. 19-20 .

69. *NutraSweet*, *supra*, note 6, pp. 20-21.

70. *NutraSweet*, *supra*, note 6, pp. 21-22.

71. *NutraSweet*, *supra*, note 6, pp. 20-21.

72. *NutraSweet*, *supra*, note 6, p. 22.

73. *NutraSweet*, *supra*, note 6, p. 22.

74. *NutraSweet*, *supra*, note 6, p. 22.

75. *NutraSweet*, *supra*, note 6, p. 22.

76. The right to compete clauses required Laidlaw's customers to notify the company of competing offers received from other suppliers of waste collection services, and prohibited the customers from accepting such offers for a 14 day period. The Competition Tribunal found that these clauses were clearly anti-competitive in that they gave Laidlaw specific knowledge of the terms on which individual customers could be obtained and prevented it from having to lower its prices across-the-board. *Laidlaw*, *supra*, note 6, pp. 339-43.

77. In commenting on this practice, the Tribunal quoted Professor Robert Bork's observation that "As a technique for predation, sham litigation is theoretically one of the most promising." See *Laidlaw*, *supra*, note 6, p. 344, and Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), chapter 18, p. 347.

78. *Laidlaw*, *supra*, note 6, pp. 295-296.

79. *Laidlaw*, *supra*, note 6, p. 295.

80. In particular, residential service typically employs rear-end loading trash compacting trucks. Lift-on-board service usually employs front-end loading trucks. Service to large industrial users is normally provided with flat-bed roll-off trucks.

81. *Laidlaw*, *supra*, note 6, pp. 295-296.

82. *Laidlaw*, *supra*, note 6, p. 296.

83. *Laidlaw*, *supra*, note 6, p. 316. The additional areas included in the second market identified by the respondent (i.e., the areas in dispute) comprised the Courtney-Comox-Cumberland area, the village of Sayward and Quadra Island.

84. *Laidlaw*, *supra*, note 6, p. 317.

85. *Laidlaw*, *supra*, note 6, pp. 317-318.

86. *Laidlaw*, *supra*, note 6, p. 321. 86. Prior to the entry into force of the new Act, the Portuguese Competition Council had already issued a ruling on the economic dependence of distributors in relation to their suppliers in a case concerning an exclusive trading agreement. It considered that the relationship between suppliers and their distributors must "reflect the material conditions dictated by the natural imbalance of the forces involved", and that notice of termination or termination of contracts must lie within a “uniform and clear commercial policy". According to the Council, notice of termination or termination of a contract which does not lie within a uniform commercial policy must therefore be "considered an infringement of the rules on competition", since these "refusals to deal" make it more difficult for the economically dependent distributor to obtain market access (or to do business in the normal way).

87. *Laidlaw*, *supra*, note 6, pp. 321-323.

88. *Laidlaw*, *supra*, note 6, p. 321.

89. *Laidlaw*, *supra*, note 6, p. 322.

90. *Laidlaw*, *supra*, note 6, p. 322.

91. Laidlaw operated hubs in both Nanaimo and Duncan despite its claim that these two areas fall into one market. Its indication that it would change in the future was not considered persuasive.

92. *Laidlaw*, *supra*, note 6, p. 323.

93. *Nielsen*, *supra*, note 6, p. 241.

94. *Nielsen*, *supra*, note 6, p. 246.

95. *Nielsen*, *supra*, note 6, p. 250.

96. *Nielsen*, *supra*, note 6, p.253.

97. *Nielsen*, *supra*, note 6, p. 253.

GERMANY

Objectives of German abuse supervision

In German competition law the conduct of dominant and powerful enterprises is not per se subject to statutory conduct control; certain practices are forbidden only where enterprises abuse their market power.

The various German provisions for the control of market power is intended to prevent firms not sufficiently controlled by effective competition from abusing their resultant scope for action at the expense of competitors or the opposite side of the market. It has to be used as a corrective only where competition is insufficient. The control of relative market power and abuse supervision is used only where instruments of safeguarding effective competition, e.g. merger control, are not available.

The following comments focus on individual aspects of German market power control, viz. control of the conduct of relatively powerful firms (Part I) and the legal treatment of specific abusive practices (Part II).

A substantial degree of market power

Legal provisions

Subject to conduct control is the abusive behaviour of market-dominating[1] firms on the one hand and powerful firms[2] on the other.

The Act Against Restraints of Competition (ARC) offers a double definition for market domination. Accordingly, an enterprise is either market-dominating if it is not exposed to any competition or to any substantial competition or if it has a paramount market position in relation to its competitors.[3] If an enterprise that is market-dominating in that sense abuses its position on the dominated market or a third market, the Bundeskartellamt (BKartA) may prohibit the abusive conduct and declare relevant contracts to be of no effect.

Additionally, market-dominating enterprises must not unfairly hinder other enterprises nor, in the absence of facts justifying such differentiation, treat enterprises differently. This comprehensive ban on hinderance and ban on discrimination also applies to powerful firms on which small or medium-sized firms as suppliers or purchasers of a certain type of goods or commercial services depend to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist.[4] This is because a firm may have such a powerful position in the market that it may cause market distortions even if it is not market-dominating.

The Act Against Restraints of Competition (ARC) thus covers situations of so-called relative market power, which is reflected among others in vertical relations among firms. (Horizontal relations among competitors with relative market power is dealt with in Section 26 (4) of the ARC). To be protected

under this provision are small and medium-sized firms that are dependent on a supplier or buyer for the very reason that they cannot switch to alternative suppliers or buyers. For example the provision cannot be invoked by large firms to enforce a claim to be supplied by a powerful supplier. On certain conditions, however, small and medium-sized firms may bring a civil action for being supplied.

In practice, it has to be examined whether a number of conditions are satifsfied before claims are enforced; in this context the criteria of dependence and the weighing of interests are of great importance.

"Dependence" criterion

The question whether conduct comes under the ban on hindrance/discrimination crucially depends on a finding of dependence. At the outset, the relevant market has to be defined. Then it has to be examined whether the dependent firms have objectively sufficient and subjectively reasonable possibilities of dealing with other enterprises in this market. The decisive question therefore is whether the dependent firm is in a position to obtain its goods from alternative sources or sell them through other distribution channels. A relevant market includes all possible channels of distribution. On the other hand, not every alternative is considered automatically sufficient or reasonable. Considering simply the number of firms supplying similar goods is not decisive. Rather, for example the question whether alternative channels of distribution at different market stages are sufficient and reasonable in a particular case is determined by the individual characteristics of the dependent firm and the actual conditions of competition in the relevant market.

If sufficient possibilities exist, it remains to be seen whether switching to such alternatives is likely to involve substantial disadvantages to the dependent firm which cause lasting damage to its competitiveness. In that case, it is not a reasonable alternative. An alternative would for example not be considered reasonable if it was not accessible to the dependent firm on the same terms as to other competitors or if it consisted of imports that could not be relied on in the long run.

The protection against hindrance/discrimination is available not only to incumbent firms, but also to newcomers that depend on certain sources of supply or channels of distribution. In that respect the ban on discrimination contributes to ensuring open markets.

Conduct control of powerful firms is especially important where the small and medium-sized firms' dependence on them has to do with the former's assortment of goods[5], i.e. where a dealer has to carry the products of certain manufacturers -- as a rule manufacturers of branded products -- in order to be competitive. The decisive factors here are the prestige and reputation of the products in the market. In the Rossignol case there was the danger that, because of their market power, the branded goods manufacturers would be able to force small and medium-sized firms which depended on them to comply with otherwise non-binding price recommendations.

A firm's dependence on another firm may also be based on the fact that its business activities are geared to another firm's products to such an extent that switching to another firm would involve substantial competitive disadvantages (dependence based on a particular firm). In general dependence is due to long-term contracts as a result of which a dealer concentrates his efforts on selling the products.[6]

Scarcity-induced dependence is fairly rare. A buyer can be dependent upon his supplier if, due to an unforeseeable shortage, sources of supply are suddenly no longer available and the buyer is unable to switch to other suppliers on competitive terms.

Weighing of interests

Conduct by powerful firms may be prohibited if other firms are "unfairly" hindered or treated differently from similar firms "in the absence of facts justifying such differentiation". To determine whether hindrance is unfair or whether there are facts justifying differentiation the individual interests of the parties concerned have to be weighed with regard to the purpose of the ARC (safeguarding the freedom of competition). Since the individual interests of the parties involved can be determined only in the particular case concerned, generalised statements can hardly be made as regards the weighing of interests.

In this context the basic business interests are of prime importance, viz. to decide on the nature and scope of one's business, including one's channels of distribution. When weighing the parties' interests, one party's vital interests in the scope of freedom of decision-taking have to be recognised, but the limit has to be drawn where the other party's justifiable interests are affected.[7] The only interest of firms hindered or discriminated against that is worthy of protection is that power-induced conduct by other firms must not impair their scope for competitive action. The principle of open markets is of central importance here. Public interests or economic policy objectives, e.g. a general guarantee of survival for small and medium-sized firms, cannot be asserted in the context of the weighing of interests.

The following topical case shows how individual interests can be weighed and balanced. The crucial importance of the facts of each individual case - here the rather tightly regulated German drug market - to the legal assessment is also evident from this proceeding. Finally, it also illustrates the efforts of the BKartA to use the instrument of conduct control of powerful enterprises with a view to keeping markets open.

The BKartA conducted proceedings against three major drug wholesalers for hindering and discriminating against an importer of proprietary drugs. The proceedings aimed at opening the market to reimported and parallel-imported pharmaceutical products by enforcing the ban on discrimination and the resulting obligation on powerful buyers to accept contracts.

The importer concerned is the leading German supplier of reimported and parallel-imported proprietary drugs. Owing to the price differences between various European countries, the importer was able to offer drugs at prices about 10-15 per cent lower than those charged by domestic manufacturers.

The importer had repeatedly attempted to establish a buyer-supplier relationship with the major drug wholesalers but invariably met with their refusal. In practice, the wholesalers' refusal to deal meant that the importer was denied access to the market stage of public pharmacies in Germany. The drug wholesale trade plays a decisive role as regards entry into the drug market. Newcomers can enter that market only if they are admitted to the wholesalers' nation-wide, watertight and punctual system of supplying public pharmacies with drugs.[8]

In weighing the interests involved, as required by law, the Federal Supreme Court, which regarded the obligation to contract on the whole as justified, started from the assumption that the drug wholesalers have a legitimate interest in freely shaping their business policies. However, the freedom of deciding on the assortment of goods is primarily derived from the sales risk taken by the trader. Due to the particular features of the German drug market, the sales risk is rather limited in this case. Moreover, the obligation to accept contracts has been confined to fast-selling or profitable articles to make sure that the drug wholesalers are not obliged to buy unprofitable articles and thus to endanger their market performance.

The interest in freely deciding on the assortment of goods in this case does not justify the general exclusion of the importer's goods, rather the importer's freedom to act was thereby unreasonably restricted.

Nor does the interest of the wholesalers in preventing their long-standing good relations with the pharmaceutical industry being endangered by business relations with the importer require, in the view of the Federal Supreme Court, that the interests of the importer be disregarded.

The pharmaceutical industry had put pressure on the wholesalers to break off or not to establish business relations with the importer in the first place. Consequently, the wholesalers safeguarded the pharmaceutical industry's interests, namely to preclude the undesirable price competition between proprietary and imported drugs. Since this line of action infringes the purpose of the ARC (ensuring efficiency-based competition and keeping markets open), it cannot be considered to be of primary importance and worthy of protection under the aspect of the maintenance of long-standing supplier-buyer relationships.

In addition, the wholesalers had argued that they had discriminated against the importer inter alia to avoid income losses and that the discrimination was therefore factually justified.[9] In the view of the court, the striving for economic success at the expense of the opposite side of the market has, in principle, to be recognised even in the case of powerful buyers. However, a limit has to be drawn where such efforts are directed against the freedom of competition, in particular open market access. Consequently, the wholesalers' interest in avoiding income losses in this case[10] does not justify the hindering of and discrimination against the importer concerned.

Examples of abusive conduct

Legal provisions

According to the above explanations, the BKartA may object to conduct by market-dominating firms insofar as they abuse their dominating position.[11] Abuse therefore means only excessive exploitation of one's business opportunities in the market. A market-dominating firm engages in abusive conduct as mentioned in the ARC if it impairs the competitive possibilities of other enterprises in a manner relevant to competition on the market in the absence of facts justifying such behaviour.[12] An abuse is also present if a market-dominating firm demands prices or terms which deviate from those which would result in all probability if effective competition existed.[13] The behaviour of firms in a comparable market characterised by effective competition is used as a yardstick. An abuse is also present if different prices or business terms are demanded by a market-dominating firm from similar buyers, unless there is a factual justification for such differentiation.[14]

Market-dominating and powerful firms are prohibited from unfairly hindering other firms or from discriminating against them in the absence of facts justifying such differentiation.[15] (see above).

In the context of all the efforts designed to categorise abusive behaviour, the German courts in reviewing a case have always placed great emphasis on the circumstances of that particular case. Some examples of recurrent practices which set statutory conduct control in motion are given below to illustrate their legal treatment.

Refusal to sell

An assessment of a refusal to sell must strike a balance between the conflicting freedom of action of third parties and the free choice of the refusing enterprise to choose its own customers. An obligation to contract means that the economic freedom of action of the party under that obligation is interfered with in a particular manner. Therefore interference with the freedom to contract is possible only in exceptional circumstances.[16] It is then necessary to weigh the interests of the discriminating enterprise against the interests of the enterprise discriminated against, having regard to the objective of the ARC to protect the freedom of competition.

"Lüsterbehangsteine"[17]

The BKartA had to examine in this case whether a market-dominating supplier of semi-finished products was allowed to withhold supplies from a processing firm with which it competes on the market for the finished product.

The leading manufacturer of artificial jewellery (STRASS), Swarovski, refused to supply its client and competitor Noblesse Crystal on the grounds that Swarovski had built up the relevant market for certain decorative materials and borne the risks and costs involved itself. For many years, Swarovski had indeed been the only supplier of those decorative materials in Germany. Swarovski held the view that it could not be reasonably expected to supply an imitator with primary materials for the latter's competing production. By contrast, the BKartA was of the opinion that this refusal to sell amounted to a case of discrimination directed against the principle of open markets, because among other aspects there was the danger that the dominant firm might extend its position into the downstream market as well.

In the context of the required weighing of interests, the courts finally found that the refusal to sell was not justifiable by the mere fact that the supplier was competing with its customer following the processing of the semi-finished products.[18]

In this case the refusal to sell was justified, though, because Noblesse Crystal, contrary to the provisions of the Unfair Competition Act (UCA), made and distributed almost identical imitations of Swarovski products. Swarovski could not be required to support anticompetitive conduct directed against itself by supplying its competitor.

"Rossignol"

The only supplier of Rossignol skis in Germany refused to supply a leading sports retailer because that shop sold the skis too cheaply in the view of the Rossignol supplier.

The crucial point in this case was that, given the unique position of Rossignol skis, the sports shop had to stock this brand. Although it is not necessary that a sports shop has a stock of *all* branded skis, the Rossignol brand holds a special position. The importance of a product apart from its price also depends on the quality of the product and the manufacturer's advertising. It became evident that the 'Rossignol' brand was of such importance to sports retailers that they depended on being supplied with this brand in order to keep the status of a renowned sports shop. Therefore sufficient and reasonable possibilities of switching to other ski brands did not exist. The importance of the brand could also be inferred from the fact that all other leading sports dealers stocked Rossignol skis. Therefore, the sports retailer was entitled to be supplied with Rossignol skis.[19]

Price control

The BKartA has been cautious about exercising control over price abuses which amounts to interference with the firms' freedom of pricing, which is of central importance to effective competition. This caution is due to the methodological problems involved but also to the extremely high standards set by the courts - which may even call for an official review of the firms' costing. [20] Also from a competition policy perspective, the control of price levels will always be a second-best solution. The Bundeskartellamt holds the view that far better protection against excessive prices consists in keeping markets open.

Under-cutting of prices: Abwehrblatt II[21]

In response to the publication of a new freesheet, the established publishers of dailies in the region involved had jointly published their own freesheet and undercut the newcomer's price by offering low advertising rates. Both freesheets temporarily operated at a loss, until the newcomer was finally obliged to discontinue publishing his freesheet.

The Federal Supreme Court found that this course of action did not constitute a case of unfair hindrance. The efforts of a dominant enterprise to price its own product so as to drive a competitor out of the market are not unfair if, in doing so, it resorts to the instruments of efficiency-based competition. The fact that the newcomer loses advertisements as a result of the publication of the competing freesheet - which weakens his financial basis - in the absence of further circumstances is considered to be the result of efficiency-based competition. Unfair price-cutting is involved, though, where the use of non-efficiency-based predatory prices is designed to drive the competitor out of the market and eliminate him. According to relevant court decisions, price competition is present so long as prices are formed economically by reasonable costing which is justifiable under commercial principles.

After having reviewed the costing, the court found that prices in this case were indeed just commercially justifiable. Particularly during the start-up phase of a freesheet, pricing that does not cover costs was reasonable from an economic point of view, the court held. Therefore, unfair hindrance was not present.

Price level control: Valium II

Another proceeding was directed against the abusive prices a pharmaceutical manufacturer charged for two of its preparations.

The crucial issue in this case was the calculation of the comparable price. This is the price which would form if there existed effective competition in that market. The so-called comparable market is used for ascertaining this price. It must be a market which is as similar as possible to the relevant market except for the competitive pricing. Appropriate additions or deductions serve to make up for peculiarities and differences in respect of the market relevant in terms of abuse supervision. Such additions and deductions must not be so considerable that the putative competitive prices that are used as a basis of comparison ultimately are based on mere estimates. In the final analysis, this would lead to a fictitious competitive price.

Owing to various governmental regulations, the foreign comparable market which was taken as a reference market in this case was so different from the investigated market that the comparable price which had been arrived at by making additions and deductions was not accepted by the Federal Supreme Court.

NOTES

1. See Section 22 (4) and (5) of the Act Against Restraints of Competition (ARC) as well as Section 26 (2) sentence 1 of the ARC.

2. See Section 26 (2) sentence 2 and (4) of the ARC.

3 . See Section 22 (1) of the ARC.

4. See Section 26 (2) sentence 2 of the ARC.

5. Cf. Rossignol.

6. Dependence based on a particular firm occurs often, but not automatically, where an authorised car dealer depends on a car maker, a filling station sells branded petrol from a specific oil company or a restaurant exclusively sells the brand of a particular brewer.

7. See "reimports".

8. Before the court decided the case, the importer had to sell the drugs directly. The Berlin Court of Appeals had held that this was a sufficient and reasonable alternative channel of distribution. The Federal Supreme Court (BGH) disagreed with this view. German pharmacies buy approx. 90 per cent of their requirements from the wholesale trade. According to the BGH, even manufacturers with large sales obviously do not regard direct selling as an efficient alternative to wholesale distribution.

9. In the view of the BKartA, justifying the refusal to buy with the avoidance of possible income losses would have meant that the exclusion of competition is accepted as a legitimate means of pursuing the interests of a powerful firm.

10. According to the BGH, in weighing interests, the legislative intent that imported drugs should be available on the domestic market in competition with other drugs must be taken into account, even if that intent is expressed in legislation other than the ARC (here Section 229 of the Social Code (SGB)V).

11. See Section 22 (4) of the ARC.

12. See Section 22 (4) No. 1 of the ARC.

13. See Section 22 (4) No. 2 of the ARC.

14. See Section 22 (4) No. 3 of the ARC.

15. See Section 26 (2) and (4) of the ARC.

16. Latest case in BGH KVR 11/94, q. 12 (re-imports).

17. WuW/E BGH 2535ff ("Lüsterbehangsteine").

18. See WuW/E BGH 2540

19. Under Sections 26 (2), 35 of the ARC, Section 249 of the Civil Code.

20. See WuW/E OLG 4401 "Allegation of unfair hindrance by price-cutting dismissed following review of costing".

21. WuW/E BGH 2195 ff.

IRELAND

Introduction

This note is concerned with the question of the appropriate remedies for dealing with abuse of dominance. There are several possibilities including:

-- Injunction to stop the abusive behaviour;
-- Financial penalties in the form of fines or damages to aggrieved parties;
-- Regulatory controls to prevent such abuse; and
-- Structural adjustment including the break-up of the dominant position.

The position under Irish law

In Ireland, Section 5 of the Competition Act 1991 prohibits the abuse of a dominant position by one or more undertakings. It is modelled on Article 86 of the Treaty of Rome. At present the Act provides aggrieved parties with a right to take court action to obtain an injunction and/or damages, including exemplary damages. The Minister for Enterprise and Employment may also seek an injunction. The Competition Act Amendment Bill which is currently before Parliament proposes to introduce penalties in the form of fines and/or jail sentences for breaches of the Act. Section 14 of the existing Act provides that the Minister may request the Competition Authority to investigate alleged abuses and, if it concludes that such abuse has occurred, the Minister may make an Order prohibiting the continuance of the dominant position except on specified conditions or require the adjustment of the dominant position by a sale of assets or otherwise. In effect therefore, if the amending legislation is passed, all of the possible remedies listed above will be available under Irish competition law.

The merits and disadvantages of each of the options is now considered. In making such an assessment the view adopted in the paper is that the relevant issue is the extent to which the options constitute an adequate deterrent to engage in abusive behaviour and the extent to which they provide an adequate remedy from the point of view of the parties harmed by such behaviour and the wider public.

Prohibition of behaviour in future (injunctions)

The nature of injunctions is that they prevent only the exact behaviour defined as having been offensive. The recognised difficulty is that firms will be able to change their behaviour, but create the same effects, requiring the enforcement agency or the private litigant to start again. The reluctance in most legal systems, and certainly in the Irish system, to grant preventative injunctions, assumes that it is not possible and on general principles not desirable to have injunctions granted in terms so wide as to catch behaviour which has not yet occurred, save where there is ‘a strong probability, almost amounting to a moral certainty’ that a wrong will be committed. Equally, any attempt to formulate orders by reference to the effect of behaviour of a firm, would to a greater or lesser extent reproduce the legal certainty problem of any general prohibition competition law, requiring the plaintiff or enforcement agency to return to court in any case to establish that the firm was now by its new behaviour causing the same effect as the

previously prohibited behaviour. Although obviously such orders might be appealing to competition enforcement agencies, any special argument for the use of injunctions in such a way for competition enforcement would have to overcome the general policy considerations against granting injunctions prohibiting future behaviour, or behaviour defined by its effects.

As a remedy injunctions have the advantage, when granted, of achieving the exact result the plaintiff or the enforcement agency wants, in the short term. This is as contrasted with the remedies of fines or damages which are intended to operate as deterrents and which achieve results on firms' behaviour in a less direct way. In the context of abuse of a dominant position, where the intention of an abuser will be to remove a rival from the market, an immediate prohibition on the abusive behaviour may be the only effective way of ensuring that does not happen. Damages, as in the *Magill* case, may be too late.

The long term usefulness of an injunction is limited, like any antitrust remedy, by the fact that market conditions change and enforcement agencies cannot make predictions which will hold true forever. No general prediction can be made about the unintended long term consequences of injunctions as a remedy, in the way that it can be for fines, for example, since the content of injunctions will be different with each type of behaviour prohibited.

The other recognised limitation of injunctions as a control of behaviour is that the risk of the sanction of injunction is one which has no deterrent effect in respect of the present behaviour of firms. In deciding on behaviour, the fact that an enforcement agency may require them to stop later is no reason for a firm to desist from acting anti-competitively now. However the absence of deterrent effect does not prevent the injunction being a particularly useful instrument for an enforcement agency. Given that for abuse of a dominant position there will sometimes be a fine dividing line between aggressive competitive behaviour, and abusive behaviour, where not only the enforcement agency and the dominant firm, but also independent economists might legitimately disagree as to whether behaviour is offensive, it is appropriate to have the option of a remedy which is not punitive in nature.

Interim Injunctions. As noted above, the intention of abusive behaviour is to remove rivals from the market. A remedy at short notice may be necessary to prevent this, as for example in the case of predatory pricing. The remedy of an interim injunction will necessarily be less easily granted than an injunction on a full hearing. However, the nature of the argument to be made for an interim injunction is one which automatically favours the retention of a competitor in a market where the alternative is their possible elimination. The decision to grant or refuse an interim injunction is made so as to preserve the status quo (the existence of the rival) and to prevent harm which cannot later be quantified in money and compensated for (the removal of a rival).

Fines/damages

As in other cases of anti-competitive behaviour, fines would appear to represent a stronger deterrent to firms engaging in abusive behaviour. This must be subject to some caveats, however. Under Irish law the imposition of fines would require criminal levels of proof. It might well be extremely difficult to satisfy such a standard of proof in cases of alleged abuse of dominance. Fines can only constitute a deterrent if there is a real likelihood of their being imposed and if this is perceived as unlikely because of the high burden of proof required, then, arguably, fines will have little deterrent effect. It is not companies which choose to engage in anti-competitive behaviour but rather the human persons who control them. Thus imposing fines on companies constitutes a relatively limited deterrent.

In looking at fines as a remedy for abusive behaviour it is worth considering what the effect of the imposition of a fine might be. Specifically a fine may be thought of as a tax on the profits of the dominant firm. Economic theory shows that in the case of a profit maximising monopolist, the imposition of a tax (fine) on profits will have no impact on the firm's price or output. The reason for this is intuitively straightforward, the imposition of the tax does not alter the profit maximising level of output and price, it simply reduces the firm's after tax profits. If it were to attempt to raise its price, which necessarily involves reducing output, unless demand was perfectly inelastic, this would reduce profits. The position is different in the case of a revenue maximising monopolist. Assuming that such a firm must earn some minimum level of profits, the imposition of a tax (fine) could alter its behaviour, if it meant that after tax profits were below the firm's minimum acceptable profit level (its profit constraint). If that were the case the firm would reduce output to the level where it was again earning the maximum possible revenue consistent with satisfying the profit constraint. This in turn would lead to an increase in price, implying that part of the burden of the fine falls on consumers. This would reduce its attractiveness as a remedy for anti-competitive behaviour.

There is a separate problem with damages as a remedy in that, unlike an injunction, in some instances the time taken for a full hearing of the case, particularly where there is an appeal, may be such that, abusive behaviour which is aimed at eliminating a competitor may have been successful. The fact that the target firm, or its creditors, may ultimately receive damages in compensation for the abusive behaviour, is of limited benefit to the firm, which has been eliminated, and indeed to consumers. In the *Magill* case for example, while it ultimately won its case in the European Court, the television companies succeeded in eliminating it from the market.

Regulatory control of the dominant firm

Regulatory controls as a means of preventing abuse of market power have a long history in the public utility industries, most notably in the US. The past ten years has seen many other OECD countries introduce various forms of regulatory controls for such industries. Such controls can involve setting price caps or other mechanisms which are designed to prevent dominant firms in such industries from abusing their market power. There are some examples, notably in the UK, of controls of this type being applied to dominant firms in other industries.

Where such controls have been applied in public utility industries, they have generally been drawn up and applied by a specialist industry regulator. Setting this type of controls is a highly complex task and requires that the regulator possess considerable amounts of information regarding the operation of the regulated firm. There is a vast amount of material in the economics literature which deals with the problems and complexities of operating such a regulatory regime. In addition there are indications that even specialist regulators can make mistakes or be misled by the regulated firm.

The fact that regulatory controls require detailed information about the operations of the regulated firm and market conditions would suggest that they may not represent a generally applicable response to the problem of abuse of market power. It would be extremely difficult for a general competition agency to establish appropriate rules for individual firms. Nor is this a task which could be dealt with at all by the Courts. More fundamentally it represents a form of detailed regulatory controls which runs contrary to the general principle that market participants know best and that markets are more efficient than a system of regulatory controls.

Structural adjustment

Although in Ireland divestment is a remedy to be ordered by a Minister, rather than granted by a Court, it is subject to a perception, not confined to Ireland and influenced by the approach of courts to enforcement, that any remedy, civil or criminal, should be quite directly addressed to the identified harmful activity. Divestment of a block of property is not however ordered on the basis that the ownership of that block is itself the wrongful act, rather that divestment will permit competition to flow where previously it was blocked. It thus appears popularly to be a more serious interference with property rights than to prohibit identifiably harmful behaviour. The mistake inherent in this is that competition law is not primarily concerned with individual wrongs and harms so much as with effect on the economy; so that it is correct to have a remedy which is directed to fixing the harm to the economy rather than to being a punishment fitted to a crime.

Another reason why divestment is not a frequently used weapon may be that it is perceived as involving a more serious interference in a business than in, for example having contract terms struck down, and furthermore without being able to know at the time of requiring the divestment what the outcome of that will be. The assumption that requiring divestment of property is more serious for a firm than requiring it to alter contract terms, as might be required by other forms of enforcement, is perhaps questionable, particularly given that enforcement agencies cannot predict the long term effects of either, and that prohibiting types of contract terms can give rise to avoidance behaviour.

The issue of public ownership is not one which comes within the scope of the Competition Act. Historically nationalisation was used as a form of regulatory control in many OECD countries. The past 15 years has seen a major shift away from public ownership as a regulatory instrument.

ITALY

In July 1995 the Italian Competition Authority pronounced on a case of alleged abuse of dominance by the Italian Society of Authors, Composers and Publishers (SIAE). The Authority had received complaints about the SIAE pricing behaviour from two associations of dance-halls. According to the plaintiffs:

a) the royalties collected by SIAE from dance-halls were significantly higher than the ones collected by corresponding societies in other EU Member States;

b) the SIAE pricing policy resulted in an unjustified discrimination among dance-halls, depending on whether or not they were members of a dance-hall association and on which association they were members of.

This paper focuses on the first point, that is on the evaluation of the alleged excessive pricing behaviour by a dominant firm.

Legal framework and dominant position

In principle, composers in Italy are free to deal directly with dance-halls in order to collect the royalties for the use of their music. However, given the huge costs that individual transactions would require, relationships between composers and dance-halls are more efficiently managed through some kind of horizontal agreement among composers.

The Italian law n. 633/1941 requires that intermediation between composers and dance-halls for the protection of copyright and the collection of royalties be provided on an exclusive basis by SIAE. Moreover SIAE acts in Italy as an agent for composers' societies based in other countries, collecting royalties also on behalf of foreign composers whose music is played in Italian discotheques.

It was therefore straightforward to assess that SIAE had a dominant position on the market for intermediation services between composers and dance-halls in Italy.

Pricing behaviour

The Authority had to appraise whether the tariffs charged by SIAE to dance-halls could be deemed "unjustifiably burdensome" and therefore abusive according to section 3 of the Italian Competition Law.

The following information was available:

a) A survey by the European Commission (1991) compared the royalties paid to composers' societies by five groups of discotheques in different Member States. Discotheques were grouped according to the following characteristics: capacity, surface, opening time (weeks,

days, hours), location, entrance fee, price of the most frequently sold drink (if not included in the entrance fee), total annual turnover. For each group, a calculation was made of the total amount of royalties that would have been paid each year to associations of composers in different Member States. The reference to the five groups of discotheques was used as an expedient due to the lack of homogeneity in the criteria used by composers' societies to charge dance-halls in different countries.

It turned out that for all groups the amount charged in Italy was from 3.6 to 4.6 times higher than the average amount paid in other EU Member States (Table 1).

It is worth noting that the tariff charged by the French composers' society, SACEM, (which was, like the one charged by SIAE, relatively high at the time of the survey and was calculated as a percentage of the turnover of discotheques) was reduced, following two prejudicial decisions by the European Court of Justice, from 8.25 per cent in 1989 to 7.18 per cent in 1991. Following an opinion rendered by the Conseil de la Concurrence in 1993, it was further decreased to 4.39 per cent of the discotheques' turnover.

b) The European Commission compared the fees charged by composers' societies, for their services, in different Member States. The fee is usually calculated as a percentage of the amount collected from discotheques. The percentage (Table 2) charged by SIAE is lower than the average one charged by other societies.

c) Detailed information was not available concerning the *costs* actually incurred by SIAE to provide intermediation services with respect to the use of music by dance-halls.

d) In principle, SIAE should pay each composer on the basis of the actual performance of his pieces of music in dance-halls. However, the society deemed the detailed music programmes transmitted by dance-halls, especially those with no live music (discotheques), highly unreliable. Therefore, it adopted a complex set of criteria for biannually allocating royalties among composers. More specifically:

   -- 15 per cent was allocated on the basis of a sampling procedure;

   -- 40 per cent was allocated on the basis of royalties received for recording in the last 5 years and of current royalties received for live-music performances in dance halls;

   -- 30 per cent was allocated on the basis of royalties received for recording in the last year;

   -- 15 per cent was allocated on the basis of current royalties received for live-music events.

It is worth noting that the classification resulting from the random sample was significantly different from the one resulting from the whole allocation procedure (only 80 of the 200 pieces on the top of the list according to the sample were included in the top 200 works identified on the basis of the whole procedure). The relative positions of pieces of music on the two lists were different as well.

Evaluation of pricing behaviour

In an answer to prejudicial questions concerning the possibility of infringements of Article 86 of the Treaty of Rome by composers' societies, the European Court of Justice stated that when an undertaking holding a dominant position charges for the services it provides tariffs which are significantly higher than the corresponding tariffs in other Member States -- assuming that the comparison is made on a

homogeneous basis - such difference should be considered circumstantial evidence of a dominant position. It is then up to the undertaking to justify the disproportionality of its tariffs, highlighting the objective differences between the situations prevailing in its country and in other Member States (European Court of Justice, *Lucazeau v. SACEM*, Joined cases 110/88, 241/88, 242/88, par. 25).

The international comparison made by the European Commission in 1991 tried to homogenise, given the available data, demand conditions facing composers' societies in different countries. Admittedly, it does not take different intermediation costs and variables such as the degree of tax evasion into account. However, the most delicate side of such international comparisons, from an economic viewpoint, is to establish where should the different tariffs converge. In fact, one cannot take as the optimal target the average value of the price in Member States (the result would be indeterminate). On the other hand, if one targets the minimum observed price, the adjustment would take place once and for all, and no rule would be given for evaluating the level of prices in view of subsequent developments in demand and cost conditions.

Given the difficulties of trying to regulate price levels merely with reference to international comparisons, it would seem appropriate to refer to the economic conditions in the relevant market when analysing whether and how one should intervene directly to regulate the prices charged by a dominant undertaking.

In the SIAE case, one faces a horizontal integration between composers, probably characterised by some efficiency gains, which results in a monopoly position with respect to dance-halls in Italy. Obviously, dance-halls demand for music is highly inelastic. Moreover, although in other Member countries composers' societies also enjoy a *de facto* monopoly position, in Italy, the monopoly of SIAE is strengthened and stabilised by legislation, which gives the society an exclusive right to act as an intermediary between composers and dance-halls. The law expressly requires SIAE to act in the interest of composers: the result is that, currently, it is "compelled" to act as a maximising monopolist on behalf of composers.

This stable monopoly situation and the low elasticity of dance-halls demand imply that the discipline exercised by consumers on the monopolist's behaviour is quite weak. However, given the difficulties of finding an economically appropriate and objective term of reference (what is the appropriate mark-up? how should costs be defined when the protection of copyright is involved?), an antitrust concern over the level of prices could lead to a continuous and discretionary control over the process of price determination. In such a situation, it could seem appropriate to encourage some form of collective bargaining between SIAE and the representatives of dance-halls.

Furthermore, section 8 of the Italian Competition Act (based on article 90(2), of the Treaty of Rome) states that an enterprise which by law is entrusted with the operation of services of a general economic interest or operates on the market in a monopoly situation is exempted from competition rules (including the prohibition of abuse of dominance), but only in so far as this is indispensable to perform the specific tasks assigned to it. The exclusive right given to SIAE by law n.633/41, therefore, somehow constrains the action of the Antitrust Authority. The Authority observed, however, that even in this case it would be possible to deem SIAE pricing behaviour abusive if it could be shown not to be useful for the performance of the society's institutional task. This would be the case, for instance, if one were able to demonstrate that SIAE is inefficient and therefore that the high prices it charges do not result in high royalties allocated to composers.

In the case under discussion, the Authority was able to demonstrate something slightly different, that is that the criteria used by SIAE to allocate royalties among composers were biased in favour of

Italian composers, unduly penalising foreign composers whose music is played in discotheques and new composers in general. Given these biased allocation criteria, the prices charged by SIAE to dance-halls could not in any case be justified in terms of the society's institutional tasks; therefore, notwithstanding the difficulties illustrated above, the prices charged by SIAE were considered an abuse of its dominant position.

Remedies

The described pricing behaviour by SIAE was therefore prohibited. As a consequence, SIAE changed the criteria for allocating royalties among composers, eliminating the most evident biases (e.g. the percentage allocated on the basis of royalties collected from live-music events) and increasing to 50 percent the share allocated on the basis of the sample, which turned out to be the most reliable allocation criterion.

TABLE 1

Comparison of tariffs collected by composers' societies in EU Member States for 5 groups of discotheques

(after 1.1.1990- Italian tariff set equal to 100)

Country/ discotheques' grouping*	**A**	**B**	**C**	**D**	**E**
Belgium	64,5	14,7	50,6	22,0	55,2
Germany	7,1	7,4	11,8	18,5	10,4
Denmark	7,3	9,2	18,3	36,7	17,3
Spain	31,7	29,8	15,9	8,9	41,4
France	80,4	84,2	85,5	87,2	84,0
Greece	12,7	11,9	7,2	1,3	13,4
Ireland	8,1	8,5	13,6	13,8	13,9
Italy	***100,0***	***100,00***	***100,0***	***100,0***	***100,0***
Luxembourg	9,6	18,1	10,2	12,4	11,3
Portugal	18,0	18,9	30,4	36,7	30,9
Netherlands	18,2	21,1	23,2	38,9	17,5
United Kingdom	12,8	13,4	13,3	13,9	14,0
Average (Italy excluded)	*24,6*	*21,6*	*25,5*	*25,4*	*28,1*

Source: calculations based on data contained in a survey by the European Commission (1991); tariffs applied to discotheques which are members of some trade association.

* A,B,C,D, and E are groups of discotheques homogeneous in terms of: surface, capability, opening time, entrance fee, price of the most frequently sold drink, total annual turnover (in decreasing order)

TABLE 2
Fees charged by composers' societies
(per cent of the total amount collected from discotheques)

	1989	1990
B	22,30[a]	21,52[a]
D	27,67	-
DK	24,21[b]	-
E	35	35
F	30[c]	30[c]
GR	37,5	-
IRL	-	25
I	22[d]	-
L	-	-
P	-	-
NL	30,7	-
UK	32,33	-

a. Social and cultural expenses (7 per cent) should be added
b. Including a public franchise fee
c. Social and cultural expenses (7 per cent) should be added
d. Social and cultural expenses (6 per cent) and taxes (0,8 per cent) should be added.

Source: European Commission (1991)

JAPAN

I. Summary of Regulations in Japan

The Antimonopoly Act in Japan prohibits private monopolisation, unreasonable restraint of trade, and unfair trade practices. Concerning regulations regarding private monopolisation and unfair trade practices, special attention is paid to the position of the players in the market. Aside from these, measures against monopolistic situations also exist, for example, in relation to the market share held by an entrepreneur, although these are not by nature prohibitive. In this paper, we will focus on and outline regulations regarding private monopolisation and unfair trading practices.

Private monopolisation is illegal when an entrepreneur substantially restrains competition by excluding or controlling the business activity of another entrepreneur. An "unfair trade practice" is illegal, even though the concerned action does not extend to the substantial restraint of competition, if it tends to impede fair competition. In "private monopolisation" cases, measures to eliminate such action will be ordered and criminal penalties may also be applied; while an action falls under "unfair trade practices", only measures to eliminate such action will be ordered.

In judging an action to be illegal, i.e. when judging whether "substantial restraint of competition" or "impediment of fair competition" exist or not, various market conditions such as market share, difficulties with regard to new market entry, demand and supply circumstances, etc., are considered. Among these, market share is the greatest factor. There is no uniform standard measuring market share, so it is judged on a case by case basis. According to precedents set by decisions of the Fair Trade Commission (FTC) and the courts in private monopolisation cases, the market shares of respondents or defendants were between 40 per cent - 80 per cent, depending on the situation in each individual market. Regarding unfair trade, the "Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices" ("Distribution Guidelines"), published in 1991, stipulate that when the concerned firm has a market share of 10 per cent or more, or its position is within the top three in the market, it is regarded as an "influential" entrepreneur and certain actions (see *infra*) of the firm are likely to fall into the category of unfair trade practices. If the entrepreneur has a market share of less than 10 per cent and is in fourth position or lower, the guidelines stipulate that such actions are usually not illegal.

When an action which may fall into the category of unfair trade practices, such as prohibiting customers from dealing with a firm's competitors, actually restrains the competition in a particular field of trade, the concerned action is not deemed an "unfair trade practice" but a "private monopolisation". As mentioned above, the regulations concerning unfair trade practices can be said to have preliminary preventive functions with regard to the regulations concerning private monopolisation.

In Japan, the Antimonopoly Act prohibits the abuse of a dominant bargaining position. Abuse of a dominant bargaining position is a type of unfair trade practice and "dominant bargaining position" refers to the relative position of an entrepreneur in relation to its trading partners, not its absolute position in the market.

II. Prohibition of "private monopolisation"

(First portion, Section 3 Antimonopoly Act)

Summary

In the Antimonopoly Act of Japan, "private monopolisation" means that "an entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby substantially restraining, contrary to the public interest, competition in any particular field of trade" (para 5, Section 2; this is prohibited in Section 3).

"Substantial restraint of competition" means that, "without referring to individual actions, competition has been decreased and a situation in which a specific entrepreneur or group of entrepreneurs can control the market by freely manipulating various conditions, including price, quality and quantity, at will has appeared or is about to appear".[1] Therefore, case-by-case judgement of whether or not competition is substantially restrained must be carried out according to the form of the illegal action and the content of the case. The concerned entrepreneur's market share becomes an important factor in the judgement, but it is difficult to establish uniform standards, and none have been established so far. According to the precedents set by the FTC's decisions and court judgements, market shares of respondents or defendants have been between around 40 per cent and 80 per cent.

Forms of Action

Exclusion of other entrepreneurs

To "exclude business activities of other entrepreneurs" means that the concerned entrepreneur puts other entrepreneurs in a position of great difficulty with regard to carrying out their business activities by unreasonably restraining their business, for instance, by obstructing other entrepreneurs from entering the market or by forcing its customers to agree to exclusive conditions prohibiting them from dealing with the concerned entrepreneur's competitors.

Control of other entrepreneurs

To "control the business activities of other entrepreneurs" means that an entrepreneur makes other entrepreneurs obey its will by making it difficult for them to make decisions freely, for example, through combined relationships involving stockholding, the interlocking of directorates or the abuse of the concerned entrepreneur's dominant bargaining position vis-à-vis its trade partners.

Elimination measures and criminal penalties

. When an action violates Section 3 of the Antimonopoly Act, the FTC may order the entrepreneur to take the measures necessary to eliminate this action, such as suspension of the concerned action and transfer of a portion of business, etc. (para 1, chapter 7).

The Antimonopoly Act stipulates, as criminal penalties for violation of its regulations, penal servitude of not more than three years or a fine of not more than five million yen for an individual person, or of not more than 100 million yen for an organisation or enterprise (sections 89 and 95).

FTC decisions as precedents

Case against Toyo Seikan Kaisha, Ltd. (decision in 1971 judgement)[2]

a) Market conditions, and an entrepreneur that violated regulations

At the time of this case, Toyo Seikan Kaisha, Ltd. (Toyo Seikan) was providing 53 per cent of the total supply of food cans in Japan and, together with its affiliated food can manufacturing companies, it supplied 74 per cent of all the food cans in Japan. Toyo Seikan was therefore in the leading position in the food can manufacturing industry in Japan and canned food manufacturers were highly dependent on Toyo Seikan. Some manufacturers of canned foods planned to manufacture food cans for their own consumption, in order to reduce their costs.

b) Forms of violation

i) Two manufacturers of canned foods wanted to manufacture food cans for their own consumption. Based on the idea that the manufacturing of food cans by these manufacturers of canned foods might have a negative influence on the leading position of Toyo Seikan in the can manufacturing industry, Toyo Seikan forced one of these companies, which had already started to manufacture cans for its own use, to give up this manufacturing by stopping Toyo Seikan's shipments to that company of other cans, made by Toyo Seikan, that the other company was unable to manufacture for itself. Toyo Seikan also forced another company which was planning to manufacture cans for its own use to cancel its plans. ("Exclusion" of a new entrant to the can manufacturing industry which attempted to manufacture cans within its own facilities);

ii) Toyo Seikan was restricting sales potential and suppressing new investments of the can manufacturers under its control ("controlling").

c) Elimination measures

The FTC ordered that *i)* Toyo Seikan must not prevent manufacturers of canned foods with which it dealt from starting to manufacturing food cans for their own use by stopping its supply of food cans to them, and that *ii)* Toyo Seikan must divert some portion of the stock of can manufacturers under the control of Toyo Seikan, which was owned by another affiliated company of Toyo Seikan, and must not intervene in the business activities of the can manufacturer.

Case against Noda Soy Co., Ltd. (decision in 1955 judgement)[3]

a) Market conditions and an entrepreneur which violated regulations

At the time of this case, only four companies were evaluated as top-ranking nation-wide soy sauce manufacturers in the soy sauce manufacturing industry in Japan. Among these, Noda Soy Co., Ltd, (Noda Soy), accounted for 14 per cent of Japan's total soy sauce production (total production share by the top four companies was 23.3 per cent) and 36.7 per cent of the soy sauce shipped to the Metropolitan Tokyo zone (total shipments from the top four companies accounted for 68.5 per cent). Also, Noda brand products were extremely influential in the market. As judgement of the quality of soy sauce was not easy, general consumers used to judge soy sauce quality mainly by its price. Under such market conditions, other soy sauce manufacturers were obliged to follow the prices set by Noda Soy, which had become the price leader in the soy sauce market.

b) Form of the violation

Under the above-mentioned circumstances, Noda Soy substantially restrained competition in the soy sauce market by forcing wholesalers and retailers to maintain the resale prices of Noda's products.

c) Elimination measures

The FTC ordered Noda Soy to withdraw its policy on resale prices and prohibited it from indicating any volition with respect to resale prices, etc.

III. Prohibition of Unfair Trade Practices

(Section 19, Antimonopoly Act: General designation)

Summary

The Antimonopoly Act provides that "No entrepreneur shall employ unfair trade practices" (Section 19).

In the Antimonopoly Act, "unfair trade practices" refers to any act falling under one of the following subparagraphs, which tends to impede fair competition and which is designated by the FTC as such (Para.9, Section 2):

i) Unjustly discriminating against other entrepreneurs;

ii) Dealing at unjust prices;

(iii) Unjustly inducing or coercing customers of a competitor to deal with oneself;

(iv) Dealing with another party on such terms as will restrict unjustly the business activities of the said party;

(v) Dealing with another party by unjust use of one's bargaining position;

(vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is an stockholder or an officer and his another transacting party; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.

Types of actions

An unfair trade practice is illegal when it is likely to impede fair competition.

It is likely to impede fair competition if "there is a possibility of exerting a bad influence on competition to obtain clients by providing good quality products and services at cheap prices".

This includes the three aspects below:

i) the concern that neither free competition between existing entrepreneurs in a market nor the participation of new comers--free competition--is impeded (lessening of competition);

ii) the order of free competition is maintained by ensuring that the means of competition are based mainly on price, quality and services--efficiency competition--(ensurement of fairness of means of competition), and, it is the trading method that is an unfair means of competition (unfairness of means of competition);

iii) deterioration of the foundation of free competition in which trading is carried out by free and independent judgement (infringement of foundation of competition).

The FTC has designated 16 acts as "unfair trade practices"[4], uses the following three phrases regarding the obstruction of fair competition:

i) "Without proper justification"

An action in which the impedance of fair competition can be basically recognised from the external appearance of the action (e.g. group boycott, resale price maintenance).

ii) "Unjustly"

In contrast to i), this term means a type of action in which the impedance of fair competition cannot be recognised obviously and individual analysis is required (e.g. price discrimination, dealing on exclusive terms, such as exclusive sales system (*senbaiten-sei*)).

iii) "Unjustly in the light of normal business practices"

This term means the same as ii), although it is used to describe actions for which it is useful to add the viewpoint of "normal business practice" to "unjustly" in judging them (e.g. abuse of dominant bargaining position).

Except illegal cases *per se*, the judgement of the impedance of fair competition requires case-by-case analysis in view of the previously-mentioned three aspects, and it is not possible to set uniform judgement standards. For the present, however, the Distribution Guidelines published in 1991 provide certain standards.

According to the Distribution Guidelines, for instance, in cases where a restriction on the handling of competing products is imposed by an influential firm in a market, and if the result is that it is difficult for new entrants or competitors to easily secure alternative distribution channels, such restriction is illegal[5]. The general standard defining an "influential firm in the market" is in the first instance the market share of the firm, that is, whether it has more than a 10 per cent share or it holds one of the top three positions in the market. In contrast, when its market share is less than 10 per cent and its position is fourth or lower, the restriction would usually not make it difficult for new entrants or competitors to easily secure alternative distribution channels and the trade of competitors would not be affected.[6] Whether or not a restriction "may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels" is determined, taking into account comprehensively such factors as the structure of the market (market concentration, characteristics of the product, distribution channels, etc.), position in the market of the manufacturer imposing the restriction (in terms of market share, brand name, etc.), number of distributors affected by the restrictions and their position in the market and the impact of the restriction on the business activities of distributors[7].

Forms of action

There are 16 types of action in the "unfair trading practices" category, and typical types among those shown in paragraph 21 ii) are introduced here.

Territory system

"Territory system" includes various forms of area restraint including the "area of responsibility system" which establishes the area of primary responsibility, the "location system" which restricts the location of business premises to within a fixed area, "exclusive territory" which restricts the distributor from selling outside the area, and "restriction of sales to outside customers", which assigns a specific area to each distributor which prevents him from selling outside his area even when requested to do so by a client.

