Voluntary Product Standards in Globalized Markets

An Analysis of the US, EC, and Swiss Antitrust Approaches Towards Private Standardization in a WTO perspective

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Résumé

The current study aims at presenting the approaches followed by US, EU and Swiss antitrust authorities towards private standardization issues. Although the main focus of the study will thus be on competition law, it must be stressed that as a matter of public international law at least, national competition authorities have to comply with WTO law dealing with standardization issues. In particular, under the TBT, WTO members have contracted a specific framework (the Code of Good Practice) for the disciplining of SSOs.

The multiple issues arising out of private standardization cover a wide variety of situations. For example, a Standard Setting Organisation (SSO) might refuse to grant access to a standard to a market actor, or a dominant firm might impose a standard which de facto excludes competitors from a market. Moreover, as technical standards often include technologies protected by a patent, the conditions for the use of such a technology by third parties must not be any more anticompetitive than necessary. Such cases might be analyzed under competition rules through the control of agreements between enterprises or the control of unilateral conduct of trade associations or leading market actors. Such competition law concepts as refusal to deal, raising rivals' costs, and essential facility play a central role in the comprehension of anticompetitive effects of standardization. Consequently, the study of competition law issues related to standardization requires the knowledge of a very broad range of competition law concepts (with the notable exception of merger control tools, which play almost no role in this context.)

Moreover, the present study presents the reach of each antitrust system. In today's globalized markets, it is critical to understand which competition system might assert jurisdiction over a particular issue. The tendency of each of these three competition systems to become applicable extraterritorially often takes place through a variation of the so-called "effects doctrine." A detailed analysis of this doctrine is necessary given that the influence of standards on competitive conditions may extend beyond national boundaries.

Accordingly, the structure of the study will be as follows: Chapter 2 will offer a brief overview of the economic theory on standardization, thus providing the necessary conceptual tools for the analysis. Chapters 3 through 5 constitute the core of this study in presenting in detail the US, EU, and Swiss approaches towards standardization. Chapter 6 will present an overview of the current discussion at the WTO level, while Chapter 7 reflects our conclusions.

True to the theme of the present study, the three chapters analyzing the approach adopted by US, EU, and Swiss antitrust authorities towards standardization have been, well, standardized,

in that they follow a similar structure. All three chapters begin with a very brief presentation of the historical development of national/regional antitrust statutes (Section 1), which is then followed by an overview of the delimitation of scope of these statutes (Section 2). The study of each antitrust system's exemptions to the reach of antitrust laws is of particular interest for a comparative approach such as the one followed in the present study. Indeed, although one might notice a great degree of convergence in relation to material concepts, exemptions have been left untouched by the pressures of convergence, as they differ from one jurisdiction to another. Arguably, this might be explained by the fact that exemptions often reflect industry-specific lobbying and are rarely grounded on sound, long-term economic arguments.

The third section will offer a general presentation of the main substantial national/regional antitrust concepts used in the standardization disputes. The subsequent section (Section 4) is dedicated to the analysis of the case law on standardization issues. Thus, the analysis of the substantial legal provisions is divided into two parts. This division is necessary because the case law on standardization is not a self-contained regime, but rather reflects the application of general antitrust concepts to the specific context of standardization. Moreover, the antitrust case law on standardization issues often does not encompass all the types of anticompetitive behavior in which enterprises might engage in the context of standardization. It is thus necessary to refer to a general presentation of antitrust concepts, including situations which have not yet been decided in the case law dealing with standardization issues.

With the adage of Judge Basdevant in mind, whereby legal systems are to be judged by their system of remedies, the fifth section of each chapter is dedicated to the remedies available in an antitrust dispute. The last section offers a quick introduction to the procedures and the enforcement agencies of each antitrust system. Finally, Section 7 briefly summarizes each chapter.

