JUDICIAL ENFORCEMENT OF COMPETITION LAW

MISE EN OEUVRE JUDICIAIRE DU DROIT DE LA CONCURRENCE

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

This document comprises proceedings in the original languages of a Seminar on Judicial Enforcement of Competition Law which was held by the Committee on Competition Law and Policy in October 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.

PRÉFACE

Ce document rassemble la documentation, dans la langue d'origine dans laquelle elle a été soumise, relative à un séminaire sur la mise en oeuvre judiciaire du droit de la concurrence qui s'est tenu en octobre 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'information qui ont été réunis à cette occasion.

JUDICIAL ENFORCEMENT OF COMPETITION LAW [*]

MISE EN OEUVRE JUDICIAIRE DU DROIT DE LA CONCURRENCE [*]

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[*] All contributions were written by the authors under their own responsibility.
Toutes les contributions ont été préparées sous la propre responsabilité des auteurs.

[**] See text of the Background Note in Section III.

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TEXTES DISPONIBLES EN FRANÇAIS

[**] Voir le texte en français du document de référence dans la Section III.

SECTION I

EXECUTIVE SUMMARY

Introduction

An effective competition policy is a necessary element in the efficient operation of market economies, and the significance of competition policy is growing, in the current context of globalisation of markets and deregulation. The judiciary has a central role in the implementation of competition policy. Competition laws are written broadly, and judicial precedent is important in interpreting these statutes, even in non-common law countries. Thus, while legal systems vary significantly between Member countries, and specific conclusions about the role of the judiciary in competition enforcement will therefore be difficult to articulate, a seminar involving judges from the several Member countries will be useful. It will promote a better understanding of the competition laws of Member countries and of the implementation of those laws, thus ultimately promoting international convergence of competition policy.

The Role of the Judiciary in the Implementation of Competition Policy

The judiciary has two important functions in the implementation of competition policy: ensuring that procedural due process is observed, and applying the underlying substantive principles of the competition law in a correct and consistent manner. Thus, courts bring economic policy under the rule of law.

Courts ensure that fundamental procedural rights, including rights of privacy, the right to a fair and impartial hearing, and confidentiality of business information, are protected. Procedural safeguards are a prerequisite for an effective competition policy. Procedural due process makes certain that antitrust policy is implemented in an objective fashion and that the competition agency is accountable, thereby enhancing its credibility with the public. But procedural due process is not absolute. Courts must make allowance for the imperatives of economic policy in implementing competition laws.

Judges are uniquely qualified to perform this balancing of procedural and substantive principles in competition enforcement. First, their independence from the executive and legislative branches of government permits an impartial and consistent interpretation of the law. Second, judges are experienced in this process – in discerning the underlying purpose or purposes of a law and reconciling those fundamental goals with the need for fair and transparent application of the law. Also, they are expert in imposing measured and appropriate sanctions and remedies for violations of the law.

Beyond these fundamental qualities of the judiciary, there may be significant differences among countries as to the types of courts that decide competition cases and the procedures that are employed in such cases. Judges may be generalists – members of the national judicial system who hear many types of civil and criminal cases – or specialists – members of a court that specialises in competition cases. Experience across countries demonstrates that effective judicial enforcement of the competition law does not necessarily require either type of judge for such cases.

The judiciary also brings a certain degree of flexibility to the implementation of the competition law, thus enhancing the development of the law and the application of current economic thinking. This aspect of judicial enforcement of the law can be especially important in countries that have only recently

enacted a competition law, including transition countries such as Poland. In some judicial decisions in that country, courts explicitly moved toward greater harmonisation with competition policies of the European Union.

The Role of Economics and Economists in Competition Cases

There is a close and fundamental relationship between economics and competition law. Economics provides the substantive basis for the competition law, which is normally drafted in broad, general terms. Economics provides meaning for such terms as "substantially lessen competition." Thus, there is broad agreement within the competition community on fundamental principles of competition analysis in such substantive areas as restrictive agreements, abuse of dominance and merger control. In this sense, economics becomes law.

Economics is not the sole basis for competition law, however. Competition law does not merely enforce economic principles. The law is fundamentally subjective, in the highest sense of the term, in that it is based upon political choices, which can include non-economic goals and purposes. Conversely, the law strives for certainty and transparency, and economics does not always lend itself to those ends. The law provides guarantees of procedural rights as well as substantive ones, and it also deals with aspects of remedies and sanctions. These factors combine to make competition law a complex system of rules and procedures of which economics is but one component, albeit an important one.

Is competition law unique in its close relationship to, and incorporation of, principles of another non-legal discipline? There is no consensus on this point. If it is unique, then there is something to be said for the use of specialised tribunals to hear competition cases. Such tribunals exist in some countries, and apparently work well. In other countries, courts of general jurisdiction hear and decide competition cases, and they too, for the most part, make informed and well-reasoned decisions. In several countries, both types of tribunals participate in competition cases. In the first instance, a specialised tribunal may make a decision, which is appealed to a higher, generalist court. At the appellate level, the court may defer to the lower tribunal in matters of economics.

In either case, judges must acquire credible economic evidence, and in the case of generalist judges, some competence in economics, in the course of their cases. How is it done? Experts in economics are often employed for this purpose, but again, there is variance among countries on how experts are used. In some countries, only the parties to a case can present evidence, including economic evidence. The adversarial system fully applies; each side offers its own economic evidence, often through experts, who are subject to cross examination. In other systems, the membership of the court or tribunal may include one or more economists, or conversely, the court may appoint an expert to advise only the court. This latter method – court-appointed experts – has the advantage of ensuring the impartiality of the experts, but it may suffer from a lack of transparency in the relationship between court and expert, and the expert's opinion may not be fully tested, as it would be in an adversarial context.

A relatively new practice in Australia combines aspects of both practices involving economic experts. After presentation of all the evidence, the experts for both sides are given the opportunity to state their views on the case. Simultaneously they respond to questions from the court, from each other and from the lawyers, who can cross examine.

Accommodation of Multiple Criteria in Competition Cases

In many countries the competition law expressly incorporates economic and social policies that are different from, if not antithetical to, the protection of competition. These articulated policies can include, among others: promotion of economic efficiency; promoting production or distribution of goods, or technical or economic progress; protection of consumers; promotion or strengthening of exports; protection of economic freedom; and protection of the public interest. In some common law countries, the caselaw has engrafted one or more of these policies onto the analysis required under the law.

On occasion there can be conflict between these goals and the promotion of competition. This is so even in those countries in which only allocative efficiency, and not other social policies, are said to be relevant in the competition analysis. Business conduct can on occasion both eliminate competition and promote efficiency. The task for the competition agency and the courts is to find a way to harmonise these different goals in situations where they apparently diverge.

The extent to which social and other policies are relevant in the competition analysis can depend, at least in part, on the type of legal provisions in the competition law and the administrative and judicial structure through which the law is enforced. Broadly speaking, the substantive provisions in competition laws may be based on the "abuse" principle, or they may be more straightforward "prohibition" provisions. The former is more susceptible to the accommodation of multiple substantive criteria. There is a distinct trend, however, to laws based on the prohibition principle. Further, where the competition tribunal is, at least initially, a specialised agency or court, on which sit specially trained judges and experts, there may be a greater willingness and ability to incorporate diverse policies into the competition analysis.

In any case, where two or more policies diverge, the process of accommodation is difficult and imprecise. In the judicial sphere, the notion of "balancing" conflicting interests is usually inapplicable. Most judges are uncomfortable with such a process. In these situations the tendency in the courts has been to develop presumptions. Conduct that significantly limits competition is presumed to violate the law, unless there is a clear showing of other, relevant benefits that clearly overcome the harm to competition.

Even where presumptions apply, however, in situations of conflicting policies there must be some comparison of the magnitude of good and harm resulting from the conduct. Thus, over time the courts tend to develop means of minimising possible conflicts between multiple criteria. Most competition laws provide that only conduct that "significantly" or "substantially" harms competition is unlawful, and in many countries courts appear to be increasingly strict in requiring a showing of such substantial harm. Thus, if the threshold of illegality is set sufficiently high, most conduct that promotes other relevant economic and social policies is automatically approved, and conversely, the presumption of illegality that applies to conduct above the threshold is more difficult to overcome. Also, it appears that in competition cases courts consider more favourably public benefits that are complimentary to, and not inconsistent with, competitive markets.

However judges approach the problem, they must be pragmatic and predictable. They must be concerned with causation – that the conduct in question will in fact bring about the claimed benefits, and that the benefits would not occur in the absence of the conduct. Finally, their decisions, both on competitive effects and offsetting benefits, must reflect business realities.

Standards of Proof in Competition Cases

The standards of proof that are required in competition cases are subject to several variables. One fact is common across countries on this issue: there is constant change and evolution in applicable evidentiary standards in these cases, as competition laws are modified by legislatures and as courts and administrative tribunals gain increasing sophistication in competition analysis.

A fundamental fact that affects applicable standards of proof is the classification of competition cases as criminal or civil. In criminal cases the prosecutor is governed by a stricter standard – the crime must be proven "beyond a reasonable doubt," or an equivalent standard. In some countries the competition law originated as a criminal statute, but today these laws are civil in almost all countries, except for certain conduct, particularly cartel conduct, which can be prosecuted criminally in some countries. The formal classification of conduct as civil or criminal may be less significant, however, than the sanction or remedy that could be applied to the conduct. If fines (or in a very few cases, imprisonment) may be imposed, the burden of proof upon the competition agency is likely to be heavier than if only a prohibition order is likely to be imposed.

Within the civil sphere, various presumptions of fact may be applied. High market shares, for example, may create a presumption of dominance or of illegality of a merger. Certain types of conduct which experience has shown often to be economically harmful, including cartel conduct, other forms of horizontal agreements and some vertical arrangements, such as resale price maintenance, have been presumed by courts to be unlawful under competition laws. There is a trend away from the use of such presumptions in some countries, however, as enforcement officials and the courts gain experience and sophistication in competition analysis.

Courts continue to wrestle with issues of sufficiency of proof in the following areas of competition analysis:

- Proof of agreement: this is often the most simple and straightforward type of evidence in competition cases, but increasingly, direct evidence of agreement is not available; in those cases, is evidence of "conscious parallelism" sufficient to prove an agreement?
- Market definition: this evidence, which often focuses on the willingness of buyers to substitute among different products, may be considered as more specialised, "economic" evidence; how are courts to evaluate this type of evidence, and are their conclusions on relevant market ones of fact or law, or both?
- Intent: some proof of intent to cause anticompetitive effects is usually required in criminal cases, but what is the standard in civil cases?
- Substantiality: How do courts decide whether a given restraint, if proven, is sufficiently harmful to competition to breach the requirement of "substantiality" or "undue" harm to competition that most laws require?

Regardless of how these specific evidentiary questions are answered in a given system, the trend toward civil and administrative treatment of competition violations, and hence toward more liberal and subjective judicial standards in these cases, can conflict with the need for protection of due process for the citizens of a country. Courts must not sacrifice due process requirements in their quest for more accuracy in competition cases.

Judicial Review of Competition Cases

The role of the judiciary in competition cases varies considerably from country to country. In a few countries the courts are active in the implementation of competition policy, and judicial precedent is the principal source of competition law. There are both advantages and disadvantages in such a system, in which decisions tend to be on a "case-by-case" basis. One advantage is that the system provides flexibility; courts can adapt to changes in economic conditions and in economic thinking. Also, the judiciary is a moderating force over time. It dampens excessive swings in policy that may affect the enforcement agency. Because courts operate on a case-by-case basis, the system produces greater accuracy in any given case, but this specificity can also be a disadvantage, in that broader rules are not always articulated in case decisions, resulting in a lack of predictability. Further, even in countries where the courts are active in competition cases, they may not decide cases regularly and often; most cases do not proceed beyond the enforcement agency. This results in a lack of continuity in the creation of judicial precedent.

In some countries courts at the first level of appeal may review both issues of fact and law in competition cases. Different standards of review may apply to the two types of issues, however. It may be more difficult to overturn findings of fact by lower tribunals. In some countries, only questions of law may be appealed, and in most countries, courts at the highest level may review only questions of law. Thus, whether a question is one of fact or law can be an important threshold issue in the judicial review of competition cases.

Many issues in competition cases are complex, and not easily categorized as questions of either fact or law. Definition of the relevant market, a critical determination in most competition cases, is such an issue. It is on the one hand heavily fact intensive, but the assessment of the facts must ordinarily be made according to a rigorous method of analysis, which could itself be said to be a rule of law. Some courts and scholars do consider market definition (and by extension, other determinative issues in competition cases, such as ease of entry, existence of market power and assessment of competitive effects) as having two parts: the selection of the analytical framework for deciding the issue is a question of law, while the application of that framework to the facts of the case is a question of fact, or alternatively, a mixed question of fact and law.

At issue in the debate is not necessarily the distinction between fact and law, which is a relatively sterile question, but more fundamentally, what should be the level of review by the courts of competition cases? The answer could depend upon the degree of expertise in competition analysis possessed by the lower court or tribunal. If it specialises in competition cases it could be given more deference in the review of its decisions. On the other hand, as noted above, in countries where generalist judges decide competition cases those judges have for the most part performed capably. Other issues are also relevant to the question, including those discussed above relating to the advantages and disadvantages of the case-by-case approach to competition enforcement. A greater degree of judicial review is likely to result in broader rules of "law", which in turn will promote greater certainty and continuity, but will also result in a loss of accuracy and flexibility in a given case.

SECTION II

OPENING SPEECH [*]

Frédéric Jenny
Chairman, Committee on Competition Law and Policy

As you all know, this seminar has been sponsored by the Committee on Competition Law and Policy (the CLP Committee). The competition authorities of OECD countries meet under the auspices of this Committee several times a year. These meetings provide a forum at which national authorities can exchange information, a forum that is also designed to provide a basis for international co-operation. The authorities also discuss their own experience in enforcing competition law and tackle some of the complex analytical problems that can arise in this connection. These discussions are all the more pertinent now that competition law, in the majority of OECD countries, is playing a greater role in regulating market operation as the globalisation of trade increases and deregulation becomes more widespread. Since competition law has its origins in both economic analysis and economic realities, the CLP Committee normally devotes a great deal of its work to advancing economic analysis and to monitoring trends in the economic climate in which the market functions.

The competition authorities represented at this seminar play an important role in implementing government policy on competition law and in decisions taken at lower levels, whether in the area of anticompetitive practices or market concentration. In order to achieve its objective -- which lies somewhere between economic policy, market regulation and the law -- competition law leaves a lot of scope for case-by-case interpretation of the conditions under which its (often abstract) requirements should be enforced. That is why in interpreting competition law the courts -- which in many of our countries have to hear appeals against decisions by lower courts or first instance authorities -- play a quite vital enforcement role since, ultimately, it is their legal interpretation that prevails.

In the last analysis, it appears, and we are well aware of this, that it is judges who make competition law, even if we, the competition authorities, take an active part in implementing it. This is why we thought it so important to organise this one-day seminar on the judicial enforcement of competition law. The aim is to exchange views with the judges who have come here today so that we can hear their opinions on the law, what difficulties they encounter in enforcing it and what role they think each of the enforcement agencies should play. It goes without saying that a better understanding of each others' views can only make that law more effective.

This seminar is a challenge for a number of reasons. First, there are many of us. We all speak different languages and come from different backgrounds: administrators, judges, economists and other legal experts. It is also a challenge because the legal systems of the countries represented are different from each other -- in many respects -- and the relationships between the competition authorities and the organisation of the courts and judicial procedures, differ enormously from one country to another.

These differences, in my view, are what makes this gathering interesting, even if they may -- and perhaps will -- make our discussions more complicated. In fact, a number of OECD countries have only recently enacted competition legislation while in others, with a longer history of competition law, both its substance and its institutional forms have developed. In France, for instance, it was only in 1986 that the

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[*] Texte en français disponible à la page 186.

competition authority, the "Council", was given powers of decision under the supervision of the Court of Appeal in Paris and the Court of Cassation.

In addition to the relevance of the discussions on the substance of the law, comparing the systems for organising and allocating jurisdiction between the competition authorities and the judiciary in different countries, and the experiences that result from these different systems, could well be a thought-provoking and enriching experience for those countries whose systems are likely to evolve.

Organising such a debate is therefore not easy. I must say from the outset that I do not think it is possible -- and I do not even think it is the aim of this seminar -- to draw any hard and fast conclusions as to how the judicial enforcement of competition law should or could be organised. But we will learn a lot simply from hearing different points of view and from accounts of the various problems that can arise in the very different contexts that I have just outlined. In this seminar, we want everyone to express themselves freely and clearly. We will be exchanging points of view. We must keep in mind that anything we have to say may help others to resolve their own problems. So, please do not hesitate to ask questions and join in the discussions.

We have invited three speakers to introduce the main theme of our discussions:

- Mr. Canivet, President of the Court of Appeal of Paris, has been one of the key figures in the development of competition law since 1986. He has written what is, to date, the definitive study and ultimate reference work on French competition law and has been active in opening this controversial area up to judicial enforcement.

- Many of you know Diane Wood, who is in the unusual position of having worn all the hats one could possibly wear at this seminar: she has been Assistant Attorney General in the Antitrust Division of the US Department of Justice; previously she was a Senior Lecturer in law and is now a Circuit Judge in the Chicago Court of Appeal.

- Justice Gronowski, from Poland, is the author of a major work, the first on the enforcement of Polish competition law.

Besides their distinguished reputations and the importance of what they have to say, these three speakers represent three very different legal systems: one represents Roman law (France), one, US law, and one, a new development in Polish law. In the latter case, enforcement is complicated by the specific problems that can arise in a country which, until recently, was in full transition and which introduced a market economy and free competition at the same time as a special court to hear litigation arising therefrom.

Before asking our three guests speakers to address the topic, *The responsibility of the Judiciary in the Implementation of Competition Policy*, Mr John W. Clark, a consultant to the OECD and former Acting Assistant Attorney General at the US Department of Justice, will briefly present his background document, to get discussions off to a start.

PRESENTATION OF THE BACKGROUND NOTE [*]

John W. Clark[1]
Consultant to the OECD,
Former Deputy Assistant Attorney General in the US Department of Justice

The background document (see Section III) is a broad overview of the issues selected for discussion at the Seminar. It also provides, following a discussion of each topic, a series of questions that may serve as a basis for discussion. These questions, however, are not exhaustive by any means and we may find that other issues come to mind for us to talk about under each of these topics.

The first topic is *The Responsibility of the Judiciary in the Implementation of Competition Policy*. In most countries, courts do play an important role in matters of commerce. It does seem, on the other hand, that there is some variance among countries in the degree of activity by courts in enforcing competition laws. However, it would seem ultimately that there is an important place for courts in this function if only because competition laws are written so broadly. This fact provides an opportunity if not a need for courts first to define and apply more specific standards to these broad standards found in our laws, and second to exercise review of what inevitably will be a significant exercise of discretion by the Competition Authority. Possible issues for discussion then under this first topic include: 'What is the proper role of the Judiciary in the enforcement of countries' competition policy?' and 'What are the limitations both practical and structural upon the courts in this function?'.

The second topic is *The Role of Economics and Economists in Competition Cases*. Economics provide an important and usually in fact the most important underpinning of competition policy. How can non-economist judges intelligently apply this specialised discipline? In some cases, there can be shortcuts or legal presumptions that may make the task easier. But in others, including for example market definition, this is apparently not possible. Expert economists can assist courts in this regard and it could be useful to discuss how to make use of good expert economic witnesses.

The third topic is *The Accommodation of Multiple Criteria in Competition Cases*. Courts are often called upon to perform a balancing function in competition cases within the strict competition analysis, for example, between anticompetitive effects of the conduct in question, on the one hand, and possible efficiency gains from that same conduct on the other. In a broader context, courts have to balance between the strict allocate goals presented by economics on the one hand, and other national interests that may be relevant in a given country such as enhancement of employment, or enhancement of international competitiveness of national industries or protection of medium and small size businesses on the other. They may have to balance also between the competition law, on the one hand, and other laws, for example laws protecting intellectual property on the other. And finally, in some circumstances, courts must balance between the competition policy on the one hand, and the regulation of natural monopolies on

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[*] Texte en français disponible à la page 189.

1 John W. Clark is a Consultant to the OECD. Most of its prior career was spent in the Antitrust Division of the United States Department of Justice, where he held several positions, most recently Deputy Assistant Attorney General, Antitrust Division.

the other. The means by which courts confront and resolve these conflicts could be discussed in this segment.

The fourth topic is *Standards of Proof in Competition Cases*. Unique and difficult issues are how proofs arise in competition cases. These include proof of agreement in the absence of explicit evidence thereof, definition or articulation of standards for dominance, determining the substituability of products or location of supply and defining markets and, perhaps the ultimate one, the substantiality or significance of competitive effects resulting from the conduct in question. There could be discussion of how courts approach these issues of proof.

The fifth and last topic to be discussed is *Judicial Review of Competition Cases*. It is more likely in most countries that courts will confront competition cases in an appellate or review function rather than as tries of fact. Competition cases present interesting and unique questions regarding the dichotomy between law and fact, and the role of judicial review will vary across legal systems, for example between common law systems and roman law systems. Here again the relationship between an enforcement agency that has a significant degree of discretion in interpreting a generally worded law and the courts charged with reviewing the actions of the agency is relevant. A related question is how there can be review, if necessary, of enforcement decisions by the agency that do not result in court cases.

THE RESPONSIBILITY OF THE JUDICIARY IN THE IMPLEMENTATION OF COMPETITION POLICY

Guy Canivet [*]
First President, Court of Appeal, Paris (France)

I. Introduction

The topic -- (*The Role of the Judiciary in the Implementation of Economic Policy*) -- is a fundamental one. It raises the wider issue of the institutional role of the judiciary: whether, by and large, the judiciary has a real role to play in implementing economic policy.

Before economic policy can be enforced, the relationships between economic agents must first be regulated by substantive law. In the case of France, Community law, particularly Articles 85 and 86 of the EEC Treaty, and domestic legislation under the Ordinance of 1 December 1986 constitute the substantive law. The objective of these provisions is to maintain effective competition in the market. So that this policy can be implemented, economic authorities have been given the power to act expressly to that end. These are the prerogative powers vested in the EEC Commission and in France's Competition Council (known as the competition authorities) for the purpose of investigating practices detrimental to the market and initiating proceedings to prohibit and penalise such practices. Accounts of such proceedings appear in regular reports, which describe and summarise current directions in competition policy. This is the role of the competition regulatory authority.

Certain of the statutory provisions confer rights and impose obligations on individuals. Consequently, civil actions by companies can be decided in court on the basis of this legislation. This means that economic agents themselves can also be instrumental in implementing regulatory policy on competition. According to the conventional definition, the duty of the judiciary is to apply the law impartially and objectively to a given state of facts. In reality this means either settling disputes between two economic operators on the basis of competition law or reviewing prohibitions, injunctions or penalties imposed on the operator by the competition authority, in other words, determining whether procedural due process has been observed and whether the substantive law has been applied correctly.

The function of the judiciary in competition cases is therefore twofold: i) to resolve disputes between undertakings on the basis of competition law, awarding damages or issuing injunctions, i.e. imposing civil penalties on practices detrimental to the economy, and ii) to rule on appeals against injunctions or penalties imposed by the competition authority, i.e. to review administrative sanctions against behaviour that is detrimental to the economy.

Seen in this light, the responsibility of the judicial system, and hence of the courts, in implementing economic policy and competition policy in particular could seem a relatively straightforward issue which could be summed up in the following two premises.

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[*] Texte en français disponible à la page 191.

The first is that the judiciary reviews the legality of the acts of the economic authority, i.e. the market regulator, in enforcing its policy. It checks that the regulator has observed the rules of procedure and evidence; in other words, it determines whether the regulator has observed procedural due process and the presumption of innocence principle. This is the judiciary exercising its traditional function as the defender of civil liberties. The judiciary also reviews the way in which the substantive law has been applied; in other words, it determines whether the regulator's understanding of the law is correct. This is the judiciary's traditional function of reviewing application of the law. The second premise is that judges construe the law -- the objective of which is to enforce economic policy -- in the light of a given factual and economic context. This is the judiciary's traditional role of establishing judicial precedent. The judiciary therefore determines both issues of substantive law and the procedural legality of its implementation by the regulatory authority.

However, the issue becomes somewhat more complex when one begins to examine the consequences of the judiciary's institutional role. First, because in interpreting economic legislation the courts give it a meaning which has an effect on its intent, i.e. which can qualify, bias, pervert or otherwise conflict with the economic policy that the law is actually intended to implement. The judiciary therefore shares some of the responsibility for shaping economic policy. Second, because the regulatory authority has to comply with procedural safeguards that necessarily have an impact on its effectiveness. The more procedural safeguards there are, the greater the risk of hampering action by the authority. Judges therefore have to balance the level of safeguards against the effectiveness of (legal) action by the authority. In other words, the judiciary assumes some measure of responsibility for the effectiveness of economic policy.

Consequently, we have to examine the responsibility of the judiciary in implementing economic policy from two standpoints. First from the conventional standpoint, its contribution to economic policy: How does the judicial function, as conventionally understood, contribute to the implementation of competition policy? The second is more problematic and relates to co-operation: How can the judiciary actively co-operate in the implementation of economic policy?

II. The judiciary's contribution to economic policy

This contribution is twofold. On the one hand, the judiciary brings economic policy under the rule of law; on the other, it brings economic factors into the legal reasoning process.

2.1 Bringing economic policy under the rule of law

The judiciary has two means of bringing economic policy under the rule of law: by protecting fundamental rights, and by making allowance for the regulatory function in framing and applying rules of procedure.

2.1.1 Protecting fundamental rights

In incorporating procedures implementing economic policy into ordinary procedural law, the courts must have due regard for the need to implement that policy effectively.

a) Incorporating procedures implementing economic policy into civil procedures

Without going into great detail, the judiciary's responsibility is to ensure that the regulations that empower the economic authority to investigate companies, issue injunctions and impose penalties are formulated and enforced in accordance with fundamental constitutional rights and with those international agreements to which the State is signatory. In short, it is responsible for ensuring that due process has been observed, that there has been no invasion of domestic and personal privacy, that the adversarial principle is observed, that defendants are presumed innocent until proven guilty and are given a fair hearing in sanctions proceedings, and in general for seeing that the rights of companies -- business confidentiality, for instance -- are protected.

This said, how does the role of the judiciary as the defender of civil liberties contribute to economic policy? I think it does so in two ways. First of all, it is only when there are sufficient safeguards that the implementation of economic policy will be brought under the law and indeed tolerated by society. It is the level of such safeguards that legitimises the actions of the economic authority; its decisions will only be understood and accepted if they are implemented in accordance with the procedures that safeguard the economic actors and if they can be openly debated. I would even go so far as to say that such decisions derive their legitimacy from open debate and from the protection of fundamental rights that procedural due process ensures. The decisions derive their legitimacy from the legitimacy of the proceedings. Then, too, this basic level of safeguards is essential if an economic position is to have credibility, i.e. if the economic policy followed by a country or group of countries is to be recognised by the international community. This is the principle of legal certainty, the principle that ensures that economic operators can, in the country in which they operate, count not only on the protection of known and stable substantive law but on objective and impartial enforcement of that law in accordance with those safeguards that are commonly acknowledged to be indispensable.

In the last analysis, therefore, the role of the judiciary is to facilitate open debate on the methods of implementing economic policy. While economic policy may be defined by the democratic process, its implementation is shaped by legal debate.

b) Upholding the effectiveness principle in enforcing economic policy

In enforcing the basic safeguards the courts nevertheless have to strike a balance between fundamental rights and those essential investigatory powers that are allocated to the regulatory authority. It follows therefore that procedural due process is not an absolute. It is rather an evolving process tending towards a level that is acceptable given the legal and judicial culture involved and the means available to the administration.

2.1.2 *Making allowance for the imperatives of economic regulation in implementing rules of procedure*

This presupposes, on the one hand, that judges will deliver rapid rulings on appeals against decisions by the market regulator and, on the other, that decisions settling private disputes between undertakings will not undermine public economic policy.

a) The regulatory function of competition law necessitates, in the first place, rapid procedures for ruling on appeals filed against decisions by the market regulator. Any doubts raised by appeals filed against actions by the regulatory authority must be quickly dispelled, decisions must be implemented and full deterrent effect given to sanctions, so that other similar anticompetitive practices can be rapidly brought to an end. The need for rapid rulings on appeals against decisions by the competition authorities has given judges greater powers to prescribe rules on appeals proceedings, allowing them to reduce the time limits for producing statements and so prevent the use of delaying tactics. Economic procedural law therefore establishes rules which can serve as a precedent that judges can follow whenever they wish to reduce the duration of proceedings.

b) The regulatory function of competition law also requires judges to allow for public economic policy in making their rulings, in this case not on appeals against injunctions or penalties, but on private disputes between economic operators, where these have an impact on the market. In the latter case, the court cannot simply confine itself to considering the interests of the litigants; it must also have regard to the general interests of economic policy. It could not allow performance of an anticompetitive agreement, for instance, even if neither party to the dispute has raised the issue of its legality. In settling private disputes the court may call on the economic authority as an expert advisor on economic policy. The imperatives of economic policy can and should influence the settlement of private disputes.

2.2 Taking economic data into consideration

In reaching its decision, the court takes economic data and mechanisms as well as the imperatives of economic regulation into consideration.

2.2.1 Taking economic arguments and data into consideration in reaching a judgment

Since judges have to weigh the economic implications in terms of obligations and penalties, they must be able to grasp economic concepts if they are to take account of them in reaching their decisions. In this respect, judicial reasoning is the link between the market regulator's economic expertise and the implications for operators' individual rights. It facilitates open debate on the application of economic policy to a particular situation. Then, through its application to successive cases, such policy acquires a logical consistency and transparency that allows it to be questioned by the public. Ultimately, it is the legal reasoning process that allows us to make the step from economics to policy, from theory to common sense, from a technocratic process to an economic policy whose implications are understood and accepted.

2.2.2 Taking the imperatives of economic regulation into consideration

If they are to take the imperatives of economic regulation into consideration in establishing judicial precedent, judges must concentrate on two areas. First and foremost, in this above all areas, they must make the law predictable, that is, they must quickly and clearly make their decisions, and the process

by which they arrived at them, known so that economic operators are quite clear as to the application of the rules. Once they have settled on an interpretation of the law they must apply it consistently. This is the principle of legal certainty in the application of the law.

III. The judiciary's co-operation in the implementation of economic policy

On this issue, two questions need to be addressed: first, how can the judiciary help to ensure compliance with the objectives of the law and maintain the economic and social balance that is the law's intent? Second, how it can it co-operate in making sanctions effective?

3.1 Compliance with the objectives of economic law and maintaining an economic balance

3.1.1 Reiterating the objectives of the law

In order to implement economic policy the resources available to the regulatory authority must be rationally deployed so as to achieve the best possible outcome having regard to the essential objectives pursued. Certainly, it is not up to the judiciary to review the authority's decisions as to appropriate economic sectors or practices to investigate. However, judges must censure inappropriate or inefficient use by the authority of the means at its disposal in prosecuting or imposing penalties on practices that are unimportant considering the law's objectives. The courts should therefore refuse to uphold penalties imposed by the authority on practices which have had no significant impact on the market and which, consequently, do not come within the ambit of the authority's regulatory role. This is the sensitivity threshold concept, which allows the judiciary not to apply competition law to practices that do not affect the general economic interest.

3.1.2 Achieving the economic balance that the law intended

In the same way, judges should actively seek to achieve the economic balance that an economic policy is intended to achieve. Thus, Article 10-2 of the Ordinance of 1 December 1986 (France's competition law) makes provision for not prohibiting or sanctioning practices which, under certain conditions, promote economic progress. By analysing the circumstances for themselves or by determining the validity of the market authority's analysis, judges are clearly taking an active part in implementing economic policy.

3.2 Co-operating in making sanctions effective

The courts can co-operate in making sanctions effective in two ways: by ensuring that the administrative penalty is proportionate to the scale of economic disruption caused by reprehensible practices, and by awarding civil damages consistent with the regulatory function of competition law.

3.2.1 Matching administrative penalties to the scale of economic disruption caused by sanctioned practices

As we know, sanctions generally serve two purposes: the first is to match the punishment to the offence committed (the retribution aspect); the second is deter those who may be tempted to do the same (the exemplary aspect). In the context of competition policy, the efficacy of a penalty is measured in terms of its deterrent effect, in other words its ability to send a signal to economic operators that anticompetitive practices do not pay and, so, make them abandon such practices.

Economic operators will realise that it does not pay to break the law, if they believe that they will be prosecuted or that the chances of prosecution are high, that the penalty, if they are found guilty, will wipe out any gains they stand to make from illegal practices, and that the damages they will have to pay will penalise them heavily vis-à-vis their competitors. The effectiveness of the prevention system depends on this balance between the strictness of enforcement and the deterrent effect of the sanction. Consequently, the less of a deterrent effect that the system is able to exercise through strictness of enforcement, the more it should exercise through the imposition of heavy penalties.

The rational implementation of preventive policy will therefore seek to achieve a balance between the means by which the authority can identify and penalise illegal practices and the size of the penalties set. Judges can co-operate in implementing economic policy when assessing the appropriate penalty, by setting fines high enough to maintain this balance.

3.2.2 Awarding civil damages consistent with the regulatory function of the law

Similarly, when the court awards compensation payments to economic operators who have suffered from anticompetitive practices, it should try to set compensation at a level that covers not only the direct damages suffered but also all the indirect damages -- the risks taken by the whistle-blower, its contribution to implementing competition policy and the costs of the trial -- such that by its exemplary nature, the award of civil damages contributes to the deterrent effect. This broad view of compensation is also an essential component in the judiciary's co-operation on economic policy.

IV. Conclusions

When beginning this review of the role of the judiciary in the implementation of economic policy I felt that it might lead to a rethink of the judiciary's traditional duties. If it is legitimate for the judiciary to take into account, within reason, the effectiveness of the authority's action in protecting companies' fundamental rights and guarantee, to weigh up economic data and arguments in arriving at its decisions, to review the actions of the authority in the light of the law's objectives, to weigh the relevance of that authority's decisions and their impact on the market, to match sanctions to the economic costs of the practices examined, to enter into a dialogue with the competition authority to establish an effective sanctions threshold, and to set compensation not only commensurate with the damages incurred but as a deterrent, then we must concede that the judiciary has a very specific role to play in economic policy.

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What Mr. Canivet has just said carries very easily across systems. Not all of it, but a great deal. As everyone knows, the judiciary in the US has had a central role in the implementation of economic policy in general and competition law in particular ever since we have had something that could be called an antitrust law. From the time the Sherman Act was passed in 1890, it has been understood as a "common law" type of statute, a statute setting forth very general propositions, that the Judges in common law fashion would implement and develop on a case by case basis. You might say: this is a quirk of the US system. I can look around the room and not see anyone else who does it in quite our way. And so what could one learn from our system? Other countries who have both benefited from our experience, both positive and negative, and tailored it to their own internal legal structures, do not entrust so much of the actual formulation of competition policy to the judges. Instead, as we have just heard, administrative agencies and expert authorities develop the fundamental rule and the judges come in at a later stage, applying it in an appellate fashion and in other ways. Judicial review is a more standard model.

With the fact of our differences in mind, it might be interesting to step back and consider what value added, if any, does judicial participation in the implementation of competition policy offer. What are we judges doing? Could anyone else do it better? Or is there some systematic advantage to placing certain tasks particularly within the judiciary in a way very similar to the observations of M. Canivet. It seems that there are at least three significant ways in which judges make a unique contribution. The first relates to the procedural protections for those who find themselves in the cross-hairs of some enforcement agency's rifle. We call it 'due process' and, in the United States, these issues arise in both criminal prosecutions and civil cases, brought by the government and by private parties. But in any of those instances the due process rights, the rights of the defence, the fundamental rights are naturally important. The second of these areas is the accountability of the enforcement authority itself. There is an old Latin saying 'Quis custodiat custodies'? 'Who will guard the guardians'? If the enforcement agency is the guardian of competition, who can make sure it is staying within its proper limits? The answer is: the judiciary. Finally, there is the need from a more public standpoint to keep the implementation of policy on a case-by-case basis objective, a policy credible in the eyes of the public. I will elaborate briefly on each of these three themes.

First of all, my guess is that we will all agree that the procedural regularity that judges bring to the system is both critically important and something which is a unique contribution of the judiciary. This is particularly true as competition laws are enforced more strictly and as penalties, whether they are civil or administrative fines, whether they are criminal penalties, whether they are triple damages, or injunctive reliefs, become more severe for violations of the law. One truth stands out among others. These are serious cases for the companies or the consumers involved. They must be treated like all other serious matters of public law enforcement from a procedural standpoint.

The Federal Courts in the US are generalist courts. We exercise jurisdiction over virtually every area of law, including constitutional, administrative, civil, criminal, public, private, federal, state laws. Judge Vance will agree with me that practically everything comes up at some point or another. We see things ranging from life and death matters to cases that might strike you as quite trivial. One recently in our court involved a prisoner who complained that the Constitution was violated when it took seven

minutes for a prison doctor to attend to a head wound that he had suffered. We decided that this was not in fact an Eighth Amendment violation and he was just going to have to live with it. Or recently, there was a case which I wrote in which a man believed that his First amendment rights were violated when he complained to the press that the name of his fire department had been changed from the Edgarton Wisconsin Fire Department to the Edgarton Wisconsin Fire District. For some reason, they fired him over this and he brought a lawsuit of course. We found that his First Amendment rights were violated. So you never know.

This breadth of exposure has its great advantages in that it enables the Federal Courts to see competition cases for what they are. They are a form of government enforcement against a private party that might have very significant consequences. Although Federal Court judges are not necessarily experts in antitrust law - by my recollection, there are some 750 or so District judges and 179 Court of Appeals judges - they are all experts in procedural due process. The CLP Committee has had many discussions on one of the points raised by M. Canivet, the confidentiality of information in the hands of the competition authorities. We have all gone round about the sensitivity of the information for the companies concerned. We also faced questions about the exchange of such information, when it needs to be transferred either to the government or to a private litigant, what kinds of restrictions or protections could be imposed, what standards of relevance should be used, what penalties will result from violating court imposed restrictions. These questions are all common not just to competition or antitrust cases in the Federal Courts. They come up in virtually any kind of litigation you can imagine.

This general perspective helps answer the questions in the competition cases. Searches of premises for evidence are not unique to antitrust cases and the standard of proof necessary before such a search will be authorised is the same as it would be in any other criminal case. It is a probable cause standard usually needing to be demonstrated to a neutral magistrate. Moving beyond evidentiary questions, the courts have well developed laws on burdens of proof. How much must the government show in order both to bring a criminal antitrust proceeding and to prevail? What about a preliminary injunction? Can you stop someone from doing something, such as our Chicago Bulls Basketball team wishing to air its games on a certain TV network? Do you stop them or do you allow them to do it? We apply these standards every day in many kinds of cases. Does the plaintiff or the government have enough evidence to justify forcing the defendant to endure civil trial? Or should summary judgement be granted? Thus, when we encounter these questions in antitrust cases, there is a great background that we bring to it. There is never any question that the antitrust defendant would be entitled to anything less than the full procedural protections anyone else would receive.

Now on the second point, how do the courts interact with the enforcement authorities? This is complicated to address in the United States because we have many enforcement authorities. But no matter what kind of a system it is, you are looking at an enforcement agency such as the Federal Trade Commission which is the original trier of fact, with the responsibility to find in an administrative proceeding what both the facts and the legal results should be. The courts themselves may be sitting as the triers of fact in a prosecution brought by the Department of Justice or in an ordinary civil case. The courts are therefore the ones who are able to assure the accountability of the enforcement authority. Has the agency stayed within its mandate conferred by its authorising legislation? Are the substantive rules it is enforcing fairly encompassed within the law? In the United States the courts struggled for many years with the question whether shared monopoly or conscious parallelism would be enough to demonstrate a violation of the Sherman Act. At the time, the enforcement agencies were pushing for test cases that attempted to use these theories. For now, in our case, the answer to that question appears to be “no”.

The situation is slightly different among our European friends where the Court of First Instance has looked at joint dominance and concluded that this theoretically falls within Article 86. Agencies should be testing new economic learning to see how well it fits inevitably older statutes. But the courts, if they are doing their jobs properly, will decide when to blow the whistle and say that a particular advance, if it is to occur at all, must be one authorised by the Congress or the Parliament or the National Assembly, as the case may be. We all accept that competition authorities themselves are trying conscientiously to stay within the proper boundaries but there comes a point where there is no substitute for disinterested outside opinion. And that is what the judiciary furnishes.

Finally, we come to this delicate question of the difference between the judiciary's role in economic policy and that of other parts of the government. There is no question that economic policy is one of the key responsibilities of the political branches of government. And in that sense we all might wonder why we insist that competition policy at some point must become insulated from political influence, as if that were a bad thing. The choice of competition policy itself is a profoundly political decision which we have seen many countries take over the last five to ten years. What business do judges have in interfering with further development of this area? The answer lies in the difference between the objectivity and reliability in the system on a case-by-case basis and its broader policy shifts. This is never an easy line to draw. And it is particularly difficult in a country like the US where some might say that the judges are making up the rules as they go along, but that would be an overstatement of course. Once the law has been established through the proper political channels, the judiciary can ensure that it is faithfully enforced until it may change at some time. Because judicial proceedings are public, because judges must write opinions explaining why they came to the results they did, because judges are independent of both the legislative and executive branches of government - like some administrative agencies, they are independent of everyone -, the judiciary is uniquely positioned to assure for the parties, the authorities and the public at large that the law, as long as it remains in force, is being implemented appropriately. If the legislature does not like a final judicial interpretation of the law, which has happened from time to time in the US, it is perfectly free to change it.

One notable example of this phenomenon occurred in the 1940's when the Supreme Court, to the shock of everyone, decided in the South-Eastern Underwriters case that the business of insurance was part of the interstate commerce covered by the Sherman Act. Congress promptly responded with the Mc Carran Ferguson Act, which withdrew the business of insurance from the Federal Antitrust Laws to the extent that it was regulated by the states. Whether that was wise or not is another question. It certainly shows that, when the courts come forward with a legal proposition that is unacceptable from an economic standpoint by the legislators, a response is not too difficult to create. Now, if a country decides to take a major shift in its policy or even a more minor course correction, it can take that action, but litigants for the reasons of predictability of stability already mentioned should not have to fear that those kinds of shifts will happen in an unpredictable or capricious manner, case-by-case.

Therefore, viewed in the proper context, the judiciary plays a crucial role in administration and implementation of competition policy. We will be discussing in more detail how the judges deal with the sophisticated economic evidence that is inevitably part of these cases, how the broadly worded substantive standards can be reduced to practical rules for specific cases, what standards of review prevail, and how we manage to make such a multi-faceted system deserve the title 'legal' rather than 'ad hoc' or 'policy'. None of these questions is easy, particularly for judges who have no previous exposure to this area of the law. But, on the other hand, in the United States, there are many programs available for judges to obtain training: there are video-tapes; there are seminars one can go to; the Federal Judicial Centre sponsors programs.. and so a judge who has come from a different background has a great deal of help available if he or she encounters the first antitrust case. These rules benefit the judiciary's special ability to protect

defendants, to keep the authorities on the straight and narrow direction, and to apply consistent rules on a case-by-case basis.

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Judge, The Antimonopoly Court, Warsaw (Poland)

I. Competition Law

In 1990, the Antimonopoly Act[1] was enacted and then followed in 1993 by the Act on Combating Unfair Competition[2]. The Antimonopoly Office was established. It operates under the auspices of the Government and is chaired by the Chairman of the Competition and Consumer Protection Office. The Chairman of this Office reports to the Ministers' Council. The Polish Antimonopoly Act contains provisions similar to those included in articles 85 and 86 of the Rome Treaty. Moreover, the Act contains regulations which do not greatly differ from those in force in the European Union in the area of merger control.[3] On the other hand, there are no provisions of the kind in force in the European Union and which are based on regulations of the Commission issued under article 85 (3) of the Rome Treaty.

The implementation of the goals of the Antimonopoly Act is carried out basically through instruments of administrative law. There is a possibility to appeal a decision issued by the Antimonopoly Office to an independent Antimonopoly Court acting within the framework of general jurisdiction. There is a right to appeal from the decisions of the Antimonopoly Court to the Supreme Court. The Antimonopoly Law protects competition to a considerable degree. The significant number of proceedings before the Antimonopoly Office shows its importance for the Polish economy. In 1995, 950 proceedings were initiated. 80 decisions were published which confirmed the existence of antimonopoly practices.

II. Harmonization of the Law

People in Poland are aware that one of the preliminary conditions for the integration of the Polish economy with other developed economies, in particular with the European Union, is to adjust the Polish economic law to existing legal standards. This complicated process cannot be implemented overnight. Legal literature discusses to which degree the courts can outdistance the activities of other state bodies. Courts in Poland, however, do not have the rights of law-making bodies.

III. Judicial Interpretation of the Law

Courts in Poland can support the activities of other state bodies by using the "off-European" interpretation of the law. Clearly, such dynamic interpretation is the least expensive and at the same time the swiftest instrument for adjusting the Polish legislation to Western European standards.[4] References to decisions of judicial systems of other countries or to the regulations of the European Community may, in many cases, contribute to the harmonisation process and to speeding up the development of the Polish economic law.

For Polish courts facing the dilemma of transferring European law standards in national laws, the opinion of the Polish Legislative Council[5] may be of some support. The Council is an advisory body to the Prime Minister. The Council has as main missions:

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[*] Texte en français disponible à la page 198.

- To give the priority to economic events over legal regulations: the process of adjusting some aspects of Polish law should not be more rapid than establishing a free-market economy in Poland;

- To adjust the Polish legal system in order to create the conditions allowing Poland to take advantage of its participation in the European as well as its own domestic market;

- To make sure that the adjustment of Polish laws to Community laws do not lead to losing the peculiarities and specificities of the Polish legal system; in this respect, the Community principles allow each Member State to choose the most appropriate means and methods to carry out the purposes of the Community.

Given the lack of possibility to carry out the sufficiently fast changes of legal regulations, the legal literature indicates the possibility for courts to use the legal institution called *desuetudo*. It is stipulated that, on this basis, courts should refuse to use the regulations which, in new economic circumstances, have lost their up-to-date character.[6] It should be pointed out that it is still not common practice for Polish courts to use Western European legal standards. It is possible, however, to find examples in which decisions within the European Union have influenced Polish legal decisions. In one of the cases concerning the validity of a commercial law company in which the partners of the company stated that the value of non-monetary contributions was lower than their actual value, the Supreme Court referred to the First Directive of the EEC Council of 9 March, 1968 (68/151/CEE)[7] in reaching its decision.

IV. Judicial Decisions of the Antimonopoly Court

Making references to Western European legal regulations and judicial decisions is rather common practice for the Antimonopoly Office. The deciding factor comes from the inclusion of the provisions of articles 85, 86 and 92 of the Rome Treaty in the European Agreement concerning the Association of Poland with the European Communities, as well as the subsequent adoption of similar regulations in Polish law. The Community competition rules have been referred to, for example, in the following cases:

- For the definition of a relevant market[8],
- To prove the restraint of competition in a franchising agreement[9],
- To legalise and define an agreement concerning exclusive transactions[10],
- To deal with a selective distribution system[11],
- To justify the significant harmful effects on competition of tie-in agreements[12],
- To allow the introduction of indirect proof concerning the existence of a cartel[13].

The Antimonopoly Court occasionally refers to the judicial precedent or legal provisions of Member States of the European Union or of other countries. For example :

- The Court's position concerning the anticompetitive effect of the mere fact of entering into an agreement, without the necessity of proving the existence of the effect limiting the competition was based on judicial precedent of the European Union and of the USA; [14]

- The Court argued on the inapplicability of the antimonopoly legislation to intra-cooperative transactions by reference to the U.S. Robinson-Patman Act of 1936;[15]

- Finally, the Court has justified the ability of the Antimonopoly Office to intervene in the activity of pharmaceutical chambers on the basis of German judicial decisions[16].

V. Influencing the legal knowledge of enterprises

In addition to issuing judicial decisions, Courts contribute to the improvement of companies' knowledge in business law. They can achieve this goal in particular through the publication of decisions of precedental character in legal publications. To date, the Antimonopoly Court has assigned approximately 100 decisions for publication. The Court also encouraged the preparation of several commentaries by legal experts.

VI. Problems of Courts in Poland.

In Poland, there are both formal guarantees of independence of judges and an appropriate selection system for candidates for the positions of judges. Unfortunately, a common phenomenon is that, after several years of work and after gaining valuable experience, judges leave the bench to pursue higher-paying legal positions. A limited budget is not sufficient for gathering a qualified group of judges. As an example, in general jurisdiction Courts, there were a total of 6 900 judges and assistant judges employed in 1995. During this period, 4 868 000 cases were submitted to general jurisdiction courts. Taking into account holidays time, a judge must deal with over 60 cases per month. In some judicial districts, the situation with personnel is particularly difficult.

A backlog of cases and very high court fees connected with the process of appeal and cassation may amount to over 24% of the value of the subject of the dispute. These factors constitute an important barrier for a company's access to the judicial system. The barrier of court fees does not appear, however, to be an issue in the proceedings before the Antimonopoly Court, where the fixed fee for an appeal does not exceed the equivalent of 200 US$.

Notes

1 Act of 24 February 1990 on counteracting monopolistic practices (consolidated text: Official Regulations Gazette of 1995 Number 80, item 405, changes in the Official Regulations Gazette of 1996 Number 106, item 496).

2 Act of 16 April 1993 on fighting unfair competition (Official Regulations Gazette Number 47, item 211, changes in the Official Regulations Gazette of 1996 Number 106, item 496).

3 This refers to decree Number 4064/89 of the Council of 21 December 1989.

4 Stanislaw Soltysilski: Adjustment of the Polish law to the requirements of the European Union (“Law and State” 1996 note book 4-5).

5 Opinion of the Legislative Council with the President of the Ministers’ Council of the Republic of Poland concerning the adjustment of Polish law to the community law ("Review of Economic Legislature" of 1995 Number 2-3).

6 Zygmunt Ziembilski: Desuetudo, "Law and State" 1994, note book 11.

7 Decree of the Supreme Court of 7 April 1993 III CZP 23/93; OSNCP 1993 notebook 10, item 172.

8 Decision of 31 May 1995, XVII Amr 9/95; "Cause-List" 1995 Number 6.

9 Decision of 21 July 1992, XVII Amr 12/92; "Economic Judicial Decisions" 1992, note book 4, item 83, gloss E. Wojtaszek.

10 Decision of 6 December 1995, XVII Amr 44/95.

11 Decision of 6 December 1995, XVII Amr 47/95.

12 Decision of 12 February 1993, XVII Amr 33/92; “Cause-List” 1993, Number 7.

13 Decision of 1 March 1993, XVII Amr 37/92; “Economic Judicial Decisions” 1993, note book 3, item 63, gloss E. Wojtaszek.

14 Decision which has already been referred to of 1 March 1993, XVII Amr 37/92.

15 Decision of 16 December 1992, XVII Amr 28/92; “Economic Judicial Decisions” 1993, note book 1, item 9.

16 Decision of 19 November 1992, XVII Amr 24/92; “Economic Judicial Decisions” 1993, notebook 1, item 7, gloss S. Soltylskiego.

THE ROLE OF ECONOMICS AND ECONOMISTS IN COMPETITION CASES

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The Italian system is based it on a two-fold idea: the freedom of enterprise is a fundamental principle of the economic system but subordinates to the protection of social interests. Article 41 of the Constitution states: "Private economic initiative is free. It may not, however, be exercised in such a manner as to contravene social utility or impair security, freedom and human dignity. The Act lays down the rules and controls required to ensure that public and private economic activity can be directed and co-ordinated to social ends". Thus, it both recognises that there is a latent, or at least a possible, conflict between firms' private interests and collective (social and market) interests, and subordinates the freedom to pursue the former to respect of the latter.

Italy was one of the last countries in Europe to adopt a specific competition law. This law is contained in Act No 287 of 10 October 1990 (rules for the protection of competition and the market, i.e. antitrust law). It aims, by fostering a higher degree of competition and starting from the same resources, to promote social welfare, not only by protecting the freedom of enterprise but also the rights of consumers. Antitrust law is not governed solely by considerations of the efficiency of the economic system; it places those considerations within the context of public intervention in the economic sphere. In Italian law, economic and legal problems are viewed on different planes, though the judiciary cannot disregard the economic aspects of the case under consideration.

The Italian legislator chose to divide responsibility for dealing with competition matters between the judicial authority and a competition authority responsible for safeguarding competition and the market. Given this division of responsibilities, the judges are inevitably and principally responsible for dealing with litigation between enterprises, while the competition authority performs a role of supervision, consultation and protection of the general interest and economic equilibria.

I. The situation prior to the enactment of the Competition Act

Before describing the respective roles of the two bodies -- judicial and administrative --, it is necessary to outline the situation prior to the enactment of antitrust legislation. Act No 287/90 was enacted in a context that was already "regulated": the judges' had a clearly defined role in competition matters by virtue of the experience they had acquired in dealing with competition disputes, though most of them had to do with disputes between firms, but their role was not to protect the general interest or the consumer interest (although obviously these were never ignored in court rulings). It should be noted that, in the Italian judicial system, the ordinary judge is competent to rule on subjective rights, and that his role is limited to disputes between private persons endowed with private rights.

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[*] Texte en français disponible à la page 203.

Even before the enactment of the Competition Act, the competition provisions of the EC Treaty (Article 85 on agreements, Article 86 on abuse of dominant position) were enforced by Italian courts, as were also domestic legal provisions governing competition such as Article 2598 *et seq.* of the Civil Code concerning unfair competitive behaviour and Article 2597 of the Civil Code concerning enterprises in a position of monopoly.

Even after the enactment of Act No. 287/90, which gave the Court of Appeal sole competence with regard to nullity actions and claims for damages (Section 33(2)), the following categories of disputes continued to be dealt with by the courts in accordance with ordinary law and established practice prior to the entry into force of Act 287/90.

a) disputes involving breaches of antitrust legislation other than nullity suits and claims for damages;

b) disputes arising from infringements of the competition rules of the EC Treaty (Articles 65 and 66 of the ECSC Treaty, and 84 and 86 of the EC Treaty, exemptions) and breaches of the rules of third countries, where it is for the Italian courts to know those rules and to enforce them;

c) disputes arising from the provisions of the Civil Code and Article 2598 in particular.

Sometimes, an infringement may be punishable in several different courts, so that a dispute may give rise to several legal actions. Several bodies may therefore be competent to rule in a given case, each competent to propose its own remedy. There is thus a risk of conflicting rulings, but it can be avoided to some extent by using the means provided for by the system; for example, injunctions may be timely, though not always possible.

II. Act No. 287 of 10 October 1990

Under Act No 287/90, the role of the judge is to remedy the previous shortcomings of domestic legislation while enforcing Community law, and to deal with those areas - admittedly very restricted - assigned to the judges by the Act.

According to the Act, the role of the ordinary judge (the court of appeal being the only competent court under Section 33(2)) is to back up and complement the powers assigned to the Competition Authority, and to the Regional Administrative Tribunal of Latium for appeals against decisions by the Authority. In addition, the Court of Appeal has sole competence to rule on urgent and protective measures which have been taken.

Section 33(2) of the Act also gives the Court of Appeal competence to rule "on appeals lodged with a view to obtaining the application of urgent measures in respect of infringements of the provisions of the Act". In addition, under the reform of the civil procedure (Act No. 353 of 26 November 1990), protective measures can be requested from another section of the court of appeal if the measure is collegial, or from the college of the same section if the measure has been taken by a single judge. In this connection, it may be noted that in the first rulings by the Milan Court of Appeal (orders of 23 January 1992, Cavirivest/Nuova Samim; 7 July 1992, AVIR/ENEL; 5 February 1992, MYC et al./AFI et al., and the B.B. Center/Parabella ruling of 21 March 1995), followed by other similar decisions of the Rome

Court of Appeal (orders 14 January/20 January 1993, Gruppo Sicurezza/Soc.Aeroporti di Roma; 7 August/20 August 1993, CMS/ENEL; 9 December/21 December 1993 De Montis/Soc. Aeroporti di Roma) that the Court of Appeal's competence to issue emergency measures was limited to the procedural aspects of nullity suits and claims for damages.

Protective measures can be requested from the tribunal on an ordinary basis provided they are not requested in connection with nullity suits or claims for damages as provided for under Section 33 of Act 287/90. In contrast, the Competition Authority has no specific powers to take protective or urgent measures but it has wide powers to impose penalties, the effects of which can be immediate on the behaviour that is under investigation.

III. The Competition Authority

The aim of the legislator when setting up the Competition Authority was to create a body that would oversee the market and deal with any infringements of competition. The Authority thus has wide-ranging consultative powers since it can draw to the attention of Parliament and the government any abnormal competitive situations that could arise from possible legislation. It can express its opinion on the initiatives needed to prevent infringements of competition. It plays a particularly important advisory role in the framing of legislation. It can express opinions on issues relating to competition and the market at the request of government departments and public bodies, and whenever it considers that it is timely to do so.

The Authority has wide powers to investigate agreements that are in restraint of competition, or abuses of dominant position. It can initiate an investigation into companies that have concluded such agreements and, if necessary, issue summonses and impose penalties (Sections 12 et seq. and 21 et seq. of Act 287/90). The Authority's decisions can be appealed in the administrative court -- the regional administrative court of Latium -- which has competence for the whole of Italy (Section 33(1), Act 287/90). However, nullity suits, claims for compensation and applications for protective measures must be submitted to the ordinary courts and in particular to the competent court of appeal of the first and last instance for the area (Section 33(2)).

IV. Persons authorised to bring an action -- other differences between the two procedures

Given the different roles assigned to the courts and the Competition Authority, general principles apply when a person brings an action in the ordinary courts; in such cases, the courts are competent to rule on subjective rights. Whereas the role of the Competition Authority is to protect general interests and objectives within the framework of public regulation of the economy, that of the ordinary courts is confined to relationships and disputes between private persons endowed with private rights. Such persons can, insofar as they argue that their rights have been damaged by a breach of competition Act, bring a case in the ordinary courts, tribunal or court of appeal -- in the latter case only if they intend to bring a nullity suit or an application for damages pursuant to Article 33(2) of Act 287/90.

The Act does not provide for intervention by the Public Prosecutor's Office in the proceedings before an ordinary court (underlining the absolutely privately nature of the dispute). At the most, the Public Prosecutor's Office has the option to intervene under the last paragraph of Article 70 of the code of civil procedure. Likewise, it can take action only in those cases provided by the Act (Article 69 of the code of civil procedure and 75(1), Judicial Regulation No. 12 of 30 January 1941).

Furthermore, Act No. 287 does not provide for an "erga omnes" extension of a nullity ruling (similarly to what is provided for in the case of the nullity of a patent by Article 79 of the Judicial Regulation No 1127 of 29 June 1939), so that a court decision declaring an agreement to be invalid could not be extended to other parties concerned, in application of the principle mentioned in Article 2909 of the Civil Code).

A case can be referred to the Competition Authority by a government department or by anybody having an interest in doing so. Also, the Authority can act ex officio. Its intervention may thus be triggered by anybody who, though unable to allege a situation of subjective law, nevertheless has an interest in ensuring that the market functions competitively, irrespective of whether a dispute between private persons is involved or not.

V. The administrative court

As regards the role of the administrative judge, Section 33(1) states that appeals against measures taken by the Competition Authority may be lodged solely in the regional administrative court of Latium. The latter court therefore has juridical competence with regard to subjective legal situations representing legitimate interests, and also with regard to subjective rights. Thus, once a decision has been formally taken by the Competition Authority, juridical competence in respect of that decision is assigned solely to the administrative judge and not to an ordinary judge. However, a careful reading of Section 33(2) would indicate that juridical competence lies with the territorially competent ordinary judge, i.e. the court of appeal, for nullity suits and applications for damages in the case of infringement of a subjective right in a dispute between persons.

The co-existence of old and new competencies and of national and Community regulations, the relationships between the penalties and remedies available under the private procedure and the oversight of government action entrusted to the Competition Authority and, in the second place, to the regional administrative tribunal of Latium, all combine to create a complex mechanism which is susceptible of generating a whole range of litigious situations and a plethora of lawsuits, and contains a variety of means and bodies for protecting competition.

Nearly six years after the enactment of antitrust legislation, and as a result of numerous contributions to legal doctrine and case law, the system is now clearer though there are still areas which overlap or are grey. The most confusing aspect from the practical point of view is unquestionably the different competencies of the various levels of jurisdiction, the administrative court and the Competition Authority. In this complex situation, responsibility for examining the economic aspects of competition cases clearly lies with Competition Authority rather than with the ordinary courts.

VI. Relations between the various authorities

However, a complaint does not first have to be lodged with the Competition Authority before proceedings can be initiated in the ordinary courts. In this connection, it had been argued that the courts of appeal would rule only on disputes arising from rights granted by decisions of the Competition Authority. In reply, it was argued that infringement of competition rules could be verified either by the Competition Authority or the ordinary courts; others considered that the special competence assigned to the Court of Appeal by Section 33(2) was conditional upon the Competition Authority having first attested

that an infringement had taken place, with the application of penalties in conformity with the Act, so that a ruling declaring an act to be invalid or awarding damages necessarily followed the administrative verification. Furthermore, the judge would have to make this verification if decision had not been appealed in the regional administrative tribunal (and even more so if it had been accepted and confirmed by the administrative judge); under Section 4, annex E of the Act of 29 March 1865, the courts may not dispense with such verification.

This is the conclusion that would seem to follow from the fact that the Court of Appeal is competent in the first and last instance, which seems consistent with the subsequent nature of the ruling, this being confined to a statement of the nullity of the act, verification of a causal link and the setting of the damages and compensation due. Furthermore, the court's role is confined to supplementing, at the level of relationships between private individuals, the effects of decisions taken by the Competition Authority with the sole aim of safeguarding competition and the market.

But the antitrust law does not seem to lend itself to this view; if an exception is made to the general principles of the legal system, it should be stated clearly, since it is not possible to infer such a limit to the powers of the ordinary courts from the sole fact that the provision is placed in the context of Section 33 (the second paragraph being subsequent to the first paragraph). It may be noted that, in Section 33 and the law in general, there is no link between the phase of administrative investigation and the legal proceedings in the Court of Appeal, or any other ordinary court (given the importance of the residual competence of the Tribunal described above).

An attempt to initiate administrative proceedings, or even the prior initiation of such proceedings, in respect of a reported infringement, may not constitute a prerequisite or formal impediment to a plaintiff taking legal proceedings, pursuant to the fundamental principle of Article 24(1) of the Constitution, which states that anybody may go to court to protect his rights, and also of the role of judge as the guarantor of provisions adopted by the government, as provided by Article 133 of the Constitution.

It is also significant that, in the many appeals brought in recent years in the ordinary courts, none of the judges, while noting that the case was being examined by the Competition Authority, thought it necessary to suspend the case pending the decision of the authority, and, in those cases where the Authority's investigation had been completed did not consider its decisions to be binding. In several cases, they referred to the conclusions of the investigation as supplementary elements of evaluation or presumption of the existence of specific infringements and behaviour but did not go any further, basing their rulings on the deductions and evidence supplied by the parties during the trial.

As stated earlier, however, it is not possible to deny that the rulings of the Competition Authority and those of the courts are linked, or the possibility that they may conflict with one another. An important example of such a conflict was the Omnitel/Telecom case concerning the GSM telephone network. The Rome Court of Appeal considered that Telecom had not committed an abuse of dominant position, while the Competition Authority considered that it had. The court based its ruling on a procedural question -- the relationship between the two parties (failure of Omnitel to meet the burden of proof), while the Competition Authority based its decision on the investigations that it had conducted ex officio as the Act authorises it to do so. It is clear that in this case the rulings of the two bodies conflicted with one another.

The risk of conflicting decisions is inherent in the system devised by the legislator. It is partly ascribable to the diversity of functions which each authority must perform. The possibilities of conflict are numerous: for example, one authority rules that an agreement is void at the level of private law, while

the other considers that it is not contrary to the public interest or does not infringe competition. Another example: the court rules that an abuse of dominant position is unlawful but the competition authority considers that it does not harm the public interest, or vice versa. In order to avoid conflicts of this kind that serve no purpose, it would be necessary to create channels of information -- even informal ones -- between the various authorities. But to date this has not been done, apart from individual contacts or information supplied to the courts by the parties.

VII. How are judges informed of the relevant economic analysis in a particular case?

After having described the competencies of the Competition Authority and the courts in the area of competition law, we shall now turn to the economic aspects. While it may be said that the Competition Authority is specifically concerned with the economic aspects of a case, a judge cannot rule in a dispute between firms if he does not understand the economic context of the dispute.

How can a judge deepen his understanding of the economic aspects of a case? Of course, the parties in the case give a preliminary picture of the situation. It may be noted that, in the Italian legal system, the principle of the "allegation of the parties" is applied, i.e. the judge confines his examination to the aspects which the parties have chosen to present. Likewise, with regard to the matter of proof, the judge must take into consideration only those means of proof (documents) which have been submitted by the parties, or consider only the evidence and questioning of the opposing party that the parties have requested in a memorandum beforehand.

Regarding the manner in which judges are informed of the relevant economic analysis in a case, as was said earlier, since a case does not have to be first brought before the Competition Authority before it can be taken to the courts, the judge is not always able to refer to investigations carried out by the Authority in the economic sector relevant to the case, nor is he bound by the conclusions that the Authority has reached in a given case. However, there is no doubt, and this has already been borne out in several cases, that if the Authority has already conducted investigations in a particular case, then the courts will refer to them. But here again, it is always one of the parties to the dispute who will supply the judge with information about the Competition Authority proceedings.

The judge is empowered to ask for information from a government department (Article 213 of the code of civil procedure) about the economic aspect of the sector in question, in addition to the information that the parties wish to give him. Up to now, however, this possibility, which seems feasible from the point of view of the civil procedure, has never been used, and the information which judges have about Competition Authority proceedings has always been supplied by the parties in the form of documents and evidence. It should also be noted that in the Italian legal system, a judge may not receive or use private information about the cases before him (Article 97, implementing regulation of the code of civil procedure), and he may not use information obtained informally from the Competition Authority or economic experts. He can only request information or technical opinions in the manner already described.

VII. What is the value and role of economic experts?

One way in which a judge can find about the economic aspects of a dispute is, of course, to call upon an expert or group of experts (a college of experts may be appointed only in cases of strict necessity or when it is provided for by the law: Article 191 of the code of civil procedure), who will give him the technical information he needs to appraise the main facts of the case). The technical expert is selected ex officio and intervenes in response to a specific question from the judge; he may accompany him in his enquiry or, as is most often the case, work alone or with the help of an assistant and submit a report to the judge. The expert may be authorised to request clarification on certain points from the parties and to ask for information from third parties. The parties can also monitor the work of the expert by appointing their own experts, who can submit their comments and reports to him.

In the Italian legal system, an expert opinion does not constitute a proof; it serves solely to supplement the judge's knowledge in those cases where the judge does not have the technical knowledge needed to appraise evidence. The role of the expert is confined to expounding the technical, scientific and specialised information which the judge needs to form a personal opinion of the case being tried; but the expert may also evaluate the data directly by setting out the methodologies and criteria used. In any case, the expert's competence stops where the legal evaluation proper begins, the latter being reserved solely to the judge.

The powers of the expert and the possibility for the judge to entrust him with an investigation of an economic nature are clearly circumscribed by the principle enshrined in the Italian judicial procedure and the rulings of the Supreme Court of Appeal, whereby an expert cannot be given a purely exploratory role, his role being always confined to providing technical clarification of the evidence submitted by the parties to the case. The expert's opinion is not binding on the judge but, in accordance with the guidelines laid down on several occasions by the Supreme Court of Appeal, the judge must explain his reasons for rejecting the conclusions of the expert whom he has chosen.

However, to date this investigative procedure has not been used in competition cases, either in precautionary or substantive proceedings, except when an expert has been called upon to value the damages resulting from a breach of antitrust Act. This cannot be explained by a lack of interest in the economic aspects of the case but by the principle that, to prove their case, the parties must illustrate the market context of the case by means of documents and memoranda. As stated earlier, the role of the ordinary judge is to settle disputes between several parties and not specifically to protect the market or consumer. The different position taken by the administrative judge (in particular the regional administrative tribunal of Latium) with regard to an appeal against a decision by the Competition Authority lies precisely in the fact that the case has already been investigated by the latter and that all the documents relating to it have been, or can be, acquired during the proceedings before the administrative tribunal.

In contrast, for the ordinary judge, an expert opinion is a valid means of obtaining clarification of the economic aspects of a case and the market involved; thus, even though judges have not had recourse to such opinions up to now, they will probably do so more frequently.

As to the question whether it is judicious to have a generalist judge in charge of competition cases, it may be noted that:

a) The choice of the Italian legislator, as well as of legislators in many Member countries, to refer competition disputes to the Court of Appeal or higher level judges, would seem to indicate that such judges have a certain degree of specialisation in economic cases;

b) Higher level judges are usually attached to courts in large towns where they have the opportunity to acquire a sound knowledge of economic matters since they handle cases brought by firms;

c) It is possible, and no doubt advisable, for the judge to call on expert opinions;

d) With regard to "automatic decisions", the judges must conform to the interpretation of the principles of Community law as formulated by Community institutions (Section 1(4) of Act 287/90).

In fact, I do not think that it is a question of taking "automatic decisions" but rather of drawing upon the experience acquired by Community institutions over more than thirty years. Furthermore, the judge does not delegate his decision to experts and does not apply their conclusions automatically; rather, he must use their expertise to reach a decision, in the process resolving problems of law. In no way can an expert replace the judge.

John S. Lockhart
President, Australian Competition Tribunal
Judge Federal Court of Australia, Sydney (Australia)

Whether competition issues should be considered by judges or others, in particular economists, must be considered in the light of constitutional constraints, if any, that apply in the countries concerned. In Australia, we are a federation of six states and the central, federal government. The decision of these questions is essentially one for the exercise of federal power. That, under our constitution, is a jurisdiction that can be exercised by judges only. Federal judges determine competition questions, and judges must therefore, in the first instance, sit by themselves. They cannot sit in a role that decides a question of law with an expert, such as an economist. Also, in Australia, there are two tribunals that have specific jurisdiction conferred upon them by the federal parliament with respect to antitrust and related matters. But ultimately, all questions of law are determined by the courts in Australia. The questions of law that are decided by the Australian Competition Tribunal can be reviewed by the courts for errors of law.

The Australian Competition Tribunal sits with the President, or Deputy President, and two others who are not necessarily lawyers - one is an expert economist, the other is a retired business-person. The judge who presides determines all questions of law and what are and are not questions of law. It works very well. I have found it myself as a lawyer extremely beneficial to have the other disciplines at work, especially the discipline of economics. And it is fair to say that, amongst the judiciary in Australia, the decisions of the Tribunal are highly regarded.

Should judges sit with advisors? As I said we cannot sit, in doing trials or appeals, other than by ourselves. But we could, under the Constitution, have say an economist sitting with us on the bench to advise us. Now, judges can, of course, be informed by expert evidence and they always are in competition cases. But there is a school of thought that is gradually gaining strength, which says that an economist should be able to sit with the judge, to advise the judge. The argument against that, of course, is that justice must also appear to have been done. Parties might think that a judge in those circumstances is being influenced by matters that cannot be publicly examined in court. This can be solved by the judge each morning saying what had been discussed with the advisor and giving an opportunity to the parties to call evidence or argue with respect to it. I sit also in some cases in admiralty where that jurisdiction is exercised and it works extremely well. I have never encountered any real fear of what goes on behind the scenes. Perhaps they have to trust the judge.

Should judges when they sit be specialists or generalists? In my country's case with the Federal Court, we are fairly generalist judges. I say 'fairly' because special cases of difficulty tend to be assigned to the specialist judge. But judges are drawn in the main in my country on our court from the ranks of senior Counsel at the Bar and they tend to have practised extensively in the work of the court which therefore includes a large measure of competition cases. So, in that sense, you have a refined speciality, notwithstanding that it is not unlike the American docket system but it is by no means the same.

I want to say a little bit about the reception of expert evidence. In Australia, previously rigid rules of evidence applied so that economists were not able to speak to prove facts or to do other than comment on facts as proved and they could not speak about the ultimate issue because that was for the

judge. We now have a new rule which permits evidence to be received by experts by way of submission in such a manner and form as the judge thinks fit. Consequently, the expert feels free to speak as the expert wishes and it is working very well.

Where do facts end and where do opinions start in this area of competition? The overlap is a very difficult one. The role of the expert I think, and I find invaluable, is to take from the massive factual material what the expert regards, from the expert's point of view, as relevant and then can lead logically to a particular expert opinion. I find it invaluable in refining the facts and the issues. And it is fair to say that the judges in our country respect the decisions of the Australian Competition Tribunal considerably but they don't always like to say so because they like to think that judges decide all these questions. It is a highly respected body, due in no small measure to the benefit of experts such as the lady who sits on my left.

I want to tell you a little about the method of receiving the evidence of experts. Not in the courts, because that is traditionally done by expert witnesses. In the Tribunal, we have the following practice. Experts prepare and exchange reports after all the other evidence has been filed. Then, when the oral evidence is given, at the completion of the oral evidence of all witnesses except experts, the experts are put into the witness box and sworn together, on both sides. I then tend to ask, and other members of the Tribunal, tend to ask, questions which exercise our minds and with a view to finding issues. We then ask each expert in turn to state briefly that view as then held by the expert - it may have changed, of course, since the expert first gave his or her opinion - and to comment on the views of the other experts sitting beside them. After a brief exposition has been given by each expert, we then ask each of the experts to ask questions to the other experts if they wish, or express further views on their views. After that has been done, and we as members of the Tribunal will intervene from time to time, to ask our own questions - but we tend to not do too much of that at that stage - then we give the lawyers the right to cross-examine.

We have found in practice that what would have been say three or four days in a big case cross-examination by experts, tends to become three or four hours because there is not much left to do. The experts have done it for us. And they have by this process defined the really relevant questions in the case. We find it assists us very considerably in fashioning the decision that we ultimately make. The advantages of this method of receiving the experts' evidence is that the worst effects of the adversary system are nullified, or at least they are seriously reduced. We find that there is, amongst the experts, frankness in their exchange of views in the witness box. And it is having the additional effect, because people are beginning to know that this is the system that is in force, whereby when experts come to actually prepare their initial opinions, they know they will have to face this system. And they tend to be very frank from the beginning. It also enables a quicker and more precise definition of the issues.