The Distribution Guidelines set out the concepts shown below regarding the territory system.

i) Exclusive territory[8]

In cases where an influential firm in a market assigns exclusive territories to its distributors, and if the price level of the product covered by the restriction is likely to be maintained, such restriction is an unfair trade practice and is therefore illegal.

ii) Restriction of sales to outside customers[9]

In cases where a firm imposes a restriction of sales to outside customers on distributors, and if the price level of the product is likely to be maintained, such restriction is an illegal unfair trade practice. When a manufacturer has prohibited the distributor from selling to customers outside the area

even upon request, the degree of this restriction is more rigid than that of exclusive territory, as the essential condition that the entrepreneur be "influential in the market" is not required.

iii) *Area of responsibility system and location system* [10]

It is not illegal for a firm to adopt the area of responsibility system or the location system for the purpose of developing an effective network for sales or securing a better system for after-sales service, except where this involves also "exclusive territory" or "restriction on sales to outside customers".

Dealing on exclusive terms

An exclusive supply arrangement is a typical example of a practice which falls into the category of dealing on exclusive terms. It forces the buyer to accept the condition of not receiving supplies of merchandise and services from the supplier's competitor. The exclusive sales system is a typical example of such a contract. The condition which prevents a buyer from handling a competitor's products and forces the buyer to handle only the supplier's own products has the effect of promoting sales by forcing the buyer to concentrate on selling the supplier's own merchandise, and also has the effect of accelerating competition, for example, by activating competition between firms. This does not therefore immediately violate the Antimonopoly Act. If the restriction on handling of competing products is imposed by an influential firm in a market, and if the restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, such restriction is illegal[11].

Abuse of dominant bargaining position

"Abuse of dominant bargaining position" means the conduct of an entrepreneur, whose position in business is superior to that of the other party, in forcing the other party to purchase merchandise or services other than those related to the deal concerned, or in forcing the other party to provide an economic benefit, such as money or services, to the entrepreneur.

"Dominant bargaining position" here means not only a monopolistic position in the market such as a private monopoly, but also a position which involves such relative superiority with regard to transactions as can impose an unreasonable disadvantage on the other party. A high market rate, as required in the case of an "influential firm" is not required for this position.

The Distribution Guidelines also stipulate concretely matters to be considered.

A retailer shall be found to be "in a dominant bargaining position over its suppliers" in such cases where the suppliers are obliged to accept the retailer's requests even if they are excessively disadvantageous to the suppliers, since discontinuance of transactions with the retailer would significantly damage the suppliers' business. In making this finding, comprehensive consideration is to be given to such factors as degree of dependence on the retailer, position of the retailer in a market, changeability of customers, and supply and demand forces of the product[12].

The Distribution Guidelines clarify concepts regarding actions in which there is a problem between a retailer and a supplier due to the abuse of the retailer's dominant bargaining position, by

giving concrete examples of such actions, such as coercion to purchase and requesting the dispatch of salespersons to shops[13].

For instance, in cases where a retailer in a dominant bargaining position causes suppliers to purchase its products or services, or those of a firm designated by the retailer, unjust disadvantage is caused to the supplier, in the light of normal business practices, and it is therefore illegal as an unfair trade practice:

i) Influence exerted by retailers on suppliers with respect to procurement by the latter;

ii) Influence exerted by retailers over suppliers to cause the latter to purchase from them.

Elimination measures

. The Fair Trade Commission may give an order to cease and desist, to delete the clauses concerned from the contract and to take any other measures necessary to eliminate the conduct from the "unfair trade methods" category.

FTC decisions as precedents

Territory system - Case against Fuji Photo Film Co., Ltd. and others (decision in 1981[14])

Fuji Photo Film Co., Ltd. was manufacturing x-ray film and in 1980 Fuji's x-ray film products had a market share of about 53 per cent, with about 90 per cent of all Fuji x-ray film sold being handled by its exclusive specially-contracted stores.

Fuji X-rays Co., Ltd. (an x-ray film seller: all stock in this company was owned by Fuji Photo Film Co., Ltd.) concluded exclusive special agent contracts for the trading of x-ray film with exclusive special agents and quasi-exclusive special agents, which restricted the sales territories and retail prices of these exclusive special agents and quasi-exclusive special agents. This action was deemed to fall into the category of "dealing on restrictive terms".

Dealing on exclusive terms - Case against France Bed Co., Ltd. (decision in 1976[15])

France Bed Co., Ltd. (France Bed) had an approximately 40 per cent share of the bed industry

France Bed concluded exclusive sales contracts with leading retailers carrying out trading of a fixed amount or more; these contracts contained a provision prohibiting the handling by retailers of beds similar to those made by France Bed. France Bed forced any retailer that violated this provision to lose the privilege of being able to purchase products at lower prices than those applied to retailers that had not yet concluded this contract.

The FTC judged that this action fell into the category of "dealing on exclusive terms", and ordered France Bed to cease its exclusive action, including abrogation of these contracts.

Abuse of dominant bargaining position - case against Mitsukoshi, Ltd.(decision in 1982)[16]

At the time of this case, annual sales of Mitsukoshi Ltd. (Mitsukoshi) were ranked at the top in the department store industry and in second place in the entire retail industry in Japan. It had also achieved a high level of reliability as one of the oldest retailers in Japan; many suppliers wanted to deal with Mitsukoshi.

Mitsukoshi demanded that suppliers bear part of the costs of renovation for sales premises in Mitsukoshi stores stating that the renovation was related to the merchandise supplied by those suppliers, but without setting any particular standard; Mitsukoshi also forced suppliers to bear expenses for sales events such as bargain sales, also with no particular standard.

The FTC judged that Mitsukoshi's actions fell into the category of "abuse of dominant bargaining position" and ordered Mitsukoshi not to demand that suppliers bear sales floor renovation costs or the expenses for sales events other than in cases in which the burden of expense had a logical basis, in which the amount was within a reasonable range, and when each supplier clearly consented to bear the expense.

Appendix

Measures against a monopolistic situation (Section 8-4, Antimonopoly Act)

The provision concerning "Measures against a monopolistic situation" states that, in a highly oligopolistic market which fulfils a structural requirement stipulated in the Act, if there is an undesirable market performance, which is not in violation of the Antimonopoly Act, but which fulfils undesirable market performance requirements stipulated by the Act, the FTC may order the entrepreneur concerned to take the necessary measures to restore competition in the concerned market through, for example, the transfer of a part of the concerned entrepreneur's business operation in accordance with the procedures as provided in the Act. This provision was introduced when the Antimonopoly Act was amended in 1977.

The following are the structural requirements of a monopolistic situation, as stipulated in the Antimonopoly Act:

-- the aggregate total amount of price of goods or services which are supplied in Japan is over 100 billion during the latest one year period; and,

-- the market share of an entrepreneur exceeds 50 per cent or the combined market share of two entrepreneurs exceeds 75 per cent.

The following are the undesirable market performance requirements as stipulated in the Antimonopoly Act:

-- it is extremely difficult for any other entrepreneur to newly enter the market;

-- for a considerable period of time, the increase in price of the particular goods or services has been remarkable, or the decrease therein has been slight in light of changes that have occurred in the supply and demand or in the cost of supplying such goods or services during such period; and

-- the entrepreneur has earned an extremely high profit rate, or has expended remarkably excessive selling costs and general and administration expenses.

The FTC has formulated and published guidelines entitled, "Guidelines Concerning Particular Fields of Business Among the Provisions of the Definition of Monopolistic Situations", in order to implement appropriately the regulations of monopolistic situations and has appended a concrete list of the particular fields of business falling under the market structure requirements, from the viewpoint that it should be clear to each entrepreneur in advance whether or not that entrepreneur's field of business is included in the applicable scope of the regulations. At present, 27 business fields are listed in the appendix.

The FTC makes constant efforts to monitor the behaviour of individual enterprises, in accordance with the undesirable market performance requirements stipulated in the Antimonopoly Act, through collecting data regarding price and profitability, etc., for each of the business fields listed in the above-mentioned appendix.

NOTES

1. Toho-Subaru case September 19, 1951 Judgement made by the Tokyo High Court:
A recent court precedent defined “substantial restraint of competition” as “restraint which decreases competitive function and has the effect of bringing about a situation in which it is almost impossible to expect effective competition from the point of view of competition as a whole (Petroleum Cartel Case, Tokyo High Court judgement, September 26, 1980)

2. Fair Trade Commission Decision Collection Vol.19, p.87

3. Fair Trade Commission Decision Collection, Vol.7, p.108

4. Fair Trade Commission Notification no.15 of 1982

5. Chapter 2-2(2), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

6. Chapter 2-2(2), Note 4, part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

7. Chapter 2-2(2), Note 5, part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

8. Chapter 2-3(3), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

9. Chapter 2-3(4), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

10. Chapter 2-3(2), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

11. Chapter 2-2(2), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

12. Chapter 5-1(2), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

13. Chapter 5-2, part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

14. FTC Decision Collection, Vol.28, p.10, also, in this case, both the territory system and the action itself, used to maintain the resale price, were judged to be illegal.

15. FTC Decision Collection, Vol.22, p.127

16. FTC Decision Collection, Vol.29, p.31

PORTUGAL

Introduction

As a result of significant changes in the relative weights of manufacturing and distribution in Portugal in the late 1980s, the issue of economic dependence and its possible abuse became a matter of concern for the competition authorities and led to the drafting of specific provisions on the subject in the new Competition Act -- Decree-Law 371/93, of 29 October 1993.

The legislation in force until 1994 had prohibited the abuse of economic dependence only insofar as the firm responsible occupied a dominant position in the market in question, which most often is not the case.

Article 4 of Decree-law 371/93 closed this loophole in the law by prohibiting abuse of the economic dependence of a supplier (or buyer), insofar as they have no equivalent alternative. Practices termed abuses in the Act are, inter alia, the fixing of purchase or selling prices and trading terms, the imposition of discriminatory terms of purchase or sale and refusal to deal.

In contrast with Article 8-2 of the French Order of 1986, it does not have to be established that the abuse "impairs the normal operation of the market"[1]

At first sight, this should make it easier to enforce the prohibition under Portuguese law. However, it is not clear that this is so.

Prohibiting abuses of economic dependence poses complex problems. The greatest difficulties lie in determining economic dependence rather than in establishing whether certain practices constitute abuses or not. Admittedly, Article 4 of Decree-Law 371/93 links economic dependence closely to the absence of an equivalent alternative, but the problem of defining "absence of an equivalent alternative" remains. Is it a situation where the only alternatives open to the buyer or supplier entail disproportionate costs? Or does it simply mean that the offending practice places the buyer or supplier in a "less advantageous" situation than previously?

At first sight, the former interpretation would seem to be the correct one. However, to verify that such a situation exists would require a great deal of information (such as, for example, how well-known the suppliers' brands are, the suppliers' financial capability and their margins, the degree of concentration of supply, the duration of the partnership and specific investment made in the context of that relationship), so that it is not as straightforward as it might seem.

Abuse of economic dependence

As stated above, certain types of behaviour can be clearly qualified as abuses. The best known examples include requiring free supplies, listing charges, imposition of the "most favoured group" rule, and "delisting".

Whilst some of these examples are clear-cut, other are less so; for example, listing charges and delisting.

Can listing charges be regarded as an abuse of economic dependence when it is the supplier himself who has chosen of his own free will to put himself in a position of dependence? Is it justified to oblige a firm to stay with a given supplier when it has found more favourable terms for the supply of the product elsewhere?

It seems that, irrespective of whether or not the supplier or buyer has an equivalent alternative, the fundamental issue is whether there is genuine abuse by the firm concerned as opposed to behaviour which might be justified as part of commercial policy.

At any rate a causal link must be established between the economic dependence of a supplier or buyer and abuse thereof. This means that the incriminated "dominant" undertaking must have imposed a requirement that is economically or commercially unjustified, with the object or effect of exploiting the weaker situation of the supplier or buyer for its own advantage.

Remedies

It should be noted, firstly, that in spite of some fairly veiled references to possible abuses of economic dependence, to date no complaints have been received by the Portuguese competition authorities (most probably owing to the risk of retaliation, on one hand, and difficulties in proving that no equivalent alternative exists, on the other).

Furthermore, although certain practices which may constitute abuses of economic dependence are currently being investigated by the DGCP, for the moment no decision regarding them has been taken by the Competition Council. The effectiveness of the measures provided for by Portuguese law cannot therefore be assessed.

Under the terms of Article 27 of Decree-Law 371/93, the Council may, in its ruling, order any measures deemed necessary to put a stop to the offending practice or its effects. By virtue of Article 37 it may also impose fines of between Esc 100 000 (approximately FF 3 500) and Esc 200 million (approximately FF seven million). These fines are the same as those imposed for price fixing or abuse of dominant position.

NOTE

1 Prior to the entry into force of the new Act, the Portuguese Competition Council had already issued a ruling on the economic dependance of Distributors in relation to their suppliers in a case concerning an exclusive trading agreement. It considered that the relationship between suppliers and their distributors must “reflect the material conditions dictated by the natural imbalance of the forces involved”, and that notice of termination or termination of contracts must lie within a uniform and clear comercial policy”. According to the Council, notice of termination or termination of a contract which does not lie withing a uniform commercial policy must therefore be “considered an infringement of the rules on competition”, since there “refusals to deal”’ make it more difficult for the economically dependent distributor to obtain market access (or to do business in the normal way).

PORTUGAL

Introduction

Au Portugal, les changements significatifs intervenus dans les rapports de force entre l'industrie et la distribution, à la fin des années 80, ont fait de la question de la dépendance économique et de son éventuel abus un sujet de préoccupation pour les autorités de concurrence et ont été à l'origine de dispositions spécifiques à cet égard dans la nouvelle loi sur la concurrence - le décret-loi n.° 371/93, du 29 octobre.

En effet, la législation en vigueur jusqu'à l994 n'interdisait l'exploitation abusive de l'état de dépendance économique que dans la mesure où l'entreprise qui en était responsable se trouvait en position dominante sur le marché en cause. Or, tel n'est pas le cas dans la plupart des situations.

L'article 4 du décret-loi n.° 371/93 est venu mettre fin à cette lacune de la législation en prévoyant l'interdiction de l'exploitation abusive de l'état de dépendance économique dans lequel se trouve un fournisseur (ou un client), à condition que celui-ci ne dispose pas d'alternative équivalente. Parmi les exemples de pratiques, mentionnés dans la loi, pouvant être qualifiées d'abusives figurent, entre autres, la fixation des prix d'achat ou de vente, aussi bien que des conditions de transaction, l'imposition de conditions d'achat ou de vente discriminatoires et le refus d'achat ou de vente.

Il faut souligner qu'à la différence de l'article 8-2 de l'ordonnance française de 1986, l'article 4 de la loi portugaise n'exige pas qu'il soit établi que l'abus porte "atteinte au fonctionnement normal du marché"[1].

Cette différence devait, en première analyse, rendre plus facile l'application de l'interdiction dans l'ordre juridique portugais. Toutefois, il n'est pas évident qu'il en soit ainsi.

En effet, la prohibition des abus de dépendance économique n'est pas sans poser des problèmes complexes. Plus que l'éventuel caractère abusif de certaines pratiques, c'est au niveau de la détermination de l'état de dépendance économique que les plus grosses difficultés apparaissent. Certes, l'article 4 du décret-loi n° 371/93 établi un lien étroit entre l'existence de la dépendance économique et l'absence d'alternative équivalente. Encore faut-il déterminer en quoi consiste l'absence d'une "alternative équivalente". S'agit-il d'une situation dans laquelle le client ou le fournisseur ne peut trouver une "solution de rechange" qu'à des "coûts" disproportionnés ? Ou, par contre, peut-on accepter la simple démonstration de ce que la pratique en cause met le client ou le fournisseur dans une situation "moins avantageuse" que celle dont il bénéficiait jusque là ?

Il semble, à première vue, que c'est la première hypothèse qui doit être retenue. Mais il ne faut pas oublier que la vérification d'une telle situation de fait doit faire appel à un grand nombre d'éléments (tels que, par exemple, la notoriété des marques proposées par les fournisseurs, leur capacité financière et l'importance des marges sur les marchés où ils opèrent, le degré de concentration de l'offre, la durée du partenariat ou encore les investissements spécifiques réalisés dans le cadre de cette relation) et qu'elle n'est donc pas de toute évidence.

L'exploitation abusive de l'état de dépendance économique

Comme on l'a indiqué ci-dessus, il existe un certain nombre de comportements dont on peut établir, à première vue, leur caractère abusif. Parmi les exemples les plus connus figurent l'imposition de fournitures gratuites, le "référencement" contre paiement d'une prime, l'application forcée de la règle du "groupe le plus favorisé" e "déréférencement".

Si certains de ces exemples ne semblent pas susciter des doutes sérieux, d'autres, par contre, ne vont pas sans poser des problèmes délicats. Tel semble être le cas du "référencement" contre paiement d'une prime et du "déréférencement".

Peut-on condamner, en tant qu'abus de dépendance économique, le "référencement" contre paiement d'une prime lorsque c'est le fournisseur lui-même qui a choisi de son propre gré de se placer dans une situation de dépendance ?

Est-il justifié d'obliger, sans plus, une entreprise à maintenir un fournisseur donné, alors que l'entreprise en cause a trouvé ailleurs des conditions plus favorables pour l'approvisionnement du produit de son fournisseur ?

Il semble, en effet, qu'indépendamment de l'existence, pour le fournisseur ou le client, d'une alternative équivalente, il est fondamental de vérifier si l'on est en présence d'un véritable abus de la part de l'entreprise en cause et non pas d'un comportement qui peut être justifié par des options de politique commerciale.

Il faudra, en tout état de cause, établir un lien de causalité entre la situation de dépendance économique d'un fournisseur ou d'un client et l'exploitation abusive qui en est faite, en ce sens que le comportement que l'on reproche à l'entreprise "dominante" doit constituer une exigence sans justification du point de vue économique ou commercial, ayant pour objet ou pour effet d'exploiter à son profit la situation de désavantage dans laquelle se trouve le fournisseur ou le client.

Réparations

Il faut mentionner, en premier lieu, que malgré des références plus ou moins voilées à des situations pouvant relever de l'abus de dépendance économique, aucune plainte n'a été déposée jusqu'à présent auprès des autorités nationales de concurrence (en raison, très probablement, d'une part, des risques de rétaliation et, d'autre part, des difficultés de preuve quant à l'absence d'alternative équivalente).

En outre, et bien qu'un certain nombre de pratiques susceptibles de constituer des abus de dépendance économique fasse actuellement l'objet d'investigations d'office de la part de la DGCeP, aucune décision à ce sujet n'a été adoptée pour l'instant par le Conseil de la Concurrence. Aucun bilan n'est, donc, possible sur l'efficacité réelle des mesures prévues dans la législation portugaise.

En vertu de l'article 27 du décret-loi n.º 371/93, le Conseil, dans sa décision, peut ordonner l'adoption des mesures jugées indispensables pour mettre fin à la pratique incriminée ou à ses effets. Il peut également, au titre de l'article 37, imposer une amende qui peut varier entre cent mille escudos (trois mille cinq cents FF, environ) et deux cents millions de escudos (sept millions FF, environ). Le montant des amendes susceptibles d'être imposées est le même que celui applicable en cas d'entente ou d'abus de position dominante.

NOTE

1. Il convient de souligner que le Conseil de la Concurrence portugais, dans une décision antérieure à l'entrée en vigueur de la nouvelle loi, s'était déjà prononcé sur la dépendance économique des distributeurs vis-à-vis de leurs fournisseurs dans une affaire relative à une concession exclusive de vente. Dans sa décision, le Conseil a considéré que les rapports entre les fournisseurs et leurs distributeurs doivent "obéir à des conditions matérielles, dictées par la naturelle disproportion des forces en présence", la dénonciation ou la résiliation des contrats devant être "effectuée dans le cadre d'une politique commerciale uniforme et claire". Selon le Conseil, la dénonciation ou la résiliation d'un contrat qui ne s'insère pas dans le cadre d'une politique commerciale uniforme doit, donc, être "être considérée comme une infraction aux règles de la concurrence", ces "refus de vente" étant de nature à rendre plus difficile l'accès du distributeur économiquement dépendant au marché (ou l'exercice normal de son activité).

SPAIN

This note briefly discusses the reactions of a company to a decline of its exclusive rights (legal monopolies). The reaction included attempts to impede, obstruct and delay the liberalisation process through various ways including the abuse of its dominant position.

The company in this case, Telefónica de España, S.A.(Telefónica), kept a legal monopoly in telecommunication services and was the only company in Spain which provided all types of telecommunication services.

All the companies wanting to provide enhanced telecommunication services (liberalised) required Telefónica's services to connect terminal units. This type of service was provided only by Telefónica before its liberalisation.

Conduct

3C Communications España, S.A. (3C) wanted to introduce in Spain credit card paying public telephones. 3C considered its concept an enhanced service because it allows the possibility of paying telephone calls with a credit card. 3C wanted to install this type of public or semi-public telephones in places frequented by businessmen such as airports, conference centres and hotels. 3C thought that this service could be very useful for these people and it wanted to take advantage of its experience in other countries and of the fact that this service was not already implemented in Spain.

3C asked for authorisation from the appropriate authority saying that its terminal units would be used as modems. It did not present them as telephones for public use. 3C obtained the legal authorisation.

When Telefónica became aware of the utilisation of the terminals as public telephones, it rejected or delayed the concession of new telephones lines, particularly in airports.

This conduct was considered abusive because Telefónica cannot unilaterally cut off, reject or delay telephone lines without an authorisation of the regulatory authority. Telefónica must supervise the utilisation of telephone lines and it must communicate to the authority any misuse in the utilisation of the lines, but it cannot cut off the lines without an authorisation of the telecommunication authority. This order was never sent by the regulator, so the unilateral conduct of Telefónica was considered abusive.

During the proceedings there were numerous discussions about the real nature of the service which 3C wanted to provide. The debate focused on the issue of whether the credit card paying public telephone was an enhanced service (liberalised) or a final service (monopolised by Telefónica). Finally, the competition authorities decided that it was an enhanced service, thus strengthening the position of 3C. Nevertheless, the basic issue was that Telefónica could not act unilaterally without authorisation of the telecommunication authority.

The conduct of Telefónica was considered especially serious in this case because of the following reasons:

A legal monopoly is only justified by protecting the general public. This general interest was damaged by the monopolist for its own profit and not that of the public. The monopolist impeded the development of a service not implemented in Spain. Its behaviour was not only detrimental to the competitors but also to consumers.

The delay caused by Telefonica allowed this company to introduce its own services of credit card paying public telephones. That harmed 3C which, would have obtained a significant advantage from being the first company to offer that service in the market.

In this case, contracts between a subsidiary of Telefónica and clients such as airports, fuel-stations, and hospitals concerning the installation of normal public telephones were also reported. These contracts included an exclusivity clause for five years. That clause acted as a way to close the market. This report has not already been finished with final decision of the competition authorities so we will not comment the case in depth. In any case, it is worth saying that these exclusivity clauses have disappeared from the contracts.

Remedies

In this case the following remedies were imposed:

-- preventive measures ordering Telefónica to maintain the telephone lines of 3C and not to obstruct the concession of new lines;

-- in the final decision Telefónica was fined Pts 124 millions (around $ one million). This fine did not include any compensation for damages caused. This compensation must be obtained from the ordinary jurisdiction;

-- to forbid Telefónica to implement this kind of practice in the future.

The Tribunal for the Protection of Competition sent a report to the Government called "Policies to Boost Free Competition in the Services Sector and Putting an End to the Damage Done by Monopolies". In the chapter about telecommunications it includes a suggestion about the pressing need to put an end to the intertwined interests between regulators and regulated industries.

Because of historical reasons in the telecommunication sector in Spain, these two levels were mixed. Historically, Telefónica was stronger and had more technical knowledge than the regulator so there were situations in which Telefónica was the shadow regulator. For example Telefónica gave *de facto* the homologations for the competitor's terminals. The current situation has notably changed in this respect.

Conclusions

-- Specific measures taken in this case, mainly the preventive measures, were useful to minimise the damage caused by Telefónica. In any case, it is difficult to provide any kind of remedy to compensate all of the damages resulting from abusive conduct. That is particularly true if the abusive conduct takes place in a market which is undertaking a liberalisation process and in which the remedies must be implemented immediately;

-- Specific remedies give partial solutions to specific cases. These kinds of solutions are partial and insufficient without general liberalisation measures taken by the Government.

SWEDEN

The Swedish Competition Act conforms with Article 85 and 86 of the Treaty of Rome and obliges the Swedish Competition Authority (the Authority) to take EC case law into account. In this contribution we will not discuss the definition of dominant position or the remedies that the government might impose on companies. In these areas we generally share the same point of view as the Commission. We will instead focus on problems concerning abuse of dominant position in a newly liberalised sector in Sweden - postal services. We list below some cases before the Authority, which illustrate different kinds of abuse.

The postal sector in Sweden was fully liberalised in 1993. As a result, reserved postal services giving exclusive rights to the Swedish Postal Administration (Sweden Post), similar to the present conditions for most national postal administrations, no longer exist in Sweden. As a result, some competition from new entrants has been established in certain areas of the postal market. This new competition also appears at the very core of the traditional postal service sector, the distribution of addressed letters to businesses and households. Several of these new entrepreneurs have filed complaints concerning alleged abuse of a dominant position by Sweden Post. Sweden Post is still in many areas a *de facto* monopolist and has to be careful not to infringe the Swedish Competition Act.

Cases concerning postal services

In the Privpak case it was found that Sweden Post entered into exclusive agreements with customers obliging them to buy all or most of their mail order distribution from Sweden Post. It was also found that different types of rebates and sales target schemes with fidelity effects were put into practice. The arrangements resulted in a situation where customers had limited or no possibilities at all to use Privpak, a new entrepreneur in the field of mail order distribution. This practice unfairly strengthened Sweden Post's dominant position on the market and was found to constitute an abuse. Sweden Post appealed against this decision to the court of first instance, Stockholm City Court, and the case is still pending.

In the CityMail case, a "cream-skimming" clause, used in agreements with customers, was examined. According to this clause a customer could expect a price rise if the customer used CityMail, a local mail operator in the Stockholm area, for a part of its mail distribution. The clause gave no information as to how much the price would rise in such a situation, thus keeping the customers in a state of uncertainty. As a consequence, a customer needing nation-wide distribution, had few opportunities to use CityMail for distribution in Stockholm and to use Sweden Post at the same time for distribution in the rest of the country. The Authority found that the way Sweden Post used this clause was an abuse of a dominant position.

The SDR case demonstrates the problems that arise when an undertaking is both a competitor to and a customer of a company which holds a dominant position. SDR competes with Sweden Post in the field of distribution of unaddressed letters. SDR operates nation-wide except in rural areas and is thus obliged to let Sweden Post distribute its customers' unaddressed letters in rural areas. The Authority found that the price for distribution in those areas was dependent upon whether the customer also used Sweden

Post for distribution in urban areas. As a consequence, SDR paid considerably higher price for this service compared to other customers. This practice was also found to constitute an abuse within the meaning of the Competition Act.

Sweden Post announced, during October 1995, new prices for the distribution of periodical publications for 1996. These new prices were lower in Stockholm than in other parts of Sweden, compared to 1995 prices. The Competition Authority found that the announced prices for distribution to Stockholm did not cover the costs for such distribution and that the purpose was to eliminate CityMail and other potential competitors. The Competition Authority considered it as predatory pricing and an abuse of a dominant position. Sweden Post appealed against the decision to the Stockholm City Court where it is still pending.

The Competition Authority has experienced that in markets where Sweden Post faced competition from other companies, it has tried to eliminate the competition with substantially lower prices. Sweden Post has moreover used different kinds of fidelity rebates in its agreements with customers. Customers who use Sweden Post to cover all their distribution needs receive better conditions compared to customers using other distributors as well. In several cases the Swedish Competition Authority has found that Sweden Post has abused its dominant position.

THE UNITED KINGDOM

The United Kingdom approach in this area of competition law and policy differs from that of most of the members of the OECD and of the European Union. The Fair Trading Act 1973 empowers the authorities to investigate "monopoly situations" as defined in the legislation and to take action if the investigation reveals conduct or structural situations that operate or may be expected to operate against the public interest.

The authorities consist of the Office of Fair Trading (OFT) and its head, the Director General of Fair Trading (DGFT), the Monopolies and Mergers Commission (MMC), and the Secretary of State for Trade and Industry. It is the function of the OFT to monitor markets and for the DGFT to decide whether a reference to the MMC is justified. The MMC is an independent tribunal which investigates and reports to the Secretary of State whether any matters uncovered operate against the public interest; if so, the MMC can make recommendations on how the adverse effects might be remedied. The Secretary of State who is the Minister with responsibility for competition policy decides what action, if any, shall be taken on an MMC report (which he must publish). The Secretary of State has extensive powers to impose remedies but usually he requests the DGFT to negotiate enforceable undertakings by the parties as to their future conduct.

The Competition Act 1980 supplements the provisions of the Fair Trading Act. It allows the DGFT to refer to the MMC specific conduct that appears to him to amount to an anti-competitive practice. The MMC investigation is therefore narrower in scope than an investigation of a monopoly situation, but otherwise the two procedures are very similar.

This administrative system contrasts with Article 86 of the Treaty of Rome, for example, which prohibits *ab initio* conduct which amounts to an abuse of a dominant position. While it may have less deterrent effect than a prohibition system (there are no financial penalties, no rights for private actions, and MMC reports do not give rise to precedents in the legal sense), it is a flexible system, applicable to a variety of situations and circumstances. After a review of the case for adopting a prohibition system similar to Article 86 and other possible reforms, the Government announced in April 1993 that it intended to retain the present system but to strengthen the DGFT's investigatory and enforcement powers in certain respects. It will shortly be issuing a consultation paper on how its proposals (and more substantial proposals to reform the law on restrictive agreements) might be implemented.

Definitions

The Fair Trading Act defines two types of "monopoly situation" that can be investigated:

-- a scale monopoly where one person or firm accounts for at least 25 per cent of the supply or acquisition of goods or services of a particular description in the United Kingdom or a part of the United Kingdom;

-- a complex monopoly where a number of persons or firms together account for at least 25 per cent of the supply or acquisition of goods or services of a particular description in the United Kingdom or a part of the United Kingdom and engage in conduct which prevents, restricts or distorts competition.

Scale and complex monopolies can exist in the same market, for example in new motor cars, Ford was a scale monopolist as it supplied more than 25 per cent of new cars in the United Kingdom while 24 car manufacturers and importers comprised a complex monopoly because of the restrictive features of their selective and exclusive distribution agreements with dealers.

These definitions determine whether there is jurisdiction for the MMC to investigate and, ultimately, for the Secretary of State to take remedial action if the MMC identify effects adverse to the public interest. The 25 per cent "market share" threshold enables a variety of market structures to be investigated. It is not a definition of dominance.

A reference to the MMC is either the supply (or acquisition) of goods or services of a particular description. The goods or services do not have to constitute a market in the economic sense (i.e. to comprise goods or services which are close substitutes from the demand and/or the supply side). The "market" referred is termed the reference market. When the MMC have established their jurisdiction by reference to this "market", they need to establish the economic market which will be relevant to their assessment of the conduct of the "monopolists" and of the public interest. The relevant product market may be wider or narrower than the reference market. Similarly the geographic market identified by the MMC as relevant to their investigation may be narrower or wider than the territory of the United Kingdom.

In practice the DGFT will endeavour to match the definition of the goods and services referred and the geographical scope of the reference to his own assessment of the relevant market from his monitoring function, and he will only refer where he has reason to believe that competition is not working effectively with potential detriments from the public interest point of view. But this may mean a market in which there is a clearly dominant firm, or a market of an oligopolistic structure, whether tight or loose oligopoly, or a more fragmented structure but where a practice of all market participants appears to restrict competition.

The complex monopoly definition is a particularly wide one; it has been said that almost any industry could be held to be a complex monopoly on some basis or another. It has enabled the authorities to investigate inter alia the rules of professional bodies, industry-wide practices such as adherence to recommended retail prices, networks of vertical agreements as in petrol, beer, films and motor cars, and selective distribution as in fine fragrances and newspapers.

While the United Kingdom legislation therefore allows a variety of market structures to be investigated, the MMC will need to establish in each case whether the firm or firms that are in a monopoly situation as defined for jurisdictional purposes do, indeed, enjoy market power and exercise it in ways that are detrimental to the public interest.

The public interest is not defined in the legislation. The MMC are to take account of any matter that they consider relevant although the statute lists a number of factors they must consider including the desirability of promoting competition.

Conduct

Over the years, the many MMC reports have found a wide variety of practices of firms in monopoly situations to be against the public interest - predatory conduct, exclusionary practices of many kinds, and exploitative conduct. Examples of conduct of scale monopolists include:

-- the acquisition of small competitors (animal waste and pest control services);

-- retrospective loyalty bonuses and volume rebates (matches and disposable lighters);

-- discounts for not stocking competitors' products (frozen foods);

-- refusal to supply (bicycles and pest control services);

-- restrictive terms in copyright licensing agreements (video games - a classic duopoly);

-- uniform delivered pricing (plasterboard);

-- discriminatory pricing (contraceptive sheaths, gas and animal waste);

-- predatory pricing (concrete roofing tiles and bus services in North East England);

-- excessive prices (artificial lower limbs, white salt - this in another duopoly - contact lens solutions).

The complex monopoly provisions have been used to investigate not only vertical restraints of various kinds and in a variety of industries, but also "conscious parallelism" or so-called "tacit collusion" in oligopolies where there is no evidence of any agreement not to compete (electric cables among others).

The MMC (which consists of part-time members, five or six of whom will be assigned to any reference) reach their conclusions after an investigation that is inquisitorial rather than adversarial. The MMC collect evidence largely from questionnaires and submissions from interested parties. Hearings may be held to elucidate the facts, but the main hearings are those with the "monopolists" at which the public interest issues as identified by the MMC are probed as are any likely recommendations that the MMC might put forward. The MMC has the power to require information and to compel persons to attend but these powers are rarely used.

A notable feature of the United Kingdom system is that invariably on a reference, the MMC examines and comments on the profitability of a monopolist: it looks for evidence that market power has been exploited. The assessment of the level of prices and profits is a step on the way to the assessment of the effectiveness of competition and to the judgement on whether there are any adverse effects of the monopoly situation upon the public interest. In taking these steps the MMC will have regard to entry conditions in the market and the potential for competition stimulated by the high profits. Where it concludes that entry is unlikely, and that competition cannot be created, the MMC may recommend price control. Competition is superior to regulation, but if competition cannot work, or be made to work by the encouragement of new entrants, regulation may be the only answer. Of course, regulation can generate its own inefficiencies and distortions. This means that the choice of regulatory technique is important, and in this regard there is increasing experience in the United Kingdom, especially in the field of utility regulation, of the use of price cap formulae - a technique designed to preserve the incentives to improve efficiency while holding the rate of increase of prices in check. Price increases are limited to a fixed

number of percentage points below the rate of inflation but if a firm is able to reduce its costs, it can increase its profits - at least until the formula is revised.

There is no doubt that the administrative system operating in the United Kingdom is better suited to the assessment of prices and profits and to reaching judgements on whether they are "excessive" than a judicial system. Courts may be reluctant to condemn if the criteria by which a company's profits are to be assessed cannot be set out in the law. The comparison should be with the profitability that would prevail were there effective competition in the market, i.e. the "as if competition test", as the Germans put it. The assessment would have to take account of relative riskness and efficiency levels. Imperfect data will be available for such assessments and the evidence required by a court to establish that a level of prices was unlawful seems, from the experience of other systems, to be of a higher order than that on which the MMC are prepared to reach a judgement. Not that the judgement is ever easy (even with the use of sophisticated measures of rate of return and the risk adjusted cost of capital); but the scope for investigating the exploitation of market power by charging prices higher than would be likely in a competitive market, or indeed discriminatory prices, is undoubtedly a distinctive and arguably advantageous feature of the United Kingdom system.

The investigation of contact lens solutions may illustrate. The MMC's approach focused on Allergan and CIBA Vision which had 38 per cent and 34 per cent of the United Kingdom market respectively: three other suppliers had shares in the 6-9 per cent range. Allergan was clearly the market leader: it had the stronger product range and was better represented in the major retailers. It was also a far more profitable company with an average return on capital employed 1988-92 of 102 per cent, far above the average for manufacturing industry generally or for pharmaceutical companies. CIBA Vision's profits were more modest. Allergan argued that its high profits were the reward for its success in developing and marketing good products in a risky industry leading to a virtuous circle of economies of scale and falling costs. The MMC did not accept that these factors justified such high returns which it believed were only possible because competition both between the suppliers and at retail level was not as vigorous as it might be. The MMC concluded that Allergan's pricing policy operated against the public interest.

But the reference also enabled the MMC to investigate competition at the retail level. Here, the Boots multiple chain with 31 per cent of sales, followed a policy of muted price competition, reflected in substantial retail margins. The MMC also found Boots' pricing policy to have been against the public interest.

The MMC also concluded, however, that the regulatory regime for contact lens solutions was a major factor inhibiting competition; companies wishing to supply contact lens solutions have to obtain a product licence from the Department of Health, and contact lens solutions may only be sold by qualified opticians and pharmacists. The MMC recommended relaxation of the regulatory agreements to encourage more competition at both levels, but that if this proved ineffective price control should be considered.

In other cases, the MMC has found no reason to condemn high profits either because entry was thought to be relatively easy (as in tampons) or because the profits were considered a due reward for efficiency and innovation (as in soluble coffee).

Similarly, there have been cases where an apparently exclusionary practice of a dominant firm has been found not against the public interest either because consumer choice was considered wider and competition more effective than market shares might suggest (as with freezer exclusivity in ice cream) or because of public interest benefits that outweighed any detriments of the restriction of competition (as in liquefied petroleum gas where safety considerations were held to justify exclusive dealing arrangements).

Remedies

Over the years a large number of undertakings have been obtained from firms after an MMC investigation and report, and in the last few years it has also been possible for the Secretary of State to accept enforceable undertakings as an alternative to a reference to the MMC. Undertakings (and the order-making powers of the Secretary of State with which they are backed up) may secure structural remedies e.g. divestment but more usually they will regulate behaviour. It is for the DGFT to monitor both compliance with undertakings and their continuing appropriateness in the light of any change in market circumstances.

More revealing than a catalogue of some of the remedies that have been in place under the United Kingdom system, are the conclusions from ten case studies in a research project undertaken for the OFT. The general findings were:

-- in some cases the MMC investigation itself had a beneficial effect on competition and on the conduct of "monopolists" e.g. by stimulating a cut in prices;

-- price controls and divestment were more effective than the termination of practices or agreements in bringing about change in a market (not surprisingly, perhaps, as behavioural undertakings affect prices or market structure only indirectly);

-- the two cases of divestment (roadside advertising and artificial lower limbs) led to dramatic changes which would not have been expected without the investigation;

-- in four of five cases where behavioural undertakings (to terminate a practice) were relied upon, the measures, in the view of the researchers, had little or no effect, the measures being too mild or too limited in scope;

-- in some cases remedies were overtaken by exogenous events, which it would not have been possible to anticipate at the time of the investigation (privatisation transformed the structure of the electricity supply industry and therefore the market for electric supply meters while the AIDS crisis dramatically affected the market for contraceptive sheaths facilitating unexpected new entry);

-- in other cases the strategic responses of investigated firms may have limited the impact of the undertakings given (e.g. undertakings designed to stimulate competition in the retailing of package holidays encouraged tour operators to vertically integrate into travel agency).

It is not possible, or wise, to generalise from such results, not least because it is impossible to say what would have happened without the MMC investigation and also because the sample of case studies is so small. Yet the conclusion that behavioural undertakings have had little or no effect in four of the five cases studied gives pause for thought. Obviously, it does not mean that such remedies should be abandoned for in many instances they will be the only feasible remedy. If a market cannot be made more competitive directly, then behavioural undertakings need to be sufficiently wide-ranging to prevent the substitution of one anti-competitive practice by another, and provisions included in the undertaking to allow monitoring, ensure compliance and, as necessary, revision of the terms of the undertaking. In the United Kingdom system, there have been a number of cases of further references to the MMC for an in-

depth investigation whether the extant undertakings are still serving their purpose of remedying the adverse effects to the public interest identified by the MMC on an earlier occasion.

THE UNITED STATES

One of the most fundamental distinctions in the field of competition law and policy is the one between single-firm conduct and collective behaviour. For example, the law in the United States differentiates between the two in sections 1 and 2 of the Sherman Act, and the European Union follows a similar line in Articles 85 and 86 of the Treaty of Rome. In general, this distinction reflects the fact that the regulation of potentially anticompetitive behaviour of single firms is a more delicate matter than the regulation of anticompetitive agreements among more than one entity. Individual firms, after all, always want to win in the competitive marketplace, and it is often difficult to distinguish aggressive competition, which is by definition desirable, from anticompetitive or abusive behaviour that is properly condemned under competition laws. This paper presents an overview of the law of monopolisation, as we would call it in the United States, with comparisons where it seems useful to the European Union's Article 86 jurisprudence.

The Economic Basis for Anti-Monopoly Policy

In economic terms, the concept of monopoly is normally contrasted with the concept of "perfect competition." Under perfect competition, there are many firms, none can affect price by itself, consumers switch readily from one firm's product to another's, and entry and exit are easy. The market mechanism under these conditions operates successfully, as illustrated in the succinct outline offered by antitrust scholars E. Thomas Sullivan and Herbert Hovenkamp:

-- consumers choose goods that satisfy their personal preferences;

-- these preferences are revealed by actual purchases in the marketplace;

-- producers choose a quantity of output that maximises their profits at a given price;

-- if profits are above necessary levels in a given industry other producers are attracted into the industry;

-- the excess supply at the high price forces producers to compete for sales;

-- the resulting equilibrium point is where marginal costs equal price. At other points, inefficiencies are created;

-- the outcome is that products are supplied at prices which reflect minimum costs.[1]

Implicit in this analysis is the prediction that firms with prices above their marginal costs will compete (in step 5) by lowering their prices in the direction of marginal cost. The most efficient firms (i.e. those with the lowest costs) will out-compete efficient firms and thus may drive some of them from the market.

A monopolist is roughly the opposite of a competitive firm. It is the only firm producing the product in question, successful entry is impossible, and the monopolist is able to affect price through its own output decisions. By taking advantage of the economic law of demand, under which people will pay more for a distinct product as the quantity offered decreases, the monopolist is able to extract higher prices from consumers as it deliberately reduces quantities available. Even monopolists eventually reach the point where people will refuse to buy a product, so this does not mean that monopoly prices will be infinite. Instead, there is a profit maximising monopoly price where the monopolist equates its marginal cost (money spent making the last unit) to its marginal revenue (money earned by selling the last unit).

Monopolies harm markets in a number of ways. First, the artificial scarcity of the product brought about by the single firm's decision creates a general misallocation of resources in the society as a whole, known as a "deadweight loss," where the amount some people would be willing to pay for a product exceeds the cost of production but not the price. Second, as to those people who paid the monopoly price and obtained the product, there is a transfer of wealth to the monopolist. In economics literature, there is some dispute over whether this transfer is harmful to the economy; however, in antitrust law it is common to measure the harm caused by a monopoly by the amount of the "overcharge." In addition, monopolists will engage in efforts to keep other competitors out of the market, recognising that the high monopoly profits would otherwise attract new entry. Those efforts, a waste of resources from a public interest perspective, are likely to inflict costs on the potential or fringe competitors, which may also be of concern to antitrust enforcers. Finally, monopolies lead to a loss of innovation.

Whether we refer to firms that are able to exercise this kind of power in a market as monopolists or as dominant firms -- defined in E.U. law as firms that are able to behave to an appreciable extent independently of their competitors, customers, and ultimately consumers -- it is plain that they distort the operation of the market, and that they therefore prevent society as a whole from enjoying the benefits of competition outlined above. That provides the economic underpinning for the near-universal condemnation of monopolisation in competition laws.

Legal Prohibitions of Monopolisation or Abuse of Dominant Position

Legal measures addressing monopolisation or abuses of a dominant position, based as they are on real-world markets and complex factual data, must necessarily rest on more than the comforting simplicity of the classic economic model. No legal system would condemn only the classic single-firm monopolist, leaving the firm with 99 per cent of a market, or 90 per cent, absolutely free. However, the question of how much control over a market is too much -- or put more accurately, how much market power should be required before legal measures should be adopted -- is a difficult one, which has been answered somewhat differently in the United States and the European Union.[2] Legal systems must also (1) select a methodology for defining markets, (2) deal in some way with other relevant factors that bear on the firm's ability to exercise market power, such as the ease (or difficulty) with which other firms might enter a market, the presence or absence of significant barriers to international trade, the speed of technological change, and the characteristics of other market participants such as fringe competitors and buyers, and (3) identify types of conduct that will be characterised as "abusive" or unlawful for a monopolist.

Elements of a Case: the US Model

Section 2 of the Sherman Act sets forth the US rule in monopoly cases in deceptively simple language:

> 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 of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, $350 000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[3]

Though section 2 mentions conspiracies to monopolise, this type of conspiracy is usually treated under section 1 of the statute, which leaves the single-firm prohibitions for section 2. Furthermore, in spite of the language indicating that it is a felony to violate section 2, in practice the Department of Justice almost never brings criminal section 2 cases. The Department is authorised elsewhere in the antitrust laws to obtain injunctions, including measures calling for structural and affirmative relief, as remedies for section 2 violations, which are discussed in more detail below. In addition, the US Federal Trade Commission can invoke section 2 standards in actions brought under section 5 of the F.T.C. Act,[4] and state attorneys general and private parties (with standing) are authorised to bring actions under section 2 (including actions for treble damages and for injunctive relief). In the final analysis, section 2 is a statute that prohibits "monopolization" and "attempts to monopolize," which has left to the US courts the task of elaborating on both those concepts.

By way of contrast, Article 86 of the Treaty of Rome is much more specific about the kinds of actions that might be considered an abuse of dominant position, although it is similarly silent about exactly what it takes to be "dominant:"

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
>
> -- directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
>
> -- limiting production, markets or technical development to the prejudice of consumers;
>
> -- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> -- 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.

Like section 2, Article 86 refers to the possibility of more than one company sharing a dominant position. Although the doctrine of "collective dominance" has more support in the European system than its US counterpart,[5] the discussion here will be confined to the far more common use of Article 86 to regulate single-firm behaviour.

In *United States v. Grinnell Corp.*, the US Supreme Court held that the offence of monopoly under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[6]

Implicit in these two criteria are several additional points: monopoly power, or market power as it would more likely be termed today, is normally assessed with respect to a particular market (although the market definition is properly understood as a means to the end of understanding the amount of market power); size or power alone is not illegal; the firm must have engaged in certain monopolistic or anticompetitive conduct; and some monopolies will escape condemnation under the statute because they were a consequence of success in the market, untainted by the impermissible conduct:

Market power. The courts have defined the idea of monopoly power or market power using various formulations over time. A typical earlier definition appeared in *United States v. E.I. Du Pont De Nemours & Co. (Cellophane)*, which held that the "cases determine that a party has monopoly power if it has, over 'any part of the trade or commerce among the several states,' a power of controlling prices or unreasonably restricting competition."[7] The Court added in *Grinnell* that "[t]he existence of such power ordinarily may be inferred from the predominant share of the market." Writing earlier, but from this analytical perspective, the Court of Appeals for the Second Circuit (sitting as a court of last resort) had suggested in *United States v. Aluminum Co. of America* that a "percentage [of ninety] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not."[8] Other monopolisation cases were not always so prescriptive about "magic" market share percentages, but something in the neighbourhood of fifty or sixty percent was as a practical matter around the lowest level at which the monopoly power criterion was thought to be satisfied.

The great problem with resting the finding of monopoly power on particular market shares is its utter dependence on a correct definition of the relevant market -- that is, the product and geographic market in which the alleged monopolist was competing. The classic example here is again *Cellophane*: if the relevant product market was "all flexible packaging materials," then Du Pont's share was only about 20 per cent; if instead the relevant product market was just cellophane, Du Pont enjoyed a hefty 75 per cent market share. Both product and geographic market determinations are inherently factual. Enforcement agencies and litigants alike devote tremendous resources to problems like whether cans compete with glass containers, whether luxury pens compete with cheap disposable pens, whether hospital patients will use hospitals as far as fifty miles away, and whether foreign-produced photographic film can compete effectively with domestically produced photographic film. As the *Cellophane* statistics readily demonstrate, a mistake in market definition can lead to a dispositive misapprehension of the competitive implications of a case. Nevertheless, often this is the central means of approaching the question, given the difficulty of obtaining direct and reliable economic evidence about market power.

More recent cases in the United States have recognised both that the market definition process is a means to an end, not an end in itself, and that direct evidence of market power and detrimental market effects is preferable if it exists. For purposes of section 2, monopoly power is a significant degree of market power.[9] Market power in turn is "the ability to raise prices above those that would be charged in a competitive market," by reducing output.[10] The degree of any firm's market power will be a function of the elasticity of demand faced by the firm's own product. If a small price increase causes many consumers to stop buying the firm's product, then the demand is said to be very elastic. If, in contrast, a firm can successfully raise its price significantly (e.g., 10 per cent), and maintain that price increase for a substantial period of time without losing many customers, then the demand is relatively inelastic. This insight is reflected in the approach to market definition that is used in the US Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, sections 1.1-1.2. It makes it more clear than the traditional market share approach that the question of market power is genuinely a question of degree: market power does not suddenly appear when a firm has a 50 per cent market share, or a 70 per cent market share, or a 90 per cent market share.

One expression of the newer approach appears in the Supreme Court's decision in *Federal Trade Commission v. Indiana Federation of Dentists,* where the Court stated:

> "...[T]he Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason... Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."[11]

The Court of Appeals for the Seventh Circuit noted the secondary importance of market share information when it wrote that "[m]arket share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them."[12]

The reorientation of thinking about the "monopoly power" element of a section 2 case has made US enforcers and courts more sensitive to factors that tend to modify the initial conclusion one would draw from market share evidence alone. For example, if new entry into a market is very easy, then other things being equal it is less likely that incumbent firms are exercising market power or would be able to do so in the future. This is sometimes expressed in terms of the contestability of markets. If a firm has a very high share of a national market, but substantial international trade is possible and likely and there are no barriers to such trade, then an inference of substantial market power is also likely to be mistaken. On the other hand, if a firm appears to have a relatively low share of a broad geographic market, but it is able successfully to engage in price discrimination with respect to a discrete group of customers, then the apparently low share will understate its market power.