Table of contents

Selected bibliography **13**

List of abbreviations **24**

Chapter 1 Introduction. **26**

1.1. Foreword 26

1.2. General economic importance of standards 27
1.2.1. Current regain in interest 27
1.2.2. Standards and industrialisation 27
1.2.3. Specialisation and interdependence 29

1.3. Definitions and typology of standards 30
1.3.1. A general definition of "standards" 30
1.3.2. Typology of standards 33
1.3.2.1. Enforcement and elaboration of standards 33
1.3.2.2 Compatibility and quality standards 36
1.3.2.3. Product and process standards 37

1.4. Scope of the study 37

Chapter 2 Economics of standards **40**

2.1. Why are standards set? 41
2.1.1. Ambivalent nature of standards 41
2.1.2. Efficiency and competition 42
a) Economies of scale 42
b) Lowering of transaction costs 42
c) Remedy against asymmetry of information issues 43
d) Network externalities 46
e) Structural effects 48
f) Promotion of social values 49
2.1.3. Effects on trade 50
a) Standards heterogeneity 50
b) Overcoming heterogeneity 51

2.2. Typical antitrust issues arising out of standardization 53
2.2.1. A typology of issues 53
a) Hold-up of a standard 54
b) Abuse of the standard-setting process 54
c) Exclusion from the standardization process or its benefits 58
d) Exchanges of information 59
e) Input restriction 59
f) Overstandardization 59
g) Price discrimination 59
2.2.2. Case by case approach towards analysis of standards 60

2.3. Voluntary or mandatory standards? 60

Chapter 3 US antitrust law 63

3.1. Overview of the principal antitrust statutes and their *ratio legis* 63
3.1.1. Introduction.....63
3.1.2 US Statutes and their origins 63

3.2. Scope of antitrust laws in federally regulated markets 65
3.2.1. Exclusive and primary agency jurisdiction 66
3.2.2. Exemptions 67
3.2.2.1. Labor 67
3.2.2.2. Sports 68
3.2.2.3. Agricultural cooperatives and fisheries 68
3.2.2.4. Insurance 68
3.2.2.5. Export associations 69
3.2.2.6. Other exemptions.....69
3.2.3. Statute of limitations 70
3.2.4. "In pari delicto" and "unclean hands" doctrines.....70
3.2.5. Noerr-Pennington doctrine 70
3.2.6. Federalism and State regulation.....73
3.2.6.1. Regulation by a State 74
3.2.6.2. Regulation by a municipality 75
3.2.7. Public international law limitations on the reach of the antitrust laws 75
3.2.7.1. Introduction 75
3.2.7.2. Extraterritorial reach of the antitrust laws.....77
3.2.7.3. Principle of comity 84
3.2.7.4. Excursus: the DoJ's Guidelines for International Operations.....86
3.2.7.5. Act of State doctrine 88
3.2.7.6. Foreign Sovereign Compulsion doctrine 88
3.2.7.7. Foreign Sovereign Immunity doctrine.....89

3.3. Substantial concepts.....89
3.3.1. "Cartels" 90
3.3.1.1. Conditions favoring cartels 90
3.3.1.1.1. Ability to raise market prices.....90
3.3.1.1.2. Barriers to entry 91
3.3.1.1.3. Market concentration 93
3.3.1.1.4. Producer homogeneity 93
3.3.1.1.5. Sales methods 94
3.3.1.1.6. Product homogeneity 94
3.3.1.1.7. Trade associations.....94
3.3.1.1.8. Detecting and punishing cheating.....95
3.3.1.2. Oligopolies: standardization of products and terms as evidence that collusion is occurring 95
3.3.1.2.1. Proof of "agreement" by circumstantial or indirect evidence and tacit collusion.....97
3.3.1.2.2. Antitrust prosecution without proof of an agreement 98
a) Under the Sherman Act.....98
b) Under Section 5 of the FTC Act 99
3.3.1.2.3. Facilitating devices 99
3.3.1.2.4. Consequences of standards.....101
a) Standardization agreements and Section 1 of the Sherman Act 101
b) Standards suggested by trade associations 102