Sitting as I do mainly on appeals - in our court we are both trial and appellate - I can say that we look at the decisions of the Tribunal with respect - except of course when I sit on the Tribunal! - and we find that the decisions define the issues of competition concisely, tightly and are fully reasoned, because they reflect the two disciplines at work in this area - law and economics. Ultimately though it is the judges who decide the law of competition.

Maureen Brunt
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I. Perspective

These are the observations of an economist who has participated in the adjudication function in competition cases in Australia and New Zealand over the last 20 years. My main experience has been as a member of the Australian Competition Tribunal (until recently called the Trade Practices Tribunal), a quasi-judicial body with mixed membership of a presiding judge and "lay" members. For the last seven years, I have also been a lay member of the New Zealand High Court, available for cases falling under their competition statute.

II. Background on Australian and New Zealand Law and Institutions

The salient features can be quickly summarized:

- In both countries we are concerned with relatively new bodies of law that constitute a decisive break with the past. In Australia, the relevant statute is the Australian Trade Practices Act 1974 and in New Zealand the Commerce Act 1986, itself modelled upon the Australian Act;

- It is antitrust law in the traditional sense, meaning a law whose objective is the promotion of effective or workable competition, and whose instruments are court-centred, requiring the interpretation and enforcement of statutory terms by the ordinary courts. In Australia, jurisdiction has been given to the Federal Court, a superior civil court dealing with federal matters, subject to appeal by special leave to the High Court. In New Zealand, jurisdiction has been given to the High Court, a superior court of general jurisdiction including criminal law; generally, appeal lies to the New Zealand Court of Appeal and exceptionally to the Privy Council. In both Australia and New Zealand, only civil actions are available. There are no jury trials;

- In both countries, enforcement is by way of both public and private actions, and for a wide range of sanctions and remedies - pecuniary penalties, injunctions, damages (compensatory, not triple or punitive) and other compensatory orders, and divestiture in a merger case;

- But if the core - the fundamental character of the law - is court-centred, there is nevertheless a distinctive and novel dual adjudication system with certain subject-matter reserved for administrative bodies. The courts have the responsibility of enforcing the statutory "prohibitions" against anticompetitive conduct. The administrative bodies, the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, have the responsibility of granting exemptions on a case-by-case basis on grounds of public benefit;

- The decisions of the two commissions are subject to review - in Australia by the Australian Competition Tribunal and in New Zealand by the High Court and thence to the Court of Appeal. Where the High Court sits on an appeal from the Commerce Commission, it must necessarily be augmented by at least one lay member; and in this way its composition resembles that of the Australian Tribunal. However, New Zealand has added a further novelty to the world of antitrust institutions. Where the court hears actions for breach of the Commerce Act, it may be augmented by a lay member, on the initiative of the judge or at the request of the parties.

III. Competition Law as Economic Law

In my view, the path to wisdom in antitrust work lies in recognizing the peculiar character of competition law as economic law. I use the term "law" in a jurisprudential sense. Of course, it is universally recognized that competition law exists to serve economic and associated social and political objectives - that it is a type of regulatory law analogous to, for example, industrial law or securities law. Equally, it is universally recognized that the law is directed to economic subject-matter, namely the conduct of business firms operating within an economy. But in using the phrase "economic law", I refer to a quality that goes to the very substance of the law itself.

There are three levels or dimensions of antitrust law, all interdependent in a fundamental sense: the formulation of standards of liability or competition rules; practice and procedure in the reception of evidence and argument; and the formulation and imposition of penalties and remedies. Economics must find a point of entry at each level.

What has happened in Australia and New Zealand in practice? In my view, there have been impressive achievements in recognizing the character of competition law as economic law in the first two of the three levels or dimensions of antitrust law that I have distinguished. There have been negligible achievements in the third dimension. This may be because our economists have given little attention to the topic of sanctions and remedies. Yet it is also the case that our courts and practitioners have demonstrated little interest in the international literature on this topic, particularly the sizable American literature.

It is one of the triumphs of Australian law that the courts have accepted that the very terms of the statute constitute economic law. That characterization was affirmed in striking fashion by the Australian High Court in its pathbreaking decision in 1989 in QWI (Queensland Wire Industries Pty Ltd v BHP Co. Ltd (1989) ATPR 40-925). This was a case under the monopolization provision (s. 46) concerning the refusal of BHP to supply Y-bar to the applicant QWI. To quote Deane J (50,111):

> "the essential notions with which s. 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones. The notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct ..."

At the same time, the economic concepts were to be in the service of the law. Deane J also said, as regards the market definition exercise in QWI (50,012):

> "in the case of an alleged contravention of the provisions of s. 46(1) there will ordinarily be little point in attempting to define relevant markets without first identifying precisely what it is said to have been done in contravention of the section."

These may not seem very startling observations. But there have been formidable barriers to adopting this route. Recall that our competition laws have a very short history. It is also the case that Australian and New Zealand law is derived from the English common law and its associated traditions and practices - the traditional literal approach to statutory interpretation, the adversary system, the common law evidentiary rules, and the focus of non-criminal law litigation upon private dispute resolution. Further, both Acts are couched in detailed terms, the Australian Act being especially long and intricately structured.

What was needed therefore was that the courts abandon some literal, plain English meaning of statutory terms such as "substantially lessening competition" and "substantial degree of power in a market"; that they adopt a purposive approach; that they understand the basic economic framework; and that they accept the necessity to give economic as well as legal content to the statutory terms.

How was this break-through achieved? The approach of the Australian courts over the 15 years preceding QWI had been somewhat variable, albeit evolving towards the QWI vision. What seems to have happened is a gradual realization by the judges that the Australian law is one species in an international genus of competition law. The courts have gained reassurance from judgments in the U.S. and the European Community, as well as from non-judicial authority and the industrial organization literature.

No doubt the partitioning of subject-matter between the courts and the administrative bodies has helped. It is plain that the courts have gained assistance from the decisions of the Tribunal, always presided over by one of their own number - a Federal Court judge - yet typically using as lay members an economist and businessman. The courts' task, too, has been simplified, cut back, by the very existence of the authorization process that grants exemptions on consideration of net public benefits, including efficiencies: thus the courts have been able to focus largely on a pure market power standard.

Thus, in Australia, the story is one of early tensions between law and economics gradually giving way to a productive union. Developments in New Zealand can be less easily characterized. On the one hand, the High Court - the trial court level - has been receptive to the use of economists and the incorporation of economic reasoning from the earliest days. This is partly because of the statutory setting. The Commerce Act is a less complexly drafted statute than the Australian Act. There is a long-standing provision in the New Zealand Acts Interpretation Act that provides for purposive construction. There is the use of lay members in the High Court, members with experience in "industry, commerce, economics, law or accountancy". In addition, the New Zealand Act permits a court to relax the usual evidentiary rules, except in respect of criminal proceedings or proceedings for penalty, where this "may in its opinion assist it to deal effectively with the matter". In many ways, New Zealand practitioners have been leading the way, showing an intense interest in overseas jurisprudence and related economists' writings in the field of industrial organization.

However, some tension has emerged between the approach of the New Zealand Court of Appeal and that of other elements in the New Zealand institutional hierarchy and indeed that of the Australian courts. The Court of Appeal's uneasiness is demonstrated in three cases, Amps A, Clear and Port Nelson II (Telecom Corp of New Zealand Ltd v Commerce Commission (1992) 3 NZLR 429; Clear Communications Ltd v Telecom Corp of New Zealand Ltd (1993) 4 NZBLC 103, 340; Port Nelson v. Commerce Commission (unreported; Court of Appeal July 1996), in which the Courts affirm the primacy of the statutory language in its "ordinary" meaning and "the facts" before the court.

One might refer to competition law as a "blend" of law and economics or as having "mixed economic-legal content". But while suggestive, such a characterization is, to a degree, misleading. It is

more apt to say that economic concepts are "absorbed" or "assimilated" by the law. For it is plain that the law must be the dominant partner. The source of the law's power lies in the controlling statute, the courts' formulation of rules of liability, its control over practice and procedure, and perhaps most fundamentally its monopoly of enforcement, the implementation of sanctions and remedies. As Edward S. Mason wrote: "The term monopoly as used in the law is not a tool of analysis but a standard of evaluation." It follows that very special economics are required. The terms "market", "market power" and "competition" are terms of art - technical terms formulated as part of a system of what might be termed "antitrust logic". They are given a meaning somewhat different from that in business or everyday usage and not necessarily exactly equivalent to the definitions that any and every economist might employ in other work. They are economic concepts in the service of restrictive practices law.

IV. Reception and Role of Expert Economic Testimony

The reception of economic evidence in the Australian courts has been fraught with difficulty and controversy from which, however, there are signs we are starting to emerge. The experience in the Australian Tribunal and the New Zealand High Court, on the other hand, has been almost wholly positive, offering a demonstration of what is possible if the fundamental character of competition law and of the nature of economic reasoning are well understood. It is commonly said that the greatest barrier to economic testimony in the Australian courts is the existence of formal rules of evidence, especially the factual basis rule and the ultimate issue rule. It is true that, in hotly contested actions in the past, counsel have succeeded in having economic testimony limited or dismissed on this basis. But the temper of the times is changing; and a more liberal approach to interpretation of the rules and a greater resort to managerial judging have given less scope to such adversary tactics.

Perhaps a more fundamental barrier can be many lawyers' customary mode of thinking, the elevation of "the facts" as the prime determinant of the outcome of a case. But, while we all - economists and lawyers alike - can agree that a decision must be "based on the facts", facts by their very nature are insufficient. As my Professor of Economic History (John La Nauze) used to say: "Facts by themselves are merely quaint objects at which to gape." Clearly, there must be a selection of relevant facts and a linking together of these facts into a causal sequence: an explanation or prediction. In the antitrust field, the significance of a fact may often only be known by economic argument. For example, observation of uniform prices in a market are equally compatible, without more, with the strongest competition or with the tightest of cartels. There is need for analysis of the conduct in its market setting to tell a "competition story" of "what is going on". What this means is that the economist is often at his most helpful when selecting the relevant facts from the raw evidence.

The nature of economic reasoning is not as well understood as it might be. How often have we heard the impatient exclamation: "economists never agree!" It is then we should remember Keynes' pronouncement: "The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor to draw correct conclusions."

What elements of economic method can be useful to the law? I suggest that there are two. First, there is the economist's method of analysis used in applied work. This consists essentially in a combination of the inductive and the deductive to form a syllogism which purports to model reality. The steps required are:

first, to scan the raw facts (here, the raw evidence)
second, to abstract the relevant facts

third, to construct a model, using available theory, which has the form:
since A + B are present,
C follows.

Where economists on either side in adversary litigation disagree, it will be largely because they are presenting competing models of the functioning of the market under the spotlight. The court or Tribunal can find assistance from the very debate between the competing models of the economists - "partisan economists"!

The second way in which economics can be useful to the law is in supplying various economic concepts such as "economic efficiency", "opportunity cost", "common costs", "cross-subsidization" etc. An economist can advance matters by explaining their meaning. Whereas with the first contribution of the economist, it is a matter of debate or argument as to whether the model truly represents reality - something for the court to assess - with the second contribution it is a matter of right or wrong - something for the economist to assess.

Interestingly, the contribution that economists can make to argument in a case has been recognized by both the Tribunal and the Federal Court.

In the Tribunal, economists submit written statements prior to the oral proceedings but after the reception of written non-expert evidence and documentary material. Then at the conclusion of the oral evidence but prior to counsels' submissions they may be called upon to participate in a short "seminar" or debate before the Tribunal. The technique has been used with great success in some recent cases and has been described by the President of the Tribunal (Lockhart J) in QIW (re Queensland Independent Wholesalers Ltd (1995) ATPR 41-438 at 40,925) thus:

> "At the conclusion of all the evidence (other than the evidence of the experts) and before the commencement of addresses, each expert was sworn immediately after the other and in turn gave an oral exposition of his or her expert opinion with respect to the relevant issues arising from the evidence.
>
> - Each expert then in turn expressed his or her opinion about the opinions expressed by the other experts.
> - Counsel then cross-examined the experts, being at liberty to cross-examine on the basis:
>
> (a) that questions could be put to each expert in the customary fashion one after the other, completing the cross-examination of one before proceeding to the next or,
> (b) that questions could be put to all or any of the experts, one after the other, in respect of a particular subject, then proceeding to the next subject. Re-examination was conducted on the same basis."

In QIW four economists appeared. The total time required for the experts' testimony was only 3½ hours but was immensely helpful to the Tribunal.

In the Federal Court, a relatively new Rule (commencing November 1993) states that the court may:

> "in proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received

by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence."

There are two principles governing receipt of expert testimony that seem to have virtually universal utility: first, that the experts be required to prepare written statements, for economic testimony needs initially to be set down as a connected argument rather than derived from disconnected responses to questioning by counsel; and second, where there is conflict between them, that some mechanism be devised for the experts themselves to reach a view and report in writing on points of agreement, points of disagreement and sources of disagreement.

It is often a feature of restrictive practices litigation that as a case proceeds there is a development of each side's perception of the issues. There is an interaction between the law, the economics and the factual matrix. An expert may give a preliminary opinion which will need to be modified, clarified, expanded. He (she) will start to understand the source of the disagreement with the other experts. And so we can add a third principle for consideration by the court. This is that the views of all economists be ascertained towards the end of a trial.

V. The Role of the Economist as Member of the Court or Tribunal

Given the nature of competition law as economic law, it must surely be obvious that the addition of an economist to the panel enlarges its knowledge and skill. Detailed discussion of the meaning and implications of the evidence from the viewpoints of both economics and law is possible. Where the litigation is characterized by some technical economic complexity, there can be early and continuing discussion of concepts.

Where the court or tribunal undertakes some active management of the trial, the economist may have a strong sense of what is relevant, what is ambiguous and what is incomplete. A trial is an irreversible process in time. It is essential to deal with evidentiary difficulties as they arise. The economist will have some expertise in problems of proof of generalizations with a high economic content and hence a better appreciation than a generalist judge that certain evidence is simply a waste of time. The economist can contribute to an early formulation of key issues.

These observations also have relevance to the question of whether assessors can be helpful in antitrust trials. It is often objected in Australian discussions of this possibility that the assessor would be giving secret briefings to the judge. It is not obvious that this is any worse than the secret thoughts of the judge! In any event the judge, the member of the Tribunal, the lay member of the court should find some means of communicating to counsel what he, she or they conceive to be the key issues.

Ronan Keane
Judge, The Supreme Court, Dublin (Ireland)

There are obviously significant differences in the competition laws applicable in the now twenty-nine Member countries of the OECD, although some degree of uniformity has been achieved in those countries which are also members of the European Union. The variety of legal frameworks reflect not merely the different approaches adopted by legislatures but also the fact that there are significant differences between the legal systems of the different states.

Ireland has a written Constitution enacted in 1937 which provides for a strict separation of powers between the legislature, executive and judiciary. The Constitution incorporates a Bill of Rights described as "fundamental rights", among which is the right to private property. That right is not, however, absolute: it can be modified or abridged (but not abolished completely) by the legislature in the interests of social justice and the common good.

The law applied by the courts established under the Constitution is essentially the Anglo American system, i.e. it is based on the common law as amended, reformed or codified by the legislature from time to time. The English common law developed in the nineteenth century certain principles relevant to what we would now call "competition law", which rendered unenforceable contracts between individuals "in restraint of trade" on the ground that such agreements were contrary to public policy. Legislation was also enacted in 1952 to deal with "restrictive practices", but it can reasonably be said that until Ireland's accession to the European Economic Community (as it was then called) in 1973, competition law was rudimentary in the extreme. It may be noted in passing that, while the dangers to consumers and the economy as a whole of anticompetitive practices in trade or industry are as serious in a small economy such as Ireland as they are in larger economies, the difficulty of enforcing anticompetition legislation, even when it eventually arrives on the statute book, is significantly greater in a small country where personal relationships in the business area are important and people are reluctant to litigate about competition issues.

The provisions of Articles 85 and 86 of the Treaty of Rome dealing with competition are well known and need not be discussed in detail. In Ireland, as elsewhere, these provisions have direct effect in national law as do the provisions of Regulation 17. Accordingly, as from 1973, the principle of prohibition became applicable for the first time in Irish competition law: agreements of the type specified in that Article were automatically prohibited. However, under the provisions of Article 17, it also became possible for the commission to declare Article 85 inapplicable in the case of either specific agreements or categories of agreements where their maintenance could be justified on particular grounds. While Irish law provided no specific machinery for the enforcement of these provisions of the Treaty of Rome, the national courts were, of course, obliged to apply their provisions where they were invoked by the parties.

Side by side with the provisions of the Treaty of Rome, the Fair Trade Commission, which had the statutory responsibility of dealing with "restrictive practices" under the existing legislation continued in being. However, a major legislative change occurred in 1991 with the enactment of the Competition Act of that year. The object of that Act, as defined by the long title, was: "to prohibit, by analogy with Articles 85 and 86 of the Treaty establishing the European Economic Community, and in the interest of the common good, the prevention, restriction, or distortion of competition and the abuse of dominant positions in trade in the State (and) to establish a competition authority..."

Thus, this Act prohibits anticompetitive agreements, decisions and concerted practices and abuses of a dominant position in terms which faithfully reflect the provisions of Articles 85 and 86 of the Treaty. Similarly, the Competition Authority established under the Act to replace the old Fair Trade Commission is empowered to grant specific or block exemptions in relation to agreements which might be captured by the provisions of the Act. The Act also conferred a right of action on any person who was aggrieved by any agreement, decision, concerted practice or abuse prohibited under the Act and on the Minister for Enterprise and Employment. That, however, was the only remedy provided: in particular, the Competition Authority itself was given no power to initiate proceedings in respect of such breaches of the Act.

The law has recently been changed, however, by the Competition (Amendment) Act 1996. This Act makes it a criminal offence to enter into prohibited agreements or practices, punishable by fines (in the case of corporate bodies) of up to three million pounds or ten per cent of the turnover of the undertaking for the previous twelve months or a term not exceeding two years imprisonment in the case of an individual. It also enables the Competition Authority to take civil proceedings claiming an injunction in respect of the allegedly unlawful practices.

Most of the litigation arising out of the competition rules laid down in the Treaty of Rome and in the Competition Acts has been in the civil courts. The fact that the Irish legal system is adversarial, rather than inquisitorial, in its nature is of considerable importance when considering the manner in which Irish courts have dealt with economic issues and the role of expert witnesses.

Under that system, the role of the Court remains at all times essentially adjudicative rather than investigatory: it is left to the parties, who initiate and defend the proceedings respectively, to present such evidence and make such legal submissions to the court as they think will assist their respective cases. The onus of proof is on the party who invokes the court's assistance: thus, a plaintiff who asserts that a particular practice is in breach of either the Treaty of Rome of the Competition Act must satisfy the court, as a matter of probability, that such a breach has occurred.

At the same time, in dealing with issues which are specific to competition law, the Irish Courts will apply the principles which have been laid down by the Courts of Justice of the European Union in cases arising under Articles 85 and 86 and, given the fact that it replicates in large measure the provisions of those articles, will adopt a broadly similar approach in relation to the domestic law. This is a necessary consequence of the primacy of European Union law over the law of the Member States. Thus, although cases involving "vertical restraints" are more likely to be found compatible with Article 85, it is clear that such agreements are not by reason of their vertical nature excluded from the scope of that article: see Consten & Grundig v. Commission of the EC, [1966] ECR 299 as applied in Master Foods Limited v. HB Ice Cream Limited, [1993] 13 ILMR 145. Similarly, the "rule of reason" approach adopted by the United States Supreme Court in Standard Oil v. US, 1911 221 US 1 and applied by the Courts of Justice of the European Union in at least some cases has also been adopted in the Irish courts [ibid].

That brings me to the role of expert witnesses. As I have already said, in the adversarial system it has been traditionally left to the parties to call such witnesses as they think will assist their respective cases. Clearly, in cases where serious controversy arises as to whether particular agreements have as their object or effect the distortion of competition, as to whether firms are in a dominant position and, if so, as to whether they are abusing their dominant position, expert evidence from professional economists is of considerable assistance. The judge will not normally have any training in economics and cannot be expected to have any knowledge of concepts which are well known to those versed in the particular discipline concerned.

Thus, the question of whether a particular practice constitutes an abuse of a dominant position must ultimately be a matter for the court which has to resolve the issue. But it cannot come to an informed conclusion without at least having some understanding of certain concepts identified by professional economists, such as "sunk costs" and "strategic barriers to entry". It is also fair to say that, even in hotly contested cases, economists on different sides of the argument will frequently agree on what is meant by such concepts. Where they are likely to disagree is on the application of accepted principles to the facts of the particular case.

There is unquestionably a tendency under an adversarial system for expert witnesses, even of high standing, to become advocates for the side by whom they are retained. This can present particular difficulties for the court dealing with the issue, since it may not have from either side to a particular dispute the impartial assessment of the economic issues which may be of importance in the particular case. How is this problem to be dealt with? One modest reform would be for the legislation to provide that, in dealing with competition cases, the judge would have the assistance of a professional economist appointed by the court itself and not employed by any of the parties to the case. Under such a procedure, the "court economist" would not have any adjudicative role: the responsibility for determining the case would remain solely with the judge.

There is clearly a case for going further and establishing a special "competition court". Here, however, possible difficulties arise which are peculiar to those countries which, like Ireland, have a rigid Constitution and one which mandates a strict separation of powers between the organs of state. Since, under the Constitution, the administration of justice is the exclusive province of the courts established under the Constitution, there could be difficulties in entrusting to a body other than those courts the resolution of disputes which might normally be regarded as embraced by the concept of "the administration of justice". It should, perhaps, be pointed out that, as in other common law countries, there is no *droit adminstratif* system in Ireland. Hence, the difficulties inherent in establishing a competition court, the decisions of which would have a coercive effect so far as individual citizens are concerned, should not be under estimated. In particular, I think it would have to be recognised that such a court could not possibly exercise any criminal jurisdiction, since, in cases of serious crime, the Constitution requires that the case be heard by a jury and, even in minor cases, it would be impermissible under the Constitution to establish a tribunal outside the courts system which would be empowered to pass sentences of imprisonment or even impose fines.

The Constitution does, however, permit the establishment in civil cases of bodies exercising "limited functions and powers of a judicial nature, in matters other than criminal matters". Consideration could be given to availing of this power to establish a court, composed in part at least of non lawyers, to determine competition cases. The model here would be the tribunals established to deal with problems that arise in the employment field, such as allegedly unfair dismissals, anti-discrimination practices and equal pay provisions. The legislation could provide that the tribunal would have the exclusive responsibility of deciding the factual issues that came before it, but that an appeal would lie to the High Court on any question of law.

Proposals of this nature require careful assessment before they are implemented. I believe, however, that they would go at least some way to meeting the difficulties which are undoubtedly encountered in the Irish context by courts in competition litigation which seems destined to become an ever more important feature of the legal scene.

André Potocki [*]
Judge, Tribunal of First Instance, Luxembourg (European Communities)

I. Relationship between law and economics in competition law

Major conceptual differences between law and economics can make it difficult for them to co-exist within the same discipline. Their respective functions are different.

In its substantive provisions, the function of law is to state in the form of rules those values and behaviour which are considered to be desirable; in its procedural provisions, it aims to lay down the procedures for applying those rules while protecting the fundamental rights of citizens. It may therefore be said that the law orders and protects. It may also be said that it is subjective in that it is based on political choices in the noblest sense of the term.

The role of economics is to describe, explain and predict the mechanisms of creation, circulation and distribution of wealth. Economics thus differs from the law in that it does not give orders and in that it is objective, i.e. based on facts.

We shall now turn more specifically to competition law. The technical character of competition law is not exceptional in itself. Law frequently deals with technical matters -- for example, medical law, patent law. But competition law is different, not only because it applies law to economics but because it grafts economic concepts onto law. It is not confined like medical law to applying the rules of civil liability to a doctor's activity. It issues prohibitions with reference to economic concepts; for example, it prohibits abuse of dominant position. This prohibition cannot be understood and applied only in its economic sense. Economic concepts thus become legal rules. The transmutation is essentially a political choice, a political act.

The creation of the Common Market embodied this logic -- a political choice transformed economic concepts into legal principles. This, in my view, has two consequences. The judge responsible for enforcing competition law must understand and master the concepts involved. If he does not, he betrays not only economics but also the law and his role. Second, as economic concepts have become an integral part of the rule of law, a purely economic logic no longer applies. Community judges thus take an extremely severe attitude towards any agreements, whether horizontal or vertical, whose effect is to compartmentalise the market. However, it is possible to imagine certain cases in which economics would not be significantly affected. But any market compartmentalisation is an infringement of the main, founding political objective -- the single market.

I am thus fully aware that it is absolutely necessary to recognise the distinctive nature of the economic concepts embodied in competition law. But I consider that these concepts partake of the same objectives as competition law and are subject to the same constraints. A direct comparison of economics and politics via the law is sometimes made by the founding Treaty of the European Community; article 90, for example, makes public services subject to competition law, but it specifies that these economic rules may be applied only insofar as they are not detrimental to the general economic interest

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[*] Texte en français disponible à la page 211.

which those services are supposed to serve. A political concept is thus clearly involved. The primacy of the law over economics is not affirmed by the satisfaction of particular interests. It would be ridiculous and meaningless to claim so. Via the law, economics dovetails with politics -- the apex of a democratic society. However, I am only stating the obvious. If it were not the case, one would talk about legal economics and not about economic law.

II. Relations between the judges and economics in competition law

For a generalist judge, the discovery of competition Act represents an intellectual revolution. He has to learn to handle new ideas and tools. Sometimes, he even has to apply them to cases that he has already tried using traditional commercial law. However, the judges sitting in the Community courts in Luxembourg do not have to make such an effort since most of them have studied, applied and even sometimes taught competition law. They thus know the place of economic concepts.

The situation of the Community judge is also special from two points of view. Firstly, his role is confined to verifying the legality of the decision submitted to him. The economic considerations whose relevance is disputed should therefore be in the decision. The Community judge verifies the conformity of the decision to the law. He quashes the decision or rejects the appeal. But he is not empowered to hand down a new decision. Secondly, the Community judge's verification is less stringent in decisions comprising complex economic arguments. He does not sanction any error, merely those that are manifest, i.e. obvious. But it is important to be clear about this; it does not mean that the judge feels he is incapable of dealing with an economically complex issue, but that the complex economic assessment reflects a choice of economic policy that belongs to the Commission.

These limits do not amount to a denial of the Community judges' competence with regard to economic matters, rather a division of responsibilities between the European Commission and the judges. The Commission defines and implements the objectives of competition law. The judge verifies ex post that these objectives are compatible with Community law. Both the Commission and the judge manipulate economic concepts, but for the Commission they are management tools whereas for the judge they are the object of his verification.

It should be recalled, even though it might seem obvious, that the close ties between the law and economics in the area of competition law require the judge to keep abreast of developments, to show imagination and to engage in a permanent dialogue with economics specialists. There is no need to labour this point. The judge should compare his opinion with that of experts, specialised lawyers and advisers from the world of business. Neither judge nor economist should use hermetic language or reasoning. And lastly, imagination is essential in order to ensure the judge's decisions take account of the hybrid character of competition law.

To wind up these brief remarks, I would say that competition law is legitimately entrusted to judges with a generalist background. But they must make a big effort to keep abreast of developments and to be open-minded. A politician at the beginning of the century used to say: "War is too serious a matter to be left to soldiers". I would say: "Competition is too serious a matter to be left to economists or judges".

Diane P. Wood
Judge, Seventh Circuit Court of Appeal, Illinois (United States)

Few areas of laws draw more heavily, or more directly, on economics learning than competition or antitrust law. The reason for this is simple: in order to condemn only practices that are anticompetitive and to leave markets free otherwise, competition law needs a screening device that will single out for enforcement only practices that undermine the market. Of the many such devices available, economics is *prima inter pares*: whether a country purports to rely solely on economic criteria, or it prefers to use economic criteria along with other factors, it is a virtual certainty that economic criteria will play a central role in competition policy and enforcement. This places heavy demands on all parties in the system: the companies who are trying to conform their behavior to the law; the legal advisors to the companies; the enforcement authorities of the government; and the courts.

In practice, of course, the law can never entirely mimic the economist, nor would it wish to do so. The discussion that follows does not, therefore, proceed on the assumption that the economic answers to the various issues that arise in competition cases will be the last word on the subject. Procedural rights for those accused of violations of the law, the need to accommodate uncertainty, and the presence of non-economic goals and purposes of the law, all combine to make competition law far more complex than its economic component. Nevertheless, competition law is riddled with economic issues. This paper begins by reviewing the central questions that demand economic analysis and the way that U.S. antitrust law handles them. It then turns to two intensely practical questions: how do parties present economic evidence to the appropriate tribunal, and what expertise does that tribunal have (or should it have) to deal competently with the evidence? It concludes with some general observations about the virtues and vices of entrusting these cases to courts of general jurisdiction, as opposed to specialized or expert tribunals.

I. Economic Concepts in Competition Law

In the United States, competition law goes by the name of "antitrust," and I will use the two terms interchangeably in this paper. In American law schools, antitrust courses normally begin with a brief overview of the economic concepts that lawyers need to understand in order to approach this area of the law. Numerous books are available to assist the student in this task, and antitrust textbooks normally provide a brief overview of price theory.[1] Although it would be impossible to do the subject justice in only a few pages, it is useful to begin by reviewing briefly the reasons why a basic grounding in economics is thought to be necessary for U.S. antitrust lawyers and what economic topics are typically covered.

Why economics? Because antitrust law is designed to protect and facilitate the competitive process itself, and the only way to do that effectively is to understand what one is trying to protect or facilitate. The economic case for the superiority of free markets rests on a number of assumptions, which must be understood both for effective enforcement of competition laws and for a broader sense of the situations where the competition model can work and those where it may not work as well, because market failure might require certain modifications or even replacement of competition law with some other regime. Without economic principles as an analytical framework, the results of competition law enforcement would be at best intuitively correct, and at worst haphazard. For the companies who must conform their behavior to the law, the increasing rigor with which economic principles have been applied

has been a welcome development that increases legal certainty at the same time it has served the law's basic purpose.

The most fundamental economic principles used in antitrust are derived from the microeconomic theory of price. We can begin with the ideas behind the supply and demand curves, which illustrate how consumers and suppliers will behave as prices for goods, quantities of goods available, and costs of production change. On the demand side, economic theory postulates that the demand for any given product will increase as the price falls. This is illustrated graphically in **Figure 1:**

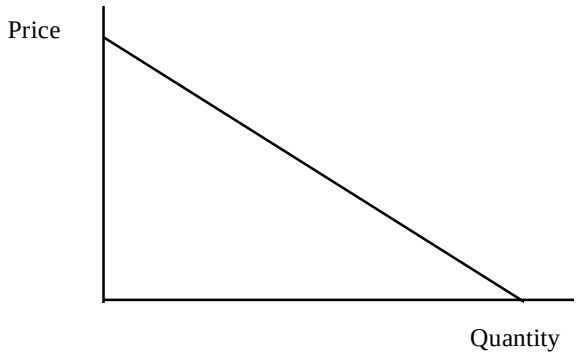

Figure 1

The counterpart of the law of demand is the law of supply: on the (simplifying) assumption that the more money a company receives for its products, the more of it will be produced and offered on the market, we find that the supply curve summing up the individual production decisions of all firms in the market is upward sloping, as illustrated in **Figure 2.**

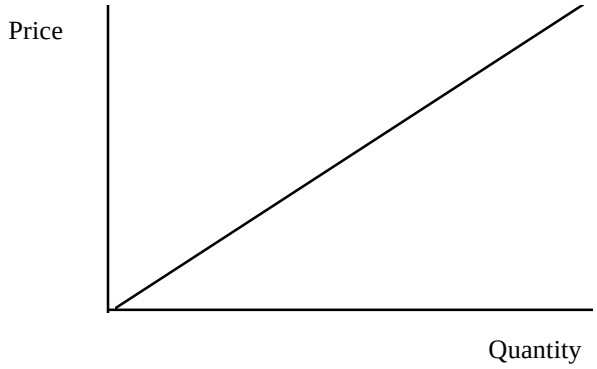

Figure 2

The economist's model of "perfect competition," while virtually never seen in the real world, offers an idealized version of the market against which we can measure real world conditions. Theoretical perfect competition occurs when five criteria are satisfied:

(1) There are many buyers and sellers.

(2) The quantity of the market's products bought by any buyer or sold by any seller is so small relative to the total quantity traded that no particular market actor can affect market prices.

(3) The product is homogeneous.

(4) All buyers and sellers have perfect information about market prices and the nature of the goods sold.

(5) There is complete freedom of entry and exit in the market.[2]

Even though these conditions also express the ideal situation, they are useful benchmarks for predicting whether competition is likely or not to be healthy in a given real world market.

Perfect competition is thought to yield the best results for consumers because resources are used and distributed efficiently. Manufacturers who can produce at price levels at or below the market-clearing price, represented by the intersection of the demand and supply curves of Figures 1 and 2, will remain in the market. Those who are inefficient will exit the market and their resources will be redeployed elsewhere. If prices rise, because demand is increasing for external reasons for a particular product (*e.g.*, health-consciousness spurs demand for lettuce, or an oil crisis spurs demand for motorcycles), new capacity will be attracted into the market because of the profit potential. They will continue entering until a new equilibrium has been established.

For the economist, the opposite of the perfect competition model is the monopoly model. The characteristics of monopoly are the opposite of those described for perfect competition: there is only one seller occupying the entire market, the seller's product has no acceptable substitutes, and substantial barriers to entry into the market, as well as barriers to exit from the market, are present. The single firm's ability to supply the product is, by definition, the industry supply curve. This means that the individual firm is able to influence price in the market, through its ability to manipulate the quantity offered. Even monopolists cannot raise prices forever, because at some point consumers will decide that they would rather do without the product in question (or lack of resources forces them to make that decision). Put differently, even the monopolist is subject to the demand curve of Figure 1, i.e. some people will simply refuse to buy at higher prices. (Note that we assume at this point that the monopolist must sell at the same price to all customers; if the monopolist is able to engage in price discrimination -- *i.e.* selling at different prices to different customers, depending upon their willingness to pay -- the monopolist will sell more, perhaps up to the amount that the firms in a competitive market would sell.)

Looking once more at a graphical illustration, **Figure 3** clearly shows that the monopolist will produce less than a competitive industry would, and consumers will pay more for the product.

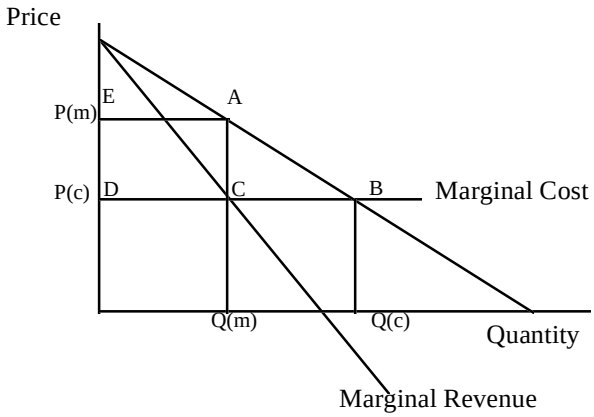

Figure 3

The monopolist will continue producing until the amount it costs to make the last unit (*i.e.* marginal cost) equals the extra amount it earns from selling that last unit (*i.e.* marginal revenue). (Note that the firm in a perfectly competitive market will do the same thing, up to a point, but if its marginal costs are higher than the prevailing market price, it must cease manufacturing, because no one will pay anything higher than the market price for the good. The monopolist, in contrast, can control price due to its control over the quantities available.). Under perfect competition, the point where the industry marginal cost curve (which is the same as the supply curve) intersects the market demand curve represents the quantity/price combination that the market will bear. As Figure 3 shows, the quantity offered by the monopolist [Q(m)] is less than the competitive quantity [Q(c)], and the price paid by consumers under monopoly [P(m)] is higher than it is under competition [P(c)]. This is wasteful, because some people who would buy the product at competitive prices are unwilling to buy it at the monopoly price: this is the "deadweight loss triangle" of the graph, noted by letters A, B, and C. There is also a significant transfer of wealth from the consumer to the monopolist producer, as shown by rectangle EACD. Although there has been a debate in the United States for many years over the relative importance of the efficiency losses due to monopoly (*i.e.* triangle ABC) and the transfer costs (*i.e.* rectangle EACD), both in the courts and among academics, it is fair to say that both furnish reasons for a law addressing competition.[3]

There is a further very important problem with monopoly that is omitted from the above diagram. Under perfectly competitive conditions, each firm will be forced to be as efficient as possible. This is because the market price will always be just enough to cover all the unit costs (calculated to include a normal return on investment) that would be incurred by a maximally efficient firm. As soon as price rises above that minimum necessary level, existing efficient firms and new entrants will take advantage of the opportunity for above normal profits by expanding their outputs. The effect of their combined increase in supply will drive price back down so it once again just covers full unit costs of efficient producers. Any firm that cannot produce in a maximally efficient way will eventually be forced out of the market. That kind of pressure simply does not exist for the owners and managers of a monopoly.

Monopolists might quite rationally opt for the easy life rather than engage in the constant vigilance necessary to minimize costs. As a result, a monopoly's marginal cost curve will end up being somewhat above the industry supply curve that would prevail under perfect competition. This will produce a further increase in prices and cutback in output and will also result in the monopoly wasting scarce resources that should instead be freed up for use elsewhere in the economy. Economists refer to

this waste of resources as "X-inefficiency". Augmented to include the effects of reduced pressure to be dynamically efficient through constantly improving products and processes, X-inefficiency probably constitutes the greatest social cost of monopoly.

Cartels behave more or less as monopolists do, although they have the added complication of the transaction costs of coordinating their activities. Some cartel members will inevitably be more efficient than others, and the more efficient ones will especially be tempted to cheat on the cartel's artificially high price. The more members of the group there are, the more monitoring the cartel as a whole must do to make sure that everyone is playing by the rules. This, of course, is usually complicated by the fact that cartels are illegal, which means that the monitoring must be accomplished in a way that does not attract law enforcement attention. Cartels, like monopolists, must worry about the firms that are nonmembers, if the cartel controls anything less than 100% of the market. Those outsiders might flourish just under the cartel's umbrella, charging a price lower than the official cartel price but higher than their own marginal costs. This, in turn, might allow the outsiders to grow and to chip away at the cartel's market share, eventually breaking it down altogether.

One final general concept is helpful to bear in mind before we turn to the content of competition law, because it recurs so frequently in legal doctrine. That is the idea of elasticity, which refers generally to the change in either purchasing (for demand elasticity) or selling (for supply elasticity) induced by a change in price. Mathematically, the elasticity of demand is expressed as follows:

$$e(d) = - (\Delta Q/Q) / (\Delta P/P)$$

where $\Delta Q/Q$ represents the percentage change in quantity demanded and $\Delta P/P$ represents the percentage change in relative price. (The negative sign reflects the fact that price and quantity changes will move in the opposite direction: when price increases, quantity demanded will decrease, and vice versa.). Under perfect competition, demand for any particular seller's product is infinitely elastic, because even a tiny increase in price would lead to a drastic reduction in the quantity demanded. Close to the opposite situation exists under a rigid monopoly. If, for example, only one company had a successful vaccine against AIDS, people would buy it (almost) without regard to the price. This illustrates a case of nearly infinitely inelastic demand. Measurements of elasticity of demand tell us a great deal about market definition, which lies at the core of almost all of competition law.

Although there is substantially more to antitrust economics than the principles just set forth, these basic concepts are enough to serve as a referent in the discussion that follows. In summary, economics tells us that competition is good, because it gives consumers the greatest choice at the lowest possible price. Monopoly, or its cousin cartelization, is bad because it leads to socially inefficient allocations of resources, shifts wealth to producers that would otherwise remain in the hands of consumers to allocate as they saw fit, and generally wastes resources through inefficient production and insufficient innovation. Other forms of market organization that appear commonly, such as monopolistic competition and oligopoly, are analyzed with reference to these two basic models. The tools of classical price theory and industrial organization economics, coupled with today's new appreciation for game theory and strategic behavior, play an indispensable role in competition law enforcement.

II. Legal Issues with Economic Answers

Almost every substantive issue in competition law will require significant reference to economic analysis. Given the constraints of space, this section includes only a brief overview of the kind of issues that can come up, with illustrations of their economic content.

Competition law as a whole is normally broken down into four broad areas: horizontal agreements (*i.e.* between competitors), vertical agreements *(i.e.* between supplier and manufacturer, or between manufacturer and distributor), abuse of dominance (*i.e.* anticompetitive behavior by firms with significant market power), and mergers or acquisitions. Note already the pervasive influence of classical microeconomics in the first three categories: agreements between competitors, as we shall see, are anticompetitive if they resemble the economist's concept of a "cartel"; vertical agreements are quite different economically, because they resemble a loose type of vertical integration, and thus the risks they pose to competition are also quite different; abusive behavior is only forbidden if the firm is "dominant," or looks something like the economist's "monopolist." In the United States, economic concepts quickly became relevant to the interpretation of the Sherman Act of 1890, because that law broadly prohibited "every contract, combination, or conspiracy in restraint of trade," and condemned every firm that "monopolized or attempted to monopolize" interstate or foreign commerce. Since every contract literally restrains someone's trade, the courts turned to the famous "rule of reason" to distinguish lawful business arrangements from those that violated the statute.[4] Today the use of economics pervades American antitrust law. A few examples from each area are enough to make the point.

Horizontal agreements

Certain agreements between competitors are branded as *per se* illegal under U.S. antitrust law, for reasons that are fundamentally economic. The Supreme Court described the rule in broad terms in its decision in *United States v. Socony-Vacuum Oil Co.*: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.[5] Yet not all agreements literally fitting this description are actually condemned. Two lawyers, who would otherwise be competitors, can get together and form a law firm, and as part of that agreement they can agree on the price they will charge their clients. Two manufacturing firms, hoping to combine their resources for basic research and development, may form a joint venture for that purpose and agree on the terms for licensing any patents that result. On the other hand, the cement manufacturers in a particular area may not get together and agree that they will all charge the same amount per ton for their cement, nor may the local roadbuilders agree to rig their bids for highway projects. How does one tell the difference between the illegal price-fixing agreements and their legal counterparts? The Supreme Court answered that question in its decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*:

> More generally, in characterizing . . . conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice is to threaten the proper operation of our predominantly free market economy -- that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more rather than less competitive.[6]

This passage is filled with economic concepts, all of which normally require expert attention in a competition case.

First, the Court defines a practice that tends to restrict competition as one in which a predictable decrease in output will result, in some particular market. As noted above, output restriction is the predictable economic result from an increase in price in a market with one seller, where customers have few if any substitute products available. If the practice in question is likely to lead to an increase in output, it is a safe bet that it is efficiency- enhancing (or at least not something likely to lead to fewer choices for consumers or higher prices). By making this the touchstone of the analysis of horizontal restrictions, the Supreme Court required the lower courts (and thus the antitrust authorities, the private

bar, and business firms) to draw the distinction between innocent restrictions and those deserving *per se* condemnation or scrutiny under the rule of reason. Economic expert witnesses, normally hired by the parties to the case, but occasionally commissioned directly by the court, fulfill this function.[7]

If, after the analysis required by *Broadcast Music*, the trial court concludes that the practice in question is likely to be output reducing and has no promise of efficiencies, the court will conclude that it is *per se* illegal. This means that the court will not entertain arguments in justification of the practice, such as efforts to convince the court that the price chosen was a reasonable one, or that the participants in the arrangement had no power in a broader market, or that competition itself is inappropriate for the industry in question. The mere fact that the parties themselves thought that it was worth the effort to try to behave as a cartel is enough. Indeed, in the United States these arrangements are normally prosecuted criminally by the Department of Justice, although they also might be attacked in a treble damages action by the victims of the cartel, or they could be pursued by the Federal Trade Commission in administrative proceedings or by state attorneys general.

If the practice does not fall within the *per se* rule, a much more sophisticated, economically based analysis is required. For joint ventures and other such arrangements, the first step is to define the relevant market or markets affected by the joint venture. This process of market definition cuts across nearly every area of antitrust: non-*per se* horizontal arrangements, vertical arrangements, mergers and acquisitions, and single-firm monopolization claims. Two dimensions of the market must be considered: the relevant product market, and the relevant geographic market. In discussing product market definition, the Supreme Court years ago in the *Cellophane* case called for a consideration of "cross-elasticities of demand" -- that is, what effect an increase in one product's price will have on consumer demand for a close substitute.[8] The Court noted that "commodities reasonably interchangeable by consumers for the same purposes" constituted a relevant product market. It failed, however, to take into account the economic fact that consumers will find substitutes even for a monopolist's product, if the monopolist is charging the profit maximizing price and then attempts to take it even higher. Thus, in recent years courts and enforcement agencies have looked for a better test for product market definition that is not subject to the *Cellophane* flaw.

One such approach is elaborated in the Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines, section 1.1. They first postulate that a single, profit maximizing firm is the only present and future seller of the product in question. They then ask whether that hypothetical firm could profitably raise price for the product and make it stick for a substantial period of time. If consumers would immediately shift to a substitute product, then the product in question does not describe an economic "product market." Through a process of trial and error, which involves a great deal of empirical research, one can find a group of products that are sufficiently close substitutes for one another that consumers will use them interchangeably, and that are distinct enough from other products in the market that it would be possible to exercise market power over them. As a practical matter, one looks at evidence that buyers have shifted purchases between products in response to changes in price or other competitive variables, evidence that sellers are aware of buyer substitutions and market their products accordingly, evidence about the downstream competition faced by buyers in their output markets, and evidence about the timing and cost of switching products. The point in the end is to describe the product market at the correct level of generality: not so specifically that there are many substitutes (*e.g.*, yellow wooden pencils as a market, where blue wooden pencils, as well as ball-point pens, mechanical pencils, etc., are all readily available substitutes), and not so generally that one misses the possibility of an exercise of market power at a commercially significant point (*e.g.*, defining a market of all food, where it might be possible to exercise market power over fresh fruits, or lamb, or boxed chocolates).

Geographic market definition follows roughly the same methodology. Some products, such as oil field equipment, automobiles, and computer software, are sold in a market that is literally global. Even if all suppliers exited the market in one country, their place would be taken quickly by suppliers from other countries. Note that this assumes that governmentally imposed barriers to foreign trade do not exist. It is of no help to have foreign suppliers ready and able to supply a market (taking into account transportation costs and the like) if onerous tariffs or other barriers to trade block them at the border. This also suggests that one of the fastest and easiest ways to achieve a competitive domestic market, from the standpoint of domestic consumers, is to assure open international trade. Other products, however, move only in more local markets, sometimes national, sometimes only a small locality. This may be due to high costs of transportation, perishability in transit, customer purchasing needs, or special needs of a local market. Ready-mix concrete, for example, is prohibitively expensive to transport long distances, and thus these markets tend to be local. Even if grocery stores exist all over a country, consumers are not going to travel hundreds of miles (or kilometers) to do their daily shopping; nor are they likely to seek out health care in distant clinics. These kinds of markets are, therefore, local in geographic scope. As is the case with product market definition, geographic market definition is a painstaking process of examining exactly where people turn for their supplies of a product in question, and on the other side which markets sellers believe they are capable of serving. Courts must evaluate both the methodology used in market definition and the conclusions that the experts offer. Often this turns into a battle of the experts, with the defense and plaintiffs' experts each producing hundred-page reports justifying their respective market analyses.

The next step in joint venture analysis, once the relevant market or markets have been ascertained, is to determine what the competitive effects of the arrangement will be on each such market. In this step, the structural characteristics of the perfectly competitive market versus the monopoly can be very helpful. If there are many other sellers in the market or it appears that significant entry is or would be very inexpensive, there is little need for antitrust concern. The difficult question is at what point does the market become so concentrated that the participants in the joint venture might have enough power to raise competitive risks. This is partly a question of economics, and partly a question of law. It is economic, in the sense that an economist with good data could estimate the degree of market power any given joint venture might have in a particular market, but it is legal, to the extent that the law dictates in the end how much power or risk of power we are willing to tolerate.

If that were not complicated enough, the third question surely is. It is also necessary, in a rule of reason case, to evaluate carefully what potential efficiencies might result from the joint venture. Particularly in prospective cases, where the venture is challenged before it has gone into operation, this is quite difficult. One can look at hoped-for efficiencies, or likely efficiencies due to the complementarity of the venture's partners, or one might consider that no efficiencies are likely, but this is a question of prediction.

Finally, if there are both risks and efficiencies, someone needs to tally up the balance. Once again, the first person likely to offer an opinion is the economic expert. Given the risks to competition revealed by step two, will the efficiencies promised by step three likely be enough to keep competition healthy and consumer prices down to make the transaction on balance consistent with the antitrust laws? At this point, many U.S. courts have also expressly factored in the costs of error. If a joint venture that is actually procompetitive is mistakenly banned, society loses not only the benefits of that arrangement but also the benefits of similar arrangements that are foregone because of the first ruling. If a joint venture that is actually anticompetitive is mistakenly permitted, society suffers the anticompetitive harm it imposes (and that from other similar arrangements) until new entry into the market attracted by higher prices causes the anticompetitive effects to break down naturally. For markets where normal market processes are likely to work well, the risks of a mistake in permitting something are fairly low; they are

much higher if entry is extremely difficult (or even impossible due to regulatory restrictions or similar rigid conditions).

Vertical agreements

The kinds of economic questions that arise in vertical agreements go beyond those that occur in horizontal cases. It is still possible that questions of horizontal collusion and its risks may arise, if for example a vertical restriction imposed by a manufacturer on its distributors runs the risk of facilitating a dealer cartel, or if an industry-wide practice of resale price maintenance appears upon closer scrutiny to be a device designed to shore up a manufacturer cartel. In this section, however, we focus on additional economic problems that may arise because of the vertical restriction.

Because all vertical restraints with the exception of resale price maintenance are judged to a greater or lesser degree by their effect on the relevant market(s), in rough terms one can say that they all fall under some type of rule of reason analysis. (This statement is qualified because the Supreme Court has never expressly said that tying arrangements should be judged under the rule of reason; however, it has indicated that they must have an effect on the market before they will be illegal.[9]) The initial point of reference, as the U.S. Supreme Court explained in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[10] is the strength of the "interbrand" competition for the product that is subject to the vertical restrictions. That, in turn, requires a definition of the market in which that product is sold, along much the same lines as the market definition process used in other contexts.

The Supreme Court's discussion of vertical restrictions in *Sylvania* offers an excellent illustration of the use of economic analysis in judicial opinions, as well as a concise description of the economic rationale for condemning some vertical restrictions as anticompetitive:

> Vertical restrictions reduce intrabrand competition [*i.e.* competition for sales of the identical, usually branded, product, when it is sold by different distributors or retailers] by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. None of these key variables, however, is affected by the form of the transaction by which a manufacturer conveys his products to the retailers.
>
> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. . . . [The Court then listed several of these, citing to economics literature, including inducing retailers to invest in a product to facilitate entry into new markets, paying for pre- sales promotion or after-sales services, and preventing one retailer from "free-riding" on the efforts of others.]
>
> Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products.[11]

Based on this analysis, the Court concluded that non-price vertical restrictions would no longer be judged under the *per se* rule. Economics taught that such restrictions would often be

efficiency-enhancing, or at least neutral from a competitive viewpoint, and this lesson meant that the *per se* rule would reach too far.

The logic of the *Sylvania* approach revolutionized the treatment of vertical restrictions in U.S. courts. In the absence of significant market power at the correct interbrand level, these restrictions almost always pass muster under the rule of reason. Where market power exists, of course, the courts continue to strike them down. Thus, in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[12] the Supreme Court used economic analysis to determine that Kodak had market power in the market for parts for its copier machines, because customers who had already purchased such a machine could not practically turn to other sources for those parts. The Court rejected the argument that market power in an aftermarket like parts was an economic impossibility as long as there was adequate competition in the primary market (there, for copiers). It discussed both cross-elasticity of demand for the copiers and the economic problems with the *Cellophane* analysis; it discussed the concept of lifecycle pricing; it discussed the costs of obtaining accurate pricing information and flaws in the information market. In short, based upon economic analysis, the Court found that the tying claim presented in *Kodak* (in which the aftermarket parts were the tying product and service for Kodak copiers was the tied product) was a valid one that was entitled to a full trial on the merits.

In addition to the anticompetitive effects of vertical restraints that have already been noted (*i.e.* enhancing manufacturer market power, facilitating a dealer cartel), others have been identified in U.S. court decisions and in the academic literature. While there is less consensus that these other effects either occur or should be of concern, the important point here is that the relevant debate is an economic one: most people would agree that the law itself prohibits whatever is anticompetitive in an economic sense. The National Association of Attorneys General, which includes all of the state attorneys general in the United States, issued its own Vertical Restraints Guidelines (most recently amended on March 25, 1995), in which it identified five anticompetitive effects of non-price vertical restraints:

1. Elimination of intrabrand competition. NAAG argues that intrabrand competition can be very important, especially when interbrand competition is weak. Another way of viewing this point is that vertical restraints lessen or eliminate competition among retailers, to the extent that the manufacturer has dictated terms on one or more aspects of that competition.

2. Facilitation of collusion. This is the point already made above, about which there is near-consensus.

3. Exclusion of competitors (foreclosure). NAAG argues here that vertical restrictions can raise entry barriers, erect new barriers, and force competitors to operate inefficiently. The phenomenon known as “raising rivals’ costs” can occur, by which a manufacturer can eventually push a rival out of a market without losing money in the process. Widespread use of vertical restrictions may force new entrants to enter at two levels simultaneously, which raises the costs of entry. Exclusive purchasing rights may tie up all or most of the supply of an important component, which in turn raises the costs of rivals or forces them to use a less satisfactory substitute.

4. Allocative inefficiency from retail promotion induced by vertical restraints. Here NAAG focuses on multi-brand retailers, who may have an incentive to promote an inferior product because of the restrictions. This point focuses on the lack of accurate information available to the consumer.

5. Reinforcement of oligopolistic behavior. This is related to point 2, except that it relates to tacit collusion and conscious parallelism instead of actual cartelization.

The battle over whether or not to accept these theories occurs, in the final analysis, before the courts. Although the Congress has power to legislate, and a number of bills have been introduced over the last ten to fifteen years that would affect antitrust policy toward vertical restraints, Congress has thus far chosen not to step into the debate. It appears to prefer the more flexible, case-by-case consideration of both theory and fact that the courts provide, since this avoids freezing the ultimate content of antitrust doctrine at any given point in economic learning.

Abuse of dominance or monopolization

Most antitrust laws, including that of the United States, do not condemn size alone. This means that theoretically even a single firm with 100% of the relevant market would not be in violation of the law. As Judge Learned Hand put it in his opinion in *United States v. Aluminum Co. of America (Alcoa):*[13]

> . . . size alone does not determine guilt; . . . there must be some "exclusion" of competitors; . . . the growth must be something else than "natural" or "normal"; . . . there must be a "wrongful intent," or some other specific intent; or . . . some "unduly" coercive means must be used. . . . 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 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.

Even this rule, as the Supreme Court later explained in *Copperweld Corp. v. Independence Tube Corp.*,[14] is derived from the Court's economic understanding of market dynamics:

> The Sherman Act contains a basic distinction between concerted and independent action. . . . The conduct of a single firm is governed by § 2 alone [the monopolization provision of the statute] and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.[15]

In many cases, the Court summarizes this rule by saying that the antitrust laws protect competition, not competitors.

Thus, in monopolization cases, like their abuse of dominance counterparts in other countries, it is necessary but not sufficient to find that the company in question possesses significant power in one or more relevant markets.[16] That initial step, of course, involves defining the relevant product and geographic markets, as noted above, and ascertaining how much power the firm in question has in the properly defined market. Market share is a useful proxy for market power, but the U.S. courts have

become increasingly attuned to the fact that the ultimate question is market power. Properly done, an inquiry into market power over the firm's own product -- the economist's "own elasticity of demand" -- will sidestep many of the risks inherent in a mistaken market definition. In any case, a market share of 70% ordinarily is enough to move to the next step in the monopolization analysis, unless it could be shown that factors such as a high supply elasticity from foreign sources or other potential new entrants would prevent the 70% firm from exercising any real power in the market.

The most difficult question in any abuse of dominance or monopolization case is the determination of exactly what qualifies as "abusive," and what is nothing more than hard and fair competition from a large firm. The role of economics is central here. The debates over what constitutes predatory pricing, which is considered an abusive practice when it occurs, have been filled with economic propositions. Several simple reasons explain why. First, the last thing the antitrust laws want to do is to condemn low pricing: when done by an efficient firm that is recovering all its economic costs (including some amount for a reasonable profit), low pricing is the engine that drives the competitive process discussed at the outset. Only when the price becomes so low that it will not permit cost recovery do questions arise. In the United States, people have debated whether the trigger point for predatory pricing should be when price is less than short-run marginal costs, or when it is less than short-run average variable costs, or when it is less than average total costs, or, from a different standpoint, when it is clear that the low pricer will not be able to recoup its losses after it has driven its rivals from the market. The Supreme Court has endorsed the last of these tests, in *Brooke Group v. Brown & Williamson Tobacco,*[17] but it has never chosen a definitive cost test to use in cases where recoupment would indeed be possible or likely.

Another practice that is abusive when done by a monopolist or a dominant firm is price discrimination, which can take many forms. Economic expertise is needed in the first instance to detect it, because it can be concealed as a tying arrangement, or in a dual distribution scheme, or under a regulatory scheme when the company participates in both regulated and unregulated markets. Although economists do not take a position on the ultimate efficiency or inefficiency of price discrimination, from the legal standpoint it is clear that the ability to engage in price discrimination makes it more profitable to be a monopolist, i.e. increases the amount of wealth transferred by consumers to the monopolist. This is enough to make it unlawful under most systems.

Finally, there are a host of other exclusionary practices that go beyond honest competition that will be condemned when engaged in by a monopolist. Courts struggle to define exactly which ones are illegal. One suggestion, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[18] is to condemn practices that appear to have no efficiency justification. There, the Ski Company refused to cooperate with its rival even when the rival issued customers cash vouchers that would enable them to ski on any of Aspen's four mountains. The Court could see no reason for turning down cash other than a raw desire to drive the competitor out of business. As soon as one turns to efficiency justifications, however, the economists are right back in the case, analyzing each challenged practice for its efficiency effects. Another way to approach this question, it should be noted, depends far less on economics and far more on general concepts of commercial fairness. The latter idea too has been important in most of the major monopolization cases brought in the United States.

Mergers and acquisitions

Most of the concepts already discussed apply also to this area: definition of the relevant market, ascertaining how the merger will affect the market's structure, and determining what the ultimate competitive effects of the merger will be. Just as we saw with agreements, it is true for mergers also that the competitive analysis will differ depending on whether the merger has horizontal effects or vertical

effects. The economic theories do not differ substantially, but their application does for the simple reason that most merger analysis is prospective in nature. An antitrust authority or a court can feel fairly confident in condemning an existing agreement that is provably anticompetitive, but the same authority or court may hesitate to prohibit a merger just because it might turn out badly. On the other hand, it is extremely difficult to devise effective remedies for monopolization or abuse of dominance, because structural relief comes at great cost, and behavioral relief can require extensive regulatory oversight. Fines, while avoiding those problems, must be high enough both to constitute a deterrent to the abusive behavior for the future and to disgorge the profits that were earned in the past. This means that there is a high premium on stopping the mergers that are most likely to lead to monopoly, because that is the best time to nip a problem in the bud. Similarly, even if the merger is not likely to lead to monopoly, if it will leave a tight oligopoly in the market it is of great concern. Oligopoly is extremely difficult to address, either under the "agreement" branch of competition law or under the "abuse of dominance" branch; efforts to reach shared monopolies, or collective dominance, have tended to be unsuccessful. Again, stopping the merger that will lead to the problem or that will exacerbate an existing problem is usually the best one can hope for.

Those familiar with the Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines know that the document is economic (some would say, practically to a fault). Once the Agencies have defined the market, made appropriate adjustments to their definition, and identified the relevant structural factors, they turn to an analysis of the potential adverse competitive effects of the transaction. There they look at a number of economic factors: the lessening of competition through coordinated interaction (either express or tacit), the lessening of competition through unilateral effects (especially in a market where products are differentiated), entry conditions (where they distinguish between "committed entry," which requires significant sunk costs for both entry and exit, and "uncommitted entry," which does not), efficiencies, and the likelihood that one of the merging firms is failing. While the courts are not bound to these factors, they have placed great weight on them both for their inherent content and as a way of holding the Agencies to a uniform enforcement policy.

III. Economics in the Courts

Given the importance of economic evidence, the next logical question is where to find it? One way or the other, it will eventually be placed before a court: either directly, if the court is the initial place where the case goes forward (as it is in private cases and in Department of Justice cases in the United States), or indirectly, if the court is reviewing the action of an administrative authority (as is the case in the United States with Federal Trade Commission cases, and as is typically the case in most other countries). Two basic models are possible: the adversarial system and the inquisitorial, or judge-centered, system. With rare exceptions, the United States follows the adversarial system. This means that the parties are responsible for hiring their own economic experts, who prepare confidential reports for them. The parties may designate which experts they wish to put forward as "testifying" experts in the proceeding. For those, as noted above, they must fully disclose to the other party the substance of the expert's opinion, so that the other party will be able to counter it if possible with its own expert. The judge, or the jury, must then decide which expert is more persuasive.

This system has its share of criticism, by those who point out that a war between hired guns may not be the most likely way to bring out the "truth" of the matter. The best tools for countering that criticism are the increasing scrutiny that trial judges give to experts who are proffered. Not everyone, after all, is an "expert," and if the person brings little or nothing to the particular case the judge can refuse to permit the testimony. Even if the proffered witness passes that hurdle, the other side is entitled to explore on cross-examination exactly how carefully the work was done, how much the person knows,

what his professional standing is, and other questions designed to inform the trier of fact about the worth of the opinion. In my experience, after reviewing expert witness use in cases in many areas, these tools do the job relatively well, and the courts are succeeding in their effort to eliminate so-called "junk science" from the courtroom. In a particularly difficult case, the judge may appoint her own expert, although when this is done the report must be made available to the parties and they must have an opportunity to comment on it.

If the case reaches a federal court on administrative review, the weight that the agency gave to each side's economic experts takes on additional importance. Federal courts of appeals review FTC decisions to see if the agency's conclusion is supported by substantial evidence on the record as a whole. Even if the appellate judges might have given greater weight to different experts as an initial matter, they defer to the agency's choice unless there is an objective reason to require a remand. The reason might be the agency's failure to admit other, relevant, evidence, or its application of an incorrect legal standard. Credibility determinations, however, will rarely if ever be overturned.

Systems that rely on experts accountable solely or primarily to the court have the advantage of reducing the gamesmanship that is possible when dueling experts of the parties have the responsibility for submitting the economic evidence. Furthermore, this can be a lower cost way of collecting the necessary information, which benefits the system as a whole. The principal disadvantage of a court-centered system lies in the completeness of the information that will be available. The adversary system relies on the incentive of the parties to make the best possible case for themselves; they will give their own experts access to all the crucial data, voluntarily. The parties are also required by discovery processes to furnish relevant information to their opponents. This means that the adversary system is likely to produce a greater quantity of information, and, one hopes, greater quality in the end. In a court-centered system, the court expert will either need compulsory process to reach much of that data or will need to work without it. The expert may therefore be forced to come to conclusions based on less than the full picture. It would be impossible here to draw general conclusions about the relative merits and demerits of these two systems, because this is just a smaller part of the broader debate about the adversary system itself. I note here only a few of the reasons why the U.S. system works as it does, and what its pros and cons appear to be.

IV. Equipping the Judges for Economics

In the United States, antitrust cases are usually heard by generalist federal judges, whose jurisdiction spans across constitutional law, administrative law, private law as it exists in the fifty states, federal statutory law, and criminal law. (The exception is at the Federal Trade Commission, where specialized administrative law judges hear the case in the first instance, and appeals are taken to the general federal courts of appeals.) If one focused only on the economic content of antitrust, this might seem to be an odd system. There are nearly 750 federal district judges in the country, and 168 federal circuit judges (excluding the 11 on the Court of Appeals for the Federal Circuit, who do not normally hear antitrust appeals). Antitrust cases are a tiny percentage of every one of those judges' dockets. What have we done to entrust such a complex subject matter to judges who cannot hope to master all its economic subtleties?

First, a variety of sources offer economics training to federal judges who want it, both at periodic courses and through printed materials and videocassettes. Thus, if a federal district judge found his first antitrust case too daunting, help is available through the Federal Judicial Center, through the American Bar Association's Sections on Antitrust Law and Judicial Administration, and through other organizations serving the courts. Second, federal judges have broad powers to manage their dockets.

They can require briefing and memoranda from the parties that explain the issues to their satisfaction. There is a great deal of value in forcing the experts to articulate their positions in plain language. Clients, after all, are not likely to be antitrust specialists either. It is not too much to ask of a law that purports to undergird a free market economy to require it to be made comprehensible to a generalist judge. Thus, under the U.S. system, the judge can learn antitrust on the job if he is not already familiar with the area.

Second, it would be a grave mistake to think that all the important steps in an antitrust case implicate substantive, economic issues. Many of the crucial questions are procedural in nature: does the complaint give the defendant proper notice of what it did wrong? does the plaintiff have the right to see sensitive business documents held by the defendant? does the privilege against compulsory self-incrimination apply to certain testimony? have the parties agreed on the facts enough to permit summary judgment or judgment as a matter of law? Generalist courts are well suited to enforce these key procedural rights, or rights of the defense as they are usually called in Europe. The judges see them every day in many different contexts. They are not likely to be swept in by "regulatory capture," which might make them focus on the ultimate outcome of the case instead of the important procedural rights of the parties. Finally, in a system that uses generalist judges for everything from civil rights cases, to federal pension law, federal environmental law, tax law, constitutional due process, and criminal law, it would be odd to single out antitrust as the one field thought to be beyond the judges' competence. Speaking from experience, and even discounting the fact that my background before becoming a judge was in antitrust, I can say definitely that antitrust is not the only, or the most, complex field I have encountered on the bench. Judicial enforcement has worked well for more than a hundred years in the United States, and there is little reason to change it.

In my view, therefore, there is no *need* to confine competition cases to separate competition courts or separate chambers of commercial courts. This is not to say, however, that it is necessarily undesirable to do this in a country that otherwise has a tradition of specialized courts. In such countries, there are normally other mechanisms available to ensure that the rights of the defense are respected, that the judges do not become too insular in their viewpoint, and that the law retains its necessary flexibility. There must also be effective mechanisms to ensure that political influence does not interfere with competition law enforcement, once whatever legitimate political override provided by the law has either been exercised or not. A great advantage of using the federal judiciary in the United States, with its strong constitutional guarantees of independence, has been to keep competition law out of the political maelstrom. In the end, the important point is to safeguard the underlying interests identified here; it is not how that goal is accomplished.

V. Conclusion

Economic analysis plays a central role in competition cases. One way or the other, the judges deciding or reviewing these cases must have access to the expert evidence that will point to the correct result. Whether the courts rely on the adversary system or on a system of court control, the content of the law before them is heavily economic. Because economics itself is a field that changes and evolves over time, the law itself must incorporate the same kind of flexibility: Americans often like to note how unfortunate it would have been if the Sherman Act had been frozen with the economic understandings of the early 1960s. This did not happen, because the judges, all generalists, were able to incorporate new economic understanding as it developed. The law is sure to evolve in the coming decades, just as it has done since 1890. With increasing transnational business and the promise of more cooperation among competition authorities, it will be more important than ever for the judiciaries of each country to understand and appreciate the role their counterparts play, both in their use of economics and in the broader application of the law.

Notes

1 See, for example, Ernest Gellhorn & William E. Kovacic, Antitrust Law and Economics (4th ed. 1994); E.T. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications (2d ed. 1994); Terry Calvani & John Siegfried, Economic Analysis and Antitrust Law (Little Brown, 2d ed. 1988); and Herbert Hovenkamp, Economics and Federal Antitrust Law (West 1985). Other commonly used reference materials focus more specifically on economics. See, for example, E. Mansfield, Microeconomics: Theory & Application (7th ed. 1991); F. M. Scherer & D. Ross, Industrial Market Structure and Economic Performance (3d ed. 1990); R. Schmallensee & R. Willig, eds., Handbook of Industrial Organization (1989).

2 See Gellhorn & Kovacic, *supra* note 1, at 53.

3 If one thought that efficiency were the only concern of the law, then a provably efficient monopolist should not be considered a violator. If, on the other hand, the transfer of wealth is a concern, then one might wish to prohibit or regulate even efficient monopolists, for reasons of consumer protection. This becomes important in merger enforcement as well as in the treatment of firms with substantial market power under concepts of abuse of dominant position or monopolization.

4 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

5 310 U.S. 150 (1940).

6 441 U.S. 1 (1979).

7 The adversary system in the United States assumes in general that the parties will find their own experts. Each side must disclose which experts it expects to call at the trial and it must provide a written report from that expert. See Fed. R. Civ. P. 26(a)(2). Parties are also entitled to depose experts who may testify at trial. See Fed. R. Civ. P. 26(b)(4)(A). The Federal Rules of Evidence permit experts to testify whenever "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. District courts are also empowered to appoint their own experts, under Fed. R. Civ. P. 53. For an example of a thorough and economically sophisticated analysis of a market in which the court appointed its own expert, see State of New York v. Kraft General Foods, Inc., 926 F. Supp. 321 (S.D.N.Y. 1995).

8 United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956).

9 See Jefferson Parish Hospital District No. 2. v. Hyde, 466 U.S. 2 (1984) (indicating that effects on 30% of a market are not enough to condemn a tying arrangement).

10 433 U.S. 36 (1977).

11 433 U.S. at 55-56.

12 112 S.Ct. 2072 (1992).

13 148 F.2d 416 (2d Cir. 1945).

14 467 U.S. 752 (1984).

15 467 U.S. at 767-68.

16 Note, incidentally, that the degree of power required to fall under the prohibitions of the law varies from place to place; this represents a judgment about the relative risks of dampening competitive zeal, as *Copperweld* put it, versus the harm to consumers from abuses of market power. A discussion of the different approaches to this part of competition law is beyond the scope of this paper.

17 113 S.Ct. 2578 (1993).

18 472 U.S. 585 (1985).

DISCUSSION

Frédéric Jenny - Chairman of the Committee on Competition Law and Policy (CLP)

We have heard quite a diversity of experiences on the role of economics and economists in competition cases. Ms. Tavassi explained that, in the Italian system, it is difficult to get expert economic advice given the procedural arrangements. It illustrates one of the points which has often been discussed in the CLP Committee but which might be revisited today - the difficulty that Roman Law systems have of considering that civil proceedings can be used to enforce competition law. Such difficulty raises a question of principle but also a question of how to get the technical expertise. Ms. Tavassi expressed the fact that, although there are ways in the Italian system, they are not all that easy to put into place. On the other hand, under the Australian system, an economist can occasionally sit as a judge, be a judge himself or be part of a set of judges. Economic experts can also cross examine each other. This obviously helps the court to understand the issue at stake and is apparently an efficient way of getting expert testimony. Another implicit suggestion of the Australian representatives was that judges may cross examine themselves on what they have said as well as competition authorities or other parties. Another system for getting expert judges was suggested by Diane Wood: it consists in training judges in economics including through video cassettes..

Geoff Connor - Delegate from New Zealand

To follow up on Justice Lockhart's presentation, one can note that New Zealand took the Australian system one step further and actually put economists on the bench of the High Court. We decided not to go for the option of having a specialised competition tribunal back in 1986 when our law was enacted. This was a new type of law as we replaced the old abuse control system with a prohibition law. At that time, it was generally felt - and the judges agreed - that judges were generalists. As such, they really did not know very much about economics. It seemed, however, that they could perhaps use economics with some assistance. We therefore negotiated this system whereby the High Court Judges themselves were prepared to tolerate the presence of economists. The experience of the last ten years has shown that it has been extremely successful. The judges have invariably commented on it very favourably. All experts in the area consider too that some very high quality judgements are made when the lay members are involved.

By comparison, my understanding is that if US judges are to get to District Court level or better, they most likely have to know a considerable amount about economics. I can obviously understand why they obviously do not need that sort of system, given their one hundred years of case law as well as the type of qualifications which seem to be required. There is just one other comment I would like to make and that is in relation to a comment made by Judge Wood and about the importance of their protecting process of natural justice and the like. Perhaps if I can say one thing that may sound heretical to the judges and the lawyers in the room, is that of course judges do put justice on a pedestal. Perhaps some of the other people in the room may think that it is not always appropriate and that sometimes that causes problems. Justice is put on such a high pedestal that there are costs in relation to that and that judicial process can be very

slow. In New Zealand, according to Commerce Commission, a major case is going to cost at least a million dollars and two years and that is just to get through the High Court. There seems to be a standard process of 5 or 6 interrogatories in every case which will take a year or more. You also know that the rule of procedures can be used in various ways by legal counsellors for strategic objectives. All that do cause a problem but of course I don't have an alternative.

Lars Jonson - Judge, The Market Court, Sweden

Most questions can be put not only to courts but also to you all representing authorities administering competition law. I have a vague suspicion that the questions have been raised in this context because some of you have a feeling that courts and judges do not really understand the problems that you are dealing with in your daily work. And being a judge myself, I can only say that I fully share that feeling. I must stress, however, that my experience is very limited, mostly to my own country. it would seem that nobody has a definite answer to the questions raised in this seminar. This has been clearly demonstrated by the excellent paper prepared by Mr. John Clark. I would like to make a remark relevant to all the substantive questions raised in his paper. The answers to all those questions differ more or less between countries and between different categories of courts and even between courts of the same category and between individual judges. Most judges probably act similarly in many respects, especially in matters of fundamental rights and formal procedural character, etc.. However, when it comes to questions such as those before us today, there are no clear answers generally valid for all courts and all judges. In the competition field, we have also in many countries a more obvious difference between ordinary courts and courts specialised in competition matters as has already been touched upon.

We have in Sweden a special court for most cases concerning competition, marketing practices, unfair competition and some similar cases. It is called the Market Court and my experience comes mainly from that specialised court. It is described briefly in a paper prepared by the Swedish Delegation (see Part III, page 90). The court includes both professional judges, experienced in ordinary courts - three professional judges -, and economic judges, as experts - four experts. Two of them are more theoretical experts, so to say, and two have experience from practical economic life. But all members are formal judges in the court. They are called judges and they have one vote each. I have had some contacts with judges in ordinary courts in Sweden which deal with some types of competition cases, concerning damages, etc.., when private law is involved. My impression is that, when those judges have a competition case, they are not very happy to handle it because they feel rather unfamiliar with this kind of legislation. I can add that the first court of instance in competition cases under our new Competition Act of 1993 is an ordinary court, that is the Stockholm City Court. But in competition cases now two economic experts have been appointed as special members of that court too. So we have so to say, two specialised courts in competition in Sweden, one of them being an ordinary court. It is rather a funny system perhaps.