No matter how the evidence is collected, the first step in any section 2 case is to ascertain whether the firm presently has "monopoly power."[13] The mere fact that the firm might not be able to increase prices above their existing level in a market does not indicate that it lacks market power, for the simple reason that monopolists (like all other firms) attempt to charge as high a price as they can without losing so many customers that the price level is unprofitable. In other words, a rational monopolist will already have increased its price to the level that maximises monopoly profits, which is a level where (1) other products may be becoming close substitutes, and (2) any further price increases would by definition cause a loss of profits.

However, US courts have consistently held that market power alone is not enough. The classic explanation for this rule (as for so much else in section 2 law) appeared in Judge Learned Hand's opinion in *Alcoa*:

> It does not follow because "Alcoa" had such a monopoly, that it "monopolized" the [aluminum] ingot market; it may not have achieved monopoly; monopoly may have been thrust upon it....[I]t is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality;...This notion has usually been expressed by saying that size does not determine guilt; that there must be some "exclusion" of competitors; that the growth must be something else than "natural" or "normal"; that there must be a "wrongful intent," or some other specific intent; or that some "unduly" coercive means must be used.[14]

He mentioned several situations in which a "monopolist" might not have violated the statute: monopoly might have occurred (somehow) "by accident"; the market might support only one firm, and

thus there is a natural monopoly; changes in taste or cost might drive out all but one seller; or "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry." In such cases, Hand explained:

> A strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat.* The successful competitor, having been urged to compete, must not be turned upon when he wins.[15]

Implicit in this fifty-year old statement is a critical point for all competition law regulation of single-firm behaviour. If, in Hand's terms, the successful competitor were to be turned upon by the law when he won, the system would have a built-in incentive against vigorous competition. Firms would be practically forced to cede market share, or to cease innovating, or otherwise to turn sluggish, just to avoid being penalised under section 2 or its equivalent. This plainly works against the entire premise of the market system, under which winners are rewarded, and the profits they generate in turn may attract new entry into the industry. Thus, the law should not intervene against even a monopolist if its position was legitimately obtained and maintained. On the other hand, as the next section outlines, the existence of significant market power coupled with different kinds of exclusionary or anticompetitive conduct can and should be prohibited by law, because monopolies do harm economic welfare. Drawing the line between legitimate and illegitimate activities of a monopolist can sometimes be a delicate problem, but it is unavoidable.

Anticompetitive conduct. The type of conduct that causes a monopolist to cross the line between legitimate behaviour and liability is often described as "exclusionary." This is conduct which, if engaged in by a firm with significant market power, is not simply competition on the merits, but instead is conduct that is impossible for a firm that is equally or more efficient to combat. Then Judge, now Justice Breyer, quoted with approval the definition of exclusionary conduct offered by Professors Areeda and Turner:

> "Exclusionary" conduct is conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.[16]

Sometimes the conduct falls within the rubric of predatory practices, which are practices that enable a firm to eliminate a competitor, to preclude re-entry by that firm or others, and then to enjoy the benefits of unchallenged monopoly. Sometimes the conduct is described as strategic predation, which is a subset of predatory practices that have the same effect, but which are less costly for the predator to use. Just as Article 86 of the Treaty of Rome begins by offering a list of practices that are considered abusive, antitrust casebooks and treatises usually treat the subject of exclusionary practices by offering various illustrative examples, such as the following:

Pricing issues. It is tempting, as Article 86 does, to condemn the practice of monopoly pricing itself -- that is, the monopolist's decision to charge a price significantly above marginal cost, which imposes the deadweight loss and transfer consequences on the economy that justify the legal prohibition in the first place. However, under US law one could not rest after proving only that the monopolist was charging high prices. The reason relates back to the doctrine discussed above, namely, that size or possession of monopoly power alone do not constitute an offence. US courts have concluded that the decision to charge a monopoly price is so intimately related to the possession of monopoly power that it would be impossible to separate the two. In addition, the high price may serve as a signal in the market that invites new entry, and it is not clear that the best policy outcome would be to invite the monopolist to engage in "limit pricing," or pricing at a level just high enough to preclude new entry. Formally speaking, this may be one of the most important differences between

Article 86 and Sherman Act § 2; however, as a practical matter the E.U. has not pursued the high-price aspect of the prohibition against unfair selling prices, and thus the actual differences are not as great as they might seem.

Prohibitions against predatory pricing are enforced in both systems. In the United States, the courts approach predatory pricing claims with caution, for the simple reason that the complaining party thinks prices are too low, and yet the act of lowering prices is a classic way that competition moves forward. How can enforcement agencies and courts distinguish low prices that reflect healthy price competition from low prices that may, eventually, lead to monopoly pricing? There is a risk that this process could discourage the former to the detriment of consumer welfare.

The US Supreme Court has taken an extremely cautious approach to its recognition of predatory pricing as a practice prohibited by section 2, most recently and definitively in *Brooke Group v. Brown & Williamson Tobacco Corp.*[17] The Court stated there that the essence of a predatory pricing claim, both for section 2 and for the Robinson-Patman Act (which prohibits certain forms of price discrimination), was as follows:

> A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market... First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs... Only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws... The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor has a reasonable prospect...or...a dangerous probability of recouping its investment in low-cost prices.... Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.

Neither in this discussion nor elsewhere did the Court resolve the question of precisely what measure of costs should be definitive. Many measures have been suggested: fully allocated costs, incremental costs, average variable costs, and short-run marginal costs, to name a few. Most US courts reject fully allocated costs as the proper measure for antitrust purposes, recognising that a firm may profitably choose to sell at prices that do not fully recover sunk costs or fixed costs, at least for a period of time. Many courts have applied the average variable cost standard, since it is somewhat easier to find evidence of variable costs than it is to ascertain short-run marginal costs. In fact, however, the *Brooke Group* Court's focus on the possibility of recoupment has eliminated many potential predatory pricing cases, for the simple reason that the market structure would never permit the aspiring predator to block new entry long enough to recoup its investment in predation. Predatory pricing claims are therefore theoretically possible under US law, and on rare occasions even successful, but they are treated cautiously because of the risk of interfering with legitimate competition.

Exclusionary practices. Next, and much more likely to be successfully challenged under section 2, are strategies designed to exclude competitors from resources that they need to be successful. These may be cases involving refusals to deal, bottlenecks, claims of essential facilities, or other situations where the monopolist has no legitimate reason business to adopt the practice in question. Recently, claims in which dominant firms have impeded interoperability between their products and others on the market have been important.

Exclusive dealing can also have the effect of foreclosing competition in a market, where the outlet or supplier tied up by the exclusive dealing arrangement cannot readily be duplicated by the other

firms in (or attempting to be in) the market. It is not always feasible or economically possible to enter a market at two levels simultaneously -- a fact which the foreclosure theory recognises.

Finally, tying and bundling arrangements can give a dominant firm an unfair advantage in the market. A tying arrangement is one in which a seller has some significant level of power over one product, called the tying product, which he exploits to coerce the buyer into taking a second product, called the tied product, that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.[18] Bundling, in contrast to tying, involves the act of offering the two products in a linked fashion, but at the same time being willing on commercially reasonable terms to offer them separately. (Obviously, if the separate offers involved prices that were sufficiently out of line with the bundled price, no one would take them that way, and a *de facto* tying arrangement would exist.)

The focus in tying cases is on the impairment of competition in the market for the tied product. The Supreme Court has in recent years become much stricter with respect to the degree of power over the tying product that it requires before it will find a violation, and the need to show that coercion or forcing of some kind has occurred with respect to the tied product. From an economic perspective, tying which facilitates the monopolist's ability to engage in profitable price discrimination or which helps the monopolist to meter use of the tying product may be harmful, and foreclosure of potential competitors in the tied product market is harmful. US courts have also expressed their concern that the monopolist may take profits earned in the tying product market (over which it has market power), and "invest" them in efforts to dominate the tied product market -- a practice normally labelled "anticompetitive leveraging." European law, as the text of Article 86 indicates, reflects similar concerns.

Permitted conduct for monopolists. As noted above, ever since *Alcoa* the US courts have recognised that anticompetitive conduct to obtain or maintain a monopoly position is an element of the offence of "monopolization" under section 2. In European terms, this may be even more clear, since Article 86 does not prohibit dominance as such, but only the abuse of a dominant position. The corollary of this proposition is that monopolists in the US, and presumably dominant firms in Europe, are entitled to conduct business and to compete vigorously as long as they do not engage in the abusive kinds of behaviour just discussed.

The US Court of Appeals for the Seventh Circuit, through Judge Posner, explained at some length what monopolists legitimately could do, in the *Olympia Leasing* decision:

> [A]s the emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency...it became recognised that the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors... Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches...

Nonetheless, it is not always clear what forms of conduct will be found abusive. The Supreme Court held in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* that a monopolist cannot arbitrarily refuse to continue dealing with other companies in the absence of a valid business reason, where the prior arrangements clearly expanded consumer choice.[19]

The Problem of Remedy

From an enforcement perspective, perhaps the most difficult problem for section 2 cases is not the determination of liability, but the decision on an effective remedy. In general, remedies should be credible; they should address the anticompetitive effects of the conduct that is challenged; and they should deter both the firms in the case and other actors in the market from engaging in the prohibited conduct. In cartel cases in the United States, these purposes are achieved very effectively through the criminal sanctions that apply to hard-core cartel activity. The enforcement agencies normally review mergers and acquisitions before they are consummated, and they are able either to petition a court to enjoin anticompetitive transactions or to file a consent decree that resolves particular competitive issues while allowing the balance of the transaction to take place. The menu of remedies in section 2 cases and the effectiveness of those remedies have been the subject of substantial debate in academic circles. The discussion that follows reviews the types of remedies available in the United States and abroad, and comments on their advantages and disadvantages.

Conduct Remedies. The first kind of remedy -- the one most commonly used in US section 2 enforcement[20] -- is the injunction that prohibits or requires specific conduct. For example, the district court in *United States v. United Shoe Machinery Corp.* issued detailed instructions about the provisions that would be permitted and prohibited in United Shoe's leases for shoe machinery equipment.[21] The court shortened the term of United's leases, it eliminated the full capacity clause and various discriminatory charges, and it required United to segregate its charges for machines from its charges for repair services. It ordered United to offer for sale any machine that it continued to lease, so that customers could choose the arrangement they preferred. These provisions were designed to eliminate for the future the anticompetitive consequences of the practices which the court had found violated the Sherman Act. The court specifically refused to order United to dissolve into several companies.

Other courts have gone even further than the United Shoe decree in terms of imposing affirmative duties. In the 1954 consent decree imposed against Eastman Kodak because of its monopolisation of the colour film and photofinishing markets, Kodak was required *inter alia* to license other companies for its photofinishing technologies and to give them technical assistance for a period of time sufficient to open up that market. In the consent decrees in the ASCAP and BMI cases, involving licensing organisations for copyrighted musical compositions, the distribution of royalties among the different types of composers was subject to the continuing supervision of the court. And finally, the 1982 Modified Final Judgement (or MFJ) in the AT&T case has involved significant judicial supervision, as the Bell Operating Companies have sought permission to enter markets that are restricted or prohibited under the terms of the decree. These are all examples of injunctions entered by US courts, and subject to their supervision, that were designed to remedy antitrust violations. (In the case of consent decrees, they still have the status of court injunctions, even though the decrees normally recite that the defendant does not concede that it violated the antitrust laws.) FTC orders are supervised by the Commission, which uses the courts to obtain fines or other relief when its orders are violated.

Structural remedies. Structural remedies refer to injunctions that literally break up the monopolist and create one or more additional free-standing entities, as a way to restore competition to the market. This is a drastic step, and structural remedies carry with them an unusually high risk of creating inadvertent inefficiencies in the economy, which would be counterproductive from an antitrust standpoint. If a manufacturing firm, for example, has only one major plant, it is nearly impossible to subdivide those assets in a way that creates new entities that can survive in the market.

This is not to say that structural relief never works. To the contrary, it has been a part of some of the most successful antitrust decrees in US history, including the famous break-up of the Standard Oil trust

in the 1910's, and the structural measures that were part of the MFJ in the AT&T case mentioned above (which led to the creation of the regional Bell Operating Companies). However, US courts and the FTC are reluctant to undertake sweeping structural relief, if lesser measures such as injunctions against anticompetitive practices, dissemination of essential technologies, and access to essential facilities can be ordered instead. Merger enforcement provides a useful contrast in this respect, since the pre-merger notification system in the United States allows the enforcement agencies to prevent anticompetitive consolidations from taking place before the "eggs are scrambled." This, too, is a form of structural remedy, but it is one that is infinitely easier to administer.

Fines. Fines are not an available remedy for violations of Sherman Act section 2 or the Federal Trade Commission Act, putting to one side the unused criminal aspect of section 2, and excluding the possibility of fines for violating a court injunction or an FTC order. This is one of the most important areas in which the European Union has made a different choice. Articles 15 and 16 of the EU's Council Regulation 17/62 provide that the Commission has the power to fine firms that are found guilty of offences under Articles 85 and 86 of the Treaty of Rome. The Commission has been increasingly willing to impose very substantial fines, recognising the deterrent effect that they will have.

Current Monopolisation Problems

In general, monopolisation problems are common in industries that have recently experienced deregulation, as old habits die hard. Vertically integrated industries in which some regulation continues, but other levels or lines of commerce are subject to competition, are also potential trouble spots.

In contrast, the claim of "natural monopoly," while easy to make, is not nearly as easy to prove as its proponents would like. Even sectors such as the US health care industry, where many asserted for a long time that the competitive model did not work as well, or the various utilities, are capable of far more competition than many would have believed. The US enforcement agencies have issued two sets of guidelines explaining how antitrust law applies to a variety of health care arrangements, and our tradition of construing exemptions from the antitrust laws as narrowly as possible has helped bring competition to many markets on the fringes of lawful monopolies. It is also important not to confuse the existence of a single firm in a country or region with a "monopoly." The real question is whether that firm is subject to effective competition, such that it cannot exercise market power. In a small country that is open to international trade, there may indeed be only one domestic competitor, but if foreign firms can and do participate actively in the market, there is no "monopoly" problem.

Conclusion

Short of outright regulation, abuse of dominance or monopolisation is the rule of last resort for a complete system of competition law. Cartels and anticompetitive agreements can be broken up, prohibited, and punished through criminal, injunctive, private damage, and administrative fine remedies. Mergers and acquisitions can be prevented, or when necessary dissolved. However, if all else fails, or if the processes of economic transition result in a single firm with significant market power, competition law has only two choices: tolerate that power, with all the harm to society that it entails, or attempt to take effective steps against it when the power is being abused.

NOTES

1. E. T. Sullivan & H. Hovenkamp, Antitrust Law, Policy & Procedure p. 65 (3d ed. 1994).

2. Roughly speaking, the threshold for "dominance" in Europe is much lower than the threshold for "monopoly power" in the United States. In Europe, market shares in the area of 40 per cent would be troublesome, while in the United States (as is explained more fully in the text that follows), actual monopolisation is not often found until market share reaches at least 60 per cent, if not more.

3. 15 U.S.C. § 2.

4. 15 U.S.C. § 45.

5. See, e.g., Cases T-68/89, Societa Italiano Vetro v. Commission; T-77/89 Fabbrica Pisana v. Commission; T-78/89 PPG Vernante Pennitalia v. Commission [1992] 5 CMLR 302 (known as the *Italian Flat Glass* cases).

6. 384 U.S. 563 (1966).

7. 351 U.S. 377 (1956).

8. 148 F.2d 416 (2d Cir. 1945).

9. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072, 2090 (1992).

10. See NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109 n.38 (1984).

11. 476 U.S. 447 (1986).

12. Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, 784 F.2d 1325, 1326 (7th Cir. 1986).

13. In an attempt to monopolise case, the question is much the same, but the level of market power required is lower. The elements of an attempt case were set forth by the Supreme Court in *Spectrum Sports, Inc. v. McQuillan*,113 S.Ct. 884, 890-91 (1993), where the Court said the plaintiff must prove "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolise and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolisation, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market."

14. 148 F.2d 416, 429.

15. 148 F.2d at 430.

16. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983).

17. 113 S.Ct. 2578 (1993).

18. See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

19. 472 U.S. 585 (1985).

20. Private parties are also entitled to enforce the U.S. antitrust laws, pursuant to Clayton Act §§ 4 and 15. They may also seek injunctions, and in those cases the rules applicable to them are quite similar to those described in the text. However, they may also sue for treble damages for injury to their business or property. Although this is not available to the Government, except in the rare case where the United States itself is the victim of the unlawful practice, awareness of the possibility of Business Practices

20. Chapter 5-1(2), part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

20. Chapter 5-2, part II, The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices

20. FTC Decision Collection, Vol.28, p.10, also, in this case, both the territory system and the action itself, used to maintain the resale price, were judged to be illegal.

20. FTC Decision Collection, Vol.22, p.127

20. FTC Decision Collection, Vol.29, p.31
20. Prior private suits is also a substantial deterrent for unlawful behaviour for firms operating in the United States market.

21. 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

COMMISSION OF THE EUROPEAN UNION

PART I

Summary of the Tetra Pak II Decision[1]

On 24 July 1991 the European Commission handed down a decision citing the Tetra Pak group for infringements of Article 86 of the EEC Treaty.

Tetra Pak, an originally Swedish group established in Switzerland, is far and away the world leader in the field of packaging liquid foods (primarily milk and fruit juices) in cartons. It had turnover of ECU 3.6 billion in 1990. In 1991, Tetra Pak acquired the Alfa Laval group, one of the world's foremost manufacturers of milk processing equipment, with turnover of some ECU 2.5 billion.

In its decision, the Commission held that the sector for the packaging of liquid foods in cartons comprised four distinct markets: on the one hand, those for the filling machines and the cartons used for aseptic packaging of "long shelf life" liquids; and on the other hand, the markets for the filling machines and cartons used for non-aseptic packaging of fresh liquids[2]. The Tetra Pak group possessed some 90-95 per cent of the two aseptic packaging markets and between 45 and 50 per cent of the non-aseptic markets. The Commission deemed that Tetra Pak held a dominant position in the first two markets, but it did not think it necessary to rule on the existence of such a position in the non-aseptic packaging markets, considering that, in any event, those markets were "neighbouring and associated".

The investigation, initiated after a complaint by one of Tetra Pak's competitors, had led the Commission to consider that on the aseptic and non-aseptic packaging markets alike Tetra Pak was committing numerous and varied abuses within the meaning of Article 86 and that those abuses formed part of an overall group strategy.

Taking advantage of its dominant, virtually monopolistic position in the aseptic packaging markets which, when combined with a leading position in the non-aseptic packaging markets, made it the only possible supplier for most of its customers. Tetra Pak had forced those customers to accept contractual obligations aimed primarily at tying them to the group and precluding any trade in its products. By using these contractual obligations to minimise the possibilities for interbrand competition, and by precluding any intra-brand competition through those same requirements and its entirely autonomous production and distribution policy, the group had compartmentalised national markets for its products within the European Community so that it could carry out a differentiated and discriminatory pricing policy for its cartons and machines alike. All of the conditions for restraint of competition were satisfied, so that in the area where it had established a virtual monopoly (the "aseptic" markets), the firm was able to pursue a profit maximising policy to the detriment of consumers a policy that in turn enabled Tetra Pak to subsidise predatory pricing in areas where there was still some competition (basically, "non-aseptic" markets). To maintain or strengthen that position, Tetra Pak had taken pains to bolster its contractual and

autonomous development policies with a wide ranging defence of intellectual property rights, using all sorts of specific measures, including, when necessary, the acquisition of competitors or, failing that, their technological innovations.

Because they had an impact on practically all aspects of marketing policy, took the most widely varied forms, involved all (or virtually all) of Tetra Pak's products and affected all of the Community's Member States, these infringements were part of an overall strategy to oust the competition. They had highly detrimental effects on competitors and users alike, enabling Tetra Pak to preserve its virtual monopoly in the aseptic packaging markets and to considerably enhance its position in the non-aseptic markets (probably to the point of establishing dominance there as well).

In particular, contractual stipulations that only Tetra Pak cartons be used on Tetra Pak machines were a major factor in blocking any effective competition in the aseptic packaging markets. In addition, they ensured that Tetra Pak would derive steady income from carton sales over a machine's entire lifetime (or rental period). Moreover, the prospect of such guaranteed carton income could not help but encourage discriminatory and predatory pricing practices with regard to the sale and rental of filling machines practices that were effectively carried out.

Meanwhile, the segmentation of the European market also made it possible for Tetra Pak to engage in radical price discrimination between Member States, with variations of as much as 50-100 per cent for cartons and 300-400 per cent for machines.

Profits generated by the Brick cartons used for aseptic packaging, for which Tetra Pak enjoyed a virtual monopoly, were such that the firm could easily absorb the losses it at times sustained on some (or even all) of its other products, a luxury its competitors could not afford. For example, the fact that for years Tetra Pak sold its Rex non-aseptic cartons in Italy at a loss of up to 34 per cent (and in some cases more) of their cost forced Elopak, its chief rival, to shut down a new production facility in the country and almost completely eliminated it from the market.

At the conclusion of the procedure against Tetra Pak, the Commission therefore directed the group to cease its infringements, decided to impose a fine of ECU 75 million (the highest fine ever imposed on a company for infringing competition rules) and laid down certain obligations for the firm's future conduct. In its judgement of 6 October 1994[3], the Court of First Instance (CFI) of the Court of Justice of the European Communities confirmed all aspects of the Commission's analysis and its decision, including the obligations imposed on Tetra Pak for its future conduct, and confirmed the fine levied by the Commission. Following the CFI's judgement, Tetra Pak paid the fine (over ECU 100 million, including interest) but decided to appeal to the Court of Justice.

Analysis

To this day, the Tetra Pak case is unique in that the Commission was confronted not by specific infringements in particular areas but, as seen above, by a group's overall anti-competitive strategy.

Nevertheless, the following analysis will be limited to providing some of the answers this case can provide for questions raised in the OECD note of 20 November 1995 (CCP/95.364).

Relevant markets

Product market

Defining the relevant market(s) is a crucial issue in that it is not otherwise possible to determine whether a dominant position or any abuses exist. In the Tetra Pak case, this led to a particularly extensive debate.

Tetra Pak argued that the relevant market was the overall liquid food packaging market, encompassing all forms of packaging (aseptic and non-aseptic alike).

Examining the substitutability of the products involved, in terms of both demand and supply, the Commission came to the conclusion that while forms of packaging as diverse as glass bottles, plastic bottles, plastic bags, metal tins, aseptic cartons and non-aseptic cartons formed part of what was commonly known, in the broad sense of the term, as the packaging market for liquid foods, this was not the "relevant market" within the meaning of Article 86, since these different types of packaging competed with each other only in the long term. In the short and probably even medium term, the conditions of supply and demand were such that the elasticity of substitution for products in relation to prices was almost zero.

At the level of demand, this low elasticity of substitution could be explained by the marginal share accounted for by packaging in the retail price of liquid foods[4] and by the fairly high stability of consumer preferences over a short period. At the level of supply, the lack of substitutability could be traced essentially to the financial cost to the producer/packager of the investment involved in changing over from one type of packaging to another, the acquisition of necessary technological know-how and the repercussions for marketing[5], particularly, for all these factors, in view of the very low substitution elasticity of demand described above.

In a given situation of technology and consumer preferences, therefore, it was necessary to consider that the various types of packaging and associated equipment formed distinct markets responding to their respective conditions of supply and demand.

The Commission also considered that the analysis used to define a market should cover only a short period. Over a long period, during which technological progress could occur and consumer habits evolve, structures would change and the very boundaries between the various markets would shift. A short period corresponded more to the economic operative time during which a given company exercised its power on the market[6] and, consequently, on which one had to concentrate in order to assess that power.

The analysis also highlighted the distinction that had to be made between technical substitutability and economic substitutability. Certain goods could be technically but not economically substitutable when conditions of supply and demand were such that the elasticity of substitution for products in relation to prices was too low. In such cases, it had to be considered that they did not belong to the same market within the meaning of Article 86.

Geographical market

The Commission deemed for various reasons and in view particularly of the low cost of transporting cartons and machinery, as well as the existence of stable, significant demand (even though it varied in intensity between the various Member States) for all products concerned throughout the territory

of the Community[7] that the relevant geographical market, within the meaning of Article 86, extended to the entire Community.

Dominant position markets neighbouring the one in which the dominant position is exercised

Once the relevant market(s) has (have) been defined, it must then be ascertained whether the firm in question holds a dominant position therein.

According to the case law of the Court, such a position exists if a firm is able to behave to an appreciable extent independently of its competitors and consumers, and to exert market power without having to suffer the constraints that generally exist in markets in which effective competition prevails[8].

While it is necessary in making this determination to take account of all factual circumstances such as the relative power of competitors and consumers and barriers to market entry, the Court stipulated in its AKZO judgement[9] not yet delivered when the Tetra Pak case was being investigated -- that, save in exceptional circumstances, a market share of 50 per cent was evidence of the existence of a dominant position.

Given, *inter alia*, market shares of 90-95 per cent, a single competitor and the existence of high technological barriers (at least for machines), it would have been difficult to dispute that Tetra Pak dominated the aseptic packaging markets, once the Commission's definition of those markets had been adopted.

With market shares that hovered, during the period under consideration[10], around 45-50 per cent, the existence of a dominant position for Tetra Pak in the non-aseptic packaging market was not a *prima facie* conclusion, even if many reasons could have been advanced to support such a claim.

The Commission did not, however, deem it necessary to address this issue, given the association between these markets and aseptic markets: while packaging technologies and the cartons used were different, the products packaged were essentially the same, as were customers and suppliers. Tetra Pak's virtual monopoly in the aseptic markets and the association of those markets with the neighbouring non-aseptic ones meant that Tetra Pak's actions in restraint of competition in these latter markets fell under Article 86 just as much as those committed in the aseptic markets.

The CFI confirmed the Commission's position, thereby acknowledging clearly that abuses could be committed in markets in which a firm was not dominant, provided there were close links between those markets and the market(s) in which that firm was dominant. This is an important provision of the judgement in that, while previous case law contained indications pointing in that direction, the principle had not yet been fully established.

Abuses

Contractual conditions

Tetra Pak's near-monopoly in the aseptic packaging sector made it virtually the only possible supplier for the clear majority of firms that produced both aseptically packaged long-life liquid foods and the corresponding fresh varieties. In this way, Tetra Pak had managed, in the aseptic and non-aseptic

packaging markets alike, to force its customers to accept a whole set of contractual conditions designed to bind them to the group and to prevent any inter- or intra-brand competition.

There is not enough room here to list all of the contractual conditions that were judged abusive under Article 86. We shall mention only the main ones.

Sales contracts

Sales contracts for Tetra Pak equipment included a series of clauses that severely limited buyers' rights of ownership and kept them in a state of exclusive dependency vis-à-vis the seller.

Equipment/configuration

-- prohibition from modifying, adding accessory equipment to or moving (and thus exporting) machines.

Transfer of ownership

-- obligation to obtain Tetra Pak's agreement before selling used equipment;

-- priority right of repurchase by Tetra Pak at a prearranged fixed and underestimated price;

-- obligation, in the event of a sale agreed to by Tetra Pak, to ensure that any third party acquiring the equipment assume all of the initial buyer's obligations vis-à-vis Tetra Pak;

-- obligation to inform Tetra Pak of any improvements or technical modifications to equipment or to cartons and to grant Tetra Pak ownership of any resulting intellectual property right;

-- right for Tetra Pak to inspect the wording to be used on cartons.

Operation and maintenance of equipment:

-- exclusive right for Tetra Pak to carry out maintenance and repairs;

-- exclusive right for Tetra Pak to supply spare parts;

-- sliding scale for charges made for assistance and maintenance, depending on the number of cartons used on Tetra Pak machines.

"Tied sales" of machines and cartons:

-- obligation that only Tetra Pak cartons be used on Tetra Pak machines;

-- obligation to obtain supplies of Tetra Pak cartons exclusively from the group's local subsidiary (i.e. no independent distributors) and at prices set by the group or its subsidiary.

Guarantee:

-- validity conditional on compliance with all contractual conditions (in certain contracts) or, at the very least, exclusive use of Tetra Pak cartons.

Inspections:

-- obligation to submit a monthly report on carton production;

-- right for Tetra Pak to inspect, without notice, production sites, accounting or other documents and customers' correspondence (allegedly to ascertain whether customers were complying with their commitments).

Lease contracts

Equipment leases included the same restrictive provisions as sales contracts, adapted to the circumstances of leasing.

Moreover, the way rent was set made leasing practically indistinguishable from buying, since it included, upon delivery, an initial payment corresponding to virtually all present and future rental charges (more than 98 per cent in some cases). The balance consisted primarily of a monthly production rental, the amount of which decreased according to the number of cartons used on all Tetra Pak machines owned by the customer.

Comments:

-- it is plain that all of these contractual clauses contributed to maximising customer loyalty and to keeping customers exclusively dependent on Tetra Pak. It could even be considered that these clauses distorted both sales and lease contracts. In the first instance, buyers were denied full rights of ownership, and in the second, lessees paid an initial price that made the transaction the financial equivalent of a purchase, even though no rights of ownership were conferred;

-- the many obligations imposed on trading partners all contributed, to varying degrees, to the same end. This was clearly part of a strategy to make customers, once they had purchased or leased machines, totally dependent on Tetra Pak for the entire lifetime of those machines, thereby precluding any possibility of competition with respect to related products (e.g. technical services, spare parts) and cartons;

-- it follows that the only stage at which any real competition could come into play was the sale of equipment, not cartons. Tetra Pak artificially limited competition to the area in which it was strongest, since it was with regard to equipment, and especially aseptic packaging machines, that the firm's technological advance was greatest and the barriers to entry highest.

-- this explains the importance Tetra Pak attached to the system of tied sales of machines and cartons. Closing the carton market to all competition enabled the company to ensure that it would derive virtually all (about 95 per cent) of its profits from guaranteed carton sales (given

the requirement to use Tetra Pak cartons) once customers had acquired its machines. And in respect of machine sales, the advantage Tetra Pak gained from its technological advance could, if necessary to influence a decision, be supplemented by a sale or lease at a loss, since in any event machines had only a totally marginal impact on corporate profits[11].

-- to justify the exclusive use of Tetra Pak cartons on Tetra Pak machines, the group cited technical reasons, liability considerations with regard to public health, and commercial usage.

Without denying the complexity involved, the Commission rejected Tetra Pak's first two arguments, deeming that the problems could be solved through existing technical solutions (by divulging standards and specifications) and an appropriate legal framework (ordinary liability statutes). The rule of "proportionality" excluded the practices in restraint of competition that Tetra Pak imposed. With regard to commercial usage, the Commission disputed that such practices were common in the non-aseptic packaging markets and considered that they could hardly be invoked in respect of the aseptic markets, in which there were only two producers and Tetra Pak held a share of some 90-95 per cent.

The CFI confirmed the Commission's position, in line with the Hilti[12] judgement, considering, *inter alia*, that "it was 'clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least inferior in quality to its own products.'" The CFI also held that "In this case, reliability of the packaging equipment for dairies and other users and compliance with standards of hygiene in relation to the final consumer could be ensured by disclosing to users of Tetra Pak machines all the technical specifications concerning the cartons to be used on those systems...", as the Commission had asserted.

Discriminatory prices

Tetra Pak pursued a strategy of almost exclusively autonomous development, granting no licences for the manufacture of its machines or its cartons (with a few exceptions in non-EC countries) and distributing its products exclusively through its network of subsidiaries (moreover, among the contractual obligations imposed on users was the requirement to purchase Tetra Pak cartons from Tetra Pak only, precluding the emergence of independent resellers or any parallel trade). Lastly, in practice users could place orders only with their local Tetra Pak subsidiary. As a result there was no intra-brand competition, and the compartmentalisation of national markets was total. The absence of intra-brand competition was particularly detrimental in the aseptic packaging markets, in which Tetra Pak held a virtual monopoly.

All of the conditions were in place for Tetra Pak to be able to carry out a discriminatory pricing policy. The Commission did in fact note extremely wide price disparities, of as much as 50-100 per cent for Tetra Pak cartons and 300-400 per cent for machines, from one Member State to another. As seen above[13], such disparities could not be explained by economic conditions specific to national markets.

The Commission and the CFI denounced as abusive these practices of discriminatory pricing between Member States, along with discriminatory pricing practices noted within at least one Member State (Italy), following a special investigation carried out in that country.

Predatory prices

Its virtual monopoly in the aseptic packaging markets, where barriers to entry were already high technologically but further aggravated by the contractual obligations analysed above, enabled Tetra Pak to concentrate all its competitive efforts on non-aseptic packaging without fear of reprisals in the aseptic markets. Furthermore, the extreme profitability of aseptic packaging, which contributed more than 90 per cent of corporate profits, provided the wherewithal, if necessary, to make financial sacrifices in the non-aseptic markets without in any way jeopardising overall margins.

A general analysis of the profitability of the various Tetra Pak products, carried out using the group's own cost accounting, showed that in some Member States "aseptic bricks" -- the best selling and most profitable cartons had been subsidising loss-making sales of "non-aseptic bricks" or even all of Tetra Pak's other products. Where this was the case, it meant that without "aseptic bricks" the Tetra Pak subsidiaries involved would have been operating at a loss.

For reasons of expediency, however, the Commission focused only on a number of cases for which it possessed data that were sufficiently clear and unequivocal for it to conclude that the sales at a loss could not have resulted from exceptional circumstances which, in all economic logic, might have prompted Tetra Pak to absorb them, but rather that they had been the result of a deliberate policy calculated to eliminate the competition. The Commission noted what it viewed as the clearly established existence of predatory pricing over a sufficient period of time -- for machines in the United Kingdom and, above all, for cartons and machines in Italy.

Predatory pricing practices were especially serious in Italy, since without the Commission's intervention they would probably have led to the total elimination of Elopak, Tetra Pak's chief rival and leader on the country's non-aseptic packaging markets.

Apart from many occasions on which machines were sold at a loss, for seven years Tetra Pak had sold its Rex cartons in Italy--Rex being a competitor of Elopak's main product, the Pure-Pak carton -- at prices well under (30-35 per cent below) its direct variable costs[14].

The 30-35 per cent difference between the price of a Rex carton and its direct variable costs was almost exactly equal to the difference between the prices at which Tetra Pak's Rex and Elopak's Pure-Pak cartons were being sold. Since it was present only in the non-aseptic markets, and Pure-Pak was its main product, the Elopak group could not counter by dropping the price below the breakeven point.

In contrast, Tetra Pak, which derived virtually all of its profits from the aseptic packaging markets, could have continued this "eliminatory" behaviour until the total disappearance of its rival: its losses remained marginal, and the compartmentalisation of national markets that the group had established also allowed it to limit geographically its action and the resultant losses.

This policy in fact cost Tetra Pak very little: with losses of 34.4 per cent on the Rex carton in 1981 (when losses were deepest), it saw its total profits in Italy, given the small quantities involved, fall by barely 3.7 per cent (i.e. from index = 100 to 96.3). This shows once again that a firm that dominates a given market can not only commit abuses in neighbouring markets that it does not dominate, but that, in addition, certain abusive practices such as predatory pricing are economically far less costly and significantly more likely to be carried out in secondary markets than in the market that the abusing firm dominates.

In its judgement, the CFI confirmed the Commission's position, stipulating *inter alia* that:

-- "the existence of [negative] gross or semi-gross margins...suggests that a pricing practice is eliminatory";

-- when only net margins are negative, prices "must be regarded as abusive if they are determined as part of a plan for eliminating a competitor" and that "a whole series of important and convergent factors provides evidence of the existence of an eliminatory intent";

-- "sales at a loss, even specific ones, by an undertaking in a dominant position are capable of constituting abuses within the meaning of Article 86 of the Treaty where their eliminatory nature is sufficiently proved."

Other practices to oust competitors

The CFI also confirmed that all of the other practices Tetra Pak engaged in to oust competitors such as routinely buying back the machines of potentially dangerous competitors with a view to withdrawing them from the market; acquiring second-hand machines at inflated prices so as to preclude specific sales; and ousting competitors from advertising markets by signing exclusive contracts -- constituted abuses.

Take-over of competing companies

Lastly, it must be noted for the record that Tetra Pak had taken over competing companies with a view to appropriating -- and in some cases eliminating -- actually or potentially competing technologies in the aseptic packaging sector. These abuses[15] were not included in the decision, however, either because the period of limitation had lapsed or because a specific decision had already been taken[16].

Remedies

Tetra Pak's abusive practices had extremely harmful effects on competition, *inter alia* enabling the group to artificially maintain its virtual monopoly in the aseptic packaging markets and gradually acquire a dominant position in non-aseptic packaging.

In its decision, the Commission ordered Tetra Pak to cease all of its infringements and to take a series of measures to open up its markets. In particular, Article 3 of the decision ordered that Tetra Pak take the following measures:

-- amend or, where appropriate, delete the incriminated clauses from its machine purchase/lease contracts and carton supply contracts so as to eliminate the abusive aspects found by the Commission, with new contracts to be submitted thereto;

-- eliminate any differences between the prices charged for its products in the various Member States that did not result solely from specific market conditions. Moreover, any customer within the Community was to be supplied by the Tetra Pak subsidiary of its choice at the price charged by that subsidiary;

-- practice neither predatory nor discriminatory pricing and refrain from granting any customer any form of discount on its products or more favourable payment terms not justified by an objective consideration. Thus, discounts on cartons were to be granted solely according to the quantity of each order, and orders for different types of cartons were not to be aggregated for that purpose;

-- refrain from refusing orders, at prevailing prices, on the ground that the orderer was not an end-user of Tetra Pak products;

-- inform any customer purchasing or leasing a machine of the specifications packaging cartons had to meet in order to be used on that machine.

Shortly before the Commission's decision, Tetra Pak sent the Commission a draft reform of its policy and contracts, meeting some of the Commission's demands. After the decision, and despite having lodged an appeal with the judicial authorities of the European Union, the group stated that it was ready to apply the Commission's decision. It amended its contracts accordingly, and initial reports on the application of the decision (which the Commission requires for five years) have been positive. Based on the information conveyed in the first report, Tetra Pak is believed to have ceased its discriminatory pricing practices within a year of the Commission's decision.

The ECU 75 million fine imposed on Tetra Pak -- the largest ever levied on a single firm -- was confirmed by the CFI and paid by the company[17].

The CFI judged that the criteria used by the Commission did in fact justify the high level of the fine: the duration, number, diversity and gravity of the infringements, which concerned all or almost all of the group's products and in some cases affected all the Member States. Furthermore, the CFI cited as aggravating circumstances the fact that, just as the Commission had claimed, the infringements formed part of a deliberate and coherent group strategy; the particularly harmful effects on competition; and the benefits Tetra Pak had gained from its infringements.

Neither did the Court accept that the fact that, at the end of the procedure, Tetra Pak had pledged to comply with most of the Commission's orders was cause for reducing the amount of the fine; only at the beginning of the procedure could such an attitude have been taken into account as an extenuating circumstance.

NOTES

1. Commission Decision No. 92/163/EEC of 24 July 1991, OJEC (Official Journal of the European Communities) No. L 72 of 18 March 1992, p. 1.

2. This definition of the markets was the same as the one determined in the Tetra Pak I case: Decision No. 88/501/EEC, Tetra Pak I, OJEC No. L 272 of 4 October 1988, p. 27.

3. Case T-83/91, Tetra Pak International SA v Commission of the European Communities (Tetra Pak II). RCJ (Reports of Cases before the Court of Justice of the European Communities), 1994-8/9/10, p. II-755.

4. Some 10 per cent for milk, and even less for most other liquid foods. This implied that a significant change of 10 per cent in the price of packaging would have only a negligible impact of approximately one per cent on the selling price of milk and generally an even more negligible impact as regards other liquid foods.

5. Changes in marketing policy, handling and storage processes, and even the distribution system (change-over from packaging on which a deposit is payable to packaging on which no deposit is payable, or vice versa).

6. Which did not mean that it could not maintain any dominant position it might have had and the resultant economic benefit if, for example, it overtook its competitors in the area of technological progress or in anticipating changes to consumer preferences, or indeed -- but then this would constitute an infringement of Article 86 by using its dominant position to maintain artificial barriers to market access.

7. It must be added that, for cartons, the prices of raw materials (which accounted for some 70 per cent of total cost) were world market prices.

8. See in particular Case 322/81, Michelin, RCJ 1983, p. 3461 and Case 311/84, Telemarketing, RCJ 1985, p. 3261.

9. Case C-62/86, AKZO, RCJ 1991, p. 3359.

10. By the end of that period, Tetra Pak's market shares exceeded 50 per cent.

11. Analysis of the group's cost accounting over a number of years showed that the contribution of carton sales to group profits had reached 87-98 per cent, whereas machine sales were contributing only two to ten per cent.

12. Case T-30/89, Hilti, RCJ 1992, p. 1439, confirmed on appeal (Case C-53/92, RCJ 1994, p I-667).

13. See above, section II, 1.2 ("Geographical market").

14. While definitions of predatory pricing differ, such divergences arise essentially from situations different from those at issue here, i.e. from situations in which selling prices lie between average cost and marginal cost. In contrast, the predatory nature of prices deliberately set below marginal cost or, to an even greater extent, of prices that are below marginal variable cost, can hardly be challenged. While in practice marginal variable costs can be difficult to ascertain, they are known to be equivalent, within wide bands of corporate activity, to direct variable costs.

15. See Case 6-72, Continental Can, RCJ 1973, p. 215.

16. The take-over of Liquipak having been the subject of the Tetra Pak I case [Commission Decision No. 88/501/EEC, Tetra Pak I (BTG), OJEC No. L 272 of 4 October 1988, p. 27].

17. Even though the group filed an appeal with the Court of Justice.

COMMISSION DE L'UNION EUROPEENNE

PARTIE I

La décision Tetra Pak II - Résumé succinct[1]

Le 24 juillet 1991, la Commission a arrêté une décision condamnant le groupe TETRA PAK pour infractions aux dispositions de l'article 86 du traité CE.

TETRA PAK, groupe d'origine suédoise établi en Suisse est, de loin, le numéro un mondial dans le secteur du conditionnement en cartons de produits alimentaires liquides (principalement lait et jus de fruit). Son chiffre d'affaires était de 3,6 milliards d' ECUs en 1990. En 1991, Tetra Pak a acquis le groupe Alfa Laval, l'un des premiers fabricants mondiaux d'équipements de traitement du lait, dont le chiffre d'affaires était d'environ 2,5 milliards d'ECUs.

Dans sa décision, la Commission a estimé que le secteur du conditionnement en cartons de produits alimentaires liquides était composé de quatre marchés distincts: le marché de machines et celui des cartons utilisés pour le conditionnement aseptique des liquides "longue conservation" d'une part, le marché des machines et celui des cartons utilisés pour le conditionnement non aseptique des liquides frais d'autre part[2]. Sur les deux marchés du conditionnement aseptique, le groupe Tetra Pak détenait +/- 90 pour cent à 95 pour cent des parts de marché, sur les marchés du conditionnement non aseptique +/- 45 pour cent à 50 pour cent. La Commission avait considéré que Tetra Pak détenait une position dominante sur les premiers marchés mais elle n'avait pas jugé nécessaire de se prononcer sur l'existence d'une telle position sur les marchés du conditionnement non aseptique, considérant qu'en tout état de cause ils étaient "voisins et connexes".

L'instruction, ouverte suite à la plainte d'un concurrent de Tetra Pak, avait conduit la Commission à estimer que Tetra Pak commettait tant sur les marchés du conditionnement aseptique que sur les marchés du conditionnement non aseptique des abus nombreux et divers au sens de l'article 86 et que ces abus relevaient d'une stratégie d'ensemble du groupe.

S'appuyant, en effet, sur la position dominante, quasi monopolistique même qu'il détenait sur les marchés du conditionnement aseptique, laquelle, alliée à une position de leader sur les marchés du conditionnement non aseptique, en faisait le fournisseur obligé de la plus grande partie des utilisateurs, Tetra Pak était parvenu à imposer à ceux-ci des obligations contractuelles ayant essentiellement pour objet de les lier au groupe et d'empêcher tout échange portant sur ses produits. Limitant au maximum par ces obligations contractuelles les possibilités de concurrence inter-marques, évitant par ces mêmes obligations contractuelles et par sa politique de production et de distribution entièrement autonome toute concurrence intra-marque, le groupe avait réussi à imposer pour ses produits un cloisonnement des marchés nationaux à l'intérieur de la Communauté Européenne qui lui permettait de pratiquer un politique différenciée et discriminatoire de prix, tant pour ses cartons que pour ses machines. Toutes les conditions restrictives de concurrence étaient réunies pour pouvoir

mener, là où sa position quasi monopolistique était établie (marchés "aseptiques"), une politique tendant à une maximisation des profits au détriment des consommateurs, laquelle politique lui permettait à son tour de subsidiaire, là où la concurrence demeurait (essentiellement marchés "non aseptiques"), une politique de prix éliminatoires. Pour préserver ou renforcer cette position, Tetra Pak avait eu soin de développer, à l'appui de sa politique contractuelle et de sa politique de développement autonome, une politique de défense extensive en matière de droits de propriété intellectuelle, les moyens ponctuels les plus divers, y compris, le cas échéant, le rachat de concurrents ou, à défaut, de leurs innovations technologiques.

Touchant donc à pratiquement tous les aspects de sa politique commerciale, prenant les formes les plus diverses, concernant tous (ou quasi tous) les produits de Tetra Pak, affectant tous les Etats membres de la Communauté, ces infractions relevaient donc d'une stratégie globale d'éviction des concurrents. Elles eurent des effets très néfastes tant pour les concurrents que pour les utilisateurs. Elles permirent à Tetra Pak de maintenir son quasi monopole sur les marchés du conditionnement aseptique et de renforcer considérablement sa position sur les marchés du conditionnement non aseptique (jusqu'à y acquérir vraisemblablement également une position dominante).

Les clauses contractuelles imposant l'usage exclusif de cartons Tetra Pak sur les machines Tetra Pak, notamment, ont grandement contribué à empêcher le développement de toute concurrence effective sur les marchés du conditionnement aseptique. Elles assuraient, d'autre part, à Tetra Pak les revenus provenant de la vente des cartons pendant toute la durée de vie (ou de location) de la machine. La perspective d'une telle rente sur les cartons ne pouvait, par ailleurs, qu'encourager la pratique - effectivement mise en oeuvre - de prix discriminatoires et prédatoires sur les ventes et locations des machines.

La segmentation du marché européen avait, quant à elle, rendu possible la pratique par Tetra Pak de prix également radicalement discriminatoires suivant les Etats membres, les différences pouvant atteindre 50 pour cent à 100 pour cent pour les cartons et 300 pour cent à 400 pour cent pour les machines.

Les seuls profits engendrés par les cartons utilisés pour le conditionnement aseptique (cartons "Brik") où Tetra Pak disposait d'un quasi monopole lui permettaient de financer aisément les pertes enregistrées parfois sur d'autres (où même sur l'ensemble de ses autres) produits, ce que ne pouvaient se permettre ses concurrents. Ainsi, la vente par Tetra Pak en Italie , pendant des années, de ses cartons non aseptiques "Rex" avec des pertes atteignant, ou dépassant dans certains cas, 34 pour cent de leur prix de revient obligea Elopak, son principal concurrent, à y fermer une nouvelle unité de production et manqua de l'éliminer complètement de ce marché.

Au terme de la procédure ouverte contre Tetra Pak, la Commission avait, en conséquence, ordonné au groupe de mettre fin aux infractions, avait décidé de lui infliger une amende de 75 millions d'ECUs (amende la plus élevée jamais infligée à une entreprise pour infraction aux règles de concurrence) et imposé certaines obligations quant à son comportement futur. Par son arrêt du 6 octobre 1994 [3], le TPI (Tribunal de Première Instance de la Cour de Justice de l'Union Européenne) a confirmé en tous points l'analyse et la décision de la Commission, y compris les obligations imposées à Tetra Pak quant à son comportement futur et a confirmé l'amende infligée par la Commission. Après l'arrêt du TPI, Tetra Pak a payé l'amende (plus de 100 millions d'Ecus avec les intérêts) mais a décidé de se pourvoir en appel devant la Cour de Justice.

Eléments d'analyse

L'affaire Tetra Pak revêt, jusqu'à ce jour, un caractère unique dans la mesure où la Commission ne s'est pas trouvé confrontée à des infractions spécifiques à tel ou tel domaine particulier mais s'est trouvé confrontée, comme on l'a vu plus haut, à une stratégie anticoncurrentielle d'ensemble d'un groupe.

L'analyse développée ci-après se limitera toutefois à évoquer des éléments de réponse que pourrait apporter cette affaire à certaines question posées dans la note de l' OCDE du 20 novembre 1995 (CLP/95.364).

Marché en cause

Marché des produits

La question de la définition du ou des marchés en cause est centrale dans la mesure où elle conditionne l'existence d'une position dominante et d'abus éventuels. Elle fut, dans l'affaire Tetra Pak, l'objet d'un débat particulièrement approfondi.

Tetra Pak soutenait que le marché en cause était le marché global de l'emballage pour liquides alimentaires incluant toutes les formes de conditionnement (aseptiques et non aseptiques).

Examinant la substituabilité des produits concernés, tant au niveau de la demande qu'au niveau de l'offre, la Commission est arrivée à la conclusion que si des emballages aussi divers que les bouteilles en verre, les bouteilles en plastique, les sacs en plastique, les boîtes métalliques, les cartons aseptiques, les cartons non-aseptiques, etc. faisaient partie de ce que l'on appelle communément et, au sens large du terme, le marché de l'emballage ou du conditionnement pour liquides alimentaires, celui-ci ne constituait pas le "marché en cause" au sens de l'article 86, ces différents types d'emballages ne se concurrençant qu'en longue période. En courte, et même vraisemblablement en moyenne période , les conditions de l'offre et de la demande étaient telles que l'élasticité de substitution des produits par rapport aux prix était quasi nulle.