c) Differences between parallel behavior in relation to pricing and standards: price leadership and *de facto* standards 102
d) *De facto* standards and "agreement" 104
3.3.1.3. Joint ventures and "co-ompetition" 105
3.3.1.3.1. Standards of review 105
a) *Per se* rule or rule of reason? 105
b) Characterization 107
3.3.1.3.2. Concerted refusal to deal in the joint venture context 108
a) Transaction costs, free riding and exclusivity 108
b) Standard of review in concerted refusals to deal cases 110
3.3.2. Monopolization 111
3.3.2.1. Monopoly power in a relevant market 112
3.3.2.2. Attempt to monopolize and monopolization 112
3.3.2.2.1. Intent 113
3.3.2.2.2. Conduct requirements 113
3.3.2.2.3. High probability of success 114
3.3.2.3. Cases of monopolization 114
3.3.2.3.1. Unilateral refusal to deal (monopolization) 114
3.3.2.3.2. Essential facility doctrine 115
3.3.2.3.3. Raising rivals' costs 117
3.4. Case law on standardization issues 119
3.4.1. Possible approaches 119
3.4.2. Characterization 120
3.4.3. Collaborative standards 124
3.4.3.1. Membership and composition of organs 124
3.4.3.2. Corruption of the decision-making process 126
3.4.3.2.1. Plaintiff's burden of proof 126
3.4.3.2.2. Examples of corruption of the SSO process 129
3.4.3.3. Enforcement 131
3.4.3.3.1. Self-regulating entities and due process 131
3.4.3.3.2. Private SSOs' enforcement after Northwest 134
a) Access to the standardization process 134
b) Anticompetitive enforcement methods: a rather stringent review 135
3.4.3.4. "Substantive" violations of the antitrust laws 139
3.4.3.4.1. Monopsony power (or "cartel of buyers") 139
3.4.3.4.2. IPR-related issues 140
a) Patent ambush 140
b) Cross-licensing and patent pooling 143
c) Patent grantbacks 144
3.4.3.4.3. Exchanges of information 145
3.4.3.5. Excursus: should deference in sports standards be duplicated in products standards? 146
3.4.3.6. Positive effects 147
3.4.4. Unilateral behavior 147
3.4.4.1. Unilateral refusal to deal and essential facility doctrines 147
3.4.4.2. Exclusionary practices in vertical relations 149
3.4.4.3. Leveraging and predatory innovation 149
3.5. Antitrust remedies 153
3.6. Enforcers 154

3.6.1. Enforcement by the Department of Justice....155
3.6.1.1. Organization....155
3.6.1.2. Powers....155
3.6.1.2.1. Criminal enforcement....155
3.6.1.2.2. Civil enforcement....155
3.6.1.2.3. "Consultative" enforcement....155
3.6.2. Enforcement by the Federal Trade Commission....156
3.6.2.1. Organization....156
3.6.2.2. Powers....156
3.6.2.3. Procedure....158
3.6.3. "Quasi-public" enforcement: State Attorneys General....158
3.6.4. Enforcement by private parties....159
3.6.4.1. *Locus standi*....161
3.6.4.2. Antitrust injury....163
3.6.4.3. Class actions....165
3.6.5. Powers of the enforcers: consequences for standards....165
3.7. Conclusions....166

Chapter 4 EC competition rules....169

4.1. An overview of EC competition law....169
4.1.1. Origins of EC competition law....169
4.1.2. The "free-market structure" of the ECT....172
4.1.3. Specific competition provisions of the EC Treaty....173
4.2. Scope of EC competition law....174
4.2.1. Horizontal reach of EC competition law....174
4.2.2. Vertical reach of EC competition law....175
4.2.2.1. Anticompetitive behavior which affects trade between Member States....176
4.2.2.1.1. The affection of trade condition....176
a) Case law....176
b) Commission Notice....180
4.2.2.1.2. "De minimis" or "appreciable effects on competition" doctrine....184
4.2.2.2. State measures which thwart competition....185
4.2.2.2.1. State measures reinforcing the effects of anticompetitive agreements are forbidden....186
4.2.2.2.2. Cases where a Member State delegates to private parties the power of determining competitive conditions: substantial uncertainty....187
4.2.2.2.3. Undertakings do not escape liability merely because of state action....188
4.2.2.2.4. Conclusions on Article 10 ECT....189
4.2.2.2.5. Article 86 ECT....189
4.2.2.2.6. Consequences for standards....190
4.2.2.3. Relationship between EC and national competition authorities....191
4.2.2.3.1. Relationship between Articles 81 and 82 ECT and national competition law....191
a) Historical perspective....191
b) Supremacy of EC law: the law of conflicts between the EC and national competition laws....192
c) Cooperation between the Commission and National Competition Authorities....194