Robert Pitofsky - Chairman, Federal Trade Commission, United States

There does seem to be a general acceptance in many countries of the idea of generalist judges deciding economic competition cases. And I might say, in the United States, these generalist judges opinions compare quite favourably with the opinions of a specialist body like my own.

The system works rather well. But as the CLP Chairman pointed out, there is a question in very complicated competition cases as to how the judge informs himself or herself of economic matters, obtains economic advice, etc.. We have all seen the flaws in wars amongst paid experts as a system for deriving economic sophistication. There is an alternative that is beginning to develop in the US: some trial judges, excellent trial judges, have obtained the services of some of most distinguished economists as advisers to the judge on economic matters. The advantage is that the adviser is objective and expert and the judge gets the advantage of that kind of input. The disadvantage is that the parties do not know what the advisers say to the judge and cannot cross examine. They may feel that the economic adviser is biased in one way or another. To call it a trend would be perhaps to go too far, but there is experimentation with this.

Diane P. Wood - Judge, Seventh Circuit Court, United States

Chairman Pitofsky just explained that the courts have been using a rule that allows them to appoint masters or experts. The principle way in which the problem of lack of accountability is handled is by requiring even the court appointed expert to prepare a report on which the parties may comment so that they know what the substance of that advice is. I actually brought with me a recent case in which another former antitrust lawyer and Federal Judge, Judge Kimberwood in New York, appointed Alfred Khan as the court's expert. If you want to know everything there is to know about the ready-to-eat cereal business in the United States, I would be happy to show you this opinion. But it is also one in which the economic advice was directly accountable to the court. I might add that there can be problems with this too. My court recently was actually forced to take the extraordinary step of removing a District Judge from a case, not in the competition field but in a different field where the court had appointed its own expert and was not abiding by these rules of accountability.

I also have another comment on the video cassette point - I do not think I quite said that, Mr. Chairman! But, just in case, let me clarify: we have two levels of educating the judges that we are talking about here. One of them is simply general background in the economic concepts that are relevant to competition cases. I was referring to it when saying that, if a judge gets his or her first antitrust case and wonders what markets are or how to find out about them, there are materials. And if a program does not happen to be coming up right when you need it, you can either get books or video-cassettes or other sorts of training things. But that is only for general background. In particular cases (see my paper in which I submitted), we normally follow the rule that was described by our Irish colleague: each party will have its own experts and often before a jury experts will be testifying and the jury will have to decide who to believe. Sometimes before a judge it really depends on the case. So we have these two kinds of informing oneself, the general and the specific. On the procedural fanaticism point that we were accused of by our distinguished colleague from New Zealand, certainly the courts know that delay is a terrible problem. Rule one of the Federal Rules of Civil Procedure calls for the just, speedy and inexpensive determination of cases. Federal Judges in the United States are becoming much more aggressive in trying to push cases along than they once were.

Judge Maureen Brunt - Professor, Melbourne Business School, The University of Melbourne, Australia

First of all, a comment on the New Zealand representative and his view of the contribution that an economist can make when sitting on the New Zealand High Court because I am an example of that species. I think it is extremely important to recognise the value that comes about from intense discussion between the judge and the economist, shall we say behind the scenes. In this way you can achieve a tremendous economy of time. And that is very, very important. Of course, what is going on behind the scenes has to be made known to the parties and there is a variety of ways in which this can be done. What I myself always do is make sure that the parties know what is on my mind, that is to say, what the key issues are and they know that I have equal standing with the judge to participate in the ultimate decision. There is one respect in which the New Zealanders have not been making as good use of me and my colleagues as they might, and that is to invite us to participate in relevant directions hearings before the trial actually gets under way. I think it is appropriate to claim that economists in many instances have a greater sense of relevance than a generalist judge and if an economist participates in the directions hearings, the preliminary directions hearings, then great economy of relevance can be achieved. And interestingly this is the procedure that we follow on the Australian Competition Tribunal. Both lay members participate with the President in the directions hearings, and indeed we have to refine our techniques to develop a series of questions for the parties and also a list of what we see at that stage as the major issues. We find now that the parties are asking us anxiously for these two items.

One other point I would like to make, because in one respect I do disagree with our President Justice Lockhart. We do take a slightly different view on the use of economist experts in the witness box. I myself think that it is possible to profit by the adversary system. I remember when I was first called upon to sit on the Australian Competition Tribunal, one of our most eminent judges said to me 'of course we wont be needing expert witnesses because we have you'. Now that in fact is a false view of the utility of economics. In some cases, it is true that economists have the word. But in other cases, there can be competing views as to the manner in which the market functions. Sitting on the Tribunal as an economist, I am myself always immensely pleased when there are economists on either side that will put each side's best case. It is a way of testing the economic dimension of the case in much the same way as the judge likes to test the legal dimension of the case.

William P. McKeown - Chairman, Competition Tribunal of Canada - Judge, Federal Court of Canada, Ottawa (Canada)

In answers to the questions raised by Judge Wood and also by the Delegate from New Zealand, I would say that one of the ways that we have tried to do that in Canada is that we also, like Australia, have a Competition Tribunal composed of both judges and lay people. The panel is always presided by a judge. There is always one lay person, who is normally an economist, and another lay person who is retired business person or it could be a second judge. We have found that we need to streamline the cases and yet keep in mind the natural justice rules which judges are always concerned about because, if we do not follow them, Courts of Appeal will reverse the decision. In the countries where you have Charters of Rights, it is impossible to avoid natural justice problems. Notwithstanding that, we still have made attempts - and we continue to make them - to streamline in the process. For example, recently, we have sort of limited the role of

intervenors. We just completed a matter in which we forced the intervenors to agree on a common expert witness and common witnesses for all five parties. We did not allow each party to just present their own evidence. So there are a number of things that can be done. I certainly find Justice Lockhart's suggestion of putting two economists on together has a lot of merit. I would certainly like to explore that because one of the problems is that you do get a very sanitised version of economic evidence from each party. I think that anything that can be done to avoid that is certainly something that should be looked at.

Hideaki Kobayashi - Delegate for Japan

My question is a bit provocative. It concerns with the kind of uniqueness of competition cases in the courts. Complex competition cases may just be one example of the fact that the courts today have to handle increasingly complex issues - not only competition issues but technological issues or other important issues. Therefore, if you start introducing an economist to handle competition issues, you will have to introduce engineers to judge highly technological issues.. I was thus wondering what makes competition issues so unique as to allow the specialist sit in courts. I noticed that Judge Potoski referred to this point and said competition cases is unique in that, if I understood correctly, it requires not only the economic theory but also its application to the facts. This may be one element. Is there is any other argument that makes competition cases unique?

Mr. Eduardo Menendez Rexach - Magistrate, National Court, Spain

To settle the issue of whether competition law is better enforced by generalist or specialised tribunals, we should weigh the importance of the publicity that surrounds judicial rulings, since court decisions can contribute to an understanding, as well as to implementation, of competition policy. Judicial publicity can make everybody aware of complex issues in terms that anyone can grasp. This makes me feel that it is appropriate to apply common law in such cases. If there is an effective link between a specialised administration—which contributes a variety of expertise (jurists and economists) to the lawmaking process—and tribunals, then judicial or administrative courts or judges can subsequently sanction infringements of competition law in terms that are as understandable to the public as possible. The provisions of competition law and the consequences of the violations it prosecutes are such as to affect everybody in their daily lives.

Mr. Alberto Heimler - Delegate for Italy

I would like to follow up on what Mr. Kobayashi of the Japanese delegation just said. It seems to me that there is another point which has not been really taken up directly in the presentations so far: the problem of damages. In fact, tribunals and judges take into account damages but administrative authorities cannot do it in general, as far as I know. At least, in Italy, they do not take damages into account. Certainly, the problem of damages seems to be quite an important and difficult one. However, the same problem probably arises in other fields, like Mr. Kobayashi rightly said, in many infringements in many other aspects of economic activity that go in front of the courts. I wonder, therefore, whether in these other instances the economists come into courts as well and whether they have a role that can be similar to the one that we currently envisage in this area.

Ronan Keane - Judge, The Supreme Court, Dublin

I too would like to comment briefly on the very interesting question raised by our Japanese colleague. He is perfectly correct of course in a way in saying that there is nothing special about competition law which requires the judge to be assisted by expert lay assessors. That leads me to think that perhaps the debate should not end with competition law. Much of litigation today, in Ireland and perhaps in other countries as well, is concerned with personal injuries cases arising from negligence, road accidents, factory accidents, and so on.. I have frequently thought that it would be very desirable for the judge to sit with a medical assessor or with an engineering assessor if there are difficult questions of medicine, as there sometimes are, of engineering. Therefore, we should not suppose indeed that this is a problem unique to competition law. We could also perhaps look at how this problematic occurs as well, and I am speaking obviously as a judge, in other branches of the law.

Frédéric Jenny - CLP Chairman

We will likely come back to this debate. Mr. Potocki in his presentation had clearly indicated the difference between: i) the source of law that is in ethical value and written in the law ; and ii) something that comes from a theory which is descriptive in nature and gives rise to a law. He explained that this was, to a certain extent, a specificity of competition law. Justice Keane also made the point that there is perhaps another angle to it, which is the general inclusion of specialists in the technical matters of justice.

ACCOMODATION OF MULTIPLE CRITERIA IN COMPETITION CASES

Pekka Hallberg
President, Supreme Administrative Court, Finland

The Finnish competition legislation was amended gradually in 1988 and 1992, so that it corresponds to the European Community competition law. The general aim of the Act on Competition Restrictions is to protect sound and effective economic competition from harmful restrictive practices. Initially, the investigation, abuse and publicity principles formed a background to the competition legislation. The prohibition principle (or the rule of reason doctrine) has been enlarged to cover the resale price maintenance, abuse of a dominant market position, tendering cartels and horizontal price cartels. Furthermore, horizontal cartels that restrict markets, sources of supplies and production, are prohibited with certain exceptions. The legislation has developed from the abuse principle to the extension of the prohibition principle. The system is characterised by practicality and by a system of court control.

In Finland, there are two special authorities for competition matters. The Office of Free Competition acts as the first instance administrative body. Its task is to follow and investigate competition conditions, to examine competition restrictions and their effects and to eliminate harmful effects of competition restrictions. Finally, if need be, it shall refer issues to the Competition Council. The last-mentioned is a judicial organ. Its decisions can be appealed to the Supreme Administrative Court, which is the final resort in administrative cases.

The Competition Council consists of a chair, a vice-chair and seven other members, who work part-time. The members are appointed by the President of the Republic for a term of three years. Under their term of office they have the same right to stay in office as a judge has. The combination of judicial and economical expertise is reflected in their qualification requirements. Namely, they shall possess legal, economic and financial expertise.

In Finland, the process regarding competition cases is an administrative one. A far advanced principle of judicial investigation prevails in these cases. It also means that the judicial organs have an obligation to see that the facts of the case are established. In practise, the Competition Council obtains expert statements and reports from various authorities when needed. Furthermore, it conducts the proceedings actively. The competition legislation contains flexible legal norms. In applying flexible norms, the fact-finding survey as well as the economical research are vital. For example, in Finland the question of a dominant market position is not deemed on the basis of exact market shares. The starting point is a flexible definition as regards economical criteria. According to the competition law, a dominant market position is held by an entrepreneur, who, either within the entire country or within a given region, holds an exclusive right or other dominant position on a specified commodity market so as to significantly control the price level or terms of delivery of that commodity. The same applies to an entrepreneur who, in some other corresponding manner, influences the competition conditions on a given level of production or distribution. The basis is thus an analysis on economic influence.

The concept of a dominant market position is not, as such, related to legal consequences. However, an abuse of such a market position is prohibited. Inter alia, the following constitute an abuse: firstly, refraining from a business relationship without a justified cause; secondly, use of business terms that are not based on fair trade practices; thirdly, use of exclusive sales rights without a justified cause and, finally, application of an unreasonable pricing practice. Even these definitions are flexible. The burden of proof rests, on the one hand, on the Office of Free Competition, and, on the other hand, on the entrepreneur as regards the question whether a certain action is permissible. The Office of Free Competition's ability to grant exemptions softens the prohibition principle. An exemption may be granted if a competition restriction promotes the production or distribution of commodities or technical or economic development and if the benefit primarily accrues to the clients or the consumers.

The sanction for a violation of the provisions regarding prohibited restrictive practices is an administrative penalty payment (a competition infringement fine). The penalty payment shall be imposed unless the procedure is considered insignificant or the imposing of a fine otherwise unjustified with respect to protecting competition. Thus, even the imposing of the fine is combined with the general aim of protecting the competition from harmful restrictive practices.

Various judicial procedures are often intermixed in the competition issues. A prohibited restrictive practice or an action that is contrary to an order or an interlocutory injunction issued by the competition authorities must not be applied. Therefore, civil law does not protect these kinds of actions. Furthermore, the requirements of the Act on Competition Restriction shall be observed even in administration, inter alia, as an element limiting the municipal self-administration (SAC 1995 A 30). In addition, although arrangements that concern the labour market, are outside the scope of the Act on Competition Restrictions, it is prohibited to create restrictive practices by collective agreements (SAC 1995 A 48).

According to my previous experience of many years as chairman of the Competition Council, the decision making in the competition issues requires an extensive survey, active conduct of the proceedings, whereby the parties are obliged to present evidence in support of their claims. Moreover, it is often necessary to obtain further clarification on, inter alia, the structure of the commodity market and other factors that influence the commodity market.

The competition cases are connected with economic and business life in several respects. Therefore, the knowledge of national economy shall be emphasised in the exercise of jurisdiction. The competition cases differ from product liability and consumer protection remarkably. The change from criminal sanctions, in practice minor fines, to competition infringement fines was a substantial one. The latter fine can amount even to ten per cent of the turnover of the entrepreneur concerned. The financial sanctions have a considerable preventive effect. On this basis, the Finnish competition legislation complies with the fundamental principles of the European Communities.

Stanislaw Gronowski [(*)]
Judge, Antimonopoly Court, Poland

I. Introduction

An analysis of antimonopoly legislation, both in countries with developed market economies and in countries entering this path indicates that the protection of competition is not always a goal in itself. In antimonopoly laws, one can find clear passages aimed at the protection of other values as well, in particular:

- protection of consumers' best interest[1],
- clarity in commerce (the obligation of the vendor to inform about prices, prohibition to sell with a material bonus, the obligation to invoice purchases, the obligation to place appropriate labels on merchandise)[2],
- general business[3], common benefit[4], public interest[5],
- increasing production and turnover efficiency[6],
- efficiency in the development of economic structures[7],
- protection, promotion or strengthening of export[8],
- economic freedom protection[9],
- effective use of social reserves[10].

Therefore, it is possible to assume that in reaching decisions in cases involving competition protection, courts also take into consideration other values to which the law on competition refers.

II. Polish Act

In light of the preamble of the Polish Antimonopoly Act, the goal of the Act is to ensure the development of competition, protection of enterprises exposed to the effect of monopoly practices and protection of consumers. Such criteria as the prerequisites for a decision in a particular case have been reflected in certain provisions of the Act. For example, pursuant to Art. 9, the Anti-Monopoly Office may issue a decision prohibiting an agreement introducing the specialization of production or joint sales if such agreement is not in the best interest of other entities or consumers.

Monopolistic practices in Poland are basically prohibited, but they may be permitted based upon Article 6. In accordance with this provision, the use of monopolistic practices is prohibited, unless such practices are necessary for technical and organizational or economic purposes for conducting economic activity and do not cause a substantial limitation of competition; the burden of proving the existence of such circumstances rests upon the entity who claims their existence. This regulation which refers to technical and organizational or economic criteria creates a rather wide range of possibilities to legalize behavior which is alleged to be monopolistic practices. However, based on this regulation there is no possibility to legalize practices mentioned in Art. 7 of the Act which are unconditionally prohibited (*per se*)[11].

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[*] Texte en français disponible à la page 215.

Article 6 of the Act creates a rule of reason. This rule however has been formulated in a different way than, for example, the judicial decisions issued in the USA. In particular, at least in the light of the literal wording of Art. 6, it is not necessary that the excused monopolistic practice had any pro-competitive effect, not to mention that such element supersedes the anticompetitive elements of a challenged practice[12]. The wording of Art. 6 of the Polish Act allows for an assessment of the subjective purpose of the monopolistic practice, therefore supporting the viewpoint of its perpetrator. A defendant's subjective intention has no major importance under U.S. antitrust judicial analysis. Pursuant to U.S. law the purpose of the antimonopoly law is not protection of the entity engaging the challenged practices, but protection of competition[13].

Art. 6 of the Polish Act also adopts other criteria justifying monopolistic practices than those included in Art. 85 (3) of the Rome Treaty[14]. Due to the obligations of Poland to harmonize its laws with those in the European Union, Poland will face the necessity of amending its Anti-Monopoly Act to be harmonized with the legal standards in the European Union.

III. Decisions of the Antimonopoly Court

Despite the doubtful prerequisites for legalizing monopolistic practices indicated in Art. 6 of Polish Act, there is a tendency in decisions of the Antimonopoly Court to interpret this provision in a way taking into account a broad economic framework and the promotion of competition. Basically, only behavior infringing the Anti-Monopoly Act is legalized which, apart from the negative influence on competition, brings positive economic effects in the area of production, technological improvement and progress so that in the final result, such positive effects prevail.

In light of judicial decisions, the "necessity" of using the challenged monopolistic practice should be proved in accordance with the objective criteria[15]. Proving such necessity should be supported by arguments indicating the reasonable grounds for the activity, which should be assessed taking into account both the best interest of the entity using the challenged practice and a broader economic context. In this situation, the Antimonopoly Court legalized, based on the criteria of Art.6, a 5-year agreement for providing food services at a railway station by only one economic entity. The entity in the agreement with the administrator of the station, undertook to renovate the commercial premises of the station and provided a wide range of possibilities to satisfy the needs of the travellers on a much higher level than had existed before[16]. In another case, the practice of Polish Telecommunications S.A. consisting of collecting from future telephone subscribers fees not included in the price list, but from which the investments of the Company were financed, was legalized pursuant to Article 6. The above-mentioned fees were subsequently credited against future telephone calls made by the subscribers. This practice allowed the hastening of the development of the telecommunication industry in Poland in comparison to the situation which would had existed had the challenged not been used[17].

In one case, the Antimonopoly Court stated that the provision of Art. 6 of the Act should not be interpreted in such a way as to discourage entities from making investments, particularly in areas which are important from a social policy perspective. Occasionally, as the court stressed, there might be a need not to actually prohibit certain anti-monopoly practices, but to identify the limits of permissible behavior of the particular economic entity justified by the circumstances of the case[18].

Examining, in light of Art. 6, the problem of proving the "necessity" of a challenged monopoly practice it is stressed in Antimonopoly Court decisions that as a result of permitting the limiting of competition or the use by an economic entity of its market position has the least harmful effect on

competitors, and consumers. Basically, only those monopoly practices necessary for conducting economic activity are justified which are the least harmful to other market participants[19].

There are some efforts, unfortunately not very frequent, in judicial decisions to refer to the category in the best interest of society in general or to a particularly justified best interest of the enterprise for justifying the settlement in a concrete anti-monopoly case. Such cases are almost always controversial. In one such case[20] the Antimonopoly Court excused the producer of alcoholic beverages who justified his challenged behavior by arguing the need of overcoming the effects caused by the activities of state administration contradictory to the law[21]. In another case, the Antimonopoly Court decided that the differentiation of milk prices by a diary cooperative - which were higher for its members and lower for other suppliers was justified by the legal character of the cooperative relationship[21]. The Supreme Court, to which this case was appealed, did not share the view of the Antimonopoly Court. The Supreme Court decided that the intent of the cooperative was to divide the market using subjective criteria[22]. The final outcome of this case was an amendment of the Antimonopoly Act in accordance with the original position of the Anti-Monopoly Court[23]. On the other hand, the antimonopoly office stated in one case that the heat power engineering industry, due to its strategic economic importance, is not governed by the rules of competition law. Finally, the Antimonopoly office recognized as legally viable the position of a monopoly supplier who ordered its customers to install heat meters manufactured by certain companies, thereby eliminating from the market other meter manufacturers. The Antimonopoly Court annulled the decision of the Antimonopoly Office[24].

It seems that Polish regulations concerning the merger of companies is a point that should be discussed in this paper. The merger regulations create for the Antimonopoly Office a potentially wide range of possibilities of using criteria other than that of proving "necessity" to protect competition and the best interest of consumers. Nevertheless, also in other countries the antimonopoly acts fulfil, to a different degree, regulatory functions in adjusting the processes of economic concentration to certain defined priorities[25] [26]. In light of Art. 11a (4.1) of the Polish Act, if, as a result of a merger, a dominant position is achieved or consolidated, the Antimonopoly Office can (but is not required to) issue a decision prohibiting the merger. If the Office consents to a merger, competitors of the merged entity have no possibility to appeal the decision. The merger regulation has been in effect since May 1995, and until September 1996, there has not been an appeal submitted to the Anti-Monopoly Court in relation to the prohibition to merge enterprises.

IV. Other legal regulations which influence competition

Poland has no separate act concerning state support granted to enterprises using public resources. Such support may deform competition. In practice, the budget act decides about the area of state support. From the viewpoint of the Antimonopoly Act, there are no legal instruments to question such support.

Granting concessions for economic activity influences competition. These issues in Poland are regulated by the act of 23 December, 1998 on economic activity[27]. The decision concerning granting concession is effected on the basis of issuing a decision. Appeals against such decisions are beyond the jurisdiction of the Antimonopoly Court, but under the jurisdiction of the Main Administration Court.

Notes

1 Preamble of Polish Act (Official Regulations Gazette from 1995, No. 80, item 405, changed by the Official Regulations Gazette from 1996 No. 106, item 496), art. 1 (2) of Finnish Act (Act No. 480/1992)

2 Art. 28, art. 29 and 31 of French Act (Ordonnance N° 86-1243 of December 1 1986. Modified in the last part by the law N° 87-499 of the 6 July 1987), art. 7 of Danish Act (act No. 370 of 7 June 1989 amended by the act No. 280 of 29 April 1992) and art. 1 (1) letter h of Greek Act (act 703/77 of 26 September 1977 amended by the Act No. 1934/91 of 8 March 1991 and by the Act No. 2000/91 of 24 December 1991.

3 Art. 19 of Dutch Act (decree of 3 January 1990; Stb. 1990, 17).

4 Art. 14 (3) of Irish Act of 22 July 1991.

5 Art. 7 (1) of Swiss Act (act of 20 December 1985; Bundesblatt 1981 II, page 1293), § 24 (3) of German Act (Consolidated text of 20 February 1990; Federal Official Regulations Gazette part I, page 235 as amended).

6 Art. 1 of Danish Act (act No. 370 of 7 June 1989, amended by the act No. 280 of 29 April 1992).

7 Art. 1 of Danish Act (act No. 370 of 7 June 1989, amended by the act No. 280 of 29 April 1992).

8 Art. 1 of Greek Act (act No. 703/77 of 26 September 1977, amended by the act No. 1934/91 of 8 March 1991 and by the act No. 2000/91 of 24 December 1991).

9 Art. 1 (2) of Finnish Act (act No. 480/1992).

10 Art. 1 of Norwegian Act (act No. 65 of 11 June 1993).

11 In the light of this provision, enterprises holding a monopolistic position are prohibited to :

1) limit production, sale or purchase of goods, despite the possibilities possessed, in particular leading to the increase of sale prices or to the decrease of purchase prices,

2) withholding the sale of goods leading to price increase,

3) collecting excessively high prices.

12 For example in 1978, in the case of Professional Engineers, the Supreme Court stated that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason", 435 U.S. 679, 688. Rather, the rule of reason inquiry focuses on whether the challenged restraint "is one that promotes competition or one that suppresses competition." 435 U.S. at 691. A defendant cannot argue that he engaged in the challenged conduct for the public interest or for the good of members of an industry, and it is not acceptable for a defense to be based on "the question whether competition is good or bad." FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 695 (1990).

13 Cargill, Inc. v. Montfact of Colo., Inc., 479 U.S. 104 (1986).

14 In virtue of Art. 85 (3) of the Rome Treaty there is a possibility to carry out the monopoly agreement if it meets two positive prerequisites, which are the improvement of production (distribution and development of technical or economic progress and securing to the user (consumer) a considerable share of profit resulting from the above and two negative prerequisites, which are not imposing limitations on interested enterprises which are not necessary in order to achieve the above mentioned goals and the lack of eliminating competition in the area concerning a considerable part of goods.

15 Decision of 23 April 1992, XVII Amr 5/92; "Wokanda" 1992, No. 11.

16 Decision of 27 October 1992, XVIIAmr 21/92; "Orzecznictwo Gospodarcze" 1993, paper 1, item 8 with the gloss of J. Napierala.

17 Decision of 25 January 1995, XVII Amr 51/94; "Wokanda" 1995, No. 12.

18 Decision of 27 October 1992, XVII Amr 15/92; "Wokanda" 1993, No. 2.

19 Decision of 21 December 1994, XVII Amr 42/94; "Wokanda" 1995, No. 10.

20 Decision of 21 May 1993, XVII Amr 9/93; "Wokanda" 1993, No. 12, with the gloss of M. Krol-Bogomilska; "Bulletin of Anti-Monopoly Office" 1994, No. 3, page 41.

21 The effect of this negligence was the uncontrollable influence from abroad of low-cost spirit which destabilised the domestic market of alcoholic beverages. Persons responsible for this situation are currently charged before the Tribunal of State.

22 Decision of 16 December 1992, XVII Amr 28/92.

23 Decision of the Supreme Court of 23 June 1993, I CRN 57/93.

24 To art. 5 of the anti-monopoly act the following has been added : "The granting by a cooperative to the benefit of its members in the turnover among them any rebates, discounts or other economic profits is not considered a monopoly practice".

25 Decision of 27 October 1992, XVII Amr 22/92; "Wokanda" 1993, No. 4.

26 In accordance with item 4 of the preamble to the decree No 4064/89 of 21 December 1989 concerning the merger of enterprises under the regulations of the European Community, the merger processes are also seen from the perspective of increasing the conditions of the development of industry and living standards in the Community. In controlling mergers, criteria other than the protection of competition are taken into account by many national legislatures. For example, in light of art. 41 of the French Act the Competition Council estimates whether a proposed merger makes sufficient contribution to economic development in order to balance such merger's anticompetitive effect.

27 Official Regulations Gazette No. 41, item 234 as amended.

Maureen Brunt
Member, Australian Competition Tribunal & New Zealand High Court, Australia

First of all, what is very striking to an economist like me is that the methodology of courts is very different from that of an economic enquiry. This is true and relevant even where cases are heard in the first instance by an administrative body because ultimately the law and the approach will be settled by the courts. My first point is that the law works by presumptions and the assumptions are established by government policy. It is true that a comprehensive competition law has the core objective of banning conduct that creates, extends or misuses market power. It is this objective that establishes the presumption that certain conduct is bad. It would seem that, even in a system like the EC where there is the single market objective as well, what we are finding is increasingly that a way has been found to make the single market objective compatible with the diminution of market power.

Now how do we construct a law that recognises this presumption? It is partly by the structure of the liability rules and partly, again, by making provisions for exemption in exceptional cases. There are a variety of techniques available to make special provisions that might be made. In Australia and New Zealand, administrative bodies were established to deal with the exceptional cases that can be justified by resort to public benefit arguments. As regards the presumption that is created by the liabilities rules, we go to the onus of proof or, in our Competition Tribunal and the comparable bodies in New Zealand, we go to the requirement established by the statute according to which the administrative bodies must be satisfied that any benefit to the public outweighs the anticompetitive detriment. So there exists a kind of onus of satisfaction. You will note, perhaps, that this point is, with respect, in disagreement with John Clark's background document, because he spoke of a question of balance. It is a nightmare to try to balance multiple objectives. You need some presumptions and especially in a court setting where you have to have economy and effectiveness.

My second point is that it is far too narrow to say that the objective of the law is economic in character. 'Pursuit of efficiency' is often said, or sometimes it is put more narrowly, 'the pursuit of allocative efficiency'. I do not believe that for a moment. I would not be in competition business if this were the sole objective. In my view, competition law has economic, social and political objectives. And these objectives are complementary. A concern of market power is at the centre of competition law and the chief basis of market power, as we all know, is barriers to entry. Now, barriers to entry have a relevance in their impact on efficiencies. But they also have a relevance in that they deny commercial freedom and economic opportunity. And they also serve as a basis for the creation of political power. We do have a number of examples where licensing systems, exclusive zones for activities, have resulted in the denial of economic opportunity for entrepreneurs with new and more efficient ways of handling the business.

My third point is that one needs to use a systematic and analytic methodology in establishing that anticompetitive conduct creates public benefit. It is not enough to have just a hazy glow, that you like what is going on. There is a requirement of causation. That is to say, if the disputed conduct is to be permitted to continue, we must be satisfied that, in the Australian and New Zealand cases, the conduct results or is likely to result in a benefit to the public that will outweigh any anticompetitive detriment. This is the requirement of causation. There is a requirement also of prediction, because you are concerned to establish what would happen if the conduct were to be abandoned. We have developed on the

Australian Tribunal what we are proud to call the 'Future With and Without' test. What will happen on the future with the conduct? What is likely to happen in the future without the conduct? Secondly, we have to think systematically in terms of the functioning of markets with and without the conduct. It is often thought that one can leap immediately and intuitively to establishing the public interest in certain conduct. Not so. What you have to study is the functioning of markets. That means that market definition is the first step even when you are analysing the sources of public benefit from the disputed conduct. Because what we are looking for essentially is sources of market failure in the broadest possible sense. We are not looking just at market failure in the economists' technical sense, as a failure to deliver economic efficiency, but also at a failure of markets to deliver the outcomes that we value.

Lars Jonson
Judge, The Market Court, Sweden

There are differences between clauses based on the principle of prohibition and clauses based on the abuse principle. Both a prohibition clause and an abuse clause could have a general and broad wording, of course, and nowadays most legislations are prohibition legislations. We have had in Sweden the abuse provisions and they normally take account of a wider range of interests. So the court is probably more free to consider many different interests where it applies an abuse provision. And that could be a negative thing because a prohibition can be more effective from a competition point of view because you do not have to take into account conflicting interests. On the other hand, prohibition clauses must be interpreted more narrowly for reasons of legal certainty. That is more in favour of the enterprises accused of breaking the law. Before 1993, the law in Sweden was based more on the abuse principle. The public interest was the general norm. Therefore, anticompetitive effects had to be balanced against other interests. That law included two prohibitions - against resale price maintenance and bid riggings. Those provisions had precise criteria. From a legal point of view, it was much easier to interpret them than the general abuse provision. Our new Competition Act of 1993 is based on the prohibition principle and the provisions are worded very similar to the EC rules. This means that they have a broad wording of the kind discussed here. It seems to me that the implementation of the provisions of the new Act gives considerable room for evaluation. This situation is in fact not quite different from what we did in applying the former abuse provision.

The principle question under this item is how courts can balance conflicting interests when applying competition law. My first answer would be that nobody really can. It is probably seldom totally clear what the result should be. How could we assess what the correct result is? Nevertheless, the balancing has to be done as far as foreseen by the law. The basis for this can be rules and principles set by the legislator. For instance, it has been stated by the Swedish legislator that only effects on competition should be taken into account in deciding if the cartel prohibition is applicable. Other interests such as effects on employment should not be considered. The balancing against other public interests may also be expressly regulated by other law provisions. There are also conflicting interests protected in one way or another by legislations in other fields without any provision solving the conflict. From such situations result conflicts between two sets of law. This creates a complex situation. One self evident principle is that constitutional law must always take precedence. For the rest, some guidance may be offered by the legislative history of the statutory laws involved and of course by case law. The general principle in Sweden is that competition law can be applied to all business agreements and practices unless they have an unavoidable effect of other legislation. That seems to be a simple rule, but we must admit that there are many unclear borderline cases.

Regarding conflicts with intellectual property law, these can present really difficult problems. In that area, however, there are some guidelines to follow for us all based on legal experience and theory on international levels. Conflicts with laws on unfair competition have not, in my experience, been so difficult. The market court is, in Sweden, the highest court in both competition cases and most cases concerning unfair competition. This competence of the court has been expressly motivated by a wish that judgements in the two fields should be balanced against each other. The main principle applied is that competition methods which are clearly unfair, from an ethical point of view, cannot be deemed to promote effective competition. Even if it may seem so momentarily. Therefore, they should not be allowed. On

the other hand, competition methods alleged to be unfair, for instance aggressive marketing, low price advertising, etc., should be evaluated in view of the goals of competition policy and maybe, therefore, accepted. And that principle, in my view, has functioned rather well so far. It should only be added that the application of competition law in the market court is the result of a discussion in the court between the professional judges and the economic expert judges. My opinion is that a body of this kind also becomes used to these balancing problems and, perhaps for this reason, they can solve these problems rather well.

ANNEX

Trial and appellate procedures in Swedish competition law

Note by the Swedish Delegation

Readers fill find below a description of trial and appellate procedures in Swedish competition law which was prepared by the Swedish Delegation to the Committee on Competition and Policy.

I. The Swedish Competition Act

The Swedish Competition Act (1993:20) is based on the prohibition principle and modelled on the articles 85 and 86 of the Treaty of Rome. Two main provisions prohibiting anticompetitive agreements and concerted practices and the abuse of a dominant position are laid down in the Act. It also contains provisions on merger control as well as on enforcement and sanctions.

II. Judicial Procedures

The Competition Authority

The Competition Authority is the government agency responsible for enforcing the Competition Act. The Competition Authority has the role of prosecutor in the two appellate courts, the Stockholm City Court (Stockholms tingsrätt) and the Market Court (Marknadsdomstolen), which adjudicate cases under the Competition Act.

The Competition Authority's decisions on exemptions, negative clearances and injunctions ordering a company to desist from a certain practice, may be appealed to the Stockholm City Court. The Competition Authority also pleads its case at the Stockholm City Court when the Authority finds that a penalty should be imposed on a company or that an acquisition or merger should be prohibited.

The Stockholm City Court

The first instance of appeal in competition cases is the Stockholm City Court. Such cases are heard by a specialized panel in one division of the Stockholm City Court. During the main hearing this panel normally consists of four members, of whom two must be lawyers with experience as judges and two must be experts in economics. In some cases, however, the main hearing may take place in "simplified form" with oral arguments before a single lawyer with experience as a judge.

A company that intentionally or negligently infringes the prohibitions in the Competition Act may be liable to a fine. The Stockholm City Court determines the fine at the request of the Competition Authority. The main factors to be taken into account when calculating the fine is the gravity and the duration of the infringement. The size of the fine may be as much as 10% of the undertaking's annual turnover in the preceding business year.

The Stockholm City Court may prohibit an acquisition if it creates or strengthens a dominant position which significantly impedes, or is liable to impede, the existence or development of effective competition on the Swedish market as a whole, or a substantial part of it, and this takes place in a manner that is detrimental to the public interest.

Judgments and decisions of the Stockholm City Court may be appealed to the Market Court in the following cases: obligations to terminate an infringement of the prohibitions on anticompetitive agreements and concerted practices and the abuse of a dominant position; anticompetitive behaviour fines; a distraint in order to secure payment of an anticompetitive behaviour fine; acquisitions of undertakings; investigations of infringements; and reviews of appeals on exemptions, negative clearances, injunctions ordering an undertaking to terminate an infringement, and obligations to supply information.

The Market Court

The Market Court handles cases related to the Competition Act as well as cases involving consumer and marketing legislation. In cases related to the Competition Act, the Market Court consists of a chairman and a vice chairman plus five special members. The chairman, the vice chairman and one of the special members must be lawyers with experience as judges. The other special members are experts in economics. The members and their deputies are appointed by the Government. All seven members normally participate in hearings. The chairman is a full-time official of the Market Court, while the other members serve on a part-time basis. The Market Court is the final court of appeal in competition cases. Therefore in Sweden, contrary to many other countries, rulings in competition cases cannot be appealed to the Government.

DISCUSSION

Frédéric Jenny - CLP Chairman

Dr. Brunt and Mr Jonson have actually stimulated the debate when discussing the necessity of the balance between efficiency and other factors or that competition law is not about balancing because it is itself a much wider concept than the strict efficiency concept.

Martin Howe - Delegate for the United Kingdom

Maureen Brunt's remarks on this issue were indeed very interesting and Judge Jonson's response too. My interest is not least because the British system still retains a broad public interest test approach. I would like to offer one comment on that from my own experience. Since we are all human beings, it is very easy with such a system to think forward to the conclusion that you think is right on this broad public interest test and then to perhaps sometimes square with the competition analysis in the conclusion. Hence my strong preference is for Maureen's remark: it would be much better to start with some presumption, which then has to be rebutted by wider public interest considerations, if that is appropriate, rather than leaving the test so open-ended. For example, if one wanted to find a merger was not against the public interest, albeit it seemed to raise competition concerns, then you might put more weight on so-called buying powers to allow the merger than otherwise. Contrary-wise if you wanted to condemn the merger and the competition analysis was a little dodgy, then you would perhaps put more weight on entry barriers than you otherwise would. The presumption approach would thus enable one to make a more objective and systematic analysis of the competition issues before bringing in what are often very legitimate non-competition points of view.

Delegate for Norway

If I understood Ms Brunt right, she said that economic efficiency would be too narrow an objective in competition policy cases. But then, for example, in our Norwegian law, the objective is only economic efficiency. It is said in the Act that its purpose is to achieve an efficient utilisation of society's resources in providing altogether the necessary conditions for effective competition. How do you then act in relation to the law? Should you step outside, so to speak, the confines of the law and include more public interest dimension, or rather define economic efficiency broadly enough to include those aspects?

Maureen Brunt - Member, Australian Competition Tribunal, Australia

Your point is quite understandable and, in fact, we have answered this in the Australian cases. What we have said is that, in identifying conditions of effective competition, we should have regard to the role that markets play in achieving efficient and progressive outcomes. We would use an efficiency criterion to identify effectively or workably competitive markets. However, in that same case, which is called Queensland Milling, - a Tribunal case by the way - it is further

said that competition is valued for many reasons and that there are objectives which are complementary to the efficiency objective. So we would have no trouble at all in obeying the Norwegian statute. For example, barriers to entry play a key role : they not only preclude firms that can conduct their businesses as efficiently as the incumbents. They also have exclusionary effects on persons who are denied the economic opportunity of participating in that particular industry. Therefore, you are satisfying social objectives of equal and commercial opportunity in the process. one further point is that it is fairly well established, in the Australian and New Zealand approach, that market power and effective competition are to be regarded as the inverse of each other. There is a quite famous New Zealand statement in one of the Commerce Commission' decisions - in fact the first Commerce Commission' decision that was ever made - in which it was said that effective competition is the inverse of market power. This is the approach taken in Australia as well.

Pekka Hallberg - President, Supreme Administrative Court, Finland

We have different traditions in our countries. Many countries have a civil court system deciding on competition cases. There are also administrative court systems. In addition, prohibition clauses versus abuse principles exist. This makes it perhaps quite difficult to understand the different traditions. Like perhaps my colleague Lars Jonson said, my feeling is that with an administrative law, an administrative court system and originally an abuse principle, it might be is easier to introduce these economic arguments and thoughts within the administrative process. It might be more difficult within the process of civil courts because they are more at the borderlines between economic and judicial questions.

We may never remark any clear borderline between economical or judicial arguments: it is more or less a question of how open and active court proceedings can be developped, in taking care of all evidence, proofs and facts. Our responsibilty is that all judgements or decisions should be real. It is very important that they be real when compared with the actual business life. In a little country as Finland, now more and more international and other country' traditions have to be leant, in particular because we are now member of the EEU but also because many cases have connections with all over the world. Therefore, we must learn these different traditions.

STANDARDS OF PROOF IN COMPETITION CASES

Jean Léonnet [*]
Counsellor, Cour de Cassation, France

A shortcut—although we should be wary of oversimplification—would be to state that any dispute comes down to a matter of proof. In civil law, plaintiffs are required to prove their right to take action and to substantiate their claims. In criminal law, and in civil cases involving unfair competition, either the victim of unlawful practices or the authorities must establish the existence of such practices, thus leading to conviction of the offending business. But standards of proof can vary in strictness, depending on whether the case in question is a criminal matter or a civil one.

This is what emerges from a comparison between the administrative case law of the Competition Board (*Commission de la concurrence*), governed in France by the Order of 30 June 1945 on prices, and relevant criminal case law. For instance, the Paris Criminal Court (31st Economic Chamber of the *Tribunal correctionnel*, on 12 December 1984) acquitted garment manufacturers under contract to the military on the grounds that "the testimony, while tending to corroborate the evidence, was not sufficiently precise and consistent enough to substantiate beyond any doubt the existence of an anticompetitive agreement." In contrast, the Council of State (*Conseil d'État*), ruling on a decision of the Competition Board, has accepted presumptive evidence to establish the existence of an agreement that was both vertical and horizontal between a producer and distributors (*Conseil d'État, Société A. Martin*, 27 April 1983, Rec. Lebon, p. 165).

The Order of 1 December 1986 on freedom of pricing, by decriminalising much of competition law, eased the burden of proof in cases heard by the Competition Board. Criminal judges were not entirely excluded from disputes of this type—they may still hear the most serious cases under Article 17 of the Order—but disputes fall primarily under the jurisdiction of the Competition Board or of the commercial courts, and decisions of the Competition Board may be appealed to the Appeal Court of Paris, which is in turn subject to review by the *Cour de Cassation.*

The first comment that needs to be made is that the Order of 1 December 1986 made no provision concerning the nature of evidence before the Board. However, the "search" for evidence is regulated if a case is initiated by the economic authorities. This freedom of proof signifies that no particular type of evidence is imposed. There is absolutely no need for either written proof or elements of written proof, as there is under civil law. Here we are in the economic domain, and presumptive evidence is admissible. This is the fundamental difference as compared with liability law under Section 1382 of the Civil Code inherited from Roman law. When two traders litigate in the courts, one of them accusing the other of unfair practices, case law of the *Cour de Cassation* does not allow presumptive evidence (see Com. 30 November 1983, Bull. IV, No. 331, p. 287). Plaintiffs must establish that their opponents are at fault, and whether or not that fault was intentional is of little importance.

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[*] Texte en français disponible à la page 221.

In competition law, however, the admissibility of presumptive evidence is a necessity when economic agents agree to act in collusion without leaving any written or electronic traces. Some twenty years ago, it was still possible to find written documents that could be used to establish collusion. But today, silence is the rule. As a result, it is necessary to make use of presumptive evidence in respect of agreements without any formal legal framework, i.e. based on concerted practices. Accordingly, the Commercial, Financial and Economic Chamber of the *Cour de Cassation* accepted on 8 October 1991 (Com. Bul. IV, No. 282, p. 195) that the existence of an agreement could be established by the "parallelism of behaviour" between oil companies that practised "rigorously consistent" pricing policies among competitors. Since then, such presumptive evidence has been recognised in a number of cases brought before the *Cour de Cassation*, in disputes involving public works, electrical works and removal companies doing work for civil servants.

It must be noted, however, that presumptive evidence in the form of identical economic behaviour is relatively easy to establish in respect of horizontal agreements, but more difficult with regard to vertical agreements concerning relationships between suppliers and distributors. Here there arises another legal issue stemming from the contract between supplier and distributor—something that can either confirm the economic analysis or nullify it, as illustrated by the following two examples. In the first case, members of an economic co-operative or Economic Interest Grouping pledge to buy products of a given brand only on terms negotiated by their co-operatives, without seeking to obtain their own, more favourable terms: by doing so, they agree horizontally among themselves, and vertically with the co-operative, to make prices uniform. This is an illegal practice which requires legal analysis of the contract and, subsequently, economic analysis of the effects of the contract (see Com. 16 May 1995, Bull. IV, No. 147, p. 131 and, once again, the Salomon case). In the second case, a supplier distributes products to traders who have no legal ties among themselves, offering preferential terms to some but not to others. Is this evidence of a vertical and horizontal agreement between the supplier and these distributors? The answer is unclear, and shows the limitations of economic analysis alone.

It is true that the Order of 1 December 1986 provides other means of countering such obviously illegal practices, with Article 36-1 sanctioning illicit practices between economic agents, most of which have a contractual or near-contractual basis. In such cases, however, disputes are heard not by the Competition Board, but by a civil court, with offending parties being liable only for damages and interest, and not a fine. Moreover, it must obviously not be forgotten that Articles 8 and 10-1 of the Order, via the notions of abuse of dominant position, state of economic dependence and abusively low pricing practices, make it possible to file suit to the Competition Board and to sanction those who commit illicit actions. Here, the evidence is entirely economic or based on accounting data, and is not easy for the Competition Board to handle. The *Cour de Cassation* pointed out in a recent ruling that "the notions of agreement and abuse of dominant position, under the meaning of Articles 7 and 8 of the Order of 1 December 1986, are not mutually exclusive" (Cass. Com. 21 June 1994 - Bull. Cass. IV, No. 233, p. 182). By this, the Commercial Chamber meant that the narrow provisions regarding anticompetitive practices laid down in the Order of 1 December 1986 should not be interpreted too strictly, and that the concepts of agreements and abuse of dominant position could be looked at together, in order to make it easier to prove illicit behaviour—which would then be established by their detrimental economic effects.

The second remark concerns ways of proving that a market exists. Here, it is obvious that the evidence is solely economic and that civil courts closely follow or draw upon the Competition Board's conclusions. Proving the existence of a market is not difficult *per se*: it is sufficient to note the presence of economic agents within a specific perimeter, exchanges between them and customers, and, lastly, the existence or non-existence of "substitutable" products in the market. The term market "perimeter" is important, since it is here that the difficulty often lies. Civil judges cannot accept markets of variable dimensions. By attempting to break markets down too finely within commercial or industrial activities,

the number of such markets is increased and their perimeters reduced. The discussion would be purely academic if the consequences in terms of fines were not so serious, the amount in question being calculated on the basis of the economic agent's turnover and the illicit practice's impact on the market. As a result, if a market is defined too narrowly or in too limited terms—and in many cases such limitations are indeed necessary—the punishment will be all the harsher owing to the consequences of the anticompetitive behaviour on the market thus defined.

My final comment relates to the options open to the authorities to ascertain the existence of practices that are contrary to free competition. In fact, this is where I should have begun, since in order for courts to recognise presumptions of agreements or concerted action between economic agents, they need to be furnished with economic, and generally accounting, documentation in order to form their opinions. For that, it is not enough to show that competitors have complained—assuming they dare to do so—but searches have to be carried out on the premises of those involved. Decided cases under the Order of 1 December 1986 (Articles 47 and 48) have proven relatively strict here.

Why? Because this procedure infringing on the freedom of individuals and economic activities has to be strictly controlled in order to avoid any abuse. Freedom of trade and industry have to be reconciled with economic regulation designed to permit such freedom. In France, the search for such evidence is not unrestricted, and remains subject to authorisation by the courts. In administrative inquiries, authorisation is ex post, allowing government agents to enter premises and seize commercial records and invoices. Authorisation is by the civil court, upon prior application by the authorities, setting forth the grounds and producing supporting documents (Article 48). This search (*"visite domiciliaire"*) takes place in the presence of a police officer, and the judge's order must stipulate the reasons for it. At any time, the parties may apply to the judge who authorised the search. He alone is empowered to rule on challenges to its legitimacy and how it is carried out. Search authorisations may be appealed to the *Cour de Cassation* within five days of notification, in accordance with the rules of the Code of Criminal Procedure.

Since 1988 these searches have generated a mass of cases before the *Cour de Cassation*, and the consequences have been far-reaching, since seized documents can no longer be used as evidence before the Competition Board. In this area, then, in which sanctions have been largely decriminalised, there has arisen a form of habeas corpus with regard to the search for evidence. What is most important is to strike a balance—as was emphasised above—between freedom of trade and industry and the economic system. But it is true that there are a wide variety of cases which sometimes pose difficult problems. This is certainly one of the trickiest tasks incumbent upon the Commercial Chamber of the *Cour de Cassation*, and one that determines the admissibility of evidence before the Competition Board.

Diane P. Wood
Judge, Seventh Circuit Court, Chicago, United States

"How do courts develop and employ the specific standards of proof that are required to implement the more general standards in law?" This is a very important question, particularly for those who wonder whether one can draw a sharp distinction between merely interpreting a law and actually elaborating it or adding to its contents somehow. The classic way of doing this in the US courts has been to begin with the language of the statute and even with statutes as general as the various antitrust laws. This proves to be a very useful starting point and, in fact, a constitutionally necessary starting point, if you want to think of it that way. When the courts began to do that with the Sherman Act, they looked at the words 'restraint of trade' which are very broad words. They thought of two possible approaches. One approach was to tie it to the English Common Law, meaning that that phrase had acquired over the years, and the other was to view it as a new piece of legislation that would be, at least to some degree, independent of the common law. And it was the latter approach that they took. This was helpful in so far as the common law had been rather narrow in its concept of a restrain of trade, but it also led to risks of very broad, unpredictable, open-ended results. Some of the kind of risks Maureen Brunt was talking about.

And it was not too long before, in the Standard Oil case, frankly through the use of a pun practically, the Court developed a rule of reason analysis. The Court said that some restraints of trade are reasonable, such as when the only tailor in town sells his business to a new tailor and promises that he will not compete in the tailor business for the next two years in that town. That is certainly a restraint on his trade but it is a reasonable one, as it facilitates the transaction. Other restraints of trade, such as price fixing among existing competitors, are not reasonable. There was already a fairly intuitive economic element to this but notice what the courts had to look at. Abuses can be perceived. You can hear people complaining about them. You can see the victims of the Standard Oil Trust coming into the Department of Justice and other places, saying: 'we were thrown out of business by the following tactics'. Thus you can see the results and you can see the conduct. It was looking at those things that helped the courts begin to develop the substantive standards that apply under the law. It was not because they were all economic geniuses before their time that they began to see certain types of practices that usually appeared to be problematic.

Once a few of the ground rules were established though, a dialectic process essentially began between economics and experience. At some times, this worked very well; at some times this worked not so well, at least in the light of current economic learning. In the earlier cases, very broad lists of practices existed using presumptions that were going to be presumed to be illegal virtually all of the time. It was a long list by today's standards, because it included conducts which we would still agree belong there - such as price-fixing among competitors, market allocation among competitors -, but it also included group boycotts, tying arrangements and resale price maintenance. In each of those three areas, one can make a very strong economic case for a much more subtle approach. They may be a problem some of the time, they may be a problem in some circumstances, but do we really want to say that they are really inevitably 'evil' for the economy? We probably do not. Nonetheless, the courts had these presumptions in place and they followed them.

By the time the 1970's came, the courts questioned the utility of presumptions in the area of competition law, because any presumption is going to miss the accurate result in some cases. It would be good for some percentage, you would have to decide that needs to be - 90%, 80%, 70% - and it will unfairly condemn conduct in some cases. Even a cartel among competitors might strike one as not really harming the market too badly. In Washington, people who rented roller skates (as they were then called before they became roller blades), at Farrowgate Square, Washington DC, decided that they should get together. They all agree to charge the same price for the roller skates per hour rental, because competition was driving the rental rates down to a level that many people did not like. Their conduct was publicised very broadly in the newspaper. It really was in some sense a cartel: if you really wanted to rent a pair of roller skates at Farrowgate Square during the noon hour, you were going to pay may be $5 per hour instead of $3.50. On the other hand, we all might think that the world was not going to rise or fall because of such behaviour. If the price really did go up to $5 per hour, it was awfully easy for somebody else to put a stand up with some more roller skates and charge $3.50 again. And it was not likely to last more than a day or so. This example illustrates that all presumptions in some way will be over-inclusive. The courts began to worry about this significantly by the time the 1970's came. A steady development occurred in the US courts from that time forward, abandoning the use of presumptions, abandoning the *per se* rule in area after area and substituting something that takes more into account the market power of the firms in question, the likelihood of efficiencies from the arrangement, and criteria which are familiar in economic analysis.

At the same time, and not by pure coincidence, one began to see literature suggesting that antitrust laws themselves really should not have multiple goals, because multiple goals are an invitation to unclear rules and capricious enforcement. Enforcement is very difficult when two goals come into conflict and if one of the goals is to preserve many small businesses while another goal is to make the prices low. There were cases where such goals came in conflict in the US courts. The goal of preserving small businesses is a very worthy goal but it is not one that US antitrust laws are asked to perform. Several laws exist in our legal system such as the Small Business Administration, the Tax Code and many other mechanisms to facilitate and encourage that kind of business organisation. Through that way antitrust law is pared down to something which always does have an answer. Some good economists might still be needed to solve the problems raised by multiple criteria but it will have an antitrust answer. In summary, the US courts have moved along this way. It began with experience; it moved through presumptions. We are now at a stage where presumptions are far less used in the economic analysis of the particular transaction.

Marshall E. Rothstein
Member, Competition Tribunal of Canada and Judge, Federal Supreme Court of Canada

Four topics are discussed here: i) the development of criminal and civil competition offences; ii) the undue lessening of competition standard; iii) the relevance of intent; and iv) market power.

First, how criminal and civil offences developped? Until 1976, all Canadian competition law was criminal in nature. The Canadian justice system is based on the adversarial approach and generally only the government brings a competition case to an independent court or tribunal. The court or tribunal adjudicates the case between the government and the parties to the alleged offence. When competition law was all criminal, the government had to prove that a person was guilty beyond a reasonable doubt. The person was assumed innocent unless proven guilty beyond a reasonable doubt. This was a very high standard. While there were some convictions in conspiracy cases to fix prices, there was never a conviction in a contested merger case. There was an interplay between the development of jurisprudence and statute, because the reason for the development of civil offences was that the courts were not finding merger offences and other types of competition offences when the standard was as high as in a criminal context. Therefore, in 1976, legislation was enacted splitting offences between criminal and civil. The reason for creating the civil offences was to reduce the standard of proof from 'proof beyond a reasonable doubt' to 'proof on a balance of probabilities' for the civil offences so that competition offences could be made the subject of more effective enforcement. Price fixing remained criminal as did mergers and monopolies. But refusals to deal, exclusive dealing and tied selling were made civil offences. In 1986, abuse of dominant position and mergers, which prevented or were likely to prevent or lessen competition substantially, became civil offences. In essence, civil offences while injuring competition are not considered morally reprehensible. Conspiracy cases continued to be decided by the criminal courts. Civil cases are now adjudicated upon by an administrative tribunal called the Competition Tribunal. But in either case the government must bring the criminal or civil action.

Second, what is the undue lessening of competition? Our criminal standard is that competition must be lessened unduly. Our civil standard is that competition must be lessened substantially. While the words 'unduly' and 'substantially' are different and will be proven according to different standards, beyond a reasonable doubt or balance of probabilities, they tend in the same direction. In the case of criminal conspiracies to limit competition unduly, the Canadian law provides that the court may infer the existence of the conspiracy from circumstantial evidence without direct evidence of communications between the parties. This again is as a result of judicial decisions that the Parliament of Canada felt made it necessary to clarify the law by way of statute. In 1992, in a case in the Supreme Court of Canada, called Nova Scotia Pharmaceutical Society, the word 'unduly' was tested as being unconstitutionally vague. Certain statutory directions about how to deal with the word unduly were creating some difficulties. For example, the Competition Act specifically states that for the unduly test to be met, it is not necessary to prove that the conspiracy would virtually or completely eliminate competition from the market. And it was alleged that this created vagueness. But the court disagreed and said that the statute was not void for vagueness. They defined the word unduly as denoting a sense of seriousness, not affected to a minimal degree but to a significant degree. The guidance provided by the Supreme Court directs the lower courts and the Competition Tribunal towards a flexible and pragmatic approach to deciding cases. While some degree of consistency and certainty is foregone by this approach, it recognises that competition law constitutes the application of complex economic policy that, on the one hand, is intended to promote a free

competitive market while, on the other hand, does not inhibit the legitimate growth of firms and the promotion of efficiency. It also recognises that over time competitive considerations must reflect new and changing competitive realities.

Third, when and how does intent have to be proven? Intent need only be proven in criminal cases. In civil cases we only look at the effect of the anticompetitive conduct. If competition is or will likely be lessened substantially, the civil offence is proven regardless of the intent of the parties. Of course, if there is evidence of intent or purpose, in a civil case, that evidence may be useful in demonstrating the likely effect of the anticompetitive conduct but proof of intent as such is unnecessary in civil offences. For a criminal case, the Canadian Competition Act provides that it is not necessary for the government to prove that the parties to the conspiracy specifically intended that it lessened competition unduly. In the Nova Scotia Pharmaceutical case, the Supreme Court said that this provision was not vague and that the statute still required the proof of subjective intent. Subjective intent is determined once it is proven that the parties to the conspiracy intend to enter into an agreement and have knowledge of its terms and that a reasonable business-person should have known that the lessening of competition unduly was the likely effect of the agreement. If those are proven, that is sufficient. Then the inference can be drawn that the parties intended to carry out an agreement to lessen competition unduly.

Fourth and last, a word about the market power standard. In Canada, as in other countries, the court first determines the relevant market in terms of product and geography. Next, it decides the question of market power, having regard generally to market shares and the question of ease of entry into the market. While the court looks at numbers, what constitutes a minimum market share for market power has not been the subject of numerical determination. Nor have entry barriers been the subject of predetermined rules or guidelines. However, the courts have said that in criminal activity minimal market power is sufficient for there to be a finding of prevention or lessening of competition unduly. In civil cases, the market power standard is higher. At least in civil matters, there has been pressure from some quarters - particularly the bar which is involved in giving advice on whether a merger might offend the Act, and wants bright lines or increased certainty for their clients - for the Competition Tribunal to provide explicit guidelines on, for example, how much lessening of competition is substantial, how much market share leads to market power, and how much market power constitutes market dominance, and the like. In Canada, the Competition Tribunal has not taken that approach to date. The government's Competition Bureau has issued merger guidelines which contain standards for the guidance of those involved in competition matters. These guidelines have been referred to by the Competition Tribunal in some of its decisions, but they are not binding on the Tribunal. However, since it is the government that decides whether to bring a competition case to the court or the Tribunal, we can presume that the government will tend to follow its own guidelines. That provides a visible set of standards for the public in their business conduct.

Marina Tavassi [*]
Counsellor, Court of Appeal of Milan, Italy

Italian law provides for the principle of "allegation by the parties". As regards proof, courts can only hear evidence from the litigants and do not have major investigative powers. The burden of proof is governed by Article 2697 of the Italian Civil Code, which stipulates that: "Any person wishing to assert a right before the court must prove the facts upon which that right is based. Any person who challenges the relevance of these facts, or who contends that the law has either been changed or expired, must prove the facts on which the exception is based." This rule, which stipulates precisely what evidence is to be furnished respectively by the plaintiff and the defendant, plays a key role in the proceedings, since disputes often hinge on whether or not one of the parties has fulfilled his burden of proof. In other words, if a plaintiff fails to substantiate his claim, it will be rejected regardless of the opposing party's attitude (unless that opposing party has conceded the plaintiff's rights), and even if the defendant is judged in absentia.

This same principle of the burden of proof has also been invoked in cases of dominant positions in reference markets and to substantiate the presence of an agreement, with the plaintiffs' claim being dismissed. Dismissals have been based on the plaintiffs' failure to present sufficient evidence to demonstrate competing firms' market power and to determine whether agreements were or were not likely to be detrimental to the structure of national markets or major segments thereof (see, in this regard, the Omnitel/Telecom case of the Appeal Court of Rome and the BB.Center/Parabella case of the Appeal Court of Milan, judgement of 21 March 1993; see also the Order of 20 September 1995 in the Sanguinetti/ANJA case; Order of 31 January 1996, Comis/Ente Fiera di Milano case).

Italian courts have no investigative powers independent of motions by the litigants, other than special investigative measures or instruments, such as expert reports (Articles 61ff of the Code of Civil Procedure) or requests for information from the authorities (Article 213). Judges may not investigate the facts of a case freely; the law is very explicit in defining what evidence is admissible in court, as well as the form and manner in which it is presented and accepted.

The principles we have just outlined also apply in competition cases, since the national antitrust act did not introduce any exception or particular investigative instrument for judges. Nevertheless, the recent provision transcribing into Italian law the TRIPS Agreement (reached at the Marrakech session of the Uruguay Round on 15 April 1994 and implemented via D.L. No. 198 of 9 March 1996) invested judges with broader powers in respect of trademarks and patents, enabling them to seek evidence and other elements on which to base their decisions, even though these powers are still conditional upon a motion by one of the litigants (e.g. discovery, acquisition of information from the opposing party, confiscation or description of evidence of the reported violation, from third parties as well). However, antitrust legislation makes no such provision to expand the investigative powers of ordinary courts to reflect the specificity of such cases; the only valid references in this respect are the general principles that govern the Italian judiciary.

It is important to see how courts refine legal criteria when enforcing competition laws, since the legislation in question, and Act No. 287/90 in particular, is based on broad principles whose content is

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[*] Texte en français disponible à la page 224.

difficult to define. Nonetheless, Act No. 287/90 provides a special instrument for interpreting these rules—one that draws on the principles of EC legislation in respect of competition law. Article 1, paragraph 4 of Act No. 287/90 stipulates: "The provision contained herein shall be interpreted on the basis of the judicial principles underlying the European Communities' regulation of competition." Nothing of the sort is to be found in the judicial systems of other European States, even if the authorities responsible for the enforcement of competition law have spontaneously and in a timely manner provided an interpretation coherent with Community principles.

It was feared that Italian courts would not take favourably to this limitation, but such was not the case. In fact, a large number of rulings, at both a preliminary and substantive level, drew not only upon the principles contained in Articles 1-8 of the Treaty of Rome and the fundamental principles relating to competition (e.g. the guarantee that competition be not distorted, unity of the integrated market), but also to factors arising from the case law of the Court of Justice and the Court of First Instance, and even from the Commission of the European Communities.

It was believed that, under Article 11 of the Constitution, the Italian judicial order accorded the same value, in Italy, to EC rules as they had under the Community system. This was upheld by the Constitutional Court, which also held that national judges act as Community judges and must, in that capacity, comply with Community provisions and disregard any domestic rule that conflicts with them, irrespective of whether that rule was adopted prior to or subsequent to the EC rule. This principle should be considered as valid for Community regulations as well as interpretive rulings of the Court of Justice (Constitutional Court No. 170 of 8 June 1984, No. 113 of 23 April 1985).

This is why—in analysing horizontal and vertical agreements, defining relevant markets, substantiating the existence of a dominant position and of abuse thereof, and choosing criteria for assessing concentrations or exemptions—Italian judges have constantly referred to cases submitted to Community bodies for review, and to principles laid down in the various decisions, which are cited explicitly in many of their competition-related orders and rulings.

Accordingly, in defining the concept of "relevant market", the criteria defined by Community case law in terms of product markets and geographical markets were adopted, whereas to substantiate dominant positions reference is made to elements such as market shares, number of competitors, a firm's technological superiority, the refinement of its own organisation, the firm's dynamic prospects and the persistence of its position. It was precisely this approach that the Appeal Court of Milan expressed (Order of 10 January 1996, Scamm/FAI Komatsu Industries case) when it examined a case of abuse of dominant position deduced from discriminatory pricing practices. Citing the decision of the Court of Justice and the precedents examined by the Commission in respect of application of Article 86 of the Treaty, the Milan court deemed that the dominant position ought to be examined in the light of so-called "structural" criteria, these being represented, first, by shares of the relevant market and of each of the "segments" examined, both in absolute value, which takes turnover into account, and as percentage shares of the competition and the number of parties present in the sector under examination (see the United Brands case, Court of Justice, 14 February 1978; Hoffmann/La Roche-vitamin case, Court of Justice, 12 February 1979; PB Industries case, Commission, 5 December 1988; Michelin case, Commission, 7 October 1981 and Court Order of 9 November 1983).

The principle expressed in the aforementioned Hoffman/Laroche decree was implemented in the following terms: "The dominant position referred to in Article 86 corresponds to a situation of economic power whereby the business holding such power is able to hinder the persistence of effective competition in the market in question, and to a firm's ability to behave in a fairly independent manner vis-à-vis its competitors, its customers and, in the final analysis, consumers" (in similar terms, see Commission,

9 December 1971, in the Continental Can case, and the decree of the Court of Justice of 5 October 1988 in the Alcatel/Novosan case). Similarly, to define the concept of an enterprise, the Appeal Court of Milan (Order of 31 January 1996, Comis/Ente Fiera di Milano) deemed that it could transcend purely judicial guidelines (Civil Code Article 2195) and refer to economic and market organisation criteria taken from Community case law arising from interpretation of Treaty provisions. This notion has been expanded to encompass all bodies that could be considered as engaging in "economic" actions and deploying their own resources and personnel (cases specifically cited were Mannesman, Order of 13 July 1972; Am. Autonome Monopole di State, 15 June 1987; Höfner/Macrotron, Order of 23 April 1991; PVC, Commission, 21 December 1988 No. 31/865; Eurotunnel, No. 32/490).

Italian law, by opting to invoke Community principles, has enabled courts and competition authorities in Italy to refer directly to the European Community's more than 30 years of accumulated experience in the realm of competition. It was therefore possible to lend substance to such general terms as "undertaking", "relevant market", "restriction of competition", "dominant position" and so on. As a result, legislative developments in Italy would seem consistent with the intention of making laws uniform throughout the Community—above all with a view towards instituting the single market.

Christopher Bellamy
Judge, Tribunal of First Instance, European Communities

The Court of First Instance was set up, in 1989, to discharge the Court of Justice of cases involving detailed actual review including, notably, competition cases. Since then, by further transfers of jurisdiction, the Court became in effect a court of general jurisdiction. Judges have been invited, for example, to stop French nuclear tests in the Pacific. They find themselves dealing with 'Mad Cow' Disease. They also deal with applications of a freedom of information type for access to community documents. We are the Court of Appeal under the Community Trade Regime. But the heart of our work remains competition and the related topic of state aids.

As regard competition, the name "Court of First Instance" is something of a misnomer, because in the EU context there will always exist already a decision by the Competition Authority, that is the European Commission. The role of judges of the Tribunal of First Instance, as illustrated earlier by Mr. Potocki, is to control the legality of that decision. So we are not a trial court, we are a court of judicial review. The grounds of review are essentially the same as those found in most national jurisdictions, including common law jurisdictions. That is to say, lack of jurisdiction, procedural failure, error of law, defective reasons, manifest error of appreciation and so forth. Among those grounds, though not specifically mentioned in the Treaty, is now established 'error of fact'. Indeed a few days before this Seminar, a decision of the Commission affecting the Channel Tunnel was annulled because the Commission made factual errors in determining what the nature of the contractual arrangements was.

In TFI cases where companies can be fined up to 10% of turnover, the highest fine to date being 70 millions ECU and where fines of 25 or 30 millions are common, control over the facts is essential. As regards standards of proof, facts probably fall into three difference kinds. First of all, there are primary or basic facts: what happened? did such a meeting indeed take place? was there such and such telephone call? if so, was an agreement in fact made? We control all these facts quite carefully. As in many continental jurisdictions, mostly it turns on the existence of written proof. Very little in fact is based on oral testimony.

No clear standard of proof has been established. The fact is that the Tribunal is working in a diversity of legal traditions in an international framework and in a quasi-criminal context. We therefore tend to say that a given fact is proved 'à suffisance du droit', or in English, 'to the requisite legal standard'. Without, however, saying quite what that standard is. Thus, we have not yet articulated the difference known in common law systems between the criminal standard of 'proof beyond reasonable doubt' and the civil standard of 'balance of probabilities', a difference which is also known in civil law systems but not perhaps articulated in quite the same way. In practice, we are applying something very close to the criminal standard but perhaps subconsciously making some allowance in cartel cases for the inherent difficulty of proving collusion. You do not always have a document of the kind we had in one case prepared by the loyal secretariat of the cartel which was headed: 'Minutes. Point 1: It was agreed that no minutes should be kept'.

More seriously, the Wood Pulp decision of the Court of Justice teaches that conscious parallelism in itself is not normally sufficient to prove a cartel, at least where parallel behaviour can be plausibly explained by the nature of the market. In practice, in cartel cases, we often use the following

syllogism, sometimes known as 'le syllogisme de la preuve', which goes as follows. 'You were at the meeting, afterwards your market conduct followed that of the others. You have offered no other plausible explanation, so we find the infringement proved.' This perhaps goes a little close to the line, as regards such topics as the privilege against self-incrimination and what, under the US constitution, would be the Fifth Amendment, This also touches the problem already mentioned by Mr. Léonnet which is the balancing between the liberty of the subject and the need to ensure that economic laws are properly enforced. A certain tension in this area regarding to what extent you can demand explanations to people, to what extent you can search premises, etc. is beginning to appear as between the jurisprudence of the European Community and that of the European Court of Human Rights at Strasbourg. This remains something of a delicate issue.

The second group of facts are now facts of an economic nature and this becomes more complex. Economic facts: what is the relevant market? what is substitutability? is there a dominant position? This is probably a question of fact or a mixed question of fact and law. But whether it is a question of fact or a question of law has not really been sorted out yet. It is important because the right of appeal from the Court of First Instance to the Court of Justice depends upon whether you can raise a point of law. We do not yet have a clear finding on whether the question like that of the market is a point of law or a pure point of fact. In practice in this area, it is somewhat difficult to dislodge the findings of the Competition Authority on what the relevant market is. The Court of Justice has done so in the past. The famous Continental Can Case, as early as 1972, 25 years ago, is an example where the Court said that, on the supply side, there is no market for metal cans for fish paste, there is just a market for metal cans, and upset an economic finding of fact on the basis, in effect, of manifest error.

If this kind of factual evaluation is contested, both parties will file experts' reports, or what Diane Wood called earlier their 'hired guns' will be called in to support their respective points of view. In practice, if these reports are sufficient to raise doubts in the minds of the courts as to the correctness of the definition of the market in the decision, we do not proceed, as a Common Law court would, to cross examination or even to a confrontation among the experts. The more normal model would be to appoint a court expert or even a panel of three experts, one nominated by each party and one chosen to be neutral, and to rely on the report of the experts. Although not abdicating judicial control over the decision, those experts reports would be important. It was done in the early days in the Diestuffs decision and has been done more recently in the Wood Pulp case, to considerable effect. The same technique is likely to be followed on questions of dominance. As regards questions of abuse, probably the question of whether a particular conduct is to be regarded as abusive, that is to say whether it is justified or not, becomes more close to a question of law rather than a question of fact. The question of whether there is some effect on trade between Member States is also now pretty well a question of law and not any longer a question of fact.

In the third category of facts, one is probably moving away from facts strictly so-called and almost entering the question of policy. For example, in a decision granting exemption under Article 85-3 of the Treaty, the competition authority, the Commission, will have to decide whether certain alleged improvements flowing from the agreement, perhaps as a joint venture, are such as to outweigh the detriment to competition and are indispensable. In this respect, we accord, in practice, a considerable margin of appreciation to the competition authority and it is only rarely that the Tribunal of First Instance will interfere on a factual issue. However, Tribunal' judges do have the possibility of entering via a very convenient route known as 'defects in the reasoning' or 'défauts de motivation'. It is probably by that route that the decisions of the Commission are most closely controlled.

DISCUSSION

Frédéric Jenny - CLP Chairman

All these presentations on standards of proof in competition cases are high-powered and very interesting. I may be very naive - being an economist that may not surprise anyone - but what is interesting is the way in which, in different jurisdictions, the standards of proof or the nature of the prohibition may change as one wants to get a specific result. The two first presentations under this theme really complement each other. Mr Léonnet shows how the use of presumption rule is, in fact, a way to facilitate the enforcement of competition law while Ms. Wood takes the reasoning one step further and says what are the limits of this. Also, Mr. Léonnet explains that France switched from criminal violations to administrative sanctions because the proper results could not be reached. In Diane Wood's reconstruction of the American antitrust history emerges also the idea that the proof of presumption did not get the proper result because it was really too wide. There is thus a tendency to abandon it. Judge Bellamy says that the EU basically apply criminal standards. However, as it is very hard to prove cartels under a criminal standard, they have to adapt. The research for efficiency and economy seems therefore to be very empirical and this still troubles me a little bit, being an outsider in the legal debate.

Ronan Keane - Judge, The Supreme Court, Dublin, Ireland

Surprisingly, nobody has yet quoted Adam Smith according to which 'whenever two traders meet, some mischief to the public is afoot'. One hopes that none of OECD legal systems go that far, that any agreement is automatically suspect simply because the two traders should be in competition. In relation to the difficult problem of the burden of proof, it emerged, particularly from Judge Bellamy's contribution, that with a body like the EU Court of First Instance, there exists some, perhaps necessary, blurring of the sharp boundary drawn by common law jurisdictions between the burden of proof in civil cases and the burden of proof in criminal cases. It emerged too from Judge Rothstein's contribution, at least in so far as the common law countries are concerned - and this is probably because of constitutional provisions -, that a law imposing a penal sanction, be it a fine or imprisonment, could never be administered on any other basis than the establishment of the crime beyond reasonable doubt. In most common law countries with written Constitutions, any other procedure would be of dubious constitutional validity. Regarding Judge Bellamy's observations on what constitutes a question of fact or law, I would have thought that the examples cited, such as the definition of the relevant market and the related question of substitutability, would be generally treated, again in common law countries, as questions of fact. At the appellate level, however, the appellate court would always find itself free to draw different inferences from - bearing in mind Mr. Bellamy's distinction between them - primary facts and the inferred facts as they were. This remark applies probably in the English jurisdiction as much as the Irish jurisdiction

Marina Tavassi – Counsellor, Court of Appeal of Milan, Italy

With regard to the burden of proof and presumptive evidence, it has to be emphasised that presumption is difficult to define. Italian law clearly acknowledges this method of proof, yet the Court of Cassation has stated repeatedly that presumptions needed to be numerous and convergent. Moreover, these presumptions must be based on evidence provided by the litigants themselves. Disputes of this nature are often resolved on the basis of whether or not the party that is supposed to provide the evidence has fulfilled the burden of proof. This is a legal principle that applies in Italy but, I believe, in many other Member countries as well. Because it is somewhat restrictive for courts, legislation should be adopted to expand the investigative powers of ordinary judges—legislation that takes the specificity of competition law into account.