Au niveau de la demande, cette faiblesse de l'élasticité de substitution s'expliquait par la part marginale du conditionnement dans le prix de vente au détail des liquides alimentaires[4] et par la stabilité assez grande des goûts des consommateurs en courte période. Au niveau de l'offre, le manque de substituabilité s'explique essentiellement par le coût financier de l'investissement que représente pour le producteur/conditionneur de liquide, le passage d'un type de conditionnement à l'autre, l'apprentissage technologique qu'il requiert et ses répercussions éventuelles au niveau de la commercialisation[5], le tout dans la perspective de la très faible élasticité de substitution de la demande décrite ci-dessus.

Dans un état donné de techniques et de goûts des consommateurs, il fallait donc considérer que les différents types d'emballage et de matériel correspondants formaient des marchés distincts répondant à leurs conditions d'offre et de demande propres.

La Commission a également considéré que l'analyse visant à définir le marché devait se situer en courte période. Sur une longue période, sous l'influence des progrès technologiques et de la modification des habitudes de consommation, les structures se modifient et les frontières mêmes des différents marchés se déplacent. La courte période est le temps économique opératoire dans lequel s'exerce le pouvoir de marché d'une entreprise déterminée[6] et où il faut, en conséquence, se placer pour l'apprécier.

L'analyse a mis également en évidence la différentiation à apporter entre substituabilité technique et substituabilité économique. Certains biens peuvent être techniquement substituables mais non économiquement quand les conditions de l'offre et de la demande sont telles que l'élasticité de substitution des produits par rapport

aux prix est trop faible. Il faut considérer, dans de tels cas, qu'ils ne relèvent pas du même marché au sens de l'article 86.

Marché géographique

La Commission a estimé pour diverses raisons - et compte tenu notamment du faible coût du transport des cartons et des machines ainsi que de l'existence d'une demande stable et non négligeable (même si elle variait en intensité entre les divers Etats membre) pour tous les produits concernés sur l'ensemble du territoire de la Communauté[7] - que le marché géographique en cause, au sens de l'article 86, s'étendait à toute la Communauté

Position dominante - marchés voisins de celui où s'exerce la position dominante

Une fois défini le ou les marché(s) en cause, il y a lieu de considérer si l'entreprise en cause y détient une position dominante.

Selon la jurisprudence de la Cour, une telle position existe si l'entreprise a la possibilité de se comporter, dans une large mesure, de manière indépendante par rapport à ses concurrents et aux consommateurs et d'exercer un pouvoir de marché sans devoir subir les contraintes qui s'exercent habituellement sur les marchés où règne une concurrence effective.[8]

S'il faut tenir compte dans cette appréciation de toutes les circonstances factuelles telles que l'importance relative des concurrents, celle des consommateurs, les barrières à l'entrée sur le marchés, la Cour a précisé dans son arrêt "Akzo"[9] - non encore rendu lors de l'instruction de l'affaire Tetra Pak - que, sauf circonstances exceptionnelles une part de marché de 50 pour cent attestait d'une position dominante.

Avec, notamment, des parts de marché de 90 pour cent à 95 pour cent, un seul concurrent et l'existence de barrières technologiques élevées (du moins pour les machines), la dominance de Tetra Pak sur les marchés du conditionnement aseptique pouvait difficilement être mise en cause pour autant que la définition des marchés donnée par la Commission était retenue.

Avec des parts de marché tournant - au cours de la période considérée[10] - autour de 45-50 pour cent, l'existence d'une position dominante de Tetra Pak sur les marchés du conditionnement non aseptique ne s'imposait pas "prima facie" même si beaucoup d'éléments auraient permis de soutenir la thèse d'une telle existence.

La Commission n'a toutefois pas considéré nécessaire de se prononcer sur cette question compte tenu de la connexité existante entre ces marchés et les marchés aseptiques : si les technologies de conditionnement et les cartons utilisés étaient différents, les produits conditionnés étaient essentiellement les mêmes, ainsi que les clients et les fournisseurs. La position quasi monopolistique de Tetra Pak sur les marchés aseptiques et la connexité de ces marchés avec les marchés voisins non aseptiques impliquaient que les actes restrictifs de concurrence posés par Tetra Pak sur ces derniers marchés relevaient tout autant de l'article 86 que ceux posés sur les marchés aseptiques.

Le TIP a confirmé la position de la Commission reconnaissant ainsi clairement que des abus pouvaient être commis sur des marchés où une entreprise n'est pas dominante pour autant qu'il existe des liens étroits entre ceux-ci et le ou les marché(s) où cette entreprise est dominante. Il s'agit là d'une disposition importante de l'arrêt dans la mesure où s'il existait des indicateurs en ce sens dans la jurisprudence antérieure, cette thèse n'était pas tout à fait acquise.

Abus

Obligations contractuelles

Le quasi monopole de Tetra Pak dans le secteur du conditionnement aseptique en faisait le fournisseur quasi obligé des entreprises - nettement majoritaires - productrices à la fois de liquide alimentaire de longue conservation conditionné aseptiquement et de liquide alimentaire frais. Tetra Pak était ainsi parvenu à imposer à ses clients, tant sur les marchés du conditionnement aseptique que sur les marchés du conditionnement non aseptique, un faisceau d'obligations contractuelles visant à les lier au groupe et à empêcher tout concurrence extra et intra-marque.

Il serait trop long de reprendre ici la liste complète des obligations contractuelles qui furent considérées comme abusives au titre de l'article 86. Nous nous contenterons d'en évoquer les principales.

Contrats de vente

Les contrats de vente du matériel Tetra Pak comportaient une série de clauses qui limitaient très sérieusement les droits de propriété de l'acheteur et le maintenaient dans une relation de dépendance exclusive vis-à-vis du vendeur.

Configuration du matériel :

-- Interdiction de modifier les machines, d'y ajouter des appareils accessoires, de les déplacer (et donc de les exporter).

Transfert de propriété

-- Obligation d'obtenir l'accord de Tetra Pak pour la revente du matériel ;

-- Droit prioritaire de rachat par Tetra Pak à un prix forfaitaire et sous-estimé ;

-- Obligation, en cas de vente acceptée par Tetra Pak, d'obtenir du tiers acquéreur la reprise de l'ensemble des obligations du premier acquéreur vis-à-vis de Tetra Pak ;

-- Obligation d'informer Tetra Pak de tout perfectionnement ou de toute modification technique apportée au matériel ou aux cartons et de lui en réserver la propriété intellectuelle ;

-- Droit de regard sur le libellé à apposer sur les cartons.

Fonctionnement et entretien du matériel

-- Exclusivité de Tetra Pak pour l'entretien et les réparations ;

-- Exclusivité pour la fourniture des pièces de rechange ;

-- Tarification dégressive des frais d'assistance et d'entretien en fonction du nombre de cartons utilisés sur les machines Tetra Pak.

"Ventes liées" machines/cartons.

-- Obligation d'utiliser uniquement des cartons Tetra Pak sur les machines Tetra Pak ;
-- Obligation d'approvisionnement exclusif en cartons Tetra Pak auprès de la filiale locale du groupe (pas de distributeur indépendant) et aux prix déterminés par le groupe ou par sa filiale.

Garantie

-- Subordination de la garantie à l'observation de toutes les clauses contractuelles (dans certains contrats) ou, à tout le moins, à l'utilisation exclusive des cartons Tetra Pak.

Contrôles

-- Obligation de remettre un rapport mensuel sur les productions des cartons ;

-- Droit d'inspection, sans préavis, des lieux de production, des documents comptables ou autres et du courrier du client (prétendument dans le but de savoir si celui-ci respectait ses engagements).

Contrats de location

Les contrats de location du matériel contenaient, mutatis mutandi, les mêmes dispositions restrictives que celles inclues dans les contrats de vente.

La fixation du loyer rendait, par ailleurs, la location pratiquement assimilable à une vente dans la mesure où il incluait le paiement, lors de la mise à la disposition du matériel, d'une somme initiale représentant la quasi totalité des loyers présents et futurs (jusqu'à 98 pour cent dans certains cas). Le solde était essentiellement constitué par une redevance mensuelle à la production dont le montant était dégressif en fonction du nombre de cartons utilisés sur l'ensemble des machines Tetra Pak détenues par le client.

Commentaires :

-- l'ensemble des clauses contractuelles allaient, on le voit, dans le sens d'une fidélisation maximale du client et du maintien d'une dépendance exclusive de celui-ci envers Tetra Pak. On peut même considérer que ces clauses dénaturaient tant le contrat de vente que celui de location. Dans le premier cas, l'acheteur ne pouvait disposer pleinement de son droit de propriété et dans le second, le locataire payait un prix de départ qui rendait la transaction financièrement équivalente à un achat, tout en ne lui conférant pas les droits de propriété ;

-- les multiples obligations imposées aux partenaires commerciaux jouaient, à des degrés divers, toujours dans le même sens et relevaient clairement d'une stratégie visant à rendre, une fois réalisée l'opération de vente ou de location des machines, le client totalement dépendant de Tetra Pak pendant toute la durée de vie de ces machines, fermant ainsi la porte à toute possibilité de concurrence au niveau des produits annexes (services techniques, pièces de rechange) et des cartons ;

-- il apparaît, dès lors, que le seul moment où la concurrence était susceptible de jouer réellement était celui de la vente de l'équipement et non des cartons. Tetra Pak limitait ainsi artificiellement

la concurrence au terrain qui lui était le plus favorable, car c'est sur l'équipement, tout spécialement en matière aseptique, que son avance technologique était la plus grande et les barrières à l'entrée les plus élevées ;

-- c'est la raison de l'importance attachée par Tetra Pak au système de ventes liées machines/cartons. Fermer le marché des cartons à toute concurrence lui permettait de s'assurer de la rentrée de la quasi totalité de ses bénéfices (environ 95 pour cent) sous forme de rente (résultat de l'achat obligatoire de ses cartons) dès que la machine était placée chez le client. Et, au niveau de cette dernière opération, l'avantage de Tetra Pak résultant de son avance technologique pouvait, s'il le fallait pour emporter la décision, être complété par une vente ou une location à perte de la machine, laquelle n'avait dans tous les cas qu'une incidence totalement marginale au niveau des résultats financiers[11]

-- pour justifier l'usage exclusif de cartons Tetra Pak sur les machines Tetra Pak, le groupe invoquait des raisons techniques, des raisons de responsabilité en matière de santé publique ainsi que l'usage commercial.

Sans nier la complexité des problèmes, la Commission rejetait les deux premiers arguments de Tetra Pak considérant qu'il existait pour les résoudre des solutions techniques (divulgation des normes et des spécifications) et un cadre juridique (droit commun de la responsabilité) appropriés. La règle de la "proportionnalité" excluait les pratiques restrictives de concurrence imposées par Tetra Pak. Pour ce qui concerne l'usage commercial, la Commission contestait qu'il soit généralisé sur les marchés du conditionnement non aseptique et il pouvait difficilement être invoqué pour ce qui concernait les marchés aseptiques où il n'existait que deux producteurs et où Tetra Pak détenait 90 à 95 pour cent du marché.

Le TPI a confirmé la position de la Commission et dans la ligne de la jurisprudence "Hilti"[12], considérant notamment "qu'il n'appartenait manifestement pas à une entreprise en position dominante de prendre de sa propre initiative des mesures destinées à éliminer des produits qu'elle considère, à tort ou à raison, comme dangereux ou à tout le moins d'une qualité inférieure à ses propres produits". Le TPI a également estimé que "Dans la présente espèce, la fiabilité de l'équipement pour les laiteries et autres utilisateurs et le respect des normes sanitaires à l'égard du consommateur final pouvaient être assurés par la divulgation auprès des utilisateurs de machines Tetra Pak de l'ensemble des spécifications techniques relatives aux cartons à utiliser sur ces équipements,...." , ainsi que le soutenait la Commission.

Prix discriminatoires

Tetra Pak a poursuivi une stratégie de développement presqu' exclusivement autonome n'accordant aucune licence de fabrication pour ses machines, aucune licence de fabrication pour ses cartons (à quelques exceptions près dans des pays hors CE) et assurant partout la distribution de ses produits à travers le réseau de ses filiales (on se rappellera par ailleurs que, parmi les obligations contractuelles imposées aux utilisateurs, celle de ne s'approvisionner en cartons Tetra Pak qu'auprès de Tetra Pak, excluait l'émergence de revendeurs indépendants et de tout commerce parallèle). En pratique enfin, l'utilisateur ne pouvait commander qu'auprès de la filiale locale de Tetra Pak. Il n'existait donc aucune concurrence intra-marque et le cloisonnement des marchés nationaux était total. L'absence de concurrence intra-marque était particulièrement préjudiciable dans les marchés du conditionnement aseptique où Tetra Pak occupait une position quasi monopolistique.

Toutes les conditions étaient ainsi réunies pour permettre à Tetra Pak de mener une politique de prix discriminatoires. Et la Commission a en effet constaté des disparités de prix extrêmement importantes entre les Etats membres, pouvant atteindre jusqu'à 50 à 100 pour cent pour les cartons Tetra Pak et 300 à 400 pour cent

pour les machines. Ces disparités ne pouvaient, comme on l'a vu plus haut[13], s'expliquer par des conditions économiques spécifiques aux marchés nationaux.

La Commission et le TPI ont condamné comme abusives ces pratiques de prix discriminatoires entre Etats membres mais également des pratiques de prix discriminatoires constatées à l'intérieur d'au moins un Etat membre (Italie), suite à une enquête spécifique menée dans ce pays.

. *Prix prédatoires*

L'existence d'une position quasi monopolistique de Tetra Pak sur les marchés du conditionnement aseptique connaissant déjà technologiquement des barrières élevées mais encore accrues par les obligations contractuelles analysées plus haut, offrait la faculté à Tetra Pak de concentrer tous ses efforts en matière de concurrence sur les marchés du conditionnement non aseptique sans craindre de riposte sur les marchés du conditionnement aseptique. L'extrême rentabilité du conditionnement aseptique contribuant pour + de 90 pour cent à ses profits lui donnait ,par ailleurs, les moyens de consentir, si nécessaire, des sacrifices financiers sur les marchés non aseptiques sans que ne soit aucunement mise en cause la rentabilité globale de ses activités.

Une analyse générale de la rentabilité des différents produits de Tetra Pak, opérée sur base de la comptabilité analytique du groupe, montra en effet que le carton "Brik aseptique" - le carton le plus vendu et le plus rentable - avait subsidié dans certains Etat membres la vente à perte des cartons "non aseptiques" ou même de l'ensemble des autres produits Tetra Pak. Dans ce dernier cas, ceci signifie que sans le "Brik aseptique" les filiales concernées de Tetra Pak auraient connu des résultats d'exploitation déficitaires.

Pour des raisons d'opportunité, la Commission ne s'est toutefois concentrée que sur certains cas où elle possédait des données suffisamment claires et univoques pour pouvoir conclure que les ventes à perte ne pouvaient résulter de circonstances exceptionnelles qui auraient pu, en toute rationalité économique, amener Tetra Pak à les subir mais avaient été le résultat d'une politique délibérée ayant visé à l'élimination de la concurrence. Elle a ainsi constaté l'existence, à ses yeux clairement établie , de prix prédatoires pendant une période de temps suffisamment longue sur des machines au Royaume-Uni et surtout sur des cartons et des machines en Italie.

Les pratiques de prix prédatoires furent particulièrement sérieuses en Italie car elles auraient vraisemblablement, sans l'intervention de la Commission, conduit à l'élimination totale d'Elopak, principal concurrent de Tetra Pak et leader sur les marchés du conditionnement non aseptique dans ce pays.

Outre de nombreuses ventes à perte ponctuelles de machines, Tetra Pak y a vendu pendant sept années durant son carton "Rex", concurrent du produit principal d'Elopak, le carton "Pure-pak" à des prix largement inférieurs de (-30 à -35 pour cent) à ses coûts variables directs.[14]

Cette différence négative de 30 à 35 pour cent entre le prix de vente du carton "Rex" et ses coûts variables directs s'identifiait largement à la différence entre le prix de vente du carton "Rex" de Tetra Pak et celle du carton "Pure-pak" d'Elopak. Présent uniquement sur les marchés non aseptiques avec pour principal produit, le carton "Rex", le groupe Elopak ne pouvait riposter en en baissant le prix en dessous de son seuil de rentabilité.

Tirant la quasi totalité de ses bénéfices des marchés du conditionnement aseptique, Tetra Pak aurait pu, par contre, continuer cette opération "éliminatoire" jusqu'à la disparition de son concurrent : ses pertes restaient marginales et le cloisonnement des marchés nationaux que le groupe avait érigé lui permettait, par ailleurs, de limiter territorialement son action et les pertes en résultant.

Cette politique lui fut effectivement extrêmement très peu coûteuse : avec 34,4 pour cent de pertes sur le carton Rex en 1981 (année où celles-ci furent les plus sévères), il a vu, compte tenu des faibles volumes en jeu, son bénéfice total en Italie diminuer d'à peine 3,7 pour cent (soit un indice de 96,3 au lieu d'un indice 100). Ceci démontre encore qu'une entreprise dominante sur un marché donné peut non seulement commettre des abus sur des marchés voisins où elle n'est pas dominante mais qu'en outre, certaines pratiques abusives telles les pratiques de prix prédatoires, sont économiquement éminemment moins coûteuses et sensiblement plus susceptibles d'être mises en oeuvre sur des marchés secondaires que sur le marché où elle est dominante.

Dans son arrêt, le TIP a confirmé la position de la Commission en précisant notamment :

-- "que l'existence de marges brutes ou semi-brutes négatives permet de présumer le caractère éliminatoire d'une pratique de prix" ;

-- que lorsque seule la marge nette est négative les prix pratiqués "doivent également être considérés comme présentant un caractère abusif, dans la mesure où tout une série d'indices sérieux et concordants permettent d'établir l'existence d'une intention d'éviction" ;

-- que "des ventes à perte, même ponctuelles, effectuées par une entreprise en position dominante, sont susceptibles de présenter un caractère abusif au sens de l'article 86 du traité, dès lors que leur caractère éliminatoire est suffisamment établi".

Autres pratiques d'éviction des concurrents

Le TPI a également confirmé que constituaient des abus toutes les autres pratiques d'éviction des concurrents mises en oeuvre par Tetra Pak, telles que : les rachats systématiques des machines de concurrents potentiellement dangereux en vue d'éliminer leur présence sur le marché, les rachats à prix surfaits de machines d'occasion en vue d'enlever des marchés ponctuels, l'éviction de concurrents de marchés publicitaires par la signature de contrats d'exclusivité.

Reprise de sociétés concurrentes

Il faut enfin noter pour mémoire le rachat par Tetra Pak de sociétés concurrentes en vue de s’approprier - pour éventuellement les éliminer - des technologies concurrentes ou potentiellement concurrentes dans le secteur du conditionnement aseptique. Ces abus[15] n'ont toutefois pas été repris dans le dispositif de la décision, soit qu'il y ait eu prescription, soit qu'une décision spécifique ait déjà été prise.[16]

Remèdes

Les pratiques abusives de Tetra Pak ont eu des effets extrêmement nocifs sur la concurrence, permettant au groupe notamment de maintenir artificiellement son quasi monopole sur les marchés du conditionnement aseptique et d'acquérir progressivement une position dominante sur les marchés du conditionnement non aseptique.

La Commission a, dans sa décision , ordonné à Tetra Pak de mettre fin à toutes ses infractions et de prendre une série de mesures visant à ouvrir les marchés. Elle a, en particulier, décrété dans l'article 3 de cette décision, que Tetra Pak devait prendre les mesures suivantes :

-- modifier ou, selon les cas, supprimer les clauses incriminées de ses contrats de vente et de location de machines et de ses contrats de fourniture de cartons de façon à en éliminer les aspects abusifs

mis en évidence par la Commission, les nouveaux contrats devant être communiqués à la Commission ;

-- éliminer les différences entre les prix qu'il pratiquait sur ses produits dans les différents Etats membres et qui ne résultaient pas des conditions spécifiques des marchés. Tout client doit, par ailleurs, pouvoir s'approvisionner, dans la Communauté, auprès de la filiale de Tetra Pak de son choix et aux prix pratiqués par celle-ci ;

-- ne pratiquer ni prix éliminatoires, ni prix discriminatoires et n'accorder à aucun client, sous quelques forme que ce soit, des remises sur ses produits ou des conditions plus favorables de paiement qui ne sont pas justifiées par une contrepartie objective. Ainsi pou les cartons, les remises ne doivent concerner que des remises de quantité à la commande, non cumulables pour des cartons de type différents;

-- ne pas refuser de répondre, aux conditions de prix en vigueur, aux offres d'achat émanant d'entreprises au motif qu'elles ne sont pas des utilisateurs finaux des produits Tetra Pak;

-- communiquer au client acheteur ou locataire d'une machine les spécifications auxquelles doivent répondre les cartons d'emballage pour pouvoir être utilisés sur ses machines.

Peu avant la décision de la Commission, Tetra Pak a envoyé à la Commission un projet de réforme de sa politique et de ses contrats, répondant partiellement aux exigences de la Commission. Après la décision, et bien qu'ayant fait appel contre celle-ci devant les instances judiciaires de l'Union européenne, le groupe s'est déclaré prêt à appliquer la décision de la Commission. Il a modifié ses contrats en conséquence et les premiers rapports d'application de la décision (exigés pendant une période de cinq ans par la Commission) sont positifs. Sur base des informations communiquées dans le premier rapport Tetra Pak aurait ainsi supprimé dès la première année suivant la décision de la Commission ses pratiques de prix discriminatoires.

L'amende de 75 millions d'Ecus infligée à Tetra Pak - amende la plus élevée jamais infligée à une seule entreprise - a été confirmée par le TPI et payée par Tetra Pak.[17]

Le TPI a, en effet, considéré que les critères retenus par la Commission justifiaient le niveau élevé de l'amende : durée, multiplicité et gravité des infractions, ayant porté sur la totalité ou la quasi totalité des produits de Tetra Pak et dont certains ont affecté tous les Etats membres. Il a, en outre, relevé comme circonstances aggravantes le fait que ces infractions relevaient bien, comme le considérait la Commission, d'une stratégie délibérée et cohérente du groupe, leurs effets particulièrement néfastes sur la concurrence et l'avantage que Tetra Pak en avait tiré.

Le Tribunal n'a, de plus, pas retenu comme élément de nature à réduire le montant de l'amende, le fait que Tetra Pak se soit, à la fin de la procédure, engagé à respecter la majorité des injonctions de la Commission. Une telle attitude n'aurait pu être prise en considération comme circonstance atténuante qu'en début de procédure.

NOTES

1. Décision de la Commission n° 92/163/CE du 24 juillet 1991, JOCE(Journal Officiel des Communautés Européennes) n° L72 du 18 mars 1992, p.1

2. Cette définition des marchés était déjà celle retenue dans l'affaire Tetra Pak I: Décision 88/501/CE, "Tetra Pak I", JOCE n° L 272 du 4.10.1988, p. 27

3. Affaire T-83/91, Tetra Pak International SA c/ Commission ("Tetra Pak II"). RCJ (Recueil de la Cour de Justice des Communautés Européennes) 1994, p. II, 755.

4. Environ 10 pour cent pour le lait, moins encore pour la plupart des autres liquides alimentaires. Ceci implique qu'une variation significative de 10 pour cent des prix relatifs des conditionnements n'a qu'un effet négligeable d'environ un pour cent dans le prix de vente du lait et un effet généralement plus négligeable encore pour les autres liquides alimentaires.

5. Modification de la politique de marketing, des procédés de manutention et de stockage, voire du système de distribution (passage d'un conditionnement consignable à un conditionnement non consignable ou vice versa).

6. Ce qui ne veut pas dire que celle-ci ne puisse pas conserver une éventuelle position dominante si, par exemple, elle devance ses concurrents en matière de progrès technologiques ou dans l'anticipation des modifications des goûts des consommateurs, ou encore - mais il s'agit alors là précisément d'une infraction à l'article 86 - par l'utilisation de cette dominance pour maintenir des barrières artificielles à l'accès au marché.

7. Il faut encore ajouter que pour les cartons, les cours des matières premières (intervenant pour environ 70 pour cent dans le prix de revient total) sont des cours mondiaux.

8. Voir notamment Affaire 322/81 "MIchelin", RCJ 1983, p.3461 et affaire 311/84 "Telemarketing", RCJ 1985, p. 3261

9. Affaire C62/86 "Akzo", RCJ 1991, p. 3354

10. A la fin de la période considérée, les parts de marché de Tetra Pak ont dépassé les 50 pour cent.

11. L'analyse des comptes analytiques du groupe sur un certain nombre d'années avait montré que la contribution de la vente des cartons aux bénéfices du groupe avait atteint 87 à 98 pour cent tandis que celles des machines n'avait été que de -2 à +10 pour cent

12. Affaire T-30/89 "Hilti", RCJ 1992, p. 1439, confirmée en appel (affaire C-53/92, RCJ 1994, p. 5-667)

13. cf supra II, 1.2 marché géographique

14. S'il existe des divergences sur la définition à donner aux prix prédatoires, celles-ci se rapportent essentiellement à des situations différentes de celles rencontrées ici, en l'occurrence à des situations où les prix de vente pratiqués se situent entre le coût moyen et le coût marginal. Par

contre, le caractère prédatoire de prix qui seraient délibérément fixés en dessous du coût marginal, a fortiori en dessous du coût variable marginal, n'est guère contesté. Or, si le coût variable marginal est, dans la pratique, difficile à isoler, on sait cependant qu'il s'identifie, à l'intérieur de larges seuils d'activité de l'entreprise, au coût variable direct.

15. Voir Affaire 6/72 "Continental Can", RCJ 1973, p. 215

16. Rachat de Liquipak ayant fait l'objet de l'affaire Tetra Pak I (décision n° 88/501/CE de la Commission, Tetra Pak I (BTG), JOCE n° L272 du 4/10/88, p. 27

17. Bien que le groupe ait introduit un pourvoi contre l'arrêt du TPI devant la Cour de Justice.

COMMISSION DE L'UNION EUROPEENNE

PARTIE II

L'application du contrôle communautaire des concentrations aux oligopoles dominants

C'est un fait largement accepté par la théorie économique que, lorsqu'un marché est fortement concentré, le degré d'interdépendance entre entreprises s'accroît de telle sorte que plusieurs entreprises peuvent avoir une forte convergence d'intérêt à réduire les quantités mises sur le marché ou à augmenter les prix. Elles se trouvent alors conjointement dans une situation de puissance économique qui leur confère le pouvoir de faire obstacle au maintien d'une concurrence effective[1]. Dés lors, les effets anticoncurrentiels résultant d'une position dominante collective devraient être les mêmes que ceux qui résultent d'une position dominante individuelle.

C'est la raison pour laquelle les principales autorités de concurrence à travers le monde sont dotées des moyens juridiques d'appréhender les positions dominantes collectives au même titre que les positions dominantes individuelles. C'est également pourquoi, le TPICE (Tribunal de Première Instance de la Communauté Européenne) dans l'affaire du "verre plat en Italie[2]" a admis que l'article 86 pouvait s'appliquer aux positions dominantes collectives. Pour la même raison, la Commission a considéré que la position dominante collective entrait dans le champ d'application du règlement "concentrations".

Curieusement, la Commission n'a eu à trancher ce point, dans l'affaire Neslé/Perrier, que relativement tardivement, près de deux ans après l'entrée en vigueur du règlement[3]. Elle avait auparavant envisagé la question mais l'avait laissée ouverte[4].

Il est remarquable que la Commission ait opté, dans cette affaire, pour une conception "pure" de la domination oligopolistique, en acceptant qu'une position dominante collective puisse exister en l'absence de tout lien structurel entre les membres de l'oligopole dominant.

Une telle approche - conforme aux enseignements de la théorie économique qui font naître la domination collective d'un degré élevé d'interdépendance des décisions conjugué à une forte convergence d'intérêt entre les membres de l'oligopole dominant - fonde la philosophie même du contrôle des concentrations qui vise à "empêcher des structures de l'offre tellement étroites que la conclusion de cartels n'est plus nécessaire pour mener à bien une action concertée"[5].

Toutefois, si la Commission considère que l'existence de liens n'est ni nécessaire, ni suffisante pour démontrer l'existence d'une domination oligopolistique, elle prend en compte ces liens dans son analyse, qu'il s'agisse de liens structurels ou de l'existence d'ententes passées.[6]

Si le premier cas fut tardif, les 18 mois qui ont suivi la décision Nestlé/Perrier (d'août 92 à janvier 94) furent, en revanche, prolifiques puisque cette question a été examinée en détail à sept reprises et a conduit la Commission à formuler des doutes sérieux dans trois cas.[7]

L'analyse de cette pratique décisionnelle courte mais fournie, permet de dégager les grandes lignes de l'analyse que met en oeuvre la Commission afin de déterminer si, postérieurement à la concentration, les caractéristiques structurelles déterminant le fonctionnement de la concurrence sur le marché en cause, favoriseront l'adoption par plusieurs entreprises d'un parallélisme de comportement anticoncurrentiel.

La méthodologie d'analyse de la Commission

Le schéma d'analyse se distingue de celui qui est utilisé en matière de position dominante individuelle. En effet, les situations de dominance collective requièrent une analyse à deux niveaux. Il faut d'abord démontrer qu'il existe une forte probabilité pour que les membres de l'oligopole adoptent un comportement parallèle anticoncurrentiel de telle sorte qu'ils agiront comme un même groupe d'entreprises sur le marché (analyse de la concurrence à l'intérieur de l'oligopole). Ce n'est qu'ensuite, lorsqu'il faut déterminer si ce groupe sera en mesure de s'abstraire de manière appréciable du comportement de ses concurrents, que l'analyse rejoint le schéma classique d'appréciation des positions dominantes individuelles.

Seule la première de ces questions est spécifique de l'analyse des oligopoles. Pour y répondre, la Commission procède au cas par cas, à une analyse multi-critères dans laquelle l'utilisation d'un "bouquet" de facteurs qualitatifs d'évaluation complète l'analyse quantitative des positions de marché. L'étude des sept décisions précitées démontre que la Commission n'utilise pas de modèle systématique et apprécie le poids qu'il convient de donner à chaque critère en fonction des caractéristiques propres à chaque marché.

L'analyse quantitative

L'analyse des décisions de la Commission montre que celle-ci n'a aucun a priori quant aux structures de marché oligopolistiques et considère qu'un marché peut être concentré et doté d'un fonctionnement proconcurrentiel. Elle opère donc une distinction entre les notions de marché oligopolistique et d'oligopole dominant. Pour autant, avec l'augmentation du degré de concentration global du marché, le degré d'incertitude quant aux décisions que prennent les concurrents diminue et le contrôle mutuel du comportement sur le marché est facilité. Aussi, la pratique de la Commission jusqu'à présent a été de considérer l'évolution du niveau et la distribution des parts de marché, avant et après la concentration, comme un point de départ permettant de déterminer dans quelle mesure la question de la position dominante devait faire l'objet d'une analyse approfondie.

Dans cinq des sept cas précités, les deux firmes leaders devaient détenir, postérieurement à l'opération plus de 60 pour cent du marché. Dans deux de ces cas, la Commission a adopté une décision d'autorisation conditionnelle, l'analyse ayant permis de conclure qu'une position dominante duopolistique serait créée à la suite de la concentration. Dans deux cas seulement, la Commission a examiné la possibilité d'une domination collective par plus de deux offreurs[8] avant d'autoriser l'opération en cause.

Dans chacun des sept cas précités, la Commission a également procédé à une analyse de la position des autres concurrents subsistant sur le marché.

L'analyse qualitative

Sur la base de ce constat d'ordre quantitatif, la Commission examine un certain nombre de facteurs d'ordre qualitatif tenant aux caractéristiques du marché et aux conditions structurelles de l'offre, afin de déterminer si une position dominante collective sera créée ou renforcée à la suite de l'opération.

Caractéristiques du marché

La Commission prend en compte les caractéristiques du marché tenant notamment à la nature des biens, produits ou services en cause, aux éléments structurels caractérisant la demande et au degré de transparence du marché, afin de déterminer dans quelle mesure elles sont de nature à faciliter et à rendre attractifs des comportements parallèles anticoncurrentiels.

Sur le premier point, la concurrence joue essentiellement sur les prix lorsque le marché est caractérisé par des produits très homogènes pour lesquels l'innovation joue peu de rôle. Une telle situation rend plus aisées les stratégies de coordination tacite du comportement concurrentiel dans des marchés concentrés. Les marchés ainsi caractérisés sont donc plus propices à l'existence d'une position dominante collective. Inversement, l'hétérogénéité des produits[9] en cause ou l'individualisation des services fournis[10] rend, en principe, plus complexe la formation des prix et plus difficile une adaptation mutuelle du comportement concurrentiel. Toutefois, une différenciation des produits, liée aux stratégies de marque ou au grand nombre de produits différents commercialisés par exemple, n'est pas incompatible avec l'existence d'une homogénéité suffisamment forte pour permettre une coordination tacite du comportement concurrentiel.[11]

S'agissant des caractéristiques de la demande, la Commission a concentré son analyse sur l'élasticité de la demande aux prix et les perspectives de croissance du marché à moyen et long terme. D'une manière générale, une faible élasticité aux prix a deux conséquences. D'une part elle permet une augmentation des prix relativement forte moyennant une baisse de volume relativement faible. D'autre part elle entraîne une forte baisse des prix lorsque des quantités additionnelles modestes sont mises sur le marché. Dès lors, l'analyse de la Commission est que plus l'élasticité de la demande aux prix sera faible, plus l'incitation sera forte pour les oligopolistes d'adopter un comportement parallèle anticoncurrentiel[12]. De la même manière, les marchés sur lesquels la demande est stagnante à long terme se prêtent plus particulièrement à l'apparition d'une domination oligopolistique dès lors que tout gain de part de marché se fait nécessairement au détriment des autres offreurs. Dans un marché fortement concentré, une telle situation est de nature à inciter les entreprises à adopter une politique concurrentielle non agressive axée sur la conservation de sa propre part de marché[13].

Enfin, l'existence d'une position dominante oligopolistique présuppose que les oligopolistes procéderont à une adaptation tacite de leurs comportements concurrentiels mutuels. Une telle stratégie n'est viable que dans la mesure où il existe une transparence du marché suffisante pour que chacun des offreurs connaisse et vérifie la politique de prix menée par ses concurrents. Dans le cas contraire, chaque offreur trouvera un intérêt individuel maximal à "tricher", c'est à dire à augmenter son volume de vente tout en bénéficiant d'un prix, certes inférieur au prix tacitement fixé mais supérieur au prix "concurrentiel"[14].

Concrètement, la Commission a fondé son appréciation du degré de transparence du marché sur des critères tels que: le degré de concentration de l'offre, l'homogénéité des produits, les comportements en matière de publicité des prix, l'organisation commerciale des offreurs, la nature des relations commerciales et des négociations entre offreurs et clients.

L'expérience acquise au cours des 18 derniers mois met en évidence que ces différents critères d'appréciation sont fortement intriqués et qu'il n'est donc pas possible d'accorder à l'un ou l'autre une influence déterminante sur l'analyse. L'incitation à rompre un éventuel accord tacite par exemple, dépendra autant du degré de transparence du marché que, notamment, de l'élasticité de la demande au prix, ou des perspectives de croissance du marché. De la même manière, la transparence du marché elle-même dépend tout autant du comportement des entreprises (existence de tarifs barèmes) que du degré de concentration, de la structure de la demande (nombreux ordres de faible volume), des différentes organisations commerciales des offreurs ou des caractéristiques du produit.

Caractéristiques structurelles de l'offre

Les caractéristiques structurelles de l'offre peuvent être telles qu'elles renforcent l'incitation à adopter un comportement parallèle anticoncurrentiel. La Commission a rencontré ce cas dans l'affaire Nestlé/Perrier. Elles peuvent, au contraire rendre improbable la création d'une situation de dominance collective, alors même que les caractéristiques du marché s'y prêtent. Cet élément a notamment joué un rôle important dans l'affaire Pilkington/SIV.

La Commission a examiné si la production était caractérisée par des économies d'échelle importante et si l'utilisation de technologies de production différentes ou l'existence de degrés d'intégration verticale distincts, généraient des structures de coûts significativement différentes selon les offreurs. De la même manière, la Commission analyse la distribution et le volume des surcapacités. L'expérience montre que, en fonction des caractéristiques de la production, l'existence de surcapacités peut tout aussi bien être un facteur proconcurrentiel que faciliter les convergences entre offreurs.

Dans Pilkington/SIV, cette analyse a amené la Commission à considérer que les économies d'échelle et l'importance des coûts fixes à couvrir constituaient une incitation forte à utiliser les surcapacités existantes et à adopter un comportement concurrentiel. Dans l'affaire DMV au contraire, l'utilisation d'une technologie de production ancienne, générant de faibles coûts fixes ainsi que des niveaux et des structures de coût comparables entre les deux leaders, ont conduit à la conclusion inverse (cf. également sur ce point Nestlé/Perrier).

La jurisprudence de la Commission atteste que celle-ci ne s'est pas ralliée à une vision mécaniste de la position dominante collective, fondée sur la mesure du taux de concentration global et l'addition des parts de marché des principaux acteurs. Au contraire, la Commission mène une analyse en profondeur des interactions concurrentielles entre les membres de l'oligopole avant de conclure, le cas échéant, que ceux-ci constitueront, postérieurement à la concentration, un groupe d'entreprises adoptant un comportement parallèle. Cette analyse qui se rapproche de la technique du faisceau d'indices se fonde sur un ensemble d'éléments, dont aucun n'est décisif en soit, relatifs aux caractéristiques structurelles du marché comme à celles des offreurs.

Dans un second temps, la Commission procède à une analyse classique de l'éventuelle position dominante détenue par ce groupe tant en appréciant la capacité des autres concurrents d'en contraindre le comportement, qu'en prenant en compte les éventuels concurrents potentiels.

Références

1. La Cour de Justice a défini la notion de position dominante dans de nombreuses affaires, notamment dans les affaires "United Brands", "Hoffmann-La-Roche" et "E.C.S/Akzo Chemie", comme une situation de puissance économique qui confère le pouvoir de faire obstacle au maintien d'une concurrence effective:

   -- en offrant la possibilité de comportements indépendants dans une mesure appréciable, de ceux des concurrents, des clients et finalement des consommateurs (CJCE 13.02.1979 Hoffmann-La-Roche) ;

   -- en éliminant ou en affaiblissant sérieusement des concurrents existant ou en empêchant des concurrents potentiels d'avoir accès au marché (CJCE 14.12.1985: E.C.S/Azko Chemie).

2. Arrêt Vetro/Commission du 10.03.1992.

3. Cas n°IV/M-190 Nestlé/Perrier du 22.07.1992.

4. Cas n°IV/M- 12 Varta/Bosch et cas n° IV/M-165 Alcatel/AEG Kabel.

5. C.D. Ehlermann "Deux ans d'application du contrôle des concentrations" in Revue du Marché Commun 1993, n°366.

6. Voir notamment le cas IV/M-308 Kali&Salz/Treuhand s'agissant des liens structurels et le cas IV/M-358 Pilkington/SIV s'agissant de l'existence d'ententes passées.

7. Cas IV/M-206 et IV/M-355 Rhône-Poulenc/SNIA (I) et (II), cas IV/M-399 Rhône-Poulenc-SNIA/Nordfaser et IV/M-337 Allied Signal/Knorr Bremse (phase 1). cas IV/M-308 Kali&Salz/Treuhand, IV/M-358 Pilkington/SIV, IV/M-315 Dalmine/Vallourec/Ilva (phase II).

8. Cas Rhône-Poulenc/SNIA et Pilkington/SIV précités.

9. Voir Allied Signal/Knorr Bremse précité.

10. Cas Rhône-Poulenc/SNIA (I) et (II) et Rhône-Poulenc-SNIA/Nordfaser précités.

11. Voir Nestlé/Perrier et Mannesmann/Vallourec/Ilva précités.

12. Voir Nestlé/Perrier, Pilkington/SIV et Mannesmann/ Vallourec/Ilva.

13. Voir les cas Kali&Salz/Treuhand et Dalmine/Vallourec/Ilva.

14. Voir notamment Nestlé/Perrier, Kali&Salz/Treuhand et Dalmine/Vallourec/Ilva où la Commission a estimé que le degré de transparence des prix était suffisant. En sens inverse, voir les cas Rhône-Poulenc/SNIA (I) et (II), Rhône-Poulenc-SNIA/Nordfaser et Allied Signal/Knorr Bremse.

COMMISSION OF THE EUROPEAN COMMISSION

PART III

Dominance in the field of secondary products

Many complaints we receive concern the alleged abuse of a dominant position in so-called "secondary" product markets. Secondary products can be for instance all kinds of spare parts, consumables like toners for copiers or maintenance service for machinery. These products/services are always linked to a primary product or equipment, a circumstance which often involves the question of compatibility.

When assessing dominance these cases raise several problems, first one is the definition of the relevant product market(s). Three possible solutions are conceivable:

-- An "overall or unified market" including all brands of the primary and secondary products (e.g. one market for copiers incl. toners)?

-- One market for the primary product and one market for all brands of the secondary product in question (e.g. one market for copiers and one market for all brands of toners)?

-- One market for the primary product and several markets for the secondary products each comprising secondary products which fit with the brand of the primary product (e.g. one market for copiers and one market for Canon compatible toners, one market for Kodak toners etc.)?

Classic theory suggests the following approach for reaching a conclusion: Would a hypothetical monopoly supplier of the narrowest possible market (i.e. a hypothetical sole supplier of the secondary product for one brand of the product) have the power to profitably raise the price above competitive level? If the answer is yes, then the third solution should be adopted. This is the case when compatibility problems are involved, i.e. all the secondary products are not substitutable, and when the price increases are not rendered impossible by the conditions of competition on the primary product market. If the answer is no (because high prices for spare parts would dissuade consumers from buying this brand of the primary or because spare parts for different primary product brands are substituable), the first or second definition should be adopted.

This method sounds rather easy, but involves some problems in practice, in particular because the assumed time-limit for reactions to price increases is not clear. And this time-limit is particularly important for the decision between the first (="unified market") and the other two options (secondary products only). If one has already opted against the first solution the decision between the remaining two options is relatively simple: as soon as compatibility problems are involved the second option is not available, i.e. the relevant market comprises only those secondary products which are compatible with a certain primary product. But the evaluation whether the first solution is the appropriate creates more

difficulties. One of the few publications available[1] suggests that the unified market definition applies, if prices and other conditions of supply of the secondary product are constrained by the impact they have on primary products. But is the market definition the right place to evaluate these probably more indirect and long-term effects? For market definition purposes only direct and quick consumer responses to price increases should be taken into account. Thus, the right question to be answered for the purpose of market definition could be: Would a potential consumer of a secondary product A switch - within 1/2-1 year - to a new primary product B if the secondary product's price is increased by 5-10 per cent? (a test which is actually meant for substitutable products, but could be translated into this form). This rapid switch is hardly conceivable, or only in those circumstances where the primary product is relatively cheap and short-lived and/or where the secondary product's value forms a very high proportion of the primary product's value. In those cases, however, there will be probably no secondary products separately available - just because it would not make sense to offer them. In all other situations we face the typical "captive or locked-in" customer who needs a spare part, but cannot just switch to another primary product.

One might now argue that the question is wrong because the potential or new customers are decisive. This means the right question has to be: would a potential consumer of primary product A switch to primary product B if the prices for secondary products A will be increased by 5-10 per cent? If this, however, should be the right question a lot of things have to be assumed: First of all, that the new customers are decisive, i.e. that they form a high proportion as compared to the "old" and captive customers and secondly that there is no price discrimination for secondary products between the two groups possible. Furthermore, the potential new consumers must dispose of all necessary information and must react in a great number rapidly so that their reactions have an immediate effect on the pricing of secondary products - for all customers. This is also hardly conceivable - at least not when an immediate effect is required. All the mentioned indirect effects via the primary products, of course, play an important role. But it is probably not appropriate to analyse it in the context of market definition, but instead in the context of assessing dominance.

In the relevant market we should only include those products which are substitutable and to which the potential customer can switch immediately. This means that secondary products normally form a separate market, either all brands or - if compatibility is involved - those secondary products which fit with one primary product. All other criteria should be evaluated when dominance is assessed. This is clearer and, I think, more appropriate than mixing the criteria for market definition and dominance test - even if the result might be the same (potential competition, for instance, is for the same reason also taken into account when assessing dominance). One might criticise that those secondary product markets are defined very narrowly. However, this is about abusive behaviour, not about merger control: it requires the analysis of a certain behaviour occurring on a market now and therefore has not the aim of analysing possible future market structures.

Assessing Dominance

As to the assessment of the relations between secondary and primary products the approaches vary between two extremes: On the one hand the per se rule that there cannot be dominance in secondary products if there is lack of market power in the primary product market because potential customers would simply stop buying the primary product of a certain supplier if its prices for parts or services were raised (Kodak's defense approach in the US case "*Eastman Kodak Co. v. Image Technical Services, Inc.*"). This theory implies the consumer's ability to calculate the overall lifetime cost (of the primary product including all spare parts, consumables, up-grades, services and whatever is possible). Reality, however, can differ from this scenario which is based on assumptions such as transparency of secondary products and services prices, stability of those prices over time, low information costs and in addition low switching

cost and/or no discrimination possibilities between informed/non-informed or locked in /new customers etc. All these facts have to be analysed, but there is no *per se* rule. The same goes for the other extreme assuming per se dominance in the secondary product market by focusing on high market shares without analysing possible effects from the primary product market including all criteria mentioned above (transparency, information and switching costs etc.).

Thus, a proper factual inquiry cannot be avoided. These kind of cases are difficult because they involve interdependencies between primary and secondary product markets and do not allow simplifying per se approaches. The following "check list" is thought to make life a bit easier. However, check lists involve always the danger of being too rigid and disregarding the individual circumstances of each case. Therefore it should be seen as a "rough guide" presenting the principal questions to be answered or criteria to be checked. It is a first proposal open to critical remarks and supplements.

"Checklist" (to define the relevant product market and to assess dominance)

Definition of the relevant product market

-- "unified market" or separate markets for primary and secondary products? (Expensive, durable primary products which require frequently spare parts and maintenance service and therefore bring about separate demand and supply of secondary products, i.e. a separate market for secondary products probably exists);

-- all brands of secondary products or only secondary products for one brand of the primary products? (if compatibility problems are involved the latter alternative applies);

-- definition of all relevant product markets concerned (i.e. even if the abuse occurs at secondary product market level, not only this/these market(s) has to be defined but the primary product market as well; although an in-depth inquiry might not always be necessary, it is important to know about the features of this market : life-time of primary products, prices, proportion of captive and new customers, market strength of the supplier);

-- "hierarchy" of relevant markets (important for analysing the alleged abuse, e.g. tying market/tied market).

Assessing dominance:

-- what is (roughly) the market position of the alleged dominant firm in all relevant markets concerned, what are (roughly) the market structures (also the primary product market is of importance because the stronger the competition at primary product level the less probable dominance at secondary product level)?

-- what is the life-time and price of the primary product (the lower the price and the shorter the life-time the more and earlier the customer is willing to switch to a new primary product when prices or quality at secondary level become dissatisfying)?

-- what are the overall switching costs (e.g. for mainframe computers they can be huge not only because of the initial price of the product, but also because of all the application running on the actual one which requires new training for the staff, reorganisation of data structures etc.);

-- what is the price of the secondary product as a proportion of the primary product value (the higher the proportion the more important it is for customers to get information about secondary product prices when buying a primary product)?

-- are the prices for the secondary products transparent and calculable for the life-cycle of the primary product (if yes, competition at the primary product level constrains the conduct of the suppliers at the secondary product level)? Are the customers mainly professional/knowledgeable ones? Are significant transaction/information costs involved (if yes, this can limit the ability to calculate life-cycle costs even for professional customers)?

-- in case secondary products prices for "old" and potential or informed and non-informed customers of the primary product differ consistently price discrimination may be involved which means that the primary product market has very little effects on the secondary products. However, separation of different customer groups is only possible if there is few or no information flow between them, if e.g. disadvantaging "old" customers has no impact on potentially new ones.

Lots of other criteria could be added depending on the circumstances of the individual case. However, if the primary products market is rather concentrated and the market position of the supplier in question not insignificant, if the life-cycle of the primary product market is long, the prices high and the ability to calculate overall life-cycle costs rather limited (due to low transparency, high information costs); then there is a high probability for dominance at the secondary product level. In this scenario the lack of dominance at the primary product level does not *per se* sufficiently constrain the scope of action at the secondary product level. If, on the other hand life-cycle cost calculation is rather easy, i.e. most of the above mentioned factors point into the opposite direction, dominance at the secondary product market level is not probable.

NOTES

1. Market definition in UK competition policy, OFT 1992, p.87 et. seq.

CONTRIBUTION BY PROFESSOR ALAN FELS*

Monopoly control policies concern the functioning of those industries characterised by market power. This power may be achieved by market dominance by actual or aspiring monopolists or oligopolists ('monopolisation'), as well as collective agreements ('cartelisation'). This paper will concentrate on the Australian approach to control of monopolisation. Due to limitations of time and space, the scope of this paper is largely limited to an examination of certain types of conduct that are considered in Australia to be subject to such control. The paper will however touch upon the types of firms subject to regulation, and the regulatory response to the effects of such behaviour, to the extent necessary to explain such conduct.

Section 46 - Misuse of Market Power

The central provision for regulation of abuse of market power in Australia is section 46 of the *Trade Practices Act 1974* ('TPA'), entitled *Misuse of market power*:

> 46 (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in relation to that market for the purpose of:
>
> -- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> -- preventing the entry of a person into that or any other market; or
>
> -- deterring or preventing a person from engaging in competitive conduct in that or any other market.

These provisions define what uses of market power constitute misuses. The concern is thus with the purpose (not effect) of the misuse of market power.