d) Cooperation with national courts 196
e) Uniform application of Community competition law 197
4.2.2.3.2. Judicial review of Commission's acts 198
a) Type of acts 199
b) Locus standi 199
c) Grounds of review 200
4.2.2.4. International reach of EC competition laws 201
4.2.2.4.1. "Effects" and similar doctrines 201
a) "Group economic unit" or "economic entity" doctrine 202
b) Implementation doctrine 203
4.2.2.4.2. Bilateral cooperation 206
4.2.2.4.3. Multilateral cooperation 206

4.3. Substantial concepts 207
4.3.1. Article 81(1) ECT 207
4.3.1.1. Collusion 208
4.3.1.1.1. Undertakings 208
a) The concept of "undertaking" 208
b) Group of undertakings 209
4.3.1.1.2. Agreements 209
4.3.1.1.3. Decisions by associations of undertakings 213
4.3.1.1.4. Concerted practices and exchanges of information 214
4.3.1.1.5. Consequences for standards 220
4.3.1.2. "Which may affect trade between Member States" 221
4.3.1.3. "Have as their object or effect the prevention, restriction or distortion of competition within the common market" 221
4.3.1.3.1. General definition 221
4.3.1.3.2. Consequences for standards 225
4.3.2. Article 81(3) ECT 226
4.3.2.1. Overview 226
4.3.2.2. Improve the production or distribution of goods, or promote technical and economic progress 227
4.3.2.3. Allow consumers a fair share of the resulting benefits 228
4.3.2.4. Not impose on the concerned undertakings restrictions which are not indispensable to the attainment of these objectives 229
4.3.2.5. Not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question 230
4.3.2.6. Individual exemptions 231
4.3.2.7. Group or block exemptions 231
4.3.3. Two special situations under Article 81 ECT 234
4.3.3.1. Oligopolies 234
4.3.3.2. Collective refusals to deal (group boycott) 234
4.3.4. Article 82 ECT 235
4.3.4.1. Introduction 235
4.3.4.2. Dominant position 236
4.3.4.2.1. Relevant market 236
a) Product market 237
b) Geographic market 240
4.3.4.2.2. Dominance 240
4.3.4.2.3. Excursus: Abuse of collective dominance under Article 82 ECT 244
4.3.4.3. Abuse 248

4.3.4.3.1. Generally 248
a) Exploitative abuse 249
b) Anticompetitive abuse 249
c) Obstacles to the single market 250
d) Justifications 251
4.3.4.3.2. Refusal to supply 251
a) Generally 251
b) Refusal to sell spare parts and consumables 253
c) Refusal to deal in an IPR context: duty to license? 254
d) Interoperability 256
e) Refusal to deal by an essential-facility-holding undertaking 257
4.3.5. Commission Guidelines on horizontal cooperation 266
4.3.5.1. Scope of the Guidelines 266
4.3.5.2. Horizontal Guidelines and standards 267
4.3.5.2.1. Article 81(1) ECT 269
4.3.5.2.2. Article 81(3) ECT 270

4.4. Case law on standards-setting 274
4.4.1 Introduction 274
4.4.2. Procedural safeguards against discrimination: transparency and majority rule 275
4.4.2.1. Transparency 275
4.4.2.2. Majority rule? 276
4.4.3. Restriction of access to the standardization process 276
4.4.4. Access to label, fair testing and conformity assessment procedures 280
4.4.5. Fair access to necessary information and FRAND Terms for use of IPRs 281
4.4.5.1. Technical information 282
4.4.5.2. FRAND terms 282
4.4.5.3. Patent hold-ups 284
4.4.6. Issues regarding information exchanges 285
4.4.7. Overstandardization: Reduction of product differentiation 285

4.5. Remedies 289
4.5.1. Penalties and fines 289
4.5.2. Statute of limitations 290
4.5.3. Voidness 290
4.5.4. Damages 291