Delegate for Spain

The problem of proof differs, depending on the jurisdiction in question—civil, criminal or administrative—in countries where these different jurisdictions co-exist. In order to prove alleged facts, Spain has no provisions specifically applicable to violations of competition law. The same problems arise for many other types of violations or offences, inasmuch as the perpetrators of such deeds obviously attempt, in all areas and using all means, not to leave any trace—thus making it difficult to furnish proof. But, apart from any problem with the choice of applicable jurisdiction, the preference accorded to a given type of jurisdiction is particularly important in countries in which one jurisdiction has a monopoly over violations of competition rules. For example, in order to bring a civil suit in countries having specialised administrative bodies, such as a Competition Council or Tribunal, it is first necessary for that body to find that such a violation has taken place at the national level. In the case of a civil suit arising from a violation of Articles 85 and 86 of the EEC Treaty, it is first necessary to obtain confirmation of the violation from the Commission or, where applicable, the Court of Justice or the court of first instance.

In a dispute between individuals, i.e a civil one, the economic system should probably not conduct its own defence. It can be noted in this regard that the authorities are not represented in most national legal systems. When a dispute arises between individuals, the main problem is the length of time that may elapse before a judicial ruling can be obtained on substance or the legitimacy of a civil suit. It is, in fact, necessary to await the decision of the competition court or specialised administrative body, and then any administrative appeal to the courts. It is only thereafter that the parties lodging an appeal to the civil courts are free to file a civil suit.

Paul Mafféi – Counsellor, Court of Appeal of Brussels, Belgium

Proof always hinges on a series of factual data that themselves determine whether practices are competitive. In Belgium, the evidence is generally provided by the investigation carried out by the Competition Department. The Department was instituted by law for the main purpose of seeking and recording factual data concerning competitive practices. However, the Competition Department, which in fact has only an investigative role, can in no way prejudge subsequent decisions of the Competition Council, the Belgian administrative body having jurisdiction over such matters. The Competition Department plays an essential role in the process in that its task is to investigate complaints filed by either individuals or businesses, or at the request of the Ministry for Economic Affairs, should the Ministry wish to denounce anticompetitive practices.

Frédéric Jenny - CLP Chairman

If there are trade-offs between the kind of prohibition (be it criminal, civil or administrative) and the standards of proof, and as a consequence the number of cases which can be successfully prosecuted, there is likely an economic argument in favour of one or the other, depending on whether you want to avoid having too many or too few successful cases. Mr. Maffei implicitly referred also to another dimension : who should bear the cost of establishing the proof? This of course depends on whether an administrative or a civil or criminal proceeding is involved. As an economist, I would say that, if an anticompetitive behaviour is a cost to society, administrative or criminal proceedings would likely shift the cost to the society as a whole so that trying to fight those practices in that way makes sense. On the other hand, civil proceedings may get to the courts the wrong kinds of cases or involve costs for private parties that should be borne by the society as a whole.

Lars Jonson - Judge, The Market Court, Stockholm, Sweden

First, in Sweden, there is no distinction between issues of fact and issues of law. This is of very little importance in Swedish law. For instance, it has no relevance for the right of appeal to the market court which is the last instance of competition cases. Another point likely to be stressed is the difference between assessing behaviour in the past and trying to assess future effects. As to behaviour in the past, we can by and large use the normal standards of proof. But assessing future effects seems to be more a question of evaluation than of proof in a strict sense. By the way, and in answer to the previous Japanese comment, this need to assess future effects may be one factor that makes competition legislation more special than other special legislation.

More generally, and in answer to questions put in the background document on this subject, I wonder to what extent the assessment of standards such as mentioned there is a matter of setting standards of proof. It can be argued that some such standards are part of substantive law. For instance, the Swedish cartel prohibition applies only to restrictions which have substantial effects on competition. This rule does not change the standard of proof. It only puts at a new level the borderline between what is prohibited and what is not. To some extent, the legislator has set standards of proof: this means a simplified burden of proof on the competition authority. This is the case in Sweden with regard to exemptions from cartel prohibitions. Enterprises applying for an exemption have to prove that the conditions for the exemption are fulfilled. Standards of proof can of course also be modified by case law by the courts themselves. The only comment would be that the court has then to take into account the rights and interests of both parties in a litigation. This last consideration puts a definite restriction on the possibility to lessen the burden of proof resting on the competition authorities in the court proceedings.

Delegate for Netherlands

Netherlands' judges were invited to participate. They did not seem very interested in this whole debate on competition policy but this may change in the future. The new Dutch law will be debated in Parliament hopefully at the end of this year. We have proposed to drastically change the system: for the time being, we have an abuse system combined with criminal law and we will change for a prohibition system with administrative law. One of the basic rationales for this

drastic change from criminal to administrative law is that the present system is felt as simply not effective: very few cases in the Netherlands seem to be able to be treated according to the current system. In the new system with an administrative law a lot more cases will hopefully come forward. On the other hand, this very same rationale is heavily criticised in the Netherlands by the judiciary. Namely, they are afraid that too many cases could come forward in the new system and that the rights of defence could not be respected enough.

Delegate for Japan

If I understand correctly Judge Bellamy's written contribution, the opinion of the competition authority is generally respected on the third factor on policy. With regard to the second category, which is the economic fact, is it correct to understand that no special weight is given to the opinion of the competition authority, because it is its very judgement which is being contested?

Christopher Bellamy - Judge, Tribunal of First Instance, European Communities

Ragarding the second category, it is quite difficult to dislodge, for example, the definition of the relevant market arrived at by the competition authority. So weight is given to it. In the third category, however, even more weight is given to the competition authority. The system in the basic regulation, Regulation 17, is described as an administrative law system and the penalties are described as administrative penalties. Our Dutch colleague has just referred to changing to administrative law rather than criminal law in the Netherlands. I still wonder myself whether and how far, by simply calling something an administrative system, you can escape the constitutional restraints that normally apply in a criminal context. After all, very heavy financial penalties have to be paid be they called penalties or fine. This seems to be a very delicate area, as Justice Keane has rightly emphasised. The basic dilemma of many courts in this area seems to be that two public interests are in play. There is a public interest obviously, that the rights of the defence must always be respected and nobody that is innocent is convicted. But, in many ways, it is just as important that the guilty is convicted as it is that the innocent goes free and we are basically grappling with that dilemma.

Delegate for Finland

In Finland, there is not so much of discussion about standards of proof. We have to estimate the evidence. If we discuss standards of proof, we are actually discussing substantial law questions. Therefore, if we give some relevance to written standards, it must be a legal question. We have an administrative law process with administrative courts and the principle of the free deliberation of the evidence. We do not see clear borderlines either between proof and evidence. The basic question is always to decide whether facts in the given case are sufficient to take a decision. Mr. Chairman, you raised the question of costs. Here is how it wotks in the Finnish system. In the Competition Council Act, a provision says that the Council may hear witnesses and experts and request experts' statements. Witness and experts are to be be paid from the state funds. It is, therefore, quite important to make sure that competition cases are in the public interest.

Delegate for the United Kingdom

Mr. Chairman, your remark is puzzling. Authorities might well bring a different number of predation cases according to the kind of law that was operating. I believe that in Canada price predation might be regarded as a criminal offence and hence the remarks that the judge made about the importance attached to intent is being very relevant. In a criminal case of predation, in most systems, predation would consist in the abuse of a dominant position, and perhaps the standards of proof would still be very demanding. It would be not so strong as a criminal jurisdiction. In many countries, predation would be dealt with entirely administratively with no financial penalties even if a verdict of predation was concluded. No rights of appeal against that judgement exist in the British system. So perhaps the standard of proof that we would be able to apply in a predation case in the United Kingdom would be less rigorous - perhaps than in the EC system and certainly than in Canada and - I suppose - in America where predation would be a criminal offence. So, perhaps there are quite different sorts of standards of proof in that, admittedly rather specialised, area of anticompetitive conduct.

Frédéric Jenny - CLP Chairman

If I understand correctly, this is a partial answer to what Judge Bellamy was saying: just by labelling something administrative fine you cannot avoid due process. However, you can still relax somewhat the standards of proof depending on the result.

Delegate for the United Kingdom

A number of predation cases occurred in the United Kingdom since the deregulation of the bus industry. If we had been operating in one of the other competition systems around this table, there would have likely been a lot of appeals against the findings reached by the British Authorities in those predation cases. However, the case ended with us with the mere undertaking of the industry that, future pricing policies will be arranged somewhat differently. Anyway, there is no scope for appeal in the UK. In another jurisdiction, however, the case would surely go through the courts and people would be challenging our analysis of the predatory pricing.

Marshall Rothstein - Member, Competition Tribunal, Canada

To compare with the Canadian law, there is a criminal offence of predation in Canada. If such action were brought in the criminal courts, the consequences could be jail or a fine or some penalty. Nonetheless, the government has the option of bringing civilly a predation case as an abuse of dominance, in which case the remedy is an order for cessation or something similar. In relation to what Judge Bellamy said, it should also be made clear that, in Canada, the difference between civil and criminal offences is largely based upon the remedy being sought. Thus, in a criminal offence, as in the example of predation, the remedy could be jail or a fine whereas in civil process, that remedy is not available. In civil process, the remedy is an order to cease the practice. There is therefore, in Canadian terms, a substantial difference between whether the action is brought civilly or criminally and not just one of terminology.

Christopher Bellamy - Judge, Tribunal of First Instance, Luxembourg, European Communities

From the EC point of view, the other element to consider is that sanctions can only be applied to corporate bodies: there is no personal liability. Then, regarding this question of proof, it may well be the case, but it is not particularly logical, to say that "the less the penalty, the easier it is to prove the offence". It may be perhaps how it works from the very liberal (from this point of view) British position where there are virtually no sanctions. Then it is probably rather easier to prove a case right through to the criminal end. At the end of the day, however, it comes down to something pretty fundamental regarding the legitimacy of the system and its compatibility with fundamental rights. If really heavy penalties are imposed, most systems today rightly demand high standards of proof as the price for making those penalties acceptable in modern society.

JUDICIAL REVIEW OF COMPETITION CASES

Sarah S. Vance
Judge, District Court of Eastern Louisiana, United States

I. Introduction and executive summary

In the more than 100 years since the United States first adopted competition statutes, American federal judges have played a very active role in the development and enforcement of the US competition law. These introductory remarks summarise the strengths and weaknesses of judicial precedent or judge-made law as a source of competition rules. Parts II. to V. below make some general observations about how U.S. competition precedent operates in a changing economic and political climate and discuss in more details the strengths and weaknesses of this mode of competition enforcement..

The role of the judiciary in the United States differs considerably from many other countries. American competition statutes are, for the most part, broad pronouncements and the specific content of American competition rules has been defined on a case-by-case basis by the courts in the Common Law tradition rather than by legislative enactment or administrative legislation. Federal judges serving life tenured positions thus control the liability standards, evidentiary burdens and standing requirements in competition cases. What are some of the consequences of the central role played by the US judiciary? Have judges - mostly generalist -, been up to the task of crafting decisions that are not only accurate in particular cases but form a predictable, coherent and enforceable body of competition principles? The answer to this question is yes and no.

First, what are the strengths of judicial precedent as a source of competition law? Judicial precedent clearly has the potential to respond flexibly to changing economic conditions. Competition precedent in the US has been able to absorb and reflect scientific economic thinking and has been able to change in response to changing developments in scientific economic thinking. For example, as Diane Wood mentioned, although US competition law has populous routes in the late 19th century, it has evolved to place heavy emphasis on economic analysis recently in the form of Chicago School economic thinking, although there has been some small inroads made by post-Chicago School economic thought.

Another characteristic of precedent-based competition law has been that it has demonstrated a tendency toward moderation. For example, in the late 1970s, American federal courts were clogged with private treble damage antitrust actions and the enforcement agencies had gone to the edge with some highly criticised enforcement proceedings. The economic and business communities perceived that the antitrust laws had over-policed the marketplace to the point that they were deterring pro-competitive business conduct. The US Supreme Court responded with three decisions. It eliminated the rule of presumptive illegality for most vertical restraints and it heightened the standing requirements for private parties to bring antitrust actions in two important ways. In so doing, the Court's analysis reflected the evolution of economic theory that had occurred since the 1960s. The effect of these decisions was to stem dramatically the flood of private antitrust litigation in American federal courts.

But just as the Court through precedent moderated the public and private enforcement excesses of the 1960s and 1970s, it has used its decisions as a restraint in the 1980s when the enforcement agencies and others sought to abandon other established tenants of US competition law. The Court thus resisted an assault against the rule of presumptive illegality that applied to resale price maintenance although it increased the evidentiary burdens involved in proving such a violation. The Court has thus demonstrated a respect for its own precedents which is necessary for the orderly development of the law.

Besides being flexible, judge-made law can produce fairly accurate results in particular cases. This is true despite the complexity of the issues and the lack of specialised training of the typical judicial decision-maker. This results because any single case would usually involve only a fairly narrow range of issues in a highly particularised context. It would not call into play the whole body of competition law. Secondly, accuracy is enhanced when the judge has access to a complete and accurate factual record. Because of the existence of liberal discovery rules in the US which courts can enforce with contempt sanctions, the facts are usually fully accessible. On the other hand, this adversarial fact finding process imposes extraordinary burdens of time and expense on the parties and the courts and for this reason it is subject to justified criticism. Certainly, other systems of fact gathering have their merits. However, given the high stakes involved and the relative sophistication of the parties, the time and expense of adversarial fact development, if properly managed by the court, can be kept within tolerable limits.

Further, an understanding of the economic issues has not been beyond the ken of generalist judges. A proper understanding of the economic issues also enhances accuracy. Accuracy can be enhanced as well when the submissions of the opposing parties are of good quality, even if they are argumentative. It has been my experience that, in competition cases, the parties are more sophisticated than average and their submissions are of better quality than average. Further, courts have professional staffs and computer access to vast amounts of legal and economic literature to educate the judges on competition issues. For all of these reasons, judicial precedent can be fairly accurate on a case-by-case basis.

What are the disadvantages of precedent based competition law? There are several disadvantages, two of which come readily to mind. First, there is a lack of predictability. The evolutionary process of developing regulatory rules from case to case simply does not produce rules of wide ranging applicability. A single case does not produce detailed, well-defined rules and regulations to guide future behaviour. On the other hand, the courts tendency to ground competition precedent on economic theory, to the relative exclusion of other social goals, tends to produce more certainty in the law. This tends to offset somewhat the lack of predictability inherent in the common law process.

A second disadvantage of judge-made competition law is lack of continuity in enforcement. Enforcement agencies deal with enforcement issues on a day-to-day basis. Competition cases come to the courts, on the other hand, only sporadically. Intervention by the courts is piecemeal and it is not self-initiated. Courts do not systematically collect information from case to case. They do not study the results of numbers of cases. They do not formulate an enforcement agenda and they rarely monitor the results of particular cases. As a result of a judge's intermittent exposure to competition law and the fact-intense nature of these issues, the learning curve for the judge does not diminish very much from one case to the next. But worse than this, the lack of continuity in judicial enforcement also creates information discontinuities. For example, the US Supreme Court has not decided a substantive merger case in 20 years. As a result, some commentators question whether the merger precedent of the court from the 1960s and early 1970s have much vitality in light of the courts more recent decisions. Further, having 700 trial courts, more than 700 trial courts, and eleven circuit courts developing and enforcing competition law, means that enforcement can be inconsistent whenever two courts of equal stature disagree on a result in

similar cases. Further, while the role of the judiciary has the advantage of vesting decision-making in an objective, ostensibly politically neutral body, the independence of the US judiciary means that official co-ordination of the enforcement agenda between the courts and the enforcement agencies does not occur.

To sum up this introduction, the strength of precedent as a source of competition law is that it is flexible enough to respond to changing economic conditions, it has a tendency towards moderation, a fair degree of accuracy in particular cases and it has a high degree of enforceability. The disadvantages of this enforcement regime are lack of predictability and continuity.

II. U.S. Competition Precedent - Cutting Edge or Anachronism?

Traditionally, United States competition law has been formed by judicial precedent written by independent federal judges who serve life terms. American competition statutes are for the most part broad pronouncements against agreements in restraint of trade, against monopolies and against anticompetitive mergers, with the details filled in case-by-case by the courts. As a result, the judiciary controls liability standards, evidentiary burdens, and standing rules in competition cases. This allocation of responsibility to the federal judiciary has drawn criticism on the grounds that relegating important national policy to over 700 generalist judges, many or most of whom have had no training in economics, robs the law of desirable coherence.[1] In addition, because competition cases have arisen as often in private litigation as through the administrative process, untutored lay juries can be asked to make important factual determinations in cases of major significance to national competition policy. Further, some suggest that U.S. competition precedent, particularly cases arising before 1980, is out of touch with economic reality and is not useful in evaluating new forms of business arrangements in an era of global competition and rapidly changing technology. This writer believes that while these criticisms have some merit, judge-made competition law has been surprisingly durable and resilient. U.S. competition precedent has proved both flexible enough to change when necessary to respond to marketplace realities and yet stable enough to serve as a moderating influence in times of radical changes in the political enforcement climate.

As to flexibility, it is well to remember that it was the United States Supreme Court that took action in the late 1970s to correct the problems created by overzealous use of the private treble-damage action. In the 1970s, private treble-damage actions, many of them class actions, clogged the federal courts. In addition to the institutional burdens imposed upon the court system by such complex litigation, there was a perception in the economic and business community that antitrust law had overpoliced the marketplace to the point that it was deterring procompetitive business conduct. In response, the Supreme Court issued three landmark decisions, all before the Reagan administration began its much-publicized assault on antitrust enforcement, that restricted the scope of the rule of per se illegality in the vertical context[2], heightened standing requirements[3], and eliminated layers of would-be plaintiffs who could challenge price-fixing arrangements.[4] These decisions have had an enormous impact on stemming the flood of private antitrust litigation in federal courts. But just as the Supreme Court has acted to regulate the excesses created by the 1960s and 1970s public and private enforcement environments, it has also acted as a moderating influence when the business community and Reagan/Bush enforcement agencies proposed wholesale abandonment of established tenets of U.S. competition laws. Thus, it has resisted an assault against the rule of per se illegality against resale price maintenance[5], as well as against the per se rule against tie-ins[6], and it has rebuffed arguments in favor of presumptive rules of legality in face of contrary evidence of marketplace realities.[7] At the same time, the Court has been receptive to amicus briefs by government enforcement agencies, even when it has not accepted their proposed results.[8] Thus, while it has not eliminated the per se rule against resale price maintenance as the government urged it to do, the Court has heightened evidentiary standards and standing requirements to control the harsh effects of potent liability standards.[9]

In summary, judicial precedent has served as both an instrument of change and an instrument of stability in the area of competition enforcement. Some of the trends and tensions that can be seen in recent U.S. competition precedent are discussed in a later section of this paper. Regardless of one's views on the quality of American competition jurisprudence, it is undoubtedly true that the insulation of the federal judiciary by the separation of powers doctrine makes it difficult for there to be a united front on U.S. enforcement policy by the Justice Department, the Federal Trade Commission, and the courts. Whether the benefits achieved by the American allocation of enforcement powers outweigh the disadvantages is debatable.

III. Generalist Judges and Complex Competition Issues

Even though American federal judges are not competition specialists, they manage to craft decisions with fairly accurate results in particular cases. A number of factors contribute to this result. First, any single case will usually involve a fairly narrow range of issues in a highly particularized context and thus will not call into play the whole body of American competition precedent. Second, the liberal discovery rules applicable in American federal courts permit the full development of the facts upon which a considered decision can be based, either on a trial record or to a lesser extent on a summary judgment record. Most competition issues are fact specific and to the extent that the facts are fully accessible, a more accurate result can be achieved. Third, competition cases are high-stakes matters for the parties involved, in which treble damages, a desired merger, or perhaps their economic viability is at risk. For this reason, the parties have an incentive to retain quality counsel, to finance the retention of economic experts, and to finance the discovery necessary to develop the facts. It is true that expert economists retained by the parties sometimes appear to sacrifice their independent judgment for litigation results, and federal courts are increasingly skeptical of partisan expert testimony. Nevertheless, expert testimony in competition cases is of invaluable assistance in understanding the relevant economic issues. Further, American courts have the discretion to retain their own economic experts at the parties' expense, if the judge feels it is necessary to do so. Although this is done rarely,[10] it is not unheard of in competition cases.[11] In addition to appointing experts who will testify, the court may appoint experts who act merely as technical advisors to assist the court in interpreting complex data or terminology. The court may also appoint special masters to investigate issues and prepare reports.[12]

There is no question that the adversarial fact-gathering process used in the American system has the unfortunate result of creating an incentive to distort the facts. But American judges have broad powers both to sanction abuses and to control the fact-finding process through case management procedures. Judges have the authority to structure pretrial and trial proceedings so as to narrow issues before trial and to isolate issues for separate stages of trial, such as liability and damages.[13] Judges can also exert considerable control over the order and quantum of proof submitted and the form in which it is submitted. The ideal is that cases will not proceed to trial without the court and the parties having worked together before trial to identify the relevant issues to be tried, as well as the law applicable to the facts, and to eliminate issues that have no merit. Although these management powers are not exercised with equal skill throughout the judiciary, the tools are available to help structure the fact-gathering process and to narrow complex issues to facilitate comprehension.

Obviously, the submissions of the parties' can greatly assist the court in identifying the relevant issues and the appropriate modes of analysis to be applied. While the adversarial system results in submissions that are argumentative, if the opposing briefs are of good quality, the court can distill from them the relevant issues, facts and precedents to which it can apply its independent judgment or direct further

research. It is worth noting that the parties in antitrust cases tend to be more sophisticated than average, and the quality of the briefs is therefore typically better than average. Further, professional staff assistance and computer access to vast amounts of research material are also available to the judge to educate him or her on competition issues. This includes the ability to access not only relevant case law, but also to locate secondary materials that provide an overview of the law in the area or that synthesize prior case law on a particular issue. Further, continuing legal education is available through the federal court system and professional legal associations for judges desiring to pursue course work in particular areas.

Finally, federal judges are not strangers to complexity, and the reasoning process in competition cases is not fundamentally different from that applied by federal judges in other areas of the law. Nor are economic issues unknown in other legal contexts. For example, courts are frequently called upon to value businesses, real estate, lost opportunities, income streams, lost profits and the like. For these reasons, the results in competition cases are no worse than those achieved in other complex areas of the law. This is not to suggest that American courts always "get it right" in competition cases. Rather, this suggests that the American judge's task in competition cases is not insurmountable and that the range of error so far has been acceptable.

IV. Judge-Made Law - An Effective Enforcement Mechanism?

If one had to give a thumbnail description of the strengths of judge-made law as an arm of competition enforcement, it would be that it has great adaptability, maximum enforceability,[14] a fair degree of accuracy on a case-by-case basis, and a tendency towards moderation. On the other hand, the evolutionary process of developing general regulatory precepts from case to case creates a lack of predictability. Case law simply does not produce detailed, well-defined rules and regulations to guide future behavior. A second disadvantage of common law development of competition precepts is that it results in a lack of continuity. Competition cases make it to the courts only sporadically,[15] the decision makers are not specialists, and information is not systematically collected and monitored from case to case.[16]

One commentator has suggested that these deficiencies are partly offset by institutional responses from the other branches of government, such as through the executive branch's development of guidelines to give greater predictability in the merger area and its development of a clearly articulated criminal enforcement policy.[17] In recent years, we have seen greater use of guidelines, such as those recently issued by the enforcement agencies in the areas of international operations,[18] and intellectual property.[19] Another institutional response can be seen in legislative elimination of the private treble-damage remedy in suits against local governments.[20] Further, use of the consent decree process gives enforcement agencies substantial control over the outcome of enforcement initiatives, although federal courts have authority to review consent decrees to determine whether they are "in the public interest."[21]

It must be observed, however, that enforcement guidelines are not binding on the courts and their contribution to predictability is illusory if the courts will not follow them. Further, regardless of the coherence of the agencies' enforcement strategies, the private damage action is always a wild card in the U.S. enforcement equation.

V. Recent Trends in American Competition Precedent

The following paragraphs discuss some recent trends in U.S. competition precedent, as well as the underlying ideological tension between different views on the appropriate goals of the antitrust laws and the appropriate methodology to use in discerning the rule to apply in particular cases. This discussion is included in the hope that it might provide some useful information for comparative purposes.

The Courts as Gatekeepers

U.S competition precedent in the 1980s and early 1990s has been shaped by a reaction to the enforcement and litigation excesses of the 1960s and 1970s, by the explosion of other types of litigation crowding federal court dockets, by the presence of more conservative judges appointed by Presidents Reagan and Bush, and by a generally conservative political climate. These developments have resulted in the judiciary's acting increasingly as a gatekeeper against questionable competitive challenges, ostensibly conserving judicial, economic and social resources by avoiding elaborate trials of cases that are of no or nominal competitive significance.

This gatekeeping role has been exercised in a number of ways, the first of which is through standing requirements. When the Supreme Court required private plaintiffs to prove injury to competition itself, that is, antitrust injury, in order to recover in a private antitrust suit, the Court discarded the view that the demise of individual firms necessarily harmed the competitive process.[22] Many courts have used this decision as a tool to weed out questionable cases without an elaborate inquiry into the merits of a challenged business practice. Invoking the antitrust injury requirement, the courts have disposed of cases summarily by examining the nature of the injury alleged in light of the type of conduct challenged. They stress that the antitrust laws are designed to protect competition, not competitors. If the alleged injury does not reach beyond the well-being of the complaining party, the case is often over.[23]

In addition, in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court signalled to lower courts that summary disposition of weak cases was appropriate if the court found the challenger's theory economically implausible.[24] Although the Supreme Court later cautioned that *Matsushita's* economic plausibility requirement did not create a special burden on antitrust claimants facing summary challenges[25], many cases have invoked economic implausibility as a rationale for disposing of competition cases prior to a full trial.[26]

Another gatekeeping device that some courts have used to avoid complex trials of antitrust cases, particularly in the area of nonprice vertical restraints, is the "market power screen." When the Supreme Court eliminated the per se rule of illegality against most vertical restraints, the result was that these issues had to be analyzed under the rule of reason. But application of the rule of reason traditionally required an elaborately fact-intensive inquiry into market conditions, purpose, effects, justifications and a balancing of procompetitive and anticompetitive results.[27] This is a burdensome undertaking, and to short-circuit this inquiry, some courts have held that before it is necessary to weigh and balance the procompetitive and anticompetitive effects of a restraint, the plaintiff must show that the supplier imposing the restraint has substantial market power.[28] Otherwise, these courts have stated that summary judgment in vertical cases is in order, because if the supplier does not have sufficient market power to influence the interbrand market adversely, its vertical restraints are irrelevant.[29] Market power screens of 10% to 30% have been applied in the case law.[30]

With the ascendancy of the rule of reason over *per se* rules of illegality, and the concomitant significance of proving market power, American courts have also exercised considerable control over

market definition.[31] It is true that courts usually proclaim that market definition is a question of fact.[32] This is not surprising given the subsidiary questions of a factual nature that this inquiry entails, such as which products to include in the relevant market, how do other products respond to price changes in the product in issue, what supplier responses are likely and what are the geographic parameters of the marketplace. But regardless of whether the issue is characterized as a question of fact, American courts have not been reluctant to reject the market definitions accepted by juries,[33] enforcement agencies[34] or advocated by the parties' economic experts.[35] Recently, for example, courts rejected market definitions for failing to account for supply responses,[36] or because the court found the proposed market too narrow[37] or simply implausible.[38] Further, even when a proposed market definition is purportedly supported by expert economic opinion evidence, courts still may reject the economic evidence if the economist's opinion is not supported by the facts, or the court determines it is unreasonable in light of undisputed facts.[39] As the Supreme Court has stated, "expert testimony is useful as a guide to interpreting market facts but it is not a substitute for them."[40]

Because the courts have acted as vigilant gatekeepers, the door to antitrust law remedies has been significantly closed to private plaintiffs. A review of the results of reported cases in the past 15 years reveals that vast numbers of cases have been summarily rejected, although cases involving horizontal price-fixing or market allocation still fare pretty well. On the other hand, the narrowing of the ambit of the private treble-damage action has allowed government enforcement agencies to play a more central role in defining the enforcement agenda. Nevertheless, as long as there is a private treble-damage remedy, it is unrealistic to expect that the private antitrust action will cease to be a factor in American antitrust enforcement.

Goals and Methods

Observers frequently note that since the 1980s, U.S. competition precedent has been significantly influenced by "Chicago school" economic theory espoused by several prominent conservative scholars now on the federal bench.[41] Using a deductive methodology, the Chicago school reasons from a sequence of truisms deduced from abstract models of reality.[42] Chicago school analysts view economic efficiency as the sole goal of antitrust enforcement; other social and political goals are irrelevant.[43] Chicago school theorists believe in minimal judicial interference in the marketplace, because they believe the market is for the most part self-correcting. Most restraints are viewed as benign; interference is warranted only when competition in the marketplace as a whole is injured by artificial limitations on output. Factual inquiries are limited to a small range of cases in which anticompetitive harm "could" occur, such as clear cartel agreements and mergers creating monopolies or near monopolies. Chicago school reasoning is exemplified in Supreme Court precedents that are hostile to predatory pricing claims despite evidence of predatory intent and below cost pricing[44], and irrespective of the losses inflicted on competitors, as long as competition as a whole is not injured.[45] Chicago school influence is also obvious in Supreme Court decisions taking a more permissive view of vertical restraints.[46]

The goals of the United States competition laws are still subject to debate, however. The history of U.S. competition law reflects concerns with competition as a process, with access, diversity, pluralism, and condemning coercion and exploitation.[47] Further, Chicago school orthodoxy has been challenged by "post-Chicago" economic theorists who demonstrate that the deductive truisms of the Chicago school produce too many false negatives. These theorists reason inductively. They are willing to examine the facts to see if Chicago-school theories actually reflect marketplace realities or how businessmen really behave.[48] Post-Chicago thinking is less ideological, its methods more flexible, and its results less predetermined. It suggests that if efficiency concerns are appropriately evaluated in light of real market

facts, the response in certain circumstances should be more intervention into areas such as vertical restraints, leveraging, dominant firm pricing, product development and investment conduct.[49]

The influence of this school of thought can be seen in the Supreme Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992), in which the Supreme Court recognized the viability of an aftermarket tying claim involving parts and services of original equipment, when the tying seller had no market power in the original equipment market. In that case, the Supreme Court showed greater receptiveness to fact-intensive, inductive analysis and skepticism for the *a priori* reasoning of the Chicago school. Further, the Court showed concern about the competitive harms caused by leveraging and foreclosure.[50] In addition, it was less sanguine than Chicago theorists that the market will always right itself, because it recognized that information costs and switching costs could distort consumer responses to price increases, giving rise to the opportunity for anticompetitive exploitation.

Which method of analysis will find hegemony in U.S. competition precedent remains to be seen. Through 1992, Ronald Reagan and George Bush had appointed two-thirds of the federal judiciary and five members of the Supreme Court. By the end of 1996, President Clinton could appoint as much as one-third of the federal judiciary. So far, the Clinton Administration has confirmed 204 new judges, including two justices of the United States Supreme Court. In the next four years, whoever is elected President will make even more judicial appointments. It is too soon to tell what impact President Clinton's new appointees will have on competition precedent or what the ideological predispositions will be of the judges appointed in the next four years. Given the moderate tendencies of most of Clinton's appointments, it appears that if change occurs, it will be modest, incremental, and in the direction of a more pragmatic and inductive approach to resolving competition problems.[51] This writer has not detected any impetus from any quarter of the judiciary to depart substantially from the lines of competition precedent developed in the past 15 years.

Notes

1 Frank H. Easterbrook, *Monopolization: Past, Present, Future,* 1992 Antitrust L.J. 99, 100.

2 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

3 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

4 *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers lack standing to sue for price-fixing).

5 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). In *Monsanto Co. v. Spray-Rite Serv. Corp.*, the Reagan Justice Department filed an amicus brief urging the Supreme Court to overrule the per se rule against resale price maintenance even though the defendant had not raised the issue at trial. *See* Brief for United States as Amicus Curiae, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *see also Monsanto*, 465 U.S. at 760 n.7.

6 *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (retaining per se rule against tying arrangements but modifying threshold requirements for application).

7 *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992). In *Eastman Kodak v. Image Technical Services*, the government filed an amicus brief in support of Kodak's position urging a presumptive rule that competition in equipment markets prevents market power in the market for parts for the equipment. *See* Brief for the United States as Amicus Curiae supporting petitioner in 504 U.S. 451 & 504 U.S. at 470 n.16. The Supreme Court rejected this argument.

8 In *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104 (1986), the government asked the Court to rule that a competitor plaintiff could never have standing to challenge a merger on the grounds of expected predation. The Court declined to adopt this sweeping principle, although it did restrict competitor standing. *See* Brief for the U.S. as Amicus Curiae Supporting Petitioners, at 10, 25; *see also Cargill*, 479 U.S. at 120-21.

9 *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (competitor lacks standing to sue for nonpredatory maximum resale price-fixing) (the government filed an amicus brief against the competitor); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (increasing evidentiary burden to prove conspiracy in resale price-fixing context); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (requiring agreement on specific resale prices or price levels to establish illegal resale price maintenance).

10 Federal Rule of Evidence 706 provides that courts may, on their own motion or on the motion of any party, enter an order to show cause why an expert witness should not be appointed by the court. If the court appoints an expert witness, the court must provide the expert with a list of duties and develop general procedures to be followed by the expert in conducting his work. After a court-appointed witness has prepared his report, Rule 706(a) requires that the parties be advised of the expert's findings and that they be able to take the deposition of the expert witness, to call the expert witness at trial and to cross-examine the expert witness. A court-appointed expert's evidence is not conclusive or binding upon any party, and its admissibility and persuasiveness are tested under the

same standards as other evidence submitted by experts. A recent survey of federal district judges conducted by the Federal Judicial Center revealed that use of court-appointed experts under Rule 706 is relatively infrequent and that most judges view the appointment of an expert as an extraordinary activity that is appropriate only in rare cases. *See* Joe S. Cecil & Thomas E. Willging, *Court Appointed Experts: Defining the Rule of Experts Appointed Under Federal Rule of Evidence 706, at 1* (Federal Judicial Center 1993); Joe S. Cecil & Thomas E. Willging, *The Use of Court-Appointed Experts in Federal Courts*, 78 Judicature 41 (1994) (concise summary of survey results). However, the same survey revealed that judges frequently cited antitrust cases as the type of complex cases where court appointed experts would be both helpful and appropriate. *Id*. at 42.

11 For example, in *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321 (S.D. N.Y. 1995), the court appointed an expert in a merger case. The Court relied on his opinion in reaching her decision.

12 Fed. R. Civ. P. 53(c).

13 *See generally* Manual for Complex Litigation, Third, Federal Judicial Center (1995); Manual for Litigation Management and Cost and Delay Reduction, Federal Judicial Center (1992).

14 Federal judges have authority to issue injunctions and have contempt powers to enforce their judgments.

15 For example, the Supreme Court has not decided a substantive merger case in 20 years, and some observers question whether its 1960s and early 1970s merger precedents have much vitality in light of the Court's more recent decisions in other areas of U.S. competition law.

16 *See* Michael Boudin, *Observations*, 59 Antitrust L.J. 131, 133 (1990).

17 *Id*. at 134.

18 Antitrust Enforcement Guidelines for International Operations, 68 Antitrust & Trade Reg. Rep. No. 1707 (April 6, 1995).

19 Antitrust Guidelines for Licensing Intellectual Property, 68 Antitrust & Trade Reg. Rep. No. 1708 (April 13, 1995). The F.T.C. and the Justice Department have also issued joint enforcement policy statements in the area of health care. *See* Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, 67 Antitrust & Trade Reg. Rep. 1682 (Sept. 29, 1994).

20 15 U.S.C. §§ 34-36 (1988).

21 *See* The Tunney Act, 15 U.S.C. § 16(e).

22 *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

23 *See generally*, John Briggs & Stephen Calkins, *Antitrust 1986-87: Power and Access* (Part II), 32 Antitrust Bulletin 699, 714-21 (1987).

24 475 U.S. at 587. *See* Susan DeSanti & William E. Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 653 (1991).

25 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. at 468 (1992).

26 *E.g., Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *A&M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368, 372 (7th Cir. 1988). *See ABA Antitrust Section, Annual Review of 1992 Antitrust Law Developments* at 155 (citing cases).

27 *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

28 *See Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (threshold inquiry in rule of reason case is market power); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. 1981).

29 Other cases have rejected market power screens when products are highly differentiated, when brand loyalty is strong, when entry is difficult or unusual facts are present. *See New York v. Anheuser-Busch, Inc.*, 673 F. Supp. 664 (E.D. N.Y. 1987) (entry barriers made market power screen inappropriate); *Package Shop, Inc. v. Anheuser-Busch, Inc.*, 675 F. Supp. 894 (D. N.J. 1987) (market share poor indicator in face of differentiated products and brand loyalty); *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986) (unusual facts made screen inappropriate). Moreover, the Supreme Court's decision in *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), suggests that this approach may be questionable, at least in tying cases, because the Supreme Court acknowledged that there could be market power over "locked-in" customers when the seller controls only a relatively small share of the interbrand market.

30 *E.g., Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311 (8th Cir. 1986) (affirming summary judgment for defendant because of low market share of 19.1%); *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 967 (10th Cir.), *cert. denied*, 479 U.S. 1005 (1990); *Murrow Furniture Galleries*, 889 F.2d 524 at 528-29; *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1259 (5th Cir. 1982); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (implying 30% share required for per se illegal tying). This approach has been used in vertical cases involving territorial and customer restraints, exclusive dealing and tying. *See* cases cited in this note, *supra*. In addition, the U.S. Tenth Circuit suggested that it could be appropriate in analyzing the exclusionary practices of a network joint venture. *See SCFC ILC. v. VISA USA, Inc.*, 36 F.3d 958, 965 n.9 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995) (citing Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 17 (1984)).

31 Regrettably, this control has not been exerted by way of imposing a coherent methodology on the market definition process. Rather, courts tend to impose normative and descriptive ideas on an already oversimplified abstraction of reality. *See generally United States Health Care, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993) ("There is no subject in antitrust law more confusing than market definition"). While this is not improper, because market definition is not a mechanical process and the law is not informed solely by economic formulae, the result nevertheless is that the cases do not provide a single paradigm indicating how various factors might be integrated or balanced in particular circumstances.

32 *E.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995); *T.O. Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1184 (5th Cir. 1988); *Fineman v. Armstrong World Indus.*, 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993).

33 *E.g., Blue Cross & Blue Shield United v. Marshfield Clinic*, 883 F. Supp. 1247 (W.D. Wis.), *rev'd.*, 65 F.3d 1406 (7th Cir. 1995) (reversing jury verdict); *Morgenstern v. Wilson*, 29 F.3d 1291 (8th Cir. 1994) (reversing jury verdict), *cert. denied*, 115 S. Ct. 1100 (1995).

34 *E.g., United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995) (terminating consent decree and rejecting government's market definition); *FTC v. Freeman Hospital*, 911 F. Supp. 1215 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *United States v. Mercy Health Serv.*, 902 F. Supp. 968 (N.D. Iowa 1995).

35 *E.g., Rebel Oil Co.*, 51 F.3d at 1436.

36 *See Blue Cross & Blue Shield United*, 65 F.3d 1406 (discussing supply response); *Rebel Oil Co.*, 51 F.3d 1421 (supply response).

37 *E.g., Bathke v. Casey's General Stores, Inc.*, 64 F.3d 340 (8th Cir. 1995) (market too narrow because it failed to consider what consumers would do in event of price increase).

38 *E. & G. Gabriel v. Gabriel Bros., Inc.*, 1994 WL 369147 (S.D. N.Y. 1994) (alleged market was implausible); *Israel Travel Advisory Serv. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (plaintiff's market definition was "absurd"), *cert. denied*, 116 S. Ct. 1847 (1996); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479-80 (3d Cir.), *cert. denied*, 506 U.S. 868 (1992).

39 *See Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993); *Rebel Oil Co., Inc.*, 51 F.3d 1421; *Traffic Scan Network, Inc. v. Winston*, 1995 WL 317307 (E.D. La. 1995), *aff'd*, 79 F.3d 1145 (5th Cir. 1996); *Morgenstern v. Wilson*, 29 F.3d 1291 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1100 (1995). *See generally Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191 (3d Cir. 1995); *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985).

40 *Brooke Group*, 509 U.S. 209, 242 (1993).

41 *See* Eleanor Fox and Lawrence Sullivan, *Antitrust - Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.L.Rev. 936, 947 (1987).

42 *See* Lawrence Sullivan, *Post-Chicago Economics: Lawyers, Judges and Enforcement Officials in a Less Determinate Theoretical World*, 63 Antitrust L.J. 669, 670 (1995) ("Lawyers, Judges and Enforcement Officials"); George Stigler, *The Theory of Price* (4th Ed. 1987).

43 *See* Robert Bork, *The Role of Courts in Applying Economics*, 54 Antitrust L.J. 21, 24 (1985); Frank Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1703 (1986).

44 *See Brooke Group*, 509 U.S. at 225-26 (1993) (requiring proof of below cost pricing and dangerous probability of recouping investment in below cost prices through sustained supercompetitive prices).

45 *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1985) (that below cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured). *Compare Akzo Chemie B.V. v. Commission*, 5 C.M.L.R. 215 (1993) (prices below average variable costs presumed predatory as are prices above average total costs when combined with intent to eliminate a competitor).

46 *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Business Electronics v. Sharp Electronics*, 485 U.S. 717 (1988).

47 *See* Eleanor Fox, *The Battle for the Soul of Antitrust*, 75 Calif. L. Rev. 917 (1987). *See also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 360 (Stevens, J., dissenting) ([I]n its haste to excuse illegal behavior in the name of efficiency, [the majority] has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare . . .").

48 *See Lawyers, Judges and Enforcement Officials*, at 670.

49 *See, e.g.*, Janusz Ordover & Garth Saloner, *Predation, Monopolization and Antitrust*, in 1 Handbook of Industrial Organization 537 (Richard Schmalensee & Robert Willig eds. 1989) (discussing economic literature favoring closer scrutiny of single-firm behavior); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985); Michael Riordan, Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995); Severin Borenstein, Jeffrey Mackie-Mason & Janet Netz, *Antitrust Policy in Aftermarkets*, 63 Antitrust L.J. 455 (1995).

50 "Kodak's alleged conduct - higher service prices and market foreclosure - is facially anticompetitive. . . ." 112 S. Ct. at 2088. In addition, the court stated that it had held many times that liability can arise if a seller exploits its dominant position in one market to expand his empire into the next. *Id.* Some observers suggest that the Supreme Court's receptiveness to leveraging arguments is nothing new. *Lawyers, Judges and Enforcement Officials*, 63 Antitrust L.J. at 671 & n.10 (citing *United States v. Griffith*, 334 U.S. 100 (1948); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)). However, lower federal courts are divided over whether leveraging in the context of a monopolist using monopoly power in one market to achieve a competitive advantage in a second market, which it has not attempted to monopolize, should be viewed as violative of the antitrust laws. *Compare Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (recognizing monopoly leveraging claim); *Willman v. Heartland Hospital East*, 34 F.3d 605 (8th Cir. 1994) (assuming leveraging is independent offense), *with Alaska Airlines v. United Airlines*, 948 F.2d 536, 547 (9th Cir. 1991) (rejecting *Berkey*), *cert. denied*, 503 U.S. 977 (1992); *Fineman v. Armstrong World Industries*, 980 F.2d 171 (3d Cir. 1992) (same), *cert. denied*, 115 S. Ct. 218 (1995); *Key Enterprises v. Venice Hospital*, 919 F.2d 1550, 1566-68 (11th Cir. 1990) (expressing reservations about *Berkey's* conclusion). Post-Chicago theorists suggest that monopoly leveraging is not always harmless, and should not be presumptively legal because under the right circumstances it can increase monopoly returns. *See Lawyers, Judges and Enforcement Officials* at 680. Courts receptive to the post-Chicago mode of reasoning would be more inclined to hear the facts of a leveraging case, rather than simply to deduce that the monopolist is acting from an efficiency motive based on the assumptions produced by an abstract model.

51 Historically, periods of permissive antitrust enforcement, particularly regarding concentration and dominant firm behavior, have been followed by periods of increased enforcement activity. *See* Eleanor Fox, *The Sherman Antitrust Act and the World - Let Freedom Ring*, 59 Antitrust L.J. 109, 126 (1990).

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Since the entry into force of the Act of 5 August 1991, Belgium -- like the other EU countries -- has had a statutory instrument to protect economic competition. The Act sets out rules protecting competition but also a special review procedure for competition cases. In addition, it establishes organs and an administrative jurisdiction to deal with such cases and entrusts the Brussels Court of Appeal with the dual task of hearing appeals against decisions by this jurisdiction and interpreting the Act in its preliminary rulings on points of law referred to it.

This raises two questions, one on the role of judicial precedent in the enforcement of competition law since the entry into force of the new Act, and the other on how the Belgian courts proceed, in fact and in law, when applying and interpreting competition law. It might also be useful to look at how these new cases fit into Belgium's legal system as a whole.

Before explaining how competition cases are reviewed by the courts under Belgian law, it might be useful to outline the legal framework of the system protecting competition introduced in Belgium by the Act of 5 August 1991. The Act prohibits any restrictive practices stemming either from agreements between undertakings, decisions by associations of undertakings or concerted practices (Section 2), or from abuse of a dominant position by one or more undertakings (Section 3). The precise scope of these bans resembles that of Community law, and the terms of the Act are virtually identical to Articles 85 and 86 of the Treaty of Rome. Agreements, decisions and concerted practices that have as their effect the restriction of competition may, under certain conditions, be granted exemptions by the Competition Council, which must have been notified of them (Section 7). The agreements, decisions and concerted practices granted exemptions under Article 85 § 3 of the Treaty of Rome need not be notified to the Competition Council (Section 8). The Council may also certify that the practices are not anticompetitive, if so requested by the undertakings concerned by an agreement (Section 6).

The 1991 Act also subjects to the approval of the Competition Council any concentration of undertakings which has the effect of significantly restricting competition on the relevant Belgian market or a substantial part thereof (Sections 9 and 10). However, this does not apply if the concentration is already subject to review by the Commission of the European Communities (Section 13).

In addition to the Competition Board (part of the Central Economic Council, acting in an advisory capacity on general competition law - Section 21), which is not dealt with here, the 1991 Act established the Competition Service and the Competition Council. As well as its administrative duties, the Competition Service is responsible for identifying and recording the type of practice covered by the Act (Section 14). It conducts investigations into cases brought under the Act (Section 23). Its main task is to gather and record facts relating to competitive practices, without pre-judging whether or not the Council has jurisdiction.

The Competition Council is an administrative jurisdiction within the Ministry for Economic Affairs; besides acting in an advisory capacity for the Minister of Economic Affairs whether on its own initiative or at the request of the Minister, it has the authority to take decisions, put forward proposals and

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[*] Texte en français disponible à la page 227.

give opinions (Sections 16 to 20). It decides whether or not there has been an infringement of the regulations prohibiting restrictive practices. It also rules on applications for exemption (Section 2 § 3 and 29) and for certification that practices are not anticompetitive (Sections 6 and 30), on notifications regarding the concentration of undertakings (Sections 10 to 12 and 33), on individual or corporate complaints lodged with the Competition Service and on investigations by the Service carried out on its own initiative or at the request of the Minister for Economic Affairs or a public institution (Sections 27 to 34).

The 1991 Act also grants extended decision-making powers to the Chairman of the Competition Council. The Chairman may, for instance, at the request of the plaintiff or the Minister of Economic Affairs, take temporary steps to suspend restrictive practices being investigated when it is urgent to avoid a situation that may cause serious, imminent and irreparable harm to the undertakings whose interests are affected by such practices, or that is contrary to the public interest (Section 35). The Chairman may also withdraw confidential elements from the case-files submitted to the Council (e.g. when they relate to industrial secrets) (Section 27 § 1 in fine) and, at the request of the Competition Service, oblige undertakings or associations of undertakings that refuse to comply to provide the information requested by the Service (Section 23 § 2 and 3). An appeal may be lodged against decisions of the Council and its Chairman before the Brussels Court of Appeal. Furthermore, when the outcome of the case hinges on whether or not a competitive practice is lawful, the judge may request a preliminary ruling from the Court of Appeal, which will give a reasoned decision and may ask the Competition Service to launch an investigation.

Thus judicial control, in the form of a review of competitive practices, can take two forms. The Brussels Court of Appeal hears appeals against the decisions of the Competition Council and its Chairman, but ordinary courts and tribunals may also declare a competitive practice invalid in the cases they hear and may ask the Brussels Court of Appeal for a preliminary ruling. It is clear that the Brussels Court of Appeal plays a central role in the judicial control of competitive practices. It is to this Court that cases are referred, either for appeals against Competition Council decisions, or for rulings on preliminary points of law. By conferring responsibility for interpreting the law on a single jurisdiction, Parliament intended[1] to ensure that judicial precedent would be consistent where competition was concerned. Case-law from the Brussels Court of Appeal will therefore determine how competition law evolves in Belgium, even though the Competition Council and the ordinary courts play a significant part too.

When the Competition Council or its Chairman, or the Court of Appeal hearing an appeal against their decisions, are to rule on a competitive practice, do they approach it as a question of fact or of law? In reality, their decisions are based on both fact and law. They consider whether the rules governing the application of the law have been complied with, which usually -- but not always -- depends on the facts specific to the situation in question. They determine what the relevant market is and how the practices affect competition. This involves factual analysis, since the issue of what the market is or whether the practice has a noticeably detrimental effect on a substantial part of that market depends largely on the facts of the case. But it also necessitates legal analysis. For while the legislation determines the regulatory framework, it does so in very general terms and seldom sets out the criteria that are vital to factual appraisal. The examples below demonstrate the need for such criteria and the crucial role played by judicial precedent in this area.

With regard to market definition, precedent states, for instance, that the market is not confined to the goods and services of the allegedly abusive undertaking or those of its competitors, but extends to goods which, given their nature, are sufficiently substitutable[2]. When the Act states that, in matters relating to dominant position, abusive practices may consist of directly or indirectly imposing unfair trading conditions, it is for the judge to determine what is unfair. Judicial precedent, based on Community

law, has established that in order to determine whether or not conditions are fair, it must be ascertained whether they would have been accepted if the other party had not been in a dominant position and if there had been genuine competition[2,3]. Again in cases relating to dominant position, it may have to be decided whether an imposed price is fair or not. In this regard, judicial precedent is based on the principle that a price should be in keeping with the economic value of the service provided[2,3,4].

It will therefore be up to the courts to determine such criteria, as is the case in the European Court of Justice and the Commission. This can but heighten the importance of precedent in the elaboration of competition law, and in this respect, judges will of course refer to the abundant legal literature in this field. In some cases, the situation must be judged solely in terms of the law, particularly when one party is seeking to protect its competitive position on the basis of legal or contractual arrangements. It will then be up to the court to decide whether these arrangements are valid in the eyes of competition law or, quite simply, ordinary law.

One example of this is the case of a selective distribution network, where an issue which may arise is whether parties outside the network can be stopped from marketing the goods concerned which they have been able to find on another market. The Brussels Court of Appeal, for instance, in an appeal against a decision by the Commercial Court regarding an application for injunction, had to rule on whether or not it was fair for a department-store chain to market perfumes when it was not part of the distribution network set up by the perfume manufacturer. The points of law referred to the Court included whether it was valid to set up a selective distribution network, whether distribution contracts could be relied on against third parties, and whether there might be third-party complicity -- all of which are largely issues of law[5].

The question of whether competition rules have been breached therefore depends on the factual and legal analysis of specific cases heard before the relevant courts. It should be noted that when the Brussels Court of Appeal hears an appeal against decisions by the Competition Council and its Chairman, it has full jurisdiction and can accordingly base its decision on fact and law[6]. The role of the court is therefore not confined to merely controlling legality. Consequently a Council decision that goes to appeal may be reversed because based on insufficient grounds, be they factual or legal. This also applies to the ordinary courts, where decisions are obviously based on both fact and law. One example is when an action is brought for an injunction in respect of commercial practices deemed unfair because they infringe the rules of competition. Here the court dealing with the substance of the case will apply both domestic and Community rules.

The issue is less straightforward in the case of decisions by the Court of Appeal ruling on preliminary points of law. The Act states (Section 42 § 1, indent 4) that *"the jurisdiction applying for the ruling on a preliminary point of law shall comply with the decision of the Brussels Court of Appeal on that point of law"*. This would suggest that the Court, in its preliminary ruling, is ruling solely on an issue of law. But it is not quite as straightforward, for the point of law before the Court of Appeal obviously relates to a factual situation at the root of the case brought before the original court. Furthermore, the principle of a factual review has been accepted since the law specifically provides that the Court of Appeal may "*request an investigation by the Competition Service"*.

At issue, however, is the scope of this type of factual review. It certainly does not allow the Court of Appeal to settle the case, for that is not the purpose of preliminary rulings. It must be confined to gathering and verifying the factual elements required for the Court's ruling on the preliminary issue. In one specific case[7], the Court asked the Competition Service to verify several facts relating to a particular market (fuel distribution), in order to determine whether a specific type of fuel distribution agreement might significantly restrict competition. In this case, the legal ruling therefore depended on a series of

facts. However, there was a risk that the original court, although bound by the Court of Appeal's ruling based on law, might consider that the factual data on which the Court had based its ruling did not match the facts submitted to it for consideration.

In practice, the technique of requesting rulings on preliminary points of law is largely based on that of the Court of Justice of the European Communities. The original court often requests preliminary rulings in such a way as in fact to invite the Court of Appeal to settle the case. In such instances, the Court of Appeal has adopted the same approach as the Court of Justice, i.e. it has either reworded the point of law in general terms as far as possible and confined itself to interpreting the law[7] or else[8] decided that there was no need for interpretation since all that was required was to apply the rule of law to a particular situation. A point to bear in mind is that, where preliminary rulings are concerned, the powers of the Brussels Court of Appeal are confined to interpreting the law, and do not extend to settling cases.

The authority carried by a preliminary ruling is limited to the case before the original court. The Act stipulates that "*the jurisdiction which has requested the ruling on a preliminary point of law shall comply with the decision of the Brussels Court of Appeal on that point of law*"[9]. Thus, even though the Court of Appeal's decision undeniably constitutes a valid precedent whenever Parliament decided to submit the interpretation of competition law to that Court in order to harmonize judicial precedent, the Court's decisions will only be actually binding on the original court in the case for which the preliminary ruling was requested. This is significant, inasmuch as the Court of Appeal's preliminary ruling will always be subject to control by the Court of Cassation (the Supreme Court of Appeal) as part of an appeal against the final decision of the original court. This differs substantially from the decisions of the European Court of Justice, the *ratio decidendi* of whose preliminary rulings are declaratory virtually *erga omnes*, valid in courts throughout the European Union, in a way becoming part of the Community rules to which they relate[10].

With regard to the interpretation of the 1991 Competition Act, it should be noted that the wording is largely based on the Treaty of Rome, some articles being almost identical. This is no coincidence. The preparatory work shows that the Act was drawn up with the intention of keeping to the wording of Community legislation and judicial precedent in order to allow the courts to refer to the interpretation consistently given by the European Court of Justice and the Commission[11]. Thus domestic precedent is largely based on European Community case-law.

One final point regarding the relationship between European Community law and domestic legislation in matters of competition is that Belgian law does not deal exclusively with cartels and abuse of dominant position affecting competition on the Belgian market or a substantial part thereof. A restrictive practice falling within the scope of Community rules may well affect competition on the Belgian market too, or a substantial part thereof[12]. In that case, will domestic law and Community rules both apply simultaneously? They will, but only to the extent that the decisions to which they give rise are not incompatible. If they are, then Community rules take precedence[12]. This is a widely acknowledged principle and even an integral part of the law for any agreements, decisions, cartels and mergers that are exempted under Article 85 § 3 of the Treaty of Rome and need not be notified to the Belgian authorities, as for mergers that are subject to control by the Commission of the European Communities. Of course the ordinary courts will apply Community law which is directly applicable. The domestic court judge will have to obtain and take into account information regarding the notification of such agreements to the EC Commission, in compliance with Regulation (EEC) No 17/62 (more specifically Articles 4 and 5).

How important is competition law in Belgium's legal system as a whole? Even before the new Act had come into force, the ordinary courts were already hearing competition cases, particularly where commercial practices were involved. Such cases related mainly to Community law. Now that the new

Act has entered into force, it is also being used in the courts. The number of such cases is clearly growing as competition law, be it domestic or European, is becoming increasingly familiar and part of economic life. Cases have been regularly referred to the Council since the Act came into force in 1993. Many of them have gone to appeal before the Brussels Court of Appeal. While such cases are on the increase, there are still relatively few of them though each is of considerable importance. Requests for preliminary rulings are similarly limited in number, as are those referred to the European Court of Justice.

In conclusion it is hard to predict, as the situation stands today, exactly how Belgian competition law will evolve, since judicial precedent is still in its early stages. However, the fact that Parliament has clearly opted to base its legislation directly on Community law suggests that the trend is towards competition policy that will not differ fundamentally from that of the European Union and the other Member States.

Notes

1 Belgian Chamber of Representatives, Ordinary Session 1990-1991, 1286/6-89-90, pp. 47-48.

2 Brussels Court of Appeal, 28 June 1996, Zwarte Arend et al. v. Honda No. 1996/QR/14;

Vandermeersch: "De mededingingswef", No. 13 *et seq.* (Kluwer, 1994).

3 Van Gerven Maresceau en Stuyck: "Handels-en economisch recht", vol. II b, Kartelrecht, in "Beginselen van Belgisch Privaatrecht", 1985.

4 Court of Justice, 13 November 1975, General Motors v. Commission, 26/75, Rec. 1975, 1367;

Court of Justice, 14 February 1978 United Brands v. Commission, 27/76, Rec. 1978, 207;

Court of Justice, 11 November 1986, British Leyland v. Commission, 226/84, Rec. 1986, 3263;

Court of Justice, 5 October 1994, Centre insémination de la Crespelle v. Commission, C-323/93, Rec. 1994, 5097.

5 Brussels Court of Appeal, 21 February 1996, Nina Ricci v. Delhaize le Lion, No 1995/AR/2360.

Brussels Court of Appeal, 21 February 1996, Confederation belge des parfumeurs détaillants (Belgian confederation of perfume retailers) and Yves Saint Laurent v. Delhaize le Lion, No 1995/AR/1425 and 1995/AR/1504.

6 Explanatory statement to the Bill, Belgian Chamber of Representatives, Ordinary Session 1989-90, 1282/1-89/90, p. 35.

7 Brussels Court of Appeal, 28 June 1995, ARAL v. ESSO and RINA, No. QR7/95.

8 Brussels Court of Appeal, 14 September 1995, Dior and Confédération belge des parfumeurs détaillants v. Delhaize le Lion, No 1994/QR/83.

9 Waelbroeck and Bouckaert: "La loi sur la protection de la concurrence économique", No. 86, Journal des tribunaux 1992, pp. 28 *et seq*.

10 Van den Bossche: "Curia non novit ius ... De prejudiciële vraggstelling aan het Hof van beroep te Brussel ex artikel 42", No. 39, Jaarboek Handelspraktijken, 1995.

11 Belgian Senate: 1990-91 session, Report on behalf of the Economic Commission by Senator Aerts, 1289-2, pp. 20-24.

12 Waelbroeck and Bouckaert: "La loi sur la protection de la concurrence économique", Nos. 16, 18 and 89, Journal des tribunaux 1992, pp. 28 *et seq.*

Court of Justice, 13 February 1969, Wilhelm v. Bundeskartelamt, 14/68, Rec. 1969, p. 1.

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Is market definition an issue of fact or law? What are the implications of characterizing the issue as fact or law for purposes of appellate review? What standard of review is appropriate for market definition? These questions, deceptively simple to ask but difficult to answer, are ones which have tremendous implications for Canadian competition law in general and for the Competition Tribunal in particular. This is currently a keenly debated issue in Canadian competition law because of a recent decision in the merger context of the Federal Court of Appeal, *Director of Investigation and Research v. Southam Inc*.,[1] overturning a decision of the Competition Tribunal. *Southam* was the first, and so far the sole, contested merger case under the *Competition Act* to reach the Federal Court of Appeal.[2] Some indication of the importance of the issues involved can be gained from the fact that the Supreme Court of Canada has granted leave to appeal the Court of Appeal decision. The appeal is expected to be heard in late November 1996.

I. Background - Adjudication of Competition Cases in Canada

Before we delve into market definition and questions of fact and law, some information may be helpful to provide a context within which these questions arise. In Canada, competition-related matters are governed by the *Competition Act*.[3] After years of debate and a number of unsuccessful attempts, Canada's competition legislation was extensively amended in 1986. Prior to 1986, all competition matters were adjudicated in the ordinary courts under the criminal law. Now, under the *Competition Act*, conspiracy, bid-rigging, misleading advertising, price discrimination, predatory pricing and the like are offences which remain within the purview of the criminal law as administered by the courts. Other trade practices (e.g. refusal to deal, exclusive dealing, tied selling), abuse of dominant position and mergers are grouped together in Part VIII of the Act and are subject to review under a civil law standard by a quasi-judicial body called the Competition Tribunal.

The Competition Tribunal is created pursuant to the *Competition Tribunal Act*[4] and is somewhat unusual in Canada, in that it includes both lay and judicial members. Having regard to this unique structure, the *Competition Tribunal Act* specifies that questions of law "shall be determined only by judicial members" while questions of fact and of mixed law and fact "shall be determined by all the members".[5] The *Competition Tribunal Act* also provides that an appeal lies to the Federal Court of Appeal from any decision of the Competition Tribunal, except that on a question of fact appeal lies only with leave of the Court of Appeal.[6]

Applications are brought before the Canadian Competition Tribunal by a public official, the Director of Investigation and Research. The Director performs the dual role of investigating allegations of anticompetitive practices as well as, where warranted, bringing the parties engaged in such practices

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[*] Texte en français disponible à la page 233.

before the Competition Tribunal for adjudication and remedial action. Although we are dealing here with a strictly civil regime, the closest parallel would be a Crown or public prosecutor in criminal law. The Director and his office, the Competition Bureau, operate autonomously from the Tribunal, and vice versa, an "arm's length" relationship which ensures the independence of each.

The Tribunal consists of four judicial members appointed from among the judges of the Federal Court - Trial Division. The remaining eight lay members are chosen for their background in relevant areas like economics, business, accounting and marketing. In setting up the Tribunal as it did, the Parliament of Canada had in mind the creation of a specialized adjudicative body. When he introduced the proposed *Competition Tribunal Act* for second reading in the House of Commons in the spring of 1986, the responsible minister had this to say on behalf of the government of the time: "In an area of law that relies so heavily on economics and business judgment it is very important to have a decision-making body that has the expertise to deal with complex competition cases while still providing the necessary legal protections. We propose to create an entirely new adjudicatory body, the competition tribunal. The purpose of this tribunal will be to adjudicate non-criminal competition matters. Its membership will comprise judges and lay experts in the areas of business, economics, and public affairs. This proposal addresses one of the problems that we have recognized and have had to live with for many years, the complexity of competition cases. Typically, the questions concern probable effects -- future effects -- and implications of various business activities, questions which have to be considered in their full commercial and economic context. . . . Answers to questions of this type usually require the application not only of legal expertise but expertise in how the market-place functions. I should add that these difficulties have been recognized and commented upon publicly by distinguished members of the judiciary itself. For instance, some 25 years ago Mr. Justice Spence expressed his view that: "A court is not trained to act as an arbitrator of economics." This problem has been addressed in other countries as well. Similar tribunals exist in Sweden and in the United Kingdom.[7]"

In a 1992 decision affirming a ruling of the Tribunal, the Supreme Court of Canada confirmed that:. . . It is readily apparent from the [*Competition Act*] and the [*Competition Tribunal Act*] that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII [of the *Competition Act*], since it involves complex issues of competition law, such as abuses of dominant position and mergers.[8]

Parliament's intention was that the Competition Tribunal would be a specialized adjudicative body uniquely suited to deal with non-criminal competition matters. Matters which are before the Tribunal require a complex balancing of legal, economic and business principles. The expertise and experience brought to the Tribunal by its members are essential components in fulfilling the mandate of the Tribunal.

II. Questions of Fact and Questions of Law - General

The distinction between questions of fact and questions of law permeates many areas of the law. Perhaps the most familiar application is the division of decision-making responsibility as between judge and jury. *Black's Law Dictionary* provides the following summary discussion: "**Fact question.** Those issues in a trial or hearing which concern facts or events and whether such occurred and how they occurred as contrasted with issues and questions of law. Fact questions are for the jury . . . while law questions are decided by the judge. Fact questions and their findings are generally not appealable though rulings of law are subject to appeal.[9]"

Most of us have some sort of intuitive feel for the distinction, in broad terms, as for instance when we are talking about the respective roles of judge and jury. Once, however, we embark into the area

of more relevance to this paper, judicial review of decisions of an inferior tribunal, complications arise. In Canada, as in other jurisdictions, the reason for drawing on the distinction is to identify the matters upon which a reviewing court can and should substitute its view for that of the initial decision-making body. In the factual domain we have references to "primary facts", facts observed by witnesses or proven by the production of an original document, and to "inferences of fact", conclusions drawn by a process of reasoning from primary facts. But inferences drawn from facts which depend on legal premises may be questions of law. And, of course, even a finding of primary fact which is "wholly unsupported" by the evidence is an error in law.

Not only do we have questions of fact and questions of law, we also have the amorphous category of "mixed fact and law". The authors of *De Smith's Judicial Review of Administrative Action* attempt to explain the difference: ". . . [W]hether the facts in issue *are capable* of falling within a category prescribed by statute may be treated as a question of law, since it entails a determination of the legal ambit of that category; whether they *do* fall within that category may be treated as a question of fact. But the latter question can also be treated as a question of law; the factual part of a question of "mixed law and fact" is then confined to the ascertainment of the primary facts and perhaps the drawing of certain inferences from the facts.[10]" [emphasis added]. Since this is hardly definitive, they try again: "Another way of expressing the distinction that is sometimes obscured by these terminological ambiguities is to say that whilst a question of statutory interpretation, normally raising an issue of significance that is not confined to the particular facts of the case is always one of law, the application of the statute, properly interpreted, to those facts may or may not be."[11]

It is certainly safe to conclude that the distinction between fact, law and mixed law and fact is by no means clear. In our view, which is hardly a novel one, what is really going on is an evaluation by the reviewing court of the level of scrutiny which should be given to the decision in question, which is then couched in terms of "fact" and "law". One could ask the same question directly: what standard of review is appropriate for, given our topic, a determination of market definition by the Competition Tribunal? Unfortunately, given that the appeal rights from Tribunal decisions use the language of "fact" and "law", we will continue to have to use these labels. Nevertheless, we should not lose sight of the underlying policy question.

In answering that question, we will review what Canadian courts have said that is of relevance to its determination. First, we look at some of the leading Canadian cases dealing directly with standard of review; second, we turn to the particular question of market definition and how the courts have labelled that exercise in terms of fact or law. Finally, we explore the implications of the *Southam* case in terms of the issues that may be considered by the Supreme Court in rendering its decision on the issue.

III. Standard of Review

Canadian jurisprudence has been in a state of constant change with respect to the issue of the appropriate standard of judicial review to be applied to decisions of administrative tribunals and agencies. Most recently, the Supreme Court of Canada in *Pezim v. Superintendent of Brokers*[12] recognized that different standards of review apply depending on the agency involved and the nature of the decision. We should note at the outset that the Court explicitly applied its analysis to both applications for judicial review strictly speaking and statutory appeals from administrative tribunals. As stated earlier, there is a statutory right of appeal of Tribunal decisions to the Federal Court of Appeal, with leave required in the case of an appeal on a question of fact.

According to the Supreme Court in *Pezim*, the central question in ascertaining the appropriate standard is the intent of the legislature in creating the tribunal. This can be discerned by looking at the tribunal's role or function, the existence of a "privative clause"[13] protecting its decision and whether or not the question goes to the jurisdiction of the tribunal. The applicable standard of review will fall somewhere along a spectrum from reasonableness (where deference is highest) to correctness (where deference is lowest). A principle of deference also applies, not just to findings of fact by the tribunal, as might be expected, but also to legal questions, where appropriate, in light of the role and expertise of the tribunal: ". . . At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. . . .At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal *and* where the tribunal has no greater expertise than the court on the issue in question . . . "[14] [emphasis added]

Although the Supreme Court in *Pezim* used the term "reasonableness", the term should be understood in light of earlier decisions of the Supreme Court and other courts: that the reviewing court should defer except where the decision under review is "patently unreasonable". While the Court in *Pezim* did not deal specifically with questions of fact, given the particular matter before it, it is hardly controversial that even when appellate courts review decisions of other superior courts, they give considerable deference to what they consider to be factual determinations. Primarily, among other reasons, the appellate courts recognize that the original court has had the advantage of observing the witnesses. They generally decline to interfere except in cases of "palpable and overriding error" or some other standard to the same effect.

In *Pezim*, the Supreme Court of Canada concluded that having regard to the nature of the securities industry, the specialization of duties of the decision-making body (the Securities Commission) and its policy development role, as well as the nature of the problem (whether provisions of the *Securities Act* relating to disclosure and insider trading had been violated in relation to certain transactions) considerable deference was warranted notwithstanding that there was a statutory right of appeal and no privative clause. It therefore held that the court below had erred in interfering with the Commission's findings.

IV. Market Definition

Importance of Market Definition

The importance of the definition of the market in a given case cannot be understated; it is critical to the success of a party involved in a case under any one of the provisions that the market definition be defined in the manner advanced by that party. The significance which "winning" on this issue has on the outcome of a competition case has been characterized in relation to mergers in the following passage: ". . . Put succinctly, the party who manages to convince the court of his view of this matter generally wins the case, because as the purported market is enlarged, the relative significance of the merging parties within the market usually decreases. Conversely, as a market is defined progressively more narrowly, the competitive significance of the challenged conduct typically increases."[15]

Market Definition under the Competition Act

While Part VIII of the *Competition Act* is replete with references to "markets" or words to that effect, the Act is silent on the mechanics of defining a market. It is difficult to conceive of how sufficiently clear yet sufficiently flexible and adaptable criteria could have been accommodated in the statute or other legislative instrument. Parliament has left the defining of the market to the decision-makers.

The approach taken by the Competition Tribunal to date with respect to product market definition focuses on the determination of whether products alleged to be in the same market are close substitutes. The Tribunal has commented on several occasions that evidence that buyers would switch from one product to another in response to small changes in relative price would provide the requisite proof of substitutability. It has also recognized, however, that such direct evidence is rarely available and, in fact, has not been advanced in any case before the Tribunal to date. Therefore, the Tribunal has had to look to other factors to determine more indirectly whether the products in question are close substitutes. Such an examination will include a review of the evidence put forward by the parties regarding product characteristics and use, the views, behaviour and identity of buyers, trade views, strategy and behaviour, price relationships and levels, switching costs and any other relevant factors. Which criteria were seen as more or less important and the relative weight given to each varied from case to case. Neither the list of factors to be considered nor the weighting of each was treated as "set in stone". Since the *Southam* decision dealt only with product market definition, we will restrict our comments to that aspect of market definition, although we are of the view that the analysis would apply equally to questions of geographic market definition.

Treatment by the Courts

Canadian jurisprudence in the area of market definition, and more particularly, whether it is a question of fact or law, is neither abundant nor is it, given the *Southam* decision, conclusive. At the current time, the Supreme Court of Canada has yet to render a decision which settles the issue and, therefore, the standard of review under the *Competition Act*. However, with this very issue before the Supreme Court, it can only be hoped that some certainty on the matter will be forthcoming. In anticipation of the Supreme Court providing some final guidance on this matter, we are left with a small number of judicial findings on the issue.

There is a line of jurisprudence which is generally regarded as holding that market definition is a question of fact. One of the earliest cases which expounded on this issue at length is a case under the *Combines Investigation Act*,[16] the precursor to the present *Competition Act*. *R. v. J.W. Mills & Son Limited*,[17] was a criminal conspiracy case involving freight forwarders. In the result, the trial judge, Mr. Justice Gibson (hereinafter Gibson J.), found the accused guilty of "unduly" lessening competition, the test which had to be met for a conviction, as a result of an agreement to fix prices, divide markets, control channels of distribution, prevent entry and restrict expansion. The decision was affirmed on appeal to the Supreme Court of Canada but without discussion of the question of the market.[18]

Gibson J. recognized the importance of defining a relevant market in order to assess the element of undue lessening. He observed: ”As a matter of law of course there is no definition of the "market" in relation to which the evidence of any alleged violation of sections 32(1)(a) and (c) [conspiracy provisions] of the *Combines Investigation Act* may be examined. What is the relevant market in every case is a matter of judgment based upon the evidence.”[19] Gibson J. further noted that there is "no legal definition capable of describing the shape of competition" because it is constantly changing as new products are introduced into direct competition or as geographical market boundaries move.[20]

Gibson J. then went on to describe the exercise of market definition, a passage which is worth quoting at length: "Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration. At one extremity, an ill-defined description of competition is that every service, article or commodity, which competes for the consumer's dollar is in competition with every other service, article, or commodity. At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service. In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another. And many characteristics or dimensions may be considered in defining the relevant market. All are not of the same order. And, in any particular case, usually, not all of the many characteristics or dimensions will have to be considered. In some instances, the definition may turn on only one characteristics or dimension or two . . . . However, in order to make a correct choice of the appropriate characteristics or dimensions, it may be necessary to review several types before selecting the proper one or ones."[21]

Gibson J. then listed a number of pertinent characteristics or dimensions that might be considered in defining a relevant market, noting that the list was not exhaustive and that it might easily be differently organized. He included product substitutability (or cross-elasticity of demand), actual and potential competition, geographical area, physical characteristics of products or services, end uses of products, relative prices of goods or services, integration and stages of manufacture and methods of production or origin. Some of the "pertinent characteristics" set out by Gibson J. are more familiar, and perhaps more apt, than others. What clearly comes out of this discussion of market definition, however, is the fact-driven and case-specific nature of the exercise. Gibson J. took a very pragmatic and flexible approach to the question.

In *R. v. Hoffmann-La Roche Ltd. (Nos 1 and 2),*[22] again a criminal case, the accused was indicted on charges of predatory pricing as a result of, among other activities, providing its patented drug free to hospitals. One of the issues before the Ontario Court of Appeal was whether the trial judge erred in finding that the hospital market was the relevant market. In reviewing this issue and upholding the trial judge's decision, the appeal court accepted the decision of Gibson J. in *Mills* and held: "What constitutes a relevant market is essentially a question of fact depending on the circumstances underlying the particular offence alleged."[23] That was pretty much the extent of judicial consideration of the question until recently.