In 1990, s.46A was added following the 1988 Australia New Zealand Closer Economic Relations Trade Agreement. This section is expressed in similar terms to s.46 but applies to corporations with substantial market power in 'trans Tasman markets' - defined as Australian and/or New Zealand markets. The New Zealand Commerce Act has a similar provision, framed in terms of dominance.

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Historical Concerns with Section 46

Since its introduction in 1974, the wording of s.46 has changed a number of times.

Initially dealing with conduct characterised as 'monopolisation', s.46 prohibited corporations in a position to substantially control a market from taking advantage of their market power to, in general terms, damage competitors, prevent entry into markets or deter or prevent competitive behaviour. The section was amended in 1977 to specifically incorporate a purpose test when evaluating the conduct in issue.

The substantial market control test gave rise to concerns over the effectiveness of the provision because the effect of the section was to encompass only single corporations controlling a market (monopolies) without apparently extending either to oligopolistic markets where there are two or more major competitors or to leading corporations in less concentrated markets. For example, the requirement "substantially to control a market" was said by the Attorney-General to be, "of quite limited effectiveness ...principally because the section applies only to monopolists or those with overwhelming market dominance".[1]

In response to these criticisms s.46 was amended in 1986, lowering the threshold and changing the character of the provision from monopolisation to 'misuse of market power'. The substantial market control test was replaced by a requirement that the corporation have a 'substantial degree of market power'. This lower threshold provides, in effect, that more than one firm may have a substantial degree of market power.

Consistent with this lowering of the s.46 threshold, the merger control provision (s.50) was amended in 1993. Until then s.50 prohibited mergers and acquisitions that were likely to result in dominance of a market. However, mergers effected on or after 21 January 1993 are to be assessed on the basis of whether they have the effect or likely effect of 'substantially lessening competition in a market'. Under the previous dominance test, the major goal of merger enforcement was to inhibit the acquisition or expansion of unilateral market power by a firm which would be in a position to dominate a market. Under the new 'substantial lessening of competition' test, mergers that do not necessarily result in dominance but increase the unilateral market power by firms may still be caught, as may mergers that are likely to facilitate the exercise of co-ordinated market power through collusion or the 'facilitating practices' of two or more large firms.

It is useful to outline some of the early concerns expressed about s.46 in order to appreciate the approaches presently taken by the Australian Competition & Consumer Commission ('the Commission') and the Courts.[2] With respect to *conduct*, concerns were raised over the interpretative difficulties faced by the Courts in determining whether a corporation has 'taken advantage' of its power to eliminate, damage, forestall or deter - especially in view of the considerations that:

-- much of the firm's commercial strength may derive from its position in the market;

-- many positions of market power rest upon production or distribution *advantages* over other firms;

-- any successful competition from a firm with market power is inevitably of a nature that is eliminating, damaging, forestalling or deterring; that is, any competition that is worthwhile is liable to hurt someone;

-- many firms, whether possessing market power or not, are activated by normal commercial motives; and

-- the nature of competition in concentrated oligopolistic industries is inevitably personal, in that the firm is not reacting to impersonal market forces but pursuing business policies directed at other firms.

Does s.46 mean that a firm with market power, in the words of Baxt and Brunt, 'feeling the hot breath of potential entry by a newcomer to its industry, must acquiesce?"

Since these concerns were aired, there has been a significant amount of judicial and administrative activity in the area, and the path that Australian monopoly control has taken is now well established.

Market Power

Market power is the ability of a corporation to behave persistently in a manner different from the behaviour that a competitive market would enforce on a corporation facing otherwise similar cost and demand conditions.[3] Consistent with this definition, s.46(3) directs that, in determining the degree of market power held by a corporation, regard needs to be paid to the extent to which that corporation is constrained by actual and potential competitors, suppliers and purchasers.

Although decided under a dominance test,[4] European cases — particularly *Continental Can v Commission*,[5] *Hoffman La Roche v Commission*[6] and *United Brands v Commission*[7] — have been of use to Australian courts in determining the approach that should be used under s.46(3) in defining market power.

The major factors to be taken into account in identifying market power are:[8]

-- the extent to which it is rational or possible for new entrants to enter the market - the extent of barriers to entry:

-- the ability of a firm to raise prices above the supply cost (the minimum cost an efficient firm would incur in producing the product) without rivals taking away customers in due time;

-- the extent to which the firm's conduct in the market is constrained by that of competitors or potential competitors;

-- the market share of the firm, although this alone is not generally determinative of market power; and

-- the existence of vertical integration, although this alone is not generally determinative of market power.

Although s.46(2) does aggregate the market power of related companies, a corporation cannot be liable under s.46 on the basis of a shared position of market power with an unrelated corporation. Nevertheless, market power acquired through contracts, arrangements and understandings are not irrelevant - they may provide one of the *sources* of a corporation's individual power. That is, market power gained through acting in concert with others will add to a corporation's individual power, and as such may be taken into account.[9] It also seems reasonable to suggest that a firm's power in a market is

related to the structural conditions of the market, for example, the number of other firms in the market, entry conditions, etc.

Conduct

The types of conduct likely to attract examination under s.46 include predatory pricing; exclusive dealing arrangements and requirements contracts; withdrawal of, and refusal to, supply; inducing price discrimination; loyalty rebates; tie-ins; certain 'lease-only' policies; and the raising of rivals costs and the strategic creation of entry barriers.

Interpretative guidance to s.46 was provided by the High Court of Australia in the *Queensland Wire Industries v BHP* case (*QWI*). Briefly, the facts were that BHP (which accounted for 97 per cent of steel production in Australia) was the sole producer of Y-bar which BHP sold only to its subsidiary AWI. (Y-bar was used to produce star picket fencing posts.) Imports of Y-bar were insignificant. QWI produced and sold barbed wire in competition with AWI. QWI sought supply of Y-bar from BHP, but was refused supply unless at an 'excessively high' price.

As a consequence, AWI held an advantage over QWI in rural fencing because it supplied both fencing and wire (around 40 per cent of its sales were combined loads). QWI, by comparison, could only sell wire; the prices it would have had to pay for posts made resale unprofitable. QWI argued successfully before the High Court that BHP had misused its market power and had breached s.46 in that BHP had taken advantage of its market power for the purpose of preventing entry into a market or deterring competitive conduct in a market.

Consistent with the Court's view in this case, the Commission sees s.46 as a competition provision and not a 'catch-all' for harsh behaviour by powerful corporations. In many instances where smaller businesses are damaged by larger corporations with which they deal, the conduct will not be caught by s.46 because there is no anti-competitive purpose.

A corporation with market power will only breach s.46 if it takes advantage of that power for a proscribed purpose. The High Court (in *QWI*) made it clear that 'take advantage' means no more than use of the market power involved, rather than misuse. As the term is not meant to be used in a pejorative (moral or hostile) sense, it is therefore unnecessary to establish impropriety in order to show that the person has taken advantage of market power. There must, of course, be a causal connection between the alleged conduct and the market power pleaded to sustain the allegation that market power was used. Conduct proscribed includes conduct directed towards potential competitors as well as existing competitors.

Good faith reliance upon an otherwise existing legal right (e.g. a contractual right), may not, on the particular facts of the case, amount to a breach of s.46, although the mere fact that the respondent is relying on such a right does not exclude the operation of s.46.

The types of market conduct to which s.46 may have application are numerous and can encompass other provisions of the act, for example s.47 on exclusive dealing. Trade practices actions can be brought for contraventions of more than one section of the Act.

Purpose

An essential element of s.46 is the establishment of an anti-competitive purpose, and it is on this element that the likelihood of establishing a breach critically rests. The Act specifies that, where conduct is engaged in with more than one purpose in mind, it is sufficient if an anti-competitive purpose is one of several purposes, so long as it was a substantial purpose. It is with a person's immediate purpose that the section is concerned and thus a person can not argue in defence to an alleged contravention of s.46 that its conduct was motivated by an ultimate purpose not proscribed by s.46.

The Act also establishes that purpose can be inferred. Hence express statements of predatory purpose are not necessarily required to prove a contravention. Purpose may, in some cases, be inferred or established from conduct which is inconsistent with a corporation's normal business methods, or is without any good business justification.

Where it is necessary to establish the state of mind of a corporation for the purposes of proceedings under s.46, it is sufficient to prove that a director, servant or agent acting within the scope of that person's actual or apparent authority had that state of mind.[10] The consequence of a breach of s.46 can be the imposition of pecuniary penalties under s.76 of up to $10 million (corporations) or $500 000 (individuals). In addition damages, injunction remedies and remedial orders are available.

As an illustration that relates to pricing behaviour, it should be observed that a corporation with substantial market power will not contravene s.46 by using its power to obtain a particular price, provided that, in doing so, it has not taken advantage of its power for a proscribed purpose.[11]

Identifying the Misuse of Market Power

The Commission will, in applying s.46, seek to protect and advance a competitive environment as a means of protecting and advancing the interests of consumers.

Whether conduct is a misuse of market power is a question of fact and degree, but the Commission takes the following considerations into account:

-- whether the impugned conduct adversely affects the competitive process in a market;

-- whether the conduct adversely affects consumers of the goods or services in terms of price, quality, availability, choice or convenience and whether it has impaired competition in an unnecessarily restrictive way;

-- whether the conduct raises the costs of entry to a market or prevents or hinders potential competitors from entering the market or, having entered the market, from engaging in competitive conduct;

-- whether the impugned conduct can be explained by a good business justification such as efficiency, or the desire to engage in genuine competitive rivalry.

An illustration of the Australian approach is best gleaned through a closer examination of the application of s.46 to particular modes of conduct. The remainder of this paper looks in particular at refusals to deal, selective distribution systems, vertical integration, and the anti-competitive use of intellectual property rights.

Refusals to deal

There have been a number of cases in which cancellation of distribution agreements or refusals to supply have been challenged under s.46. Probably the best known is the *QWI* case mentioned above. The High Court approach, in the context of a market with a corporation with a substantial degree of market power (in this case, clearly a dominant corporation), was to ask whether the corporation in question would have behaved differently if it were operating in a competitive market, that is, whether the conduct was made possible only by the absence of competitive conditions. The dilemma of distinguishing between monopolistic practices which are prohibited and vigorous competition which is not, was answered in *QWI* by asking whether the conduct was consistent with that in which BHP could have engaged in a competitive market.

However, s.46 applies to a much wider range of types of conduct than refusals to supply, and s.46 (as noted above) does not only apply to dominant corporations.

Selective Distribution Systems

With respect to selective distribution systems, many commercial decisions relating to marketing, and the appointment of distributors or dealerships, will not contravene s.46 where such conduct has no proscribed anticompetitive purpose. The Commission acknowledges that particular characteristics of some products may require a policy that restricts distribution to a limited number of outlets (for example, they may be technically sophisticated products). Where such restrictions are based on objective qualitative criteria and are uniformly applied, the Commission is unlikely to intervene if dealers who would not be able to sell and service the products in a manner satisfactory to the supplier are excluded. In such cases the Commission accepts that while intra-brand competition may be restricted by selective distribution systems, inter-brand competition may be enhanced.

On the other hand, where a corporation with substantial market power operates a selective distribution system and refuses to supply products (or withdraws supplies) to qualified dealers for an anticompetitive purpose — for example, because a dealer has engaged or is likely to engage in price discounting to the detriment of the corporation's other dealers — the Commission is likely to investigate further. As in *QWI*, the Commission, in investigating refusal to deal conduct will pay particular attention to evidence as to whether:

-- there is an intention to achieve a proscribed purpose, i.e. damage a competitor, preclude entry or deter competitive conduct;

-- there is a lack of a legitimate reason for the conduct;

-- the nature of the conduct is inconsistent with the corporation's usual practices; and

-- other sources of supply are available for the business affected by the conduct.

Vertical Integration

As with vertical non-price restrictions in selective distribution arrangements, vertical integration may be potentially pro-competitive and potentially anti-competitive. It may be anti-competitive if brought

about by a refusal to deal with independent distributors, or a price or supply 'squeeze' (squeezing of the margin available to an unintegrated customer who competes with the supplier). In the petroleum industry, it is often alleged by independent retailers that on entering the market, the vertically integrated refiners/marketers will lower the retail price at their stations and/or would retain or increase their supply price to the independent retailer. Such conduct may infringe s.46.

Corporations which integrate vertically or are already vertically integrated do not have to supply potential customers if the reason for refusing supply is based on valid commercial considerations - e.g. capacity considerations or a loss of efficiency gains if required to supply. If a corporation with substantial market power is able to sell to consumers at a lower price because of cost savings associated with vertical integration, and independent retailers are unable to compete as a result, there will be no misuse of market power.

Anticompetitive Use of Intellectual Property Rights

Intellectual property ('IP') rights have the potential to provide a corporation with the means to achieve one of various ends that would be likely to attract examination under s.46. Some circumstances that may attract the Commission's attention include:

-- legal action taken to enforce IP rights, although some judicial uncertainty exists as to the exact scope of this category;

-- refusal to grant licences of IP; and

-- imposing restrictive terms in a licence or assignment of IP, refusing to licence IP because the proposed licensee would not accept such restrictive terms or enforcing by legal action such restrictive terms.[12]

When a s.46 case deals with intellectual property the process of market definition is likely to be particularly complex. This is because, as a general rule, it is unlikely that a single piece of intellectual property will constitute its own market as other pieces of intellectual property are likely to be substitutable.[13]

In all cases, however, conduct would only be caught if it was engaged in by a corporation taking advantage of its substantial degree of market power for a 'proscribed purpose'. For example, in the case of restrictive conditions contained in licences of intellectual property, the purpose of imposing the condition may be to deter or prevent the licensee from engaging in competitive conduct in a particular market. As it is not possible to address all the different anticompetitive purposes that may take form around intellectual property rights, the remainder of this section of the paper will focus only on the application of s.46 of the Act to the latter two categories relating to the licensing of IP rights.

The existence of IP rights for a product is independently a relevant factor in assessing whether a corporation has a substantial degree of market power, and in assessing the barriers to entry in a particular market.

The Commission believes that a corporation with a substantial degree of market power is under no general duty to license intellectual property rights or to disclose confidential information to its existing competitors or to potential new entrants. The Commission endorses the approach taken in the US case

Berkey Photo v Eastman Kodak where the Court accepted that any success that a monopolist may achieve through 'the process of invention and innovation' was clearly tolerated by US antitrust laws.

Thus, the Commission considers that the owner should be free to decide whether profits will be maximised by licensing others or exploiting the rights alone. This is not to say that a proprietor of intellectual property rights can never be guilty of conduct that infringes s.46. So while there is no general duty to grant a licence of IP rights, a misuse of market power might arise once such rights are exercised.

This Australian approach appears to differ to that taken by the European Court of Justice last year in the renowned *Magill* decision.[14] In that case, a refusal to license was considered abusive in the circumstances. Whether an Australian court would find such a refusal to license to be a misuse of market power in similar circumstances (*i.e.*, where the refusal to license was considered to pursue an aim contrary to Article 86 and was not in a manner corresponding to the essential function of the IP right) is open to question. However, it is safe to say that, absent a proscribed anticompetitive purpose, a refusal to license intellectual property rights will not fall within the ambit of s.46.

A misuse of market power might arise if the decision to refuse the licence was for the reason that the proposed licensee would not accept licence terms which were unjustifiably restrictive of competition. In these circumstances, it may be open to find that the licenser is only able to refuse to licence the IP rights owing to the absence of competitive conditions in the relevant market.

In addition, a misuse of market power may arise from the terms of a licence to exploit IP rights.

Those restrictions imposed for the purpose of deterring or preventing a person from engaging in competitive conduct in a market or damaging a competitor in a market may infringe s.46. The forms of restrictions may vary, although the following types may be regarded as typical: exclusive licence grants; territorial restraints; price restrictions; quota restrictions; quality requirements; minimum royalty/quality requirements; post termination restrictions; sub-licensing restrictions; grant back provisions; no challenge clauses; and full or third line forcing. It should be noted that such conduct may violate other provisions of the Act simultaneously.

Time permits only a few illustrations of how s.46 deals with restrictions on licences.

In the Commission's view, the acceptance by a licenser of a restriction not to grant further licences limits the number of persons able to produce the licensed product, but will nevertheless be unlikely to contravene s.46 because the purpose will generally be unrelated to deterring others from entering the market. That is, the purpose is likely to be to provide necessary protection, and therefore incentive, to the licensee. This view is consistent with the line taken by the European Court of Justice in *Nungesser v Commission*[15] regarding the compatibility with 'open' exclusive licences whereby the licenser covenants not to exploit the product itself nor license others to do so in the territory.[16]

Even if the licensee has a substantial degree of market power, s.46 is unlikely to be contravened unless the licensee could not be said to be taking advantage of its market power in acquiring the licence.

A corporation that seeks through an IP licence to require its licensee to obtain goods and services not protected by the IP right either from the corporation itself or from another third party may contravene s.46, amongst other provisions of the Act. In engaging in full or third line forcing, a corporation may use its market power in one market to acquire power in another.[17] Strong evidence will usually be required to establish that such a condition is necessary for the purpose of quality control, safety or some other similar reason, so that s.46 will not be contravened.[18]

In granting a licence of IP rights, a corporation may seek to licence rights for which it has no protection at law. Such leveraging can be achieved, for example, by 'bundling' products, some of which are protected by a patent and some of which are not. The effects of such arrangements are similar to those of tying, in that either the licensee or others who might otherwise supply the licensee are deterred from competing in the market for such products.

Excessive Pricing

Excessive pricing may fall within the price oversight operations of the Commission. The Prices Surveillance Act enables the Commission to examine prices of selected goods and services in the Australian economy.[19] Although lacking a legislative power of compulsion, one of the Commission's tasks is to restrain price rises in markets where competition is less than effective.

In Australia, at the Commonwealth level, there are three levels of price oversight (not control) - surveillance, monitoring and inquiries.

Price surveillance is a system whereby firms are declared. Currently 28 organisations, supplying 8 goods and services are subject to declaration. The Commission considers notifications from declared firms and indicates to notifying firms whether it supports the proposed price increase. The Commission is to have particular regard for certain statutory criteria, including 'the need to discourage a person who is in a position substantially to influence a market for goods or services from taking advantage of that power in setting prices'.[20] Firms are not required to comply with the Commission's recommendations, the system relying on moral suasion. However, declared firms have on all occasions followed the pricing recommendations.

Recent reforms have potentially extend the Commonwealth surveillance provisions to apply to State and Territory government businesses where:

-- the State or Territory concerned has agreed; or

-- the National Competition Council has, on the request of an Australian government (Commonwealth, State or Territory), recommended declaration of the business on the basis that the business is not subject to effective oversight and the Commonwealth Minister has consulted the appropriate Minister of the State or Territory concerned. The details of, and information on, this process are set out in the Competition Principles Agreement.

Price monitoring is a less intrusive form of oversight. The Commission can monitor prices, costs and profits of an industry or business. The Minister determines which industries or businesses are monitored.

The Commission has the power to recommend to the minister that an inquiry be undertaken if the prices surveillance procedure is perceived to be unsatisfactory. This inquiry is to be conducted in public, and a report of the Commission's findings and recommendations submitted to the minister.

Industry-specific Legislation

Finally some words need to be said about certain industry-specific legislation that covers the regulation of abuse of market power outside and in addition to regulation under the TPA - in particular the

regulation of conduct in the telecommunications sector. The Telecommunications Act 1991 implements a series of competitive safeguards, the objective of which is to foster the development of commercially sustainable competition by preventing the dominant carrier in Australia (Telstra) from being able to use its market power to prevent or restrict the entry and continued survival of service providers into the market. These rules are to be replaced in 1997 with new anti-competitive conduct rules which are based on the restrictive trade practice provisions of the TPA.

NOTES

1. *Hansard*, House of Representatives, 19 March 1986, p1626.

2. See Baxt R and Brunt M, 'A Guide to the Act', in *Australian Trade Practices Readings*, (ed. Nieuwenhuysen) 2nd ed, 1976; Baxt R and Brunt M, 'The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means', 1974 ABLR 3.

3. Kaysen and Turner, *Antitrust Policy* (1959), quoted with approval by Dawson J in *QWI* case (at 200).

4. It should be noted that the test of 'dominance', when it was an issue under the TPA, was considered in Australia to be higher than that applying in the case of a 'substantial degree of market power' because it suggested a greater degree of independence of constraints of market power.

5. Case 6/72 [1973] ECR 215.

6. Case 85/76 [1979] ECR 461.

7. Case 27/76 [1978] ECR 207.

8. According to Lockhart J in *Dowling v Dalgety Australia* (1992) 34 FCR 109, drawing primarily from *Qld Wire Industries* case.

9. Dowling v Dalgety Australia Ltd (1992) 34 FCR 109.

10. S.84(1) of the TPA.

11. *ASX Operations v Pont Data Australia* (1991) 27 FCR 492.

12. This list is not exhaustive, and does not cover those situations where IP may raise barriers to entry to a market and therefore be a relevant factor in the determination of whether conduct has an anti-competitive effect.

13. See Beaumont J's discussion of whether a single copyrighted computer program had a substantial degree of market power: *Broderbund Software Inc v Computermate Products (Aust) Pty Ltd* (1992) ATPR ¶41-155 at 40,110-40,112.

14. C-241/P and C-242/91P, RTE and IPC v Commission, judgement of 6 April 1995.

15. [1982] ECR 2015

16. This is to be distinguished from an exclusive licence guaranteeing absolute territorial protection, where the approach taken under European law is of little relevance for Australia for it is based on the integrationist objective unique to the Treaty of Rome.

17. Note that third line forcing is prohibited under s.47 of the TPA, although protection may be afforded through a notification process and through authorisation by the Commission.

18. For example, the Commission rejected a claim of quality control in *Nashua Australia Pty Ltd* (1974-1975) ATPR 8720.

19. The Commission took over the responsibility of administering the Prices Surveillance Act in 1995. Previously this was carried out by the Prices Surveillance Authority.

20. Section 17(3)(b) of the Prices Surveillance Act 1983.

CONTRIBUTION FROM BIAC*

Article 86 EC: Abuse of Dominance

Points for Consideration

Article 86 EC v. EC Merger Regulation: Market Definition and Dominance

Different criteria are used in assessing dominance under Article 86 and the Merger Regulation. The generally accepted explanation for the difference is that Article 86 looks backward while Merger Regulation looks forward in time. However, this is not enough to explain the distinction.

Under the Merger Regulation, dominance is defined in an objective way using clear economic criteria and quantitative benchmarks (based on US Department of Justice 1982 guidelines), involving a systematic consideration of competition. It is generally felt that decisions made under it have defined markets in a way which stand up to economic scrutiny, and lead to correct assessments of dominance (or lack of it).

By contrast, it is felt that product, geographic and temporal market definition under Article 86 has often been flawed, resulting in decisions which would not have been arrived at had quantitative methods been used. In particular, markets have tended to be defined too narrowly, leading to findings of dominance against companies who in fact have no market power. In relation to dominance, Article 86 focuses only on the ability of firms to act independently of their competitors, customers and suppliers and ignores the crucial idea that a firm must be able to act profitably in acting independently. Article 86 decisions have arguably been more subjective, motivated by issues such as sympathy for small businesses (even if inefficient) and extending to areas such as unfair economic dependence rather than concentrating solely on competition considerations.

The distinction is at least partly historical. Many Article 86 decisions now deemed incorrect date from a time when quantitative methods were not widely used. In addition, the competition regimes in some Member States allowed consideration of factors other than pure competition and this thinking may have been carried over into Article 86 decisions.

There is evidence that economic methods are becoming more widely used throughout the ECd institutions, and recent Article 86 cases such as Tetra Pak II show that they are being applied in this area too. The question therefore is whether decisions under Article 86 should now always be taken using the

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* This contribution was submitted by Christopher Bright, Linlaters & Paines.

same methods as in Merger Regulation cases, or whether it is right to used a different approach to Article 86 on the basis that it is a different animal to the Merger Regulation, serving a different purpose.

Article 86 EC and the "Essential Facilities" Doctrine

The "essential facilities" doctrine requires the owner of a facility, not easily replicated, generally tangible, without access to which that party's competitors cannot provide services to their customers, to make that facility available to others. It is a concept borrowed from the US. In the EC it has usually been applied in the context of Article 86.

Where it involves a straightforward refusal to supply by a dominant party in a market, it is correctly assessed under Article 86. Likewise, it will prove a useful tool for breaking up natural monopolies operating in regulated environments, such as former state monopolies (it will therefore be very relevant to Article 90(2) (EC)).

However, there are signs that it is being taken too far by the EC competition authorities, and may constitute a misuse of Article 86. In particular, the following can be observed from recent cases:

-- the Commission is trying to extend it to the markets for goods and services, even IP rights (see Magill below);

-- dominance is often lacking, and a finding of dominance is only achieved by over--narrow market definition which bears little relationship to the economic definitions used under the Merger Regulation;

-- arguably, an abuse is no longer necessary. The owner of an essential facility may be open to attack under Article 86 simply by virtue of owning it. This does not fit with the theory that dominance is not an offence per se; and it has been applied to situations where the facility is not really essential.

In addition, the EC authorities take no account of the legitimate business expectations of parties investing in large infrastructure projects, where the sums involved are so great that they should be entitled to exclusive use for at least a period of time to recoup initial investment.

The current extent of application of the doctrine may be having an anti--competitive effect in that it acts as a disincentive to invest in new projects.

Article 86 EC and Intellectual Property Rights

As a result of the decision in Magill, it is clear that a refusal to license by a dominant undertaking can constitute an abuse under Article 86.

The ECJ stressed that the ownership of IP rights is not to be equated with dominance. However, it stated that the TV companies enjoyed a *de facto* monopoly over the information used to compile TV listings. This is confusing distinction -- in the UK at least, that information is the subject matter of the IP right (in this case copyright), and thus it would seem that the owner of copyright is dominant by virtue of ownership.

The decision made it clear that a refusal to license may constitute an abuse in "exceptional circumstances", although it is unclear what is meant by these words. While it made it clear that compulsory licensing is available as a remedy, it is silent on the question of compensation. It also draws a distinction between various types of copyright: it seems that low grade rights of the sort in question in this case may be open to attack, although "genuine" copyright (works of art, etc.) will not.

It is a difficult decision leaving many issues open. In practice it may have a very important impact in the IP and telecom sectors, where people own similar "low-grade" types of copyright. This may prove particularly relevant to the issue of software interoperability.

The case is likely to have less impact in the patents field (where the IP rights are not "low--grade", but the reward for long--term, high--risk, high--cost investment). It is also unlikely to apply to trademarks cases as it will be difficult to show "de facto" dominance in the market for the relevant product, where the marketing of substitute products is commonplace.

Article 86 EC and the Technology Transfer Block Exemption

The EC's proposed technology transfer block exemption has now been under discussion for some time. It seemed for much of it that the Commission was determined that the exemption should apply only to parties whose market share was under a specified limit. This was rigorously opposed by industry and recently it has been deleted from the draft.

However, both the recitals to and Article 7 of the draft regulation indicate that the Commission will give special attention to agreements where the licensee holds over 40 per cent of the market in considering its withdrawal of the benefit of the block exemption as part of its general economic assessment. It is clear therefore that analysis of market share will be relevant in this context for large companies, and it remains to be seen which methods for assessing market share will be used by the relevant part of DG IV.

Development of the Concept of Joint Dominance

The most important case under Article 86 relating to joint or collective dominance is Italian Fiat Glass (1989), which stated that a joint dominant position could be held by independent economic entities united by economic links. While current case law is clear that, in order to have collective dominance, there must be economic links between the parties, it is less clear whether it can apply to parallel non-collusive behaviour. In Alsatel (1990), the Commission proposed that it should, but the ECJ did not consider the issue as it was unconnected with the facts.

All the more recent decisions involving oligopolies have been taken under the Merger Regulation rather than Article 86. In assessing collective dominance under the Merger Regulation, the Commission starts from the following basic premises:

-- there is no presumption of dominance arising from oligopolistic supply oligopolies are consistent with both dominance and fierce competition;

-- it will take a multi-criteria approach; and

-- it will analyse the facts in two stages: first, it will examine the market in question, looking at issues such as the degree of supply concentration and basic market conditions; second, it will assess the competitive forces at work in that market, i.e., relations between the oligopolists, customers' countervailing power and potential competition.
A typical case requiring asssessment of the oligopolies issues will be characterised by the following:

-- there must be a high level of supply concentration (two companies holding more than 50 per cent or three companies with around two--thirds of the market). In addition, there must be a significant gap between these and the market shares of the remaining suppliers;

-- the market shares of the leading firms must be stable over time;

-- demand must be stagnant. The more price-inelastic demand is, the more oligopolists will have an incentive to avoid price competition;

-- products must be homogenous and the market not characterised by product or technological innovations likely to erode acquired positions; and

-- the market must be relatively transparent.

It is as yet untested whether the analysis methods adopted under the Merger Regulation will be applied to future Article 86 decisions, or whether Article 86 collective dominance case law will develop independently.

Article 86 and Reform of UK Competition Law

The UK Government has recently been considering reform of UK competition law. After extensive consultation with industry it has been decided not to adopt legislation along the lines of Article 86.

The main reasons given for rejecting Article 86--style legislation was that it was felt that existing UK law was wider in scope and more flexible than Article 86, in that it allowed matters to be resolved through negotiation rather than punishment. Although the existing legislation was to be improved by giving the UK regulators stronger powers of investigation, increasing the scope for enforceable undertakings and making provision for interim orders to suspend anti--competitive practices, it was felt that Article 86 was unsuitable for the following reasons:

-- unlike the Fair Trading Act ("FTA"), Article 86 does not appear to allow the investigation of oligopolists who are not structurally or economically linked;

-- it is more difficult to establish abuse of dominance through excessive pricing than to show that it acts against the public interest; and

-- under Article 86, there is no provision for providing structural remedies such as divestment or regulatory remedies such as price control.

In addition, industry regarded Article 86 as inflexible and not reflective of the commercial realities of the market place; there was a fear that companies could be subject to fines for activities which

were not obviously abusive (see problems outlined in section 1 above); and Article 86 led to uncertainty, fear of fines and third party actions, and had a "chilling effect" on companies' business development.

Improving the Treatment of Article 86 Cases

Companies which are the subject of investigation under Article 86 face a delay of many years before the Commission issues a final decision. The House of Lords has recommended that the Commission should prescribe a mandatory timetable for the investigations, with extensions to be agreed between the parties.

In a recent article, the former Director-General of DGIV C-D Ehlemann suggests that, while this may ultimately be possible for cases under Article 85 which involve notification to the Commission, cases under Article 86 are usually too complex for fixed timetables. It therefore appears that parties under investigation for breach of Article 86 will continue to have a long and uncertain wait for a decision.

CONTRIBUTION FROM BIAC*

Abuse of Dominance in the United States:

Denial of Access
Points for Consideration

Summary and Historical Context

The counterpart in the United States to the doctrine of abuse of dominant position is contained in section 2 of the Sherman Act, which provides that "[e]very 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 of a felony,..." 15 U.S.C. § 2.... Although monopolization technically can be a criminal offense, it has generally been enforced only in the civil context.

Monopolization requires two basic elements to complete the offense: (1) possession of monopoly power, and (2) the willful acquisition or maintenance of that power. The failure of the statute and the courts, at least initially, to provide greater guidance as to the types of conduct condemned by the Act caused substantial uncertainty in the United States for many years.

Early interpretations of the Act were quite problematic for successful businesses and competition policy. The primary case in this area for decades was *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). In *Alcoa*, the court observed that Alcoa maintained its monopoly over aluminum ingot by constantly increasing capacity to meet new demand and effectively forestalled all competition as a result. The court there stated that a monopolist does not violate the law where monopoly is "thrust upon it," but "no monopolist monopolizes unconscious of what he is doing." *Id.* at 432. Cases following *Alcoa* generally took the position that the second element of monopolization, the willful acquisition or maintenance element, was

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met if monopoly was the logical result of actions by the monopolist. *United State v. Grinnell Corp.* 384 U.S. 563, 576 n.7 (1966); *United States v. Paramount Pictures*, 334 U.S. 131, 173 (1948); *United States v. Griffith*, 334 U.S. 100, 106 (1948). Such actions, of course, could be efficiency enhancing as well as efficiency reducing.

The *Alcoa* line of cases created a serious dilemma for the courts. Although monopoly can be thought of as contrary to the goals of competition because of the dangers of higher prices and lower output, a firm that is driven by competition to create the best product at the lowest cost is likely to obtain a monopoly by the very process of competition. Even the court in *Alcoa* recognized that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." *Alcoa*, 148 F.2d at 430. The problem with *Alcoa* and its progeny is that it did just that by suggesting that the pursuit of normal competitive, efficiency enhancing conduct could be considered unlawful if it led to or enhanced a dominant market position. As a result, it is likely there was a chilling effect on the larger, more successful businesses in the United States, which constrained their drive to produce better products at lower prices.

Alcoa was subjected to severe criticism, largely from scholars associated with the University of Chicago. R. Posner, ANTITRUST LAW; AN ECONOMIC PERSPECTIVE 206-207, 215-215 (1976). In addition, most other types of monopolization cases dealt with some type of leveraging, tying, refusal to deal or exclusive dealing, and these were heavily criticized as well. These types of restraints generally represent different methods of accomplishing vertical integration and the cases involving them were primarily concerned with the monopolist using its monopoly power in one market to gain an advantage in another market. Scholars argued that there was only one monopoly profit to be had and that the allegedly exclusionary conduct could not increase the already extant market power. This is commonly referred to as the single monopoly profit argument. Id. at 173; R. Bork, THE ANTITRUST PARADOX 367, 273-74 (1978). At one point, Judge Bork concluded that as to tying cases, "perhaps no other variety of that theory has been so thoroughly demolished in the legal and economic literature." *Id.* at 372.

The Chicago school criticisms, however, were not universally applicable. The single monopoly profit argument only applies to products produced in fixed proportion, for which there is probably fairly limited real world application. For products produced in variable proportions, vertical integration effectuated through refusals to deal, leveraging, exclusive dealing, and vertical merger can theoretically reduce prices to consumers, raise them or leave them unchanged. In most instances, it is very difficult to determine the result. Martin K. Perry, *Vertical Integration: Determinants and Effects*, HANDBOOK OF INDUSTRIAL ORGANIZATION (R. SCHMALENSEE AND R. WILLIG EDS.) 191-92 (1989); M. Katz, *Vertical Contractual Relations*, HANDBOOK OF INDUSTRIAL ORGANIZATION (R. SCHMALENSEE AND R. WILLIG EDS.) 713-14 (1989).

Where, however, there are economies of scope or scale in distribution and the restraint interferes with the distribution of the products of competitors of the manufacturer and denies them such economies, the effect on consumers may be much less ambiguous and more likely to be detrimental. *Id.* at 706. In addition, restraints that have the effect of bundling monopoly products with competitive products (including the same product sold in a different geographic area) have also been shown to be problematic. *Id. at 709; see also G. Stigler*, THE ORGANIZATION OF INDUSTRY 166 (1968).

Over the last decade or so, and probably in response to the scholarly criticism, the courts in the United States have tended to limit the range of conduct subject to the application of monopolization law. The courts now require that the monopolist acquire or maintain its monopoly "on some basis other than efficiency" in order to violate Section 2 of the Sherman Act. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). Thus, normal competitive conduct, even by a monopolist where the effect is to maintain the monopoly, is today regarded as lawful. In addition, more recent Supreme Court opinions make clear that claims of monopolistic exclusion should be judged by assessing their effects on consumer welfare, rather than by their

effects on competitors. *Id.* at 605. These developments have been viewed as quite beneficial and the status of monopolization law in the United States is generally viewed much more favorably.

Although the Supreme Court now requires a demonstration as to how exclusionary conduct by a monopolist injures consumers, the Court has provided little guidance as to the way in which that inquiry should be carried out. The Supreme Court does appear to have focused on the situation where exclusionary conduct impacts the distribution of the products of the competitors of the manufacturer, and to have condemned such conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

Market Definition in Monopolization Cases

Market definition, similar to the analysis applicable to mergers, is a prerequisite to proof of monopolization. Although the market definition of the Department of Justice and Federal Trade Commission Merger Guidelines has not been expressly adopted by the courts, it is highly consistent with the case law and is often referenced with approval.

The relevant product market is defined to consist of "products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351, U.S. 377, 404 (1956). In applying this test, the Supreme Court considered the economic concept of cross-elasticity of demand, which measures the responsiveness of the sales of one product to price changes of another. The Court explained that "[i]f a slight decrease in the price of [one product] causes a considerable number of customers of [another] product to switch to [the first product], it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market." *Id.* at 400.

Under this standard, courts will consider price differences between products, which will not necessarily place them in separate markets. As long as the trade off between price and quality is similar, products should be deemed to be within the same market assuming they are reasonably interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351, U.S. 377, 401 (1956); *Twin City Sportservice, Inc. v. Charles O. Finley & co.* 512 F.2d 1264, 1274 (9th Cir. 1975). The 1993 National Association of Attorneys General Merger Guidelines suggests that price differentials are determinative of separate markets. 4 TRADE REG. REP. (CCH) ¶ 13,406 at § 3.1 n.22. This position has been widely criticized and is not supported by the courts or the federal enforcement authorities. Such a position is demonstrably contrary to consumer welfare analysis.

Courts will also consider reasonable interchangeability of production (or cross-elasticity of supply). *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 n.42 (1962) (merger context); *In re Municipal Bond Reporting Litigation*, 672 F.2d 436, 441 (5th Cir. 1982). Thus, where firms producing a particular product can easily switch over their facilities to production of another product, the appropriate relevant product market includes both types of products.

The test for relevant geographic market is similar to that of product market. The relevant geographic market is the area in which the defendant sells the particular product or service in question plus the areas to which purchasers in that area can practically turn for the supply of such product or service. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

Monopoly Power in Monopolization Cases

Monopoly power is the power to control price or output, or to exclude competition. Monopoly power within the relevant market can be proven directly by evidence of control over prices or the actual exclusion of all competitors. More often, however, monopoly power is evaluated by examining the firm's market share in conjunction with market structure factors including the relative size and strength of competitors, fluctuations in market share, ease of entry, and evidence of monopoly profit. In general, high market shares are not conclusive of monopoly power. The defendant's share of the relevant market is a primary factor and supports an inference of monopoly power generally for shares above 70 per cent ABA, ANTITRUST LAW DEVELOPMENTS (THIRD) 213 (1992). But that inference may be rebutted by other evidence. In contrast, a market share of less than 40 per cent virtually precludes a finding of monopoly power. *Id.* Other factors significant in the determination of monopoly power are barriers to entry or fringe expansion, technological or other superiority providing substantial cost advantages, economies of scale, the relative size of competitors, potential competition, and stability of market shares over time. *Id.* at 215. Recently, one court relied upon quantitative estimates of own demand and cross price elasticities in concluding that Kodak's 70 per cent market share was not indicative of monopoly power. *United States v. Eastman Kodak Co.*, 853 F.Supp. 1454 (S.D.N.Y. 1994), *aff'd*, 63 F.3d 95 (2d Cir. 1995).

The purpose of both market definition and monopoly power inquiries is to determine whether an arrangement or conduct has the potential for generating adverse effects on competition. It is highly unlikely that exclusionary conduct by firms with small market shares will be profitable. Therefore, proof of market definition and market power serves as a screen to filter out conduct unlikely to impact competition adversely.

Denial of Access

Courts in the United States have categorized various types of conduct that may constitute monopolization. Denials of access could fall into three of these categories, refusals to deal, denial of access to essential facilities, and leveraging. But proof of monopolization is not dependent upon fitting the alleged conduct to one of the commonly identified categories; it is sufficient if the two elements of monopolization are proved. Placing the alleged conduct within one of the commonly identified categories, however, makes the analysis more familiar to the courts and is more readily dealt with.

Refusals to deal

Refusals to deal can take at least two forms[1/] But such refusals to deal are condemned under section 2 of the Sherman Act only when the first element of monopolization is satisfied; that is, the firm possesses monopoly power in an economic relevant market.

Refusals to deal may involve the situation where a firm with monopoly power refuses to deal with buyers unless they agree to cease buying from a competitor of the monopolist. In such cases, the refusal to deal is "inherently anticompetitive." *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Byars v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir. 1979). In *Lorain Journal*, the newspaper refused to sell advertising space to any buyers who also advertised on competing local radio stations. This case is quite old, but is still cited with approval.

Refusals to deal can also be illegal where the competitors must use a product or service of the monopolist in order to be competitive with the monopolist with respect to another product or service. *Rural Telephone Service Co., Inc. v. Feist Publications, Inc.* 957 F.2d 765 (10th Cir.), *cert. denied,* 113 S.Ct. 490

(1992); *Great Western Directories v. S.W. Bell Telephone*, 63 F. 3d 1378, 1384 (5th Cir. 1995), *modified on other grounds*, __ F.3d __ (5th Cir. Jan. 26, 1996).

A monopolist may defend a refusal to deal if it is based upon a legitimate business justification, which is efficiency enhancing. *Oahu Gas Service V. Pacific Resources Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).

With respect to intellectual property, courts have in effect inferred a legitimate justification for refusals to license by virtue of the grant of the intellectual property. *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994); *California Computer Prods., Inc. v. IBM*, 613 F.2d 727, 744 (9th Cir. 1979). In one such case, the FTC stated that imposing a duty to license might discourage the innovative process that led to the cost and competitive advantage that was sought. *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653 (1980), *aff'd*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

Essential facilities

The essential facilities doctrine describes a particular set of circumstances where a refusal to deal will be deemed to violate Section 2 of the Sherman Act. Under this doctrine, a monopolist's refusal to deal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

The doctrine requires (1) control of an essential facility by the monopolist, (2) that competitors are unable practicably or reasonably to duplicate, and (3) that the monopolist denied use of the facility to the competitor, (4) when granting use of the facility would have been feasible. *Id.* at 1132-33.

The first element considers the essentialness of the facility. A facility or resource is essential if access or use of the resource is vital to competitive viability and competitors cannot compete effectively without it. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520-21 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585, 611 (1985) (essential facilities doctrine not considered). A facility that is unique is more likely to be considered essential. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539-40 (7th Cir. 1986) (stadium for professional basketball in Chicago unique and could charge higher prices without losing business). The host firm's monopoly power must be in the market that includes the essential facility. However, essentialness does not presuppose a requirement for there to be a level playing field in terms of the cost of alternatives.

The essential facility must not be a resource that competitors can practicably or reasonably duplicate. It is insufficient that creating a duplicate facility would be more costly. *Alaska Airlines Inc. v. United Airlines Inc.*, 948 F.2d 536, 544-46 (9th Cir. 1991) (claim fails where denying access would only impose financial burden on excluded competitors). Duplication or production of an alternative facility must not be feasible. *Twin Labs. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990).

The essential facilities doctrine also requires that competitors seek and be denied access to the facility.

Finally, it must be feasible for the owner of the essential facility to provide access to competitors. The facility must be sufficient that the competitors' use of the facility would not deny or substantially impede use of the facility to the owner. *Cf. Anaheim v. S. Cal. Edison Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,246, at 64,912

(C.D. Cal. 1990) (refusing access does not violate Section 2 where owner wanted limited quantity of low-cost power available for its customers).

Leveraging

Leveraging is the use of monopoly power in one market to monopolize or attempt to monopolize another market. Courts have found unlawful the use of monopoly in some product or geographic markets to obtain exclusive distribution privileges in other markets unlawful. *United States v. Griffith*, 334 U.S. 100, 108 (1948); *Great Western Directories v. S.W. Bell Telephone*, 63 F. 3d 1378, 1384 (5th Cir. 1995), *modified on other grounds*, __ F.3d __ (5th Cir. Jan. 26, 1996); *Sun Newspapers v. Omaha World-Herald Co*., 713 F.2d 428, 429 (8th Cir. 1983). Similarly, the linking of patented products with unpatented products in a volume rebate program was held to be an illegal use of the patented monopoly to enhance sales of the unpatented products. *SmithKline Corp. v. Eli Lilly & Co.* 575 F.2d 1056, 1065 (3rd Cir.), *cert. denied*, 439 U.S. 838 (1978).

There is a split in the circuit courts as to whether a leveraging violation requires a monopolization or likelihood of monopolization of the second market. The Second Circuit Court of Appeals does not maintain such a requirement, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), while the Ninth Circuit does have such a requirement. *Alaska Airlines v. United States*, 948 F.2d 536 (9th Cir. 1991).

Contrary to the criticism of Judge Bork, leveraging through block booking or bundling can reduce consumer welfare by enabling the seller to extract greater revenues than would be possible otherwise. See G. Stigler, THE ORGANIZATION OF INDUSTRY 166 (1968).

Miscellaneous Conduct

The 1994 consent decree between the Department of Justice and Microsoft Corporation prohibits Microsoft from offering "per processor" licensing arrangements for its operating system software. Under these licenses, a computer manufacturer must pay a royalty for every computer it sells regardless of whether all of its computers have the Microsoft operating system installed. The Department of Justice recognized that while "volume discount pricing can be and normally is pro-competitive, volume discounts can be structured by a seller with monopoly power (such as Microsoft) in such a way that buyers, who must purchase some substantial quantity from a monopolist, effectively are coerced by

the *structure* of the discount schedule (as opposed to the level of the price) to buy all or substantially all of the supplies they need from the monopolist. Where such a result occurs the volume discount structure would unlawfully foreclose competing suppliers from the marketplace..."Competitive Impact Statement", *United States v. Microsoft Corp.*, 59 Fed. Reg. 42,854 (1994).

NOTE

1. For a comprehensive history and analysis of the requirements governing refusals to deal, see Kenneth L. Glazer and Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749 (1995).

CONTRIBUTION FROM BIAC*

Abuse of Dominant Position Under the Canadian Competition Act

Background

The abuse of dominant position provisions under the Canadian *Competition Act* (the "Act") address conduct by a dominant entity which prevents or impedes market access through the creation of barriers to entry. The principle underlying these provisions is that the public interest is best served when markets are competitive.[1] Mere structural dominance is not, in and of itself, the focus of the abuse of dominance provisions. Rather, the purpose of these provisions is to "control certain forms of behaviour considered abusive for consumers or producers."[2] As is the case with the abuse of dominance provisions in Article 86 of the *Treaty of Rome*, a threshold level of dominance is a prerequisite to the application of the provisions.

The abuse of dominant position provisions in section 79 the Act provide for conduct which may be reviewable by the Competition Tribunal (the "Tribunal") and addressed through a remedial order. Failure to comply with an order of the Tribunal with regard to these reviewable matters constitutes a criminal offence. Only the Director of Investigation and Research (the "Director"), who is responsible for enforcing the Act, may make an application to the Tribunal with respect to abuse of dominance. Abuse applications can be brought no later than three years after the impugned conduct has ceased. Private parties cannot bring a civil action under the Act for damages suffered as a result of conduct constituting abuse of dominant position.

The abuse of dominance provisions replaced Canada's criminal monopoly provisions, which are not viewed as having been particularly effective. The requirement under the monopoly provisions to establish "detriment" has been replaced by the need to establish that the impugned conduct has the effect of preventing or lessening competition substantially. Further, the burden of proof is now on a balance of probabilities, instead of beyond a reasonable doubt.

Abuse of dominant position cases are an enforcement priority of the Director and since these provisions were introduced in 1986, three contested cases have been brought before the Tribunal. In addition, one consent order has been issued by the Tribunal in resolution of abuse allegations, and two applications for consent orders are currently before the Tribunal. In one other case, the Director's concerns

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* This contribution was submitted by Calvin S. Goldman and Crystal L. Witterick, Davies Ward & Beck.

under these provisions were addressed by formal undertakings from the parties involved. Attached as Appendix A is a summary of cases under the abuse of dominant position provisions.

Joint Abuse of Dominant Position

The concept of joint abuse by two or more firms is increasingly being recognised and addressed in Canada.[3] In fact, two of the last three abuse of dominance cases under the Act involved allegations of joint abuse. The Director has indicated that strategic alliances may be reviewable under the abuse of dominant position provisions if the parties to the alliance substantially control a business and the other statutory tests are met.[4] The required degree of co-ordination between two or more persons has yet to be determined as there have been no contested cases in these circumstances.

Some of the conduct encompassed by the abuse of dominance provisions is also addressed by other provisions of the Act. For example, joint conduct can also raise issues under the conspiracy or merger provisions of the Act. However, the Act provides that an abuse application cannot be brought in respect of the same facts which form the basis of a conspiracy proceeding or merger application. The Act does not preclude bringing a simultaneous application under both the abuse of dominance provisions and those which deal solely with exclusive dealing, tied selling and market restriction, and refusal to deal.[5]

Conduct Addressed Under Canadian Law

The Director must establish the following three elements under the abuse of dominance provisions:

-- one or more persons substantially or completely controls a type of business throughout Canada or any part of Canada;

-- one or more persons has engaged, or is engaging, in a practice of anti-competitive acts; and

-- the practice has had, is having, or will likely have the effect of preventing or lessening competition substantially. (ss. 79(1))

While the Tribunal has discretion in determining whether to issue an order, it has indicated that the occasions on which it would exercise its discretion to refuse to issue an order would "surely be rare".[6]

Product and Geographic Markets

The definition of the product and geographic markets is critical in an abuse case. The Tribunal has essentially equated "class or species of business" with the relevant product market, rejecting the Director's submissions that "class or species of business" should be interpreted in a commercial sense.[7]

The general test used by the Tribunal for determining the geographic market is the same as that used to determine the product dimensions, namely the identification of the universe of effective competition, where "effective competition" means that the competitor provides a significant restraint on the dominant entity's ability to raise prices above the competitive level."[8]

The Tribunal has taken a pragmatic approach to analysing abuse cases, recognising that the market definition will ultimately determine the analysis of whether the impugned conduct is having the requisite effect on competition.[9]

Substantial Control

The Tribunal has equated substantial or complete control of a business with market power in the economic sense, namely whether the entity has sufficient market power to maintain prices above competitive levels for a considerable period;[10] in other words, has "the ability to earn supra-normal profits by reducing output and charging more than the competitive price for a product".[11] In determining whether a supplier has market power, the Tribunal has indicated that it will look to indicators such as market share and entry barriers.[12] The Tribunal has also indicated that if a firm has a very large market share, it will very likely have market power, but considerations such as the number of competitors and their respective market shares, excess capacity in the market, and ease of entry will also be taken into account.[13]

There is no "bright-line" test regarding the determination of when a company will be found to substantially control a business - in all three contested cases, the market shares of the relevant entities exceeded 85 per cent and the Tribunal did not embrace a minimum market share threshold which would provide a *prima facie* indication of market power.