4.6. Authorities 292
4.6.1. Council of Ministers 292
4.6.2. European Commission 292
4.6.3. The European Courts 292
4.6.4. ACRPDP/ACC 293
4.6.5. National courts 293
4.6.6. European Parliament and ECOSOC 293

4.7. Conclusions 294

Chapter 5 Swiss competition rules 297

5.1. Swiss competition rules 297
5.1.1. Material sources of Swiss competition law 297
5.1.2. Short historical presentation of Swiss federal rules on competition 300

5.2. Scope of Swiss competition rules 304

5.2.1. Undertakings (personal scope)....304
5.2.2. "Which restrict competition" (material scope)....305
5.2.3. In Switzerland (geographic scope)....306
5.2.4. Relations with other provisions of law (Article 3 ACart)....312
5.2.4.1. In general....312
5.2.4.2. In relation with intellectual property rights....315

5.3. Substantial concepts....315
5.3.1. Introduction....315
5.3.2. Article 5 I ACart....316
5.3.2.1. Agreements and concerted practices....317
5.3.2.2. Significant restriction of competition....317
5.3.2.3. Grounds of economic efficiency....319
5.3.2.4. Elimination of effective competition....321
5.3.3. Article 5 III and IV ACart....322
5.3.4. Article 7 ACart....323
5.3.4.1. Dominant position....323
5.3.4.1.1. Relevant market....323
a) Product market....324
b) Geographic market....325
5.3.4.1.2. Dominance....325
5.3.4.2. Abuse of dominance....328
5.3.4.2.1. Refusal to deal (litt. a)....330
a) Generally....330
b) Essential facilities....332
5.3.4.2.2. Technical limitation (litt. e)....335

5.4. Swiss approach towards standards....340
5.4.1. The legislation other than the ACart....340
5.4.2. Under Article 5 ACart....341
5.4.2.1. Elimination of competition....341
5.4.2.2. Significant restriction of competition....342
5.4.2.3. Which approach for standards under Article 5 ACart?....344
5.4.3. The Swiss Notice regarding the Certification and Sponsoring of Sporting Goods....346
5.4.4. Under Article 7 ACart....348
5.4.5. Certification....349

5.5. Remedies....351
5.5.1. Civil remedies....351
5.5.2. Illegality....351
5.5.3. "Administrative sanctions" and criminal sanctions....352

5.6. Procedural rules and Swiss competition law authorities....354
5.6.1. Procedures....354
5.6.1.1. Civil proceedings....354
5.6.1.1.1. Locus standi....354
5.6.1.1.2. Reference to administrative authorities....355
5.6.1.2. Administrative proceedings....356
5.6.1.2.1. Structure of the ACart's chapter on administrative proceedings....356
5.6.1.2.2. Preliminary investigations....356
5.6.1.2.3. Investigations....356

5.6.1.2.4. Appeals 357
5.6.2. Swiss competition law authorities 358
5.6.2.1. The Competition Commission 358
5.6.2.2. The Secretariat 359
5.7. Conclusions 359

Chapter 6 WTO law 361
6.1. The 1994 GATT and GATS 363
6.2. SPS 364
6.3. TBT 366
6.3.1. Code of Good Practice 367
6.3.1.1. Scope of the Members obligation to promote compliance with the CGP 367
6.3.1.1.1. Article 4.1 TBT 367
6.3.1.1.2. Interpretative issues 367
6.3.1.1.3. A tentative interpretation of Article 4.1 TBT 369
a) First Sentence 369
b) Second sentence 369
c) Third sentence 374
d) The private addressees of the CGP 375
6.3.1.2. The CGP's disciplines 376
6.3.1.2.1. Non-discrimination 377
6.3.1.2.2. Necessity requirement 378
a) International standards as a basis for standardization 379
aa) International standards 379
bb) Relevant international standards 381
cc) Basis for technical regulations 381
b) Deviation from international standards 382
aa) Conditions for deviation 382
bb) Burden of proof 383
cc) Necessity 386
6.3.1.2.3. Other disciplines 387
6.3.2. Principles of the TBT Committee on international standardization 388
6.3.3. Conformity assessment 389
6.3.4. Process standards 390
6.4. Conclusion 394