Two decisions of the Federal Court of Appeal, one rendered in May 1995 and the second, the *Southam* case which originated in the Tribunal, rendered in August 1995, reach opposite conclusions on the issue. The Chief Justice of the Court of Appeal sat on both panels; he was in dissent in the first case and one of the unanimous majority in the second.

The first case chronologically is *Upper Lakes Group Inc. v. National Transportation Agency.*[24] This case involved a decision by the National Transportation Agency under the *National Transportation Act, 1987*[25] that the prices set by a rail carrier for certain cargo violated the statute by being too low and caused harm to marine carriers seeking the same business.[26] An appeal lies to the Federal Court of Appeal from decisions of that Agency, with leave, on questions of law or jurisdiction only. Leave was granted on a single question of law involving the interpretation of the applicable section of the *National Transportation Act, 1987*.

One of the arguments of the appellants in attacking the Agency's decision was that the Agency erred by defining the market too broadly. The majority of the Court of Appeal held that, even if leave to appeal the market definition had been sought (which it was not), leave could not have been obtained on the question. The majority was of the opinion that it was "settled law" that the definition of a market in cases like the one at issue was a question of fact and not of law, citing *Mills* and *Hoffman-La Roche*.[27] In dissent, Isaac C.J. held that if the Agency errs in its interpretation of "competition" or "competitor", that is, in defining the relevant market, it errs in law.[28]

That brings us to the *Southam* decision.[29] Briefly, the relevant features of the *Southam* case are as follows. Southam Inc., a major Canadian publisher of daily newspapers, owned the two daily newspapers in the greater Vancouver area of British Columbia. The Director challenged Southam's acquisition of a community newspaper in each of two communities within that area on the grounds that the acquisitions would likely substantially lessen competition in the market for retail print advertising. The Tribunal found that the community newspapers were not in the same product market as the dailies with respect to retail print advertising and dismissed the application. The Director appealed (without seeking leave). On appeal, the Director alleged that the Tribunal erred in failing to apply its stated approach to market definition. Southam denied that the Tribunal committed any reviewable error and further maintained that the question of market definition is one of fact, for which leave should have been sought. Alternatively, if market definition was found not to be a question of fact, Southam argued that the Tribunal's findings on this issue fell squarely within its area of expertise and should be treated with higher degree of deference, that is, "correctness" would not be the appropriate standard of review.

On the issue of the characterization of market definition as fact or law, the Court of Appeal decided that the question is one of law. The Court then went on to address whether the decisions of the Tribunal on questions of law, including market definition, are owed curial deference by the reviewing court and concluded that they were not. With respect to market definition, the Court of Appeal held that:" The test or analytical framework that is to be adopted in determining whether the products offered by two merging firms are "close substitutes", and therefore in the same product market, is a question of law. . . . The adoption of the appropriate framework and its proper application remain a question of law. Whether the facts in a particular case satisfy the requirements of any one framework is a question of fact or more precisely a question of mixed law and fact."[30]

It should be noted that, in setting up the distinction between fact and law, the Court included as part of the legal element not only the "adoption" of an appropriate framework but also its "proper application", presumably in a particular case. The same point is reiterated later in the reasons.[31] The factual element that is left, on this analysis, appears to be relatively minor.

The Court of Appeal explained the *Mills* and *Hoffmann-La Roche* decisions, which are generally taken as holding that market definition is a question of fact, by relying on the reasoning of the Supreme Court of Canada in another recent competition law case dealing with the criminal conspiracy provisions of the *Competition Act*.[32] The Court of Appeal concluded that the judgment in that case: "... indicates that the process and criteria used by a lower tribunal to determine the legal meaning of statutory language is reviewable by an appellate court as a question of law. However, the application of that legal meaning to a particular case (i.e., the "full inquiry") is a question of fact or, more precisely, a question of mixed law and fact."[33]

The Court of Appeal also referred with approval to a passage from a Canadian textbook in which the author concluded, with reference to the *Mills* and *Hoffman-La Roche* decisions: "It would appear from the context of the remarks in these cases that the learned judges meant that the question "what constitutes the relevant market in a given case" is a question of fact. The distinction is important, because the meaning of

the notion "relevant market" does not change from one fact situation to another."[34] [emphasis in Court of Appeal reasons]

The Court of Appeal changed the reference from a "question of fact" to a "question of fact and law" but otherwise agreed with what the Court characterized as "the notion that the analytical framework for determining a relevant market does not change from one case to another".[35] In our view, this does not fully explain the *Mills* case, at least, in which Gibson J. seemed to be saying that the "analytical framework" itself must needs be flexible and fact-oriented.

In summary, *Southam* held that the appropriate analytical framework for market definition is a question of law and that framework does not vary from case to case. The "proper application" of the framework in a given case is apparently also a question of law, although the adoption of the reasoning from the Supreme Court conspiracy case referred to above causes some confusion in light of the Court's earlier statements. Finally, whether the facts in the particular case satisfy the requirements of the framework is a question of mixed law and fact. The Court of Appeal noted the discrepancy between its decision and that of its brother members in *Upper Lakes*, making it clear that there are two contradictory views extant in the Federal Court of Appeal.

On the issue of curial deference, the Court of Appeal held that no deference was owed to the Tribunal on the question of market definition and that the standard of review was "correctness", at the end of the spectrum where the least deference is accorded. With respect to the "expertise" of Tribunal members the Court reasoned as follows: ". . . it is trite to note that the judicial members are not required by law to possess an expertise in competition law. (This is not to suggest that the judicial members do not bring to the Tribunal a legal expertise relevant to competition issues.) Similarly, its lay members come to the Tribunal with diverse backgrounds. Some might possess an expertise in economics. Others are drawn from the business community because of their practical understanding of markets. Some lay members may well be perceived as representing the interests of opposing groups, e.g. business and labour."[36]

The Court noted that even if the question of market definition could be seen as falling within the specialized expertise of the lay members, which in the Court's opinion it did not, questions of law were vested solely in the judicial members. In conclusion, the Court stated that since product market definition was a question of law, the criteria or factors used to circumscribe that definition would be decided by the judicial members and, therefore, product market definition could not be said to fall within the Tribunal's expertise. The Court was of the view that Parliament had expressly decided otherwise by assigning questions of law to the judicial members, who could not be deemed to bring any special expertise in competition law to the Tribunal.[37]

The Court also cited "strong policy reasons" to support its conclusion that market definition should be subject to ordinary appellate review as a question of law. The Court concluded that market definition is a legal construct not an economic one. The term "relevant market" is undefined in the *Competition Act*, according to the Court, as an implied recognition of the fact that it is and always has been a judicial construct informed by economic principles and now guided by the practical experience of the Tribunal's lay members based on their familiarity with the operation of markets.[38] Yet, we note that on the Court's characterization of the question, lay members have a rather limited role to play in defining a market. They can neither contribute to deciding the appropriate analytical framework nor to determining its "proper application" in a particular case.

Implications of the Southam Decision

The decision in *Southam* raises several interesting points about the role of the Competition Tribunal generally and, more particularly, in the context of defining the relevant market. Some have already been raised in passing in the earlier portions of the paper but will be discussed more fully in this part. In view of the pending appeal before the Supreme Court, it would not be appropriate for us to take a position on the matter ourselves. Instead, we will attempt to provide a sampling of some of the views that have been expressed by others in the competition community, formally and informally, to give you a flavour of the debate.

Separation of "factual" and "legal" components of market definition

One of the features of the *Southam* decision is the Court's characterization of market definition as a two-stage inquiry; first, the determination of the "appropriate legal framework" and its "proper application" and second, the determination of the relevant product market in the particular case by assigning the facts as found to the appropriate categories. The idea of a two-stage process is accepted by some. One of these is Paul Crampton, whose text was referred to by the Court of Appeal in *Southam*: ". . . [I]t is important to recognize that while the delineation of the relevant market in a particular case is a question of fact, the meaning of the notion of "relevant market" is a question of law. That is to say, while the limits of a market in a particular case will be a function of both the unique factual situation at hand and the weight that is placed on certain factors by the Competition Tribunal, the issue of what must be considered, and the legitimacy of various criteria, are questions of law."[39]

Based on the arguments set out in the factum filed for purposes of the Supreme Court appeal, the Director holds a similar view. The Director submits that the determination of the approach to market definition is derived from a construction of the statute and an appreciation of its objectives, and is thus an important question of law. The Director further argues that the Court of Appeal properly concluded that the application of "established" facts to a legal test is essentially a question of mixed law and fact, although the determination of a market in a specific situation is often described as a question of fact when there is no reason to distinguish between questions of fact and questions of mixed fact and law. In conclusion, the Director submits that there is no basis in law or principle for the proposition that market definition in the context of a merger is purely or entirely a question of fact.

On the other side of the debate, Southam argues in its factum that the task of defining the relevant product market in a merger case is a question of fact. First, Southam denies that market definition involves the drawing of inferences that depend on legal training. Southam points out that the treatment of mergers in the current Act is based on a recognition that market definition requires an analysis of complex interactions and examination by experts in economic and commerce. Second, it is advanced that market definition is a matter of judgment and degree involving a selection among a range of reasonable alternatives.

There seems to be little dispute that the exercise of market definition is a highly complex one. One engages in the process of market definition, not as an end in itself, but rather as a necessary step in reaching a conclusion on whether the merged firms or firms facing allegations of anticompetitive conduct possess the requisite degree of "market power" such that there is a likely substantial lessening of competition. While there would seem to be a general consensus that there are two dimensions to a market,[40] the product market and the geographic market, the consensus seems to end there. That it may be difficult to conceive of an analytical framework which can be applied universally to all determinations of the relevant market can be divined from the fact that the Court of Appeal reviewed two market power "paradigms": cross-elasticity and the hypothetical monopolist. In his text, under the heading "Question of

Law", Mr. Crampton refers to four principal "frameworks": substitutability, cross-elasticity, price relationships and the hypothetical monopolist.[41]

Those who do not accept that a two-stage process is practical argue that different cases may require a different method of analysis, to respond to the particular facts of the case and the way in which the parties present their arguments and evidence. As one commentator on this subject, Neil Finkelstein, who is counsel for the appellant in *Southam*, has recently written: " Given the limited methods of inquiry available in either an adversarial or administrative system, market definition must be established by evidence. Accordingly, as a result of the unique and complex factual intricacies that animate competition cases, a broad range of factors must be considered in reaching any decision. Though technical economic evidence is critically important, it is hardly definitive. Legal rules ought to provide precision and predictability; however, in our opinion, a flexible approach to market definition is critical. The facts at issue and the evidence available in each particular case will recommend some methods of determining market definition and will reject others."[42]

On this view the factual aspect of market definition is pervasive. The facts drive the analysis, and indeed, dictate what type of analysis is appropriate in a given case. Purporting to draw a clear line between the legal framework and how it should be applied, on the one hand, and the remainder of the exercise, on the other, is seen as an oversimplification given that the line between the legal and factual aspects of market definition is blurred, by the very nature of the question at issue.

One of the concerns driving those who endorse the two-stage approach is a desire for certainty or a desire to avoid "arbitrariness" in market definition. Mr. Crampton takes the position that the legal component to market definition will provide the necessary discipline: ". . . By recognizing the need to adopt, as a matter of law, a particular relevant market analytical framework, and by accepting, also as a matter of law, the need to address certain market assessment criteria in assessing the factual bounds of the relevant market in any given case, the scope for arbitrariness can be reduced."[43]

In a more recent article, Messrs. Crampton and Corley describe the Tribunal's contribution to market definition as "somewhat disappointing" in that the Tribunal, while recognizing the practical necessity of defining a relevant market, missed opportunities to articulate general principles.[44] They commend the Court of Appeal in *Southam* for making a "substantial effort to bridge the jurisprudential void"[45] in the area of market definition but note that: ". . . it would have been much better if the Court had ruled that the hypothetical monopolist is the superior analytical approach and that that approach should be adopted as a matter of law in all cases unless there are very good reasons for adopting a different approach. This would have provided much more certainty for the Canadian public and the Tribunal."[46]

Messrs. Goldman and Bodrug, writing shortly after the original Tribunal decision in *Southam*, recognize that there is generally a trade-off between certainty and flexibility: ". . . [T]he Tribunal has adopted a case-by-case approach to the analysis of relevant markets and the time frame in which the effects of a merger should be assessed, rather than the more specific analytical framework proposed by the [Director's Merger] *Guidelines*. . . . In many cases, the Tribunal's approach in this regard may be helpful to parties proposing a merger that raises issues under the merger provisions of the *Act*, given its greater potential latitude and flexibility. This choice involves an inevitable trade-off in that less certainty also means less guidance for business planners acting on the advice of legal counsel. Moreover, if the Tribunal intends to take a case-by-case approach, then it would be of more assistance if principles established in earlier Tribunal decisions, with respect to concepts such as substantial lessening of competition, were more expressly applied in subsequent Tribunal decisions."[47]

While establishing the “correct” approach to market definition and its proper application as a matter of law may have the benefit of providing some degree of certainty, although it is debatable how much given that any general framework must be just that, is it worth the cost to flexibility and adaptability in the decision-making process?

Neither side in the debate takes the position that there is no analytical framework within which the definition of the market must be determined. Decision-makers will use principles to guide them in defining the market. The point of difference is whether the legal principles can be separated from the economic or business principles or other "factual" inputs in so complicated a question as market definition. If, indeed, there is no workable distinction between the legal and the factual aspects of market definition, then it would seem that market definition might be considered to be a question of mixed fact and law, in the sense that the legal and the factual are so melded that they are indivisible.

The effect on the decision-making process of the Tribunal

As Stanley Wong, counsel for the Director in the *Southam* case, notes in a paper given at a recent conference, there are those who have raised concerns about the implications of Court of Appeal decision in *Southam* on "collegiality" in Tribunal panels.[48] If the determination of the appropriate analytical framework for market definition and its proper application is a legal question, then it follows that the question will be decided in a particular case only by the judicial members on the panel.

While recognizing that the judicial members have an important role to play in the exercise, the concern is based on the exclusion of the lay members in the choice of the appropriate analytical tool by characterizing this most critical question as a question of law. The concern is that lay members will be marginalized because they cannot participate in all aspects of defining the relevant market, yet many cases will turn on market definition. As the Court of Appeal said in *Southam*: "It cannot be forgotten that market definition is vital to merger analysis and Parliament's concern over the exercise of market power".[49] Those concerned about this exclusion point out that Parliament evidently thought that the expertise of the lay members was relevant to competition policy since it specifically created, in 1986, a new adjudicative body that included them. Prior to the enactment of the *Competition Act*, questions such as the one in issue were decided solely by the courts. Parliament instead chose to place these decisions in the hands of an expert body which included members with backgrounds in economics, business and public affairs as well as law.

Both Mr. Crampton and Mr. Wong appear to recognize the value of input from the lay members in the initial stage of market definition but take the position that they can still provide useful input even though they have no decision-making authority on the appropriate framework for market definition and its proper application. Mr. Wong states that "there is no reason in law which prohibits judicial members from consulting with other panel members" on questions of law.[50] Mr. Crampton seems to envisage a similar scenario when he comments that: “. . . the extent to which future judgments of the Competition Tribunal reflect the level of sophisticated analysis that is appropriate to the evaluation of complex economic concepts such as the relevant market, will largely be a function of the extent to which the judicial members of the Tribunal accept the advice of their lay counterparts and/or the arguments of counsel.”[51]

Appropriate forum for market definition

The issues raised by the treatment of market definition as fact or law and the question of curial deference, brought to the fore in *Southam*, have been characterized more broadly as the choice of the appropriate forum for deciding market definition. Some believe that the Tribunal with its combination of

legal and other expertise is best suited to conduct the entire exercise of market definition. Others prefer that at least a portion of market definition be treated as a question of law, to safeguard appeal rights and to foster consistency by subjecting it to rules of judicial precedent and the like in the appellate courts.

Rather than treating the Tribunal as a whole or a single entity, in considering its expertise the Court of Appeal in *Southam* looked at the qualifications of particular types of members. It reviewed what lay members and what judicial members could be considered to bring in terms of expertise. Some commentators have suggested that the Supreme Court in *Pezim* did not envisage such an analysis. They say that no statute that establishes an expert tribunal indicates that individual members must come to the tribunal with a specific or required degree of expertise. They point out that other courts, in considering whether to accord curial deference, have not embarked upon an analysis of the expertise of individual members or groups of members. Rather, the focus is on the overall legislative scheme and the subject matter of the particular decision of the tribunal to determine Parliament's intention regarding the "expert" nature of the tribunal as a whole.

If the Federal Court of Appeal is correct, the question of judicial deference will have to be considered not only having regard to the intention of Parliament in creating the tribunal and the nature of the decision being reviewed but also to the particular qualifications of the members of the tribunal involved in rendering the decision. The current debate reveals that there is a real question as to whether the approach is workable, even if justified in theory.

Those who support the approach to curial deference taken by the Court of Appeal in *Southam* take the position that the legal component of market definition is sufficiently distinct to make it practicable that the courts should have the final word on the approach and the proper application of the approach while leaving the remainder of the exercise to the Tribunal. One important proponent of this view is the Director. In the appeal factum, the Director recognizes the specialized and unique nature of the Tribunal. However, the factum supports the finding of the Court of Appeal that correctness is the appropriate standard of review on questions of law on market definition that are decided solely by judicial members. Reference is made to the fact that the statutory rights of appeal from Tribunal decisions are more expansive than those provided in the enabling legislation of other administrative tribunals, the decisions of which have been treated with curial deference by the courts. Likewise, these tribunals have investigative, regulatory, licensing, policy making or governmental advisory powers while the Competition Tribunal is strictly adjudicative. By assigning the judicial members responsibility over questions of law and providing for full rights of appeal on such questions, the Director argues, Parliament sought to build consistency and certainty into merger review, particularly on the important question of the proper approach to market definition.

In responding in his paper to the concern that *Southam* undermines the legislative purpose in creating a specialized tribunal to adjudicate Part VIII matters, Mr. Wong submits that the composition of the Tribunal and the jurisdiction of judicial members over questions of law reflects: "... a policy compromise between giving jurisdiction on Part VIII matters to a body composed solely of lay members versus giving jurisdiction to the courts. There should be no doubt that Parliament saw fit to leave questions of law and interpretation to judges."[52]

According to the opposing view, irrespective of whether it is labelled law or fact, market definition is a highly fact-driven process. Even the so-called "legal" principles derive as much from economics as they do from strict application of judicial precedents. As the Court of Appeal noted in *Southam*, the *Competition Act* is silent on what should constitute a "market". Therefore, traditional statutory interpretation is an inapt analogy. There is no statutory language to be interpreted, yet, markets must always be defined.

Thus, the comments of Mr. Finkelstein in his paper: " Though framed by the Federal Court of Appeal as a distinction between selecting a test (a question of law for the Court) and applying it (a question of fact for the Tribunal), the issue to be determined by the Supreme Court in *Southam* is, simply, who ought to determine the relevant market. In our opinion, there is only one test, and that is determining close substitutes in order to delineate the relevant market. The ultimate objective never changes; it is only the inputs available in making the decision that vary from case to case. One may call the close substitutes test a question of law, but nothing turns on that. The real issue is how the market is defined on the facts in each case. In *Southam*, the Supreme Court of Canada must decide who ought to make such determinations, the courts or the Competition Tribunal. . . . "[53]

Based on the objectives of the Act[54], proponents of leaving market definition in the hands of the Tribunal argue that the Tribunal, as a whole, is perhaps better qualified to undertake the exercise in a way that promotes those goals than an appellate court. The Tribunal can inject the type of flexibility in analysis which is crucial in an ever-evolving field such as competition law which is so heavily reliant on economics and business judgment. They argue that to return market definition essentially to the arena of the courts by deeming it a question of law, subject to strict legal principles and precedents, would negate, in effect, the creation of the new regime in 1986.

Mr. Finkelstein's conclusion is representative of this school of thought. He submits that: "Market definition is precisely the sort of complex economic issue that Parliament intended to be determined by the Tribunal, on the basis of its specific expertise in the problems of protecting competition in the marketplace. Leaving to the Competition Tribunal the administration and development of the close substitutes standard set down in *Southam*, will lead to a distinctive and effective Canadian approach to the law of market definition."[55]

Therefore, whether one calls it a question of fact or a question of mixed fact and law, the conclusion is that market definition falls squarely within the expertise of the Tribunal and its decisions on that issue should attract a high degree of curial deference. It is to be hoped that the Supreme Court will provide clear guidance as to which school of thought should prevail since the issues involved are of the highest concern to all persons interested in the competition field.

Notes

1 [1995] 3 F.C. 557 (C.A.).

2 The only other contested merger case to date was not appealed.

3 R.S.C. 1985, c. C-34.

4 R.S.C. 1985 (2d Supp.), c. 19.

5 *Ibid.*, s. 12(1).

6 *Ibid.*, s. 13.

7 *House of Commons Debates* (7 April 1986) at 11927-11928.

8 *Competition Tribunal v. Chrysler Canada Ltd.*, [1992] 2 S.C.R. 394 at 406.

9 6th ed. (St-Paul, Minn.: West, 1990) at 593.

10 4th ed. by J.M. Evans (London: Stevens & Sons, 1980) at 134 (footnote omitted).

11 *Ibid.*

12 [1994] 2 S.C.R. 557.

13 A statutory provision protecting a tribunal decision from review. S. Blake, *Administrative Law in Canada* (Toronto: Butterworths, 1992) at 177, describes three "typical" kinds of privative clauses found in statutes governing administrative tribunals: (1) a clause which states that the tribunal's decision is "final and conclusive"; (2) a clause which grants the tribunal "exclusive jurisdiction" over the issue to be decided; (3) a clause which attempts to directly prevent review of the tribunal's decision by the courts by stating, e.g., that the tribunal's decision shall not be "questioned or reviewed" in any court or words to that effect.

14 *Supra*, note 12 at 590.

15 P. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) at 263 (footnote omitted).

16 R.S.C. 1952, c. 314.

17 [1968] 2 Ex. C.R. 275. This was a decision of the Exchequer Court of Canada, the predecessor to the Federal Court of Canada.

18 (1970), [1971] S.C.R. 63.

19 *Supra*, note 17 at 305.

20 *Ibid.*

21 *Ibid.* at 305-6.

22 (1981), 33 O.R. (2d) 694 (Ont. C.A.).

23 *Ibid.* at 706.

24 [1995] 3 F.C. 395.

25 R.S.C. 1985 (3d Supp.), c. 28.

26 The National Transportation Agency is a regulatory body which deals with all aspects of rail services, including competitive issues.

27 *Supra*, note 24 at 440-41.

28 *Ibid.* at 418.

29 The approach to market definition set out in *Southam* was applied in a recent conspiracy case by the Ontario court, but without expanding further on the *Southam* analysis: *R. v. Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500, 64 C.P.R. (3d) 289 (Ont. Ct. Gen. Div'n).

30 *Southam, supra*, note 1 at 592.

31 *Ibid.* at 595:

> . . . as noted earlier, the "practical indicia" formulation is but one of several frameworks and its adoption remains a question of law as does the question of whether the Tribunal properly applied it.

32 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

33 *Southam, supra*, note 1 at 596.

34 *Ibid.* at 597, quoting from P. Crampton, *Mergers and the Competition Act, supra*, note 15.

35 *Ibid.*

36 *Ibid.* at 603.

37 *Ibid.* at 605.

38 *Ibid.*

39 *Supra*, note 15 at page 264 (footnote omitted).

40 Paul Crampton includes explicitly a third, temporal, dimension: *supra*, note 15 at 262.

41 *Ibid.* at 266ff.

42 N. Finkelstein, "The Evolving Concept of Market Definition: Southam, Nielsen and Consolidated Fastfrate" in *Competition Law and Competitive Business Practices* (Toronto: Canadian Institute, 10 May 1996) at 5.

43 *Supra*, note 15 at page 293.

44 P.S. Crampton & R.S. Corley, "Merger Review under the *Competition Act*: Reflections on the First Decade" (Winter 1995-96) 16(4) Can. Comp. Record 37 at 49.

45 *Ibid.* at 51.

46 *Ibid.* at 53.

47 C.S. Goldman & J.D. Bodrug, "The *Hillsdown* and *Southam* Decisions: The First Round of Contested Mergers Under the *Competition Act*" (1993) 38 McGill L.J. 724 at 749.

48 S. Wong, "The Competition Tribunal Process: Implications of the *Southam* Decisions" in *Competition Law and Competitive Business Practices* (Toronto: Canadian Institute, 10 May 1996) at 23.

49 *Supra*, note 1 at 606.

50 *Supra*, note 45 at 23.

51 *Supra*, note 15 at 264.

52 *Supra*, note 45 at 22.

53 *Supra*, note 42 at 49-50.

54 Objectives are: “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.” [Competition Act, *supra* note 3, s. 1.1]

55 *Supra*, note 42 at 51.

John S. Lockhart
President, Australian Competition Tribunal - Judge, Federal Court of Australia

This paper is written in the light of 17 years experience as a judge of the Federal Court of Australia and deputy president, now president of the Australian competition Tribunal. As a judge I sit both at trial and on appeals. The Federal Court is one of the few courts where its judges have both trial and appellate jurisdiction.

Australia is a federation comprising six States, two Territories and a central government known as the Commonwealth Government. The principal statutory instrument of regulation of competition law is the *Trade Practices Act* 1974 of the Commonwealth Parliament, which applies throughout Australia. Amendments were made to the *Trade Practices Act* by the *Competition Policy Reform Act* 1995; they came into force earlier this year. Legislation exists in the States and Territories which also impacts upon competition law, but not in major respects other than with respect to consumer protection.

The *Trade Practices Act* fundamentally is administered by three bodies: courts (both federal and state, by virtue of Australia's cross-vesting legislation), the Australian Competition and Consumer Commission, and the Australian Competition Tribunal (the latter bodies were known respectively as the Trade Practices Commission and the Trade Practices Tribunal prior to the reforms introduced this year). The three bodies traverse the regulatory spectrum from the judicial to the quasi-judicial to the administrative. Their different natures create flexibility in the resolution of trade practices or competition matters in Australia. There was also created by the *Competition Policy Reform Act* an advisory body known as the National Competition Council, which was established to carry out research into, and provide advice on matters referred to it by the government.

Australia's is largely a judicially regulated antitrust system. At the judicial end of the spectrum of regulation, courts provide the remedies of injunction or damages; they may make orders varying or declaring void the whole or part of contracts, arrangements, or covenants which offend the *Trade Practices Act*; and they may order the variation or termination of an instrument creating or transferring an interest in land. These remedies may be employed by courts upon the occurrence, *inter alia*, of restrictive trade practices, described generally by Deane J. in *Refrigerated Express Lines (Australasia) Pty Limited v Australian Meat and Live-stock Corporation (No. 2)* (1980) 44 FLR 455 at 460-1 as: “the making of certain contracts or arrangements or the reaching of certain understandings, the giving or extracting of certain covenants in relation to land, the engaging in conduct involving a secondary boycott, engaging in the practices of monopolization, exclusive dealing or resale price maintenance, engaging in predatory price discrimination, and the increasing of market share by means of take-over or merger.” Other triggers for resort to the armoury of remedies provided by the *Trade Practices Act* to the courts are instances of unconscionable conduct within the meaning of the 'unwritten law', breaches of product safety standards, and 'misleading or deceptive conduct' (possibly tautologically according to some: see Gibbs C.J. in *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1982) 149 CLR 191 at 198).

At first instance, courts consist of judges sitting alone. Although the judges do not have advisers such as economists, they do of course have the benefit of expert witnesses. Also, the court has power to appoint experts if it wishes. On this subject, however, it is notable that a considerable body of opinion in Australia, among experts in general and economists in particular, holds the view that the adversary system

subjects expert witnesses to all its imperfections. It is said that they are expected to take one side or the other, and that they are cross-examined in a hostile fashion, when in truth what they are seeking to do is to give impartial evidence of their opinions. While it is true that, generally speaking, expert witnesses tend to take the side of the party who called them, the adversarial process does correctly expose the strengths and weaknesses of the arguments advanced by experts. And in any case, the possibility of candid observations may be achieved if, as has been tried in Australia, economists are called to give their evidence at the close of the other evidence for the purpose of stating their opinions in the light of all the evidence. At this point, it is useful for all experts to be called together, with each answering questions from counsel and the bench, and with each expressing views on the opinions of their fellow experts, also engaging in dialogue with the other experts. According to my experience, this procedure tends to lift experts away from the adversarial process and allows them to give the courts frankly the benefit of their opinions.

Notwithstanding some initial rigidity in the courts' attitude to the receipt of evidence from experts (the point was particularly applicable to economists), the Federal Court of Australia now is able to avoid an unduly technical application of the rules of evidence and may (it often does) receive the evidence of experts by way of submission, in such manner and form as the presiding judge thinks fit, whether or not the opinion would be admissible as evidence. This practice works well; it allows experts to give their evidence without undue objection and interruption, relaxes them in the witness box and gives considerable assistance to the court.

On the spectrum of regulation of competition, the Commission is the administrative body in Australia. It has a double role. First, it has a role as caretaker of the *Trade Practices Act*, undertaking investigations of breaches of the *Trade Practices Act* and bringing prosecutions to court. Secondly, upon application it is responsible for authorization (and notification) of provisions embodying business practices which would offend the *Trade Practices Act* were it not for the fact that, in all the circumstances of a given case, a putatively illegal provision of a contract, arrangement, understanding or covenant has resulted, or is likely to result, in a benefit to the public which outweighs, or would outweigh, the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or covenant. These decisions are susceptible to review by the Tribunal.

The Australian Competition Tribunal consists of a President and Deputy Presidents, who must be judges of Federal Courts, and of members, who are appointed because of their knowledge of or experience in industry, commerce, economics, law or public administration. At present, I sit with an expert economist (Dr. Maureen Brunt) and a retired business man (Dr Aldrich). Each of us has the right to vote on the decision, though I, as the President, decide questions of law. The assistance from these two colleagues is invaluable. I would like to see the system replicated in the Federal Court, but there are constitutional constraints imposed as only judges can exercise the judicial power of the Commonwealth.

Until the amendments effected by the *Competition Policy Reform Act*, and continuing from then, the work of the Tribunal has been essentially to review, by way of rehearing, decisions of the Commission in relation to applications for authorization of conduct that, in the absence of the requisite public benefit, would be unlawful under the *Trade Practices Act*. In *Re John Dee (Export) Pty Limited* (1989) ATPR 40-938 at 50,206, the Tribunal stated the guiding principles for the grant of authorizations to be: “First, it is for the parties seeking authorisation to satisfy the Tribunal that benefit to the public is likely and that there will be sufficient public benefit to outweigh any likely anticompetitive detriment; second, since the likely benefits and detriments to be considered are those that would result from the proposed conduct, the Tribunal is required to consider the likely shape of the future both with and without the conduct in question; and third,

that task will generally entail an understanding of the functioning of relevant markets with and without the conduct for which authorization is sought."

"Benefit to the public" is a term of wide import. The Tribunal has come to regard it as "anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress": *Re QCMA Limited* (1976) ATPR 40-012 at 17,242. Subsequently, the Tribunal underlined that it is the economic concept of "efficiency" with which the Tribunal must be most concerned: *Re 7-Eleven Stores Pty Limited* (1994) ATPR 41-357 at 42,677. "Detriment to the public" has been given an ambit of similar width to "benefit to the public"; although two major classes of detriment have been distinguished: inefficiency, and denial of commercial freedom and economic opportunity: *Re 7-Eleven Stores Pty Limited* (1994) ATPR 41-677 at 42-683-685.

The Tribunal's task also extends to reviewing decisions of the Commission in relation to mergers and acquisitions, including mergers and acquisitions outside Australia which have repercussions on the controlling interests of corporations in Australia. Under the provisions of Part X of the *Trade Practices Act*, the Tribunal also has the power to hold inquiries and report to the government on whether a non-conference ocean carrier has a substantial degree of market power on a trade route. This original work of the Tribunal was augmented in 1996 by the *Competition Policy Reform Act*. A new Part IIIA was added to the *Trade Practices Act*; it established a legal regime to facilitate access to the services of certain essential facilities of infra-structure such as power grids and rail networks. Appeals from decisions in these access matters constitute additional responsibilities of the Australian Competition Tribunal (which may prove to be considerable).

Appeals do not lie to the courts from decisions of the Commission or the Tribunal, but errors of law or matters involving denial of natural justice can come before the courts by virtue of s. 39B of the *Judiciary Act* 1903, which describes the original jurisdiction of the Federal Court of Australia as including any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, or by virtue of the *Administrative Decisions (Judicial Review) Act* 1977: see *Queensland Wire Industries Pty Limited v Broken Hill Pty Limited* (1989) 167 CLR 177.

Kemal Erol
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I. Historical Background

Turkey entered into the Custom's Union with the European Community by virtue of the Association Agreement signed in Ankara on 12 September 1963.[1] As a result of this agreement, Turkey had to adopt a competition law. Efforts to enact such a law go back to the 1970's.[2] Despite these early efforts, Turkey did not adopt its law until December 1994.[3] It is entitled: "The Law on the Protection of Competition."[4]

II. The Importance of the Law

The Constitution of the Republic of Turkey, which was adopted in 1982, put the state authorities under the obligation "...to take measures to ensure and promote the sound, orderly functioning of... markets" and "to prevent the formation, in practice or by agreement of monopolies and cartels."[5]

Adoption of the new competition law[6] has thus been an important step for the fulfilment of the constitutional order by the state authorities. Secondly, Turkey, as an OECD Member country, has undertaken a number of common obligations with regard to an efficient use of economic resources, the pursuit of policies to achieve growth and stability without endangering the economy of other Member countries, the pursuit of efforts to minimise trade barriers and payment difficulties and a contribution to general economic development in Member and non-Member countries. Thirdly and most importantly, Article 37 of the Decision of the Association Council No:1/95 dated 6 March 1995[7] quotes that, "with a view to achieving the economic integration sought by the Custom's Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively." As it may be seen, Turkey undertook not only to adopt a competition law compatible with that of the European Community, but also has to effectively implement it.

Unfortunately, while the Parliament passed the Law on Protection of competition on 7th December 1994 and this Law entered into force, in general, following the publication on the Official Gazette on 13 December 1994, it has not been applied until now. This is due to the fact that the members of the Competition Board, which will be an independent body responsible for the application of this law, have not yet been appointed by the Council of Ministers. It is sincerely hoped that the Competition Board will be established soon and the law enforced effectively. Even though the Competition Board has not been established, one can nontheless litigate someone at the civil courts for the recovery of damages and indeed for triple damages by claiming of a breach of the Competition Law or defend himself at the civil courts by claiming that the agreement is void by virtue of the relevant provisions of the Law No. 4054.

III. Substantial Provisions of the Law

The substantial provisions can be summarised under three headlines:

1. *Prohibition of practices (agreements concerted practices and decisions) which prevent, restrict or distort competition (Article 4)* : the definition of the practices and even the examples of that practices are almost identical[8] to those of the Community Competition rules, namely Art 85 of the EEC;

2. *Prohibition of abuse of dominant position (Article 6)*: again, this provision is identical to the Article 86 of the EEC.

3. *Control of mergers and acquisitions: a*rticle 7 of the Law prohibits and declares void the merger of two or more undertakings or acquisition by an undertaking or by a person, of another undertaking which would create or strengthen the dominant position of one or more undertakings as a result of which competition would be significantly impeded either in the whole territory of Turkey or substantial part of it. The Competition Board shall publish the categories of mergers and acquisitions which, to be considered as legally valid, require a prior notification to the Board.

IV. The Competition Board and its Powers

The Competition Board is comprised of eleven members including the Director and the Vice-Director. [9] The Competition Board has been granted enormous power ranging from certifying negative clearance to imposing administrative penalties upon those who are found liable for prohibited practices. Even though the Board has been designed as a semi-judiciary organ[10] regarding to the autonomous structure and regarding to the eligibility of the membership, it is obviously an administrative body and this requires the judicial review of its decisions.

V. The Types of the Decisions (Acts) of the Competition Board

The Decisions (Acts) of the competition Board may be categoritized as follows:

1. *Decisions (Acts) for the Application of the substantial provisions of the Law; These acts can be subdivided into two groups: a) Regulatory (quasi-legislative) acts: f*or example, the Board may issue notifications to grant a block exemption to certain categories of agreements which it believes meet the conditions of the exemption mentioned in Article 5; *b) Non-regulatory decisions:* these are the decisions foreseen in various provisions of the law in view of its enforcement and to be addressed to individual undertakings such as negative clearance[11], individual exemption,[12] request of information[13] or declaration of opening of an investigation,[14] imposing penalties[15].

2. *Administrative Decisions of the Board*: these are decisions of the Board of an administrative nature and which are set out in several provisions such as the appointment of the Vice-Director of the Board[16] , the designation of candidates to be appointed by the Authority for Board's membership[17].

3. *Policy-Making Duties and Acts*: these are a third group of acts of the Board such as to following the legislation, practice, policy and measures of other state[18] to publish an annual report on its fields of activities and developments[19].

VI. Judicial Review of Competition Cases

In line with the main principle that "recourse to judicial review shall be open against all actions and acts of the administration"[20], the Law[21] provides that the decisions, injunctions (interim measures), fines and periodic penalty payments shall be subject to the review of the Council of State (High Administrative Court) in Ankara. The Turkish judicial system, similar to the French system, provides for a separate administrative judiciary system distinct from the civil courts. According to the Law of Council of State[22] and the Law of Procedure of Administrative Court Cases,[23] an administrative act can be appealed to the Administrative Courts or to the Council of State (which is the High Administrative Court), depending on the level of the acting administrative body. The Competition Law puts the Competition Board to a higher position, by describing the Council of State as the appeal court for the review of it's decisions.

The Administrative Courts review the administrative acts from certain points of views: did the administrative body have the competence? did it follow the procedure? did it watch limit of subject-matter of the law? does this act comply with the aim of the law and legislator? and is this act or decision contrary to the law or not? Usually the Administrative Courts are not permitted to review the issues of facts. The basis for reversal of the decision are limited to those which are shown on the law of procedure.

We do not know yet what would actually be the basis for review of the competition cases at the Council of State. However, it is not difficult to predict that the Council of State may well hear witnesses or experts on competition cases if the market definition or assessment of competitive effects is being discussed, on the grounds that all decisions should be in compliance with the competition law itself. This review process will likely not be an intervention to the discretion of the Competition Board; rather it will strengthen the reliability of its decisions or acts, provided that the Court find the competent experts to hear from.

Notes

1 Agreement Establishing an Association Between EEC and Turkey, J.O 1964, 3687; O.J 1977 L 361.

2 For more details on these efforts and various drafts, see: EROL, K: Turkish Competition Law as Compared with EEC Competition law, University of Amsterdam, Europe Institute, Amsterdam, 1989; ÖZSUNAY, E:Kartel Hukuku, Istanbul 1985.

3 The Law on the Protection of Competition Law No: 4054, dated 7.12.1994 Turkish Official Journal (Resmi Gazete) 13.12.1994.

4 A limited number of English copies of this law shall be distributed during the Seminar.

5 Article 167/1 of the Constitution of the Republic of Turkey.

6 The Law on the Protection of Competition Law: see references above

7 For the full text of Decision of the Association Council No: 1/95 dated 6 March 1995: O.J. L 35. 13 February 1996, p.1.41.

8 There has been some minor amendments on the Article 85 examples and of course, “affect between member States” condition has been lifted.

9 For the detailed information about the composition of the Board appointment conditions, durations of the members and procedure, see: Text of Law Articles 22-28 and 40-55, also EROL, Kemal, Rekabet Kurulunun Yapýsý, Yetkileri ve Usul, Rekabetin Korunmasý Hakkýnda Kanunun KOBÝ’lere Etkisi- Tesar Yayýnlarý No. 20 Ankara 1996 p.27.

10 These provisions perfectly comply with the provisions of the GATT’s (WTO) Draft International Antitrust Code. July 10.1993 Munich, and of the UNCTAD’s Draft Commentaries to Possible Elements For Articles of a Model Law or Laws. Intergovernmental Group of Experts on Restrictive Business Practices 18 October 1993 Geneva.

11 Art 8 of the Law.

12 Art 5 of the Law

13 Art 14 of the Law.

14 Art 15 of the Law.

15 Articles 16,17,18,19.

16 Art 27/e of the Law.

17 Art 27/j of the Law.

18 Art 27/h of the Law.

19 Art 27/k of the Law.

20 Article 125 of the Constitution of the Republic of Turkey 1982.

21 Art 55 of the Law.

22 Danýþtay Kanunu No. 2575 dated. 6.1.1982.

23 Ýdari Yargýlama Usulu Kanunu No. 2577 dated. 6.1.1982.

GENERAL DISCUSSION

Judge Lockhart - President, Australian Competition Tribunal

On judicial review, it is difficult to generalise too much outside the ambit of one's own experience and one's own jurisdiction. In Australia, appeals lie, from trial judges to appellate courts in competition as in other cases, on questions of law. They do not rely on questions of fact. Moreover, there are no jury trials on these questions in civil cases. To decide when findings of fact become questions of law is an interesting and uneasy question. We have developed principles more along the British lines, but not entirely in accord with them. The Australian mainstream was developped wider. Typical examples of judicial error in relation to findings of fact are the following: perception by the appellate court of a plain error of principle; irrelevant considerations taken into account; relevant considerations not taken into account; so unreasonable action in findings of fact that no reasonable fact finder could have made; misapplication of established authority or failure to apply established authority. Those are typical examples where the court can say that this is not just an error of fact. There is an error of principle, so there has been therefore an error of law - which in the Australian system can throw the whole fact finding exercise open to review.

When the courts are reviewing administrative decisions, such as the Competition Tribunal - the primary one in our case, they can interfere on the basis of the traditional prerogative rights or, more particularly, on the basis of the relevant act or acts of Parliament which set out the grounds of review. One interesting question is whether competition cases on review establish different principles or lead to different approaches. To an extent, they do because of the very nature of the subject matter. In competition cases, questions under review are such as markets, market power, misuse of market power, dominance, competition, public benefit, anticompetitive detriment, and many others. These are basically economic concepts. The trial judge must therefore use the basic facts to marshall his or her findings in the light of the facts and the economic evidence. The law in Australia recognises that they are economic concepts, embraces these and then gives to the trial judge the task of saying how they apply in the context of the statute in question. Then the court will see whether the trial judge correctly applied the economic concepts to the definition of market, for example.

The courts will judicially develop doctrines in order to define the question of liability, remedies, sanctions, etc.. These essentially become legal questions, questions of law, though in the ambiance of economic concepts. A misapplication by the lower court or tribunal of the concepts to the necessary statutory settings would be plainly an error of law, and that would lead therefore to an intervention by the appellate court. Has the trial judge, for example, misapplied economic concepts involved in the notion of market? In our country's case, the definition of market in the statute is the simplest possible: it really virtually means market for goods or services in Australia. That is in part the constitutional definition because of possible problems outside Australia. So it is very wide but the economic concepts have to work within that framework to establish it. A trial judge can plainly misapply them when reaching the question of market definition. That is the sort of issue appellate judges have to deal with. It is a fairly difficult jurisdiction on appeal, but judges do the best they can. It is true to say that there are special considerations, at least in Australia, that turn on what are basically economic concepts, which

may differ considerably from the average understanding of the person on the street to what they mean.

Paul Mafféi - Counsellor, Brussels Court of Appeal, Belgium

A general remark to begin with: some of our countries are still experiencing certain difficulties in approaching cases relating to competition. The countries concerned are those in which the rules of competition have recently been introduced. I am thinking in particular of Belgium, where the relevant law has been in effect since 1993 and where relatively few cases have been brought before the Court of Appeal. To date we have had three questions referred to us for a preliminary ruling, of which two received an answer; the third was rejected because it was not a question of law.

If were are experiencing difficulties of approach, it is because we lack experience. Ours obviously falls far short of that of our Anglo-Saxon colleagues (Australia, New Zealand, United States ...), since antitrust laws and regulations on competition are a very long-standing tradition in their countries. I find, moreover, that they have a very great deal to tell us about their experiences and about their approach. Our lack of experience perhaps explains why we naturally tend to adhere to the jurisprudence of the Luxembourg Court of Justice. It is not only because the law would have it so, it is also because this jurisprudence offers us a refuge or at least the possibility of finding points of reference that can be safely used.

It is difficult to foresee what the course of case law will be in the countries which are newcomers to the rules of competition. However, as regards the Member States of the European Community, the systems of law are fundamentally the same in their purpose. All, in substance, are shaped by the Community rules.

Diane P. Wood - Judge, Seventh Circuit Court of Appeal, United States

The mechanisms for judicial review tell a lot about how much weight and influence the authorities get versus the judges. They also raise some general issues. Appeal in the United States is of right on anything: law, facts, decisions from the FTC, the District Court, etc.. Anyone who wants to pay $105 can take an appeal to the Federal Court of Appeal. Standards of review are similar to those explained earlier: if we are listening a FTC case, we review it to see if the Commission's decision was supported by substantial evidence. That means that, even if we might have come out the other way, the decision stands as long as the Commission has reasonable support in the record for its decision. If there are legal issues involved, we review them *de novo*. In district courts, there are a number of different elements to review. If it is a jury trial, and if a question of fact is raised, the Constitution requires us not to re-examine the facts found by the jury, and that in general is true although there are exceptions if the jury was instructed improperly or if evidence should have come in. Judges in Circuit Courts look at questions of law. In the case of a decision by a district court, we look to see if its decision was 'clearly erroneous'. There are all sorts of formulations for that standard but it should really be striking and beyond what a reasonable person could conclude before to be found erroneous. We would almost never find a credibility determination 'clearly erroneous'.

There has been a trend in the Supreme Court in different areas of law to increase appellate review powers with mixed questions of law and fact. Talismanic importance should not be placed on the distinction between these two. In the United States, for example, the interpretation of a contract is thought to be a question of law. The reason is very simple. You can go way back in the common law and see that juries were not considered as up to the task of reading a written document and interpreting it. I could not tell you why that would be a question of law and defining a market would be a question of fact. It is because it is...

Judges in Circuit courts of appeal are really looking at two issues. One has already been mentioned: who has the greater expertise? would it be the agency or would it be the Court of appeal? If it is a question of fact, the agency is really the one where the expertise lies and the court should give the agency deference. But we are also looking at a broader question of whether case by case variation is desirable because the circumstances differ. Or, on the other hand, you may be looking for broad consistency. You could say that the definition of the relevant market should be a question of law because beer markets in the north-east should be defined as they are in the south-west. That is not the way in which it is done in the United States. But the interest at stake is how important is consistency on the one hand, or how important is it to vary things case by case, on the other hand. Therefore, we can describe the rules that follow from calling something a question of fact or a question of law, but it is really not that simple in the end.

Delegate for Ireland

Judge Vance in talking about the US experience made a very interesting point about how judicial precedent, particularly in the area of non-price vertical restraints, has evolved during the 60s and 70s. She explained that the current US position is that non-price vertical restraints are subject to a rule of reason approach. Most economists would agree on this. It is, however, fair to say that over the 10-15 year period the US Supreme Court did change its mind a couple of times before it finally settled one way. A similar note came out in the contribution from the Canadian Judge Mckeown where he talked about changes in the competition field, perhaps because precedents were less rigid or there was a greater flexibility than in other areas, although in part this is because of particular institutional arrangements.

That raises an important issue: competition is an area, at least from an economist's perspective, where a view of how competition works or what processes are or are not anticompetitive, is constantly changing over time. Basically, unharmful practices today would have been regarded as harmful in the past. Who knows what view will be taken in the future? Hopefully, judges and lawyers will not take that as an indication that we economists just simply cannot make up our minds about what is good and what is harmful.. This issue rather touches really upon the nature of how economics fits into competition law. A basic starting point is that virtually all competition laws are based on a notion that competition is good from the point of view of the economy. What economic analysis or, at least, what this branch of economic analysis tries to deal with is to analyse company behaviours and how behaviours of firms affect markets. We live in a changing world: it is therefore inevitable that our view of those behaviours is constantly changing over time. Legal rules should not be outdated by economic analysis. That is an important point. Economics have an important role to play in competition policy. It is equally important, from a legal point of view, to take account that economic analysis - the economic understanding of how competition works, how markets work - is an evolving concept.

Delegate for the United States

The advantages and disadvantages of judicial review were discussed at some length today. There are some imperfections, there are some difficulties, but we should keep our attention on another question which is: 'compared to what?' If there were not judicial review, what other system would we have? In the United States, the idea of conferring unreviewable discretion on an unelected bureaucrat like myself would be quite unpopular. The US system can work because the judges are there. Quite often, competition officials are required to challenge very powerful economic interests. Thinking again of our experience in the US, breaking up our largest corporation, (Standard Oil) at the turn of the century, or AT&T just a few decades ago, charging fines of $100 million - which is what happened just last week in a Justice Department case-, blocking somewhere between 50 and 100 mergers every year, means taking on some very powerful interests and requires a rough political consensus that competition enforcement is a good idea. My impression, on the basis of the US' experience, is that that kind of challenge is only acceptable because judicial review stands in the background. That is a building block of the rough political consensus that supports competition enforcement in the US.

Finally, Judge Vance mentioned something important: in our experience, judges are a moderating force. Where the law goes too far, judges stand ready to cut back on what the enforcement authorities, or private litigants, are saying in cases. However, there are two situations in which judicial review may not be as formidable as described. One is what can judges do in the face of non-enforcement? They can cut back excesses of enforcement but if you have minimalist enforcement that deals the judges out of the game, what can they do? A similar situation occured in the 1980s. The other development in the US is that more and more people point out that competition policy is becoming something approaching a regulatory state. The reason is that litigation in the US is now so expensive and the burdens on corporate executives so great that fewer and fewer cases are litigated. If that is going to be increasingly the case, then judicial review will have less of a role to play in structuring competition policy. It puts more of a burden on the regulators to be sure that what they are doing is moderate and meets acceptable standards.

Lars Jonson - Judge, The Market Court, Sweden

To go back to the perhaps starting point of this whole discussion, we could have some thoughts about the fact that competition laws are broadly worded. A new question could be appropriate here, although it should not be put to courts, but to economists and lawyers in general: must we take it for granted that competition law should forever have clauses with such a broad wording? General clauses of this kind are not very satisfactory from a legal point of view. They leave plenty of room for different interpretation as we have heard today and they do not create legal certainty. In spite of that, this type of clauses are since long widely accepted in competition legislation. Why is it so? Well, it is a tradition. They may be natural in common law countries like the US. For all countries, one obvious answer is that this field of legislation covers so complicated economic matters that more precise rules would not be flexible enough or otherwise not function well, or even be impossible to draft. On the other hand, attempts have been made by legislators in some countries to create more precise legal rules. Have these problems been studied as much as they deserve? In some countries, the question can be of fundamental importance for future developments of competition law. It could be a common and great challenge for scientific economists and lawyers.

Delegate for Japan

As mentioned in Ms Vance's presentation, there exists a great change of the competition enforcement policy in the US under the so-called 'Reaganomics'. But, as commented earlier by Mr. Potofsky and Ms. Wood, one can observe that, even though enforcement policy changes in accordance with the economic theory employed by competition authorities or in accordance with the economic or political conditions, it takes a longer time before the policy changes and has effects. Many articles say that the competition enforcement policy in the US greatly changed under 'Reaganomics' influence. In fact, it would seem that the real effects of this change were not so large, not so wide. I would like to be confirmed in this observation, if relevant indeed.

Diane P. Wood - Judge, Seventh Circuit Court of Appeal, United States

It is complicated to assess whether the 'Reaganomics' really made an important difference in enforcement. There was certainly a great decrease in the number of cases brought by the DOJ, and also by the FTC to a lesser degree. The types of cases brought also differed. On the other hand, States Attorney Generals started bringing more cases. In addition, private cases were being brought too. In my personal view, they may not have been huge changes if you count up in numbers indeed. In my opinion, the real change comes not from the enforcement agencies cases but from the fact that judges were put on the courts by President Reagan. They were very young and very committed to Reaganomics; they are now on for life. If you look at the content of the law, the rules slowly got reshaped through the eighties. We still have some of the rules that Judge Vance was talking about, restricting the rights of persons to bring suit, making it more difficult to stop a merger, etc.. These rules are a direct result of the philosophy of that period and are likely to stay for some time.

Delegate for Korea

There seems to be a general agreement in the US that new economic learnings and fact findings of the sixties and seventies have made their way to court decisions, especially since the late seventies. The Sylvaner decision on non-price vertical restraints and its aftermath illustrates the potential influence of economic thinking and evidence. But that does not seem to be the case with vertical price restraints, the economic impact of which is generally deemed to be identical or at least similar to vertical non-price restrictions. The Supreme Court, in my understanding, refused to deal with the question of changing the legal status of resale price maintenance, which was established almost a century ago. What characteristics of resale price maintenance warrant a judicial treatment different from other non-price restraints? Does that reflect the level of consensus among economists concerning the economic impact of resale price maintenance? On the contrary, if it implies a lack of coherence of antitrust rules, it would be one of the drawbacks of judge-made competition rules.

Sarah S. Vance, Judge, District Court of Eastern Louisiana, United States

One reason why the rule against resale price maintenance has not been over-ruled despite large-scale views that it should be - there are also a lot of other views that it should not among small

businesses - is that there is a political aspect to that rule. But it also hinges on price relationships which, in the American antitrust jurisprudence, are always viewed as the central nerve system of the economy. For that reason, the Supreme Court was reluctant to overturn the per se rule against resale price maintenance.

Diane P. Wood, Judge, Seventh Circuit Court of Appeal, United States

There is an interesting decision from the Chicago Seventh Circuit Court written by our chief judge, Richard Posner, about a month ago on the question of whether maximum vertical price-fixing is still illegal *per se* in the US. Probably to the great surprise of the defendants in that case, Judge Posner is on the way towards saying that maximum price fixing is still illegal *per se*. He has a very interesting economic discussion of some of the theories under which one might plausibly take that position. And then he goes on saying what nonsense he thinks those theories are. Practically in bold-faced letters, he says to the Supreme Court 'I'm a lower court judge and I can't get rid of this rule, but you should take a look at it'. So we can all stay tuned.

Delegate for the United Kingdom

The OECD is trying to spread the gospel of competition policy, at least through the OECD if not further, and particularly with a view to improving trade flows between countries, which some people think can be obstructed by deficiencies in competition policy. Against that background, there are many proposals to try to have some kind of world competition law agreed at the WTO or co-operation agreements and so on. All of those items look really difficult to get very far. There is, however, a certain amount of discussion going on about them. Meetings like this conference and a whole lot of other methods of dissemination of judicial decisions actually cause quite a degree of convergence between competition policies in different countries. Convergence brought about by these methods of dissemination, not just seminars, but through the judgements flowing from one country to another, people taking an interest in them and studying them and so on, actually brings about a certain proportion of the aims that we, competition authorities in the OECD, are trying to achieve through these other more difficult means of having actual international agreements that we all sign up on.

Delegate for New Zealand

The point is that courts really have to wait for parliaments, for the law-makers to actually give them powers to obtain information from overseas jurisdictions, for example. In fact, it may not be their own parliament; it may be a parliament from an overseas country that has to give them those powers. Perhaps two situations are relevant in this context. Firstly, for example, under the New Zealand Commerce Act ,a firm with a dominant position in the Australian market is prohibited from using that for anticompetitive purposes in New Zealand. A mirror provision exists in Australia. Such provision did actually require political negotiation before those provisions could be put in because essentially it was a matter of Australia giving some sovereignty to New Zealand and vice versa. There was a sort of acceptance that it was in our common interest to do so. Secondly, a case occurred a few years ago (called Helenus Steel) when the Australian Trade Practices Commission did try and took an action against a merger that occurred in NZ: it was simply a takeover of a NZ steel company by an Australian steel

company on NZ territory. Such merger was therefore pretty much beyond the practical stretch of the Australian courts. In that case, my recollection is that Justice French said that the Australian Court had jurisdiction over this matter in a theoretical sense. But through the judgement, comments were that there was nothing in Australia that could really be done. And subsequently that is the way it actually proved to be.

Delegate for Japan

We discuss how crucial a role the judiciary are playing in the enforcement of competition policy. If we look at this from the international corporations point of view, one point must be seriously taken into account: if a judiciary of a country takes a decision on a trade related issue and if the other country concerned is not satisfied with the decision of that judiciary, what can this other country do? Usually, the decision of the judiciary of that country is final. The judgement made in competition issues is therefore of a different nature as compared to trade measures. Most trade decisions are taken by governments. They can therefore be changed in one way or another.

Frédéric Jenny, Chairman of the Committee on Competition Law and Policy

This is an important question, which the CLP together with the Trade Committee is going to talk about for a while, on exactly how one can solve the problems that you talk about. One realises that the enforcement of competition law involves the judiciary and that the judiciary is an independent institution within the government. As an economist - and therefore not particularly qualified to try to reflect on this debate - I was struck by the weight given by several speakers on the fact that competition law has to be seen in the larger context of the social and political values of the country and that you cannot treat it only as applied micro-economics theory. It was notably illustrated by Ms. Brunt when she mentioned that efficiency was not the reason why she was interested in, or not the only reason why, she was interested in competition law and policy and that there were other wider objectives that one tried to achieve. Now, having said that, everybody agreed that economic analysis is however useful to deal with the problems of competition law.

A long exchange was held on how to get economic expertise into the judicial process. To get what? A more efficient enforcement of the law or to get an enforcement of the law which is somehow better given its goals. One of the lessons we learned was that, holding constant the law, the procedural way in which the economic expertise is introduced is going to make a difference. We also talked about efficiency of competition law by saying that, holding constant the law, you get different results depending on whether prohibitions are criminal, civil or administrative. In addition, if you get more predictability, there is less flexibility, and with more flexibility, less predictability. In a large number of cases, the end result of law enforcement is going to depend on the procedural aspects as well as on the way the economic expertise is going to be introduced.

Now, what strikes me is that within the CLP Committee, among competition authorities, we have not up to this date given a great deal of thought to thess issues. And even worse, I would say, OECD like other organisations or competition authorities have promoted competition law in countries in transition, focusing practically exclusively on the provisions that they would like to see in the law. They gave no real attention to the broader context of those countries, to the way

in which those countries were going to get economic expertise and to the relationships between the procedural - the judicial - system and the way in which the competition law was going to be administered. In my personal opinion, this explains why, in some countries, the results may have not been so far up to expectations, in spite of a very significant amount of technical assistance given by countries which had some experience in competition law.

SECTION III

BACKGROUND NOTE [*]

John W. Clark[1]

This Seminar on judicial enforcement of competition law is the first such OECD-wide meeting on this subject. It presents a unique opportunity for the exchange of ideas and experiences among judges and competition officials across many countries on this important subject of competition enforcement. The agenda is ambitious; it could occupy substantially more than one day. Nevertheless, the seminar promises to be a fruitful one. The following is an overview of some of the issues presented by each of the five topics scheduled for discussion during the day. Suggested questions for discussion are posed at the end of each section. These are merely suggestions, however. Time may not permit exploration of all of the questions, and conversely, participants may wish to raise other issues relevant to each topic.

I. The Role of the Judiciary in the Implementation of Economic Policy

Judges and courts do not make policy directly, but they have an important role in its implementation. The judiciary is nowhere more significant than as the final arbiter in matters of commerce. Smoothly functioning markets require certainty that valid contracts are observed. Fair and effective judicial enforcement of contractual obligations provides that certainty. In addition, governments impose a myriad of other rules that govern and shape commerce, ranging from taxation and regulation of capital markets to safety and environmental regulations and labor standards. In most countries the courts enforce these rules, either in initial enforcement proceedings or as reviewers of administrative decisions. The task confronting judges in these situations may be exceptionally complex.

Almost all countries with advanced market economies have competition laws, and most transition and developing countries have such a law or are in the process of creating one. A competition law is an overarching set of rules that touches in some way almost all sectors in a market economy, including those in which there is a substantial amount of regulation. In most countries, these laws too are ultimately enforced by the courts.

National legal systems vary among countries, and so do mechanisms for enforcing competition laws. Judges who hear and decide competition cases may be generalists or specialists; they may be members of the national court system or of a specialised competition tribunal; they may take evidence and render decisions of fact and law in the first instance or they may hear appeals from administrative decisions, acting only on the record created in the lower tribunal; they may hear several antitrust cases in a year, or they may hear only one or a few in a period of several years.

Nevertheless, there is much in common across countries in enforcement of competition laws. The laws themselves share common substantive provisions in many cases. The Committee on

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[*] Texte en français disponible à la page 175.

1 John W. Clark is a Consultant to the OECD. Most of its prior career was spent in the Antitrust Division of the United States Department of Justice, where he held several positions, most recently Deputy Assistant Attorney General, Antitrust Division.

Competition Law and Policy ("CLP Committee"), of course, in its work on convergence has identified broad areas of agreement among Member countries on substantive competition policy. Most competition laws contain provisions prohibiting restrictive agreements, both horizontal and vertical, and most apply a stricter standard to traditional cartel conduct, such as price fixing and market allocation. Abusive conduct by dominant firms is prohibited, though there is not universal agreement on the forms of conduct that may be considered abusive. Finally, control of mergers is considered necessary to prevent the creation of market structures in which abuse of dominance and anticompetitive restrictive agreements would be substantially more likely.

Competition laws are written in general terms, however. Business conduct is ambiguous on its face, save perhaps the "naked" cartel arrangement, in the context of the rules governing competition. Enforcement officials and the judiciary are faced with the task of separating the competitively harmful conduct from the procompetitive, or merely benign. Such enquiries are therefore necessarily fact-intensive. There are differences among countries on the best way to undertake the difficult tasks of assembling and understanding complex factual material and applying general and ambiguous standards in evaluating it. The judiciary, whether specialised or general, may be more or less involved in the process.

In most countries, however, important competition cases are ultimately subject to judicial review, and thus the judiciary's role is an important one. As noted above, the courts do not make policy, nor in the matter of competition enforcement do they initiate cases. The broad, general standards that govern competition enforcement inevitably invest the enforcement authority with significant discretion in its prosecutorial decisions. In this regard, the competition authority has more such discretion than most government enforcement agencies, and the courts can exert important control over the exercise of this discretion. In common law countries, judicial decisions define and elaborate the legal standards that govern the competition agency's decisions. In all countries, success or failure in court shapes the enforcement decisions of the agency, and ultimately the country's competition policy itself.

> *What is the proper role of the judiciary in the implementation of national economic policy? How can the function of judicial review be employed most effectively to influence a country's competition policy? What are the limitations (institutional, procedural, national customs or traditions) that hinder effective enforcement of competition laws by the judiciary, and how can these limitations be overcome?*

II. The Role of Economics and Economists in Competition Cases

Competition policy is grounded in economics. Its purpose is to preserve an environment in which markets can function most effectively, according to generally accepted economic principles. Economics is not the only basis for competition policy in most countries, of course, but is likely to be the most significant. Economics is a science, if a relatively inexact one, that is not easily understood by non-economists. How can the lay competition enforcement community, in particular the judiciary, function effectively in such a technical environment?

In many countries, economics and practical experience in competition enforcement have combined over time to bring about analytical shortcuts, or presumptions, that obviate the need for sophisticated economic analysis in every case. Thus, both practical experience and economics teach that cartel conduct, without more, is harmful and should be proscribed. In most countries where such conduct is found, it is almost automatically enjoined and punished. It is usually unnecessary to examine in detail, or at all, the actual effects of the activity. (Identifying and analysing those situations in which restrictive

horizontal agreements may be combined with some efficiency-enhancing integration, however, poses a considerably more difficult challenge.)

Market structure, measured in terms of shares of output, capacity or sales held by market participants, is considered a predictor, though not sufficient by itself, of the competitive consequences of some business conduct. In some cases, the existence of high concentration may operate to create a presumption of illegality of certain conduct, including some mergers and exclusionary conduct by large firms. More recent economic thinking has cast doubt on the validity of some of these presumptions, however. More widely employed, on the other hand, are "negative" presumptions, or "safe harbours", based on market concentration. Mergers in markets in which pre and post-merger concentration are below certain specified levels may be considered lawful, without the need for further inquiry, because economics tells us that the likelihood of successful, harmful restrictive agreements or single-firm conduct is low or nonexistent where concentration is so low. A similar test may be applied to the definition of dominance. A firm cannot be considered dominant if its market share is below, say, 35 per cent. Concentration safe harbours may also be employed in analysis of restrictive non-cartel horizontal and vertical agreements.

Most issues that arise in competition analysis cannot be so readily resolved, however. Perhaps the single most important -- and vexing -- analytical issue is that of market definition. It is important because it cuts across all types of competition cases, save possibly cartel conduct. It is vexing because it is both fact-intensive and inexact. Economics provides a means of solving the problem -- identifying and measuring the degree of substitutability of products and locations of production or supply -- but the paradigm is almost impossible to use scientifically, such as by analysing transaction data relating to such substitutability, because the reliability and adequacy of such data are almost always subject to question, and also because most courts are not conversant with the rigorous statistical techniques that must be employed.

Courts and enforcement officials are usually more comfortable dealing with anecdotal evidence, including opinions of buyers and sellers, about aspects of substitutability in market definition inquiries. Such an approach has its own obvious weaknesses, however. A great deal of such evidence is required if it is to be credible, and such evidence can often be found supporting both sides of an issue.

Another area in which rigorous economics confronts practical competition analysis is in consideration of efficiencies. There is broad consensus that competitive markets result in the most efficient allocation of resources, which benefits consumers through greater output and lower prices. Efficiency considerations are important in competition analysis, therefore, but it seems that they are not often directly considered in competition cases. This is apparently so because efficiencies are so difficult to measure in specific cases, and balancing the efficiency gains against possible harm from anticompetitive conduct may be even more challenging for non-economists. (Of course, there may be other reasons why, in some countries, efficiencies are not usually an explicit factor in competition cases, including the existence of other public policy goals embodied in national competition policy.)

It appears that courts and competition authorities prefer to consider efficiencies indirectly, through, for example, the use of concentration safe harbours. The safe harbor may be constructed at least in part specifically to encompass many or most efficiency-enhancing transactions. In transactions that fall outside the safe harbor, efficiency gains can overcome demonstrated anticompetitive effects only in extraordinary circumstances. This approach permits certainty and ease of application, but it may be insufficiently sensitive to what is a central economic underpinning of competition policy.

Given that most judges of competition cases are not economists, there obviously can be a role for an expert economist as witness or advisor to the court in a competition case. First, for judges not conversant with basic economic principles the expert can provide the economic framework for evaluation of the case. Second, the expert can provide analysis of difficult factual issues in the case, especially those in which there is a significant amount of apparently conflicting evidence. Finally, the expert can provide opinion and analysis of the more ultimate and decisive issues in the case, including particularly an assessment of the likely competitive effects of the conduct in question. The procedures for obtaining such expert assistance may vary. In an adversarial system both sides to the case may provide their own experts in support of their position, and the court must evaluate the testimony of both. Alternatively, an expert or experts may be chosen to advise only the court. There are advantages and disadvantages to both methods.

> *Given the importance of economics in competition analysis, is it advisable to ask judges with little or no economic background to decide such cases? In any case, how can such non-specialist judges be informed of relevant economic analysis in specific cases? Given the specialised and technical aspects of economic policy, including particularly competition policy, are generalist or specialist judges better equipped to hear these cases, and if generalist judges are involved, how can they equip themselves for the task?. What legal inferences are permitted from economic analysis? Is it advisable to employ more or fewer of such "shortcuts" and if fewer, how can non-expert judges make accurate decisions? What is the value and role of expert witnesses and advisors in competition cases? Do the answers differ between the different categories of courts (ordinary versus specialised courts) and between countries? In particular, is there a difference between countries in which the principle of prohibition applies to the competition law, as opposed to those in which the abuse principle applies?*

III. Standards of Proof in Competition Cases

The ultimate substantive standards in competition cases are brief and general, such as "prevention, restriction or distortion of competition," or "substantially lessen competition." Moreover there are often several intermediate issues in competition cases, such as market definition or conditions of entry, any one of which may be determinative. These issues are both complex and fact-intensive. Courts must both evaluate the probative value of large amounts of often conflicting evidence and apply to that evidence accurate, but practical, legal standards that are not specifically prescribed in the competition statute.

Specific issues of this type are presented in every type of competition case. In cartel cases, for example, which are on the whole the most straightforward of competition cases, it is necessary nevertheless to prove that an agreement of a certain kind was reached. The evidence may permit, however, only an inference of agreement from certain conduct of the parties or from circumstantial evidence. Is evidence solely of "conscious parallelism" sufficient in this regard?

As noted above, market definition requires consideration of the substitutability of products and of sources of supply. Substitutability is usually a matter of degree, however. Some buyers (sellers when evaluating possible monopsony power) will more readily substitute between a set of products than others. Except in obvious situations the evidence on this issue will be contradictory and possibly indeterminative. In these situations courts may be tempted to adopt for purposes of competition analysis generally recognised industrial classifications that have been created for other purposes. Short of employing such external indices, which may not be sufficiently accurate for the purposes of competition analysis, there appear to be no good means of simplifying this most important step in the process.

In abuse of dominance cases, a critical first step is determining whether or not the subject firm is dominant. As noted above, a large market share is necessary for dominance, but it is not sufficient. Unless entry into the relevant market is also difficult, the large firm has no market power. But when is entry sufficiently "difficult," and how can such difficulty be measured? In one sense, the standard for measuring difficulty of entry may be relatively arbitrary, for example, if it takes more than two years for successful entry it may be considered difficult. In other ways, the entry analysis is not susceptible to generalisation. A high absolute cost of entry, for example, may not signal real difficulty if all or most of the costs are not sunk, or if they are small relative to the size of the industry. The entry issue has come to be one of the most technical in competition analysis. Courts are faced with a real challenge in articulating a practical and accurate standard for this issue.

Mergers may be the most difficult type of case for courts and competition authorities, if only because merger cases involve all of the most complex analytical issues, including market definition, analysis of entry conditions and evaluation of competitive effects. The effects issue is especially challenging because it is prospective; it requires a prediction of future effects of present conduct. In all types of cases, however, again possibly saving only cartel cases, analysis of the competitive effects of the subject conduct is required. Moreover, competition laws impose a vague standard of substantiality. Most laws either by their terms or as a result of interpretation and practice, proscribe not all anticompetitive conduct but only that which is "substantially", or "significantly" anticompetitive. Courts and competition authorities are left to articulate that standard in a more concrete fashion. They may or may not resort to relatively "bright line" tests, for example, a presumption of unlawfulness of mergers resulting in a certain degree of market concentration.

In the analysis of competitive effects courts are likely to turn to evidence, if it exists, of the parties' purpose in employing the subject conduct. Evidence of intent to bring about an anticompetitive result, as well as a procompetitive one, is relevant in this regard. Probative evidence of the former, however, may not often be found, particularly if the parties are well counselled about how to avoid creating such evidence. In the absence of such a clear signal about the expected effects of the conduct in question, courts face a more difficult challenge in reaching an ultimate conclusion about the benefits or harm therefrom.

> *How do courts develop and employ the specific standards of proof that are required to implement the more general standards articulated in most competition laws? Such standards include the following: simplified burdens applicable to certain types of anticompetitive conduct, usually cartel conduct; substitutability of products or sources of supply in defining markets; assessment of entry conditions; necessity of proof of anticompetitive purposes or intent; magnitude of required anticompetititve effect, e.g. "significant" lessening of competition; proof of agreement -- tacit v. explicit agreements. What presumptions are employed in this regard, and are they sufficiently reliable?*

IV. Judicial Review of Competition Cases

In most countries, courts become involved in competition cases only at the appellate level, reviewing decisions of administrative tribunals. They normally do not hear or evaluate evidence. They usually do not consider questions that are strictly factual in nature, except possibly to decide whether the record contains the necessary minimum factual basis for a conclusion by court or authority below. Thus, appellate judges on balance are not regularly or intimately involved in competition enforcement. They are

likely to hear relatively few cases in comparison to the total number of enforcement actions instituted by the competition agency, and their role in the cases that they get is limited to the traditional function of appellate review of administrative actions, which in many countries affords a measure of discretion to the administrative authority. What is the real significance, therefore, of the judiciary in competition enforcement in most countries?

The answer to this question is country-specific, of course, but the nature of competition cases affords the opportunity for substantial involvement by the courts at the appellate level. While appellate courts normally consider only questions of "law", as opposed to questions of "fact", that dichotomy may be blurred in competition cases. Is assessment of the competitive effect of the conduct in question, for example, an issue of fact or law? In any case, whether the tribunal below applied the correct method of analysis to the competitive effects analysis is likely to be reviewable at the appellate level, and as noted above, the proper articulation and application of relevant standards is critical in most competition cases.

If the tribunal below is a specialised one, whose members are experts in economics or competition policy, it may be afforded relatively more latitude in courts of appeals. It may be possible to overturn its decisions only upon a showing that it made a gross, or egregious error. These are matters that are specific to each country. The experience in countries where the judiciary is relatively more active in competition cases, however, suggests that generalist judges can exercise their appellate function capably in these cases, as in other types of cases involving complex commercial or scientific issues.

There are differences among countries as to the role of judicial precedent, which in turn could affect the manner and extent to which courts influence competition law and policy. In common law countries, of course, judicial precedent has a binding effect in appropriate circumstances. In this sense judges in common law countries "make" competition law much more than their counterparts in countries with a Roman law tradition. In the latter countries, the written law is likely to be more detailed, leaving relatively less room for judicial interpretation.

In common law countries judges are likely to have more flexibility to adjust competition law enforcement to changing economic and technological conditions, as well as, of course, to changing economic thought. Such flexibility can be useful in today's economic climate, in which markets are changing at an ever more rapid pace. On the other hand, the enforcement authority in all countries presumably retains such flexibility. In any case, the written competition law is relatively static in all countries, and thus accuracy and consistency of enforcement is important everywhere.

A separate question is whether applicable administrative or judicial procedures unduly limit the role of the courts in implementing competition policy. The competition agency may have broad authority to compromise or settle matters in dispute. These powers, coupled with possibly onerous expenses and delays associated with litigation, may make appeals of administrative decisions unpalatable to most parties. In some quarters there are calls for more active judicial supervision of decisions by competition authorities that do not result in litigation. On the other hand, a significant restriction of the competition agency's discretion to prosecute and compromise cases could severely impair its ability to enforce a law that, most agree, requires the intelligent exercise of such discretion.