The Tribunal has noted that "no prima facie finding of dominance would arise" with respect to a market share of below 50 per cent.[14] It is not clear whether the implication therefore is that a market share of over 50 per cent would give rise to a prima facie finding of dominance. The Tribunal also noted that a 100 per cent market share constitutes at least a prima facie substantial lessening of competition.

Practice of Anti-competitive Acts

The Act contains a definition of "anti-competitive acts", which includes the following:

-- squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier;

-- the acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or the acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer;

-- freight equalisation on the plant of a competitor;

-- the use of fighting brands introduced selectively on a temporary basis;

-- the pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

-- buying up of products to prevent the erosion of existing price levels;

-- the adoption of product specifications that are incompatible with products produced by any other person;

-- requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor; and

-- selling articles at a price lower than the acquisition cost. (s. 78).

Except for (f), these enumerated acts must be performed for an anti-competitive purpose, which generally involves an intentional predatory, exclusionary or disciplinary effect on a competitor.[15] The onus is on the Director to establish that purpose for each alleged act.[16] The Tribunal has accepted that such a purpose can be proved either by direct evidence of subjective intent or by a consideration of the necessary and foreseeable consequences of the act itself, from which such a purpose may be inferred.[17] The Tribunal has commented that proof of subjective intention is not necessary because corporate actors and individuals are deemed to intend the effects of their actions.[18]

This enumerated list of anti-competitive acts in the Act is not exhaustive. In determining whether an act is anti-competitive, the analysis must take into account "the commercial interests of both parties served by the conduct in question and the degree of restraint or distortion of competition which exists."[19]

The Tribunal has found that the following may also constitute anti-competitive acts: exclusivity clauses, substantial discounts for displaying a dominant supplier's trademark and logo and substantial promotional allowances, "meet or release" clauses in a supply agreement, "most-favoured-nation" clauses, acquisitions of competitors with a view to eliminating competition, rights of first refusal for continuation or reacquisition of the business of a customer; requirements that a customer reveal competitive bids or information regarding discussions, negotiations or quotes provided to the customer from competitors; requiring a customer to pay stipulated sums (or liquidated damages) upon early termination; threatening customers with spurious litigation for breach of contract to prevent them from switching to competitors; and predatory pricing by a manufacturer, whether or not it falls within the criminal predatory pricing offence in the Act.

A consistent pattern in the anti-competitive acts enumerated in section 78 (except section 78(f)), is that it is the competitor of the dominant firm that is the target. However, the Tribunal has acknowledged that horizontal arrangements may fall within these provisions in the appropriate case.[20]

Legitimate business justifications are relevant to an evaluation of whether an act is anti-competitive, but the mere proof of some legitimate business purpose would not be sufficient to disprove the fact of anti-competitive acts.[21] Further, the Tribunal has held that retaining or obtaining a dominant position in order to defend against the potential dominance of another firm is not an acceptable business justification.[22]

The Tribunal has held that a "practice" of anti-competitive acts may exist where a firm has engaged in more than an isolated act or acts, and that different types of individual acts taken together may constitute a practice.[23]

Substantial Lessening of Competition

A substantial lessening of competition will be found where the anti-competitive acts engaged in by the respondent preserve or add to the respondent's market power."[24] The factors to be considered are similar to those that are relevant in determining the presence of market power, namely, the degree to which anti-competitive acts create entry barriers in the relevant market.

In determining whether a practice has had or is having the requisite effect on competition, the Act requires the Tribunal to consider whether the practice is a result of superior competitive performance (ss. 79(4)).

While vertical conduct (e.g., between a supplier and its customer) has been challenged under Article 86 of the *Treaty of Rome*, the requirement in Canada to establish that the practice has had, or is likely to have, the effect of substantially lessening competition may make it difficult to address vertical behaviour through the abuse of dominant position provisions of the Act.

Remedial Relief

If the Tribunal finds abuse of dominance, it may issue an order prohibiting the practice of anti-competitive acts or, if it concludes that a prohibition order is not likely to restore competition, it may make any other alternative order that is reasonable and necessary to overcome the effects of the practice of anti-competitive acts, such as an order that assets or shares be divested or that terms of a contract be rendered unenforceable. (ss. 79(2)) The terms of such an order may "interfere with the rights of any person to whom the order is directed or any other person only to the extent necessary to achieve the purpose of the order". (ss. 79(3))

The Tribunal has noted that its function in making an order under section 79 does not include imposing penalties or punitive measures and that "simple clear-cut remedies targeted at the fundamental issues are preferable to more complex and interventionist ones that will have a perpetual life and may not cover adequately all situations present and future".[25] The Tribunal has also noted that, in its view, the Act provided it with "broad jurisdiction to interfere with property rights not only of the party or parties before it but also of third parties who have contracts with the respondent".[26]

In one case where the Tribunal was asked to declare various contracts invalid, the respondent apparently raised an issue whether the Tribunal has the jurisdiction to make such declarations. The Tribunal avoided the issue by making orders prohibiting the respondent from enforcing such provisions or entering into contracts containing them.[27]

Appendix

Summary of Cases Under the Abuse of Dominant Position Provisions of the Canadian Competition Act

Director of Investigation and Research v. NutraSweet Co.[28]

On October 4, 1990, the Tribunal issued its first remedial order under the abuse of dominant position provisions against The NutraSweet Company, which manufactures and markets aspartame, a low-calorie sweetener, under the brand name "NutraSweet". At the time of the Tribunal's decision, NutraSweet accounted for approximately 95 per cent of sales of aspartame in Canada. While NutraSweet's Canadian patent in respect of its production process for aspartame had expired, it still held a U.S. patent, making NutraSweet the only supplier of aspartame in the U.S. The only other Canadian marketer/producer of aspartame was Tosoh Canada Ltd. The investigation by the Director, which ultimately led to the Tribunal's prohibition order, was initiated by a complaint made by Tosoh.

The conduct of NutraSweet that gave rise to the Director's application to the Tribunal included NutraSweet's negotiation of supply contracts that (i) required customers to purchase from NutraSweet all of their aspartame requirements for specified products, (ii) provided a substantial price discount to customers if they displayed the "NutraSweet" name and "swirl" logo on their packaging and in print and television advertising for their products, and (iii) provided a substantial marketing allowance to support promotions of products containing only NutraSweet brand aspartame.

The Tribunal decided that there was no evidence of direct competition with aspartame by other sweeteners and therefore the relevant product market was aspartame. The Tribunal found that despite the presence of other competing sweeteners, NutraSweet was able to maintain prices in the U.S. which were more than 50 per cent higher than prices in Canada because of its U.S. patent, and concluded that these other types of sweeteners did not provide sufficient competition to limit the market power of NutraSweet.

The Tribunal concluded Canada was a separate geographic market at the distribution level, noting that NutraSweet's prices in Europe were 10 per cent higher than Canadian prices in 1987 (the year in which NutraSweet's patents expired in Canada), six per cent higher in 1988 and 13 per cent lower in 1989. Further, the Tribunal found that multi-country contracts negotiated by NutraSweet for the supply of aspartame which had country-specific prices indicated that differing market conditions must exist in other countries. The Tribunal called the comparison of prices actually paid the "most important test ... in segregating the Canadian market from the rest of the world".[29]

The Tribunal concluded that there were "very serious barriers" to the entry of new manufacturers other than NutraSweet, including the significant economies of scale relative to demand for aspartame; significant "sunk" costs (i.e., unrecoverable costs) that increase the risks of entry; and the two-year "lag" before a producer would have sufficient experience to begin large-scale production. The Tribunal did not accept NutraSweet's arguments that it did not have market power because its principal customers, Coca-Cola and Pepsi-Cola, had considerable power given their economic resources and their importance to NutraSweet, since neither Coke nor Pepsi would be likely to develop its own aspartame production in response to price increases by NutraSweet.

Based on NutraSweet's significant market share and high barriers to entry, the Tribunal found that NutraSweet had significant market power and clearly substantially controlled the relevant market.

The Tribunal held that the practices engaged in by NutraSweet were impeding entry into the market by small competitors, supported in this conclusion by evidence that Tosoh had been unable to increase its market share. The Tribunal also noted that exclusive supply contracts covered 90 per cent of the Canadian market for aspartame, making it especially difficult for new suppliers to enter during the currency of these contracts.

The Tribunal ordered that NutraSweet shall not enter into, or enforce, any term of an agreement for the supply of aspartame which contain exclusivity clauses, entitlements to discounts or allowance return for the use of NutraSweet's trademark or logo or to a customer to buy aspartame exclusively from NutraSweet, "meet or release" clauses or most-favoured nation clauses.

Director of Investigation and Research v. Laidlaw Waste Systems Ltd.[30]

The Tribunal issued on January 20, 1992, its second remedial order under the abuse of dominant position provisions against Laidlaw Waste Systems Ltd., a company engaged in, among other things, the waste collection and disposal business. The conduct which led to the Director's application included:

-- acquiring competitors' businesses in a series of transactions;

-- obtaining from the vendors "overly restrictive" covenants prohibiting the vendor from competing within a 300 mile radius (when the Tribunal found that the businesses generally operated within less than a 30 mile radius);

-- obtaining from customers (sometimes without them knowing what they were signing) three-year contracts with automatic renewal terms and significant liquidated damages clauses and rights of first refusal on the customer's business after termination; and

-- threatening both customers and new competitors with "spurious" litigation to prevent customers from switching to competitors.

The parties agreed that the relevant product market was commercial or front-end waste collection and disposal services. The Tribunal found four separate relevant geographic markets, each consisting of a community identified by the Director, because competitors had not generally attempted to provide service to customers outside of their community.

The Tribunal noted that although in general the barriers in the commercial waste disposal industry were very low, higher barriers existed in the markets in question as a result of the contracting practices of Laidlaw which made it difficult for a customer to switch to a competitor.

Counsel for Laidlaw argued that it should not be found to be dominant in the markets in question in the absence of evidence that it had been charging prices above a competitive level. While the Tribunal acknowledged that there was no firm evidence that Laidlaw was charging monopoly prices in the markets in question, it noted anecdotal evidence of higher prices and price increases imposed by Laidlaw which the Tribunal described as "more consistent with a firm exercising market power than the reverse".

The Tribunal stated that Laidlaw's acquisition practices which at times increased concentration in a market to 100 per cent, by themselves constituted at least *a prima facie* lessening of competition which was substantial, but did not purport to determine whether those practices alone, in the absence of the Laidlaw contracts, could have resulted in a substantial lessening of competition. The Tribunal commented

that, based solely on the economics of waste service and the otherwise low barriers to entry, the relevant markets should have been highly competitive. The Tribunal found that the acquisition practices of Laidlaw, buttressed by the creation of artificial barriers to entry through Laidlaw's contracts, resulted in a substantial lessening of competition.

The Tribunal issued an order prohibiting Laidlaw from acquiring the business assets or interests of any competitor with respect to the provision of a relevant product in the relevant markets for a period of three years. The Tribunal also ordered Laidlaw to delete from its service agreements (and not re-introduce) right of first refusal and exclusivity clauses, clauses obliging a customer to reveal competitive bids, and clauses requiring a customer to pay any stipulated sum upon early termination.

The order also directed that Laidlaw's service agreements be amended to limit the initial terms or renewal terms to a one-year period, terminable upon 30 days' notice, state clearly that they are contracts "of legal significance" and clearly describe the rights of renewal and the termination provisions. Further, Laidlaw was prohibited from withdrawing from all or any of the relevant markets for a period of three years without first providing at least 60 days' notice and reasonable details thereof to the Director.

Director of Investigation and Research v. The D&B Companies of Canada Ltd. (Nielsen)[31]

On August 30, 1995 the Tribunal issued an order under the abuse provisions against The D&B Companies of Canada Ltd., carrying on business as Nielsen Marketing Research ("Nielsen"). The Tribunal found that Nielsen had 100 per cent of the scanner based market tracking business in Canada and therefore *prima facie* enjoyed market power in the absence of evidence of barriers to entry. Further, Nielsen had entered into exclusive contracts with grocery and drug retailers to purchase their scanner check-out data, which it used for developing market research which it then sold to manufacturers and others. These contracts were long-term (up to five years) and included "most favoured nation" clauses requiring a competitor to pay at least as much as Nielsen to purchase the scanner data. These activities were found to constitute anti-competitive acts, the purpose of which was to withhold scarce resources from the market and prevent new entry.

The order issued by the Tribunal granted virtually all of the relief sought by the Director. Among other things, the Tribunal prohibited Nielsen from enforcing or entering into contracts containing exclusivity clauses that restrict grocery and drug retail chains from making scanner data available to potential competitors of Nielsen. The Tribunal also prohibited Nielsen from offering any inducements to suppliers of scanner data to restrict access and declared null and void all provisions in all of Nielsen's contracts which preclude or in any way restrict a supplier of scanner data from making such data available to others. The order also permits customers to terminate existing supply contracts on eight months' notice. In fact, the Tribunal went further than requested by the Director by preventing the inclusion of certain terms in future contracts between Nielsen and consumer packaged goods manufacturers, the purchasers of its market tracking services. The Director had taken the position that this aspect of the remedy was not necessary; however, the Tribunal was persuaded by Information Resources, Inc. ("IRI"), an intervenor, that without such relief IRI would be at a significant disadvantage in its attempts to enter the market in Canada.

Mark Breslin[32]

The Director accepted undertakings in October 1991 from Mark Breslin and various companies controlled by him (collectively, "Breslin") that operated in the stand-up comedy entertainment business in Ontario. Some of the companies within the group operated venues for live stand-up comedy and others were in the business of booking comedians for those venues. The Director alleged that Breslin substantially controlled the business of supplying stand-up comedy entertainment in Ontario, Canada and were engaging in a practice of anti-competitive acts which were preventing or lessening competition substantially in the market. In order to resolve the matter with the Director, Breslin undertook not to:

-- require stand-up comics provided with stage time by Breslin to perform only at venues owned, operated, booked or approved by Breslin;

-- require that stand-up comics provided with stage time by Breslin book only through a specified agency;

-- discipline or discriminate against stand-up comics who did not comply with the policies described in (a) or (b) above; or

-- require a booking agency to book comics exclusively or primarily for Breslin.

Yellow Pages[33]

In November, 1995, the Tribunal issued its first consent order under the abuse provisions, which is also the first case involving joint abuse allegations. The order related to the sale of national advertising in Yellow Pages. The Director alleged that the Respondents, all provincial or regional publishers of Yellow Pages telephone directories, possess a dominant position in their respective territory and, through an impugned agreement, "together foreclosed the entry of independents into the business of Selling National Advertising into Telephone Directories in Canada, and prevented the entry of the Respondents into the territory of other Respondents", thereby substantially preventing or lessening competition.[34]

The Director alleged the respondents engaged in the following anti-competitive acts: agreeing that only Yellow Pages publishers could sell national advertising in Yellow Pages directories; appointing each other as exclusive agents for the sale of national advertising in each of their territories of operations; and agreeing that national advertising must be sold to other Respondents through the Respondent in whose territory was located the head office of the entity seeking national advertising.

Even though the Respondents voluntarily agreed to put into practice in mid-1993 many of the changes contemplated by the Consent Order, and notwithstanding that the impugned agreement was abrogated by the Respondents in June 1995, the Director sought the Consent Order "to guard against recurrence of these practices." The hearing was very brief, following which the Tribunal issued the Draft Consent Order without modification.

The Consent Order contains two categories of provisions: (i) prohibitions designed to prevent the Respondents from engaging in certain acts in the selling of national advertising into Yellow Pages telephone directories; and (ii) monitoring provisions enabling the Director to review the Respondents' business practices. The Director has indicated that the Consent Order was designed to facilitate the entry of independent and non-affiliated Selling Companies and that he expects competition between and among affiliated and non-affiliated Selling Companies will provide for a richer mix of service options and lower prices for advertisers.

Tele-Direct[35]

A fourth section 79 application was filed by the Director on December 22, 1994 against Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. This matter involves allegations that the respondents had engaged in anti-competitive practices which substantially lessen competition in the sale of local advertising services and advertising space in telephone directories. The alleged anti-competitive acts include refusal to deal with third parties, squeezing the return available to independent agencies, refusing to license trademarks to competing suppliers of advertising services, threatening legal action and targeting price reductions to preclude entry by competitors. The Director is seeking an order prohibiting the respondents from continuing these practices.

Interac[36]

On December 14, 1995, the Director filed an application for a consent order against Interac Inc. and nine of Canada's major financial institutions, which are the Charter members of the Interac Association ("Interac"). The Director has alleged that the Charter members of Interac substantially or completely control the market for the supply of shared electronic network services in by leveraging their control of demand deposits and automated banking machines, and have jointly abused this dominant position. The Consent Order application is the result of a three-year investigation.

Interac is an electronic banking network which provides a shared cash dispensing service whereby cards issued by one member of Interac can be used to obtain cash from an automated banking machine owned by another Interac member. Interac also provides an electronic funds transfer at the point-of-sale service which allows consumers to make purchases at participating retail outlets using Interac trademarked debit cards.

The consent order application alleges that Interac's Charter members abused their market power in several ways, including:

-- the establishment of a structure and membership criteria that discriminate against non-financial institutions, including third-party processors and retailers, and against non-Charter members;

-- the imposition of excessively high fees for new members wanting to join Interac; and

-- the unnecessary limiting of services that may be provided over the Interac network, depriving consumers of the benefits of innovation.

The draft consent order requires that membership in Interac be opened on a non-discriminatory basis and which will prohibit those members from engaging in specified anti-competitive acts. All members will be allowed direct access to Interac (currently they must obtain access through the Charter members) and they will also be allowed to set their own fees for customer access to accounts.

NOTES

1. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Tribunal) at 332 ("*Laidlaw*").

2. *Alex Couture Inc.* v. *Canada* (1991), 38 C.P.R. (3d) 293 at 324.

3. See Howard I. Wetston, Q.C., Director of Investigation and Research, Bureau of Competition Policy, *Developments and Emerging Challenges in Canadian Competition Law*, Fordham Corporate Law Institute, New York, New York, October 22, 1992.

4. *Strategic Alliances Under The Competition Act*, Director of Investigation and Research, Competition Bureau, Industry Canada (Minister of Supply and Services Canada, 1995).

5. In *Director of Investigation and Research* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Tribunal) ("*NutraSweet*"), an application was also brought by the Director under the exclusive dealing and tied selling provisions in section 77 of the Act. In another matter, the Director alleged both abuse of dominant position and tied selling. See *Director Accepts Undertakings in Abuse of Dominant Position Case*, NR-10540/91-37, Consumer and Corporate Affairs Canada.

6 *Director of Investigation and Research* v. *The D&B Companies of Canada Ltd.*, [1995] CT - 94/1 (Competition Tribunal) at 99 ("*Nielsen*").

7. *NutraSweet* at 9-10.

8. *Laidlaw* at 316. The Tribunal seems to have rejected using the hypothetical monopolist model to define the relevant geographic market, noting that it is not the potential dominant position or increase in dominance of a firm which is at issue. The analysis is to focus on the existing situation rather than a prospective one. The Tribunal stated that:

> "... it is not obvious that a significant non-transitory price increase test for determining market boundaries is useful in an abuse of dominant position case. In an abuse of dominant position case, it is not the *potential* dominant position or the increase in dominance of a firm which is at issue. The respondent firm is alleged already *to have* a dominant position in the relevant market. The market definition issue relates to an existing situation rather than a prospective one." (*Laidlaw* at 319-320).

For a detailed discussion of the Tribunal's approach to market definition, see Robert D. Anderson and Joseph Monteiro, Economics and International Affairs Branch, Bureau of Competition

Policy, *Market Definition in Abuse of Dominant Position Cases: The Pragmatic Approach of the Competition Tribunal* (September 1, 1994).

9. In *NutraSweet,* the Tribunal stated that:

> "In approaching the discussion of product market, the Tribunal has kept in mind the implications that its conclusions would have for its consideration of market power." (at 10)

10. *Laidlaw* at 325.

11. *NutraSweet* at 28.

12. *Ibid.*

13. *Laidlaw* at 325. Although it was argued by the respondents in *Laidlaw* that there was no convincing evidence of dominance because there was no evidence that it was charging prices above the competitive level, the Tribunal found that the anecdotal evidence was more consistent with a firm exercising market power than the reverse. (at 327-30)

14. *Laidlaw* at 317.

15. The abuse provisions are not intended to affect the legitimate exercise of intellectual or industrial property rights. Section 79(5) of the Act provides that:

> "... an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-Marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

16. *NutraSweet* at 34-35.

17. *NutraSweet* at 35.

18. *Laidlaw* at 342-43.

19. *Laidlaw* at 332.

20. *NutraSweet* at 38.

21. *Nielsen* at 70.

22. *Nielsen* at 71.

23. *NutraSweet* at 35.

24. *NutraSweet* at 47.

25. *Laidlaw* at 351.

26. *Laidlaw* at 352.

27. *NutraSweet*.

28. *NutraSweet* at 22.

29. *Ibid.*

30. For a more detailed discussion of the *NutraSweet* and *Laidlaw* cases, see *Competition Law of Canada*, Matthew Bender & Company, Inc., Davies, Ward & Beck, eds.

31. *Nielsen*.

32. *Director Accepts Undertakings in Abuse of Dominant Position Case*, NR-10540/91-37, Consumer and Corporate Affairs Canada.

33. *Dir. of Investigation and Research v. AGT Directory Limited*, [1994] C.C.T.D. No. 24 (Comp. Tribunal).

34. *Director of Investigation and Research and Tele-Direct (Publications) Inc., Tele-Direct (Services) Inc.*, Competition Tribunal 94-03 (December 22, 1994) ("*Tele-Direct*").

35. *Tele-Direct*.

36. *Director Seeks Consent Order from Competition Tribunal in Interac*, NR-7369 and accompanying Backgrounder, December 14, 1995, Bureau of Competition Policy, Government of Canada.

AIDE-MEMOIRE OF THE DISCUSSION

The Chairman (Mr. Jenny), divided the discussion into three parts: definitions of relevant markets and dominance, abusive conduct and relief. For each part, there were presentations followed by general discussion.

Definitions

The Chairman noted a difficulty in defining "market power." The traditional approach is to define the market, assess whether the firm or group of firms had market power or dominance, then to assess whether such firms had abused their market power. However, according to some country contributions, such an approach raises difficult questions of economic analysis because, to a certain extent, market definition principles that are commonly used in merger cases often require modification before they can be appropriately applied in abuse of dominance or monopolisation cases. The Canadian contribution provides a discussion of methodological problems associated with the definition of relevant market in cases of abuse of dominance and presents three cases to illustrate this point.

The United States made a sharp distinction between "monopolisation" and "monopoly," that is, between the creation or maintenance of monopoly or market power on the one hand versus the exercise of market power on the other hand. The mere exercise of market power, e.g., through price setting, or the possession of market power would not in and of itself be illegal under U.S. law. Activities to create or enhance or extend in time monopoly power would fall under Section 2 of the Sherman Act. This is a fundamental distinction, reflected in a 50 year old doctrine (expressed in the court opinion in *Alcoa*) that "A successful competitor, having been urged to compete, must not be turned upon when he wins." While the dangers of monopoly power are recognised, American competition enforcement agencies and courts do not wish to stifle competition that can sometimes lead to a dominant position. This implies that the American competition officials look for exclusionary conduct, conduct that reduces rivals' ability to compete effectively or survive. Conduct that legitimately serves consumers or promotes economic efficiency is permitted. This implies that remedies prohibit specific conduct rather than the exercise of pricing power. Where market power is so durable or significant that these remedies are not adequate to erode market power, an industry-specific regulatory structure would be put into place rather than the application of over-all antitrust policies. In the United States, private antitrust lawsuits are much more numerous than enforcement actions by the Antitrust Division or the Federal Trade Commission, thereby acting as a strong deterrent of monopolising conduct.

As noted by the Chairman, one cannot apply, unchanged, the market definition method as defined for merger investigations in, e.g., the *Merger Guidelines* to market definition in monopolisation cases because they are designed to detect mergers that will lead to increases in price whereas, in

monopolisation cases, one is often concerned about practices that will prevent prices from falling. Market definition in the two types of cases is, however, closely related.

There are potentially three steps to an analysis: market definition, assessment of market power and evaluating conduct. Market definition is merely a means to the end of determining whether the conduct in question has injured consumers and damaged competition. Direct evidence of such injury, e.g., exclusion of direct competitors who would be more efficient, can obviate the need to take this step. In the delegate's personal opinion, not necessarily shared throughout the enforcement agencies, the market definition step itself should be taken with a eye to what, exactly, is the conduct that is being challenged. E.g., if the conduct is exclusionary, it would take into account who was excluded, what products or services they offered and what would be the impact -- higher prices or lower quality -- of that exclusion on the firm's market position. So, even if a firm has a monopoly, one would still look at its strongest competitors and determine whether the exclusion "knocks out" those competitors or reduces their ability to compete.

For some monopolisation cases, markets are and must be defined. Market power is a matter of degree; any firm will face some competition at the margin, as illustrated in the *Cellophane* case in the 1950s. The relevant question is how close are the substitutes, i.e., how much power does the firm have as measured, e.g., by cost advantage or quality advantage over its next closest competitors.

In addition to market definition and measurement of market shares, entry conditions are important in an evaluation. Market shares in the 60 to 70 percent range generally indicate monopoly power, which is an elevated degree of market power.

Finally, the American competition authorities are unlikely to take Section 2 action against a company with monopoly power for only a brief period, but a firm with monopoly power for a year or two or usually longer is subject to these cases.

Canada introduced the Canadian note, which focuses on market definition as a tool for assessing market power in abuse of dominant position cases. The analysis of market power and market definition is critical to the sound application of competition law in this area. Many of the practices that are commonly thought of as abuses of a dominant position can, in fact, serve legitimate pro-competitive purposes depending on the market context. Determining whether, in a given instance, these practices are anticompetitive requires an analysis of their relationship to market power. Despite any difficulties, market definition is a helpful tool in assessing market power or at least in avoiding some fundamental mistakes.

Market definition is particularly challenging in abuse of dominance cases. In merger analysis, the "hypothetical monopolist approach" is based on a prospective price increase test, whereas in abuse of dominance cases one is potentially dealing with an actual monopolist. Since consumers will always substitute away from a good if its price is raised sufficiently high (the essence of the "*Cellophane* fallacy"), asking what would be the consumer response to a further price increase will not reliably indicate the existence or absence of market power.

A few guiding principles can be helpful in defining relevant markets in abuse cases:

-- keep in mind the underlying concerns motivating the case. For example, if potential entrants would enter only if prices increased, then they are not relevant to assessing whether prices would fall if incumbents were not permitted to engage in certain exclusionary practices.

-- wherever possible, consider the physical attributes of products, their substitutability for specific end-uses, established patterns of consumer preferences, etc. The danger of relying on these characteristics is that the analysis can be impressionistic, but case experience suggests that this approach can satisfactorily define relevant markets in many cases.

In the *NutraSweet* case, the sole supplier in Canada of the artificial sweetener aspartame argued that the market included other artificial sweeteners and perhaps sugar. The Bureau of Competition Policy successfully argued that no other sweetener was a substitute and based its argument primarily on the dietetic characteristics of aspartame, culinary uses and safety concerns associated with other sweeteners. In the *Laidlaw* case, there was considerable debate as to whether certain outlying towns were included in local markets for waste collection services. The Bureau argued that the geographic market argued by the respondent was inconsistent with the normal usage of trucks, the load factors associated with waste collection, and so forth. In fact, the respondent's efforts to include the outlying towns in the relevant market were a classic example of the *Cellophane* fallacy. In the *A.C. Nielsen* case, the respondent was the only provider of electronic scanner-based market tracking services in Canada. The Bureau established that this type of market tracking service was superior to and very distinct from other types of market tracking services that were available from other providers, thereby defining the relevant market and establishing that Nielsen was the sole supplier to that market. This helped to establish that the practices engaged in by Nielsen were indeed exclusionary.

In some cases, it may be possible to bypass the market definition stage and go directly to the evidence of exclusionary effects and monopolistic performance. However, this approach has its own difficulties.

The Chairman noted that the discussion was moving from the traditional approach towards one in which dominance and relevant market are inferred from the exclusionary nature of the practice which, as noted, may cause concern in the business community. He noted that the Monopolies and Mergers Commission in the United Kingdom has much leeway to infer dominance from practices.

The United Kingdom said that the British system was wholly administrative with no prohibitions of conduct, either specific or generalised. The system provides for a case-by-case examination of whether conduct or a market situation has effects adverse to the public interest, a notion which certainly is broader than the promotion of economic efficiency. For the British authorities to have jurisdiction to initiate an investigation, neither an economically-defined market nor any precisely defined situation of dominance or market power must be present. The paper sets out the jurisdictional tests that must be met. Broadly speaking, these are that there is a firm or a group of firms who operate in a similar fashion that may adversely affect competition and who have 25 per cent or more of supply of a product or service as described in the reference. In practice, there have been a variety of breadth of goods described for this purpose and a variety of market structures, ranging from dominant firms to loose oligopolies. However, after the MMC has established its jurisdiction, then it must establish what is the market that is relevant to assessing the conduct of the firms who are being investigated. The MMC must investigate whether the firms do indeed exercise market power in a "properly" defined market and then it looks at the conduct of those firms. As the MMC operates in an administrative system, its thinking and conclusions are not subject to the sort of review to which they would be subject in an adversarial, judicial system.

In defining markets, the MMC relies on substitutability by buyers and, to an extent, on substitutability by suppliers. It relies on an approach like that described by the Canadian delegate, that is, on the functional and physical characteristics of products. One question is whether it makes sense to look first at supply substitutability and entry barriers before one looks at demand substitutability, noting that these different approaches can lead to different answers.

In summary, in the United Kingdom there is a two-stage process according to which it is easy to meet the threshold to initiate an investigation but this is followed by an economic-orientated assessment of market definition and market power.

A BIAC representative addressed the topic of "joint dominance." Many firms are increasingly operating in international or global markets. This supposes that the conditions of competition in various countries are sufficiently similar that they do not consist of distinct markets. The question now is whether the rules to which such internationally operating firms are subject should be increasingly harmonised or convergent. The issue of "joint dominance" arises in this context. In the European Commission flat glass case, only parties that had economic links were candidates for being considered jointly dominant. Later, in the *Alcatel* decision, the European Commission said that joint dominance may be found where there is parallel behaviour but not sufficient proof to find collusion.

The concept of joint dominance has been further developed in the merger control regulation. There, the Commission has put forward the concept that joint dominance may be present where there are four or fewer oligopolists without the need to demonstrate that the parties involved are united by economic links or otherwise cooperating. This differs markedly from the situation in the United States, where a shared monopoly can be deemed to be present only where there is sufficient evidence of collusive behaviour.

The issue of whether economic links between parties must be present for them to be found to be jointly dominant under Article 86 of the Treaty of Rome is important because the test in Article 86 is not a pure efficiency test. Rather, according to some scholars and enterprises, the test is essentially a test of "fairness" in certain situations, and it is felt by some to prohibit, under certain situations, those practices that have made a firm successful. When Article 86 is used to promote fair competition rather than efficient competition, then the consequence of accepting the existence of joint dominance at a fairly low level of market share for individual firms is to reduce the threshold at which rules for fair competition are applied. Already, the European Union threshold for dominance is about 50 per cent share of the market, whereas in the United States it is somewhere between 70 and 90 per cent share of the market. This difference in attitude with respect to normally accepted practices is of major concern to internationally operating firms.

The Chairman noted that this intervention broadened the concept of dominance. This introduces the next definitional part of the roundtable, that related to another concept called variously economic dependency, relative market power or dominant bargaining position or power. Three written contributions, from Germany, Portugal and Japan, address this concept.

Germany said that the concept of relative market power is included in the general ban on discrimination by both dominant firms and powerful firms. In the German view, abuses and discriminatory practices by powerful firms can have the same distortionary effects as abuses by dominant firms. The difference in the concepts is the following: if a firm is market dominating then it is dominant on the whole market, whereas a powerful firm is in a strong position vis-à-vis only particular enterprises (i.e., small- and medium-sized firms). There are two main market situations in which the issue of relative market power arise:

-- where a firm is dependent on its supplier, e.g., authorised car dealers who depend on their car manufacturers -- they cannot easily switch to another car manufacturer -- but the manufacturers themselves are not in market dominating positions.

-- where firms, e.g., retailers or dealers, need to have particular branded goods in their range of products offered in order to be competitive. The *Rossignol* case is an example. In this case, the ski manufacturer -- who had a very high reputation for quality but a rather minor market share -- refused to sell to a discounting ski retailer. (Rossignol skis were present in all other shops and had a specific reputation in the market.) The law permitted the imposition of the duty to deal on the manufacturer. At the time, the German competition law had just been reformed to no longer protect resale price maintenance.

Portugal said that, as the competition law had been in force for only two years, there had not yet been any cases involving economic dependency. This concept was introduced into the law because there had been a major change in the balance between major retailers and suppliers. It was thought that this provision needed to be included in the competition law even if it was not abuse of dominance because such practices can damage the smooth operation of the market.

Japan said that abuse of bargaining position is an unfair trade practice that is banned in Section 19 of the Antimonopoly Act. An unfair trade practice is defined as conduct which tends to impede fair competition including having a negative influence on competitors through providing competing products and services at a cheaper price. The Japanese Fair Trade Commission has identified sixteen categories of specific conduct that may be subject to this prohibition. Unfair trade practices have three aspects related to competition policy: the lessening of competition, assurance of fairness of the method of competition and the erosion of the foundation of competition. Abuse of dominant bargaining position relates to the latter two aspects, fairness and erosion.

Dominant bargaining position refers to relative economic superiority of an entrepreneur in a transaction. It does not refer to an absolute position in a market. A dominant bargaining position may exist, in particular, in long-term transactions. The JFTC's *Distribution Guidelines* contain examples of a dominant bargaining position and of concrete conduct that may be considered to be abuse of a dominant bargaining position.

In the *Mitsukoshi, Ltd* case (1982), a retailer was accused of abusing its dominant bargaining position. In Japan, there are many cases in which large retailers, such as department stores and supermarkets, coerce their suppliers to incur expenses related to the products sold by the retailer, that would otherwise be incurred by the retailer. Mitsukoshi is the largest department store and second largest retailer in Japan and has a very prestigious reputation. Therefore, for high-ranking recipients, it is appropriate to present a gift bearing the Mitsukoshi name on the wrapping paper. As a result, suppliers want to deal with Mitsukoshi. In the case described, Mitsukoshi demanded that suppliers bear part of the costs of renovation and special sales events without providing a logical basis for the charges or gaining the clear consent of the suppliers. The JFTC concluded that Mitsukoshi had a dominant bargaining position and that the actions were abusive.

The Chairman noted that the French law contains the same sort of statutes as in the Japanese law.

General Discussion on Definitions

Ireland said that, since the Irish competition law came into effect in late 1991, a small number of cases on abuse of dominance have been in the Irish courts. In these cases, the judges have tended largely to brush over the issues of market definition without providing their reasoning on this point. Therefore, it seems that market definition is a particularly difficult issue for judges and there is a problem in conveying this complex idea to judges.

At the direction of the Ministry, the Authority undertook a study of the newspaper industry. The Authority went into some depth on market definition and one key issue was whether Irish and UK newspapers were in the same markets. With respect to tabloid newspapers, the evidence seemed to suggest that they were, whereas with respect to broadsheet, quality daily newspapers the situation seemed to be different, with UK papers having only a small sales share in Ireland. The Authority focused on the effects of relative price changes. In 1984, both Irish and UK papers sold for about the same price in Dublin, about 40-45 pence. Ten years later, Irish papers sold for about 85 pence and UK papers for about 45 pence, but only about 1500-2000 copies of the UK papers were sold each day versus about 100 000 to 150 000 copies of the Irish papers. It is clear that there has been no switching despite the large relative price change. Some critics of the study have argued that there is some price at which readers of Irish papers would switch and the Authority has had to defend itself against these *Cellophane*-type arguments.

The Irish *Competition Act* does not contain a relative market power concept. However, a remnant of the former legislation, the *Restrictive Business Practices Act*, the *Groceries Order*, bans below-cost selling of grocery goods. It's clear that the grocery chains are not dominant in the Irish market, with perhaps 20 per cent of the market. The Authority has recommended repeal of the *Groceries Order* because predatory pricing would be caught under the *Competition Act* and it is inappropriate to prohibit other instances of below cost selling.

Spain agreed that the concept of relative market power or economic dependency is more related to unfair competition than with the protection of competition. In Spain, there is both a law on unfair competition and a law on protection of competition and the two laws have different aims: the law on unfair competition is to protect competitors and the competition law is to protect the market. The concept of relative market power is included in the law on unfair competition.

Italy, commenting on the *Mitsukoshi* case, said that it seemed that the department store was in a dominant position and that it abused its position by asking for additional expenditures by its suppliers. Hence, it would seem that the case could have been brought under an abuse of dominance article. However, if there are substitute suppliers, then such a case would not endanger market processes and there would not be a competition policy interest. Frequently, distributors' sunk costs are not specific to the brand(s) which they currently sell so that they could economically switch to distributing other producers' brands. Where this is true, the market can take care of exploitative behaviour by suppliers without recourse to the competition law.

The Commission of the European Union responding to the issue of uncertainty of legal treatment raised by the representative from BIAC, noted that the Treaty of Rome contains a non-exhaustive list of abusive behaviour but that this area is developing, essentially, through the case law. Given that there are relatively few cases, some uncertainty is inevitable. There is, however, a rarely used negative clearance procedure by which undertakings can receive certification that their behaviour is not abusive of a dominant position.

On the basis of the case law, one may categorise -- non-exclusively and non-exhaustively -- behaviour into two types, exploitative and exclusionary.

Is it legitimate to infer market power from conduct? He cannot deny that the case examiners do that, although there is an element of reverse engineering from the abuse to the dominant position.

The Commission has been criticised with respect to its narrow market definitions. However, these market definitions may be a means of dealing with economic dependency. Further, there is a moral imperative for market integration in the European Union's competition law and one may find that most of

the cases in which narrow markets were defined were attempts to deal with interferences with trade across national borders within the single market.

Poland noted that, in the mass media market, it is difficult to define a dominant position where a newspaper with a small share can have a very influential voice and where diversity of opinion is important in maintaining a democracy. The key point in this discussion is not the market but the behaviour of a firm, especially behaviour related to its counter-partner. Consider particular behaviour which is very characteristic of firms in a monopoly position. If other enterprises, regardless of their market positions, engaged in similar behaviour then they would be found to be monopolists. However, this may be too general a rule for application to specific sectors such as mass media, for which a redesign of this general definition may be needed.

The Chairman, summarising this part of the roundtable, said that, if there is some "reverse engineering" whereby competition officials infer market power from abuses, maybe one's "shame" can be mitigated by precisely defining abuses thereby reintroducing legal certainty. When we look at what is considered to be potential abuses, some legislation lists *a priori* what may be considered to be abusive conduct and others are much less precise, thereby compounding the problems discussed in the first part of this roundtable.

Abusive Conduct

The Chairman, introducing the next topic of the roundtable, noted that the United States contribution says that Section 2 of the Sherman Act has left to the courts the elaboration of what is "monopolisation" and "attempt to monopolise." At the same time, it seems that in the United States there is a concept that a firm that has lawful monopoly power has no general duty to help its competitors, and yet exclusionary practices are the source of most of the abuses. If the courts must define what is an abuse, if exclusion is a problem, but if on the other hand there is no general duty of monopolists to help competitors, precisely where does one draw the line under United States law? What is the case law identifying what is exclusionary and what is simply not helping one's competitors? The central question is, how does one define a "valid reason" for, e.g., refusal to continue to engage in a cooperative venture as in the *Aspen Ski* case?

The United States said that, because the statute is very vague, this area of the law is developed in the case law. To respond to the question of the Chairman, there is a distinction between not helping competitors and behaviour that actively injures or harms competitors, that "goes out of its way" to undercut the ability of competitors to compete in the market. "Intent" does not need to be established, but rather there must be specific proactive conduct that harms competitors, as contrasted with simply not dealing. The general principle is to ask the question: Is the conduct ultimately serving consumers and promoting economic efficiency or is it not? I.e., does the conduct constitute "competition on the merits" or not? Does the conduct decrease the value of rival products or increase the costs of smaller firms that would hope to compete with the dominant firm? If it has those effects then it may well be illegal. If a firm takes actions that undercut some competitors but leaves a number unaffected, then those actions would be unlikely to have significant market-wide effects.

Justice Breyer wrote, "Exclusionary conduct is conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power."

The above constitutes the principle, but this must be applied. One category of potentially abusive conduct is exclusive dealing. Where a dominant firm requires its customers or suppliers not to deal with the dominant firm's would-be competitors, this may reflect the firm going out of its way to make it more difficult for its competitors to offer their products. Various fidelity discounts or loyalty discounts are related to exclusive dealing, as they are financial incentives to deal exclusively with the dominant firm. In the 1950s, the United States took action against FTD, a floral delivery network with a large market share, for requiring that florists who were members of FTD not to join other competing networks. In 1995, FTD introduced a programme of financial incentives for florists to deal only with FTD. The Antitrust Division found that, also, to be an exclusionary practice and the programme was ceased. At one time, the MAC ATM network required banks to belong exclusively to that network and to not join any other regional networks. During the investigation, MAC dropped this exclusivity requirement. The 1994 Microsoft consent decree followed from an investigation in which the Antitrust Division found that the financial arrangement between Microsoft and the computer manufacturers gave financial incentives for exclusivity, making it difficult for sellers of other operating systems to sell to manufacturers. These are examples of abusive practices that either require or provide incentives for exclusivity.

Another category of abusive conduct is pricing, with "high prices," "low prices" and "complex prices." High prices are not illegal although they may, along with high profits, indicate monopoly power. Courts have been somewhat skeptical of predatory pricing. Various types of price discrimination in complex pricing schemes can raise questions of monopolisation and abuse.

Tying is an example of conduct that may be illegal both for firms in a monopoly position and for firms that are not. In the above-mentioned MAC ATM case, the Antitrust Division took action against the network for tying ATM processing services to the membership of the ATM network itself. In assessing such cases, the authorities look at whether consumer choice is reduced, in particular whether competition is harmed in the market for the tied product (not the monopoly or "tying" product).

Each of these types of conduct are assessed using a "rule of reason." Therefore, defendants usually offer a business justification, the assessment of which is an important part of the investigation.

Refusal to deal is closely related to the essential facility doctrine. It is harder to bring a refusal to deal case in the United States than in Europe. While the *Aspen Ski* case is complex, there are two important factors: there had been a change of policy (after dealing with the competitor for a number of years, there was cut-off, so investments were stranded and the argument that dealing would be difficult or impossible was undermined) and the business justification was very weak. This remains an unclear area in the law. The 1995 Intellectual Property Guidelines provide some discussion and the recent *Kodak* case involving refusal to deal on spare parts also provides some guidance.

The Chairman contrasted the situation in the United States with that in the European Union where there is an non-exhaustive, indicative list of conduct that may be considered to be abusive.

The Commission of the European Union said that the Treaty of Rome contained a non-exhaustive list of broad definitions of abuse. In addition, the case law can be divided into a number of headings. One type are abuses involving excessive pricing, "excessive" compared either with production costs or with price in a very similar, neighboring market. These situations are rare and frequently arise in narrow market situations. Price discrimination cases can be discrimination between markets in the European Union or EEA where there are no objective justifications and there is a dominant position. An exclusionary type of price discrimination occurs where an incumbent in a dominant position, seeking to drive out a small competitor, picks up a major customer of the small competitor through offering predatory prices. The *Akzo* case is an example of this.

Another type of abuse involves essential facilities, but these have been dealt with elsewhere.

Refusals to supply type abuses are another type. A case is strengthened enormously where there is a pre-existing supply relationship that is interrupted. There are also abusive refusals to supply where the existence or development of a neighboring, usually downstream, market is prevented or stultified by the refusal to supply. This often happens when a dominant firm integrates downstream into an activity it had not previously engaged in and cuts off supply of an essential input to downstream competitors.

There is a series of cases involving abuse of intellectual property rights. The *existence* of intellectual property rights is undisturbed by the Treaty of Rome but the *exercise* of those rights comes under the Treaty, both as regards the free movement of goods or free provision of services and competition. There have been numerous interventions under Article 86 to prohibit the abusive exercise of intellectual property rights, whether through pricing or, in exceptional circumstances, refusal to license. The argument that freedom to make licensing decisions goes to the very heart of intellectual property rights is well-known and there is a lively debate about whether the Commission has gone too far. The Court of Justice upheld the *Magill* case, so there is now a leading case on how competition law can limit the exercise of intellectual property rights, going so far as to say that the refusal to license can be an abuse of a dominant position, therefore mandating the granting of a license.

There are a number of cases related to exclusive dealing (e.g., *TetraPak*) and tying (e.g., *Hilti*). Prior to the Merger Regulation in 1989, Article 86 was applied to the *Continental Can* 1973 merger. The Court found that the takeover of a competitor by a firm already in a dominant position is an abuse. *TetraPak* also deals with a dominant firm buying an essential technology that is needed for its competitors to operate.

There are a number of cases involving secondary markets. Some relate to the market integration imperative. For example, a case in the 1980s concerned a car manufacturer, *British Leyland*, providing information (a number) necessary for the consumer to register the car for use on the road only at extortionate rates. This was one method used to prevent re-import of cars from Belgium to the United Kingdom. It was found to be an abuse of a dominant position. Clearly, *British Leyland* did not have a dominant position relative to any car market but the Commission said that *British Leyland* had a dominant position in the market for the provision of information necessary to use its cars on British highways once purchased. That is very close to the concept of a position of dependency.

The key to an understanding of secondary markets is the extent of information that the purchaser has before committing to the purchase. It is not always the case that consumers know about after-market costs, such as servicing and repair costs. Rather, the extent of information held by consumers is a question of fact, specific to each case. If consumers know all about after-market costs, then Mr. Faull would agree that there is only one general market, but if consumers do not know all the after-market costs, then there is no general market.

Japan said that, under Japanese law, "monopolisation" is defined as "substantial restraint of competition" in a particular field of trade by means of exclusion or control over the other firms. Many types of conduct can be included in this definition. In addition, many types of conduct are included in the definition of "unfair trade practices."

In the *Toyo Seikan Kaisha* case, the market was very concentrated. There were thirteen makers of cans in Japan; Toyo Seikan had 53 per cent of the market; if the shares of its affiliated companies were included, the share was 74 per cent. Some food processors tried to vertically integrate into making cans. Toyo Seikan threatened to cut off supply of other types of cans if the food processors began making cans.

The food manufacturers ceased the production of cans. The conduct by Toyo Seikan was a sort of exclusion of new entrants. In addition, Toyo Seikan restricted the sales and new investments of its affiliate companies. The JFTC ordered the conduct to cease.

Australia said that, in his view, for conduct to constitute "misuse of market power" under Australian law it must have an anticompetitive effect and, as well, it must be demonstrated to have an anticompetitive purpose. Section 46 says that a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of eliminating or damaging competitors, preventing entry or deterring or preventing competitive conduct. Private action is possible and, for Section 46, is the dominant form of action.

Some of the early concerns expressed about the balance to be struck in Section 46 were that much market power stems from efficiency and much competitive action is intended to and does damage competitors. Indeed, the Commission frequently receives complaints about unfair, though perhaps not anticompetitive, business behaviour and must take care that the law focuses on the economic effects of the use of market power.

In one case involving Section 46 taken to the High Court, *Queensland Wire Industries v BHP*, BHP had 97 per cent of the production of steel in Australia and there were almost no imports. BHP was the sole producer of the bars that were required for building fences on farms (Y-bar). QWI sold wire in competition with BHP's subsidiary. QWI sought to buy Y-bar from BHP but BHP refused supply except at "excessively high" price. There was substantial internal documentation that the purpose of the refusal to supply was to eliminate the competitor. The High Court called this a misuse of market power. Subsequently, the parties reached an agreement about the price of Y-bar.

"Purpose" is an element of the Australian law on "misuse of market power" because there is concern about the ability to judge whether an action is very competitive or anticompetitive and the purpose test acts to limit the scope of application of the law. With sufficient evidence, one can infer purpose from effects but generally one needs better evidence.

The law has been "touched up" with respect to telecommunications, both with respect to access and with respect to limiting actions that can be taken by the dominant incumbent in competition against the new entrant.

The Australian approach to intellectual property rights is to apply the Section 46 standard. For example, if there is a refusal to license or the imposition of a restrictive term in a license or assignment of intellectual property, then the general competition tests apply: the relevant market is defined (and can be substantially larger than the scope of the intellectual property rights) and the behaviour is examined for whether it has an anticompetitive effect and whether it has an anticompetitive purpose. With respect to the *Magill* case, if it had been heard in Australia there would have needed to be clearer evidence of anticompetitive purpose and a fuller analysis of competition.

Excessive prices under Australian law are dealt with under a separate, very limited price surveillance regime.

Germany, responding to a comment by the Spanish delegate, said that the concept of relative market power was seen as complementing the abuse of dominance provision in the law as both provisions deal with competition distortions stemming from market power. The Supreme Court confirmed that a company that is not in a dominant position could create the same kinds of distortions as a dominant firm

through abuse of relative market power. In current discussions in Germany about the reform of the competition law, the question of removal of the provision on relative market power has not been raised.

In cases dealing with relative market power, such as the *Rossignol* case, the issue is whether a small or medium-sized firm was in a position of dependency with respect to a particular firm. This can be ascertained only on a case-by-case basis. The *Rossignol* case was brought to the courts by the dealer; the Bundeskartellamt was not directly involved.