Conclusion 396
Standards and competition law 396
Foreclosure and refusal to deal 396
Other issues 398
New benchmarks for the antitrust analysis? 398

Selected bibliography

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List of abbreviations

AB	WTO Appellate Body
ALJ	Administrative law Judge
ATF	Arrêt du Tribunal Fédéral
BBl	Bundesblatt
BGE	Bundesgerichtsentscheide
CAP	Common Agricultural Policy
CEN	Comité Européen de Normalisation
CFI	Court of First Instance
CGP	WTO Code of Good Practice
CMLR	Common Market Law Reports
Cst	Swiss Federal Constitution
DFEP	Federal Department for Public Economy
DG Comp	Directorate-General of the European Commission responsible for Competition Policy
DoJ	US Department of Justice
DSB	WTO Dispute Settlement Body
DSU	WTO Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECMR	European Community Merger Regulation
ECSC	European Coal and Steel Community
ECT	Treaty establishing the European Community
ETSI	Eurpean Telecommunications Standardisation Institute
EU	European Union
FAIM	Swiss Federal Act on the Internal Market of October 1995
FATBT	Swiss Federal Act on Technical Barriers to Trade of 6 October 1995
FF	Feuille Fédérale
FRAND	Fair, Reasonable And Not Discriminatory
FTAIA	US Foreign Trade Antitrust Improvements Act of 1982
FTC	Federal Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
IPR	Intellectual Property Rights
NAAT	Non-Appreciable Affection of Trade
NCAs	National Competition Authorities
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreements
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OHIM	Office for Harmonisation in the Internal Market
OJ	Official Journal of the European Communities
OMB	US Office of Management and Budget
PCIJ	Permanent Court of International Justice
PIL	Public International Law

Reko	Rekurskommission für Wettbewerbsfragen
RPW/DPC	Recht und Politik des Wettbewerbs / Droit et politique de la concurrence en pratique
RRC	Raising Rivals' Costs
SAG	State Attorney General
S.Ct.	US Supreme Court Bulletin
SME	Small and Medium sized companies
SPS	WTO Agreement on WTO Agreement on Sanitary and Phytosanitary measures
SR	Systematische Rechtssammlung
SSNIP	Small but Significant Non-transitory Increase in Price
SSO	Standard-setting organisation
TBT	WTO Agreement on Technical Barriers to Trade
TEC	Treaty establishing the European Community
TRIPS	WTO Agreement on Trade Related Aspects of Intellectual Property Rights
U.S.	United States Supreme Court Reports
U.S.S.C.	United States Supreme Court
VCLT	Vienna Convention on the Law of Treaties
Weko	Wettbewerbskommission
WTO	World Trade Organization

Chapter 1 Introduction.

1.1. Foreword

Increased societal and economic attention is being paid to product standards.[1] This is true even though the prominent role standards play in everyday life is not always obvious, or at least not *prima facie*. Indeed, even labeled products do not usually mention all the standards with which they or their production processes must comply. However, a closer look reveals that most of the tools used at work or home (including means of transportation, clothes, and communication systems), usually comply with particular standards. How could electric devices be operated without compliance with electric standards? Would we accept children's toys that do not comply with minimal safety standards? How would computers interact if they did not have a common language? Even agricultural products have to meet specific public or private standards before being marketed. Broadly defined, standards are not limited to productive activities, as even social behavior often complies with collectively established standards (e.g., languages and ethical or moral principles might be considered societal standards.)

Although their importance seems to have increased in our modern societies, product standards are not a modern invention, as they were already in use at least as early as Antiquity.[2] However, their increased pervasiveness and the surge in world trade after World War II have amplified their social significance. Standards are established at various national, regional, or international levels by organizations that are usually staffed by technicians and experts who only infrequently are democratically elected. As standards have an impact on everyday life, their quasi-regulatory status has prompted a more in-depth study of the democratic control exercized over such organizations. The present study contributes to this effort. Both because antitrust law[3] has as its subject the regulation of the economic behavior of private actors, and because antitrust rules constitute one of the major regulatory constraints imposed on firms who do the standardizing, this study focuses on the approach followed under antitrust law towards private standardization.