> *What is the distinction between issues of fact and law in competition cases; for example, are market definition and assessment of competitive effects issues of fact or law? On what basis should an administrative decision be subject to reversal for an insufficient factual or legal foundation? What is the role of precedent in judicial enforcement of competition cases respectively in common law and Roman law systems? What are the advantages and*

disadvantages of both systems in terms of judicial enforceability, predictability and consistency in competition casesAre the courts getting "enough" competition cases, and if not, is the problem related to national administrative and judicial structures that control the manner in which such cases are resolved?

V. Accommodation of Multiple Criteria in Competition Cases

As noted above, economics is in most countries the principal underpinning of competition laws, but other public policies may also find expression in the enforcement of these laws. There may be conflict between applicable policies in a given case, requiring courts to exercise a balancing function. It may be necessary somehow to weigh the perceived competitive harm from the conduct under scrutiny against other benefits to the public that are cognizable under the law.

Even when a strict economic analysis is employed, a balancing of conflicting interests is sometimes required. In particular, in a rule of reason analysis it may be necessary to balance expected efficiency gains from the relevant conduct against anticipated harm to competition that will also result. Economists have devised an elegant method for doing so in a quantitative manner. The cost savings resulting from efficiency gains are compared to the "dead-weight loss" caused by the expected anticompetitive price increase. This exercise is technical and relatively sterile, however, and there is disagreement among some economists and knowledgeable competition officials over the precise standard that should apply (e.g., "total surplus" vs. "total welfare"). In any case, as noted above, courts have not embraced the method to date and in general have preferred not to attempt directly such a balancing effort.

Other public policies also impinge upon competition policy to a greater or lesser extent in many countries. They include enhancement of employment (or reduction of unemployment), enhancement of competitiveness of national firms in international markets, promotion of regional integration, and protection of small firms against more powerful, larger ones. One or more of these objectives may conflict with the more narrow allocative efficiency goal in any given case, and the task may fall to the court to decide which is the more important in those circumstances.

There may also be conflict, real or perceived, between competition policy and other national laws. There is tension, if not conflict, between competition laws and those protecting intellectual property. The latter create property rights (considered by some to be "monopolies", but that is not always, or usually, the case) because it is necessary to provide adequate incentives for innovation. Courts may have to consider this underlying purpose of intellectual property laws when confronted with allegedly anticompetitive abuses of those rights. Similarly, while competition laws are said to "protect competition, not competitors" other laws may prohibit "unfair" competition. These two laws may conflict in some respects, particularly if public policy favors protection of certain classes of competitors, such as small and medium sized businesses, for reasons other than promotion of efficiency.

In every country there is pervasive regulation of some economic sectors, usually because they are characterised by elements of natural monopoly. Absent express exemption, competition laws may also apply to these industries, because parts of them can operate successfully in a competitive environment. Courts may be called upon in a given case to determine when competition should prevail over regulation, or vice versa. This exercise may include having to decide which of the public policies underlying the competition and regulatory regimes, respectively, are more important in the case at hand.

Given the broadly-worded competition laws in most countries, what are the legitimate goals of such laws, and how can courts identify and apply them? How can courts properly implement competition laws while taking into account other national laws such as intellectual property law or laws on unfair competition? When is it appropriate to permit anticompetitive conduct because of another overriding public interest, and how can courts balance such conflicting interests? In the absence of express legislative guidance, how can courts determine which public policy objectives are applicable to the case at hand?

DOCUMENT DE RÉFÉRENCE

John W. Clark[1]

Ce séminaire sur la mise en oeuvre judiciaire du droit de la concurrence est la première rencontre à l'échelle de l'OCDE consacrée à cette question. Il constitue une occasion unique d'échange d'idées et d'expériences entre juges et responsables de la concurrence de nombreux pays sur cet important sujet qu'est la mise en oeuvre du droit de la concurrence. L'ordre du jour est ambitieux ; il faudrait nettement plus d'une journée pour en venir à bout. Quoi qu'il en soit, ce séminaire promet d'être un succès. On trouvera ci-après un tour d'horizon de quelques-uns des problèmes posés par chacun des cinq thèmes qu'il est prévu d'examiner au cours de cette journée. A la fin de chaque section sont proposées des questions à examiner. Il ne s'agit cependant que de suggestions. Compte tenu du temps imparti, il se peut que toutes ces questions ne puissent être explorées et, à l'inverse, les participants pourraient souhaiter poser d'autres questions concernant chacun de ces thèmes.

I. Le rôle du système judiciaire dans la mise en oeuvre de la politique économique

Les juges et les tribunaux n'élaborent pas directement la politique économique, mais ils jouent un rôle important dans sa mise en oeuvre. Le rôle essentiel du pouvoir judiciaire à cet égard est d'arbitre ultime en matière de commerce. Pour que les marchés fonctionnent sans à-coups, il faut être certain que les contrats soient valides et respectés. La mise en application loyale et effective des obligations contractuelles pour les juges apporte cette certitude. En outre, les gouvernements imposent une myriade d'autres règles qui régissent et encadrent le commerce et vont de la fiscalité et de la réglementation des marchés des capitaux aux règles sur la sécurité et l'environnement et aux normes de travail. Dans la plupart des pays, les tribunaux sont chargés de l'application de ces règles, soit dans le cadre de poursuites, soit dans celui du contrôle des décisions administratives. Les tâches auxquelles sont confrontés les juges dans ces situations peuvent être extraordinairement complexes.

La quasi-totalité des pays à économie de marché développée sont dotés d'un droit de la concurrence et la plupart des économies en transition et en développement possèdent une législation en la matière ou sont en passe d'en élaborer une. Le droit de la concurrence est un ensemble de règles à vocation universelle, qui d'une façon ou d'une autre touchent la quasi-totalité des secteurs d'une économie de marché, y compris ceux où il existe déjà une grande quantité de réglementations. Dans la plupart des pays, l'application de ces réglementations incombe également en dernière analyse aux tribunaux.

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Les systèmes juridiques varient d'un pays à l'autre, tout comme les mécanismes d'application du droit de la concurrence. Les juges saisis des affaires de concurrence peuvent être des généralistes ou des spécialistes ; ils peuvent être membres des juridictions de droit commun ou de juridictions spécialisées en matière de concurrence ; ils peuvent se prononcer en première instance ou sur un pourvoi en appel ou en cassation ; ils peuvent avoir à connaître plusieurs affaires antitrust par an, ou quelques-unes, voire une seule, sur une période de plusieurs années.

Toutefois, il existe entre les pays beaucoup d'éléments communs en matière de mise en oeuvre du droit de la concurrence. Dans de nombreux cas, on trouve dans les textes les mêmes dispositions de fond. Le Comité du droit et de la politique de la concurrence (CLP) a bien évidemment lors de ses travaux sur la convergence recensé de vastes domaines d'accord entre les pays Membres en matière de politique de la concurrence. La plupart des droits de la concurrence comportent des dispositions interdisant les accords restrictifs, tant horizontaux que verticaux, et prévoient l'application de normes plus strictes aux ententes traditionnelles comme celles sur la fixation des prix et la répartition des marchés. Les pratiques abusives de la part d'entreprises dominantes sont interdites, malgré certaines divergences quant aux types de pratiques pouvant être considérées comme abusives. Enfin, le contrôle des fusions est jugé nécessaire pour éviter la création sur le marché de structures au sein desquelles l'abus de position dominante et des accords restrictifs anticoncurrentiels auraient nettement plus de chances de se développer.

Quoi qu'il en soit, le droit de la concurrence est rédigé en termes généraux. Si l'on se place au niveau des règles régissant la concurrence, les pratiques des entreprises sont à première vue ambiguës, sauf peut-être les ententes pures et simples. Les responsables de l'application des lois et le pouvoir judiciaire ont pour tâche de distinguer les pratiques préjudiciables à la concurrence de celles qui lui sont favorables ou qui ne constituent que des violations bénignes. Ce type de démarche nécessite donc la prise en compte de nombreux faits. Il existe entre les pays des différences quant à la meilleure méthode pour mener à bien les tâches difficiles de collecte et de compréhension d'éléments factuels complexes et d'application de normes générales et ambiguës pour leur évaluation. Le système judiciaire, spécialisé ou général, peut plus ou moins intervenir dans ce processus.

Dans la plupart des pays, les affaires de concurrence importantes font cependant, en définitive, l'objet d'un contrôle judiciaire et le rôle des juges est donc essentiel. Comme on l'a fait remarquer précédemment, les tribunaux n'élaborent pas la politique, pas plus qu'ils n'engagent des actions en matière d'application du droit de la concurrence. Du fait des normes générales qui régissent cette application, les autorités qui en sont chargées disposent en matière de poursuites d'une marge de manoeuvre considérable. A cet égard, les autorités chargées de la concurrence bénéficient d'un pouvoir d'appréciation plus large que la plupart des organismes gouvernementaux chargés d'assurer le respect de la loi, et les tribunaux peuvent exercer un contrôle sur l'usage de ce pouvoir d'appréciation. Dans les pays de common law, les décisions judiciaires définissent et précisent les normes juridiques régissant les décisions des organismes chargés de la concurrence. Dans tous les pays, l'échec ou le succès devant les tribunaux détermine les décisions de l'organisme chargé de l'application et finalement la politique de la concurrence elle-même.

> *Quel est le rôle propre aux juges dans la mise en oeuvre de la politique économique nationale ? Comment la fonction de contrôle judiciaire peut-elle être employée le plus efficacement pour influer sur la politique de la concurrence d'un pays ? Quelles limites (sur le plan des institutions, des procédures, des coutumes ou traditions nationales) freinent l'application effective du droit de la concurrence par les juges et comment peut-on les surmonter ?*

II. Le rôle de la science économique et des économistes dans les affaires de concurrence

La politique de la concurrence se fonde sur la science économique. Son objet est de préserver un environnement dans lequel les marchés puissent fonctionner le plus efficacement, selon les principes économiques généralement admis. Certes, la science économique ne constitue pas dans la plupart des pays le seul fondement de la politique de la concurrence, mais c'est probablement le plus important. Fut-elle relativement inexacte, il s'agit d'une science qui n'est pas aisément compréhensible par les non-économistes. Comment les instances chargées de l'application du droit de la concurrence et, en particulier, les juges, réagissent-ils effectivement dans un tel environnement technique ?

Dans de nombreux pays, la science économique et l'expérience concrète en matière d'application du droit de la concurrence ont abouti au fil du temps à des raccourcis analytiques, des présomptions, qui évitent d'avoir à procéder à une analyse économique sophistiquée dans tous les cas. Ainsi, tant l'expérience pratique que la science économique nous apprennent que les pratiques d'entente sont en soi néfastes et devraient être proscrites. Dans la plupart des pays, lorsqu'on constate de telles pratiques, elles sont presque automatiquement prohibées et sanctionnées. Habituellement, l'étude détaillée, voire le simple examen, des conséquences réelles de l'entente n'est pas indispensable. (Il peut être beaucoup plus difficile de repérer et d'analyser les situations dans lesquelles des accords restrictifs horizontaux peuvent s'accompagner d'une intégration renforçant l'efficience.)

La structure du marché défini en termes de parts de production, de capacité ou de vente des participants, est considérée comme un indicateur, certes insuffisant en soi, mais permettant de prévoir les conséquences sur la concurrence de certaines pratiques des entreprises. Dans certains cas, l'existence d'une forte concentration peut entraîner une présomption d'illégalité de certaines pratiques, y compris certaines fusions et pratiques d'exclusion de la part de grandes entreprises. Toutefois, des analyses économiques plus récentes ont remis en cause la validité de certaines de ces présomptions. D'un usage plus répandu, on trouve à l'opposé les présomptions "négatives" ou "marges de tolérance" basées sur la concentration des marchés. Les fusions opérées sur des marchés où la concentration avant et après ces opérations est inférieure à certains niveaux précisés, peuvent être considérées comme licites, sans qu'il soit nécessaire d'enquêter plus avant, car la science économique nous enseigne que lorsque la concentration est faible, la probabilité d'accords restrictifs néfastes ou de pratiques monopolistiques est également réduite. On peut appliquer un critère similaire à la définition de la position dominante. Une entreprise ne peut pas être considérée comme dominante si ses parts de marché sont inférieures à, disons, 35 pour cent. Les marges de tolérance en matière de concentration peuvent également servir dans l'analyse des accords restrictifs horizontaux et verticaux ne présentant pas un caractère d'entente.

Quoi qu'il en soit, la plupart des problèmes rencontrés dans l'analyse de la concurrence ne peuvent être résolus aisément. Sans doute le plus important -- et le plus délicat -- d'entre eux est celui de la définition du marché. Il est important car on le retrouve dans tous les types d'affaires de concurrence, sauf peut-être celles concernant les pratiques d'entente. Il est délicat car une telle définition nécessite la prise en compte de nombreux faits et est entachée d'inexactitude. La science économique offre un moyen de résoudre ce problème -- déterminer et mesurer le degré de substituabilité des produits et des lieux de production ou d'approvisionnement --, mais ce modèle est quasiment impossible à utiliser de façon scientifique dans le cas, par exemple, de l'analyse des données relatives aux transactions concernant cette substituabilité, car la fiabilité et l'adéquation de telles données sont presque toujours sujettes à caution et que la plupart des tribunaux ne sont pas au fait des techniques statistiques rigoureuses qui doivent être utilisées.

Pour ce qui est des aspects relatifs à la substituabilité dans les investigations concernant la définition du marché, les tribunaux et les responsables de l'application de la loi sont plus habitués à traiter de faits anecdotiques, comme les opinions des acheteurs et des vendeurs. Mais ce type d'approche présente aussi des faiblesses évidentes. Pour que ces éléments soient crédibles, il faut en réunir un grand nombre, car ils peuvent souvent s'avérer favorables à chacun des deux camps.

Un autre domaine dans lequel la science économique stricto sensu s'oppose à l'analyse concrète de la concurrence est celui de l'étude de l'efficience. Il est généralement admis que les marchés concurrentiels engendrent l'allocation des ressources la plus efficiente, laquelle est bénéfique pour les consommateurs du fait d'une production plus importante et de prix inférieurs. La prise en considération de l'efficience est donc importante dans l'analyse de la concurrence, mais il ne semble pas qu'il soit fréquemment directement tenu compte de cet élément dans les affaires de concurrence. Ceci tient apparemment au fait que l'efficience est particulièrement difficile à mesurer dans des cas spécifiques et que, pour un non-économiste, faire la part des gains d'efficience par rapport aux éventuels effets néfastes d'une pratique anticoncurrentielle est sans doute encore plus délicat. (Il peut bien sûr y avoir d'autres raisons à cela : dans certains pays, l'efficience n'est pas habituellement un facteur explicite dans les affaires de concurrence, sans parler de l'existence d'autres objectifs des pouvoirs publics inscrits dans la politique nationale de la concurrence.)

Il apparaît que les tribunaux et les organismes chargés de la concurrence préfèrent prendre en compte l'efficience de façon indirecte, en recourant, par exemple, aux marges de tolérance en matière de concentration. Ces marges peuvent être déterminées, du moins en partie, de façon à englober un grand nombre, sinon la plupart des transactions favorisant l'efficience. Pour les transactions se situant en dehors de cette marge, les gains d'efficience ne peuvent l'emporter sur des effets anticoncurrentiels démontrés que dans des circonstances exceptionnelles. Cette approche offre l'avantage de la certitude et est facile à appliquer, mais elle n'est peut-être pas suffisamment sensible à ce qui constitue l'un des principaux fondements économiques de la politique de la concurrence.

Etant donné que la plupart des juges ayant à connaître des affaires de concurrence ne sont pas des économistes, un expert en la matière a donc à l'évidence sa place en tant que témoin ou conseiller auprès du tribunal. Premièrement, pour les juges qui ne sont pas au fait des principes économiques de base, il peut leur fournir le cadre économique nécessaire à l'évaluation de l'affaire. Deuxièmement, il peut effectuer une analyse des questions factuelles délicates que présente l'affaire, en particulier celles pour lesquelles on dispose d'un grand nombre d'éléments apparemment contradictoires. Enfin, l'expert peut donner un avis et fournir une analyse des éléments plus décisifs de l'affaire et, en particulier, procéder à une évaluation des effets probables sur la concurrence de la pratique en question. Les procédures permettent d'obtenir le concours d'un tel expert peuvent varier. Dans le système de procédure contradictoire, les deux parties à 'l'affaire peuvent faire appel à leurs propres experts pour appuyer leur position et le tribunal doit évaluer les témoignages de chacune des parties. Le ou les experts peuvent aussi être désignés uniquement pour conseiller le tribunal. Ces deux méthodes présentent des avantages et des inconvénients.

> *Etant donné l'importance de la science économique dans l'analyse des problèmes de concurrence, est-il souhaitable de demander à des juges qui ont peu ou pas de formation économique de se prononcer sur de telles affaires ? Dans tous les cas, comment des juges non spécialisés peuvent-ils savoir quelle analyse économique doit-être utilisée dans ce cas ? Compte tenu des aspects spécifiques et techniques de la politique économique et en particulier de la politique de la concurrence, les généralistes sont-ils mieux à même de connaître de ces affaires que les spécialistes et, lorsque le juge chargé de l'affaire est un généraliste, comment peut-il se*

préparer lui-même à cette tâche ? Quelles conclusions juridiques peut-on déduire de l'analyse économique ? Est-il souhaitable de recourir à ce type de "raccourci" plus fréquemment ou moins souvent et, dans ce dernier cas, comment des juges non spécialisés peuvent-ils prendre des décisions appropriées ? Quel est l'intérêt et le rôle des experts en tant que témoins et conseillers dans les affaires de concurrence ? La réponse diffère-t-elle selon les types de tribunaux (instances ordinaires par opposition aux instances spécialisées) et selon les pays ? Y a-t-il en particulier une différence entre les pays dans lesquels le principe applicable en droit de la concurrence est celui de l'interdiction et ceux où il s'agit du principe de l'abus ?

III. Les règles de preuve dans les affaires de concurrence

Dans les affaires de concurrence, les critères de base sont brefs et généreux comme "prévention, restriction ou distorsion de la concurrence", ou "réduction substantielle de la concurrence". En outre, dans ces affaires, il existe souvent plusieurs problèmes intermédiaires tels que la définition du marché ou les conditions d'entrée, lesquels peuvent tous être déterminants. Ces problèmes sont complexes et supposent l'interprétation de faits extrêmement nombreux. Les tribunaux doivent à la fois évaluer la valeur probante de très nombreux éléments souvent contradictoires et appliquer à ces éléments des normes juridiques précises mais concrètes, qui ne sont pas spécifiquement prescrites dans la législation sur la concurrence.

Des problèmes spécifiques de ce genre se posent dans tous les types d'affaires de concurrence. Par exemple, dans les affaires d'entente, par exemple, qui globalement sont les plus simples, il est néanmoins nécessaire de prouver qu'une forme d'accord a été conclue. Mais, souvent, on ne peut déduire l'existence d'un accord que de certains actes des parties ou de preuves indirectes. La seule preuve d'un "parallélisme délibéré" est-elle suffisante à cet égard ?

Comme on l'a fait remarquer précédemment, la définition du marché nécessite la prise en compte de la substituabilité des produits et des sources d'approvisionnement. Mais la substituabilité est habituellement une question de degré. Certains acheteurs (ou vendeurs, lorsqu'il s'agit d'évaluer un éventuel pouvoir de monopsone) se reporteront plus facilement à un produit ou à un autre. En dehors des situations évidentes, les faits sur ce point seront contradictoires et probablement pas déterminants. Les tribunaux risquent dans ce cas d'être tentés en matière d'analyse de la concurrence d'adopter des classifications industrielles reconnues par tous, mais conçues à d'autres fins. Faute de recourir à ce type d'indices extérieurs, qui peuvent ne pas être suffisamment précis à des fins d'analyse de la concurrence, il ne semble pas exister de bonnes méthodes de simplification de cette étape de la plus haute importance dans le processus.

Dans les affaires d'abus de position dominante, l'une des premières étapes critiques est de déterminer si l'entreprise en cause est ou non en position dominante. Comme on l'a déjà fait remarquer, pour être dans une telle situation, la détention d'une importante part de marché est une condition nécessaire, mais elle n'est pas suffisante. A moins que l'entrée sur le marché en question soit également difficile, l'entreprise en question n'a aucun pouvoir de marché. Mais quand peut-on considérer que l'entrée est suffisamment "difficile" et comment mesurer cette difficulté ? Dans un sens, le critère de mesure de la difficulté d'entrée peut être relativement arbitraire ; ainsi, par exemple, s'il faut plus de deux ans pour réussir son entrée, on peut alors considérer celle-ci comme difficile. Autrement dit, l'analyse concernant l'entrée sur le marché n'est pas susceptible d'être généralisée. Un coût d'entrée élevé en valeur absolue peut, par exemple, ne pas être le signe d'une réelle difficulté, si la totalité ou la plupart des coûts ne sont pas irrécupérables ou s'ils sont modestes par rapport à la taille du secteur. Le problème de l'entrée est devenu un des aspects les plus techniques de l'analyse de la concurrence. L'énoncé d'un critère précis et applicable en la matière constitue pour les tribunaux un véritable défi.

Les fusions constituent sans doute la catégorie d'affaires la plus difficile pour les tribunaux et les autorités chargées de la concurrence, ne serait-ce que parce que c'est dans ce type d'affaires que l'on retrouve tous les problèmes analytiques les plus complexes et, notamment, la définition du marché, l'analyse des conditions d'entrée et l'évaluation des effets sur le plan de la concurrence. Cette dernière question est tout particulièrement délicate, car on se situe ici dans le domaine de la prévision ; il s'agit en effet de prévoir les effets futurs d'une pratique présente. Dans tous les types d'affaires, à l'exception sans doute encore une fois des affaires d'entente, l'analyse des effets de la pratique visée sur la concurrence est cependant nécessaire. En outre, le critère d'importance de la pratique anticoncurrentielle prévu par le droit de la concurrence est vague. La plupart des législations, que ce soit dans les textes ou dans l'interprétation ou la pratique, n'interdisent pas toutes les pratiques anticoncurrentielles mais seulement celles qui le sont "sensiblement" ou "substantiellement". Il revient aux tribunaux et aux services chargés de la concurrence d'expliciter cette norme de façon plus concrète. Ils peuvent ou non recourir à des critères relativement simples comme, par exemple, le fait de présumer qu'une fusion est illicite lorsqu'elle entraîne un certain degré de concentration du marché.

Dans leur analyse des conséquences sur la concurrence, il y a de bonnes chances pour que les tribunaux s'intéressent, s'il en existe, aux éléments de preuve qui ont trait au but recherché par les parties. Il peut s'agir d'éléments prouvant l'intention de parvenir aussi bien à des résultats anticoncurrentiels qu'à des résultats favorables à la concurrence. Mais dans le premier cas, il pourra être souvent difficile de trouver des éléments probants, en particulier si les parties sont bien conseillées sur la façon d'éviter de laisser de telles preuves. En l'absence d'une indication précise sur les effets escomptés de la pratique en question, les tribunaux auront encore plus de difficultés à parvenir à une conclusion définitive sur son caractère bénéfique ou préjudiciable.

> *De quelle façon les tribunaux élaborent-ils et appliquent-ils les règles de preuve spécifiques nécessaires à la mise en oeuvre des normes plus générales énoncées dans la plupart des législations relatives à la concurrence ? Parmi ces règles figurent les suivantes : simplification de la charge de la preuve pour certaines catégories de pratiques anticoncurrentielles, à savoir habituellement les ententes ; substituabilité des produits ou des sources d'approvisionnement dans la définition des marchés ; évaluation des conditions d'entrée ; nécessité de prouver le but ou l'intention anticoncurrentiels ; importance des effets anticoncurrentiels, exemple : atteinte substantielle à la concurrence ; preuve de l'existence d'un accord -- accord tacite/exprès. Quelles sont les présomptions utilisées à cet égard et sont-elles suffisamment fiables ?*

IV. Examen judiciaire des affaires de la concurrence

Dans la plupart des pays, les tribunaux judiciaires n'interviennent dans les affaires que pour contrôler les décisions de juridictions spécialisées. Normalement, ils n'ont pas à se prononcer sur les faits ni à les évaluer. Ils ne se penchent habituellement pas sur les questions présentant un caractère strictement factuel, si ce n'est éventuellement pour décider si le dossier comporte le minimum de faits nécessaire pour que le tribunal ou une instance inférieure puisse se prononcer. Par conséquent, les juges appelés à exercer ce type de contrôle, qualifié d'"appel" dans les pays du common law, n'interviennent généralement pas régulièrement ou activement dans la mise en oeuvre du droit de la concurrence. Ils auront probablement à connaître de relativement peu d'affaires, comparé au nombre total d'actions engagées par l'organisme chargé de la concurrence, et leur rôle dans les affaires qui leur sont confiées est limité à la fonction traditionnelle de contrôle de décisions administratives pour lesquelles les autorités qui les prennent, bénéficient dans de nombreux pays d'un certain pouvoir d'appréciation. Quelle est donc dans la plupart des pays l'importance réelle du pouvoir judiciaire dans la mise en oeuvre du droit de la concurrence ?

La réponse à cette question variera bien évidemment selon le pays, mais de par leur nature, les affaires de concurrence sont matière à une intervention importante des tribunaux d'"appel" (au sens indiqué plus haut). Bien que normalement les tribunaux "d'appel" n'examinent que les points de droit, par opposition aux points de fait, cette dichotomie peut se trouver estompée dans les affaires de concurrence. L'évaluation des effets sur la concurrence de la pratique incriminée est-elle, par exemple, une question de fait ou de droit ? Quoi qu'il en soit, la question de savoir si la juridiction inférieure à appliquer la méthode correcte pour analyser ces effets a de bonnes chances de faire l'objet d'un contrôle en appel et, comme on l'a fait remarquer précédemment, dans la plupart des affaires de concurrence, l'articulation et l'application correctes des normes appropriées revêtent un caractère fondamental.

Si la juridiction de première instance est une juridiction spécialisée dont les membres sont des experts en sciences économiques ou en politique de la concurrence, elle bénéficiera d'une latitude relativement plus grande vis-à-vis des tribunaux d'appel. Souvent, sa décision ne pourra être invalidée qu'en cas d'erreur grossière ou manifeste. Mais en la matière, chaque pays a sa spécificité. Dans les pays où les juges sont relativement plus actifs dans les affaires de concurrence, l'expérience laisse cependant à penser que les généralistes peuvent exercer efficacement leur fonction d'appel dans ces affaires, comme dans d'autres types d'affaires intéressant des questions commerciales ou scientifiques complexes.
Il existe selon les pays des différences quant au rôle du précédent judiciaire, qui lui-même peut se répercuter sur la manière dont les tribunaux influent sur le droit et la politique de la concurrence et sur l'ampleur de cette influence. Dans les pays de commun law, le juge est tenu au précédent sous certaines conditions. De ce point de vue, les juges de ces pays "font" le droit de la concurrence beaucoup plus que leurs homologues des pays de droit romain. Dans ces derniers, le droit écrit sera probablement plus détaillé et laissera relativement moins de place à l'interprétation par les juges.

Dans les pays de common law, les juges bénéficieront sans doute d'une plus grande flexibilité pour adapter l'application du droit de la concurrence à l'évolution des conditions économiques et technologiques et, bien évidement, à celles de la pensée économique. Cette flexibilité peut être utile dans le contexte économique actuel où les marchés évoluent à un rythme toujours plus rapide. Dans tous les pays, les autorités chargées de faire appliquer le droit bénéficient vraisemblablement de cette flexibilité. Quoi qu'il en soit, le droit de la concurrence écrit est relativement statique dans tous les pays et la précision et la cohérence de l'application sont donc partout importantes.

Que les procédures administratives ou judiciaires applicables puissent restreindre indûment le rôle des tribunaux dans la mise en oeuvre de la politique de la concurrence constitue une question distincte. L'organisme chargé de la concurrence peut disposer de vastes pouvoirs en matière de compromis ou de règlement des différends. Ces pouvoirs, se conjuguant éventuellement au coût d'un procès et à la lenteur de la justice peuvent décourager la plupart des parties de contester des décisions administratives. Certains observateurs seraient favorables à un contrôle judiciaire des décisions des autorités chargées de la concurrence plus actif, qui ne se traduisent pas par des actions en justice. Mais une limitation importante du pouvoir d'appréciation des organismes chargés de la concurrence en matière de poursuite et de transaction pourrait gravement entraver leur aptitude à faire respecter une législation qui, comme la plupart l'admettent, nécessite un exercice avisé de ce pouvoir d'appréciation.

> *Quelle est la distinction entre les questions de fait et les questions de droit dans les affaires de concurrence ; la définition du marché et l'évaluation des effets sur la concurrence sont-elles, par exemple, des questions de fait ou de droit ? Dans quelles conditions une décision administrative devrait-elle pouvoir être annulée parce qu'insuffisamment fondée en fait ou en droit ? Quel est le rôle du précédent dans les systèmes du common law et de droit romain ?*

Quels avantages et quels inconvénients présentent-ils en termes d'applicabilité judiciaire, de prévisibilité et de cohérence dans les affaires de concurrence ? Les tribunaux se voient-ils soumettre "suffisamment" d'affaires de concurrence et, ce n'est pas le cas, ce problème tient-il aux structures administratives et judiciaires nationales qui déterminent la façon dont ce type d'affaire est résolu ?

V. Conciliation de critères multiples dans les affaires de concurrence

Comme on l'a fait remarquer précédemment, les sciences économiques constituent dans la plupart des pays le principal fondement du droit de la concurrence, mais d'autres politiques poursuivies par les pouvoirs publics peuvent également trouver leur expression dans la mise en oeuvre de ce droit. Les politiques applicables dans une situation donnée peuvent être contradictoires, d'où la nécessité pour les tribunaux d'exercer une fonction d'équilibrage. Il peut être nécessaire éventuellement d'évaluer l'atteinte perçue à la concurrence résultant de la pratique considérée au regard d'avantages pour le public qui sont pris en compte par le législateur.

Même lorsque l'on recourt à une analyse économique stricte, une comparaison des intérêts contradictoires est parfois nécessaire. En particulier, si l'on applique la règle de raison, il peut être nécessaire de mettre en balance les gains d'efficience attendus de la pratique considérée et l'atteinte prévisible à la concurrence qui en résultera également. Les économistes ont conçu à cet effet une méthode élégante de nature quantitative. Les économies sur les coûts découlant des gains d'efficience sont comparées à la "perte nette de bien-être" provoquée par l'augmentation de prix anticoncurrentielle escomptée. Mais il s'agit d'un exercice technique relativement stérile et il existe parmi les économistes et les responsables de la concurrence les plus avertis des divergences quant à la norme précise qui devrait être appliquée (exemple : le "surplus total" par opposition au "bien-être total"). Quoi qu'il en soit, comme on l'a déjà fait observer, les tribunaux n'ont pas jusqu'à présent adopté cette méthode et ont préféré en général ne pas tenter directement de se livrer à cet exercice de mise en balance.

Dans de nombreux pays, d'autres politiques gouvernementales interfèrent également plus ou moins avec la politique de la concurrence. Il s'agit notamment des politiques qui visent à promouvoir l'emploi (ou à lutter contre le chômage), à améliorer la compétitivité des entreprises nationales sur les marchés internationaux, à favoriser l'intégration régionale et à protéger les petites entreprises contre les entreprises plus importantes et plus puissantes. Un ou plusieurs de ces objectifs peut, quoi qu'il en soit, se trouver en contradiction avec l'objectif plus restreint d'efficience allocative et il peut arriver que les tribunaux aient à décider de ce qui est le plus important dans de telles circonstances.

Il peut y avoir également conflit, réel ou perçu, entre la réglementation de la concurrence et d'autres réglementations. Il existe en effet des tensions, sinon des conflits, entre le droit de la concurrence et les lois protégeant la propriété intellectuelle. Ces dernières instituent des droits de propriété (considérés par certains comme "monopoles" mais ce n'est pas toujours ni habituellement le cas), car il est nécessaire de promouvoir l'innovation par des incitations appropriées. Les tribunaux peuvent avoir à examiner cette finalité sous-jacente de la législation sur la propriété intellectuelle lorsque sont allégués des abus de ces droits préjudiciables à la concurrence. De même, si le droit de la concurrence est réputé "protéger la concurrence, et non les concurrents", d'autres législations peuvent interdire la concurrence "déloyale". Ces deux types de législation peuvent, à certains égards, être contradictoires, en particulier si la politique gouvernementale favorise la protection de certaines catégories de concurrents, tels que les petites et moyennes entreprises, pour des raisons autres que la promotion de l'efficience.

Dans tous les pays, certains secteurs économiques font l'objet d'une abondante réglementation et ce, en général, parce que ces secteurs ont pour caractéristique de présenter des éléments de monopole naturel. En l'absence d'exemption expresse, le droit de la concurrence peut également être applicable à ces secteurs, du fait qu'ils peuvent en partie opérer avec succès dans un environnement concurrentiel. Dans certaines affaires, les tribunaux peuvent être appelés à déterminer si la concurrence doit primer sur la réglementation, ou inversement. Ils peuvent avoir à cette occasion à décider, parmi les politiques gouvernementales sur lesquelles reposent respectivement le régime de la concurrence et le régime réglementaire, lesquelles sont les plus importantes dans l'affaire en cause.

> *Compte tenu de la formulation générale du droit de la concurrence dans la plupart des pays, quels sont les objectifs légitimes de ce droit et comment les tribunaux peuvent-ils les identifier et les appliquer ? Comment peuvent-ils convenablement mettre en oeuvre ce droit tout en tenant compte des autres lois nationales telles que celles sur la propriété intellectuelle ou sur la concurrence déloyale ? Quand convient-il d'autoriser une pratique anticoncurrentielle en raison d'un autre intérêt public prioritaire et comment les tribunaux peuvent-ils concilier de tels intérêts contradictoires ? En l'absence d'orientations législatives expresses, comment peuvent-ils déterminer quels sont les objectifs de la politique gouvernementale applicables dans l'affaire en cause ?*

SECTION IV

DISCOURS D'OUVERTURE

Frédéric Jenny
Président, Comité du droit et de la politique de la concurrence

Comme vous le savez tous, ce séminaire est organisé sous les auspices du Comité du droit et de la politique de la concurrence ("Comité CLP"). Plusieurs fois par an, les autorités de concurrence des pays de l'OCDE se réunissent sous ses auspices. Elles y échangent des informations, échanges qui sont aussi destinés à jeter les bases de coopération entre les pays. Elles partagent également leurs expériences nationales en matière de mise en oeuvre du droit de la concurrence et traitent, enfin, de certains problèmes analytiques complexes qui peuvent se poser dans ce cadre. Ces échanges sont évidemment d'autant plus utiles que le droit de la concurrence prend, dans la plupart des pays de l'OCDE, une part de plus en plus importante dans l'encadrement du fonctionnement des marchés au fur et à mesure, d'une part, que la globalisation des échanges progresse et que, d'autre part, la déréglementation s'accentue. Comme le droit de la concurrence trouve ses racines à la fois dans l'analyse et la réalité économiques, les débats habituels du Comité CLP font une large place au développement de cette analyse économique et au suivi de l'évolution des situations économiques dans le contexte desquelles fonctionne le marché.

Les autorités de concurrence, représentées à ce séminaire, jouent un rôle important dans la mise en oeuvre de l'action publique en matière de droit de la concurrence, mais aussi dans la prise de décisions au premier niveau, qu'il s'agisse de pratiques anticoncurrentielles ou qu'il s'agisse d'affaires concernant des concentrations. Pour remplir son objet qui se situe aux confins de la politique économique, de la régulation des marchés et du droit, le droit de la concurrence fait une large place à l'interprétation, au cas par cas, des conditions dans lesquelles ses prescriptions souvent abstraites doivent être mises en oeuvre. C'est pourquoi les tribunaux qui, dans beaucoup de nos pays, ont à connaître des décisions prises en première instance ou au premier niveau jouent eux-mêmes un rôle tout à fait fondamental dans la mise en oeuvre du droit de la concurrence par l'interprétation qu'ils en donnent et qui est ultimement l'interprétation légale qui prévaut.

In fine, il apparaît donc, et nous en sommes bien conscients, que ce sont les juges qui font le droit de la concurrence, même si les autorités de la concurrence que nous sommes contribuent activement à la mise en oeuvre de ce droit. Il nous a par conséquent semblé tout particulièrement important d'organiser cette journée de réflexion et d'échanges sur la mise en oeuvre judiciaire du droit de la concurrence. L'objectif est de dialoguer avec les magistrats qui sont ici présents afin qu'ils nous disent comment ils perçoivent ce droit, quelles difficultés éventuelles ils rencontrent dans sa mise en oeuvre et quel rôle ils estiment devoir être assigné à chacun des acteurs de la mise en oeuvre de ce droit. Mieux se comprendre ne peut que conduire évidemment à une amélioration de l'efficacité de ce droit.

Ce séminaire représente une gageure pour différentes raisons. D'abord, nous sommes nombreux, nous parlons des langues différentes et nous venons d'horizons divers : administrateurs, magistrats, économistes et même juristes sans être magistrats. C'est aussi une gageure parce que les pays représentés ont des systèmes juridiques qui sont pour partie différents -- voire quelquefois même très différents -- les uns des autres et que les interactions entre les autorités de concurrence et les tribunaux sont organisées de façon très différentes d'un pays à l'autre, de même d'ailleurs que les procédures de type judiciaire.

Cette diversité est aussi l'un des intérêts, à mon sens, de cette réunion même si elle rend peut-être -- ou elle rendra peut-être -- nos débats plus complexes. En effet, un certain nombre de pays de l'OCDE ne se sont dotés d'un droit de la concurrence que relativement récemment. Par ailleurs, dans d'autres pays qui ont un droit de la concurrence depuis plus longtemps, ce droit évolue tant dans sa substance que dans ses formes institutionnelles. Par exemple, en France, ce n'est que depuis 1986 que l'autorité de concurrence qu'est le Conseil s'est vue confier un pouvoir de décision contrôlé par la Cour d'Appel de Paris et la Cour de Cassation.

Outre l'intérêt des débats de substance, la comparaison des systèmes d'organisation et de l'articulation des compétences entre les autorités de concurrence et les juridictions dans les différents pays, tout comme l'expérience qui en résulte, pourront être une source de réflexion et une source d'enrichissement pour ceux des pays dont le système est susceptible d'évoluer.

Organiser le débat n'est pas donc pas chose facile. Je dois dire tout de suite que je ne crois pas possible -- et d'ailleurs je ne crois même pas que ce soit l'objet de notre réunion -- d'arriver à des conclusions fermes et définitives sur ce que devrait être, ou ce que pourrait être, l'organisation de la mise en oeuvre judiciaire du droit de la concurrence. En revanche, nous apprendrons beaucoup de la simple confrontation des points de vue et de la nature des problèmes que nous nous posons les uns et les autres dans cette diversité de contextes que j'ai évoquée il y a un instant. Dans ce séminaire, il est souhaitable que tout le monde s'exprime de façon libre et pédagogique. Nous échangerons des points de vue. Nous devrons être bien conscients du fait que tout ce que nous pourrons dire peut aider d'autres à résoudre ensuite leurs propres problèmes. Nous ne devrons donc pas hésiter à poser des questions et à participer librement.

Nous avons demandé à trois personnalités d'introduire le sujet général de nos débats :

- Monsieur Canivet, Premier Président de la Cour d'Appel de Paris, a été un des acteurs tout à fait fondamentaux du développement du droit de la concurrence depuis 1986. Il a écrit l'ouvrage qui est la référence incontournable dans le domaine du droit de la concurrence en France et il a pris une part très active dans l'ouverture de ce contentieux économique à la mise en oeuvre judiciaire ;

- Beaucoup d'entre vous connaissent Diane Wood puisqu'elle a la particularité d'avoir toutes les casquettes qu'on peut avoir dans ce séminaire : elle a été Assistant Attorney General au Département de la justice chargée des affaires de la concurrence ; elle était antérieurement Professeur de droit et elle est maintenant Juge à la Cour d'Appel de Chicago ;

- Le Juge Gronowski vient de Pologne et est l'auteur d'un ouvrage très important, le premier ouvrage sur la mise en oeuvre du droit de la concurrence polonais.

Ces trois intervenants, outre leur notoriété personnelle et l'importance de leurs réflexions, représentent trois systèmes juridiques très différents: un pays de droit romain comme la France, le droit américain pour Diane Wood et le droit polonais qui est une nouveauté. La mise en oeuvre de ce dernier est compliquée par les problèmes spécifiques que l'on peut rencontrer dans des pays qui récemment encore étaient en transition et dans lesquels l'on a instauré à la fois une économie de marché et une économie de concurrence ainsi qu'une juridiction appelée à connaître de ce contentieux.

Avant d'entendre ces trois personnalités qui vont traiter de *La responsabilité du système judiciaire dans la mise en oeuvre de la politique de la concurrence*, M. John W. Clark, Consultant à l'OCDE, Ancien Assistant Attorney General adjoint au Ministère de la Justice américain, va brièvement présenter la note de référence qu'il a préparée pour stimuler notre réflexion.

PRESENTATION DU DOCUMENT DE REFERENCE

John W. Clark[1]
Consultant auprès de l'OCDE, Ancien Deputy Assistant Attorney General au Ministère de la Justice des Etats-Unis

Le document de référence (voir Section III, page 175) passe en revue le choix de questions qui doivent être examinées lors du séminaire. La présentation de chaque thème y est suivie d'une série de questions qui peuvent servir de point de départ au débat. Toutefois, ces questions ne sont en aucune façon exhaustives et chacun de ces thèmes pourrait sans doute susciter d'autres questions de nature à alimenter le débat.

Le premier thème est le *Rôle du système judiciaire dans la mise en oeuvre de la politique économique*. Dans la plupart des pays, les tribunaux jouent à l'évidence un rôle important dans les affaires ayant trait au commerce. Par ailleurs, il apparaît bien que selon les différents pays les tribunaux sont plus ou moins actifs dans l'application des lois. Mais il semblerait en définitive que les tribunaux ont un rôle important à jouer dans ce domaine, ne serait-ce qu'en raison du caractère très général des termes dans lesquels sont énoncées les lois de la concurrence. De ce fait, les tribunaux peuvent ou même doivent, en premier lieu, définir et appliquer des normes plus spécifiques que les larges normes juridiques prévues dans nos lois et, en second lieu, procéder à un réexamen de ce qui, inévitablement, laisse une marge de manoeuvre considérable à l'Autorité chargée de la concurrence. Les sujets qui pourraient donc être examinés sous ce premier thème sont les suivants : "Quel est le rôle propre à l'instance judiciaire dans la mise en oeuvre de la politique économique d'un pays ?" et "A quelles limites, tant pratiques que structurelles, se heurtent les tribunaux dans l'exercice de cette fonction ?"

Deuxième thème : le *Rôle de la science économique et des économistes dans les affaires de concurrence*. La science économique constitue un fondement important de la politique économique en général, et elle est en fait le plus important. Comment des juges qui ne sont pas des économistes peuvent-ils appliquer de façon appropriée cette discipline spécialisée ? Dans certains cas, ils peuvent recourir à des raccourcis ou à des présomptions légales qui peuvent leur faciliter la tâche. Mais dans d'autres, et notamment lorsqu'il s'agit de définir un marché, cela n'est apparemment pas possible. Des experts économistes peuvent aider les tribunaux à cet égard et il pourrait être utile d'examiner comment utiliser comme témoins de bons experts économiques.

Troisième thème : *Conciliation de critères multiples dans les affaires de concurrence*. Les tribunaux sont souvent appelés à procéder dans les affaires de concurrence à une mise en balance dans le cadre d'une analyse stricte de la concurrence, par exemple entre les effets anticoncurrentiels du comportement considéré, et d'autre part les gains d'efficience éventuels de ce comportement. Dans un contexte élargi, les tribunaux doivent mettre en balance d'une part les stricts objectifs présentés par la science économique et, d'autre part, d'autres intérêts nationaux propres à un pays donné, notamment l'augmentation de l'emploi ou l'accroissement de la compétitivité internationale de ses industries, ou encore la protection des petites et moyennes entreprises. Ils peuvent avoir à mettre en balance aussi le

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droit de la concurrence d'une part, et d'autre part d'autres lois, par exemple des lois protégeant la propriété intellectuelle. Enfin, dans certaines circonstances, les tribunaux doivent comparer la politique de la concurrence et la réglementation des monopoles naturels. Comment les tribunaux abordent et règlent les conflits, c'est là le sujet qui pourrait être examiné dans cette partie.

Quatrième thème : *Les règles de preuve dans les affaires de concurrence.* Comment réunir des preuves dans les affaires de concurrence ? c'est là un problème spécifique et difficile. Comment prouver par exemple l'existence d'un accord lorsqu'il n'existe pas de preuve explicite de cet accord, définir ou articuler des normes pour déterminer une position dominante, déterminer la substituabilité des produits ou des sources d'approvisionnement et, question ultime peut-être, l'existence ou l'importance des effets sur la concurrence liés au comportement en cause ? La façon dont les tribunaux abordent ces questions de preuve pourrait être examinée ici.

Cinquième et dernier thème à examiner : *L'examen judiciaire des affaires de concurrence*. Dans la plupart des pays, les tribunaux connaîtront probablement des affaires de concurrence dans le cadre de leurs fonctions de juges d'appel ou de réexamen d'une décision plutôt qu'ils n'auront à juger des faits. Les affaires de concurrence soulèvent des questions particulièrement intéressantes visant la dichotomie entre droit et fait ; le rôle des juges varie d'un système juridique à l'autre et selon qu'il s'agit d'un système de common law ou de droit romain. Là aussi, il convient de s'interroger sur la relation existant entre l'instance chargée de l'application des lois, qui dispose d'une certaine latitude pour interpréter les lois stipulées en termes généraux, et les tribunaux chargés de réexaminer ses actes. Une question connexe qui se pose est de savoir comment réexaminer, si besoin était, les décisions d'exécution prises par l'agence qui ne sont pas portées devant les tribunaux.

LA RESPONSABILITE DU SYSTEME JUDICIAIRE DANS L'EXECUTION DE LA POLITIQUE ECONOMIQUE

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I. Introduction

Tel qu'il est formulé, le sujet (*Le rôle du juge dans la mise en oeuvre d'une politique économique)* est fondamental. Il pose la question générale du rôle institutionnel du juge ; celle de savoir, de manière générale, si l'autorité judiciaire peut avoir un rôle effectif dans l'exécution d'une politique économique.

La mise en oeuvre d'une politique économique suppose, d'abord, une loi de fond régulatrice des rapports des acteurs économiques. En France, en matière de concurrence, le droit matériel est le droit communautaire, en particulier les articles 85 et 86 du Traité CEE, et le droit national, tel qu'il résulte de l'ordonnance du 1er décembre 1986. Ces dispositions ont pour but le maintien d'une concurrence effective sur le marché. Pour la réalisation de cette politique, des pouvoirs sont donnés à une administration économique pour des actions finalisées. Ce sont les prérogatives données à la Commission CEE et au Conseil de la concurrence, dites autorités de concurrence, aux fins de rechercher les atteintes au marché et d'engager des procédures pour les faire cesser et les sanctionner. L'ensemble des ces actions est consigné dans des rapports périodiques définissant les orientations et rendant compte de la politique de la concurrence. Telle est la fonction propre de l'autorité administrative de concurrence.

La loi prévoit aussi que certaines de ses dispositions sont créatrices de droits et d'obligations pour les particuliers. Par conséquent, des litiges privés entre entreprises pourront être tranchés par les juridictions sur le fondement de ces textes. Les opérateurs économiques deviennent ainsi des organes de mise en oeuvre d'une politique régulatrice de la concurrence. Classiquement définie, la mission du juge est d'appliquer une norme juridique à une situation de fait déterminée, en fonction de principes d'impartialité et d'objectivité. C'est, par conséquent, soit trancher des litiges entre deux opérateurs économiques sur le fondement de la loi régulatrice, soit valider les décisions d'interdiction, d'injonction et de sanctions prises par l'autorité de concurrence à l'égard d'un opérateur, c'est à dire d'examiner, a posteriori, la régularité de la procédure employée et l'exacte application de la loi de fond.

Ainsi, le juge de la concurrence a une double fonction : i) premièrement, il tranche des litiges entre entreprises sur le fondement du droit de la concurrence, en accordant des réparations ou en édictant des interdictions; il sanctionne civilement des pratiques anti-économiques; ii) deuxièmement, il statue sur les recours formés contre les décisions d'interdiction et de sanction prononcées par l'autorité de la concurrence. Il valide les sanctions administratives de comportements anti-économiques.

Ces constatations étant faites, la réponse à la question de savoir quelle est la responsabilité du système judiciaire, donc du juge, dans l'exécution d'une politique économique, en particulier d'une politique de concurrence, pourrait être simple. Elle tient en deux propositions.

La première proposition est que le juge contrôle la régularité de l'action de l'administration économique, c'est à dire de l'autorité de marché, dans la mise en oeuvre de sa politique. En premier lieu, il contrôle la régularité de l'application, faite par l'autorité de marché, des règles de procédure et des moyens d'administration de la preuve, c'est à dire qu'il vérifie le respect, par elle, des garanties procédurales et de la présomption d'innocence. C'est la fonction spécifique du juge en matière de protection des libertés. En second lieu, il contrôle l'exacte application des règles de fond, c'est à dire qu'il vérifie que l'autorité de marché a correctement compris la loi, c'est le contrôle normatif traditionnel du juge. La seconde proposition est la suivante: le juge interprète la loi dont l'application vise à la mise en oeuvre de la politique économique. Il lui donne un sens dans une situation de fait et un contexte économique déterminé. C'est la fonction jurisprudentielle classique. Le juge exerce donc tout à la fois un pouvoir normatif sur le fond de la loi en même temps qu'un contrôle de la régularité procédurale de sa mise en oeuvre par l'administration.

Les réponses sont toutefois plus complexes, si on examine les conséquences de ce rôle institutionnel du juge. D'abord, parce qu'interprétant la loi économique, il lui donne un sens et que ce sens influe sur sa finalité, c'est à dire qu'il peut nuancer, infléchir, pervertir, voir contrarier la politique économique voulue par la loi. Le juge a donc une responsabilité dans l'orientation de la politique économique. Ensuite, parce que le niveau des garanties procédurales imposé à l'administration influe nécessairement sur l'efficacité de l'action de celle-ci. Plus les garantie formelles sont importantes, plus l'action de l'administration risque d'être entravée. Le juge a donc la responsabilité du rapport entre le niveau des garanties de procédure et l'efficience de l'action de l'administration ; en d'autres termes, il assume une part de la responsabilité dans l'efficacité de la politique économique.

Il en résulte que la responsabilité du juge dans l'exécution d'une politique économique est à examiner à un double point de vue. Le premier est traditionnel, c'est l'apport de la fonction judiciaire à une politique économique ; sous cet angle, il s'agira de rechercher en quoi la fonction judiciaire, classiquement comprise, participe à la mise en oeuvre d'une politique de concurrence. Le second est plus problématique, c'est la coopération, c'est à dire l'engagement actif du juge dans la mise en oeuvre de cette politique économique.

II. L'apport de la fonction judiciaire à une politique économique

Cet apport est double. Il est constitué, d'une part, par l'insertion de la politique économique dans l'Etat de droit, d'autre part, par l'intégration du raisonnement économique dans le raisonnement juridique.

2.1 L'insertion de la politique économique dans l'Etat de droit

Elle se fait de deux manières : par le respect des droits et libertés fondamentaux et par la prise en compte de la fonction de régulation dans la conception et l'application des règles de procédure.

2.1.1. Le respect des droits et libertés fondamentaux

L'insertion des procédures de mise en oeuvre de la politique économique dans un droit commun processuel doit tenir compte d'une nécessaire efficacité dans l'exécution de la politique économique :

a) L'insertion des procédures de mise en oeuvre de la politique économique dans un droit commun processuel :

Sans entrer dans les détails, il appartient au juge de veiller à ce que les textes qui permettent à l'administration économique de procéder à des investigations contraignantes au sein des entreprises, de leur édicter des injonctions et de leur infliger des sanctions sont conçus et appliqués en conformité avec les droits fondamentaux tels qu'ils résultent des principes constitutionnels et des conventions internationales auxquelles l'Etat a adhéré. C'est, en un mot, le respect des garanties de la défense, la protection du domicile et de la vie privée dans la procédure d'enquête, le respect du principe du contradictoire et des la présomption d'innocence, le droit à une libre défense, dans les procédures de sanction, enfin, d'une manière générale, la protection des droits propres aux entreprises, tel, par exemple, la protection du secret des affaires.

Ceci étant dit, en quoi la fonction judiciaire de protection des libertés constitue-t-elle un apport à la politique économique ? A mon sens, de deux manières. Tout d'abord, c'est seulement lorsque ce niveau de garantie est suffisant que la mise en oeuvre d'un politique économique sera, non seulement conforme à l'Etat de droit, mais tolérée par le tissu social. C'est le niveau des garanties qui légitime l'action de l'administration économique ; c'est seulement parce qu'elles sont prises selon des procédures protectrices des acteurs économiques et soumises à une libre discussion que les décisions de l'autorité économique sont comprises et acceptées. Allant même plus loin, on peut dire que c'est parce qu'elles sont prises à la suite d'un débat contradictoire, d'une procédure ménageant les garanties essentielles que les décisions économiques seront pertinentes. De la qualité de la procédure dépend la qualité de la décision. Ensuite, ce niveau élémentaire de garantie est indispensable pour assurer le crédit d'une place économique, c'est à dire pour faire admettre la politique économique d'un Etat ou d'un ensemble d'Etats par la communauté internationale. C'est le principe de sécurité juridique, celui qui assure un opérateur économique de trouver dans l'Etat où il intervient, non seulement la protection d'un droit matériel connu et stable, mais encore le mise en oeuvre impartiale et objective de ce droit selon des garanties de procédures de mise en oeuvre communément admises comme indispensables.

En définitive, le rôle du système judiciaire est donc de permettre une libre contestation sur les modalités de la mise en oeuvre de la politique économique. Si la définition d'une politique économique relève d'un contrôle démocratique, celle de sa mise en oeuvre relève du débat judiciaire.

b) Le maintien d'un principe d'efficacité dans l'exécution de la politique économique :

L'application des garanties fondamentales doit toutefois se faire dans la recherche d'un équilibre entre la protection effective des droits et libertés fondamentaux et les pouvoirs d'investigation indispensables laissés à l'administration. Il faut en déduire pour conséquence que le respect des garanties procédurales n'est pas un objectif absolu mais une démarche progressive qui tend à un niveau de garantie acceptable en l'état d'une culture juridique et judiciaire et des moyens donnés l'administration.

2.1.2. *La prise en compte des impératifs de régulation économique dans la mise en oeuvre des règles de procédure*

Cette prise en compte suppose, d'une part, que le juge statue rapidement sur les recours contre les décisions de l'autorité de marché, d'autre part, que ses décisions, tranchant des litiges privés entre entreprises, ne méconnaissent pas l'ordre public économique.

a) La fonction régulatrice du droit de la concurrence exige, en premier lieu, la création de procédures rapides pour statuer sur les recours formés contre les décisions de l'autorité de marché. Il convient en effet de mettre fin rapidement aux situations d'incertitude crées par les recours formés contre les décisions de l'administration, de rendre effective ses décisions, de donner un plein effet dissuasif aux sanctions qu'elle prononce afin de faire cesser rapidement le développement de pratiques semblables estimées anticoncurrentielles. La nécessité de juger rapidement les recours formés contre les décisions des autorités de la concurrence a donc conduit à renforcer les pouvoirs du juge dans l'instruction de la procédure de recours, à lui permettre de limiter utilement les délais de production des mémoires et d'éviter les stratégies procédurales dilatoires. Le droit processuel économique est donc un droit directif qui peut servir d'exemple chaque fois que l'on voudra réduire la durée des procès.

b) La fonction régulatrice du droit de la concurrence oblige, en second lieu, le juge à considérer l'ordre public économique lorsqu'il statue, non plus sur des recours contre des décisions d'interdiction ou de sanction, mais dans des litiges privés entre opérateurs économiques qui ont une incidence sur le marché. En ce cas, il ne peut se borner à considérer les intérêts respectifs des opérateurs qui s'opposent dans le procès ; il doit aussi examiner l'intérêt général de la politique économique. Il ne saurait, par exemple, consacrer l'exécution d'un accord anticoncurrentiel, même si aucune des parties n'en soulève l'illicéité. Pour être parfaitement éclairé sur l'ordre public économique, il pourra appeler à l'instance l'administration économique en lui demandant d'exprimer son avis sur la solution du litige privé du point de vue de la politique économique. Les impératifs de la mise en oeuvre de la politique économique peuvent et doivent donc influer sur la solution de litiges privés.

2.2.La prise en compte des données économiques par le système judiciaire

Elle se fait, d'une part, par l'intégration des données et des mécanismes économiques dans le raisonnement juridique, d'autre part, par la prise en compte dans le système judiciaire des impératifs de régulation économique.

2.2.1. L'intégration des données et raisonnements économiques dans le raisonnement juridique

Chargé de tirer les conséquences en termes d'obligation et de sanction d'un raisonnement économique, le juge doit conceptualiser des notions économiques pour les intégrer dans un raisonnement juridique. A cet égard, le raisonnement juridique est le lien entre l'expertise économique de l'autorité de marché et ses conséquences sur les droits individuels des opérateurs. C'est lui qui permet de débattre de l'application de la politique économique à une situation particulière, de lui donner, dans la succession des cas d'espèce, une cohérence logique, transparente et susceptible d'une contestation publique. C'est finalement le raisonnement juridique qui permet de passer de l'économique au politique, de la science, à

la raison commune, d'une démarche technocratique, à une politique économique comprise et acceptée dans ses conséquences.

2.2.2. Le respect des impératifs de régulation économique par le système judiciaire

Pour respecter les impératifs de la régulation économique dans cette oeuvre de création jurisprudentielle, le juge doit faire porter ses efforts dans deux directions. Il doit, d'abord, en cette matière plus qu'en toute autre, rendre le droit prévisible, c'est à dire indiquer rapidement et clairement les solutions retenues, la démarche ayant permis de les arrêter pour rendre l'application de la règle prévisible pour les opérateurs économiques. Le sens de la loi étant fixé, il doit s'y tenir de manière constante. C'est le principe général de sûreté dans l'application de la loi.

III. La coopération du juge à la mise en oeuvre d'une politique économique

De ce point de vue, deux questions sont à aborder : d'abord, la contribution du juge au respect des objectifs de la loi et au maintien des équilibres économiques et sociaux voulus par elle, ensuite, la coopération du juge à la recherche d'efficacité de la sanction.

3.1. Le respect des objectifs de la loi économique et la recherche des équilibres économiques

3.1.1 Le rappel par le juge des objectifs de la loi

L'exécution d'une politique économique est la mise en oeuvre rationnelle des moyens dont dispose l'administration pour le meilleur résultat possible en considération de ses objectifs essentiels. Certes, le juge n'a pas à contrôler les décisions d'opportunité prises par l'administration quant aux secteurs économiques ou aux pratiques sur lesquels elle fait porter ses investigations. Il doit néanmoins sanctionner les dérives consistant, pour l'administration, à user des moyens mis à sa disposition à des fins détournées ou non efficientes consistant à poursuivre et sanctionner des pratiques insignifiantes au regard des objectifs de la loi. Ainsi le juge refusera-t-il de valider les sanctions prises par l'administration relativement à des pratiques qui n'ont pas eu d'incidence perceptible sur le marché et qui par conséquent n'entrent pas dans le cadre de la mission régulatrice de l'administration. C'est la notion de seuil de sensibilité qui permet d'écarter l'application du droit de la concurrence à des pratiques qui n'intéressent pas l'intérêt général économique.

3.1.2 La recherche par le juge des équilibres économiques voulus par la loi

De la même manière, le juge doit participer activement à la recherche des équilibres voulus par la politique économique. Ainsi, l'article 10-2 de l'ordonnance du 1er décembre 1986, qui constitue le droit français de la concurrence, permet-il de ne pas interdire et sanctionner les pratiques qui, à certaines conditions, assurent un progrès économique. En procédant lui même à cette analyse ou en validant celle qu'aura effectuée l'autorité de marché, il n'est pas douteux que le juge prend une part active dans la mise en oeuvre d'une politique économique.

3.2. La coopération du juge à la recherche d'efficacité de la sanction

Elle se développe dans deux directions : l'adéquation de la sanction administrative à la nuisance économique des pratiques réprimées et l'évaluation de réparations civiles adaptées à la fonction régulatrice de la loi économique.

3.2.1. L'adéquation de la sanction administrative à la nuisance économique des pratiques sanctionnée.

On sait que, d'une manière générale, une sanction, quelle qu'elle soit, a une double fonction : la première est de punir le coupable à la mesure de la faute commise, c'est ce que l'on appelle le caractère rétributif de la peine, la seconde est de dissuader ceux qui seraient tentés de commettre une telle infraction, c'est l'exemplarité de la peine. Dans le cadre d'une politique régulatrice des rapports de concurrence, l'utilité de la peine se mesure à son caractère dissuasif, c'est à dire à sa propriété à faire en sorte que les opérateurs économiques comprennent qu'ils n'ont plus d'intérêt à mettre en oeuvre de pratiques anticoncurrentielles et qu'ils y renoncent.

Or, l'opérateur économique comprendra qu'il n'a plus d'intérêt à violer les règles de la concurrence, d'une part, s'il sait qu'il sera nécessairement sanctionné, en tout cas qu'il a de fortes chances de l'être, d'autre part, s'il sait que, étant convaincu d'infraction, il sera puni de telle sorte que la sanction supprimera le gain tiré des pratiques illicites et, au surplus, l'obligera à réparer le dommage causé à la collectivité en le pénalisant lourdement par rapport à ses concurrents. C'est de ce rapport entre le caractère exhaustif de la répression et le caractère dissuasif de la sanction que dépend l'efficacité d'un système d'interdiction. Par conséquent, moins le système d'interdiction sera dissuasif par sa possibilité d'être exhaustif dans la constatation des infractions, plus il devra l'être par le montant des sanctions infligées.

La mise en oeuvre rationnelle d'une politique répressive sera donc de rechercher un équilibre entre les moyens dont dispose l'administration pour constater et sanctionner les pratiques illicites et le montant des sanctions infligées. A cet égard, la coopération du juge à la politique économique consistera à déterminer, dans l'appréciation de proportionnalité de la peine, un niveau de sanction suffisant qui tienne compte de cet équilibre.

3.2.2 L'évaluation de réparations civiles adaptées à la fonction régulatrice de la loi économique

De la même manière, lorsqu'il évalue les indemnités accordées aux opérateurs victimes de pratiques anti-économiques, le juge doit s'efforcer d'en fixer le montant, non seulement à la mesure du dommage directement subi par celles-ci mais, aussi, en fonction de l'ensemble des préjudices induits, des risques pris par l'entreprise dénonciatrice, de sa contribution personnelle à la mise en oeuvre d'une politique de concurrence et du coût effectif du procès, de sorte que, par son caractère exhaustif, la réparation civile participe d'une démarche dissuasive. Cette conception large de la réparation est, elle aussi, une composante essentielle de la coopération du juge à une politique économique.

IV. Conclusions

Je pressentais, en commençant, que l'examen du rôle du juge dans la mise en oeuvre d'une politique économique pouvait conduire à reconsidérer son office traditionnel. Si l'on estime légitime que le juge tienne compte, dans une mesure raisonnable, de l'efficacité de l'action de l'administration dans la

mise en oeuvre des droits et garanties fondamentaux des entreprises, qu'il intègre des données et une logique économiques dans le raisonnement juridique, qu'il contrôle l'action de l'administration au regard des objectifs de la loi, qu'il mesure la pertinence de ses décisions à leur incidence sur le marché, qu'il module l'application de la prohibition au bilan économique des pratiques examinées, qu'il introduise, avec l'autorité de concurrence, un dialogue pour rechercher un seuil d'efficacité de la sanction, enfin qu'il fixe le montant des réparations, non seulement en fonction de celui des dommages subis mais d'un principe de dissuasion, alors on doit admettre qu'il y a un office spécifique du juge économique.

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I. Le droit de la concurrence

La loi contre les pratiques monopolistes[1] a été votée en 1990 puis, en 1993, la loi contre la concurrence déloyale a été adoptée.[2] Conformément aux dispositions de la première de ces deux lois, l'Office antimonopole a été créé. Il est soumis à la tutelle gouvernementale et est dirigé par le Président de l'Office de la Protection de la Concurrence et des Consommateurs. Le Président de cette institution dépend directement du Conseil des Ministres. La loi polonaise antimonopole contient des dispositions semblables à celles des art. 85 et 86 du Traité de Rome. Elle inclue également des clauses analogues à celles appliquées dans le cadre de l'Union Européenne en matière de contrôle des concentrations[3]. Par contre, il n'existe pas de dispositions comparables à celles en vigueur au sein de l'Union Européenne et fondées sur les règlements de la Commission pris dans le cadre de l'application de l'article 85 (3) du Traité de Rome.

La réalisation des objectifs de la loi antimonopole se fait en principe par l'intermédiaire d'instruments du domaine du droit administratif. Les décisions prises par l'Office antimonopole sont susceptibles d'appel auprès du Tribunal antimonopole, une juridiction indépendante agissant dans le cadre des structures juridictionnelles de droit commun. Un recours en cassation peut être formulé auprès de la Cour Suprême à l'encontre d'un jugement rendu par le Tribunal antimonopole. Le droit antimonopole préserve relativement bien la concurrence. Le nombre important de procédures réalisées devant l'Office antimonopole témoigne de son importance pour l'économie polonaise. En 1995, il y a eu 950 procédures effectuées et 80 décisions ont été publiées, confirmant l'existence des pratiques monopolistiques. On peut ajouter qu'au cours de cette année, plus de 70 affaires ont été traitées par le Tribunal antimonopole.

II. L'harmonisation du droit

En Pologne, l'on a conscience que l'harmonisation du droit économique polonais avec les normes existantes est l'une des conditions préliminaires à l'intégration de l'économie polonaise dans d'autres économies développées et en particulier dans l'Union Européenne. Ce genre de processus ne se réalise pas du jour au lendemain. Les revues de droit discutent de la question de savoir dans quel domaine les tribunaux peuvent devancer les actions d'autres organes d'Etat. Cependant, ils n'ont pas la compétence de créer le droit.

III. L'interprétation judiciaire

Les tribunaux en Pologne peuvent soutenir les actions d'autres organes d'Etat à travers l'application "pro-européenne" de l'interprétation de la loi. Il convient de souligner que cette interprétation dynamique est l'instrument le moins coûteux mais aussi le plus rapide pour favoriser l'adaptation de la législation polonaise aux modèles ouest-européens[4]. Le recours aux acquis de la jurisprudence d'autres Etats ou encore aux règlements communautaires peut permettre d'obtenir, dans de nombreux cas, un effet harmonieux et d'accélérer le développement du droit économique polonais.

Pour les tribunaux confrontés au dilemme de l'intégration des normes européennes en polonais, l'opinion du Conseil législatif polonais peut se révéler dans une certaine mesure utile[5]. Le Conseil est l'organe consultatif du Premier Ministre, il a pour principales missions:

- D'accorder la priorité aux faits économiques par rapport aux réglementations juridiques; le processus d'ajustement du droit polonais ne devant pas être plus rapide que la mise en place d'une économie de libre-concurrence en Pologne;
- D'adapter le système juridique polonais afin de créer les conditions permettant à la Pologne de bénéficier des effets dus à sa participation au marché commun et intérieur;
- D'adapter le droit polonais au droit communautaire sans pour autant lui faire perdre sa spécificité et les particularismes du système juridique dans lequel il s'insère; d'ailleurs, les principes du droit communautaire permettent à chacun des Etats membres de choisir les voies et moyens les plus appropriés pour satisfaire les objectifs communautaires.

Etant donné que de rapides transformations du droit sont impossibles à réaliser, les revues de droit notent le besoin qu'ont les tribunaux d'avoir recours à des procédures de désuétude. Sur ce fondement de désuétude, il est stipulé que les tribunaux doivent refuser d'appliquer des dispositions qui, compte tenu des nouvelles conditions économiques, ont cessé d'être pertinentes.[6] Il convient de souligner que la conformité aux normes juridiques ouest-européennes n'est pas encore une pratique courante pour les tribunaux polonais. Il arrive pourtant que l'on puisse trouver des exemples de jugements polonais inspirés de décisions rendues dans le cadre de l'Union Européenne. Dans l'une des affaires concernant la validité de l'accord judiciaire d'une société de droit commercial, dans laquelle les associés ont estimé que la valeur des apports non monétaires était inférieure à leur valeur réelle, la Cour Suprême s'est référée dans sa décision à la Première directive du Conseil de la CEE du 9 mars 1968 (68/151/CEE).[7]

IV. La jurisprudence du Tribunal antimonopole

La référence aux dispositions juridiques et à la jurisprudence ouest-européenne est une pratique relativement fréquente au Tribunal antimonopole. Le facteur décisif à cet égard a été l'insertion dans l'Accord Européen concernant l'association de la Pologne aux Communautés Européennes, des dispositions des art. 85, 86 et 92 du Traité de Rome, puis l'adoption de dispositions analogues dans le droit polonais. Le Tribunal s'est conformé aux règles communautaires de la concurrence en diverses occasions, par exemple pour:

- Définir un marché de référence;[8]
- Prouver des restrictions de concurrence dans un contrat de franchise;[9]
- Légaliser et définir un accord concernant des transactions d'exclusivité;[10]
- Traiter des systèmes de distribution sélective;[11]
- Démontrer le caractère anticoncurrentiel d'accords comportant des clauses de subordination de vente;[12]
- Autoriser l'introduction de preuves indirectes afin de démontrer l'existence de cartels;[13]

Le Tribunal antimonopole se réfère parfois aussi à la jurisprudence ou aux dispositions juridiques de certains Etats membres de l'Union Européenne, voire même d'autres pays. Par exemple:

- Il s'est fondé sur la jurisprudence de l'Union Européenne et des Etats-Unis en ce qui concerne le caractère anticoncurrentiel d'une entente sans qu'il soit nécessaire de prouver l'existence de la restriction de concurrence;[14]
- Il a décidé que le droit antimonopole n'était pas applicable aux rapports de coopérations internes à l'entreprise en se référant à la loi américaine Robinson-Patman de 1936.[15]
- Enfin, le Tribunal a justifié la capacité de l'Office antimonopole à intervenir dans le secteur pharmaceutique sur la base des expériences de la jurisprudence allemande.[16]

V. L'influence des tribunaux sur les entreprises

En dehors des jugements qu'ils rendent, les tribunaux agissent aussi pour améliorer le degré de connaissance de la législation économique de la part des entreprises. Ils publient à cette fin dans les revues de droit les jugements qui ont un caractère jurisprudentiel. Jusqu'à présent, le Tribunal antimonopole a décidé la publication d'une centaine de jugements. Il a également encouragé la rédaction de plusieurs commentaires par des juristes qualifiés.

VI. Les problèmes du système judiciaire en Pologne

Il existe en Pologne des garanties formelles préservant l'indépendance du juge ainsi qu'un système de sélection des candidats au poste de juge. Malheureusement, après quelques années de travail et d'expériences satisfaisantes, on assiste au phénomène suivant: les juges abandonnent leur fonction pour d'autres postes juridiques mieux rémunérés. En raison d'un budget trop faible, le nombre de juges est insuffisant. En 1995, 6.900 juges et assesseurs au total ont été employés et, durant cette période, 4.868 000 affaires ont été traitées par les tribunaux de droit commun. Si l'on tient compte des périodes de congés payés, un juge traite, en moyenne, plus de 60 affaires par mois. Dans certains districts juridiques, la situation en matière de personnel est exceptionnellement difficile.

En raison du retard accumulé dans le traitement des affaires et du niveau très élevé des frais judiciaires en cas d'appel et de cassation, le montant de ceux-ci peut atteindre jusqu'à 24% de la valeur de l'objet du litige. Ceci constitue un obstacle important à l'accès à la justice pour les entreprises. Toutefois, cet obstacle résultant du niveau élevé des frais judiciaires n'existe pas pour les procédures engagées auprès du Tribunal antimonopole, dans la mesure où le coût d'un appel est fixé à un montant forfaitaire qui n'excède pas 200 dollars US.

Notes

1 Journal des Lois 1995, N° 80, texte 405 et amendement du Journal des Lois 1996, N° 106, texte 496.

2 Journal des Lois N° 47, texte 211 et amendement du Journal des Lois 1996, N° 106, texte 496.

3 Il s'agit ici du règlement N° 4064/89 du Conseil du 21 décembre 1989.

4 Stanislaw Soltysiñski: Dostosowywanie prawa polskiego do wymagañ Ukladu Europejskiego ("Pañstwo i Prawo" 1996, N° 4-5).

5 Opinia Rady Legislacyjnej przy Prezesie Rady Ministrów RP w sprawie dostosowania prawa polskiego do prawa wspólnotowego („Przegl¹d Ustawodawstwa Gospodarczego" 1995, N° 2-3).

6 Zygmunt Ziembiñski: Desuetudo, "Pañstwo i Prawo" 1994, N° 11.

7 Décision de la Cour Suprême du 7 avril 1993 III CZP 23/93; OSNCP 1993, N° 10, texte 172.

8 Jugement du 31 mai 1995, XVII Amr 9/95; "Wokanda" 1995, N° 6.

9 Jugement du 21 juillet 1992, XVII Amr 12/92; "Orzecznictwo Gospodarcze" 1992, N° 4, texte 83, avec le commentaire de E. Wojtaszek.

10 Jugement du 6 décembre 1995, XVII Amr 44/95.

11 Jugement du 6 décembre 1995, XVII Amr 47/95.

12 Jugement du 12 février 1993, XVII Amr 33/92; "Wokanda" 1993, N° 7.

13 Jugement du 1 mars 1993 r., XVII Amr 37/92; "Orzecznictwo Gospodarcze" 1993, N° 3, texte 63, avec le commentaire de E. Wojtaszek.

14 voir le jugement du 1 mars 1993, XVII Amr 37/92.

15 Jugement du 16 décembre 1992, XVII Amr 28/92; „Orzecznictwo Gospodarcze" 1993, N° 1, texte 9.

16 Jugement du 19 novembre 1992, XVII Amr 24/92; „Orzecznictwo Gospodarcze" 1993, N° 1, texte 7, avec le commentaire de S. Soltysiñski.