The *Swarovksi* case is an example of an abuse of dominance case. *Swarovski* had a dominant position for semi-finished artificial jewelry and had a strong position downstream in the market for finished artificial jewelry. *Swarovski* refused to supply a competitor on the downstream market. The Bundeskartellamt had to weigh the legally protected interests of the parties involved as well as take into account the intent of the competition law, i.e., to safeguard the freedom of competition and to keep markets open. *Swarovski* claimed that it had built up the downstream market and therefore could not be forced to supply a competitor. This argument was rejected. *Swarovski* also claimed that the downstream competitor offered almost identical products. This was considered to be an infringement of the law against unfair competition and was accepted by the Court as a valid justification for *Swarovski*'s refusal to supply.

The Chairman noted that it is an open question whether having built up a market is a valid justification for refusal to deal with a competitor.

Spain introduced a case, *Telefónica de España, S.A.*, which he characterised as typical of a monopolist opposing the liberalisation of markets in which it was formerly the legal monopoly. Currently, some services such as enhanced services are liberalised and other services, such as the telephone lines and "normal" local service, are monopolised. Entry into the liberalised markets requires the cooperation of *Telefónica* because it controls the telephone lines. In this case, *Telefónica* tried to impede the entry of another firm. *3C Communications España, S.A.* wished to offer credit card public telephones. While one issue in the case was whether or not this was an enhanced -- therefore liberalised -- service, the competition authorities focused on the fact that the monopolist firm refused to supply the lines without an order by the regulator. The competition authorities held that this decision properly belonged to the regulator and that *Telefónica*, by taking this decision into its own hands, abused its dominant position.

Sweden introduced an example of abuse of dominance in a newly liberalised sector, postal services. Each of the cases involving such sectors -- telecommunications, railways, energy -- have in common certain characteristics:

-- there are newly created markets so there is no reference to "normally functioning" markets; there is usually only one competitor, rarely two, trying to establish itself on the newly created market (so that the distinction between "protection of competition" and "protection of a competitor" becomes problematic);

-- the traditional monopolist is dominant and will remain so for many years (this is a different situation from a market in which a successful competitor has, over the years, gained a dominant position);

-- the new competitors nearly always rely on an input supplied by the traditional monopolist, such as access to the network in telecommunications and the universal network in postal services;

-- the traditional monopolist is not habituated to operating on a market, e.g., state firms usually do not have an adequate accounting system and may not have managers or directors with experience of operating in such an environment.

Postal services are fully liberalised in Sweden; no monopolies remain. Sweden Post has a universal service obligation to deliver letters. Entry has occurred only in very narrow service areas, the most profitable ones, and Sweden Post has objected to the so-called "creme skimming." Sweden Post tried to obligate clients to use Sweden Post for all their postal service needs. This was done through rebate schemes and lowering prices where it faced competitors. The rebate schemes made it impossible for clients to purchase some postal services from Sweden Post and other services from a competitor. This constituted almost all clients.

Pricing as an abuse of dominance

The Chairman introduced the topic by noting that the United Kingdom contribution said that excess prices and excess profits are important elements in the judgment of whether there are adverse effects of the monopoly situation on the public interest. In contrast the United States and Canadian contributions say that monopoly pricing is not really an abuse of dominance. Among the lines of reasoning provided is, even if monopoly pricing were an abuse then what would be the remedy? In the European Union and in Italy, monopoly pricing has been considered to be an abuse of dominance. The Italian contribution raises serious questions about the enforcement of the European law at the national level and the reasoning of the European Court of Justice in an authors' guild case.

The United States said that, in areas where high prices are believed to be a long-lasting problem, regulation is imposed and industry-specific expertise is applied to regulate. Interconnection and final product regulation by, e.g., the Federal Communications Commission in telecommunications, the Federal Energy Regulatory Commission in electricity, and so on is considered to be quite distinct from the general body of antitrust law. The antitrust authorities are wary of considering high prices as abusive because of the fear of creating broad pricing regulation. Note, though, that the competition authorities use high prices, margins and profits as evidence of dominant position and monopoly power, but do not consider them as abuse of dominance itself. However, the competition authorities will look at predatory pricing, price discrimination and other possibly exclusionary pricing schemes as potential instances of monopolisation.

One exception to the general rule regarding high prices are the recording artists societies (ASCAP and BMI) who were permitted to, essentially, set prices for those using their music. In these cases, which were not seen as single firm matters but rather as agreements among collections of artists, the price level is subject to antitrust oversight.

The general view in the United States is that the courts are not well suited to evaluating which prices are excessive, what rates of return are reasonable, what capital should be allocated to which activity and what the risk characteristics are of various industries.

Canada said that the Canadian law on abuse of dominance is primarily focused on exclusionary conduct rather than on the exploitation of consumers. This position is taken because price regulation is difficult, often involves inefficiencies and requires a lot of expertise, both in e.g., accounting and specific to the industry, which is not sufficiently available in the competition offices.

Canada also has performing rights societies. Rather than address those issues under the competition law as in the United States, they have a specific regulator, the Copyright Board.

The United Kingdom said that, when the MMC investigates a market, it will invariably assess and comment upon the level of profitability of any "monopolist" and hence will begin to assess the level of prices. One can draw inferences about market power from profitability. There are formidable problems of interpreting accounting data for purposes for which they were not designed and for assessing a risk-adjusted competitive rate of return, but the MMC has been doing this for many years and arguably has some expertise. Recall that the test in the United Kingdom is whether people have been performing in a way that is against the public interest, not whether they have been performing in a way that is an abuse of a dominant position. It is therefore not surprising that the agency charged with applying that test assesses whether prices in a market are excessive.

There have been cases in which the MMC has found that profits were excessive, prices were excessive and against the public interest and that something should be done to remedy the situation. It has concluded that if entry is impossible or unlikely over a reasonably foreseeable period of time then the government might be advised to regulate prices or profits. It has been concluded that prices in natural monopolies or highly dominant firms in recently privatised industries should be subject to price regulation. This thinking applies also to firms that have long been in the private sector. There are shortcomings to regulation but that does not mean that regulation should not be considered where markets cannot be made to operate efficiently. Three cases in which prices are or were regulated for some time were *Librium* and *Valium* (where the dominance arose from patent protection), condoms (which is almost a natural monopoly from economies of scale) and table salt (which is a duopoly where entry is virtually impossible because the two firms own all the underground brine). In a recent examination of a completed merger between two makers of gluten-free bread, the MMC recommended that the merger not be unscrambled but that the price of the gluten-free bread be regulated.

Only occasionally has the MMC, having found excessive profits, recommended price control. Instead, in many cases, the MMC makes recommendations that open up entry and does not recommend price control.

The Commission of the European Union said that, in the European Union, there is typically one performing rights society in each country. There is a celebrated case in which it was alleged by discotheques that SACEM, the performing rights society in France, charged much higher prices than the counterpart societies charged in other countries. The question was, Is this a legitimate yardstick? The Court of Justice said that it probably was. As the case was so fact-specific much other litigation was pending in the French courts, French courts and French competition authorities were allowed to take up the matter. Hence, European Union law has recognised a possible breach of Article 86 by excessive pricing where the price is compared with that in a comparable market.

Italy said that, as in the European Union, the Italian law considers excessive pricing to be an abuse of dominance. In general, the Authority holds the view that high profits or high prices, *per se*, should not be considered as abusive as it is more efficient to remove the causes of high prices or profits, perhaps regulatory restraints or behaviour by the dominant incumbent. If the only remedy is to mandate lower price, then the incumbent remains and entry may be discouraged. I.e., there may be dynamic effects that lead to further inefficiencies. Where excessive prices are related to tying or other types of abuse of dominance, then they would be considered abusive.

The Competition Authority received complaints about pricing by the Italian Society of Authors, Composers and Publishers (SIAE). The Authority made its decision after the SACEM case in France and

the decision by the European Court of Justice, and, under Italian law, the Authority had to refer directly to principles of European law. Therefore, the Court of Justice decision had precedential, binding status.

In the SACEM case, the Court of Justice said that, if prices are different in different national markets then this is evidence of a dominant position in the high-priced countries and, if the higher price cannot be justified then the dominant position is being abused. The Court of Justice took into account differences in demand by five different standard types of discotheques.

The Competition Authority had difficulty in finding a standard by which to judge whether or not the prices in Italy were excessive. The European Court of Justice had used the average price for Member States but, logically, this standard could be used only once. Further, no adjustment in the SACEM case was made for differences in collection costs, level of *de facto* taxation on discotheques, etc. In Italy there was an additional legal difference in that SIAE was a legal monopoly set up for the purpose of maximising the returns to authors. It was felt that SIAE could be subject to price control or to collective bargaining between SIAE and the discotheques. It would seem to be difficult to regulate the return on an artist's performance.

The Authority chose not to intervene on the level of tariffs but rather on other issues. It did end the discrimination in favour of major Italian singers.

International Trade Perspective

Ms. Janow (Consultant to the Trade Secretariat) discussed the difference in perspective between international trade officials and competition officials with respect to exclusionary practices by dominant firms. Her paper contains some analysis of comparative jurisprudence in the United States, European Communities and Japan as well as two scenarios of cross-border action by a dominant firm. (One scenario concerns denial of market access by a dominant firm and the other scenario concerns leveraging.) The paper raises the question, Is exclusionary or anticompetitive conduct by a firm with substantial market power only a concern of domestic competition authorities or can it raise market access issues as well? What are some trade policy approaches to those issues? The paper argues that abuse of dominance can indeed give rise to market access problems.

Circumstances in which there are cross-border effects include when a dominant firm ties up a distribution system that is difficult to duplicate, denies access to an essential facility, refuses to procure from foreign sources or when a dominant firm requires financially linked or beholden buyers not to deal with foreign sources of supply. Under these circumstances, the actions of the dominant firm can result in market foreclosure or the reduction of competition in the market. Hence, in theory, the harm is to both home market customers and foreign exporters seeking access.

From a competition perspective, dominant firm conduct would be analysed to determine whether it had efficiency reasons and whether the same efficiency savings (if any) could be gained through a less competitively harmful means. Remedies to which competition officials first turn involve the domestic enforcement of competition laws, which raises the issues of the degree of enforcement and manner of enforcement. While some jurisdictions provide for "self-help," this recourse is limited, in practice, by the rigorous of methodology of antitrust examination and the difficulties of establishing violations in a cross-border context --e.g., differences in discovery procedures, variations in evidentiary and jurisdictional requirements, etc. The absence of internationally agreed disciplines on private restraints, and differences

in standards and application of domestic laws explain part of the reason why the trade community's concerns surfaces.

With the internationalisation of markets, the growing perception is that private restraints are foreclosing or distorting access to markets. This concern has surfaced notably in the bilateral context, especially between the United States and Japan, in circumstances when dominant firms have used vertical restraints in, e.g., glass, automobiles and consumer photographic film. In contrast to the relatively clear and established methodology for identifying effects of restraints in the antitrust context, the trade policy response has been to seek improved access to the market in question through government to government negotiations and in some cases to invoke other self-help remedies, if available. The negotiations have been concerned with a broader and somewhat different range of concerns than those raised by competition analysis, including not only the conduct of the firm itself but also the degree of enforcement of the competition law and structural features of the market, which together affect market access. This is driven in part by fairness concerns that are broader than and different from competition concerns which are also linked to basic trade policy principles of transparency, accountability, national treatment, etc.

The resulting agreements between the United States and Japan, for example, are illustrative of the difference of approach taken by trade and competition concerns. They contain general undertakings by the local government to vigorously enforce the competition laws, to monitor business practices, to encourage more open and competitive markets and to consider a variety of structural features of the business and policy environment that are seen as affecting access. These latter undertakings recognize that some practices may not violate local or even American competition laws but nonetheless very much affect the opportunities for access to markets. A question is whether these kinds of general undertakings create a more pro-competitive market or whether they create a "bully pulpit" for continued government supervision of the set of undertakings that, over time, can lead to more competitive environments.

A second issue discussed in the paper is leveraging into export markets and price predation. In theory, this can arise when a firm can support its activities abroad through exclusionary practices in its home market and predatory pricing practices abroad. It is now exceptionally hard in the United States to win an antitrust lawsuit alleging predatory pricing unless one can show a capability for recoupment of losses in the target market. But price predation is more concerned with effects in the target market than with foreclosure in the home market. Clearly, the methodology employed in antitrust analysis to predatory pricing runs head-on into the methodology and approach employed in antidumping policy. A central concern of antidumping policy is one of fairness and the effects of dumping on competitors in the target market rather than competition as such in the target market. Neither antidumping methodology nor competition policy applied to price predation is principally concerned with foreclosure in the market of the exporting firm.

In summary, the paper argues that beyond the "core conduct" with respect to abuse of dominance, i.e., firms with substantial market power using that power to control prices, limit production and keep out competitors, there appears to be considerable disagreement about the competitive effects of other practices such as vertical restraints. Much of these differences is influenced by the differing objectives, such as efficiency and integration. Dominant firm conduct can have effects internationally and has already given rise to substantial market access concerns. A significant feature of these are perceived lack of enforcement or discriminatory enforcement of local laws. Trade policy might ask whether even this perspective is sufficiently broad or whether related issues such as regulatory, industrial structure and business environment factors should also be added to an examination of effective access to markets. This suggests that vigorous enforcement of competition law is a necessary but not sufficient condition to foster open and competitive markets. It needs to work in tandem with trade policy initiatives, which increasingly, by themselves, cannot deal effectively with the market distorting effects of private restraints.

General Discussion on Abusive Conduct

The Chairman recalled the differences in laws, such as in treatment exclusionary practices by Spain and Germany and in treatment of intellectual property rights by Australia and the European Union. Differences can arise by different sensitivities to the same problem, e.g., the trade perspective is very broad relative to competition perspectives.

The Commission of the European Union, responding to the Australian delegate's comments on intellectual property rights, said that there is no doubt that there is a fine line between subjecting the exercise of intellectual property rights to competition scrutiny and interfering with the very existence of property rights. As a matter of constitutional law, property rights are entirely a matter for the Member States and not for the Community, but the rules of the Treaty of Rome apply to the exercise of property rights.

Regarding the *Magill* case, until fairly recently in Ireland and the United Kingdom, the television stations owned the copyright of the list of their broadcasting schedules. They license them on a daily basis to the daily papers and on a two-day basis to the weekend papers but refused to license to anybody on a weekly basis. Each of the three main stations -- *BBC* and *ITV* in Britain and *RTE* in Ireland -- published their own highly profitable, highly successful listings magazines with only their own listings. Therefore, a weekly magazine listing all the main broadcasters' schedules did not exist in the United Kingdom or Ireland. The Commission reasoned that monopoly rights in related markets were being used to prevent the emergence of another market with clear and known demand.

This is similar to another rationale that is applied under Article 90 when considering national, usually publicly owned, monopolies. (In the *Magill* case, Article 90 did not apply because it is addressed to States.) If it is argued that monopolies must do something in the public interest but it is demonstrably failing to serve the market which it was created to serve, then Community law says that that monopoly must, to that extent, be abolished.

Regarding the approach described by the Australian delegate, giving consideration to intent, even if the television broadcasters had provided evidence of lack of intent to prevent the emergence of a market for universal weekly listing magazines, this would not have changed the view of the Commission.

Finland said that the law on market dominance and its abuse is under increasing pressure. There is, increasingly, a tradeoff between producing economically reasonable solutions to the problems of the conduct of dominant firms, and the legal certainty required by the business community and the need for a rapid conclusion of an investigation and implementation of a solution. Market dominance is a dynamic phenomenon and is a special case of the competitive advantage for which firms strive. Most cases occur when the original competitive advantage is in the process of being eroded. This results in several problems. Market definition is difficult because part of this erosion process is in the form of broadening of markets by new substitutes. Price discrimination is usually seen as a means of retarding the erosion of market power and therefore stringent limits have been placed on price differentiation among consumers or trading partners. However, as the process proceeds the firm eventually can no longer retard the process; deciding at what point the firm has the right to "meet the competition" and has an equal right to compete is increasingly difficult.

In a recent case decided at the Supreme Administrative Court concerning the petroleum refining industry, the state-owned, dominant firm *Neste* was required to maintain a pricing policy based on relative

costs while at the same time it was allowed to meet competition by providing rebates on the basis of the customers' capacity to import petroleum products into Finland.

Increasingly, competition officials are facing problems of, on one hand, maintaining competition and preventing the dominant firm from stifling its competitors and, on the other hand, allowing the dominant firm to "meet the competition" and letting it operate on the market without distorting competition between the dominant firm and its competitors. These problems put competition officials under pressure to promote economically reasonable solutions and the need to maintain clear rules for the business community.

Canada, responding to comments about the relative ability for specialised agencies and antitrust authorities to regulate prices, said that specialised agencies can better immerse themselves in the specific facts of an industry but that antitrust authorities may be less susceptible to regulatory capture.

A BIAC representative addressed the delineation of abusive practices. Competition enforcement authorities must decide whether they seek to protect competition or protect competitors. The choice of objective affects *inter alia* what constitutes evidence of a violation. For example, if a firm has as its goal to be a monopoly, is this an anticompetitive intent? If a firm has internal documents that say, "If we do x then we will be a monopoly," does that imply that conduct x constitutes an illegal conduct? If protection of competitors is an objective of competition policy, then this could constitute an anticompetitive intent.

BIAC believes that the goal of competition policies should be to protect competition, rather than competitors, and that the touchstone for determining competition is a welfare or efficiency analysis. BIAC encourages authorities to take that approach in any sort of abuse of dominance analysis.

BIAC further urges some modesty in assessing whether any particular conduct in a particular circumstance is, in fact, anti-competitive, i.e., welfare-reducing. BIAC submits that most conduct, even by dominant firms, is likely to be welfare-enhancing and it is difficult to identify those few instances in which such conduct is likely to be efficiency-reducing.

Relief

Ireland said that Irish law on abuse of dominance is modeled after Article 86 and currently allows parties to seek an injunction. The law is being amended to permit the imposition of fines. Another remedy is available under Section 14 whereby the Minister, following an investigation by the Authority, can put an order before Parliament which effectively permits the Minister to impose regulatory control or indeed to order the break-up of the dominant position.

On the face of it, fines would appear to be a stronger deterrence than an injunction. However, under Irish law a criminal level of proof would need to be satisfied and that would seem to be very difficult to meet. Second, a dominant firm may simply pass on the fine to its customers. Third, in the event of abuse to eliminate a competitor, the imposition of financial penalties -- fines or damages -- might occur after the behaviour has succeeded in its objective and the fine may be smaller than the benefit from having eliminated a competitor. In the aftermath of the *Magill* case, for example, Magill exited the market.

Regulatory controls are widely applied to dominant firms in public utilities. The information requirements are so great that a general competition authority or a court would have difficulty in

effectively operating them. On the other hand, one advantage of regulation by a general agency may be to reduce the risk of regulatory capture.

Ireland addressed divestment as a remedy. It is difficult to get a political decision to order divestment for state-owned or for private firms. One reason for the reluctance to order divestment is the assumption that property rights are more sacrosanct than freedom to contract. There may be fact situations in which interference with freedom to contract will be as serious for a firm as changing its ownership of property.

Competition law is the implementation of a policy that is intended to affect the economy at large whereas courts are concerned with individual rights and individual wrongs and they are not makers of policy decisions. When a court is asked to order divestment, it is inevitably being asked to make a policy decision. After the Irish law is amended as expected, the Authority will have a choice whether to ask the Minister or ask a court to order divestment and it will be difficult to know which will be the better route.

Injunctions are perceived as having serious disadvantages, but these may also be advantages. They are perceived as being short-term and able to address only to specific behaviour, but when a dominant firm is about to eliminate a competitor these would seem to be advantages. For example, in one case the effective remedy was simply the injunction of specific advertising.

The United Kingdom said that, in the British system, no fines can be levied. However the Minister can order structural relief, the imposition of regulation of prices and modification of behaviour of firms. These remedies can be imposed only after an investigation by the MMC and after a finding that conduct has been against the public interest. The remedies can be enforced by various means.

In the course of reviewing old undertakings, the Office of Fair Trading sponsored some research on the effect of the undertakings. The researchers studied structural changes and performance of the participants in the market, using interview techniques. They found that structural relief was more effective than behavioral remedies but did not address the costs of imposing structural change. Undertakings given to modify distribution arrangements, contract terms and other aspects of behaviour were seen to have had little effect, usually because firms found another method to secure customer loyalty. The authorities often failed to anticipate the strategic response of firms to the imposition of behavioural remedies. The research is not yet finalised.

The United States said that the American authorities rely, by and large, on injunctive relief -- prohibiting the firm from continuing to engage in the anticompetitive conduct -- as they did in the florist case, the ATM case and the Microsoft case. Indeed, when choosing which cases to pursue and investigate, the authorities ask whether there will be an effective relief. The remedy may go further, e.g., the structural remedy applied in the famous *AT&T* case, but this is relatively rare. Further, most remedies are settled in the form of a consent decree rather than going to court.

In addition, private action is very important in the United States. Because successful private plaintiffs are awarded treble damages plus attorneys fees, either individual suits or class action suits on behalf of classes of consumers, can result in very substantial financial penalties.

The results of the British study, which not yet complete, may need to be carefully interpreted. The imposition of price regulation or a structural divestment results in clearly visible effects in the market whereas the market effects of the imposition of behavioural remedies are much harder to trace. Further, the costs of imposing the remedies -- e.g., perhaps diminishing efficiencies -- need to be included in

assessing the total welfare effect. Finally, the deterrence effects of remedies on firms' future behaviour should be included in the study.

General Discussion on Relief

Sweden noted that the comments on the British study apply as well to measurement of *de facto* enforcement of competition law. If, e.g., there is a settlement that is believed to take care of abusive behaviour, would this be considered more lax enforcement than imposing a very high fine?

To provide a follow-up to the Swedish Post cases discussed earlier, in 1995 one of the competitors to Swedish Post went into receivership and the Competition Authority permitted Swedish Post to acquire it because the Authority saw no alternative. The Authority required that the former competitor be held in a separate company and that the services it had been providing be continued.

A BIAC representative noted that, with respect to behavioural remedies, markets change rapidly and time limitations should be a part of such remedies. If a behavioural remedy has not had the intended effect after, say, ten years, then it is unlikely to do so after ten years and if it has had the intended effect then it is likely, after ten years, hindering the competitive behaviour by a competitive firm.

The Chairman thanked participants for their thoughtful contributions and interventions and closed the meeting.

AIDE-MEMOIRE DE LA DISCUSSION

Note du Secrétariat

Le Président, M. Jenny, subdivise le débat en trois points : la définition du marché pertinent et de la position dominante, les comportements abusifs et les mesures pouvant être prononcées. Chacun de ces points donne lieu à une présentation suivie d'un débat général.

Définitions

Le Président note combien il est difficile de définir la "puissance sur le marché". La démarche traditionnelle consiste à définir le marché, à évaluer si l'entreprise ou le groupe d'entreprises détiennent une puissance sur le marché ou est en position dominante et, pour finir, à déterminer si l'entreprise ou le groupe d'entreprises ont abusé de leur puissance sur le marché. A en juger par les contributions de certains pays, cette démarche soulève des difficultés du point de vue de l'analyse économique parce que, dans une certaine mesure, les principes de définition du marché utilisés habituellement dans des cas de fusion nécessitent souvent des modifications avant de pouvoir être appliqués de façon appropriée aux cas d'abus de position dominante ou de monopolisation**.** La contribution canadienne examine les problèmes méthodologiques qui se posent pour la définition du marché pertinent en cas d'abus de position dominante et présente trois cas pour illustrer ces problèmes.

Les Etats-Unis font une nette distinction entre la "monopolisation" et le "monopole", c'est-à-dire entre la création ou le maintien d'un pouvoir de monopole ou d'une puissance sur le marché, d'une part, et l'exercice du puissance sur le marché, d'autre part. Le simple exercice du puissance sur le marché, par exemple au moyen de la fixation des prix, ou la détention d'une puissance sur le marché ne sont pas en soi illicite en droit américain. Les activités destinées à créer ou à accroître un pouvoir monopolistique relèvent de l'article 2 de la loi Sherman. Il s'agit d'une distinction fondamentale, formulée il y a plus de 50 ans (dans l'affaire *Alcoa*) : "Il ne faut pas s'en prendre, lorsqu'il est victorieux, à celui qu'on a incité à jouer le jeu de la concurrence". Tout en reconnaissant les dangers d'un pouvoir monopolistique, les autorités américaines chargées de la concurrence et les tribunaux américains ne souhaitent pas étouffer une concurrence qui peut parfois aboutir à une position dominante. Cela veut dire que les responsables américains de la concurrence recherchent les comportements d'exclusion, qui empêchent des entreprises rivales de livrer efficacement concurrence ou de survivre. Les comportements qui sont légitimement bénéfiques pour les consommateurs ou pour l'efficience économique sont autorisés. Autrement dit, on interdit certains comportements et non l'exercice d'un pouvoir sur les prix. Lorsque la puissance sur le marché est si durable ou si important que les mesures dont disposent les autorités chargées de la concurrence ne suffisent pas pour entamer la puissance sur le marché, on met en place une structure réglementaire sectorielle plutôt que d'appliquer les mesures d'ensemble relevant de la politique antitrust. Aux Etats-Unis, les procès antitrust privés sont bien plus nombreux que les actions intentées par la Division antitrust ou la Federal Trade Commission, ce qui a un effet très dissuasif sur les comportements de monopolisation.

Comme le note le Président, on ne peut appliquer sans modification la méthode de définition du marché retenue dans les enquêtes en matière de fusions, par exemple dans les *Merger Guidelines*, aux cas de monopolisation. En effet, ces règles sont conçues pour détecter des fusions qui aboutiront à une majoration des prix, alors que, dans les affaires de monopolisation, on s'intéresse souvent aux pratiques qui empêchent une baisse des prix. Malgré tout, il existe des liens étroits entre les deux types d'affaires du point de vue de la définition du marché.

On peut considérer que l'analyse comporte trois stades : la définition du marché, l'évaluation de la puissance sur le marché et l'appréciation du comportement. La définition du marché n'est qu'un moyen pour déterminer si le comportement en cause a été préjudiciable aux consommateurs et a porté atteinte à la concurrence. Lorsqu'on a directement la preuve d'un tel préjudice, par exemple en cas d'exclusion de concurrents directs qui seraient plus efficaces, on peut se passer de cette phase de définition du marché. M. Shapiro considère, et c'est là une opinion qui n'est pas nécessairement celle des autorités chargées de la concurrence, que pour la phase même de définition du marché il faut se situer dans l'optique du comportement précis qui est contesté. A titre d'exemple, si l'on se trouve devant un comportement d'exclusion, on prendra en compte les entreprises qui ont été exclues, les produits ou les services qu'elles offraient et l'incidence -- sous la forme de prix plus élevés ou d'une moindre qualité -- de l'exclusion sur la position de l'entreprise sur le marché. Dès lors, même si une entreprise détient un monopole, on examinera ses concurrents les plus sérieux pour déterminer si le comportement d'exclusion a pour effet d'éliminer ces concurrents ou de réduire leur capacité concurrentielle.

Dans certaines affaires de monopolisation, on procède à une définition du marché et il faut d'ailleurs le faire. La puissance sur le marché est une question de degré ; toute entreprise fait face à une certaine concurrence à la marge, comme l'illustre l'affaire *Cellophane*, qui remonte aux années 50. Ce qu'il faut se demander, c'est à quel point les produits sont substituables, c'est-à-dire quel est le pouvoir que détient l'entreprise -- en termes, par exemple, d'avantages sur le plan des coûts et de la qualité -- par rapport à ses concurrents les plus proches.

En dehors de la définition du marché et de la détermination des parts de marché, les conditions d'entrée sont importantes lorsqu'on veut procéder à une évaluation. Une part de marché de l'ordre de 60 à 70 pour cent est généralement l'indice d'un pouvoir monopolistique, qui correspond à un degré élevé de puissance sur le marché.

Enfin, il est peu probable que les autorités américaines chargées de la concurrence intentent une action en vertu de l'article 2 de la loi Sherman contre une entreprise qui ne détient que depuis peu un pouvoir monopolistique, ce qui ne sera pas le cas d'une entreprise détenant un pouvoir de monopole depuis un an ou deux, voire généralement davantage.

Le Canada présente la note canadienne, essentiellement consacrée à la définition du marché en tant qu'instrument d'évaluation de puissance sur le marché dans les cas d'abus de position dominante. L'analyse de puissance sur le marché et la définition du marché sont fondamentales si l'on veut appliquer correctement le droit de la concurrence dans ces cas. Un grand nombre de pratiques dans lesquelles on voit couramment un abus de position dominante peuvent en fait avoir une finalité pro-concurrentielle légitime, selon le contexte spécifique du marché. Pour déterminer si, dans une situation donnée, ces pratiques sont anticoncurrentielles, il faut analyser leurs liens avec la puissance sur le marché. En dépit de certaines difficultés, la définition du marché est un instrument utile pour évaluer la puissance sur le marché ou, au moins, pour éviter certaines erreurs fondamentales.

La définition du marché est particulièrement délicate dans les affaires d'abus de position dominante. Dans le domaine de l'analyse des fusions, la "méthode du monopoleur hypothétique" s'appuie

sur un critère prospectif de majoration des prix, alors qu'en cas d'abus de position dominante on pourra se trouver face à un monopoleur effectif. Puisque les consommateurs renonceront toujours à un produit si son prix subit une majoration suffisamment forte (c'est pour cela même qu'on a pu parler “d’illusion” dans l'affaire *Cellophane*) ce n'est pas en se demandant quelle serait la réaction des consommateurs à une nouvelle hausse des prix qu'on pourra déterminer de façon fiable s'il y a ou non puissance sur le marché.

Quelques grands principes peuvent être utiles pour définir les marchés pertinents dans les cas d’abus **:**

-- il faut garder à l'esprit les problèmes sous-jacents qui sont à l’origine de la situation. Par exemple, si les entrants potentiels n'entrent sur le marché que si les prix augmentent, il n'y a pas alors à les prendre en compte pour déterminer si les prix baisseront dès lors que les entreprises en place se verraient interdire certaines pratiques d'exclusion ;

-- chaque fois que possible, il faut considérer les caractéristiques matérielles des produits, leur substituabilité pour certains types d'usage, les préférences établies des consommateurs, etc. En s'appuyant sur ces caractéristiques, on court le risque d'une analyse pointilliste, mais l'expérience montre que cette démarche permet de définir correctement dans beaucoup de cas les marchés pertinents.

Dans l'affaire *NutraSweet*, la seule entreprise qui fournissait au Canada l'aspartame, édulcorant artificiel, soutenait que le marché pertinent comprenait les autres édulcorants artificiels et éventuellement le sucre. Le Bureau de la politique de la concurrence a fait valoir -- et c'est ce point de vue qui l'a emporté-- qu'aucun autre édulcorant n'était un produit de substitution et il a fondé uniquement son argumentation sur les propriétés diététiques de l'aspartame, les utilisations culinaires et les problèmes de sécurité que posaient les autres édulcorants. Dans l'affaire *Laidlaw*, il y a eu un débat important pour savoir si certains villages éloignés faisaient partie du marché local des services de collecte des déchets. Le Bureau de la politique de la concurrence a fait valoir que le marché allégué par le défendeur n'était pas compatible avec l'usage normal des camions, les coefficients de chargement liés à la collecte des déchets, etc. En fait, en voulant inclure les villages éloignés dans le marché pertinent, le défendeur donnait un exemple classique d'illusion du même type que dans l'affaire *Cellophane*. Dans l'affaire *A.C. Nielsen*, le défendeur était l'unique fournisseur au Canada de services d'études de marché à analyseur électronique. Le Bureau de la politique de la concurrence a établi que ce type de services était supérieur aux autres types de services d'études de marché offerts par d'autres fournisseurs et en était très différent, en définissant ainsi le marché pertinent et en établissant que Nielsen était le seul fournisseur sur ce marché. Il a pu ainsi démontrer que les pratiques auxquelles se livrait Nielsen étaient effectivement des pratiques d'exclusion.

Dans certains cas, il est possible de court-circuiter le stade de la définition du marché et de passer directement à la preuve de l'existence d'effets d'exclusion et de résultats monopolistiques. Mais ce processus soulève lui-même certaines difficultés.

Le Président note que dans ce débat on s'écarte de la démarche traditionnelle en s'orientant vers une approche dans laquelle la position dominante et le marché pertinent sont induits de la nature de la pratique, résidant dans son effet d'exclusion, ce qui -- comme on l'a fait observer -- peut susciter certaines préoccupations dans les milieux d'affaires. Il signale qu'au Royaume-Uni la Monopolies and Mergers Commission (MMC) a une très grande latitude pour induire une position dominante d'une pratique.

Le Royaume-Uni indique que le système britannique est totalement administratif et ne comporte aucune interdiction de certains comportements, particuliers ou généralisés. Il prévoit un examen au cas par cas sur le point de savoir si un comportement ou une situation sur le marché ont des effets qui portent

atteinte à l'intérêt public, notion assurément plus large que la promotion de l'efficience économique. La compétence des autorités britanniques ne repose pas sur la définition économique d'un marché ni sur l'existence d'une situation précise de domination ou de puissance sur le marché. Les critères de compétence sont les suivants : on doit être en présence d'une entreprise ou d'un groupe d'entreprises opérant d'une façon similaire de nature à nuire à la concurrence et détenant 25 pour cent ou plus de l'offre d'un produit ou service. Dans la pratique, on prend en compte un large éventail de biens à cet effet et un large éventail de structures de marché, depuis la position dominante jusqu'à l'oligopole peu structuré. Une fois que la MMC a établi sa compétence, elle doit déterminer le marché pertinent pour l'évaluation du comportement des entreprises faisant l'objet d'une enquête. La MMC doit examiner si les entreprises exercent effectivement une puissance sur le marché sur un marché défini "de façon adéquate", puis examiner le comportement de ces entreprises. Etant donné que la MMC opère dans un cadre administratif, son raisonnement et ses conclusions ne sont pas soumis aux types de contrôles qui s'exerceraient dans un cadre judiciaire et avec une procédure accusatoire.

Pour définir le marché, la MMC s'appuie sur la substituabilité au niveau des acheteurs et, dans une certaine mesure, au niveau des offreurs. Elle met en oeuvre une démarche similaire à celle qu'a décrite le délégué canadien, c'est-à-dire qu'elle s'appuie sur les caractéristiques fonctionnelles et matérielles des produits. La question qui se pose est de savoir s'il est rationnel de s'attacher à la substituabilité au niveau de l'offre et aux barrières à l'entrée avant d'examiner la substituabilité au niveau de la demande, sachant que ces deux démarches peuvent aboutir à des réponses différentes.

En résumé, c'est un mécanisme en deux phases qui s'applique au Royaume-Uni. Ce mécanisme permet facilement, dans une première phase, d'atteindre le seuil de déclenchement d'une enquête, mais la deuxième phase consiste en une évaluation à caractère économique pour la définition du marché et la détermination de puissance sur le marché.

Un représentant du BIAC aborde la question de la "domination conjointe". Un grand nombre d'entreprises opèrent de plus en plus sur des marchés internationaux, voire mondiaux. Cela suppose que les conditions de concurrence dans les différents pays sont suffisamment similaires pour que les marchés ne soient pas distincts. La question est maintenant de savoir s'il faut harmoniser ou faire converger davantage les règles auxquelles ces entreprises à champ d'action international sont soumises. C'est dans ce contexte que se situe le problème de la "domination conjointe". Dans l'affaire du verre plat, soumise à la Commission européenne, seules les parties qui avaient des liens économiques étaient susceptibles d'être considérées comme conjointement dominantes. Plus tard, dans la décision *Alcatel*, la Commission européenne a indiqué qu'il pouvait y avoir domination conjointe lorsqu'on observait des comportements parallèles, mais que les preuves de collusion n'étaient pas suffisantes.

La notion de domination conjointe a été approfondie dans le secteur de la réglementation du contrôle des fusions. La Commission a développé l'idée qu'il peut y avoir domination conjointe lorsqu'on se trouve en présence de quatre oligopoleurs ou moins, sans qu'il soit besoin de démontrer que les parties sont unies par des liens économiques ou coopèrent d'une autre manière. Cette approche est très différente de celle qui prévaut aux Etats-Unis, où il ne peut y avoir monopole partagé que s'il existe des preuves suffisantes d'un comportement collusoire.

La question de savoir s'il faut des liens économiques entre les parties pour qu'elles puissent être considérées comme conjointement dominantes dans le cadre de l'article 86 du traité de Rome est importante, parce que le critère prévu à l'article 86 n'est pas un critère pur et simple d'efficience. Une partie des spécialistes et des entreprises estiment qu'il s'agit essentiellement d'un critère de "loyauté" dans des situations déterminées, interdisant dans ces situations les pratiques grâce auxquelles l'entreprise a pu réussir. Lorsque l'article 86 est utilisé pour promouvoir une concurrence loyale et non une concurrence

efficiente, le fait d'accepter l'existence d'une domination conjointe à un niveau relativement bas de part de marché pour les diverses entreprises a pour conséquence d'abaisser le seuil auquel les règles de loyauté de la concurrence s'appliquent. D'ores et déjà, le seuil pris en compte dans l'Union européenne pour la position dominante est une part de marché de l'ordre de 50 pour cent, alors qu'aux Etats-Unis, la part de marché se situe entre 70 et 90 pour cent. Cette attitude différente à l'égard des pratiques normalement acceptées constitue un sérieux problème pour les entreprises à champ d'action international.

Le Président note que cette intervention a permis d'élargir la notion de position dominante. On en arrive ainsi au deuxième volet de la question de la définition, qui a trait à une autre notion pour laquelle on utilise diverses dénominations, à savoir la dépendance économique, la puissance relative sur le marché, la position dominante de négociation ou le pouvoir dominant de négociation. Trois contributions écrites, de l'Allemagne, du Portugal et du Japon sont consacrées à cette notion.

L'Allemagne indique que la notion de puissance relative sur le marché s'inscrit dans le cadre de l'interdiction générale de la discrimination par les entreprises dominantes et par les entreprises puissantes. Du point de vue allemand, les abus et les pratiques discriminatoires auxquels se livrent les entreprises puissantes peuvent avoir les mêmes effets de distorsion que l'abus de position dominante. La différence entre ces notions est la suivante : si une entreprise domine le marché, elle est dominante sur l'ensemble du marché, alors qu'une firme puissante n'est en position de force que par rapport à certaines entreprises. La question du pouvoir relatif de marché se pose essentiellement dans deux cas de figure :

-- lorsqu'une entreprise est dépendante d'un producteur (par exemple, un concessionnaire automobile qui dépend d'un constructeur automobile, car il ne peut que difficilement changer de constructeur), mais que le producteur n'est pas lui-même en position dominante ;

-- lorsqu'une entreprise, par exemple un détaillant ou un distributeur, doit offrir certains produits dans sa gamme pour être concurrentiel. On peut citer à cet égard l'affaire *Rossignol*. Dans cette affaire, le fabricant de skis -- qui détenait une part relativement faible du marché -- avait refusé de vendre à un détaillant pratiquant des prix discount, mais ce détaillant voulait absolument proposer à ses clients la marque Rossignol pour pouvoir être concurrentiel (les skis Rossignol étaient en vente dans tous les autres magasins et bénéficiaient d'une notoriété spécifique sur le marché). La loi permettait d'obliger le fabricant à vendre au détaillant. A l'époque, le droit allemand de la concurrence venait d'être modifié de façon à ne plus protéger les accords de prix imposés.

Le Portugal signale que la loi portugaise sur la concurrence n'étant en vigueur que depuis deux ans, la notion de dépendance économique n'a encore donné lieu à aucune affaire. Cette notion a été introduite dans la loi en raison d'une profonde modification de l'équilibre entre les grands détaillants et les grands producteurs. On a jugé nécessaire de s'appuyer sur cette notion dans la loi sur la concurrence parce que, tout en ne constituant pas un abus de position dominante, les pratiques en cause peuvent nuire au bon fonctionnement du marché.

Le Japon fait observer que l'abus de position de négociation est une pratique commerciale déloyale qui est interdite par l'article 19 de la loi antimonopole. Une pratique commerciale déloyale consiste en un comportement qui a tendance à empêcher toute concurrence loyale, notamment un comportement ayant une influence négative sur les concurrents du fait de la fourniture de produits et services concurrents à un prix plus bas. La Commission japonaise de la concurrence a recensé 16 catégories de comportements pouvant donner lieu à cette interdiction. Les pratiques commerciales déloyales comportent trois aspects qui se rattachent à la politique de la concurrence : la réduction de la

concurrence, l'assurance de la loyauté du mode de concurrence et l'érosion des fondements de la concurrence. L'abus de position dominante de négociation concerne les deux derniers aspects.

La position dominante de négociation vise la supériorité économique relative d'une entreprise dans une transaction. Elle ne vise pas une position absolue sur un marché. Il peut y avoir en particulier position de négociation dominante dans des transactions à long terme. Les Directives concernant la distribution de la Commission japonaise de la concurrence contiennent des exemples de position de négociation dominante et des exemples de comportements concrets qui peuvent être considérés comme un abus de position dominante de négociation.

Dans l'affaire *Mitsukoshi Ltd.* (1982), il était reproché à un détaillant d'abuser de sa position dominante de négociation. Au Japon, il existe de nombreux cas où de grands détaillants, notamment des grands magasins et des grandes surfaces, obligent le producteur à assumer certaines dépenses liées aux produits, qui devraient être à la charge du détaillant. Mitsukoshi est le premier grand magasin et le deuxième détaillant au Japon et il bénéficie d'un grand prestige. Les cadeaux dont l'emballage porte le nom Mitsukoshi sont traditionnellement très appréciés. C'est pourquoi les fabricants veulent traiter avec Mitsukoshi. Dans cette affaire, Mitsukoshi exigeait des fabricants qu'ils supportent une partie de ses coûts de rénovation et des frais de certaines manifestations commerciales spéciales sans véritablement justifier ces charges ou obtenir clairement le consentement du fabricant. La Commission japonaise de la concurrence a conclu que Mitsukoshi détenait une position de négociation dominante et que ces mesures étaient abusives.

Le Président note que le droit français comporte des dispositions similaires au droit japonais.

Débat général sur les définitions

L'Irlande signale que, depuis l'entrée en vigueur de la loi irlandaise sur la concurrence, à la fin de 1991, les tribunaux irlandais ont été saisis d'un petit nombre d'affaires d'abus de position dominante. Dans ces affaires, les juges ont eu, la plupart du temps, tendance à ne pas examiner de près la question de la définition du marché et à ne pas formuler d'attendus sur ce point. Il semble donc que la définition du marché soit une question particulièrement délicate pour les juges et qu'il soit difficile de sensibiliser les juges à cette notion complexe.

A la demande du ministère compétent, l'Autorité chargée de la concurrence a entrepris une étude du secteur de la presse. L'Autorité a examiné de façon approfondie la question de la définition du marché, l'un des principaux problèmes étant de savoir si les marchés étaient les mêmes pour les journaux irlandais et ceux du Royaume-Uni. Pour la presse à sensation, c'était semble-t-il le cas, alors que pour les autres quotidiens de qualité de format plus large la situation paraissait différente, les journaux du Royaume-Uni ne représentant qu'une faible partie des ventes en Irlande. L'Autorité s'est attachée aux conséquences des modifications des prix. En 1984, les journaux irlandais et ceux du Royaume-Uni étaient vendus à peu près au même prix à Dublin, environ 40-45 pence. Dix ans plus tard, le prix des journaux irlandais était de 85 pence et celui des journaux du Royaume-Uni de 45 pence environ, mais seulement 1 500-2 000 exemplaires des journaux du Royaume-Uni étaient vendus chaque jour, contre 100 000 à 150 000 pour les journaux irlandais. Il est clair que les lecteurs n'avaient pas changé de journal malgré une forte modification des prix relatifs. Certains observateurs ont critiqué cette étude en faisant valoir qu'il existe un prix auquel les lecteurs de journaux irlandais opteraient pour un journal du Royaume-Uni. L'Autorité a dû se défendre contre ces critiques reposant sur des arguments du type de ceux avancés dans l'affaire *Cellophane*.

La loi irlandaise sur la concurrence ne fait pas appel à la notion de puissance relative sur le marché. Mais -- séquelle de l'ancienne loi, la loi sur les pratiques commerciales restrictives -- le *Groceries Order* interdit la vente des articles d'épicerie au-dessous du prix de revient. Il est clair que dans ce secteur les chaînes de magasins ne sont pas dominantes sur le marché irlandais puisqu'elles détiennent peut-être 20 pour cent seulement du marché. L'Autorité a recommandé l'abrogation du *Groceries Order* parce que la *loi sur la concurrence* couvre la fixation de prix d'éviction. Il n'y a pas lieu d'interdire d'autres cas de vente au-dessous du prix de revient.

L'Espagne estime lui aussi que la notion de puissance relative sur le marché ou de dépendance économique se rattache davantage à la concurrence déloyale qu'à la protection de la concurrence. En Espagne, il y a à la fois une loi sur la concurrence déloyale et une loi sur la protection de la concurrence et ces deux lois ont des objectifs différents : la loi sur la concurrence déloyale vise à protéger les concurrents et la loi sur la concurrence à protéger le marché. C'est dans la loi sur la concurrence déloyale que figure la notion de pouvoir relatif de marché.

L'Italie, commentant l'affaire *Mitsukoshi*, indique que ce grand magasin semblait en position dominante et qu'il a abusé de sa position sur le marché en exigeant de ses fournisseurs des dépenses supplémentaires. On aurait donc pu, semble-t-il invoquer les dispositions concernant l'abus de position dominante. Toutefois, s'il existe des fournisseurs de remplacement, les mécanismes du marché ne seront pas alors en danger et la politique de la concurrence ne sera pas en jeu. Souvent, les coûts irrécupérables des distributeurs ne sont pas spécifiques à la marque ou aux marques qu'ils distribuent à un moment donné, de sorte qu'il leur est économiquement possible de passer à la distribution de marques d'autres producteurs. Dans ces conditions, le marché peut remédier à un tel comportement d'exploitation sans qu'il soit besoin d'avoir recours au droit de la concurrence.

La Commission de l'Union européenne, répondant à la question soulevée par le représentant du BIAC à propos de l'incertitude du régime juridique, note que le traité de Rome contient une liste non exhaustive de comportements abusifs, mais que ce domaine se développe essentiellement par le biais de la jurisprudence. Les affaires étant relativement rares, l'incertitude est inévitable. Il existe néanmoins une procédure, rarement utilisée, d'attestation négative, qui permet aux entreprises d'être assurées que leur comportement ne constitue pas un abus de position dominante.

A la lumière de la jurisprudence, on peut distinguer -- sans que cette distinction soit exclusive et exhaustive -- deux types de comportements : l'exploitation et l'exclusion.

Est-il légitime d'induire la puissance sur le marché du comportement ? M. Faull ne peut nier qu'on procède ainsi dans l'examen de ces affaires, bien qu'il y ait également en quelque sorte "rétroconception" lorsqu'on part de l'abus pour en arriver à la position dominante.

La Commission a été critiquée pour sa définition étroite du marché. Mais ce type de définition du marché peut être un moyen de prendre en compte la dépendance économique. En outre, le droit de la concurrence de l'Union européenne comporte un impératif moral d'intégration du marché et on peut constater que dans la plupart des affaires ayant donné lieu à une définition étroite du marché on s'est efforcé de prendre en compte les interférences avec les échanges transfrontaliers dans le marché unique.

La Pologne note que sur le marché des médias de masse il est difficile de définir la position dominante, sachant qu'un journal détenant une faible part de marché peut être très influent et que la diversité des opinions est essentielle pour maintenir la démocratie. L'élément important dans ce contexte n'est pas le marché, mais le comportement de l'entreprise, surtout son comportement vis-à-vis de son concurrent. Envisageons le comportement très spécifique des entreprises se trouvant en situation de

monopole. Si d'autres entreprises, quelle que soit leur position sur le marché, se livraient à un comportement similaire, elles seraient considérées comme des monopoleurs. Mais cette règle serait sans doute trop générale pour qu'on puisse l'appliquer à certains secteurs comme les médias de masse, pour lesquels il faut sans doute reconcevoir cette définition générale.

Le Président, résumant cette partie de la table ronde, indique que, si l'on observe une certaine "rétroconception" en ce que les responsables de la concurrence induisent une puissance sur le marché de certaines situations d'abus, peut-être cela est-il moins blâmable dès lors qu'on définit précisément les abus, ce qui rétablit la certitude juridique. Si l'on regarde ce qui est jugé potentiellement abusif, certaines lois énumèrent *a priori* les comportements pouvant être jugés abusifs, alors que d'autres sont bien moins précises. Cela vient compliquer des problèmes qui ont été évoqués lors de la première partie de la table ronde.

Comportement abusif

Le Président, présentant le thème suivant de la table ronde, note, comme il est indiqué dans la contribution des Etats-Unis, que l'article 2 de la loi Sherman laisse le soin aux tribunaux d'interpréter les notions de "monopolisation" et de "tentative de monopolisation". Dans le même temps, il semble qu'aux Etats-Unis une entreprise détenant un pouvoir légal de monopole n'ait pas l'obligation générale d'aider ses concurrents et que, pourtant, les pratiques d'exclusion soient à l'origine de la plupart des abus. Si les tribunaux doivent définir ce qu'est un abus, si l'exclusion pose problème, mais si, en revanche, il n'y a pas d'obligation générale pour le monopoleur d'aider les concurrents, où se situe précisément la ligne de partage en droit américain ? Quelle est la jurisprudence déterminant en quoi l'exclusion se distingue des actes qui consistent tout simplement à ne pas aider ses concurrents ? La question fondamentale est de savoir comment on définit "une raison valable" justifiant, par exemple, le refus de poursuivre une opération de coopération comme dans l'affaire *Aspen Ski* ?

Les Etats-Unis font observer que, la loi étant très vague, c'est dans la jurisprudence qu'il faut rechercher les règles applicables. Pour répondre à la question du Président, on établit une distinction entre le fait de ne pas aider un concurrent et le fait de nuire activement à un concurrent, en recherchant toutes les occasions d'empêcher un concurrent de pouvoir rivaliser sur le marché. Il ne faut pas nécessairement prouver un élément intentionnel, mais on doit se trouver en présence d'arrangements contractuels précis qui nuisent aux concurrents, et non d'un simple refus de traiter. Le principe général est le suivant : est-ce qu'en définitive le comportement en cause sert les consommateurs et favorise l'efficience économique ? Autrement dit, le comportement est-il, quant au fond, concurrentiel ? Dévalue-t-il les produits rivaux ou accroît-il les coûts des entreprises de plus petite dimension qui voudraient concurrencer l'entreprise dominante ? Si le comportement a ces effets, il pourra fort bien être illicite. Si une entreprise prend des mesures qui sapent quelques concurrents, mais sont sans incidence sur un certain nombre d'autres concurrents, ces mesures n'auront vraisemblablement pas d'effets importants sur l'ensemble du marché.