LE ROLE DE LA SCIENCE ECONOMIQUE ET DES ECONOMISTES DANS LES AFFAIRES DE CONCURRENCE

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Le système italien comporte une double conception qui affirme l'idée d'entreprise comme principe fondamental du système économique, mais qui subordonne aussi cette liberté à la sauvegarde des intérêts sociaux rappelés par l'art. 41 de la Constitution, selon lequel :"L'initiative économique privée est libre. Elle ne peut s'effectuer en opposition à l'utilité sociale ou en portant préjudice à la sécurité, à la liberté, à la dignité humaine. La loi détermine les programmes et les contrôles nécessaires pour que l'activité économique publique et privée puisse être orientée et coordonnée à des fins sociales". Le texte de l'article révèle à la fois la reconnaissance d'un conflit latent et en tout cas possible entre les intérêts privés des entreprises et les intérêts collectifs (sociaux et de marché) et l'assujettissement consécutif de la liberté de réalisation des premiers au respect des seconds.

La réglementation spécifique en matière de concurrence à laquelle l'Italie, presque dernière parmi les Etats européens, est récemment parvenue, avec la loi du 10 octobre 1997 (loi 287/90) (règles pour la protection de la concurrence et du marché, c'est à dire la loi antitrust), vise, à travers la réalisation d'un plus haut degré de concurrence, à poursuivre, en partant de ressources égales, un bien-être social plus développé, en protégeant non seulement la liberté d'entreprise mais aussi le droit des consommateurs. Ce ne sont pas seulement les objectifs de rendement du système économique qui caractérisent la législation antitrust ; cette dernière s'intègre aussi dans le contexte des instruments de l'intervention publique dans le domaine économique. Dans l'ordonnancement italien, les problèmes économiques et juridiques sont vus sur des plans différents, même si l'action judiciaire ne peut pas faire abstraction des aspects économiques du cas d'espèce.

Le législateur italien a choisi de répartir les compétences pour le traitement des questions de concurrence entre l'autorité judiciaire et l'autorité garante de la concurrence et du marché : cette répartition est telle que les juges sont inévitablement et principalement chargés des questions de droit et de règlement des différends entre les entreprises, alors que l'autorité garante exerce un rôle de contrôle, de consultation et de protection des intérêts généraux et des équilibres économiques.

I. La situation antérieure à la loi nationale sur la concurrence

Afin d'élucider les rôles respectifs des deux organes - judiciaire et administratif - il importe de mieux décrire la situation qui s'était créée avant l'entrée en vigueur de la législation nationale antitrust. En effet, les solutions adoptées par la loi 287/90 ont été introduites dans un contexte déjà organisé, dans un domaine où le rôle joué par le juge sur les problèmes de concurrence était bien défini sur la base de l'expérience acquise, encore qu'il s'agisse toujours essentiellement de régler des conflits intersubjectifs entre les entreprises, et non pas de protéger l'intérêt général ou l'intérêt du consommateur (même s'il est certain que ces intérêts n'ont jamais été ignorés dans l'examen de chaque cas). En effet, on doit rappeler que, en ce

qui concerne l'organisation juridique italienne, le juge ordinaire est compétent en matière de droits subjectifs et que son intervention est limitée au domaine des rapports intersubjectifs, qualifiés par la possession de droits privés afin de résoudre des conflits entre personnes privées.

Avant même l'entrée en vigueur de la législation spéciale, les dispositions de concurrence du Traité CE (art. 85 se référant aux ententes, art. 86 à propos de l'abus de position dominante) étaient appliquées par les juges nationaux, de même que les règles du droit intérieur qui régissaient les rapports de concurrence, telles que l'art. 2598 et suivants Cod. Civ., pour la protection contre les comportements de concurrence déloyale ou l'art. 2597 Cod. Civ., applicable aux entreprises qui exercent leur activité en régime de monopole.

Même à la suite de la promulgation de la loi 287/90, qui a attribué à la compétence unique de la Cour d'appel les différends relatifs aux actions en nullité et en dédommagement (art. 33, alinéa 2), les différends suivants sont restés de la compétence du Tribunal, selon les règles ordinaires et selon la pratique qui s'était enracinée avant l'entrée en vigueur de la loi 287/90 :

a) Les différends fondés sur la violation de la législation antitrust autres que les actions en nullité et en dédommagement,

b) Les différends découlant de la violation des règles sur la concurrence du Traité CE (art. 65 et 66 du Traité CECA, 85 et 86 du Traité CE, règlements d'exemption) et de la violation des règles de pays tiers où c'est le juge national qui est appelé à connaître ces règles et à les faire appliquer,

c) Les différends relevant des dispositions du Code Civil et en particulier de l'art. 2598 C.C..

Il arrive parfois que le même cas d'espèce soit sanctionné au titre de plusieurs systèmes juridiques. Pour cette même raison plusieurs actions peuvent être proposées pour un même différend. Il pourra donc y avoir plusieurs organismes compétents, chacun en mesure de proposer son propre remède : il pourra se créer un concours complexe d'interventions, de même qu'un risque de jugements contradictoires. Ce risque peut être évité en partie, en utilisant les moyens prévus par le système, notamment par des ordonnances de suspension, sûrement opportunes, mais pas toujours possibles.

II. La loi n. 287 du 10 octobre 1990

Le rôle du juge dans la législation antitrust se déroule donc, d'une part, en suppléant les carences antérieures de la législation nationale et en assurant parallèlement sa fonction de juge du droit communautaire, et, d'autre part, en s'occupant des espaces, au demeurant très restreints, qui lui sont assignés par la loi 287/90.

Sur la base de cette législation, l'intervention du juge ordinaire (la Cour d'appel étant seule compétente au titre de l'art. 33, alinéa 2 de la loi nationale antitrust) accompagne et complète les compétences attribuées à l'Autorité garante de la concurrence et du marché et à la juridiction exclusive du Tribunal administratif régional (TAR) du Latium pour les jugements sur les recours contre les dispositions arrêtées par l'autorité ; il faut ajouter à cela la compétence réservée à la Cour d'appel en tant que juge des dispositions d'urgence et conservatoires.

Le second point de l'art. 33, alinéa 2 de la loi 287/90 attribue aussi à la Cour d'appel la compétence pour juger des recours visant à obtenir des mesures d'urgence en liaison avec la violation des dispositions de cette même loi ; il faut ajouter que, avec la réforme de la procédure civile (loi n. 353 du 26 novembre 90), les mesures conservatoires peuvent être demandées à une autre section de la Cour d'appel, si la mesure est collégiale ou au collège de cette même section si la mesure a été prise par un juge unique. A cet égard, on a constaté, dans les premières mesures arrêtées par la Cour d'appel de Milan (les ordonnances 23.1.92, Cavirivest/Nuova Samim ; 7.7.92, AVIR/ENEL ; 5.2.92, MYC et autres/AFI et autres ; enfin l'arrêt B.B. Center/Parabella du 21.3.95) suivies par d'autres décisions analogues de la Cour d'appel de Rome (ordonnances 14.1/20.1.93, Gruppo Sicurezza/soc. Aeroporti di Roma ; 7.8/20.8.93, CMS/ENEL ; 9.12/21.12.93 De Montis/Soc. Aeroporti di Roma) que la compétence de la Cour d'appel pour arrêter des mesures d'urgence est limitée aux mesures de procédure par rapport aux actions en nullité et en demande d'indemnités.

Les mesures conservatoires qui ne relèvent pas du cadre des actions en nullité ou en demande d'indemnités prévues par l'art. 33 de la loi 287/90, pourront être demandées au tribunal sur la base des règles ordinaires. Au contraire, l'Autorité garante ne s'est vue reconnaître aucun pouvoir spécifique en matière de mesures conservatoires, d'intervention immédiate et urgente, mais elle conserve toutefois de larges pouvoirs de sanction dont les effets importants peuvent être immédiats dans la poursuite du comportement soumis à enquête.

III. L'Autorité Garante de la concurrence et du marché

Avec l'institution d'une Autorité garante, le législateur a voulu créer un organisme de contrôle sur lequel concentrer tous les pouvoirs pour traiter de tous les problèmes pouvant constituer une violation de la protection du marché et de la concurrence. L'Autorité se voit aussi reconnaître des pouvoirs consultatifs puisqu'elle peut signaler au Parlement et au Gouvernement toute situation anormale de la concurrence dérivant d'éventuelles mesures législatives ; elle peut exprimer son avis sur les initiatives nécessaires pour empêcher ou prévenir ces entorses. En ce qui concerne la fonction consultative, l'activité de l'Autorité est particulièrement importante dans le domaine de l'élaboration législative ; celle-ci peut exprimer des avis sur les problèmes concernant la concurrence et le marché à la requête des administrations et des organismes publics intéressés et toutes les fois qu'il l'estime opportun.

L'Autorité dispose de larges pouvoirs d'enquête pour relever d'éventuelles ententes restrictives à la liberté de concurrence et des situations d'abus de position dominante ; elle peut donc ouvrir une instruction sur les sociétés qui ont réalisé ces ententes et, éventuellement, adresser des mises en demeure et engager des sanctions (articles 12 et suivants de la loi 287/90 et 21 et suivants de la même loi). Il est possible de présenter un recours contre les mesures adoptées par l'Autorité, devant la juridiction exclusive du juge administratif, le Tribunal administratif régional du Latium, pour toute l'Italie (art. 33, alinéa 1, loi 287/90). Il n'en va pas de même pour les actions en nullité et en dédommagement du préjudice et pour les recours visant à obtenir des mesures d'urgence qui doivent être présentés devant le juge ordinaire, et, en particulier, devant la cour d'Appel compétente en premier et dernier ressort pour le territoire (alinéa 2 du même article).

IV. Personnes autorisées à engager une action - Autres différences entre les deux procédures

Du fait des rôles différents attribués au juge et à l'Autorité garante, il faut aussi noter que, pour les personnes autorisées à engager une action devant le juge ordinaire, les principes généraux sont applicables en sorte que le juge est compétent en matière de droits subjectifs. Alors que les pouvoirs réservés à l'Autorité

garante visent à protéger les intérêts et les objectifs généraux et s'insèrent dans une réglementation publique du secteur de l'économie, l'intervention du juge ordinaire est réservée aux rapports entre particuliers, qualifiés par la possession de droits privés, et lui permet de résoudre des différends entre personnes privées. Ainsi, seules ces dernières pourront, dans la mesure où elles déclarent être lésées dans un de leur droit par la violation de la législation de la concurrence, saisir le juge ordinaire, le tribunal ou la cour d'appel (dans ce dernier cas, seulement si elles envisagent des actions en nullité ou en demande d'indemnisation du dommage, en vertu de l'art 33, alinéa 2 de la loi 287/90.)

On relèvera aussi que la législation n'a pas prévu d'intervention du Ministère Public au cours de la procédure devant le juge ordinaire italien (ce qui constitue une preuve significative du rôle absolument privé du différend) ; celui-ci pourrait tout au plus intervenir de manière facultative, en vertu du dernier alinéa de l'art. 70 du c.p.c.. De même, le Ministère Public ne dispose pas d'un pouvoir d'action. L'ordonnancement ne lui réserve ce pouvoir que dans les cas prévus par la loi (art. 69 du c.p.c. et 75 1° alinéa, Règlement judiciaire R.D. n.12 du 30.1.41).

Par ailleurs, la loi n. 287 ne prévoit pas une extension "erga omnes" du jugement de nullité (ce qui est prévu, par exemple, en matière de nullité de brevet d'invention, par l'art. 79 du R.D. n. 1127 du 29.6.39), en sorte que l'arrêt déclarant la nullité d'une entente à la demande d'un plaignant, ne pourra avoir d'effets contre d'autres sujets concernés, en application du principe évoqué à l'art 2909 du Code civil.

L'Autorité garante peut être saisie par les administrations publiques, ainsi que par toute personne y ayant un intérêt ; en outre, l'Autorité peut agir d'office. C'est ainsi que son intervention peut être provoquée par toute personne qui, sans pouvoir exciper d'une situation de droit subjectif, a toutefois intérêt à la protection du fonctionnement concurrentiel du marché, en dehors de l'existence d'un litige inter-personnel.

V. Le juge administratif

En ce qui concerne les fonctions du juge administratif, le premier alinéa de l'article 33 réserve exclusivement au TAR du Latium le recours contre les mesures promulguées par l'Autorité garante. Le TAR du Latium dispose donc de la compétence juridictionnelle à l'égard de situations juridiques subjectives pouvant être qualifiées comme des intérêts légitimes, mais aussi de droits subjectifs, lorsqu'il s'agit de contrôler le travail de l'Autorité garante. Aussi, dès que la décision de l'Autorité est formellement prise, la compétence juridictionnelle est exclusivement attribuée au juge administratif et non pas au juge ordinaire. Toutefois, une lecture attentive de l'art. 33, alinéa 2, laisse penser que la compétence juridique relève du juge ordinaire territorialement compétent, en l'espèce la Cour d'appel, pour les actions en nullité et en demande d'indemnités, en cas de lésion d'un droit subjectif dans le cadre d'un litige inter-personnel.

La présence concomitante des compétences anciennes et nouvelles, le cumul des réglementations nationales et communautaires, les rapports entre les sanctions et les remèdes de la procédure privée et le contrôle de l'action publique confié à l'Autorité, et, au second degré au TAR du Latium, tous ces éléments ont créé un mécanisme complexe au sein duquel il est possible de relever toute une série de facteurs illicites possibles, de multiplicités d'actions en justice, de diversité d'instruments de protection et d'organes préposés à la protection.

Près de six ans après la promulgation de la loi nationale antitrust et grâce aux nombreuses contributions de la doctrine et de la jurisprudence, le système est devenu plus clair, bien qu'il demeure encore des zones de superposition et d'incertitude. L'aspect qui suscite le plus de perplexité d'un point de vue fonctionnel et d'application pratique est sans conteste représenté par les compétences multiples accordées

aux différents degrés de juridiction, au juge administratif à l'Autorité garante. Dans cette situation complexe, il est certain que l'examen des aspects économiques relève spécifiquement de l'Autorité garante plus que du juge ordinaire.

VI. Les rapports entre les différentes autorités

On ne peut pas non plus considérer que l'engagement de la procédure devant l'Autorité garante constitue une condition procédurale à l'action devant le juge ordinaire. Sur ce point, on avait émis l'hypothèse que les Cours d'appel traiteraient seulement les différends concernant les droits ouverts par des décisions de l'Autorité garante. Il a été répondu que la vérification des violations des règles pour la protection de la concurrence et du marché était dévolue soit à l'Autorité garante, soit à l'Autorité judiciaire ordinaire, alors que d'autres considéraient que la compétence spéciale attribuée à la Cour d'appel par le deuxième alinéa de l'art. 33 n'intervenait que dans les hypothèses où l'Autorité garante aurait déjà vérifié la violation, avec l'application des sanctions jugées conformes à la loi, de sorte que le jugement de nullité et d'indemnisation du dommage suivrait nécessairement la vérification au niveau administratif. En outre, cette vérification s'imposerait au juge si le jugement ne fait pas l'objet d'un recours devant le TAR (et, il faudrait ajouter, à plus forte raison, s'il a été accueilli et confirmé par le juge administratif) et ne saurait pas être écarté au niveau judiciaire, aux termes de l'art. 4, annexe E de la loi du 29 mars 1865.

On parvient à cette conclusion, compte tenu de l'attribution de la compétence de premier et dernier ressort à la Cour d'appel. Elle semble cohérente avec le caractère subséquent du jugement, limité à la déclaration de nullité de l'acte, de vérification du lien de causalité et à la fixation du dommage et de la réparation due. En outre, le rôle de la cour serait limité aux rapports entre particuliers, en complément des mesures adoptées par l'Autorité garante dans l'intérêt exclusif de la protection de la concurrence et du marché.

Mais il ne semble pas que la loi nationale antitrust soit allée dans ce sens ; pour soustraire les cas relevant des principes généraux du système juridique elle devrait s'exprimer clairement, car il n'est pas possible de déduire une telle limitation de pouvoir du juge ordinaire du seul fait que la disposition est placée dans le contexte de l'art. 33 (subséquentialité du deuxième alinéa par rapport au premier). En effet, on peut noter l'absence, dans l'art. 33 et dans la loi en général, de tout élément de raccordement entre la phase d'instruction administrative et la procédure judiciaire engagée devant la Cour d'appel, ou tout autre juge ordinaire (en relation avec l'importance des compétences résiduelles du Tribunal, évoquées plus haut).

La tentative ou même seulement l'engagement au préalable d'une procédure administrative contre la violation invoquée ne peut constituer un préalable ni un empêchement formel à l'initiative judiciaire d'un requérant, en application du principe fondamental de l'art 24 alinéa 1 de la Constitution, selon lequel "toute personne est autorisée à se pourvoir en justice pour la protection de ses droits..." et aussi du rôle du juge en tant que garant des dispositions prises par l'administration publique, comme le prévoit l'art. 133 de la Constitution.

Il est aussi significatif que, à l'occasion des nombreux recours de ces dernières années devant les juges ordinaires et tout en donnant acte de la procédure en cours devant l'Autorité, aucun des juges saisis n'a cru pouvoir suspendre son examen dans l'attente de la décision de l'organe administratif, et, dans les cas ou cet examen était achevé, il n'a pas considéré les décisions de l'Autorité comme contraignantes. Dans plusieurs cas, il a été fait référence à ces conclusions en tant qu'éléments supplémentaires d'évaluation ou de présomption de subsistance de violations et de comportements déterminés, mais on n'est pas allé au-delà de

ce rappel pour conforter des jugements fondés sur des déductions et sur les preuves apportées au procès à l'instigation des parties.

Comme on l'a déjà indiqué, on ne peut toutefois pas nier une inter-relation entre les deux ordres de jugement et la possibilité de parvenir à des décisions de sens opposé entre les organes administratif et judiciaire. Un exemple important est donné par l'affaire Omnitel/Telecom, pour la gestion du réseau téléphonique GSM, dans lequel la Cour d'appel de Rome a considéré que l'abus de position dominante de Telecom ne subsistait pas, alors que l'Autorité garante avait estimé qu'il subsistait. On relèvera que, pour le juge ordinaire, l'affaire s'est résolue sur la base d'une question procédurale portant sur le rapport entre les deux parties dans le jugement (défaillance d'Omnitel de se soumettre à l'obligation de la charge de la preuve), et que l'Autorité a pris sa décision, au contraire, sur la base des enquêtes qu'elle a engagées d'office comme le lui permet la loi. Toutefois, on ne peut nier que les conclusions auxquelles les deux instances sont parvenues dans cette affaire soient contradictoires.

Le risque d'arrêts contradictoires subsiste dans le système voulu par le législateur. Il peut en partie trouver une justification dans la diversité des fonctions que doivent remplir les deux autorités. De grandes perplexités n'en subsistent pas moins, par exemple dans le cas d'une entente qui serait déclarée nulle dans le rapport intersubjectif entre personnes privées et qui ne serait pas sanctionnée pour son atteinte à l'intérêt public et à la protection de la concurrence, ou, autre exemple, dans le cas d'un abus de position dominante qui serait jugé illicite par le juge ordinaire et qui ne serait pas retenu comme portant atteinte à l'intérêt collectif par l'autorité administrative, et vice versa... Afin d'éviter des discordances inutiles dans le système, il faudrait créer des canaux d'information, même informels, entre les différentes autorités ; mais, jusqu'à présent, cette solution n'a pas eu de suite, si ce n'est par des contacts individuels ou par le biais des indications fournies au juge par les parties.

VII. Comment les juges sont-ils informés de l'analyse économique pertinente dans une affaire donnée?

Après avoir présenté le cadre des différentes compétences en matière de droit de la concurrence, on peut affirmer que l'examen des aspects économiques relève spécifiquement de l'Autorité garante, mais qu'il n'est pas possible d'apporter de solution à une affaire soumise au juge ordinaire, dans le cadre d'un litige opposant des entreprises, sans connaître et procéder à l'examen du contexte économique dans lequel s'inscrit le différend.

Quels sont les instruments à la disposition du juge pour approfondir sa connaissance des aspects économiques ? Un premier tableau de la situation lui est certainement fourni par les parties elles-mêmes. Nous rappellerons qu'on applique, dans le système italien, le principe de "l'allégation des parties", sur la base duquel le juge examine le litige tel qu'il lui est présenté dans les actes du jugement, en se limitant aux aspects que les parties ont estimé devoir lui soumettre. De même, en matière probatoire, le juge ne doit prendre en considération que les moyens de preuve qui lui ont été soumis par les parties (production de documents) ou considérer uniquement le témoignage par preuve et l'interrogatoire de la partie adverse que les parties ont demandé dans un mémoire déposé au préalable.

Si l'on recherche de quelle manière les juges sont informés de l'analyse économique pertinente dans une affaire donnée, il faut d'abord remarquer, comme on l'a déjà indiqué, que la procédure administrative soumise à l'Autorité garante ne représente pas une condition nécessaire à la procédure judiciaire, de sorte que le juge n'est pas toujours en mesure de se référer aux vérifications accomplies par l'Autorité dans le secteur économique pertinent de l'affaire examinée, de même qu'il n'est pas lié par les

conclusions auxquelles l'Autorité est parvenue sur cette même affaire. Toutefois, il ne fait aucun doute, et le cas s'est déjà présenté dans plusieurs affaires, que si l'Autorité a déjà procédé à des enquêtes sur un cas particulier, celles-ci constituent une référence pour la décision judiciaire ; mais, dans ce cas aussi, l'instrument dont dispose le juge pour connaître le déroulement d'une procédure devant l'Autorité garante reste toujours celui de l'information donnée par l'une des parties.

On peut envisager l'utilisation du pouvoir de demander des informations à l'administration publique (art. 213 c.p.c.), un instrument qui pourrait servir au juge pour acquérir des éléments sur les aspects économiques du secteur du marché concerné, en dehors des éléments que les parties voudraient bien lui soumettre. Jusqu'à présent, toutefois, cette possibilité qui semble praticable du point de vue de la procédure civile, n'a jamais été exploitée, et les informations dont les juges disposaient sur l'activité de l'Autorité garante sont toujours parvenues par le canal des indications et productions de preuves des parties. En outre, il faut rappeler que, dans le système juridique italien, le juge ne peut recevoir ni utiliser des informations privées sur les affaires en instance devant lui (art. 97, règlement d'application du c.p.c.), et il ne peut donc se prévaloir d'informations acquises de manière informelle auprès de l'Autorité garante ou d'experts économiques ; il peut seulement obtenir leur collaboration par l'intermédiaire des instruments déjà indiqués de la demande d'information ou de l'expertise technique.

VIII. Quelle est la valeur et le rôle des conseillers experts en économie ?

Un instrument valable à la disposition du juge pour se doter de connaissances sur les aspects économiques du litige est, justement, le recours à un avis technique. Cette démarche permet au juge de faire appel à un expert ou à un groupe d'experts (on ne peut nommer un collège d'experts qu'en cas de nécessité grave ou lorsque la loi le précise : art. 191 C.p.c.) pour se doter des données techniques nécessaires à l'évaluation des faits importants pour le procès. L'expert technique choisi d'office intervient à partir d'une question spécifique du juge, qui peut l'accompagner dans son enquête, ou, comme c'est plus souvent le cas, peut opérer seul ou en utilisant la collaboration d'un assistant pour mener à bien ses recherches et en faire rapport écrit au juge. L'expert peut être autorisé à demander des éclaircissements aux parties en cause et à se renseigner auprès de tierces personnes. Les parties peuvent suivre l'action de l'expert aussi par le biais d'experts qu'elles auront eux-mêmes choisis et qui pourront soumettre par écrit des observations et des rapports à l'expert en titre.

Dans le système judiciaire italien, l'avis des experts ne constitue pas une preuve : il n'a pour but que de venir s'ajouter aux connaissances du juge dans les cas où, pour évaluer une preuve, il s'avère nécessaire de disposer de connaissances techniques dont le juge ne dispose pas ; l'expert se limite à illustrer les règles techniques, scientifiques ou d'expertise nécessaires au juge pour pouvoir apprécier personnellement les données de l'instruction probatoire mais il peut aussi évaluer directement les données, en exposant les méthodologies utilisées et les critères adoptés. En tout état de cause, la compétence de l'expert s'arrête là où commence la véritable évaluation juridique du matériel du procès, cette dernière faisant partie des tâches exclusivement réservées au juge.

Une limite imprescriptible aux pouvoirs de l'expert et à la faculté du juge de lui confier une enquête de nature économique est celle du principe, acquis dans la procédure judiciaire italienne et dans la jurisprudence de la Cour de cassation, selon lequel l'expert ne peut pas être chargé d'une activité purement exploratoire et qu'il doit donc opérer toujours dans le cadre de l'approfondissement technique des éléments de preuve que les parties en cause sont tenues de présenter au juge. L'évaluation de l'expert n'est pas contraignante pour le juge mais, selon les orientations exprimées à plusieurs reprises par la Cour de

Cassation, le juge doit expliquer les raisons qui l'ont poussé à ne pas retenir les conclusions de l'expert choisi par ses propres soins.

Toutefois, cette procédure d'enquête n'a jamais trouvé sa place dans les procédures qui se sont déroulées jusqu'à présent en matière de concurrence et ce ni dans le cadre des procédures conservatoires ni dans celles sur le fond, sauf dans certains cas où on a renvoyé à l'expert l'évaluation des dommages consécutifs à la violation de la loi antitrust, en réponse à une demande de dédommagement. Cette exclusion ne s'explique pas tant par la faible attention portée aux aspects économiques du cas d'espèce que par le principe de l'initiative renvoyée aux parties en matière probatoire, et par leur devoir d'illustrer, moyennant des documents et des mémoires, le contexte du marché dans lequel s'inscrit le cas d'espèce. De plus, comme on l'a déjà indiqué, le juge ordinaire s'occupe de régler le différend entre deux ou plusieurs parties au jugement et non pas spécifiquement de protéger le marché ou le consommateur. La position différente prise par le juge administratif (en particulier du Tribunal administratif régional du Latium), agissant sur la base d'un recours contre une disposition prise par l'Autorité garante, réside justement dans le fait qu'une instruction a déjà été menée par celle-ci sur le cas d'espèce et que tous les actes s'y rapportant ont été acquis ou peuvent l'être dans le cadre de la procédure devant le TAR.

En revanche, si l'on revient au jugement du juge ordinaire, nous pouvons affirmer avec certitude que l'expertise technique pourrait représenter un instrument de vérification valable permettant d'approfondir les données de nature économique et les aspects du marché qui concernent le cas d'espèce ; aussi, même si cette expertise n'a pas été utilisée jusqu'à présent, il est probable qu'un recours plus fréquent à celle-ci aiderait le juge à approfondir les questions de nature technique et, plus particulièrement, économique qu'il estime nécessaires.

Quant à la question de savoir s'il est judicieux qu'un juge généraliste soit chargé des litiges en matière de concurrence, on notera que :

a) Le choix du législateur italien ainsi que celui de beaucoup de législateurs des pays Membres de l'Organisation consistant à renvoyer à la compétence des Cours d'appel ou des juges de niveau supérieur les différends dans cette matière, semble effectivement indiquer que ces juges disposent d'un certain degré de spécialisation dans les affaires économiques;

b) Les juges de niveau supérieur sont normalement attachés aux tribunaux des grandes villes où ils ont l'occasion d'acquérir une bonne connaissance des problèmes économiques, s'occupant de nombreux litiges entre les entreprises;

c) Il est possible, et sans aucun doute opportun, que le juge fasse appel à l'aide de conseillers-experts;

d) Sur la question des éventuelles "décisions automatiques", il faut noter que dans l'ordonnancement italien les juges doivent appliquer l'interprétation des principes du droit de la concurrence élaborée par les institutions communautaires (art.1, 4e alinéa, de la loi 287/90).

En l'espèce, je crois, qu'il ne s'agit pas de prendre des "décisions automatiques", mais plutôt de s'appuyer sur l'expérience mûrie par les institutions communautaires, en plus de trente ans d'existence. En outre, le juge ne délègue pas la décision aux conseillers-experts et n'applique pas automatiquement leurs conclusions, mais il doit utiliser les données et les instruments techniques qui lui ont été fournis pour arriver à la décision dans le cas d'espèce en résolvant aussi les problèmes de droit. En aucun cas, les conseillers-experts ne peuvent remplacer le juge.

André Potocki
Juge, Tribunal de première instance des Communautés Européennes

I. Les relations entre le droit et l'économie dans le droit de la concurrence

Sur le plan conceptuel, de grandes différences existent entre le droit et l'économie, qui peuvent rendre difficile leur cohabitation au sein d'une même discipline. Leurs fonctions respectives, notamment, ne sont pas semblables.

Dans ses dispositions substantielles, le droit a pour fonction de poser comme règle les valeurs et les comportements regardés comme souhaitables; dans ses dispositions procédurales, il a pour objet de fixer les modalités de mise en oeuvre de ces règles, tout en protégeant les droits fondamentaux des citoyens. On peut donc dire que le droit ordonne et protège. On peut dire aussi qu'il est subjectif, car il est fondé sur des choix politiques, au sens le plus noble du terme.

L'économie, elle, se donne pour rôle de décrire, d'expliquer et même de prévoir les mécanismes de création, de circulation et de distribution des richesses. L'économie se distingue donc du droit en ce qu'elle ne donne pas des ordres, et en ce qu'elle est objective, c'est-à-dire qu'elle se fonde sur des faits.

Venons en plus concrètement au droit de la concurrence. Le caractère technique du droit de la concurrence n'est pas, en soi, exceptionnel. Il est fréquent que le droit règle des matières techniques : le droit médical, le droit des brevets en sont des exemples. Mais le droit de la concurrence est différent, car non seulement il applique le droit à l'économie, mais encore il greffe des concepts économiques sur le droit : il ne se limite pas, comme en matière médicale, par exemple, à appliquer les règles de la responsabilité civile à l'activité du médecin. Il introduit des interdictions définies par référence à des concepts économiques : ainsi, il est interdit d'abuser d'une position dominante sur le marché. Cette prohibition ne peut être comprise et appliquée que dans son sens économique. Mais il faut souligner que, alors, ces concepts économiques deviennent des règles juridiques. Cette transmutation est fondamentalement un choix politique, un acte politique.

Toute la création du Marché commun suit précisément cette logique : un choix politique a transformé des concepts économiques en principes juridiques. Il en résulte, à mes yeux, deux conséquences. En premier lieu, le juge chargé d'appliquer le droit de la concurrence doit comprendre et maîtriser ces concepts. S'il ne le faisait pas, il trahirait, non pas l'économie, mais le droit et sa mission. En second lieu, le concept économique devenu partie intégrante de la règle de droit n'est plus soumis à la seule logique économique. Ainsi, les juges communautaires sont d'une extrême sévérité avec toutes les ententes, horizontales ou verticales, qui peuvent avoir pour effet de cloisonner le marché. Pourtant, on peut imaginer certain cas dans lesquels l'économie n'en serait pas significativement troublée. Mais tout cloisonnement du marché est une atteinte à l'objectif prioritaire, fondateur, politique : le marché unique.

Je suis donc pleinement conscient de l'absolue nécessité de reconnaître le particularisme des notions économiques intégrées dans le droit de la concurrence. Mais je considère que ces notions participent alors à la réalisation des mêmes objectifs que la règle de droit et sont soumises aux mêmes contraintes.

Une confrontation directe entre l'économique et le politique à travers le juridique est parfois

organisée par le Traité instituant la Communauté européenne : ainsi, l'article 90 soumet les services publics au droit de la concurrence ; mais il précise que l'application de ces règles économiques trouvent leurs limites lorsqu'elles font échec à la mission d'intérêt économique général dont ces services sont chargés. Il s'agit bien là d'un concept politique. Cette primauté du droit sur l'économie n'est pas affirmée pour la satisfaction de susceptibilités particulières. Ce serait ridicule et sans portée. Elle signifie que, à travers le droit, l'économie rejoint le politique, qui est le point culminant d'une société démocratique. Mais ce que je dis est évident. Sinon, on parlerait d'économie juridique et non de droit économique.

II. Les relations entre les juges et l'économie dans le droit de la concurrence

Pour le juge généraliste, la découverte du droit de la concurrence est une révolution intellectuelle. Il lui faut manier des idées et des outils nouveaux. Parfois, il doit même les appliquer à des situations qu'il a déjà jugées en utilisant le droit commercial classique. Cependant, les juges siégeant dans les juridictions communautaires à Luxembourg n'ont pas à faire un tel effort. La plupart d'entre eux ont étudié, appliqué et parfois même enseigné le droit de la concurrence. Ils savent donc la place qu'il faut faire aux notions économiques.

La situation du juge communautaire est également particulière à un double point de vue. Premièrement, il se limite à un contrôle de légalité de la décision qui lui est soumise. Les éléments économiques dont la pertinence est contestée doivent donc être dans la décision. Le juge communautaire vérifie la conformité de la décision au droit. Il annule la décision ou rejette le recours. Mais il n'a pas un pouvoir de plein contentieux pour reconstruire une nouvelle décision. Deuxièmement, dans les décisions comportant des appréciations économiques complexes, le juge communautaire allège son contrôle : il ne sanctionne pas n'importe quelle erreur, mais seulement l'erreur manifeste, c'est-à-dire celle qui est évidente. Mais il ne faut pas commettre de contresens : cela ne veut pas dire que le juge se sente incapable de traiter une question économiquement complexe. Cela signifie que l'appréciation économique complexe recouvre un choix de politique économique qui revient à la Commission.

Ces limitations ne sont donc pas un recul du juge communautaire devant les questions économiques. Elles traduisent une répartition des tâches entre la Commission européenne et le juge. C'est à la Commission qu'il appartient de définir et de mettre en oeuvre les objectifs du droit de la concurrence. C'est au juge qu'il appartient de contrôler, a posteriori, la conformité de ces choix avec le droit communautaire. La Commission et le juge manient l'économie. Mais pour la Commission, les concepts économiques sont un outil de gestion, alors que pour le juge, ils sont un objet de son contrôle.

Il faut rappeler, même si cela est évident, que les liens intimes qui unissent le droit et l'économie dans le champ du droit de la concurrence exigent de la part du juge formation permanente, dialogue et imagination. La formation permanente est un devoir pour les juges. Il n'est pas nécessaire de développer cette idée. Le dialogue doit être permanent avec les spécialistes de l'économie : le juge doit pouvoir confronter son opinion à celle d'experts, d'avocats spécialisés, d'assesseurs venant du monde de l'entreprise. Ni le juge, ni l'économiste ne doivent s'enfermer dans un langage ou raisonnement inaccessible. L'imagination, enfin, est indispensable, afin d'élaborer des décisions prenant en compte le caractère hybride du droit de la concurrence.

Ces brèves observations me conduisent à considérer que le droit de la concurrence est légitimement confié à des juges qui ont une expérience diversifiée de généralistes. Mais ces juges doivent réaliser un puissant effort de formation et d'ouverture d'esprit. Un homme politique du début du siècle disait : "La guerre

est une chose trop sérieuse pour la laisser aux militaires." Je dirai : "Le droit de la concurrence est une chose trop sérieuse pour qu'il soit laissé aux seuls économistes ou aux seuls juristes."

CONCILIATION DE CRITERES MULTIPLES EN DROIT DE LA CONCURRENCE

Stanislaw Gronowski
Juge, Cour Antimonopole (Pologne)

I. Introduction

L'analyse de la législation antimonopole, aussi bien dans les Etats à économie de marché développée que dans ceux se dirigeant sur cette voie, montre que la protection de la concurrence n'est pas toujours un but en soi. On trouve en effet dans les lois antimonopoles des notes précises concernant également la protection d'autres valeurs et en particulier:

- La défense des intérêts des consommateurs.[1]
- La protection de la transparence dans le commerce (l'obligation au vendeur d'informer sur les prix, l'interdiction de vendre avec un réel rabais, l'obligation de facturer les achats, l'obligation d'attribuer aux marchandises leurs propres étiquettes).[2]
- La défense de l'intérêt général[3], du bien commun[4] et de l'intérêt public.[5]
- L'accroissement du rendement de la production et de la transaction.[6]
- L'effectivité du développement des structures économiques.[7]
- La protection, la promotion et le renforcement de l'exportation.[8]
- La défense de la liberté économique.[9]
- L'efficace mise à profit des ressources de la société.[10]

On peut par conséquent affirmer que, parallèlement à l'arbitrage des affaires liées à la protection de la concurrence, les tribunaux prennent en considération d'autres valeurs auxquelles renvoie le droit de la concurrence.

II. La loi polonaise

Selon le préambule de la loi polonaise, celle-ci a pour but d'assurer le développement de la concurrence, de protéger les entreprises exposées à l'application des pratiques monopolistiques et les consommateurs. Ces critères considérés comme des motifs de règlement d'affaires se reflètent dans les dispositions pertinentes de la loi. Par exemple, l'art. 9 stipule que l'organe antimonopole peut porter atteinte à l'intérêt d'autres unités économiques ou à celui des consommateurs lorsque cet accord introduit la spécialisation de l'assortiment de production ou de la vente collective des marchandises.

En Pologne, les pratiques monopolistiques, ne pouvant être justifiées conformément à l'art. 6, sont en principe interdites. Selon ce règlement, il est défendu d'utiliser des pratiques de monopole à moins qu'elles ne soient indispensables pour exercer une activité économique et si elles n'amènent pas à une

restriction considérable de la concurrence; la charge de la preuve de ces circonstances incombe à l'opérateur qui les invoque. Cette réglementation, se référant aux critères techniques d'organisation ou économiques, crée d'assez larges possibilités pour justifier des pratiques monopolistiques. Par contre, en vertu de cette disposition, ne peuvent être légalisées les pratiques mentionnées dans l'art. 7 de la loi qui sont formellement interdites (*per se)*.[11]

La disposition citée ci-dessus établit une règle de raison *(rule of reason)*. Toutefois celle-ci n'a pas été formulée de la même manière que dans la jurisprudence des Etats-Unis. En particulier, selon les termes de l'art. 6, il n'est pas nécessaire pour qu'une pratique monopolistique ait un effet proconcurrentiel que ce dernier l'emporte sur les éléments anticoncurrentiels de la pratique donnée.[12] La rédaction de l'art. 6 de la loi polonaise prend plutôt en considération l'aspect subjectif de la pratique antimonopolistique, et donc le point de vue de ses auteurs. Ceci n'a pas de grande signification dans la jurisprudence des tribunaux américains. On souligne là que l'objectif du droit antimonopole n'est pas la protection du sujet ayant recours aux pratiques en question mais la protection de la concurrence.[13]

L'article 6 de la loi polonaise admet également d'autres critères justifiant les pratiques monopolistiques et qui ne sont pas mentionnés dans l'art. 85 (3) du Traité de Rome.[14] Etant donné les obligations de la Pologne en matière d'harmonisation du droit de son Etat avec les concepts de l'Union Européenne, la Pologne fait face à la nécessité d'adapter la réglementation antimonopole aux normes de droit existantes.

III. La jurisprudence du Tribunal Antimonopole

Malgré les doutes suscités par les conditions de la légalisation des pratiques monopolistiques indiquées dans l'art. 6 de la loi polonaise, on remarque dans la jurisprudence du Tribunal Antimonopole, une tendance à l'interprétation de cette disposition tenant compte d'un plus large contexte économique. En principe, seules sont justifiables les pratiques transgressant la loi antimonopole, lorsque parallèlement à leur effet négatif sur la concurrence, elles provoquent des résultats économiques bénéfiques dans le domaine de la rationalisation de la production et du progrès technique si bien qu'en fin de compte ces avantages dominent.

En se référant à la jurisprudence, la nécessité absolue de la pratique monopolistique devrait être établie selon des critères objectifs.[15] La démonstration d'une telle nécessité devrait s'appuyer sur des arguments démontrant la rationalité des procédures, ce qu'il convient d'évaluer en tenant compte de l'intérêt du sujet utilisant une pratique monopolistique et d'un contexte économique plus large. De cette façon, en s'appuyant sur les critères de l'art. 6, le Tribunal Antimonopole a légalisé un accord conclu pour 5 ans, octroyant à un seul opérateur économique l'exclusivité d'introduire dans les gares des services de restauration. Cet opérateur, en accord avec l'administrateur de la gare, s'est alors chargé de réviser les objectifs commerciaux de cette dernière et a garanti de nombreuses prestations permettant de satisfaire les besoins des voyageurs à un niveau relativement supérieur à celui existant précédemment.[16] Lors d'une autre affaire, on a légalisé la pratique de la société des Télécommunications Polonaises qui repose sur le prélèvement de frais non prévus par la tarification aux futurs abonnés et qui a permis de financer les investissements de cette entreprise. Les frais dont il est question ci-dessus ont été par la suite ajoutés au montant des conversations téléphoniques passées par les abonnés. Cette pratique a permis d'accélérer le développement du réseau téléphonique de la Pologne.[17]

Dans l'une de ces affaires, le Tribunal Antimonopole a fait savoir que le règlement de l'art. 6 ne devrait pas être interprété de manière à décourager les entreprises à investir. Parfois, comme l'a souligné le tribunal, il n'est pas toujours nécessaire d'interdire les pratiques monopolistiques. Ceci, dit il faut

davantage mettre l'accent sur les divers comportements de l'opérateur économique concerné par l'affaire en cours.[18]

En examinant, aux termes de l'art. 6, la nécessité absolue de la pratique monopolistique, on souligne dans la jurisprudence du Tribunal Antimonopole que cette pratique légalisée doit être moins onéreuse à la fois pour les concurrents, les contractants et les consommateurs. En principe, seules sont justifiées les pratiques monopolistiques, qui tout en étant les moins dommageables pour les autres opérateurs présents sur le marché, sont indispensables au bon fonctionnement de l'activité économique.[19]

Dans la jurisprudence, des démarches sont rarement faites visant la notion d'intérêt commun ou l'intérêt principal de l'entreprise, afin de justifier les décisions d'une affaire antimonopole. Dans l'une de ces affaires[20], le Tribunal Antimonopole a donné raison à un producteur de boissons alcoolisées dont le comportement résultait de la nécessité de surmonter les effets contraires au droit des actions de l'administration.[21] Dans un autre cas[22], le Tribunal Antimonopole a reconnu que la différenciation du prix d'achat du lait pratiquée par une coopérative laitière, plus élevé pour ses membres et plus bas pour le reste des consommateurs, était justifiée par le caractère juridique de la coopérative. La Cour Suprême, devant laquelle cette affaire a été renvoyée, n'a pas partagé cette position, apercevant dans le comportement de la coopérative une division du marché s'appuyant sur des critères subjectifs.[23] Cette affaire s'est soldée par l'amendement de la loi antimonopole conformément à la position du Tribunal Antimonopole.[24] Dans une autre affaire, l'organe antimonopole a jugé qu'en matière d'énergie, compte tenu de la signification économique du secteur, les règles de concurrence ne devraient pas s'appliquer. En définitif, il a reconnu légitime la position du fournisseur monopolistique qui avait ordonné à la partie prenante d'installer des compteurs d'énergie provenant de sociétés spécifiques et éliminant ainsi du marché les autres producteurs. Le tribunal a cassé la décision de l'organe antimonopole qui ne partageait pas son raisonnement.[25]

Il est intéressant de mentionner les réglementations polonaises applicables aux fusions d'entreprises. Elles créent pour l'organe antimonopole de larges et potentielles possibilités d'appliquer d'autres critères que ceux relatifs à la protection de la concurrence et aux intérêts des consommateurs. Du reste, dans certains Etats, les lois antimonopoles servent à réglementer l'adaptation des processus de concentration économique aux priorités déterminées.[26] Dans l'art. 11a de la loi polonaise, si, en effet, les fusions ont pour effet d'atteindre ou de renforcer une position dominante sur le marché, l'organe antimonopole peut, mais n'est pas contraint, prononcer une décision d'interdiction. En cas d'accord sur ces fusions, les concurrents n'ont pas la possibilité de porter cette décision en justice. La disposition évoquée ci-dessus est entrée en vigueur en mai 1995, et jusqu'en 1996 il n'y a eu au Tribunal Antimonopole aucun appel relatif à des fusions d'entreprises.

IV. Les réglementations juridiques ayant un effet sur la concurrence

La Pologne n'a pas de loi particulière concernant l'aide budgétaire de l'Etat aux entreprises. Dans la pratique, c'est la loi budgétaire qui décide de l'affectation des aides de l'Etat. Dans la loi antimonopole, il n'existe pas d'instruments juridiques qui permettraient de contester ces aides.

Le régime de la concession influence la concurrence. En Pologne, la loi du 23 décembre 1988 sur l'activité économique normalise ces questions.[27] La solution en matière de concession suit le chemin de la décision. Les plaintes concernant ces décisions ne sont pas du ressort du Tribunal Antimonopole, mais du Tribunal Administratif.

Notes

1 Préambule de la loi polonaise (Journal des Lois 1995, N° 80, texte 405, et amendement du Journal des Lois 1996, N° 106, texte 496); art 1 (2) de la loi finlandaise (loi N° 480/1992).

2 Art. 28, 29 et 31 de la loi française, art. 7 de la loi danoise et art. 1 (1) de la loi grecque.

3 Art. 19 de la loi hollandaise.

4 Art. 14 (3) de la loi irlandaise.

5 Art. 7 (1) de la loi suisse et § 24 (3) de la loi allemande.

6 Art. 1 de la loi danoise.

7 Art. 1 de la loi danoise.

8 Art. 6 de la loi grecque.

9 Art. 1 (2) de la loi finlandaise.

10 Art. 1 de la loi norvégienne.

11 Aux termes de l'art. 7 (1) de la loi polonaise, il est interdit aux unités économiques qui jouissent d'une position de monopole:

1) De limiter la production, les ventes ou les achats des marchandises malgré les capacités possédées, de manière à augmenter les prix de vente ou à baisser les prix d'achat,

2) D'arrêter la vente des marchandises de manière à augmenter les prix,

3) De vendre à des prix excessivement anormaux.

12 Par exemple, en 1978, dans l'affaire du Professional Engineers, la Cour Suprême a jugé que la règle de raison dans la procédure antimonopole n'offre pas la possibilité d'utiliser un quelconque argument en faveur de la pratique donnée. Cette règle de raison a pour objet de définir si une pratique donnée promouvoit ou restreint la concurrence. Dans ce jugement, l'accusé ne peut contester le fait qu'il a utilisé la pratique examinée. Sa défense ne peut également pas reposer sur la question de savoir si la concurrence est une bonne ou mauvaise chose.

13 Cargill, Inc.v.Montfact of Colo., Inc., 479 U.S. 104 (1986).

14 Conformément à l'art. 85 (3), la légalisation d'un accord monopolistique est possible dans la mesure ou celui-ci remplit deux conditions positives: l'amélioration de la production (distribution, développement des progrès techniques ou économiques) et la garantie aux consommateurs d'une part équitable du bénéfice qui en résulte; ainsi que deux conditions négatives: la non application aux entreprises intéressées de restrictions qui ne sont pas indispensables et le manque d'élimination de la concurrence en ce qui concerne une partie substantielle des produits en cause.

15 Jugement du 23 avril 1992, XVII Amr 5/92; “Wokanda” 1992, N° 11.

16 Jugement du 27 octobre 1992, XVII Amr 21/92; “Orzecznictwo Gospodarcze” 1993, N° 1, texte 8, avec le commentaire de J. Napierala.

17 Jugement du 25 janvier 1995, XVII Amr 51/94; “Wokanda” 1995 r., N° 12.

18 Jugement du 27 octobre 1992, XVII Amr 15/92; “Wokanda” 1993 r., N° 2.

19 Jugement du 21 décembre 1994, XVII Amr 42/94; “Wokanda” 1995, N° 10.

20 Jugement du 21 mai 1993, XVII Amr 9/93; “Wokanda” 1993, N° 12, avec le commentaire de M. Król-Bogomilska; “Biuletyn Urzêdu Antymonopolowego” 1994 r., N° 3.

21 Cette négligence administrative a eu pour conséquence l’afflux incontrôlé d’alcool à bas prix en provenance de l’étranger et la déstabilisation du marché national des boissons alcoolisées.

22 Jugement du 16 décembre 1992, XVII Amr 28/92.

23 Jugement de la Cour Suprême du 23 juin 1993, I CRN 57/93.

24 A l’art. 5 de la loi polonaise, un deuxième alinéa a été rajouté: “Le décernement de réductions, d’allégements et d’autres avantages économiques de la coopération à ses membres n’est pas reconnu comme une pratique monopoliste”.

25 Jugement du 27 octobre 1992, XVII Amr 22/92; “Wokanda” 1993, N° 4.

26 Aux termes du point 4 du préambule du règlement N° 4064/89 du 21 décembre 1989 concernant la concentration des entreprises au sein de l’Union Européenne, on examine les perspectives d’amélioration des conditions de développement des entreprises et du niveau de vie de la Communauté. Par exemple, dans l’art. 41 de la loi française, c’est le conseil de la concurrence qui estime si le projet de fusion apporte une contribution suffisante au développement économique pour compenser les restrictions dans le domaine de la concurrence.

27 Journal des Lois N° 41, texte 234, accompagné d’amendements.

LES ELEMENTS DE PREUVE DANS LES AFFAIRES DE CONCURRENCE

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Un raccourci - mais il faut se méfier des opinions trop abruptes - conduirait à énoncer que tout litige se résume à une question de preuve. En droit civil, le demandeur au procès doit faire la preuve de son droit à agir et du bien fondé de son action. En droit pénal, ou en droit civil de la concurrence déloyale, la victime des pratiques illicites ou l'administration doit établir l'existence de ces pratiques, cette preuve ayant pour conséquence de faire sanctionner l'entreprise contrevenante. Mais cette preuve est appréciée de façon plus rigoureuse selon que l'on est en matière pénale ou en matière civile.

C'est ce qui ressort de la comparaison entre la jurisprudence administrative de la Commission de la concurrence ayant existé en France sous l'empire de l'ordonnance du 30 juin 1945 relative aux prix et la jurisprudence pénale. Le Tribunal correctionnel de Paris avait, par exemple, relaxé des confectionneurs de vêtements travaillant pour des marchés militaires (31ème Chambre économique, 12 décembre 1984) au motif que : "les témoignages recueillis, confirmant dans une certaine mesure les indices décelés, ne sont pas suffisamment précis et concordants dans leur contenu pour accréditer sans équivoque l'hypothèse d'une entente anticoncurrentielle". A l'inverse, le Conseil d'Etat statuant sur une décision de la Commission de la Concurrence avait admis la méthode de preuve par simples présomptions pour établir une entente à la fois verticale et horizontale entre un producteur et des distributeurs (C.E., Société A. MARTIN, 27 avril 1983, Rec. Lebon, p. 165).

L'ordonnance du 1er décembre 1986 sur la liberté des prix, en dépénalisant largement le droit de la concurrence, a permis d'assouplir l'établissement des modes de preuve devant le Conseil de la Concurrence. Non pas que le juge pénal ait été tout à fait banni de ce type de litiges - il peut être saisi des faits les plus graves sur le fondement de l'article 17 de l'ordonnance - mais les litiges restent essentiellement du domaine du Conseil de la Concurrence ou des tribunaux de commerce et les décisions du Conseil de la Concurrence sont susceptibles de recours devant la Cour d'appel de Paris qui est, elle-même, contrôlée par la Cour de Cassation.

La première observation qui s'impose est la constatation que l'ordonnance du 1er décembre 1986 n'a rien prévu en ce qui concerne la justification de la preuve devant le Conseil. Par contre, la "recherche" de la preuve qui est réglementée dès lors que l'administration économique prend l'initiative de l'action. Cette liberté de la preuve signifie qu'aucun mode de preuve n'est imposé. Il n'est nul besoin d'une preuve écrite ou d'un commencement de preuve par écrit comme en droit civil. Nous sommes en matière économique et la preuve par présomptions est admise. C'est toute la différence qui existe avec le droit de la responsabilité fondée sur l'article 1382 du Code civil issu du droit romain. Lorsque deux commerçants s'affrontent en justice devant les tribunaux, l'un d'eux invoquant des procédés déloyaux à son égard de la part de son concurrent, la jurisprudence de la Cour de Cassation n'admet pas la preuve par présomptions ou même par "faisceaux" de présomptions (cf. : Com. 30.11.1983, Bull. IV, n° 331, p. 287). Le demandeur en justice doit établir la faute de son adversaire, peut important, du reste, que cette faute soit ou non intentionnelle.

Mais, en droit de la concurrence (droits des entrants, etc...), la preuve par présomptions est une nécessité à une époque où les opérateurs économiques lorsqu'ils se concertent entre eux évitent de laisser des traces écrites ou informatiques ... Il y a une vingtaine d'années, on trouvait encore des "bribes" de documents écrits permettant de reconstruire une entente préalable. Mais aujourd'hui, la règle est le silence ... Alors, force est de recourir à la preuve par présomptions pour les ententes non juridiquement structurées, c'est-à-dire découlant de pratiques concertées. Ainsi, la Chambre commerciale, financière et économique de la Cour de Cassation a admis le 8 octobre 1991 (Com. Bull. IV, n° 282, p. 195) qu'une entente puisse être établie par "le parallélisme de comportement" de sociétés pétrolières entre elles en pratiquant une politique d'ajustement des prix "rigoureusement conformes" entre concurrents. Depuis, cette preuve par présomptions a été reconnue dans nombre d'affaires dont la Cour de Cassation a eu à connaître : qu'il s'agisse de litiges concernant des travaux publics, des travaux électriques ou d'entreprises de déménagement effectuant des prestations pour les fonctionnaires.

Il faut noter toutefois que cette preuve par présomptions d'identité de comportements économiques est relativement facile en matière d'entente horizontale, mais qu'elle est plus difficile pour les ententes verticales concernant les relations entre un fournisseur et des distributeurs. Là, apparaît une autre notion juridique liée à l'existence du contrat qui lie le fournisseur au distributeur et qui vient tantôt renforcer l'analyse économique, tantôt l'annihiler. Deux exemples pour illustrer cette notion. Dans le premier cas, les membres d'une coopérative économique ou d'un G.I.E. s'engagent à ne s'approvisionner qu'aux conditions négociées par leurs coopératives pour les produits d'une marque donnée, sans pouvoir rechercher des avantages propres : ce faisant, ils font une entente, à la fois horizontale entre eux et verticale avec la coopérative, pour uniformiser les prix. C'est une pratique illicite qui suppose une analyse juridique préalable au niveau contractuel et, dans un second temps, une analyse économique au regard des effets du contrat (cf. : Com. 16 mai 1995, Bull. IV, n° 147, p. 131 - cf. encore affaire SALOMON...). Dans le second cas, il existe un fournisseur qui distribue des produits à des commerçants n'ayant aucun lien juridique entre eux. Il consent des avantages à certains mais pas à d'autres. Y a-t-il là la preuve d'une entente verticale et horizontale entre ce fournisseur et ces distributeurs ? La réponse n'est pas évidente et montre les limites de la seule analyse économique.

Il est vrai qu'il existe dans l'ordonnance du 1er décembre 1986 d'autres moyens d'atteindre ces pratiques à l'évidence illicites : ainsi, l'article 36-1 sanctionne les pratiques illicites entre opérateurs économiques et qui ont le plus souvent pour origine un cadre contractuel ou paracontractuel. Mais alors le litige se déroule en dehors du Conseil de la Concurrence, devant les juges judiciaires, et n'aboutit qu'à la condamnation du contrevenant au paiement de dommages et intérêts au profit de la victime et non à des sanctions pécuniaires. Enfin, il ne faut évidemment pas oublier les dispositions des articles 8 et 10-1 de l'ordonnance qui, à travers les notions d'abus de position dominante, d'état de dépendance économique ou de pratiques de prix abusivement bas, permettent de saisir le Conseil de la Concurrence et de sanctionner les auteurs des agissements illicites. Là, la preuve est totalement économique ou d’essence comptable. Et elle est très délicate à manier par le Conseil de la Concurrence. La Cour de Cassation a rappelé récemment dans un arrêt que "les notions d'entente et d'abus de position dominante, au sens des articles 7 et 8 de l'ordonnance du 1er décembre 1986, ne sont pas exclusives l’une de l'autre" (Cass. Com. 21 juin 1994 - Bull. Cass. IV, n° 233 p. 182). La Chambre commerciale a ainsi voulu dire qu'il ne fallait pas être prisonnier du corset trop étroit des diverses rubriques de pratique anticoncurrentielle prévue par l'ordonnance du 1er décembre 1986 et que l'on pouvait viser à la fois la notion d'entente et celle d'abus de position dominante afin de rendre plus facile la preuve des comportements illicites qui se trouvent alors établis par leurs incidences négatives sur le plan économique.

La seconde observation est relative aux modes de preuve concernant l'existence du marché. Là, à l'évidence, cette preuve est uniquement économique et le juge judiciaire suit étroitement ou s'inspire de l'analyse faite par le Conseil de la Concurrence. La preuve de l'existence d'un marché n'est pas en soi

difficile : il suffit de constater la présence d'opérateurs économiques sur un périmètre précis, les échanges s'opérant entre eux et les demandeurs de produits, et enfin, l'existence ou la non-existence de produits "substituables" sur ce marché. Le mot "périmètre" d'un marché est important. Car c'est souvent ici que gît la difficulté. Le juge judiciaire ne peut s'accommoder d'un marché à dimension variable. A trop vouloir fragmenter les marchés à l'intérieur d'une activité commerciale ou industrielle, on en multiplie le nombre et on en réduit le périmètre. Ce serait là pure discussion académique si les conséquences n'en étaient pas aussi graves au regard de la sanction pécuniaire. Car le montant de la sanction pécuniaire est calculé à partir du chiffre d'affaires de l'opérateur économique et est fonction des incidences de la pratique illicite sur le marché. Par conséquent, si un marché est défini de façon trop étroite ou trop limitée - et il est vrai que dans nombre de cas ce caractère limité s'impose -, la sanction sera plus sévère du fait des conséquences qu'entraînent sur le marché ainsi défini les agissements anticoncurrentiels.

Ma dernière observation portera sur les modes de recherches ouverts aux agents de l'administration leur permettant de conclure à l'existence de pratiques contraires au libre exercice de la concurrence. Il aurait même fallu commencer par là. Car, pour que le juge puisse admettre qu'il y a une présomption d'entente ou d'actions concertées entre opérateurs économiques, il faut lui apporter des documents économiques, le plus souvent comptables qui lui permettront de se forger une opinion. Pour cela, il ne suffit pas de justifier de l'existence de plaintes de concurrents - à supposer qu'ils osent se plaindre - il faut procéder à des recherches dans les locaux des opérateurs économiques. C'est certainement en ce domaine que la jurisprudence issue de l'ordonnance du 1er décembre 1986 (art. 47 et 48) se montre relativement rigoureuse.

Pourquoi ? Parce que cette procédure touchant à la liberté des personnes et à des activités économiques des opérateurs doit être encadrée pour éviter tout débordement. Cruel dilemme entre les notions de liberté du commerce et de l'industrie et celles d'un ordre public économique qui a été conçu pour permettre cette liberté ! Ce qui est sûr, c'est qu'en France la recherche de cette preuve n'est pas libre et qu'elle reste soumise au contrôle du juge judiciaire. Contrôle "a posteriori" pour les enquêtes administratives permettant aux représentants de l'administration d'accéder aux locaux, de se faire communiquer les livres commerciaux et les factures. Contrôle d'un juge judiciaire qui doit être saisi préalablement d'une requête motivée, émanant de l'administration à laquelle sont annexées des pièces justificatives (art. 48). Cette enquête appelée "visite domiciliaire" se fait en présence d'un officier de police judiciaire. L'ordonnance du juge doit être motivée. A tout moment, les parties peuvent saisir le juge judiciaire qui a autorisé la visite domiciliaire. Il est seul compétent pour statuer sur les contestations relatives à leur exécution et à leur régularité. Un recours peut être formé devant la Cour de Cassation contre l'ordonnance d'autorisation dans les cinq jours de sa notification et le pourvoi est formé selon les règles du Code de procédure pénale.

Ces ordonnances ont donné lieu depuis 1988 à un abondant contentieux de la part de la Cour de Cassation et les conséquences sont importantes puisque les documents saisis ne peuvent plus servir d'éléments de preuves devant le Conseil de la Concurrence. Ainsi, est né dans ce domaine, largement dépénalisé en ce qui concerne les sanctions, une forme d'habeas corpus au niveau de la recherche des preuves. Le plus important est de trouver un équilibre - comme souligné précédemment - entre les notions de liberté du commerce et de l'industrie et celles d'un ordre public économique. Mais il est vrai que les cas d'espèce sont multiples et posent parfois des problèmes difficiles à résoudre. C'est certainement là une des tâches les plus délicates que la Chambre commerciale de la Cour de Cassation est appelée à résoudre et qui conditionne la recevabilité de la preuve devant le Conseil de la Concurrence.

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Le système juridique italien prévoit le principe de l' "allégation des parties". Même au niveau probatoire, le juge est limité aux moyens de preuve fournis par les parties et n'est pas doté de pouvoirs d'enquête importants. La charge de la preuve est régie par l'art. 2697 du Code civil italien qui prévoit que: "Toute personne souhaitant faire valoir un droit en jugement doit prouver les faits qui en constituent le fondement. Toute personne qui conteste l'efficacité de ces faits, ou qui déclare que le droit est modifié ou qu'il est caduc, doit prouver les faits sur lesquels l'exception est fondée." Cette règle, qui définit de manière précise les preuves devant être fournies par la partie demanderesse et celles devant être fournies par la partie défenderesse, joue un rôle fondamental dans la structure du procès ; en effet, les différends sont souvent réglés sur la base d'une vérification du respect ou non de cette charge de la preuve par celui qui était censé la présenter. Autrement dit, si le demandeur ne prouve pas le bien fondé de sa demande, celle-ci est rejetée indépendamment de l'attitude de la partie adverse, (sauf si celle-ci s'est limitée à reconnaître le droit d'autrui) et même si elle est jugée par contumace.

Ce même principe de charge de la preuve a été aussi rappelé dans le cas d'une position dominante constatée sur le marché de référence ou pour vérifier la présence d'une entente. La demande de la partie demanderesse a été rejetée. Le rejet se fonde sur la non-présentation, par la partie demanderesse, d'éléments suffisants concernant le pouvoir de marché de la société concurrente, et permettant d'évaluer si cette entente était ou non susceptible de porter préjudice à la structure du marché national ou à une partie importante de ce dernier (voir, à cet égard, l'affaire Omnitel/Telecom de la Cour d'Appel de Rome et l'affaire B.B.Center/Parabella de la Cour d'Appel de Milan, jugement du 21.3.93; cf. aussi ordonnance du 20.9.95, affaire Sanguinetti/ANJA ; ordonnance du 31.1.96, affaire Comis/Ente Fiera di Milano).

Le juge italien n'a aucun pouvoir d'enquête qui ne soit pas lié aux demandes des parties, à l'exception d'hypothèses ou d'instruments d'enquête particuliers, tels que l'expertise technique (articles 61 et suivants du Code de procédure civile) ou la demande de renseignements à l'administration publique (article 213 du C.p.c.). En effet, le juge ne peut pas enquêter librement sur les faits du procès ; la loi régit de manière très précise les moyens de preuve dont il est permis de faire usage au cours de la procédure ainsi que les moyens et les formes de leur production ou acceptation au procès.

Les principes que l'on vient de rappeler brièvement s'appliquent aussi en matière de concurrence, la loi nationale antitrust n'ayant introduit aucune exception ou instrument particulier d'enquête pour le juge. En revanche, la récente disposition adaptant la législation italienne aux prescriptions des Accords TRIPs (issus de l'Uruguay Round de Marrakech du 15.4.1994 et mis en application par le D.L. n. 198 du 9.3.1996) a doté le juge de pouvoirs élargis en matière de marques et de brevets d'invention pour lui permettre de rechercher les preuves et les éléments utiles à ses décisions, même si ces pouvoirs restent subordonnés à la demande de la partie (ex. ordres de présentation, acquisition d'information auprès de la partie adverse, confiscation ou description des éléments de preuve concernant la violation dénoncée, auprès de tierces personnes également). Par contre, le rédacteur de la loi antitrust n'a pris aucune disposition de ce genre pour accroître les pouvoirs d'instruction du juge ordinaire en raison de la spécificité de la matière ; ainsi, les seules sources valables auxquelles on peut se référer sur ce point particulier sont les principes généraux qui régissent la structure judiciaire italienne.

Il est important de voir comment les juges affinent les critères légaux lors de la mise en application des lois de la concurrence car il est certain que le droit de la concurrence et, en particulier, la loi 287/90 sont fondés sur des principes de caractère général dont le contenu est difficilement définissable. Toutefois, la loi 287/90 fournit un instrument d'interprétation spécifique de ces règles, en faisant appel aux principes de la législation des Communautés européennes en matière de droit de la concurrence. Le quatrième alinéa de l'article 1 de la loi n. 287/90 prévoit : "L'interprétation de la disposition contenue dans le présent titre est effectuée sur la base des principes de l'ordonnancement juridique des Communautés européennes en matière de réglementation de la concurrence". On ne trouve rien de tel dans les systèmes juridiques des autres Etats européens applicables en la matière, même si les autorités chargées de l'application de ces lois en ont donné spontanément et opportunément une interprétation cohérente avec les principes communautaires.

On craignait qu'une telle limitation ne soit pas perçue favorablement par les juges italiens, mais tel n'a pas été le cas ; en effet, on a souvent observé, dans les arrêts rendus aussi bien au niveau conservatoire qu'au fond, que l'on avait recours non seulement aux principes contenus dans les articles 1-8 du Traité de Rome et aux principes fondamentaux relatifs à la concurrence (garantie d'une concurrence qui ne soit pas faussée, unité du marché intégré), mais aussi aux paramètres élaborés par la jurisprudence de la Cour de Justice, du Tribunal de Première instance et, même, par la Commission des Communautés Européennes.

Avec l'article 11 de la Constitution, on considérait déjà que l'ordonnancement juridique italien reconnaissait immédiatement aux règles communautaires la même valeur, en Italie, que celle dont elles disposent dans le système communautaire. La Cour Constitutionnelle s'était exprimée dans ce sens, en affirmant aussi que le juge national opère en tant que juge communautaire et qu'il doit, à ce titre, respecter la norme communautaire et écarter toute disposition nationale en opposition avec celle-ci, qu'elle soit antérieure ou postérieure. Ce principe devait être considéré comme valable aussi bien pour la réglementation communautaire que pour les délibérations interprétatives rendues par la Cour de Justice (Cour Constitutionnelle n. 170 du 8.6.1984, n. 113 du 23.4.1985).

C'est pourquoi, dans l'analyse des ententes horizontales et verticales, dans la définition du marché pertinent, dans la vérification de l'existence d'une position dominante et de l'abus de cette position, ainsi que dans le choix des critères pour évaluer les concentrations ou les exemptions, les juges italiens se sont constamment référés aux cas soumis à l'examen des organes communautaires et aux principes définis dans différentes décisions auxquelles il est souvent fait expressément référence dans les ordonnances et dans les jugements rendus en matière de concurrence.

Ainsi, pour la définition du concept de marché pertinent, les critères définis par la jurisprudence communautaire en termes de marché du produit et de marché géographique ont été adoptés, alors que pour la vérification de la position dominante il est fait référence à des éléments tels que les parts de marché détenues, le nombre des concurrents, les avantages technologiques de l'entreprise par rapport à ces derniers, l'affinement de sa propre organisation, la perspective dynamique de l'entreprise, la persistance de la position acquise. C'est précisément dans ce sens que la Cour d'Appel de Milan s'est exprimée (ordonnance du 10.1.1996, affaire Scamm/FAI Komatsu Industries) à l'occasion de l'examen d'un cas d'abus de position dominante déduit des pratiques de prix discriminatoires. En rappelant la décision de la Cour de Justice et les précédents examinés par la Commission quant à l'application de l'article 86 du Traité, la Cour de Milan a considéré que la vérification de la position dominante devait être conduite à la lumière des critères dits "structurels" ; ceux-ci sont, en premier lieu, représentés par la part détenue sur le marché pertinent et sur chacun des "segments" examinés, aussi bien en valeur absolue, en tenant compte du chiffre d'affaires réalisé, qu'en termes de pourcentage par rapport aux parts détenues par la concurrence et au nombre des entreprises présentes dans le secteur examiné (cf. affaire United Brands, Cour de Justice du 14.2.78 ; affaire

Hoffmann/La Roche-vitamine, Cour de Justice du 12.2.79 ; affaire PB Industries, Commission du 5.12.1988 ; affaire Michelin, Commission du 7.10.1981 et arrêt de la Cour du 9.11.1983).

Le principe exprimé dans l'arrêt précité Hoffmann/Laroche a été mis en pratique dans les termes suivants : "La position dominante évoquée à l'article 86 correspond à une situation de puissance économique par laquelle l'entreprise qui la détient est en mesure de faire obstacle à la persistance d'une concurrence effective sur le marché dont il s'agit et à la possibilité d'avoir des comportements assez indépendants à l'égard de ses concurrents, de ses clients et, en dernière analyse, des consommateurs" (en termes analogues, voir Commission, 9.12.1971 dans l'affaire Continental Can Co., et l'arrêt de la Cour de Justice du 5.10.1988 dans l'affaire Alcatel/Novosan). De même, pour la définition du concept d'entreprise, la Cour d'Appel de Milan (ordonnance du 31.1.1996 Comis/Ente Fiera di Milano) a estimé pouvoir dépasser les indications purement juridiques (article 2195 C.c.), pour se référer à des critères de nature économique et d'organisation de marché tirés de la jurisprudence communautaire qui s'est formée sur l'interprétation des règles du Traité. Cette notion a été élargie jusqu'à inclure tous les organes pouvant être qualifiés par une action de type "économique" et agissant avec une organisation propre de moyens et de personnes (un rappel spécifique a été fait de l'affaire Mannesman, arrêt du 13.7.1972 ; affaire Am. Autonome Monopole di State, du 15.6.1987 ; affaire Höfner/Macrotron, arrêt du 23.4.1991 ; Commission du 21.12.1988 n. 31/865, affaire PVC; 13.12.1994 n. 32/490, affaire Eurotunnel).

Le choix effectué par le législateur italien, en rappelant les principes communautaires, a permis au juge et à l'Autorité garante de la concurrence en Italie de faire une référence directe à l'expérience acquise au sein de la Communauté européenne au cours de plus de trente années d'activité dans le domaine de la concurrence. On a pu ainsi donner un contenu à des expressions générales telles que : "entreprise", "marché pertinent", "restriction à la concurrence", "position dominante", et ainsi de suite. Par conséquent, la démarche législative suivie en Italie semble cohérente avec l'intention d'uniformiser le droit au sein de la Communauté surtout dans la perspective de la réalisation du marché unique.

L’EXAMEN JUDICIAIRE DES AFFAIRES DE CONCURRENCE

Paul Mafféi
Conseiller, Cour d’Appel de Bruxelles (Belgique)

Depuis l'entrée en vigueur de la loi du 5 août 1991, la Belgique dispose donc, à l'instar des autres pays européens, d'un instrument de protection de la concurrence économique. Cette loi prévoit, outre les règles proprement dites de protection de la concurrence économique, une procédure spécifique pour l'examen du contentieux relatif à celle-ci. Elle crée également des organes et une juridiction administrative chargés de traiter les affaires de concurrence et confie à la Cour d'appel de Bruxelles, la mission non seulement de statuer sur les recours contre les décisions de la juridiction administrative créée, mais également d'interpréter la loi en répondant aux questions préjudicielles qui lui sont posées.

Il convient dès lors de s'interroger sur le rôle de la jurisprudence depuis l'entrée en vigueur de la nouvelle loi dans la mise en oeuvre du droit de la concurrence ainsi que sur l'approche factuelle et juridique qui préside à l'application et à l'interprétation de celui-ci par les juridictions belges. Par ailleurs, il n'est pas inutile de décrire la mesure dans laquelle ce nouveau contentieux s'intègre actuellement dans le paysage juridique du pays.

Avant d'expliquer le mode d'examen judiciaire du contentieux de la concurrence tel qu'il est conçu en droit belge, il n'est pas inutile de tracer succinctement le cadre légal du système de protection de la concurrence mis sur pied en Belgique par la loi du 5 août 1991. La loi prohibe toutes les pratiques restrictives de concurrence résultant soit d'accords entre entreprises, de décisions d'association d'entreprises ou de pratiques concertées (article 2) soit d'un abus de position dominante d'une ou de plusieurs entreprises (article 3). La portée exacte de ces interdictions est similaire à celle prévue par le droit communautaire et les termes de la loi sont à cet égard la copie quasi conforme des articles 85 et 86 du Traité de Rome. Il est prévu que les accords, décisions et pratiques concertées ayant un effet restrictif de la concurrence peuvent bénéficier à certaines conditions d'une exemption par le Conseil de la concurrence auxquels ils doivent être notifiés (art. 7). Les accords, décisions et pratiques concertées qui bénéficient d'une exemption en vertu de l'article 85 § 3 du Traité de Rome ne doivent pas être notifiés au Conseil de la concurrence (art. 8). Ce même conseil peut également délivrer, à la demande des entreprises concernées par un accord, une attestation négative (art. 6).

La loi soumet également à l'approbation du Conseil de la concurrence les concentrations d'entreprises qui ont pour effet d'entraver de manière significative une concurrence effective sur le marché belge concerné ou une partie substantielle de celui-ci (art. 9 et 10). Toutefois, ces concentrations ne sont pas soumises à ce contrôle lorsqu'elles font déjà l'objet d'un contrôle par la Commission des Communautés européennes (art. 13).

Outre la Commission de la concurrence (instituée au sein du Conseil central de l'économie et qui a une compétence d'avis sur la politique générale de concurrence - art. 21), qui ne fait pas l'objet du présent examen, la loi a créé un Service de la concurrence et un Conseil de la concurrence. Le Service de

la concurrence est en plus du secrétariat chargé de la recherche et de la constatation des pratiques que la loi entend réglementer (art. 14). Il instruit les affaires introduites en vertu de la loi (art. 23). Sa tâche consiste essentiellement en la recherche et le constat des données factuelles entourant les pratiques de concurrence, sans qu'il puisse préjuger de la compétence du Conseil.

Le Conseil de la concurrence est une juridiction administrative au sein du Ministère des affaires économiques qui, outre une compétence d'avis au Ministre des Affaires économiques exercée d'initiative ou à la demande du Ministre, a des compétences de décision, de proposition et d'avis (art. 16 à 20). Il décide de l'existence ou non d'une infraction à l'interdiction des pratiques restrictives de concurrence. Il statue également sur les demandes d'exemption (art. 2 § 3 et 29) ou d'attestation négative (art. 6 et 30), de même que sur les notifications de concentrations d'entreprises (art. 10 à 12 et 33) et sur les plaintes déposées par des particuliers ou des entreprises auprès du Service de la concurrence ainsi que sur toute instruction faite par ce dernier soit d'office, soit à la demande du Ministre des Affaires économiques, soit d'un organisme public (art. 27 à 34).