Comme l'a indiqué le Juge Breyer, "un comportement d'exclusion est un comportement -- autre qu'une concurrence intrinsèque ou des restrictions raisonnablement "nécessaires" au regard d'une telle concurrence -- qui paraît raisonnablement de nature à largement contribuer à créer ou à préserver un pouvoir de monopole".

C'est là le principe, mais encore faut-il l'appliquer. L'exclusivité constitue une catégorie de comportements susceptibles d'être abusifs. Lorsqu'une entreprise dominante oblige ses clients ou ses fournisseurs à ne pas traiter avec ses concurrents potentiels, on peut considérer qu'elle ne se borne plus à faire en sorte que ses concurrents aient plus de difficultés à offrir leurs produits. Divers rabais de fidélité

relèvent de l'exclusivité, puisqu'il s'agit d'une incitation financière à traiter exclusivement avec l'entreprise dominante. Dans les années 50, une action a été intentée aux Etats-Unis contre FTD, réseau de livraison de fleurs détenant une forte part de marché, qui interdisait à ses membres d'adhérer à des réseaux concurrents. En 1995, le réseau FTD a mis en place un programme d'incitations financières visant à ce que les fleuristes ne traitent qu'avec lui. La Division antitrust a considéré que cette pratique avait un caractère d'exclusion et FTD a mis fin à ce programme. A une certaine époque, le réseau GAB MAC exigeait l'exclusivité de la part des banques, avec interdiction d'adhérer à d'autres réseaux régionaux. MAC a mis fin à cette obligation d'exclusivité lors de l'enquête. Un jugement transactionnel a été rendu en 1994 dans l'affaire Microsoft, à l'issue d'une enquête au cours de laquelle la Division antitrust a constaté que les modalités financières convenues entre Microsoft et les fabricants d'ordinateurs constituaient une incitation financière à l'exclusivité, en faisant obstacle à la vente d'autres systèmes d'exploitation aux fabricants. Ce sont là des exemples de pratiques abusives exigeant l'exclusivité ou y incitant.

Il existe une autre catégorie de comportements abusifs, qui relèvent de la fixation des prix (prix "élevés", prix "bas" et prix "complexes"). Les prix élevés ne sont pas illicites, bien qu'ils puissent, s'ils se doublent de profits élevés, être l'indice d'un pouvoir de monopole. Les tribunaux se montrent quelque peu sceptiques à l'égard des prix d'éviction. Divers types de discrimination par les prix dans le cadre de dispositifs complexes de fixation des prix peuvent soulever des problèmes de monopolisation et d'abus.

La vente liée est un exemple de comportement pouvant être illicite aussi bien dans le cas d'entreprises en situation de monopole que dans le cas d'entreprises qui ne sont pas en situation de monopole. Dans l'affaire des GAB MAC, la Division antitrust a intenté une action contre le réseau MAC parce que l'adhésion au réseau de GAB était subordonnée à des prestations de services informatiques pour les GAB. Dans ces affaires, les autorités se demandent si le choix des consommateurs est réduit, et en particulier si les comportements en cause portent préjudice à la concurrence sur le marché du produit "lié" (et non sur le marché du produit pour lequel il y a monopole ou du produit "liant").

C'est au regard de la "règle de raison" que sont appréciés ces types de comportements. Par conséquent, le défendeur présente souvent des justifications commerciales, dont l'évaluation constitue un élément important de l'enquête.

Le refus de traiter se rattache étroitement à la doctrine des équipements essentiels. Il est plus difficile de justifier un refus de traiter aux Etats-Unis qu'en Europe. Malgré sa complexité, l'affaire *Aspen Ski* comporte deux éléments importants : il y avait eu changement de politique (la rupture avec le concurrent était intervenue après plusieurs années de relations d'affaires, de sorte que des investissements étaient perdus et qu'on ne pouvait invoquer valablement l'argument fondé sur la difficulté ou l'impossibilité de traiter) et la justification commerciale était très faible. C'est là un domaine du droit qui reste obscur. Les Directives de 1995 pour la propriété intellectuelle examinent ce point et la récente affaire *Kodak*, portant sur le refus de traiter pour des pièces détachées, fournit également certaines indications.

Le Président souligne l'opposition entre la situation qui prévaut aux Etats-Unis et celle qui caractérise l'Union européenne, où il existe une liste indicative de comportements pouvant être considérés comme abusifs.

La Commission de l'Union européenne fait observer que le traité de Rome contient une liste non exhaustive de larges définitions de l'abus. En outre, on peut subdiviser la jurisprudence en plusieurs rubriques. Un premier type d'abus concerne les prix excessifs, c'est-à-dire excessifs par rapport au coût de production ou au prix sur un marché voisin très similaire. Ces situations sont rares et c'est souvent sur des marchés étroits qu'on les observe. La discrimination par les prix peut être une discrimination entre des marchés de l'Union européenne ou de l'EEE lorsqu'il n'existe aucune justification objective et qu'on se

trouve en présence d'une position dominante. La discrimination par les prix a un caractère d'exclusion parce qu'une entreprise en place qui détient une position dominante, cherchant à éliminer un petit concurrent, lui fait perdre un client important grâce à des prix d'éviction. L'affaire *Akzo* offre un exemple de ce type de situation.

Il existe un autre type d'abus dans le contexte des équipements essentiels, mais ces abus ont été traités ailleurs.

Les refus d'approvisionnement constituent une autre catégorie d'abus. L'affaire prend une dimension encore plus grande lorsqu'il y a interruption d'une relation antérieure d'approvisionnement. Il y a également refus abusif d'approvisionnement lorsque ce refus empêche l'existence ou le développement d'un marché voisin, se situant généralement en aval. C'est souvent ce qui se produit lorsqu'une entreprise dominante intègre en aval des activités qu'elle n'exerçait pas précédemment et cesse de fournir à des concurrents en aval un élément essentiel.

Toute une série d'affaires illustrent les abus dans le domaine des droits de propriété intellectuelle. Le traité de Rome n'intervient pas au niveau de l'*existence* des droits de propriété intellectuelle, mais il concerne l'*exercice* de ces droits, aussi bien pour la libre circulation des biens que pour la libre prestation des services et pour la concurrence. De nombreuses mesures ont été prises au titre de l'article 86 pour interdire l'exercice abusif des droits de propriété intellectuelle, par le biais de la fixation des prix ou, dans des circonstances exceptionnelles, du refus d'accorder une licence. On sait combien le principe de la liberté d'octroi d'une licence est fondamental pour les droits de propriété intellectuelle et on a pu reprocher à la Commission d'avoir été trop loin. La Cour de justice ayant confirmé la décision *Magill*, il y a maintenant une jurisprudence bien établie en ce qui concerne la façon dont le droit de la concurrence peut limiter l'exercice des droits de propriété intellectuelle ; cette jurisprudence va très loin, puisque le refus d'accorder une licence peut constituer un abus de position dominante et que, par conséquent, l'octroi d'une licence peut être obligatoire.

Plusieurs affaires concernent la question de l'exclusivité (par exemple *TetraPak*) et des ventes liées (par exemple *Hilti*). Avant le règlement sur les fusions de 1989, l'article 86 a été appliqué à la fusion *Continental Can* de 1973. La Cour a jugé que le rachat d'un concurrent par une entreprise se trouvant déjà en position dominante avait un caractère abusif. L'affaire *TetraPak* concerne elle aussi une entreprise dominante rachetant une technologie essentielle sans laquelle ses concurrents ne pouvaient opérer.

Plusieurs affaires ont trait aux marchés secondaires. Certaines mettent en jeu l'impératif d'intégration des marchés. A titre d'exemple, une affaire remontant aux années 80 concernait un constructeur automobile, *British Leyland*, qui ne fournissait une information (un chiffre) dont avait besoin le consommateur pour immatriculer l'automobile qu'à un prix exorbitant. Ce procédé visait à empêcher la réimportation au Royaume-Uni en provenance de Belgique. Ce comportement a été qualifié d'abus de position dominante. Bien entendu, *British Leyland* ne détenait pas une position dominante sur l'un des marchés de l'automobile, mais la Commission a considéré que *British Leyland* était en position dominante sur le marché de la fourniture des informations nécessaires pour pouvoir utiliser ses automobiles sur les routes britanniques après l'achat. On est très près de la notion de position de dépendance.

Un élément est essentiel pour bien comprendre la notion de marché secondaire, le degré auquel l'acheteur est informé avant de prendre sa décision d'achat. Les consommateurs ne connaissent pas toujours les coûts après achat, notamment ceux qui se rapportent au service après-vente et aux réparations. Le degré d'information des consommateurs est une question de fait ; il est fonction de chaque cas d'espèce. Si les consommateurs connaissent parfaitement les coûts après achat, M. Faull conviendra qu'on a alors affaire à

un seul marché général, mais s'ils ne connaissent pas parfaitement ces coûts, il n'y a pas alors de marché général.

Le Japon fait observer qu'en droit japonais la "monopolisation" est définie comme "une restriction importante à la concurrence" dans un secteur particulier par voie d'exclusion ou de contrôle des autres entreprises. Cette définition recouvre un grand nombre de types de comportements. En outre, un grand nombre de types de comportements sont couverts par la définition des "pratiques commerciales déloyales".

Dans l'affaire *Toyo Seikan Kaisha*, le marché était très concentré. Le Japon comptait 13 fabricants de boîtes à conserves. Toyo Seikan détenait 53 pour cent du marché et si l'on ajoutait les sociétés qui lui étaient affiliées, sa part totale était de 74 pour cent. Certains industriels de l'alimentation essayaient d'opérer une intégration verticale en se lançant dans la fabrication de boîtes à conserves. Toyo Seikan a menacé de ne plus leur fournir certains autres types de boîtes s'ils se lançaient dans cette fabrication. Les industriels de l'alimentation ont alors cessé de produire des boîtes. Le comportement de Toyo Seikan constituait un cas d'exclusion de nouveaux entrants. En outre, Toyo Seikan limitait les ventes et les nouveaux investissements de ses sociétés affiliées. La Commission japonaise de la concurrence a ordonné à Toyo Seikan de mettre fin à ces pratiques.

L'Australie fait observer que, pour qu'il y ait "abus de puissance sur le marché" en droit australien, il faut à la fois un effet anticoncurrentiel et un but anticoncurrentiel. L'article 46 de la loi australienne dispose qu'une entreprise détenant une puissance sur le marché substantielle ne doit pas en tirer avantage pour éliminer ses concurrents ou leur nuire, empêcher l'entrée ou dissuader ou empêcher un comportement concurrentiel. Les personnes privées peuvent intenter une action et c'est d'ailleurs cette forme d'action qui prédomine dans le cas de l'article 46.

En ce qui concerne l'équilibre à atteindre dans le cadre de cet article 46, certains avaient fait valoir dès le départ que c'est l'efficience qui est en grande partie à l'origine de puissance sur le marché et que pour une large part les actions communes des entreprises sur le plan de la concurrence ont pour but de nuire à leurs concurrents et leur nuisent effectivement. Il est un fait que la Commission australienne de la concurrence reçoit souvent des plaintes au sujet de comportements déloyaux, mais qui ne sont peut-être pas anticoncurrentiels, et doit garder à l'esprit que la loi s'attache aux effets économiques de la mise en oeuvre de puissance sur le marché.

Dans une affaire concernant l'article 46 dont a été saisie la High Court, l'affaire *Queensland Wire Industries* contre *BHP*, BHP détenait 97 pour cent de la production d'acier en Australie. Les importations étaient quasi inexistantes. BHP était l'unique producteur des poteaux nécessaires pour construire les clôtures d'exploitations agricoles (poteaux Y). QW1 commercialisait du fil d'acier en concurrence avec une filiale de BHP. QW1 voulait acheter des poteaux Y par BHP, mais celle-ci refusait de l'approvisionner, sinon à des prix "excessivement élevés". De nombreux documents internes montraient que ce refus avait pour but d'éliminer le concurrent. La High Court a considéré qu'il y avait abus de puissance sur le marché. Les parties se sont entendues ultérieurement sur le prix des poteaux Y.

Le "but" est l'un des éléments pris en compte dans le droit australien en matière "d'abus de puissance sur le marché", parce qu'il est difficile de juger si le comportement est très concurrentiel ou anticoncurrentiel et que le critère du but concourt à limiter le champ d'application de la loi. Avec suffisamment d'éléments de preuve, on peut induire le but des effets, mais il faut généralement de meilleurs éléments de preuve.

La loi a été "retouchée" pour le secteur des télécommunications, pour ce qui est de l'accès au marché et des mesures que peut prendre l'entreprise dominante face à un nouvel entrant, qui ont été limitées.

Dans le domaine des droits de propriété intellectuelle, l'Australie applique la norme prévue à l'article 46. Les critères généraux du droit de la concurrence s'appliquent par exemple, en cas de refus d'accorder une licence ou d'imposition d'une condition restrictive dans une licence ou une cession de droits de propriété intellectuelle : on définit le marché pertinent (qui peut être bien plus vaste que le domaine couvert par les droits de propriété intellectuelle) et on examine le comportement en cause pour savoir s'il a un effet anticoncurrentiel et une finalité anticoncurrentielle. Si l'affaire *Magill* avait été jugée en Australie, il aurait fallu démontrer plus clairement le but anticoncurrentiel et on aurait analysé de façon plus approfondie la concurrence.

En droit australien, les prix excessifs font l'objet d'un régime de surveillance distinct, très limité.

L'Allemagne, répondant à une observation du délégué espagnol, indique que la notion de pouvoir relatif de marché est considérée en droit allemand comme complémentaire du régime de l'abus de position dominante, car dans les deux cas il s'agit de s'attaquer aux distorsions de la concurrence qui proviennent de puissance sur le marché. La juridiction suprême allemande a confirmé qu'une entreprise qui ne se trouve pas en position dominante peut créer des distorsions du même type qu'une entreprise dominante par abus du pouvoir relatif de marché. Dans les débats qui ont lieu actuellement en Allemagne à propos de la réforme du droit de la concurrence, on n'a pas évoqué la question de la suppression des dispositions concernant le pouvoir relatif de marché.

Dans les affaires qui ont trait au pouvoir relatif de marché, comme l'affaire *Rossignol*, le problème est de déterminer si une petite ou moyenne entreprise est en situation de dépendance par rapport à une entreprise déterminée. On ne peut le savoir qu'au cas par cas. C'est le distributeur qui avait intenté l'action dans l'affaire *Rossignol* ; le Bundeskartellamt n'était pas directement concerné.

L'affaire *Swarovski* offre un exemple d'abus de position dominante. *Swarovski* était en position dominante pour les articles semi-finis de joaillerie fantaisie et détenait une forte position en aval sur le marché des articles finis de joaillerie fantaisie. *Swarovski* avait refusé d'approvisionner un concurrent sur le marché situé en aval. Le Bundeskartellamt devait prendre en compte les intérêts juridiquement protégés des parties et également la finalité de la loi de la concurrence, à savoir préserver la liberté de la concurrence et l'ouverture des marchés. *Swarovski* faisait valoir qu'il avait créé le marché en aval et qu'on ne pouvait donc pas l'obliger à approvisionner un concurrent. Cet argument a été rejeté. *Swarovski* invoquait également le fait que le concurrent situé en aval offrait des produits pratiquement identiques. Ce fait a été jugé contraire à la loi sur la concurrence déloyale et le tribunal a considéré qu'il justifiait de la part de *Swarovski* un refus de vente.

Le Président fait observer que la question de savoir si la création d'un marché justifie un refus de vente à un concurrent reste ouverte.

L'Espagne présente l'affaire *Telefónica de España, S.A.*, cas typique d'un monopoleur s'opposant à la libéralisation de marchés pour lesquels il avait précédemment un monopole légal. A l'heure actuelle, certains services à valeur ajoutée sont libéralisés et d'autres services, notamment les lignes téléphoniques et le service local "normal", font l'objet d'un monopole. L'entrée sur les marchés libéralisés exige la coopération de *Telefónica*, qui contrôle les lignes téléphoniques. Dans cette affaire, *Telefónica* avait essayé d'empêcher l'entrée d'une autre entreprise. *3C Communications España, S.A.*, voulait offrir des téléphones publics à carte de crédit. L'un des points à trancher était celui de savoir s'il s'agissait d'un service à valeur

ajoutée -- et donc libéralisé -- mais les autorités chargées de la concurrence ont pris en compte le fait que c'est l'entreprise en situation de monopole, et pas l'autorité réglementaire, qui avait pris la décision de classer le service en cause dans les services à valeur ajoutée et refusait en conséquence la mise à disposition des lignes téléphoniques. Les autorités de la concurrence ont considéré que cette décision relevait de l'autorité réglementaire et que *Telefónica*, en prenant elle-même cette décision, avait abusé de sa position dominante.

La Suède présente un exemple d'abus de position dominante sur un marché venant d'être libéralisé, celui des services postaux. Les affaires concernant les secteurs de ce type -- les télécommunications, les chemins de fer, l'énergie -- ont certaines caractéristiques communes :

-- il s'agit d'un marché nouvellement créé, de sorte qu'on ne peut se référer à des marchés "fonctionnant normalement" ; il n'y a généralement qu'un seul concurrent, rarement deux, s'efforçant de s'établir sur le nouveau marché (c'est pourquoi il est difficile de distinguer entre la "protection de la concurrence" et la "protection d'un concurrent") ;

-- le monopoleur traditionnel est en position dominante et conservera cette position pendant de nombreuses années (la situation est différente de celle d'un marché où un concurrent a réussi au fil des années à acquérir une position dominante) ;

-- les nouveaux concurrents s'appuient presque toujours sur un élément fourni par le monopoleur traditionnel, notamment l'accès au réseau de télécommunications et au réseau universel pour les services postaux ;

-- le monopoleur traditionnel n'est pas habitué à opérer sur un marché ; par exemple, les entreprises publiques, qui n'ont généralement pas de système adéquat de comptabilité, peuvent ne pas avoir de gestionnaires à même d'opérer dans ce type d'environnement.

Les services postaux sont entièrement libéralisés en Suède, où il ne subsiste aucun monopole. Sweden Post a une obligation de service universel pour la distribution du courrier, mais elle ne reçoit aucune subvention. On n'a assisté à certaines entrées que sur des segments très étroits, et plus rentables, et Sweden Post a essayé de s'opposer à "l'écrémage" en essayant d'obliger ses clients à utiliser ses services pour tous leurs besoins postaux, au moyen de rabais et d'une réduction des prix en présence de concurrents. Sous l'effet du dispositif de rabais, le client ne pouvait pas obtenir certains services postaux de Sweden Post et d'autres d'un concurrent. La quasi-totalité des clients se trouvaient dans cette situation.

La fixation des prix en tant qu'abus de position dominante

Le Président présente ce thème en se référant à la contribution du Royaume-Uni, selon laquelle les prix excessifs et les bénéfices excessifs sont des éléments importants pour apprécier si la situation de monopole a des effets négatifs sur l'intérêt public. En revanche, les contributions des Etats-Unis et du Canada ne considèrent pas la fixation de prix de monopole comme un abus de position dominante, le raisonnement étant que, même si la fixation des prix de monopole constitue un abus, comment peut-on y remédier ? Dans l'Union européenne et en Italie, on a considéré que la fixation de prix de monopole était un abus de position dominante. La contribution italienne soulève des questions délicates quant à la mise en oeuvre du droit européen au niveau national et aux motifs avancés par la Cour de justice des Communautés européennes dans une affaire concernant une association de défense des droits d'auteur.

Les Etats-Unis déclarent que, dans les secteurs où l'on considère que les prix élevés sont un problème ancien, on impose une réglementation en se fondant sur l'expertise sectorielle. Les réglementations concernant l'interconnexion et le produit final, adoptées notamment par la Federal Communications Commission dans les télécommunications et la Federal Energy Regulatory Commission pour l'électricité, sont bien distinctes des dispositions générales du droit de la concurrence. Les autorités antitrust sont réticentes à considérer des prix élevés comme abusifs, parce qu'elles craignent de créer une large réglementation des prix. On notera cependant que pour les autorités chargées de la concurrence l'existence de prix, marges et bénéfices élevés est un indice de position dominante et de pouvoir monopolistique, mais pas d'abus proprement dit de position dominante. Malgré tout, les autorités chargées de la concurrence recherchent quels pourraient être les éléments de monopolisation (prix d'éviction, discrimination par les prix et autres dispositifs de fixation des prix à caractère d'exclusion).

On peut citer une exception à cette règle générale concernant les prix élevés : les sociétés d'artistes auteurs d'enregistrement (ASCAP et BMI), autorisées à fixer leurs prix pour les utilisateurs. Dans ce cas, ce n'est pas seulement une entreprise qui est en cause, mais un accord entre un certain nombre d'artistes ; c'est pourquoi le niveau des prix fait l'objet d'une surveillance de la part des autorités antitrust.

L'opinion générale qui prévaut aux Etats-Unis est que les tribunaux ne sont pas les mieux à même d'évaluer quels sont les prix excessifs, quels sont les taux de rentabilité raisonnables, comment le capital doit être réparti entre chaque activité et quels sont les risques propres aux divers secteurs.

Le Canada fait observer que le droit canadien en matière d'abus de position dominante est essentiellement axé sur les comportements d'exclusion et non sur l'exploitation des consommateurs, et ce parce que la réglementation des prix est un exercice difficile, qui est souvent source d'inefficience et qui exige des compétences, notamment dans le domaine comptable et du point de vue de la connaissance des caractéristiques sectorielles, dont les autorités chargées de la concurrence ne disposent pas suffisamment.

Il existe également au Canada des sociétés qui ont en charge les droits d'exécution des oeuvres. Au Canada, ces problèmes ne relèvent pas du droit de la concurrence comme aux Etats-Unis ; c'est un organisme spécial, la Commission du droit d'auteur, qui est compétent dans ce domaine.

Le Royaume-Uni indique que, lorsque la MMC enquête sur un marché, elle évalue systématiquement le niveau de rentabilité de tout "monopoleur" et évalue donc d'emblée le niveau des prix. On peut, à partir de la rentabilité, procéder à certaines déductions en ce qui concerne la puissance sur le marché. Il est extrêmement difficile d'interpréter les données comptables dans une optique pour laquelle elles n'ont pas été conçues et d'évaluer un taux de rendement concurrentiel corrigé en fonction du risque, mais la MMC le fait depuis de nombreuses années avec une compétence indéniable. Il faut rappeler qu'au Royaume-Uni le critère consiste à déterminer si un comportement est contraire à l'intérêt public ; il ne s'agit pas de savoir si le comportement en cause constitue un abus de position dominante. Il n'est donc pas surprenant que l'organisme chargé d'appliquer ce critère examine si les prix pratiqués sur un marché sont excessifs ou ne le sont pas.

Dans certains cas, la MMC a estimé que les bénéfices étaient excessifs, que les prix étaient eux aussi excessifs et n'étaient pas conformes à l'intérêt public, et qu'il fallait remédier à cette situation. Elle a conclu que si l'entrée est impossible ou improbable dans un laps de temps raisonnablement prévisible, les pouvoirs publics auraient tout intérêt à réglementer les prix ou les bénéfices. Le résultat est que les prix des entreprises en situation de monopole naturel ou des entreprises très dominantes dans les secteurs récemment privatisés devraient faire l'objet d'une réglementation des prix. Ce raisonnement vaut également pour les entreprises qui sont depuis longtemps dans le secteur privé. La réglementation présente certaines déficiences, mais ce n'est pas une raison pour ne pas envisager une réglementation lorsqu'on ne peut

obtenir un fonctionnement correct des marchés. On peut citer trois cas dans lesquels les prix sont réglementés ou l'ont été un certain temps : le *Librium* et le *Valium* (la position dominante était due à des brevets), les préservatifs (pour lesquels il y a pratiquement monopole naturel du fait des économies d'échelle) et le sel de table (marché sur lequel il y a duopole et où l'entrée est pratiquement impossible parce que les deux entreprises détiennent la totalité des salines). Dans l'examen récent d'une fusion réalisée entre deux producteurs de pain sans gluten, la MMC a recommandé de ne pas revenir sur la fusion, mais de réglementer le prix de ce type de pain.

C'est seulement dans certains cas que la MMC, ayant constaté l'existence de bénéfices excessifs, a recommandé un contrôle des prix. Dans la plupart des cas, elle se borne à recommander des mesures d'ouverture du marché.

La Commission européenne fait observer qu'il n'existe en général dans les Etats membres de l'Union européenne qu'une seule société de droits d'auteur. Dans une affaire célèbre, des discothèques faisaient valoir que la SACEM, la société française de protection du droit d'auteur, pratiquait des tarifs bien supérieurs à ceux pratiqués par ses homologues des autres pays. La question qui se posait était de savoir si ce critère était fondé. La Cour de justice a jugé qu'il était probablement fondé. Cette affaire était extrêmement spécifique sur le plan des faits et d'autres procès étaient en cours devant les tribunaux français ; c'est pourquoi les tribunaux français et les autorités françaises chargés de la concurrence ont eu à juger ce contentieux. Le droit communautaire a donc reconnu qu'il pouvait y avoir violation de l'article 86 du traité de Rome du fait d'un prix excessif lorsqu'on compare ce prix à celui d'un marché comparable.

L'Italie indique qu'en Italie, comme dans l'Union européenne, la loi considère comme un cas d'abus de position dominante la fixation de prix excessifs. En général, l'autorité italienne chargée de la concurrence estime que des bénéfices élevés ou des prix élevés ne doivent pas être considérés en soi comme abusifs, étant donné qu'il est plus efficace d'éliminer les causes de prix et de bénéfices élevés, qui peuvent être des restrictions réglementaires ou certains comportements de l'entreprise dominante en place. Si le seul remède est d'imposer une baisse des prix, l'entreprise dominante reste néanmoins en place et on peut décourager ainsi l'entrée. Autrement dit, il peut se produire certains effets dynamiques qui créent de nouveaux éléments d'inefficience. Lorsque les prix excessifs proviennent de ventes liées ou d'autres types d'abus de position dominante, ils sont considérés comme abusifs.

L'autorité italienne chargée de la concurrence a été saisie de plaintes concernant les prix pratiqués par la société des auteurs, compositeurs et éditeurs (SIAE). L'Autorité a rendu sa décision après l'affaire SACEM en France et après la décision de la Cour européenne de justice ; en vertu du droit italien, elle devait se référer directement aux principes du droit européen. La décision de la Cour de justice avait donc valeur de précédent.

Dans l'affaire SACEM, la Cour de justice a jugé que, si les prix sont différents sur les marchés nationaux, cela démontre l'existence d'une position dominante dans les pays où les prix sont élevés et que, si les prix plus élevés ne peuvent être justifiés, il y a abus de position dominante. La Cour de justice a pris en compte les différences au niveau de la demande entre cinq types différents de discothèques.

L'autorité italienne a éprouvé des difficultés à définir une norme pour déterminer si les prix pratiqués en Italie étaient excessifs. La Cour européenne de justice s'était appuyée sur le prix moyen dans les Etats membres, mais, logiquement, on ne pouvait utiliser qu'une fois ce critère. En outre, il n'avait pas été tenu compte dans l'affaire SACEM des différences concernant les coûts de recouvrement, le niveau d'imposition de fait des discothèques, etc. La situation en Italie se caractérisait par une autre différence juridique, en ce que la SIAE était un monopole légal créé pour maximiser les revenus des auteurs. Il

paraissait possible de soumettre la SIAE à un contrôle des prix ou de l'obliger à conclure un accord avec les discothèques, mais difficile de réglementer le revenu provenant de l'exécution d'une oeuvre artistique.

L'Autorité a choisi de ne pas intervenir au niveau des tarifs, mais d'agir sur d'autres éléments. Elle a mis fin à la discrimination en faveur des principaux chanteurs italiens.

Mme Janow (Consultante à la direction des Echanges) fait valoir l'optique différente des responsables des échanges et des responsables de la concurrence dans le domaine des pratiques d'exclusion des entreprises dominantes. Le document qu'elle présente est consacré en partie à une analyse comparée de la situation juridique aux Etats-Unis, dans la Communauté européenne et au Japon et contient également deux scénarios de comportement international d'une firme dominante. (Dans l'un des scénarios, une entreprise dominante refuse l'accès au marché et dans l'autre scénario, l'entreprise dominante soutient une activité à l'étranger par des pratiques d'exclusion sur le marché intérieur et des pratiques d'éviction à l'étranger. Est-ce qu'un comportement d'exclusion ou anticoncurrentiel de la part d'une entreprise disposant d'une puissance substantielle sur le marché ne concerne que les autorités nationales chargées de la concurrence ou peut-il poser également des problèmes d'accès au marché ? Comment les responsables de la politique de la concurrence envisagent-ils ces problèmes ? La thèse défendue dans ce document est que l'abus de position dominante peut effectivement créer des problèmes d'accès au marché.

On observe des effets internationaux lorsqu'une entreprise dominante verrouille un système de distribution qu'il est difficile de dupliquer, refuse l'accès à un équipement essentiel, refuse de s'approvisionner à l'étranger, ou interdit à des entreprises avec lesquelles elle a des liens financiers ou qui lui sont redevables à d'autres égards de traiter avec des sources d'approvisionnement étrangères. Dans ces conditions, le comportement de l'entreprise dominante peut aboutir à une fermeture du marché ou à une limitation de la concurrence. Par conséquent, en théorie, ce sont à la fois les clients sur le marché intérieur et les exportateurs étrangers souhaitant avoir accès au marché qui subissent un préjudice.

Du point de vue de la concurrence, on analysera le comportement de l'entreprise dominante pour déterminer s'il se fonde sur des raisons d'efficience et si les mêmes gains d'efficience (si tant est que de tels gains existent) ne pourraient pas être obtenus par des moyens moins nocifs sur le plan de la concurrence. Les autorités chargées de la concurrence s'appuient en premier lieu sur la mise en oeuvre du droit interne de la concurrence, ce qui pose le problème du degré d'application de ce droit et de la façon dont il est appliqué. S'il est vrai que dans certains pays, l'autodéfense est possible, ce recours est limité en pratique par la méthodologie rigoureuse de l'examen antitrust et les difficultés d'établir les violations dans un contexte transfrontalier -- c'est-à-dire, les différences dans les procédures de communication des pièces, les variations dans les preuves requises et les demandes juridictionnelles, etc. L'absence de disciplines convenues, au niveau international sur les restrictions privées et les différences dans les normes et applications de lois nationales expliquent en partie les préocupations des responsables des échanges.

Avec l'internationalisation des marchés, on a de plus en plus le sentiment que les restrictions de source privée ferment les marché ou faussent l'accès aux marchés. Ce problème s'est manifesté tout particulièrement dans le contexte bilatéral, surtout dans les relations entre les Etats-Unis et le Japon, dans le cas où des entreprises dominantes avaient recours à des restrictions verticales dans des secteurs comme le verre, l'automobile et les pellicules photos grand public. Alors que dans le contexte du droit de la concurrence les méthodes d'identification des effets des restrictions sont relativement claires et bien établies, la réaction sur le plan de la politique commerciale a été de rechercher de meilleurs accès au marché en question par le biais de négociations de gouvernement à gouvernement et dans certains cas d'invoquer d'autres mesures d'auto-défense,s'il en existait. Les négociations ont porté sur des problèmes plus larges que ceux soulevés par l'analyse du point de vue de la concurrence, ces problèmes étant d'ailleurs un peu différents ; ce qui était en cause, ce n'était pas seulement le comportement de l'entreprise

même, mais aussi le degré d'application du droit de la concurrence et les caractéristiques structurelles du marché, ces deux éléments se répercutant sur l'accès du marché. Ceci résulte, en partie, d'une préoccupation d'équité, qui est plus large et de nature différente de celle de la politique de la concurrence, et qui est aussi liée aux principes de base de la politique des échanges, à savoir, les principes de transparence, de responsabilité financière, de traitement national, etc.

Les accords conclus entre les Etats-Unis et le Japon, par exemple**,** illustrent bien l'approche différente du point de vue de la politique commerciale et du point de vue de la politique de la concurrence. Dans ces accords, le gouvernement local prend l'engagement général d'appliquer avec rigueur le droit de la concurrence, de surveiller les pratiques des entreprises, de favoriser des marchés plus ouverts et plus concurrentiels et d'examiner toute une série de caractéristiques structurelles de l'environnement des entreprises et de l'action des pouvoirs publics qui sont censées influer sur l'accès au marché. Ces derniers engagements reconnaissent que certaines pratiques peuvent ne pas être contraires au droit local de la concurrence ou même au droit américain de la concurrence, mais ont de profondes répercussions sur les possibilités d'accès au marché. On peut se demander si les engagements généraux de ce type créent un marché davantage propice à la concurrence ou s'il s'agit d'une sorte d'autorité morale permettant d'assurer en permanence la surveillance d'un ensemble d'engagements pouvant, à terme, conduire à un environnement plus concurrentiel.

Le second thème abordé dans ce document est celui du soutien d'activités à l'étranger par des pratiques d'exclusion sur le marché intérieur et des prix d'éviction à l'étranger. En théorie, le cas peut se présenter lorsqu'une entreprise peut soutenir ses activités à l'étranger par des pratiques d'exclusion sur son marché intérieur et par des pratiques de prix d'éviction à l'étranger. Il est désormais extrêmement difficile de gagner aux Etats-Unis un procès antitrust lorsqu'on invoque des prix d'éviction, à moins de pouvoir prouver qu'il y a possibilité récupération des pertes sur le marché cible. Mais l'éviction par les prix met davantage en jeu les effets sur le marché cible que la fermeture du marché d'origine. Manifestement, la méthodologie qui préside à l'analyse des prix d'éviction du point de vue du droit de la concurrence est contraire à celle utilisée pour la politique antidumping. Un problème majeur de la politique antidumping est celui de l'équité. et les effets du dumping sur les concurrents dans le marché visé bien plus que celui de la concurrence elle-même sur le marché visé. Ni la méthodologie antidumping, ni la politique de la concurrence appliquée à la prédation par les prix n'est concernée en premier lieu par la fermeture au marché de l'entreprise exportatrice.

En résumé, l'auteur de ce document fait valoir qu'à côté des comportements "inadmissibles" d'abus de position dominante -- l'entreprise disposant d'une puissance sur le marché important et utilisant cette puissance pour contrôler les prix, limiter la production et évincer les concurrents -- d'autres pratiques comme les restrictions verticales ont des effets sur la concurrence qui sont extrêmement controversés. Ces divergences tiennent pour une large part à l'existence d'objectifs différents, notamment l'efficience et l'intégration. Les comportements des entreprises dominantes peuvent avoir des effets sur le plan international et suscitent d'ores et déjà de sérieux problèmes du point de vue de l'accès au marché. Ces problèmes paraissent être dus en particulier à une application insuffisante ou discriminatoire de la législation locale. Du point de vue de la politique commerciale, on peut se demander si cette perspective n'est pas trop étroite et s'il ne faudrait pas prendre en compte en plus de l'examen d'un accès efficace aux marchés d'autres aspects, notamment des facteurs réglementaires, de structure industrielle et d'environnement commercial. Ceci suppose une application rigoureuse du droit de la concurrence est nécessaire, mais elle n'est pas suffisante pour promouvoir des marchés ouverts et concurrentiels. Elle doit opérer en parallèle avec des initiatives de politique commerciale, lesquelles, de plus en plus, ne peuvent pas en elles-mêmes faire face efficacement aux distortions résultant des restrictions privées.

Débat général sur les comportements abusifs

Le Président rappelle les différences sur le plan de la réglementation, notamment pour le traitement des pratiques d'exclusion par l'Espagne et par l'Allemagne et pour le régime des droits de propriété intellectuelle en vigueur en Australie et dans l'Union européenne. Ces différences peuvent être dues à une sensibilité différente à un même problème ; par exemple, l'optique de la politique commerciale sera très large par rapport à l'optique de la concurrence.

La Commission européenne, répondant aux commentaires du délégué australien à propos des droits de propriété intellectuelle, fait observer qu'indéniablement on peut facilement, en soumettant l'exercice des droits de propriété intellectuelle à un examen au regard de la concurrence, interférer avec l'existence même des droits de propriété. Relevant du droit constitutionnel, les droits de propriété sont entièrement de la compétence des Etats Membres, et pas de la compétence de la Communauté, mais les règles du traité de Rome s'appliquent à l'exercice des droits de propriété.

En ce qui concerne l'affaire *Magill*, jusqu'à une période très récente, les stations de télévision détenaient en Irlande et au Royaume-Uni le droit de reproduction des programmes de leurs émissions. Elles concédaient l'autorisation de reproduction des programmes du jour pour les quotidiens, et pour les programmes du week-end pour les journaux du week-end, mais refusaient de concéder ce droit sur une base hebdomadaire. Les trois grandes stations -- la *BBC* et *ITV* au Royaume-Uni et la *RTE en* Irlande -- publiaient chacune un magazine pour leurs programmes, ce magazine étant très rentable et largement diffusé. Par conséquent, il n'y avait pas au Royaume-Uni ou en Irlande de magazine hebdomadaire contenant les programmes de toutes les grandes stations. La Commission a jugé qu'il y avait exercice de droits de monopole sur des marchés connexes en vue d'empêcher la création d'un autre marché caractérisé par une demande manifeste et connue.

Le raisonnement est similaire à celui qui s'applique dans le cadre de l'article 90 pour les monopoles nationaux, généralement à capitaux publics. (Dans l'affaire *Magill*, l'article 90 ne s'appliquait parce qu'il concerne les Etats). Lorsqu'il s'avère qu'un monopole, au lieu d'agir dans l'intérêt public, n'est pas au service du marché qu'il est censé servir, le droit communautaire dispose que ce monopole devra, dans cette mesure, être supprimé.

En ce qui concerne la démarche évoquée par le délégué australien, qui consiste à s'attacher à l'intention, même si les stations de télévision avaient pu prouver qu'elles n'avaient pas l'intention d'empêcher l'apparition d'un marché de magazines hebdomadaires de programmes universels, cela n'aurait pas modifié la position de la Commission.

La Finlande estime que le droit des positions dominantes et de l'abus de position dominante est soumis à des pressions de plus en plus fortes. On constate de plus en plus qu'il y a un choix à faire entre, d'une part, la recherche d'une solution économiquement raisonnable aux problèmes que pose le comportement des entreprises dominantes et, d'autre part, la sécurité juridique dont ont besoin les entreprises et la nécessité de clore rapidement les enquêtes et de mettre rapidement en oeuvre la solution. La domination d'un marché est un phénomène dynamique et constitue un cas particulier de l'avantage concurrentiel auquel les entreprises aspirent. La plupart des affaires se produisent lorsque l'avantage concurrentiel initial est en voie d'érosion. Plusieurs problèmes se posent alors. Il est difficile de définir le marché, puisque ce processus d'érosion prend en partie la forme d'un élargissement des marchés sous l'effet de l'apparition de nouveaux substituts. On voit généralement dans la discrimination par les prix un moyen de retarder l'érosion de puissance sur le marché. C'est pourquoi on a fixé des limites strictes pour la différenciation des prix entre consommateurs ou partenaires commerciaux. Mais à mesure que ce processus se poursuit, l'entreprise ne peut plus en définitive le retarder ; il est de plus en plus difficile de

déterminer à quel stade l'entreprise a le droit de "contrer la concurrence" et peut livrer concurrence sur un pied d'égalité.

Dans une affaire récente jugée par la Cour administrative suprême qui concernait le secteur du raffinage du pétrole, l'entreprise publique dominante *Nesta* s'est vu imposer le maintien d'une politique de prix fondée sur les coûts relatifs, tout en étant autorisée à contrer la concurrence en accordant des rabais en fonction de la capacité du client d'importer des produits pétroliers en Finlande.

De plus en plus, les responsables de la concurrence se trouvent confrontés à un double problème : d'une part, préserver la concurrence et empêcher l'entreprise dominante d'étouffer ses concurrents et, d'autre part, permettre à l'entreprise dominante de "contrer la concurrence" et la laisser opérer sur le marché sans fausser la concurrence. Les responsables de la concurrence doivent à la fois promouvoir des solutions économiquement raisonnables et préserver des règles claires pour les entreprises.

Le Canada, répondant aux commentaires sur le point de savoir qui, des organismes spécialisés ou des autorités chargées de la concurrence, est le mieux à même de réglementer les prix, fait observer que les organismes spécialisés peuvent mieux s'imprégner des caractéristiques d'un secteur, mais que le phénomène de captation réglementaire est sans doute moins susceptible de jouer pour les autorités chargées de la concurrence.

Un représentant du BIAC aborde le problème de la délimitation des pratiques abusives. Les autorités chargées de la concurrence doivent décider si elles veulent protéger la concurrence ou protéger les concurrents. Le choix de l'objectif se répercute, entre autres, sur les éléments constitutifs d'une violation du droit de la concurrence. A titre d'exemple, si une entreprise a pour but de devenir un monopole, a-t-on affaire à une intention anticoncurrentielle ? Si des documents internes contiennent un texte du genre "Si nous faisons telle opération, nous serons un monopole", cela signifie-t-il que cette opération est illicite ? Si la protection des concurrents est un objectif de la politique de la concurrence, il y aura dans ce cas intention anticoncurrentielle.

Le BIAC estime que l'objectif de la politique de la concurrence doit être de protéger la concurrence, et pas de protéger les concurrents, et que l'élément clé pour se prononcer sur la concurrence est une analyse de bien-être ou d'efficience. Le BIAC encourage les autorités à adopter cette approche pour l'analyse, quelle qu'elle soit, de l'abus de position dominante.

Le BIAC invite en outre à faire preuve d'une certaine modestie pour évaluer si un comportement donné est en fait, dans les circonstances considérées, anticoncurrentiel, c'est-à-dire entraîne une diminution du bien-être. Le BIAC estime que la plupart des actions des entreprises, même s'il s'agit d'entreprises dominantes, ont toutes chances d'avoir pour effet d'améliorer le bien-être, et il est difficile d'identifier les cas, peu nombreux, où le comportement des entreprises a toutes chances de nuire à l'efficience.

Remèdes

L' Irlande souligne que le droit irlandais en matière d'abus de position dominante est conçu sur le modèle de l'article 86 du traité de Rome et permet à l'heure actuelle aux parties d'obtenir une injonction. Une réforme est en cours pour rendre possible le prononcé d'une amende. Il existe un autre moyen d'action en vertu de l'article 14 de la loi irlandaise sur la concurrence : le Ministre, après enquête de l'Autorité chargée de la concurrence, peut soumettre au Parlement un arrêté lui permettant d'imposer un contrôle réglementaire ou même d'ordonner le démantèlement de la position dominante.

A première vue, une amende paraît plus dissuasive qu'une injonction. Mais, en droit irlandais, l'administration de la preuve obéit alors aux règles du droit pénal et ces règles sont extrêmement strictes. De plus, une entreprise dominante peut tout simplement répercuter l'amende sur ses clients. Enfin, dans le cas où l'abus de position dominante a eu pour effet d'éliminer un concurrent, une sanction financière -- une amende ou des dommages-intérêts -- risque d'intervenir après que l'objectif d'élimination du concurrent a été atteint et la sanction financière sera sans doute moindre que l'avantage obtenu grâce à l'élimination du concurrent. Si l'on prend l'exemple de l'affaire *Magill*, cette société a par la suite quitté le marché.

Les mesures de contrôle réglementaire sont largement appliquées aux entreprises dominantes dans le secteur des services publics. Les obligations d'information sont telles qu'une autorité chargée de la concurrence en général ou un tribunal éprouverait des difficultés à mettre en oeuvre efficacement ces contrôles. Par contre, le contrôle réglementaire par un organisme chargé de la concurrence en général offre l'avantage de diminuer le risque de captation réglementaire.

L'Irlande aborde la question du désinvestissement. Il est difficile d'obtenir une décision politique constituant à ordonner un désinvestissement dans le cas d'une entreprise à capitaux publics ou d'une entreprise à capitaux privés. Si l'on répugne à ordonner un désinvestissement, c'est parce qu'on part de l'idée que le droit de propriété est plus sacro-saint que la liberté contractuelle. Or, interférer avec la liberté contractuelle sera dans certaines situations aussi grave pour une entreprise que modifier son patrimoine.

La mise en oeuvre du droit de la concurrence touche l'économie dans son ensemble, alors que les tribunaux ont affaire à des droits individuels et à des comportements répréhensibles individuels et n'ont pas à prendre des décisions qui relèvent de l'action des pouvoirs publics. Lorsqu'on demande à un tribunal d'ordonner un désinvestissement, on lui demande inévitablement de prendre une décision qui relève de l'action des pouvoirs publics. Une fois que le droit irlandais aura été modifié dans le sens prévu, l'Autorité chargée de la concurrence pourra demander au ministre ou à un tribunal d'ordonner un désinvestissement et il est difficile de savoir quelle sera la meilleure solution.

On attribue à l'injonction de sérieux inconvénients, mais ces inconvénients peuvent être également des avantages. On reproche à l'injonction de se situer dans une optique à court terme et de ne pouvoir remédier qu'à certains comportements, mais lorsqu'une entreprise dominante est sur le point d'éliminer un concurrent, ces inconvénients semblent être des avantages. Par exemple, la bonne solution a été dans une affaire d'ordonner tout simplement l'insertion d'une annonce publicitaire très précise.

Le Royaume-Uni souligne qu'au Royaume-Uni il n'est pas possible de prononcer une amende. Mais le ministre peut ordonner un remède structurel, à savoir la mise en place d'une réglementation des prix et la modification du comportement de l'entreprise. Ces mesures supposent préalablement une enquête de la MMC concluant à un comportement contraire à l'intérêt public. Elles peuvent être exécutées de différentes manière.

Voulant dresser un bilan d'engagements anciens, l'Office of Fair Trading a fait réaliser une étude des effets des engagements. Les auteurs de cette étude ont examiné les changements structurels et les performances des participants au marché, sur la base d'interviews. Ils ont constaté que les remèdes structurels étaient plus efficaces que les mesures visant à corriger certains comportements, mais ils n'ont pas pris en compte le coût que représentent les mesures imposant des changements structurels. Les engagements pris pour modifier les modalités de distribution, les clauses contractuelles et d'autres éléments du comportement des entreprises ne paraissent guère avoir eu d'effets, car généralement les entreprises ont trouvé d'autres moyens de fidéliser leur clientèle. Souvent, les autorités n'ont pas anticipé la réaction stratégique des entreprises aux mesures visant à agir sur leur comportement. Ces recherches ne sont pas encore terminées.

Les Etats-Unis signalent que les autorités américaines s'appuient généralement sur des injonctions interdisant à l'entreprise de continuer de se livrer aux agissements anticoncurrentiels ; c'est ce qu'ont fait les autorités américaines dans l'affaire des fleuristes, dans l'affaire des GAB, et dans l'affaire *Microsoft*. De fait, lorsqu'elles choisissent les affaires devant donner lieu à des poursuites et à une enquête, les autorités se demandent s'il y aura un remède efficace. Certes, les remèdes peuvent aller plus loin -- il suffit de citer les mesures structurelles mises en oeuvre dans la célèbre affaire *AT&T* -- mais cela est relativement rare. De plus, c'est souvent dans le cadre d'une transaction que les mesures sont prises, et non par la voie judiciaire.

Il faut en outre garder à l'esprit que dans ce domaine les actions en justice intentées par les parties privées jouent un très grand rôle aux Etats-Unis. Le demandeur privé se voyant accorder, s'il obtient gain de cause, des dommages-intérêts triples et le remboursement de ses honoraires d'avocat, les actions individuelles ou les actions collectives pour le compte de certaines catégories de consommateurs peuvent aboutir à de très lourdes pénalités financières.

Il faut interpréter avec prudence les résultats de l'étude réalisée au Royaume-Uni, qui n'est pas encore achevée. Une réglementation des prix ou un désinvestissement structurel a des effets très visibles sur le marché, alors qu'il est beaucoup plus difficile de détecter les effets des mesures visant à modifier le comportement des entreprises. En outre, pour évaluer l'effet total du point de vue du bien-être, il faut prendre en compte le coût que représentent les mesures prises, qui peuvent par exemple aboutir à une moindre efficience. Enfin, il ne faudrait pas laisser de côté dans cette étude les effets dissuasifs que peuvent avoir les mesures sur le comportement futur des entreprises.

Débat général sur les remèdes

La Suède note que les commentaires qui ont été faits à propos de l'étude réalisée au Royaume-Uni sont également valables lorsqu'il s'agit de mesurer l'application de fait du droit de la concurrence. Si, par exemple, on estime qu'une décision transactionnelle remédiera au comportement abusif, devra-t-on considérer que la loi est appliquée moins sévèrement qu'en cas de prononcé d'une très lourde amende ?

Dans les affaires concernant les Postes suédoises, évoquées précédemment, l'un des concurrents des Postes suédoises a été mis en liquidation en 1995 et l'autorité chargée de la concurrence a autorisé les Postes suédoises à l'acquérir, en estimant qu'il n'y avait pas d'autre solution. L'autorité a exigé que l'ancien concurrent soit organisé en une société séparée et continue à fournir les services qu'il offrait.

Un représentant (BIAC) note, à propos des remèdes visant à modifier le comportement des entreprises, que les marchés évoluent rapidement et qu'il faut prendre en compte l'élément temps. Si un tel remède n'a pas eu l'effet voulu, disons au bout de dix ans, il ne faut pas s'attendre à ce qu'il ait cet effet plus tard, et s'il a eu l'effet voulu, on peut s'attendre à ce qu'au bout de dix ans il entrave le comportement concurrentiel d'une entreprise concurrentielle.

Le Président remercie les participants pour leurs contributions et interventions extrêmement fructueuses et clôt la réunion.

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