La loi reconnaît également des pouvoirs de décision étendus au Président du Conseil de la concurrence. Le président peut, ainsi prendre des mesures provisoires destinées à suspendre les pratiques restrictives de concurrence faisant l'objet de l'instruction et ce à la demande du plaignant ou du Ministre des Affaires économiques lorsqu'il est urgent d'éviter une situation susceptible de provoquer un préjudice grave, imminent et irréparable aux entreprises dont les intérêts sont affectés par ces pratiques ou de nuire à l'intérêt général (art. 35). Il peut également retirer les éléments confidentiels contenus dans les dossiers soumis au Conseil (p. ex. les éléments qui concernant le secret des affaires) - (art. 27 § 1 in fine) et, à la demande du Service de la concurrence, exiger des entreprises ou association d'entreprises qui s'y refusent les renseignements réclamés par ledit service (art. 23 § 2, 3). Les décisions du Conseil et de son président sont susceptibles d'un recours auprès de la Cour d'appel de Bruxelles. En outre, lorsque la solution du litige dépend du caractère licite d'une pratique de concurrence, le juge saisi peut poser une question préjudicielle à cette même cour qui prend une décision motivée et peut demander une instruction au Service de la concurrence.

Le contrôle juridictionnel des pratiques de concurrence qui implique l'examen de celles-ci s'exerce donc dans les cas suivants: d'une part, la Cour d'appel de Bruxelles connaît des recours contre les décisions prises par le Conseil de la concurrence et son président et, d'autre part, les cours et tribunaux ordinaires se voient reconnaître le pouvoir de retenir la nullité d'une pratique de concurrence dans les causes qui leur sont soumises et la possibilité d'adresser une question préjudicielle à la Cour d'appel de Bruxelles. L'on remarquera d'emblée le rôle central que joue la Cour d'appel de Bruxelles dans le contrôle juridictionnel des pratiques de concurrence. C'est, en effet, elle qui est saisie, que ce soit comme juge d'appel des décisions du Conseil de la concurrence ou comme juridiction à laquelle est posée une question préjudicielle. Il s'agit là d'un choix délibéré du législateur[1] qui a voulu confier l'interprétation de la loi à une seule juridiction afin d'assurer l'unité de la jurisprudence en matière de concurrence. La jurisprudence de la Cour d'appel de Bruxelles sera donc déterminante dans l'évolution du droit de la concurrence en Belgique, même si le Conseil de la concurrence et les juridictions ordinaires contribueront largement à celle-ci.

Lorsque le Conseil de la concurrence ou son président, de même que la Cour d'appel saisie d'un recours d'une décision de ceux-ci, ont à se prononcer sur une pratique de concurrence, se pose la question de savoir si ce qui préside à leur démarche est une approche factuelle ou juridique. En réalité, ces juridictions statuent en fait et en droit. Ainsi ces juridictions devront-elles examiner si les conditions d'application de la loi sont réunies, ce qui dépend généralement - mais pas uniquement - des données factuelles propres à la situation donnée. Elles devront déterminer le marché concerné et les effets

concurrentiels des pratiques en cause. Cela implique une analyse en fait car la question de savoir quel est le marché concerné ou si la pratique dénoncée affecte de manière sensible une partie substantielle de celui-ci dépend essentiellement de données factuelles qu'il importe d'analyser. Mais cela nécessite également une analyse en droit. Car si la loi détermine le cadre régulateur, elle le fait en termes très généraux et ne fournit que rarement les critères d'appréciation indispensables à l'appréciation des données factuelles. Les exemples qui suivent démontrent la nécessité de définir de tels critères et le rôle essentiel de la jurisprudence dans ce domaine.

En ce qui concerne la définition du marché concerné, la jurisprudence a notamment énoncé que celui-ci ne se réduit pas aux produits et services de l'entreprise dont le comportement abusif est dénoncé ou à ceux de ses concurrents, mais s'étend également à tous les produits qui, eu égard à leurs caractéristiques, sont suffisamment substituables[2]. Lorsque la loi dispose qu'en matière de position dominante, les pratiques abusives peuvent consister à imposer de façon directe ou indirecte des conditions de transaction non équitables, il incombe au juge de déterminer ce qu'est une condition inéquitable. La jurisprudence, s'inspirant de l'exemple communautaire, a, ainsi, admis que pour déterminer si une condition était équitable ou non, il fallait vérifier si le cocontractant aurait accepté ces conditions si l'autre partie n'avait pas occupé une position dominante et si une situation de réelle concurrence avait existé (2 et 3). Toujours en matière de position dominante, une des questions qui peuvent se poser est celle de savoir si un prix imposé est équitable ou non. A cet égard, la jurisprudence a retenu comme critère d'appréciation qu'un prix doit être en rapport avec la valeur économique de la prestation fournie (2, 3 et 4).

Il appartiendra donc à la jurisprudence de déterminer les critères d'appréciation, ainsi que le font la Cour de Justice et la Commission. Cela ne fait donc que renforcer le rôle de la jurisprudence dans l'élaboration du droit de la concurrence, jurisprudence qui ne manquera d'ailleurs pas de tirer profit de l'abondante doctrine en la matière. Par ailleurs, dans certains cas, la situation doit être appréciée uniquement en droit, notamment lorsqu'une partie entend protéger sa position concurrentielle sur base de dispositions légales ou contractuelles. Au juge du fond d'apprécier alors la validité de ces dispositions au regard du droit de la concurrence ou, tout simplement, du droit commun.

L'on citera ici, à titre d'exemple, le cas d'un réseau de distribution sélective où une des questions susceptibles de se poser est de savoir si des tiers à un tel réseau peuvent se voir interdire la commercialisation des produits qui en font l'objet et qu'ils sont parvenus à se procurer sur un marché parallèle. La Cour d'appel de Bruxelles, saisie d'un recours contre une décision du Tribunal de commerce ayant statué sur une action en cessation, a ainsi dû se prononcer sur le caractère loyal ou non de la commercialisation de parfums par une chaîne de grands magasins qui ne fait pas partie du réseau mis en place par le fabricant de ces parfums. Les questions soumises à la cour concernaient, notamment, la validité de la mise en place d'un réseau de distribution sélective, l'opposabilité aux tiers des contrats de distribution, l'éventuelle tierce complicité, toutes questions qui sont à trancher essentiellement en droit[5].

L'on doit donc conclure que la détermination de la réalité d'une infraction aux règles de concurrence dépend d'une analyse tant factuelle que juridique des situations concrètes soumises à l'appréciation des juridictions saisies. Un mot en ce qui concerne la Cour d'appel de Bruxelles statuant sur les recours contre les décisions du Conseil de la concurrence et de son président. Il s'agit là d'un recours de pleine juridiction qui permet donc à la Cour d'appel de statuer en fait et en droit[6]. Ainsi, le rôle de la cour n'est pas limité à un simple contrôle de légalité. Il s'ensuit qu'une décision du Conseil sur laquelle un contrôle juridictionnel est exercé par la voie du recours peut être réformée en raison de l'insuffisance de fondement factuel ou juridique. Ce qui vient d'être dit s'applique aux juridictions ordinaires qui statuent évidemment en fait et en droit. L'on citera ici comme exemple les actions en cessation de pratiques de

commerce jugées contraires aux usages honnêtes en raison d'une atteinte aux règles de la concurrence. Le juge du fond fera dans ces cas application des règles de droit interne et communautaire.

La question paraît plus délicate en ce qui concerne les décisions de la Cour d'appel sur les questions préjudicielles qui lui sont posées. En effet, la loi dispose (article 42 § ler, alinéa 4) que "la *juridiction qui a posé la question préjudicielle est tenue de se conformer à la décision rendue par la Cour d'appel de Bruxelles* sur le point de *droit faisant l'objet de la question préjudicielle".* A lire ce texte, la Cour, statuant sur une question préjudicielle, statue donc en droit. Mais la chose n'est pas aussi simple, car la question qui est posée à la cour se raccroche bien évidemment à une situation de fait qui est à la base du litige soumis au juge du fond. En outre, la loi admet le principe d'un examen factuel dès lors que le texte prévoit expressément la possibilité pour la Cour d'appel de *"demander une instruction par le Service de la concurrence".*

La question est, cependant, de savoir quelle peut être la portée de cet examen factuel. Elle n'est certainement pas de permettre à la Cour d'appel de trancher le litige au fond, car tel n'est pas l'objet de la question préjudicielle. Elle doit se limiter à réunir et à vérifier les éléments de faits indispensables à la réponse à donner à la question préjudicielle. Ainsi, la Cour d'appel a, dans un cas précis[7], demandé au Service de la concurrence de vérifier plusieurs données de fait propres à un marché concerné (celui de la distribution de carburants) afin de déterminer si un type bien spécifique de convention de distribution de carburant était de nature à limiter de manière notable la concurrence. Dans cette affaire, la réponse en droit était donc dépendante d'une série de données factuelles. Ceci implique, toutefois, le risque que le juge de renvoi, tout en étant certes tenu par la réponse en droit donnée par la Cour d'appel considère, que ces données factuelles sur lesquelles cette même cour s'est fondée ne correspondent pas aux faits soumis à son appréciation.

Dans la pratique, la technique de la question préjudicielle est largement empruntée à celle utilisée par la Cour de Justice des Communauté Européennes. L'on constate que le juge du fond pose parfois sa question préjudicielle de telle manière qu'il soumet, en réalité, la solution du litige à la Cour d'appel. Dans ces cas, la Cour a, à l'instar de ce qui se passe devant la Cour de Justice, soit reformulé la question en termes généraux dans la mesure où elle l'estimait possible pour se limiter à une interprétation de la loi[7], soit, lorsque tel n'était pas le cas,[8.] décidé qu'il n'y avait pas lieu à interprétation, la question visant uniquement à appliquer la règle de droit à une situation concrète. Il ne faut, en effet, pas perdre de vue que le pouvoir dévolu à la Cour d'appel de Bruxelles en matière de questions préjudicielles est limité à l'interprétation de la loi et non à la solution concrète des litiges.

Quant à l'autorité de la réponse donnée à la question préjudicielle, elle est limitée à la cause dont le juge de renvoi est saisi. Cela résulte du texte de la loi qui dit que *"la juridiction qui a posé la question préjudicielle est tenue de se conformer à la décision rendue par la Cour d'appel de Bruxelles sur le point de droit faisant l'objet de la question préjudicielle"*[9]. Ainsi, même si la décision de la Cour d'appel de Bruxelles a une valeur jurisprudentielle indéniable dès lors que le législateur a voulu soumettre l'interprétation de la loi sur la protection de la concurrence économique à ladite cour dans un but d'unification de la jurisprudence, les décisions de celle-ci ne lieront que le juge de renvoi dans l'affaire qui a fait l'objet de la question préjudicielle. La chose est d'importance, car la réponse donnée par la Cour d'appel à une question préjudicielle pourra toujours être soumise au contrôle de la Cour de cassation dans le cadre d'un recours contre la décision finale du juge du fond. Il s'agit là d'une différence majeure avec les décisions de la Cour de Justice dont les arrêts préjudiciels ont un caractère déclaratoire qui vaut quasiment erga omnes du fait de leur *"ratio decidendi"* qui s'impose à toutes les juridictions de l'ensemble de l'Union européenne, s'intégrant, en quelque sorte aux règles communautaires auxquelles elles se rapportent[10].

En ce qui concerne l'interprétation de la loi sur la protection de la concurrence économique, il convient de rappeler que le texte est largement inspiré du traité de Rome, certains articles en étant la copie quasi conforme. Ce n'est pas un hasard, mais, au contraire, un choix délibéré. En effet, les travaux préparatoires font apparaître que les rédacteurs de la loi ont voulu s'en tenir aux termes utilisés par les textes légaux et la jurisprudence communautaires afin de pouvoir se référer, en cas de contestation, à l'interprétation qui est donnée de façon constante par la Cour de Justice et la Commission des Communautés européennes[11]. Ainsi, la jurisprudence communautaire inspirera largement la jurisprudence nationale.

Enfin, en ce qui concerne les rapports entre le droit communautaire et le droit interne de la concurrence, il faut observer que la loi belge ne limite pas son application aux ententes et abus de position dominante affectant la concurrence sur le seul marché belge ou dans une partie substantielle de celui-ci. Une pratique restrictive de concurrence tombant sous l'application des règles communautaires peut très bien affecter également la concurrence sur le marché belge ou dans une partie substantielle de celui-ci[12]. Y a-t-il alors application parallèle du système national et des règles communautaires ? Cela ne sera possible que pour autant que cette application parallèle n'aboutisse pas à des solutions inconciliables. Dans ce cas, les règles communautaires ont la primauté[12]. Cette primauté, qui est un principe de droit généralement reconnu, est d'ailleurs intégrée dans la loi dès lors que les accords, décisions et ententes, de même que les concentrations, qui bénéficient d'une exemption en vertu de l'article 85 § 3 du traité de Rome, ne doivent pas être notifiés aux autorités belges pas plus que les concentrations soumises au contrôle de la Commission des Communautés européennes. Il va de soi que les juridictions ordinaires appliqueront le droit communautaire qui est directement applicable. A cet égard, le juge national devra s'informer sur les notifications des accords à la Commission des Communautés européennes et en tenir compte conformément aux dispositions du règlement 17/62 (plus particulièrement les articles 4 et 5).

Quelle est la place du droit de la concurrence dans le paysage judiciaire belge ? En réalité, déjà avant l'entrée en vigueur de la nouvelle loi, les juridictions ordinaires étaient saisies, surtout en matière de pratique de commerce, d'un contentieux de la concurrence. Ces litiges concernaient essentiellement le droit communautaire. Depuis l'entrée en vigueur de la nouvelle loi, les parties se fondent également sur celle-ci. Ces affaires, ont une nette tendance à augmenter dès lors que l'on observe que le droit de la concurrence, qu'il soit interne ou communautaire, s'intègre de plus en plus dans les moeurs et dans la vie économique. C'est pourquoi le Conseil a été régulièrement saisi depuis l'entrée en vigueur de la loi en 1993. Nombre de ces causes ont fait l'objet d'un recours devant la Cour d'appel de Bruxelles. Toutefois, il s'agit d'un contentieux qui, s'il va en s'accroissant, reste encore relativement limité pour l'instant, même si chaque affaire prend des développements considérables. Quant aux questions préjudicielles, elles demeurent encore limitées en nombre, tout comme le sont d'ailleurs celles posées à la Cour de Justice des Communautés européennes.

En conclusion, il est difficile aujourd'hui de prédire le sens précis de l'évolution du droit de la concurrence en Belgique dès lors que la jurisprudence en la matière n'en est toujours qu'à ses débuts. Toutefois, le choix très clair fait par le législateur d'une législation inspirée directement du droit communautaire laisse augurer d'une politique de concurrence qui ne s'écartera pas fondamentalement de celles de l'Union européenne et des autres Etats membres.

Notes

1 Chambre des Représentants de Belgique, Session ordinaire 1990-91, 1286/6-89-90, p. 47 et 48.

2 Cour d'appel de Bruxelles , 28 juin 1996 en cause de Zwarte Arend et crts c/ Honda n°1996/QR/14 ;

Vandermeersch: “De mededingingswef”, n° 13 et svts (éd. Kluwer, 1994) ;

3 Van Gerven, Maresceau en Stuyck: “Handels- en economisch rechf”, t. II, b, Kartelrecht, in “Beginselen van Belgisch Privaatrechf”, éd. 1985.

4 Cour de Justice, 13 novembre 1975 en cause General Motors c/ Commission, aff. 26/75, Rec. 1975,1367 ;
Cour de Justice, 14 février 1978 en cause United Brands c/ Commission, aff. 27/67, Rec. 1978, 207 ;
Cour de Justice, 11 novembre 1986 en cause British Leyland c/ Commission, aff. 226/84, Rec. 1986,3263 ;
Cour de Justice, 5 octobre 1994 en cause Centre d'insémination de la Crespelle c/ Commission, aff. C-323/93, Rec. 1994, 5097 ;

5 Cour d'appel de Bruxelles, 21 février 1996 en cause de Nina Ricci c/ Delhaize le Lion, aff. N° 1995/AR/2360 ;
Cour d'appel de Bruxelles, 21 février 1996 en cause Confédération belge des parfumeurs détaillants et Yves Saint Laurent c/ Delhaize le Lion, aff. N° 1995/AR/1425 et 1995/AR/1504 ;

6 Exposé des motifs du projet de loi, Chambre des Représentants de Belgique, session ordinaire 1989-90, 1282/1-89/90, p. 35 ;

7 Cour d'appel de Bruxelles, 28 juin 1995 en cause ARAL c/ ESSO et RINA, aff. N° QR7/95 ;

8 Cour d'appel de Bruxelles, 14 septembre 1995 en cause Dior et Confédération belge des parfumeurs détaillants c/ Delhaize le Lion, aff. N° 1994/QR/83 ;

9 Waelbroeck et Bouckaert: "La loi sur la protection de la concurrence économique", n°86, Journal des tribunaux 1992, pp. 28 et svts ;

10 Van den Bossche: “Curia non novit ius ... De prejudiciële vraggstelling aan het Hof van beroepte Brussel ex artikel 42”, n°39, in Jaarboek Handelspraktijken, 1995 ;

11 Sénat de Belgique: session 1990-91, Rapport fait au nom de la Commission de l'économie par le sénateur Aerts, 1289-2, p. 20-24 ;

12 Waelbroeck et Bouckaert: “La loi sur la protection de la concurrence économique”, nn° 16, 18 et 89, Journal des tribunaux 1992, pp. 28 et svts ; Cour de Justice, 13 février 1969 en cause de Wilhelm c/ Bundeskartelamt, aff. 14/68, Rec. 1969, P. 1.

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La définition du marché est-elle une question de fait ou de droit? Quelles conséquences la décision quant à la nature juridique ou factuelle d'une question entraîne-t-elle sur l'examen en appel. Quelles normes d'examen convient-il d'appliquer pour définir un marché? Ces questions, auxquelles il est d'autant plus difficile de répondre qu'elles trompent par leur apparente simplicité, ont des répercussions énormes sur le droit canadien de la concurrence en général et sur le Tribunal de la concurrence en particulier. Depuis que la Cour d'appel fédérale a, dans une décision récente rendue en matière de fusionnement (l'arrêt *Directeur des enquêtes et recherches c. Southam Inc.*[1]), infirmé une décision du Tribunal de la concurrence, un vif débat s'est élevé à ce sujet. L'affaire *Southam* était la première affaire de fusionnement contesté sous le régime de la *Loi sur la concurrence* que la Cour d'appel fédérale entendait, et il n'y en a pas eu d'autre depuis[2]. Le fait que la Cour suprême ait accepté d'entendre le pourvoi formé contre cette décision donne une idée de l'importance des questions en cause. L'audience en Cour suprême doit avoir lieu vers la fin du mois de novembre 1996.

I. Contexte - le règlement judiciaire des affaires de concurrence au Canada

Avant d'aborder la définition du marché et les questions de fait et de droit, il peut être utile de donner un aperçu du contexte de ces questions. Au Canada, le domaine de la concurrence est régi par la *Loi sur la concurrence*[3]. Après des années de débat et plusieurs tentatives avortées, la législation canadienne en matière de concurrence a fait l'objet d'une réforme en profondeur en 1986. Avant 1986, les affaires relatives à la concurrence étaient soumises aux tribunaux ordinaires et relevaient du droit criminel. Aux termes de la Loi actuelle, le complot, le truquage d'offres, la publicité trompeuse, la discrimination par les prix, la pratique de prix d'éviction et d'autres comportements similaires continuent de relever du droit criminel et d'être examinés par les tribunaux judiciaires. Toutefois, d'autres pratiques commerciales (p. ex. le refus de vendre, l'exclusivité, les ventes liées) ainsi que l'abus de position dominante et les fusionnements sont rassemblés dans la partie VIII de la Loi et ressortissent à la compétence d'un tribunal quasi judiciaire, le Tribunal de la concurrence, lequel tranche les questions dont il est saisi en appliquant les règles du droit civil.

Le Tribunal de la concurrence a été créé par la *Loi sur le Tribunal de la concurrence*[4], et sa composition est plutôt inhabituelle au Canada, car des juges et d'autres membres y siègent. Étant donné cette structure unique, il est prévu, dans la *Loi sur le Tribunal de la concurrence*, que "seuls les juges [...] ont compétence pour trancher les questions de droit" tandis que "tous les membres [...] ont compétence pour trancher les questions de fait ou de droit et de fait[5]" Cette loi énonce en outre que les décisions du Tribunal sont susceptibles d'appel devant la Cour d'appel fédérale, mais qu'un appel visant une question de fait ne peut être soumis qu'avec l'autorisation de cette cour[6].

Les demandes dont le Tribunal est saisi sont déposées par le directeur des enquêtes et recherches, un préposé de l'État. La fonction du directeur est double; il fait enquête sur les allégations de

pratiques anticoncurrentielles et, dans les cas où cela est opportun, il traduit les auteurs de ces pratiques devant le Tribunal de la concurrence pour que celui-ci statue sur la question et ordonne des mesures de redressement. Bien qu'il s'agisse d'un régime civil, c'est la comparaison avec le procureur de la Couronne ou le poursuivant public en matière criminelle qui serait la plus juste. Le directeur et le bureau qu'il dirige, le Bureau de la concurrence, sont des entités distinctes du Tribunal; cette autonomie garantit l'indépendance de chaque organisme.

Le Tribunal est constitué de quatre membres désignés parmi les juges de la Section de première instance de la Cour fédérale et de huit autres membres, choisis pour leur expertise dans des domaines pertinents comme l'économie, les affaires, la comptabilité et la commercialisation. Le Parlement du Canada, quand il a arrêté cette composition, visait à constituer un organisme décisionnel spécialisé. Cette intention ressort des propos tenus par le ministre du gouvernement qui a présenté le projet de loi en deuxième lecture devant la Chambre des communes, au printemps 1986, le ministre responsable a dit ceci de la part du gouvernement de l'époque : "Dans un domaine juridique qui dépend autant de l'économique et des décisions des entreprises, il est primordial de se doter d'un organisme décisionnel capable d'entendre les causes de concurrence complexes et d'apporter en même temps les protections légales nécessaires. Nous proposons de créer un organisme d'arbitrage, le Tribunal de la concurrence. Il aura pour fonction de juger les causes non criminelles relatives à la concurrence. Il sera formé de juges et d'experts en commerce, en économique et en affaires publiques. Cette proposition résout une difficulté que nous avons perçue et qui nous afflige depuis de nombreuses années: la complexité des causes en matière de concurrence. Généralement, ces questions concernent les effets probables ou futurs et les incidences des diverses activités commerciales, et il faut les envisager en tenant compte de l'ensemble du contexte commercial et économique [...] Les réponses à des questions de ce genre exigent normalement, outre une compétence juridique, une connaissance des rouages du marché. Je dois ajouter que ces difficultés ont été signalées et discutées publiquement par des membres distingués de la magistrature. Ainsi, il y a environ 25 ans, M. le juge Spence a exprimé l'avis qu'un tribunal n'avait pas la préparation nécessaire pour arbitrer les questions d'ordre économique. Le problème a également été étudié dans d'autres pays. Des tribunaux semblables existent en Suède et au Royaume-Uni[7].

La Cour suprême du Canada, dans un arrêt de 1992 confirmant une décision du Tribunal, a reconnu : ". . . Il ressort nettement de la [*Loi sur la concurrence*] et de la [*Loi sur le Tribunal de la concurrence*] que le législateur a créé le Tribunal comme organisme spécialisé chargé de traiter uniquement et exclusivement de la partie VIII de la [*Loi sur la concurrence*], puisqu'elle vise des questions complexes de droit en matière de concurrence comme les abus de position dominante et les fusionnements"[8].

L'intention du Parlement à l'égard du Tribunal de la concurrence était donc de constituer un organisme décisionnel spécialisé, particulièrement adapté au traitement des affaires de concurrence non criminelles. Le Tribunal, pour trancher les affaires dont il est saisi, doit appliquer harmonieusement un ensemble complexe de principes juridiques, économiques et commerciaux. L'expertise qu'il tire de l'expérience de ses membres constitue un élément essentiel de sa capacité à remplir son mandat.

II. Les questions de fait et les questions de droit - Généralités

La distinction entre les questions de fait et les questions de droit a des ramifications dans de nombreux domaines juridiques. Son application la plus connue est peut-être le partage de la responsabilité décisionnelle entre le juge et le jury. Le *Black's Law Dictionary* donne la définition suivante : "**Questions de fait.** Par opposition aux questions de droit, les questions qui, dans un procès ou une audience, portent sur des faits ou des événements, sur l'existence de ceux-ci et sur leurs modalités. Les questions de fait sont décidées par le jury [...] tandis que les questions de droit sont tranchées par le juge. Les questions de fait et

les conclusions relatives à ces questions ne peuvent généralement être portées en appel, tandis qu'il peut être interjeté appel des décisions relatives aux questions de droit"[9].

En général, la plupart d'entre nous reconnaissons en quelque sorte intuitivement cette distinction lorsque nous parlons, par exemple, du rôle respectif du juge et du jury. Toutefois, des complications se présentent lorsque nos abordons le domaine qui nous occupe plus particulièrement, celui du contrôle judiciaire des décisions des tribunaux inférieurs. Au Canada comme ailleurs, la distinction sert à circonscrire dans quels cas un tribunal judiciaire siégeant en révision peut et doit substituer son opinion à celle de l'organisme décisionnel initial. En matière factuelle, nous parlons de "faits principaux", c'est-à-dire de faits observés par les témoins ou établis par la production d'un document original et d'"inférences de fait", c'est-à-dire de conclusions tirées par suite d'un raisonnement faisant intervenir des faits principaux. Toutefois, les inférences formulées à partir de faits dépendant de prémisses juridiques peuvent être des questions de droit et, bien sûr, même les conclusions de faits principaux qui ne sont "absolument pas étayées" par la preuve constituent des erreurs de droit.

Aux questions de fait et aux questions de droit s'ajoute la catégorie imprécise des "questions de fait et de droit". Les auteurs du traité *De Smith's Judicial Review of Administrative Action* ont tenté d'expliquer ainsi cette notion : "[...] il est possible de considérer la question de savoir si les faits en litige *peuvent* entrer dans une catégorie établie par la loi comme une question de droit, car elle suppose la détermination de la portée juridique de cette catégorie. La question de savoir s'ils *entrent* dans cette catégorie peut être considérée comme une question de fait, mais il pourrait également s'agir d'une question de droit. L'aspect factuel d'une "question de fait et de droit" se limite alors à la constatation des faits principaux et, peut-être, à la formulation d'inférences à partir de ces faits[10]. [Italiques ajoutées] Comme cette explication est loin d'être limpide, ils ont ajouté : "La distinction que ces ambiguïtés terminologiques tendent quelquefois à brouiller peut aussi s'expliquer en disant que, bien que l'interprétation de dispositions législatives, qui constitue habituellement une question importante transcendant les faits particuliers de l'affaire, soit toujours une question de droit, l'application de la loi, correctement interprétée, à ces faits peut ou non être une question de droit[11]".

On peut, sans crainte de se tromper, conclure que la distinction entre les questions de fait, les questions de droit et les questions de droit et de fait est loin d'être claire. Nous croyons, et cette opinion n'est pas nouvelle, que le tribunal siégeant en révision se livre en fait à une évaluation du niveau d'examen qu'il doit effectuer à l'égard de la décision en cause, qu'il caractérise ensuite en faisant appel aux expressions "question de fait" ou "question de droit". On pourrait poser la même question de façon plus directe, relativement au sujet qui nous intéresse : quelles normes de contrôle s'appliquent à la définition du marché par le Tribunal de la concurrence? Malheureusement, les dispositions énonçant les droits d'appel applicables aux décisions du Tribunal emploient les termes "fait" et "droit", il nous faudra donc continuer à nous en servir. Il importe cependant de ne pas perdre de vue les questions de principe sous-jacentes.

Pour répondre à la question qui vient d'être évoquée, nous passerons en revue les décisions des tribunaux canadiens se rapportant à cette définition. Il sera question d'abord de quelques-unes des affaires canadiennes qui traitent précisément des normes d'examen, puis nous nous pencherons sur la question particulière de la définition du marché et sur la façon dont les tribunaux ont qualifié cet exercice en termes de question de droit ou de question de fait. Finalement, nous analyserons l'affaire *Southam* en nous demandant quelles questions la Cour suprême pourrait examiner pour rendre une décision.

III. Les normes de contrôle

La jurisprudence canadienne n'a pas cessé d'évoluer sur la question des normes d'examen qu'il convient d'appliquer pour le contrôle judiciaire des décisions des tribunaux et organismes administratifs. Tout récemment, la Cour suprême du Canada a reconnu, dans l'arrêt *Pezim c. Colombie-Britannique (Superintendant of Brokers)*[12], que le type d'organisme en cause et la nature de la décision rendue influaient sur les critères d'examen applicables. Il faut signaler, dès le départ, que l'analyse de la Cour a porté expressément sur les demandes de contrôle judiciaire de même que sur les appels prévus par la loi à l'égard de décisions de tribunaux administratifs. Comme nous l'avons déjà mentionné, la loi prévoit que les décisions du Tribunal peuvent être portées en appel devant la Cour d'appel fédérale, et que les appels portant sur des questions de fait doivent être préalablement autorisés.

La Cour suprême a statué, dans l'arrêt *Pezim*, que la détermination des normes de contrôle applicables dépendait essentiellement de l'intention du législateur relativement à la création du tribunal, laquelle pouvait ressortir du rôle ou de la fonction du tribunal, de l'existence d'une "clause privative"[13] protégeant les décisions qu'il rend ou de la question de savoir si l'objet en cause ressortit à sa compétence. L'éventail des normes applicables suit un axe dont les deux pôles sont la décision manifestement déraisonnable (où la retenue judiciaire est la plus grande) et la décision correcte (où la retenue est la plus faible). Le principe de la retenue judiciaire ne s'applique pas qu'aux seules conclusions de fait formulées par le tribunal administratif, comme on serait tenté de le penser, mais également aux questions juridiques dont celui-ci est saisi en raison de son rôle et de son expertise : "[...] Pour ce qui est des décisions manifestement déraisonnables, qui appellent la plus grande retenue, ce sont les cas où un tribunal protégé par une véritable clause privative rend une décision relevant de sa compétence et où il n'existe aucun droit d'appel prévu par la loi[...]. Quant aux décisions correctes où l'on est tenu à une moins grande retenue relativement aux questions juridiques, ce sont les cas où les questions en litige portent sur l'interprétation d'une disposition limitant la compétence du tribunal (erreur dans l'exercice de la compétence) ou encore les cas où la loi prévoit un droit d'appel qui permet au tribunal siégeant en révision de substituer son opinion à celle du tribunal, *et* où le tribunal ne possède pas une expertise plus grande que la cour de justice sur la question soulevée [...][14]." [Italiques ajoutées]

Il faut comprendre que le tribunal siégeant en révision devra faire preuve de retenue à moins que la décision ne soit "manifestement déraisonnable": [Dans la version anglaise, la Cour suprême abandonne l'expression "patently unreasonable" qu'elle et d'autre tribunaux avaient employée, pour utiliser le terme "reasonableness".] Bien que dans l'arrêt *Pezim*, la Cour n'ait pas, en raison de la nature de l'affaire dont elle était saisie, examiné les questions de fait, nul ne contestera que les cours d'appel, lorsqu'elles examinent les décisions d'autres cours supérieures, font preuve de beaucoup de retenue à l'égard de ce qu'elles considèrent être des conclusions de fait. Au premier rang des raisons expliquant ce comportement figure le fait qu'elles reconnaissent que le tribunal de première instance a eu l'occasion d'observer les témoins. Les cours d'appel vont généralement s'abstenir de modifier la décision sauf s'il y a "erreur manifeste et prépondérante" ou si peut être appliquée une autre norme de même nature.

Dans l'arrêt *Pezim*, la Cour suprême a conclu que, compte tenu de la nature de l'industrie des valeurs mobilières, des fonctions spécialisées de l'organisme décisionnel (la Commission des valeurs mobilières), du rôle de celui-ci en matière d'établissement de politiques et de la nature du problème (la question de savoir si certaines opérations contrevenaient aux dispositions de la *Securities Act* relatives à l'information et aux opérations d'initiés), il y avait lieu de faire preuve d'une très grande retenue malgré le droit d'appel prévu par la loi et l'absence de clause privative. Elle a jugé, par conséquent, que la Cour d'appel avait commis une erreur en modifiant les conclusions de la Commission.

IV. La définition du marché

Importance

On ne doit pas sous-estimer l'importance que revêt la définition du marché dans une affaire. Il est indispensable au succès d'une partie, quelle que soit la disposition législative en jeu, que le tribunal retienne la définition du marché qu'elle propose. L'importance d'une “victoire” sur cette question pour la détermination finale d'une affaire de concurrence a été décrite en relation avec le fusionnement dans l'extrait suivant : “[...] Bref, la partie qui réussit à convaincre la cour obtient généralement gain de cause, parce que l'élargissement du marché considéré se traduit habituellement par l'amoindrissement de l'importance relative des parties fusionnantes dans ce marché. À l'inverse, plus la définition du marché est étroite, plus l'effet que le comportement contesté exerce sur la concurrence augmente”[15].

La définition du marché sous le régime de la Loi sur la concurrence

Bien que le mot “marché” ou d'autres termes semblables soient abondamment utilisés dans la partie VIII de la *Loi sur la concurrence*, la Loi ne prévoit rien quant à la façon de définir un marché. Il est difficile de savoir si la Loi ou un autre texte réglementaire aurait pu réussir à établir des critères qui allient une clarté suffisante à la souplesse et à l'adaptabilité nécessaires. Quoi qu'il en soit, le législateur a laissé aux décideurs la tâche de définir le marché.

La façon dont le Tribunal de la concurrence a abordé la définition du marché d'un produit, jusqu'à maintenant, a mis l'accent sur la question de savoir si des produits dont on prétendait qu'ils appartenaient au même marché étaient de proches substituts. Le Tribunal a indiqué à plusieurs reprises que la preuve que des acheteurs se tourneraient vers un autre produit par suite de légers changements dans le prix relatif suffirait à établir le caractère substitutif. Il a reconnu, toutefois, qu'il est rarement possible de disposer de cette preuve directe et que, de fait, elle n'avait encore jamais été présentée devant le Tribunal. Il a donc fallu avoir recours à d'autres facteurs pour déterminer de façon plus indirecte si des produits étaient de proches substituts. À cet égard, l'examen comporte l'appréciation de la preuve soumise par les parties concernant les caractéristiques et l'usage du produit, les opinions, le comportement et la description des acheteurs, les opinions, les stratégies et le comportement de l'industrie, les rapports entre les prix, les niveaux de prix, les coûts de transfert et d'autres facteurs pertinents. L'importance accordée à chaque critère et le poids relatif de chacun variera d'une affaire à l'autre. Pour le Tribunal, ni la liste des facteurs à prendre en considération ni leur pondération sont “immuables”. Comme l'arrêt *Southam* n'a porté que sur la définition du marché du produit, nous limiterons nos propos à cet aspect de la définition du marché, bien que nous estimons que l'analyse puisse s'appliquer également à la définition du marché géographique.

Traitement par les tribunaux

La jurisprudence canadienne sur la définition du marché et, plus particulièrement, sur la qualification de cette opération comme une question de fait ou de droit n'est pas abondante. Compte tenu de la décision *Southam*, elle n'est pas non plus concluante. La Cour suprême du Canada n'a pas encore tranché cette question, par conséquent, celle des normes de contrôle applicables sous le régime de la *Loi sur la concurrence* est encore ouverte. Puisque la Cour suprême est saisie de cette question, il est toutefois permis d'espérer un peu plus de certitude. En attendant, il faut se contenter des quelques conclusions jurisprudentielles formulées jusqu'à maintenant.

On considère généralement qu'existe un courant jurisprudentiel affirmant que la définition d'un marché est une question de fait. L'une des premières affaires où cette question a été examinée longuement était fondée sur la *Loi relative aux enquêtes sur les coalitions*[16], la loi antérieure à l'actuelle *Loi sur la*

concurrence. Il s'agissait de *R. v. J.W. Mills & Son Limited*[17] une affaire de complot ourdi par des transitaires. À l'issue du procès, le juge Gibson avait déclaré l'accusé coupable d'avoir diminué "indûment" la concurrence (c'est en effet ce critère qu'il fallait démontrer pour obtenir une condamnation), en concluant une entente visant à fixer les prix, à diviser les marchés, à contrôler les voies de distribution, à empêcher l'entrée sur le marché et à limiter l'expansion. La décision a été confirmée par la Cour suprême du Canada, mais la question du marché n'a pas été examinée[18].

Le juge Gibson a reconnu l'importance que revêtait la définition du marché pertinent pour l'évaluation du caractère indu de la diminution de la concurrence. Il s'est exprimé ainsi : "Bien entendu, du point de vue juridique, il n'y a pas de définition du "marché" au regard de laquelle on puisse examiner la preuve d'une allégation portant que les alinéas 32(1)*a*) et 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions* ont été violés. La définition du marché pertinent est, dans chaque cas, une question de jugement se fondant sur la preuve"[19]. Il a ensuite signalé qu'"aucune définition juridique ne pouvait décrire la concurrence" parce que l'arrivée constante de nouveaux produits livrant une concurrence et la modification des frontières des marchés géographiques en changeaient sans arrêt la forme[20].

Puis il a décrit en quoi consistait la définition du marché. Cette description mérite d'être citée au long : "la définition du marché pertinent dans une affaire particulière nécessite donc un examen équilibré de plusieurs caractéristiques ou dimensions pour satisfaire aux besoins analytiques de la question à l'étude. A une extrémité, il y a une description vague de la concurrence, à savoir que chaque service, article ou produit qui lutte pour attirer la clientèle est en concurrence avec tous les autres services, articles ou produits. A l'autre extrémité, il y a la définition de portée plus restreinte, qui limite le marché aux services, aux articles ou aux produits qui comportent une qualité et un service uniformes. Dans l'analyse d'une affaire particulière, il convient d'éviter ces extrêmes et d'évaluer plutôt les divers facteurs qui déterminent les degrés de concurrence et les dimensions ou les frontières de la situation concurrentielle. A cet égard, les dimensions ou les frontières d'un marché pertinent doivent être déterminées en tenant compte de l'objet de ce marché. Ainsi, deux produits peuvent être sur le même marché dans un cas et pas dans un autre. De plus, de nombreuses caractéristiques ou dimensions peuvent être prises en considération pour définir le marché pertinent. Elles ne sont pas toutes du même ordre. Habituellement, dans une affaire particulière, il n'est pas nécessaire d'examiner la totalité des nombreuses caractéristiques ou dimensions. Dans certains cas, la définition peut reposer uniquement sur une ou deux caractéristiques ou dimensions [...] Toutefois, afin de bien choisir les caractéristiques ou les dimensions appropriées, il peut s'avérer nécessaire d'en examiner plusieurs avant de sélectionner celle qui convient ou celles qui conviennent"[21].

Le juge Gibson a alors énuméré des caractéristiques ou dimensions utiles pouvant être considérées dans la définition du marché pertinent, faisant remarquer que cette liste n'était pas exhaustive et pouvait fort bien être organisée différemment. Y figuraient le caractère substitutif des produits (ou l'élasticité croisée de la demande), la concurrence réelle et potentielle, le secteur géographique, les caractéristiques physiques des produits ou services, l'utilisation finale des produits, les prix relatifs des biens et services, l'intégration et les stades de fabrication ainsi que les méthodes de production ou l'origine. Certaines des "caractéristiques pertinentes" énumérées par le juge Gibson sont plus connues et, peut-être, plus utiles que d'autres. Ce qui ressort clairement de cette analyse de la définition du marché, toutefois, c'est la nature factuelle de l'opération et son étroit rapport avec les circonstances de chaque affaire. Le juge Gibson a abordé la question de façon très souple et très pragmatique.

L'affaire *R. v. Hoffmann-La Roche Ltd. (Nos 1 and 2)*[22], une autre affaire criminelle, portait sur des accusations de pratiques de prix d'éviction découlant, notamment, de la fourniture, sans frais, de médicaments brevetés à des hôpitaux. La Cour d'appel de l'Ontario devait déterminer si le juge du procès avait commis une erreur en statuant que le marché des hôpitaux était le marché pertinent. En examinant cette question et en confirmant la décision de première instance, la Cour d'appel a fait sienne la conclusion

du juge Gibson et a jugé : “Ce qui constitue un marché pertinent est essentiellement une question de fait eu égard aux circonstances qui sous-tendent l'infraction particulière qui est reprochée”[23]. C'est en gros la jurisprudence qui existait sur la question jusqu'à tout récemment.

Dans deux décisions, l'une rendue au mois de mai 1995 et l'autre, l'affaire *Southam* initialement tranchée par le Tribunal, rendue au mois d'août 1995, la Cour d'appel fédérale a prononcé des conclusions opposées. Le juge en chef de la Cour faisait partie des deux formations. Il était dissident dans le premier arrêt; le second a été rendu à l'unanimité.

Chronologiquement, le premier arrêt est *Upper Lakes Group Inc. c. Canada (Office national des transports)*[24]. Il portait sur une décision rendue par l'Office sous le régime de la *Loi de 1987 sur les transports nationaux*[25], statuant que le tarif établi par un transporteur ferroviaire pour le transport de certaines marchandises contrevenait à la Loi en raison de sa modicité et faisait du tort aux transporteurs maritimes sollicitant les mêmes clients[26]. Les décisions de l'Office peuvent être portées en appel, sur autorisation, devant la Cour d'appel fédérale, mais uniquement à l'égard des questions de droit ou de compétence. L'autorisation a été accordée sur le fondement d'une seule question de droit relative à l'interprétation de la disposition applicable de la *Loi de 1987 sur les transports nationaux*.

Les appelantes soutenaient notamment que l'Office avait commis une erreur en définissant le marché de façon trop large. Les juges majoritaires de la Cour d'appel ont statué que même si une autorisation d'appel avait été sollicitée à l'égard de la définition du marché (ce qui n'avait pas été fait), la Cour n'aurait pu l'accorder. Citant les décisions *Mills* et *Hoffmann-La Roche*, la Cour a affirmé majoritairement qu'il était “établi en droit” que la définition du marché dans ce type d'affaires était une question de fait et non de droit[27]. Le Juge en chef Isaac, dissident, était d'avis que si l'Office se trompe en interprétant les mots “concurrence” et “concurrent”, c'est-à-dire en définissant le marché pertinent, il commet une erreur de droit[28].

Cela nous amène à l'arrêt *Southam*[29]. Brièvement, les éléments pertinents de l'arrêt *Southam* sont les suivants. Southam Inc., une importante entreprise canadienne de publication de quotidiens, possédait les deux quotidiens de la région du grand Vancouver. Le directeur a contesté l'acquisition par Southam du journal communautaire de deux collectivités situées dans cette région au motif qu'elle diminuerait sensiblement la concurrence dans le marché de la publicité-détaillants par la presse. Le Tribunal a conclu que les journaux communautaires n'étaient pas dans le même marché de produit que les quotidiens en ce qui concernait la publicité-détaillants par la presse et a rejeté la demande du directeur. Ce dernier a interjeté appel de la décision (sans demander d'autorisation), alléguant que le Tribunal avait mal appliqué l'approche de la définition du marché qu'il avait adoptée. Pour Southam, le Tribunal n'avait pas commis d'erreur susceptible de révision. Elle a soutenu également que la définition du marché était une question de fait, à l'égard de laquelle il aurait fallu demander une autorisation d'appel. Elle a fait valoir, subsidiairement, pour le cas où la Cour conclurait qu'il ne s'agissait pas d'une question de fait, que les conclusions du Tribunal à ce sujet relevaient tout à fait de son expertise et qu'il fallait faire preuve d'un haut degré de retenue judiciaire à leur égard; la retenue afférente à la “décision correcte” ne constituerait pas la norme de contrôle appropriée.

Sur la question de l'inclusion de la définition du marché dans la catégorie des questions de fait ou dans celle des questions de droit, la Cour d'appel a jugé qu'il s'agissait d'une question de droit, puis elle a examiné si le tribunal siégeant en révision devait faire preuve de retenue judiciaire à l'égard des questions de droit, y compris celle de la définition du marché et conclu que non. Relativement à la définition du marché, la Cour d'appel s'est exprimée ainsi : “Le critère ou le cadre d'analyse qu'il convient d'adopter pour déterminer si les produits offerts par deux entreprises fusionnantes sont de “proches substituts” et, partant, sont sur le même marché du produit est une question de droit [...] L'adoption du cadre

approprié et son application correcte demeurent une question de droit. La question de savoir si les faits dans une affaire particulière satisfont aux exigences d'un cadre donné est une question de fait ou, plus exactement, une question de droit et de fait"[30].

Il importe de signaler qu'en établissant la distinction entre les questions de fait et de droit, la Cour a placé dans la catégorie des questions de droit non seulement "l'adoption" d'un cadre d'analyse approprié mais aussi son "application correcte", c'est-à-dire, est-il permis de présumer, son application à une affaire donnée. La Cour a répété cette affirmation un peu plus loin dans ses motifs[31]. Somme toute, cette analyse semble laisser peu d'importance à l'élément factuel.

La Cour d'appel a expliqué les décisions *Mills* et *Hoffmann-La Roche*, dont on tient généralement pour acquis qu'elles concluent au caractère factuel de la définition du marché, en invoquant le raisonnement que la Cour suprême du Canada a tenu récemment dans une autre affaire de concurrence faisant intervenir les dispositions criminelles de la *Loi sur la concurrence* relatives au complot[32]. La Cour d'appel a conclu que cet arrêt indique que :"la démarche suivie et les critères utilisés par un tribunal d'instance inférieure pour déterminer le sens juridique d'un texte législatif sont susceptibles de contrôle par un tribunal d'appel en tant que question de droit. Toutefois, l'application de ce sens juridique à une affaire particulière (c.-à-d. l'"examen complet") est une question de fait ou, plus précisément, une question de droit et de fait"[33].

La Cour d'appel a également mentionné, en l'approuvant, un extrait d'un traité de droit où l'auteur concluait, relativement aux décisions *Mills* et *Hoffmann-La Roche* : "D'après le contexte des remarques faites dans ces affaires, il semble que les juges ont voulu dire que la question de savoir "ce qui constitue le marché pertinent dans un cas donné" est une question de fait. La distinction est importante parce que la signification de l'expression "marché pertinent" ne change pas d'une situation de fait à l'autre"[34]. [Souligné par la Cour d'appel]

La Cour d'appel a reformulé l'affirmation pour faire de la "question de fait" une "question de fait et de droit", mais a par ailleurs souscrit à ce que la Cour a présenté comme "l'idée que le cadre d'analyse pour la définition du marché pertinent ne change pas en fonction des circonstances".[35] À notre avis, ce raisonnement n'explique pas entièrement la décision *Mills*, à tout le moins, dans laquelle le juge Gibson semblait dire que le "cadre d'analyse" lui-même doit être souple et axé sur les faits.

En résumé, l'arrêt *Southam* a affirmé que le cadre d'analyse approprié pour la définition du marché est une question de droit et que ce cadre ne varie pas en fonction des affaires. L'"application correcte" du cadre est, semble-t-il, également une question de droit, bien que le recours au raisonnement tenu par la Cour suprême dans l'affaire de complot mentionnée ci-dessus suscite une certaine confusion, étant donné les déclarations antérieures de la Cour. Finalement, la question de savoir si les faits d'une affaire donnée satisfont aux exigences du cadre d'analyse est une question de droit et de fait. La Cour d'appel a fait état des contradictions opposant sa décision à celle qui avait été rendue par une autre formation de la Cour dans l'affaire *Upper Lakes*, reconnaissant l'existence de deux courants d'idées opposés au sein de la Cour.

La Cour d'appel a statué qu'il ne convenait pas de faire preuve de retenue judiciaire envers les décisions du Tribunal en matière de définition du marché et que la norme de contrôle applicable était celle de la "décision correcte", laquelle suppose le moins de retenue. Relativement à l'"expertise" du Tribunal, la Cour a fait le raisonnement suivant : "[...] il va sans dire que les juges ne sont pas tenus par la loi d'être versés en droit de la concurrence. (Cela ne veut pas dire que les juges n'apportent pas au tribunal une expertise juridique utile pour régler des questions touchant la concurrence.) Quant aux autres membres du Tribunal, ils proviennent de différents milieux. Certains peuvent être spécialisés en économie. D'autres sont

issus du monde des affaires à cause de leur compréhension pratique des marchés. Certains peuvent sans aucun doute être perçus comme représentant les intérêts de groupes opposés, tels le patronat et les syndicats”[36].

La Cour a souligné que même si la question de la définition du marché pouvait être considérée comme relevant de l'expertise des membres non-juges, ce qui n'était pas le cas selon la Cour, seuls les juges pouvaient être saisis des questions de droit. Bref, la Cour a statué que puisque la définition du marché du produit était une question de droit, la détermination des critères ou facteurs devant servir à établir cette définition était l'apanage des juges et que, par conséquent, on ne pouvait conclure que la définition du marché du produit relevait de l'expertise du Tribunal. La Cour a exprimé l'opinion que le Parlement en avait expressément décidé autrement en attribuant l'examen des questions de droit aux juges, lesquels ne pouvaient être considérés comme des personnes apportant au Tribunal des connaissances spécialisées dans le domaine du droit de la concurrence[37].

La Cour a également expliqué qu'il existait de “sérieuses raisons fondamentales” à l'appui de la conclusion selon laquelle la définition du marché devrait être soumise au pouvoir de contrôle ordinaire d'une cour d'appel, à titre de question de droit. Elle a conclu que la définition du marché était un concept non pas économique mais juridique. Selon la Cour, découle implicitement du fait que l'expression “marché pertinent” n'est pas définie dans la *Loi sur la concurrence* que cette expression est et a toujours été un concept judiciaire éclairé par des principes économiques et, maintenant, par l'expérience pratique de ceux qui connaissent bien le fonctionnement des marchés, les membres non-juges du Tribunal[38]. Nous ne pouvons nous empêcher de constater, cependant, que la qualification de la question faite par la Cour laisse peu de place à ces membres dans la définition du marché; ils ne peuvent ni participer aux décisions relatives au cadre d'analyse approprié ni déterminer quelle en est l'“application correcte” dans un cas donné.

Conséquences de l'arrêt Southam

La décision *Southam* soulève plusieurs questions intéressantes sur le rôle du Tribunal de la concurrence, en général, et dans le contexte de la définition du marché pertinent en particulier. Il a déjà été brièvement question de certaines d'entre elles dans la présente étude, mais elles seront examinées plus en détail ici. Comme un pourvoi est pendant devant la Cour suprême, il ne convient pas que nous prenions position nous-mêmes sur la question. Nous nous contenterons d'exposer diverses opinions exprimées, de façon formelle ou informelle, par d'autres personnes oeuvrant dans le domaine de la concurrence, afin de vous donner une idée du débat.

Séparation des aspects “factuels” et “juridiques” de la définition du marché

L'une des caractéristiques de l'arrêt *Southam* est l'affirmation de la Cour que la définition du marché se fait en deux temps. On procède d'abord à la détermination du “cadre d'analyse juridique approprié” et de son “application correcte”, puis on passe à celle du marché pertinent du produit, en classant les faits démontrés dans les catégories applicables. Cette notion d'un processus en deux étapes a reçu l'approbation de certains commentateurs, dont Paul Crampton, que la Cour d'appel a cité dans l'arrêt *Southam* : “Toutefois, [...], il est important de reconnaître que même si la délimitation du marché pertinent dans un cas particulier est une question de fait, la définition de la notion de “marché pertinent” est une question de droit. Autrement dit, bien que les limites d'un marché dans un cas particulier soient fonction à la fois d'une situation factuelle unique et de l'importance que le tribunal de la concurrence accorde à certains facteurs, la question de savoir ce qui doit être examiné, et la légitimité des différents critères applicables, sont des questions de droit”[39].

Il ressort du mémoire qu'il a déposé devant la Cour suprême en relation avec le pourvoi, que le directeur défend une position similaire. Il fait valoir que le choix de la démarche de définition du marché est fonction de l'interprétation de la Loi et de ses objectifs, et qu'il constitue donc une importante question de droit. Le directeur soutient en outre que la Cour d'appel a conclu à bon droit que l'application d'un critère juridique à des faits établis est essentiellement une question de droit et de fait, bien que la délimitation d'un marché dans une situation donnée soit souvent décrite comme une question de fait lorsqu'il n'y a aucune raison de distinguer entre les questions de fait et les questions de droit et de fait. Le directeur conclut son mémoire en affirmant que la proposition selon laquelle la définition du marché en matière de fusionnement est purement ou entièrement une question de fait n'est pas fondée en droit ou en principe.

Southam, pour sa part, défend la position inverse et soutient, dans son mémoire, que la définition du marché pertinent du produit, dans une affaire de fusionnement, est une question de fait. Elle commence par réfuter l'affirmation voulant que cette opération comporte la formulation de conclusions qui supposent une formation juridique. Elle signale que le traitement des fusionnements dans la Loi actuelle repose sur la reconnaissance du fait que la définition du marché nécessite l'analyse d'interactions complexes par des personnes versées en économie et en commerce. Elle fait valoir ensuite que la définition du marché est une question de jugement et de degrés impliquant un choix parmi un éventail de possibilités raisonnables.

Personne ne semble contester que la définition du marché constitue une opération extrêmement complexe. Cette opération n'est pas une fin en soi, mais une étape nécessaire du processus visant à établir si les parties fusionnantes ou si les entreprises auxquelles on reproche un comportement anticoncurrentiel possèdent la “puissance commerciale” nécessaire pour permettre de conclure à l'existence d'un risque de diminution sensible de la concurrence. Bien qu'il semble y avoir consensus autour de la proposition voulant que le marché comporte deux dimensions[40], le marché du produit et le marché géographique, le consensus ne s'étend à aucune autre notion. La difficulté de concevoir un cadre d'analyse susceptible d'application à toute détermination du marché pertinent peut s'inférer du fait que la Cour d'appel a examiné deux “paradigmes” de puissance commerciale, celui de l'élasticité croisée et celui du monopoleur hypothétique. M. Crampton, sous le titre “Questions of Law” de son ouvrage, fait état de quatre “cadres” principaux: le caractère substitutif, l'élasticité croisée, les rapports entre les prix et le monopoleur hypothétique[41].

Ceux qui ne sont pas d'avis que le processus en deux étapes constitue une méthode pratique soutiennent que des affaires différentes peuvent demander des méthodes d'analyse différentes, adaptées aux faits particuliers de l’affaire et à la façon dont les parties présentent leurs éléments de preuve et leurs arguments. Comme l'a écrit récemment un commentateur, Neil Finkelstein, l’avocat de l'appelante Southam : “Compte tenu du peu de méthodes d'enquête utilisables, en système accusatoire ou en système administratif, pour la définition du marché, il faut avoir recours à la preuve. Il s'impose donc de prendre en considération un large éventail de facteurs, en raison des complexités factuelles propres à chaque affaire de concurrence. Bien que les éléments de preuve techniques de nature économique soient d'une importance capitale, ils sont peu concluants. Certes, les règles de droit doivent procurer précision et prévisibilité, mais il est indispensable, à notre avis, que l'approche utilisée pour définir un marché soit souple. Les faits en cause et la preuve disponible indiqueront, dans chaque affaire, quelles méthodes il conviendrait d'employer et quelles méthodes il faudrait rejeter”[42].

Selon cette opinion, l'aspect factuel de la définition du marché est prépondérant. Les faits orientent l'analyse et, en vérité, dictent le type d'analyse qui convient à une affaire donnée. Le fait de vouloir établir une distinction claire entre, d'une part, le cadre juridique et sa méthode d'application et, d'autre part, le reste de l'exercice apparaît comme une simplification à outrance étant donné que la nature

même de la question en cause brouille la démarcation entre les aspects juridiques et factuels de la définition du marché.

Ceux qui appuient la démarche en deux temps sont mus, notamment, par un désir de certitude ou par la volonté d'éviter tout “arbitraire”. M. Crampton soutient que l'élément juridique de la définition du marché fournira la discipline nécessaire : “. . . Il est possible de réduire le caractère arbitraire en reconnaissant la nécessité, en droit, d'adopter un cadre d'analyse particulier et, aussi, d'avoir recours à certains critères d'évaluation du marché pour déterminer les limites factuelles du marché pertinent dans chaque cas”[43].

Dans un article plus récent, MM. Crampton et Corley considèrent que la contribution du Tribunal à la définition du marché a été “quelque peu décevante” car, tout en reconnaissant la nécessité pratique de définir le marché pertinent, il a laissé passer des occasions de formuler des principes généraux[44]. Ils louent la Cour d'appel, qui a déployé “des efforts considérables pour combler le vide jurisprudentiel”[45] dans le domaine de la définition du marché, mais n'en écrivent pas moins : “[...] il aurait été beaucoup mieux de conclure à la supériorité de la méthode d'analyse du monopoleur hypothétique et d'en faire, en droit, la méthode à employer dans tous les cas à moins qu'il n'existe des motifs sérieux d'en adopter une autre. Une telle conclusion aurait procuré un degré de certitude beaucoup plus élevé aux justiciables canadiens et au Tribunal”[46].

MM. Goldman et Bodrug, dans un article écrit peu de temps après la décision du Tribunal dans l'affaire *Southam*, avaient reconnu qu'il faut généralement accepter un compromis entre la certitude et la souplesse : “[...] le Tribunal aborde au cas par cas l'analyse du marché pertinent et de la période pendant laquelle il convient d'évaluer les effets d'un fusionnement plutôt que d'appliquer le cadre d'analyse plus précis proposé dans les *Lignes directrices* [du directeur] [...] Cette approche, qui permet plus de latitude et de souplesse, pourra souvent se révéler utile aux parties se proposant de réaliser un fusionnement pouvant susciter des craintes quant au respect des dispositions applicables de la Loi. Ce choix implique inévitablement un compromis, car une certitude moindre signifie que la planification d'entreprises, assistée de l'avis de conseillers juridiques, sera moins bien encadrée. De plus, si le Tribunal veut procéder au cas par cas, il serait préférable qu'il applique de façon plus explicite les principes qu'il a déjà établis dans des décisions antérieures relativement à des concepts comme la diminution sensible de la concurrence”[47].

On peut se demander si l'établissement en droit de l'approche “à utiliser” et de son application correcte, qui peut avoir l'avantage de procurer un certain degré de certitude - quoiqu'on puisse débattre du degré véritable de certitude étant donné que tout cadre général a cet effet - vaut qu'on sacrifie la souplesse et l'adaptabilité du processus décisionnel.

Aucun des intervenants au débat ne soutient que la définition du marché doit se faire sans cadre d'analyse. Les décideurs vont définir des principes à appliquer pour définir un marché. C'est sur la question de la possibilité de séparer, dans une opération aussi complexe que la définition du marché, les principes juridiques des principes économiques ou commerciaux et des autres éléments “de fait” que les opinions diffèrent. De fait, s'il n'existe pas de distinction fonctionnelle entre les aspects juridiques et factuels de la définition du marché, il paraît possible de considérer cette définition comme une question de fait et de droit, c'est-à-dire comme une question où les éléments juridiques et factuels sont si entremêlés qu'on ne peut les départager.

Effets sur le processus décisionnel du Tribunal

Comme l'a signalé Stanley Wong, l'avocat du directeur dans l'affaire *Southam*, dans un texte présenté lors d'une conférence récente, la décision de la Cour d'appel dans l'affaire *Southam* a soulevé des

inquiétudes quant au principe de la collégialité observé par les formations du Tribunal[48]. Si la détermination du cadre analytique à employer pour définir un marché et de son application correcte constitue une question de droit, il s'ensuit que seuls les membres de la formation qui sont juges pourront trancher cette question dans une affaire donnée.

Sans nier le rôle important que les juges peuvent jouer dans l'exercice de définition, la caractérisation de cette question essentielle comme une question de droit exclut les membres non-juges du choix de l'instrument analytique approprié, ce qui fait craindre leur marginalisation, du fait qu'ils ne peuvent prendre part à tous les aspects de la définition du marché pertinent alors que la solution de nombreuses affaires dépendra de ce facteur. Comme la Cour d'appel l'a affirmé dans l'arrêt *Southam* : “On ne saurait oublier que la définition du marché est vitale pour l'analyse d'un fusionnement et la préoccupation du législateur à l'égard de l'exercice d'une puissance commerciale[49]. Ceux que préoccupe cette exclusion soulignent que le législateur a, de toute évidence, estimé que l'expertise des membres non-juges était d'une quelconque utilité pour la politique de concurrence puisqu'il a expressément établi, en 1986, un nouvel organisme décisionnel dont ils faisaient partie. Avant l'adoption de la *Loi sur la concurrence*, les questions comme celles que nous examinons, relevaient des seuls tribunaux. Le législateur a plutôt décidé de les déférer à un organisme spécialisé comprenant des membres versés en économie, en commerce ou en affaires publiques et des membres versés en droit.

Le fait que MM. Crampton et Wong semblent reconnaître la valeur de la contribution que les membres non-juges peuvent apporter à la première étape de la définition du marché ne les empêche pas de soutenir qu'ils peuvent continuer de faire oeuvre utile même en l'absence de tout pouvoir décisionnel quant au cadre d'analyse à utiliser et à son application correcte. M. Wong affirme que [TRADUCTION] “rien, en droit, ne s'oppose à ce que les juges consultent d'autres membres de la formation” sur les questions de droit[50]. M. Crampton semble envisager un scénario similaire lorsqu'il écrit : “[...] c'est principalement dans la mesure où les juges du Tribunal de la concurrence accepteront de recevoir les avis des autres membres ainsi que les arguments des avocats que ce Tribunal pourra, dans ses futurs jugements, réaliser les analyses fouillées nécessaires à l'évaluation de concepts économiques complexes comme celui du marché pertinent”[51].

Le forum approprié à la définition du marché

On a considéré plus généralement que les questions liées au classement de la définition du marché dans la catégorie des questions de droit ou des questions de fait ainsi que la question de la retenue judiciaire, que l'arrêt *Southam* a mises en évidence, relevaient du choix du forum le plus apte à se prononcer sur la définition du marché. D'aucuns croient que le Tribunal, combinant une expertise en droit et dans d'autres domaines, est le plus à même de procéder à toute l'opération. D'autres préféreraient qu'une partie au moins de la définition du marché soit considérée comme une question de droit; on préserverait ainsi les droits d'appel et on garantirait une certaine cohérence par l'application des règles relatives au précédent et d'autres règles similaires, supposant l'intervention de cours d'appel.

Au lieu de considérer le Tribunal comme une entité complète ou unique, la Cour d'appel, dans l'arrêt *Southam*, a examiné les compétences de divers types de membres. Elle a pris en considération l'apport en expertise des membres juges et des autres membres. Certains commentateurs ont fait valoir que la Cour suprême n'avait pas envisagé une analyse de ce type dans l'arrêt *Pezim*. Selon eux, aucune loi instituant un tribunal spécialisé ne prévoit que ses membres doivent y apporter un degré déterminé d'expertise. Ils signalent que d'autres tribunaux judiciaires se sont prononcés sur la retenue à exercer sans procéder à l'analyse de l'expertise de membres individuels ou de catégories de membres. Ils se sont plutôt attachés à dégager l'économie générale de la loi visée et à définir l'objet de la décision du tribunal pour déterminer quelle était l'intention du législateur au sujet de l'“expertise” du tribunal pris dans son entier.

Si la Cour d'appel fédérale a raison, la question de la retenue judiciaire devra se poser non seulement par rapport à l'intention que poursuivait le législateur en créant le tribunal et à la nature de la décision faisant l'objet du contrôle judiciaire, mais également par rapport aux compétences particulières des membres du tribunal qui ont rendu la décision. Le débat actuel révèle que, même si l'approche est théoriquement justifiée, elle suscite de réelles interrogations quant à son caractère fonctionnel.

Ceux qui souscrivent à la vision de la retenue judiciaire exposée par la Cour d'appel dans l'arrêt *Southam* soutiennent que l'élément juridique de la définition du marché est assez distinctif pour qu'il soit possible, en pratique, de donner aux tribunaux judiciaires le dernier mot sur l'approche retenue en cette matière et sur son application correcte tout en laissant le Tribunal s'occuper du reste de l'opération. Parmi les principaux partisans de cette position se trouve le directeur. Dans son mémoire, le directeur reconnaît le caractère unique et la spécialisation du Tribunal. Il n'en appuie pas moins la conclusion de la Cour d'appel selon laquelle la norme de contrôle à appliquer aux décisions du Tribunal quant aux questions de droit liées à la définition du marché tranchées par les membres-juges uniquement est celle de la décision correcte. Il mentionne le fait que les droits d'appel prévus par la Loi à l'égard des décisions du Tribunal sont plus larges que ceux qu'on retrouve dans les lois habilitantes d'autres tribunaux administratifs aux décisions desquels le principe de la retenue judiciaire a été appliqué. Ces tribunaux peuvent également procéder à des enquêtes, réglementer, octroyer des licences, établir des politiques ou conseiller le gouvernement, alors que la fonction du Tribunal est strictement décisionnelle. En chargeant les juges membres du Tribunal de trancher les questions de droit et en prévoyant de pleins droits d'appels à l'égard de ce type de décisions, le législateur a voulu, selon le directeur, instiller au processus d'examen des fusionnements une mesure de cohérence et de certitude, en particulier pour ce qui concerne l'importante question de l'approche à suivre pour la définition du marché.

Répondant à ceux qui craignent que l'arrêt *Southam* affaiblisse l'objectif que le législateur poursuivait en créant un tribunal spécialisé pour décider des questions relevant de la partie VIII, M. Wong fait valoir que la composition du Tribunal et la compétence de ses membres-juges sur les questions de droit sont le résultat d'un : “compromis entre l'attribution de la compétence pour examiner les affaires relevant de la partie VIII à un organisme composé uniquement de membres non-juges et l'attribution de cette compétence aux tribunaux judiciaires. Il ne fait aucun doute que le législateur a jugé bon de confier à des juges l'examen des questions de droit et d'interprétation”[52].

Pour ceux qui contestent cette position, la définition du marché, peu importe qu'elle soit qualifiée de question de droit ou de fait, est un processus fortement axé sur les faits. Même les principes qu'on dit “juridiques” découlent autant de l'économie que de l'application stricte de précédents judiciaires. Comme l'a fait remarquer la Cour d'appel dans l'arrêt *Southam*, la *Loi sur la concurrence* ne définit aucunement la notion de “marché”. L'interprétation traditionnelle des lois n'est donc pas une analogie utile; il n'y a pas de texte de loi à interpréter, pourtant, il faut toujours définir des marchés.

C'est pourquoi M. Finkelstein fait les commentaires suivants : “La question que doit trancher la Cour suprême dans l'affaire *Southam*, même si elle a été présentée par la Cour d'appel fédérale comme la distinction entre le choix d'un critère (une question de droit devant être déterminée par la Cour) et son application (une question de fait ressortissant à la compétence du Tribunal), est simplement celle de savoir à qui il revient de définir le marché pertinent. À notre avis, cela ne peut se faire que d'une seule façon, par la détermination des proches substituts. L'objectif final ne change jamais, ce ne sont que les données à partir desquelles chaque décision est prise qui varient. Le critère des proches substituts peut être qualifié de question de droit, mais cette caractérisation est sans objet; la vraie question est la façon dont le marché est défini à partir des faits de chaque affaire. Dans l'affaire *Southam*, la Cour suprême du Canada doit déterminer qui doit rendre les décisions en cette matière, les tribunaux judiciaires ou le Tribunal de la concurrence [...]”[53].

Ceux qui estiment que la définition du marché devrait être l'apanage du Tribunal invoquent les objectifs de la Loi[54]. Ils soutiennent que le Tribunal, dans son ensemble, est peut-être mieux qualifié qu'une cour d'appel pour entreprendre la définition du marché d'une façon qui serve ces objectifs. Le Tribunal peut assurer à l'analyse la souplesse que requiert un domaine en constante mutation comme le droit de la concurrence, qui dépend énormément d'appréciations de caractère économique et commercial. Ils font valoir que la qualification de la définition du marché comme une question de droit soumise aux règles de droit et aux précédents judiciaires remet, à toute fin pratique, cette question entre les mains des tribunaux judiciaires et réduit à néant, dans les faits, le nouveau régime instauré en 1986.

La conclusion de M. Finkelstein est représentative de cette école de pensée. Elle est ainsi conçue : “La définition du marché est précisément le type de questions économiques complexes que le législateur voulait voir soumettre au Tribunal, en raison de l'expertise particulière de cet organisme en matière de protection de la concurrence. En laissant au Tribunal le soin d'appliquer et de perfectionner le critère des proches substituts élaboré dans l'affaire *Southam*, on permettra le développement d'une approche canadienne originale et efficace du droit de la définition du marché”[55].

Par conséquent, soutiennent-ils, que la définition du marché soit perçue comme une question de fait ou comme une question de fait et de droit, elle relève précisément de l'expertise du Tribunal, et une très grande retenue judiciaire devrait marquer l'examen des décisions que rend celui-ci sur cette question. Il faut espérer que la Cour suprême déterminera clairement laquelle des deux écoles de pensée a préséance car les questions en jeu sont de la plus haute importance pour tous les intéressés du domaine de la concurrence.

Notes

1 [1995] 3 C.F. 557 (C.A.).

2 La seule autre affaire de fusionnement contesté n'a pas été portée en appel.

3 L.R.C. 1985, c. C-34.

4 L.R.C. 1985 (2e supp.), c. 19.

5 *Ibid.* à l'art. no 12(1).

6 *Ibid.* à l'art. no 13.

7 *Débats de la Chambre des communes* (7 avril 1986), aux pp. 11927-28.

8 *Chrysler Canada Ltd. c. Tribunal de la concurrence*, [1992] 2 R.C.S. 394 à la p. 406.

9 6e éd., St-Paul (Minn.), West, 1990 à la p. 593.

10 4e éd., J.M. Evans, Londres, Stevens & Sons, 1980 à la p. 134 (notes infrapaginales omises).

11 *Ibid.*

12 [1994] 2 R.C.S. 557.

13 Une disposition législative empêchant l'examen de décisions d'un tribunal administratif. S. Blake, dans son traité intitulé *Administrative Law in Canada* (Toronto, Butterworths, 1992 à la p. 177), décrit les trois types habituels de clauses privatives prévues dans les lois créant des tribunaux administratifs : (1) la clause énonçant que les décisions du tribunal sont “finales et définitives”, (2) la clause octroyant au tribunal “compétence exclusive” sur les questions à trancher et (3) la clause tentant d'empêcher directement le contrôle judiciaire des décisions du tribunal en prévoyant que les décisions du tribunal ne peuvent être soumises au pouvoir de surveillance et de contrôle d'un tribunal judiciaire ou d'autres dispositions similaires.

14 *Supra* note 12 à la p. 590.

15 P. Crampton, *Mergers and the Competition Act*, Toronto, Carswell, 1990 à la p. 263 (notes infrapaginales omises).

16 L.R.C. 1952, c. 314.

17 [1968] 2 Ex. C.R. 275, décision de la Cour de l'Échiquier du Canada, qu'a remplacée la Cour fédérale du Canada.

18 (1970), [1971] R.C.S. 63.

19 *Supra* note 17 à la p. 305.

20 *Ibid.*

21 *Ibid.* aux pp. 305-306.

22 (1981), 33 O.R. (2 e) 694 (C.A. Ont.).

23 *Ibid.* à la p. 706.

24 [1995] 3 C.F. 395.

25 L.R.C. 1985 (3e supp.), c. 28.

26 L'Office national des transports est un organisme réglementaire qui supervise tous les aspects des services ferroviaires, y compris les questions relatives à la concurrence.

27 *Supra* note 24 aux pp. 440-41.

28 *Ibid.* à la p. 418.

29 Dans une récente affaire de complot, la Cour de l'Ontario a appliqué la position prise dans l'arrêt *Southam* relativement à la définition du marché, mais sans développer davantage l'analyse : *R. v. Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4 e) 500, 64 C.P.R. (3 e) 289 (Ont. Ct. (Gen. Div.)).

30 *Southam, supra* note 1 à la p. 592.

31 *Ibid.* à la p. 595 *:*

> [...] comme je l'ai fait remarquer plus haut, la formulation d'"‘indices pratiques" est une approche parmi d'autres et son adoption demeure une question de droit, tout comme la question de savoir si le Tribunal l'a appliquée correctement.

32 *R. c. Nova Scotia Pharmaceutical Society,* [1992] 2 R.C.S. 606.

33 *Southam, supra* note 1 à la p. 596.

34 *Ibid.* à la p. 597, citation de P. Crampton, *Mergers and the Competition Act, supra* note 15.

35 *Ibid.*

36 *Ibid.* à la p. 603.

37 *Ibid.* à la p. 605.

38 *Ibid.*

39 *supra* note 15 à la p. 264 (notes infrapaginales omises).

40 Paul Crampton ajoute une troisième dimension : le temps, *supra* note 15 à la p. 262.

41 *Ibid. à la p. 266 et s.*

42 N. Finkelstein, “The Evolving Concept of Market Definition: Southam, Nielsen and Consolidated Fastfrate”, *Competition Law and Competitive Business Practices*, Toronto, Canadian Institute, 10 mai 1996, à la p. 5.

43 *Supra* note 15 à la p. 293.

44 P.S. Crampton et R.S. Corley, “Merger Review Under the *Competition Act*: Reflections on the First Decade”, hiver 1995-1996, 16(4) *Can. Comp. Record* 37 à la p. 49.

45 *Ibid.* à la p. 51.

46 *Ibid.* à la p. 53.

47 C.S. Goldman et J.D. Bodrug, “The *Hillsdown* and *Southam* Decisions: The First Round of Contested Mergers Under the *Competition Act*”, (1993) 38 McGill L.J. 724 à la p. 749.

48 S. Wong, “The Competition Tribunal Process: Implications of the *Southam* Decisions”, *Competition Law and Competitive Business Practices*, Toronto, Canadian Institute, 10 mai 1996, à la p. 23.

49 *Supra* note 1 à la p. 606.

50 *Supra* note 45 à la p. 23.

51 *Supra* note 15 à la p. 264.

52 *Supra note 45 à la p. 22.*

53 *Supra note 42 aux pp. 49-50.*

54 Les objectifs sont “de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.” [*Loi sur la concurrence, supra* note 3 à l’ art. 1.1.]

55 *Supra* note 42 à la p. 51.

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