Chapter 1 introduces the reader to the treatment of private standardization by antitrust authorities. After a quick presentation of the general importance of standards (Section 1.2.),

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[1] See Subsection 1.2.1. Current regain in interest.

[2] G.VAROUFAKIS, *Ancient Greece and Standards*, ELOT, 1999.

[3] In this study, the terms "antitrust authorities" and "competition authorities" as well as "antitrust law" and "competition law" will be used indifferently. Note, however, that the term "antitrust" has sometimes been given a narrower definition (the mere regulation of anticompetitive agreements between undertakings or cartel behavior). In contrast, the Treaty Establishing the European Community's ("ECT") use of the word "competition" seems to be broader, as the chapter on competition rules (Title VI, Chapter 1 ECT) also encompasses control of abuses of dominant positions, state aid, and rules on state enterprises. In common parlance, the *lato sensu* definition of antitrust is sometimes used to refer to rules covering the same set of objects. Originally, the word "antitrust" was coined in the US to describe the fight against abusive conduct of "business trusts" in which firms used the common law institution of the trust to conduct interstate trade. Today the term "antitrust" is commonly used to designate the US body of laws which aims at combating the anticompetitive behavior of enterprises, while in Europe, the term "competition law" has been preferred. Obviously, the EC term describes the good to be protected rather than the subject to be controlled as compared to US approach.

Section 1.3. provides a succinct overview of the legal definitions of standards, while Section 1.4. sets forth the scope and structure of this study.

1.2. General economic importance of standards

Although it seems they have only now gathered particular interest due to the increased number of exchanges between nations (Subsection 1.2.1.), standards played a crucial economic role long before the establishment of the General Agreement on Tariffs and Trade ("GATT") and the ensuing liberalization of trade (Subsection 1.2.2.). The increased specialization induced by standardization entails an increase in social interdependence (Subsection 1.2.3.). Given the importance of network externalities in such industries, the importance of standards is not likely to diminish with the advent of what some have called the "New Economy."

1.2.1. Current regain in interest

Although standards were probably used (albeit in a rudimentary form) since the first commercial exchanges, only in the past twenty years have economists started more systematically analyzing their effects in the market. The number of studies on standardization has greatly increased during this period whereas previously they attracted little attention.[4] The number of standard-setting organizations ("SSOs") or more informally, forums where standards are discussed, has also dramatically increased. It has been argued that such a renewed attention regarding standards is due to the increase in world trade and the reduction of tariff barriers to trade that has rendered more apparent non-tariff barriers such as technical regulations and standards.[5] Accordingly, the WTO and the EU have put standards at the center of their legislative priorities to bolster exchanges between their Members. Indeed, although the 1979 Agreement on Technical Barriers to Trade bound only its signatories, the WTO Agreement on Technical Barriers to Trade ("TBT") binds all WTO Members.[6]

1.2.2. Standards and industrialisation

The increase in the use of standards seems to be linked to the rise of industrialization. Of course, the Roman administration and the medieval guilds[7] also established standards, but their importance relative to general production was quite low. As Adam Smith indicated in his famous 1776 book, *The Wealth of Nations*, economies of scale are the key to industrial development. Using a pin factory as an example, Smith described the economic benefits

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[4] For a summary of the economic literature on standardization, see P.SWANN, *The Economics of Standardization*, Report for the Standards and Technical Regulations Directorate ("STRD"), Department of Trade and Industry, Manchester Business School, 2000.

[5] WTO SECRETARIAT, *World Trade Report 2005, Exploring the Links Between Trade, Standards and the WTO,* pp. 31 and ff, 2005.

[6] At the regional level, in 1986 the EU adopted its New Approach in the field of standards to reach its goal of a single market. The US has also signed many Mutual Recognition Agreements to ensure its trade standards will be recognized.

[7] For historical accounts of the importance of standards, see, e.g., G.VAROUFAKIS, *Ancient Greece and Standards*, ELOT, 1999, A.GROOM, *How We Weigh and Measure*, Routledge, 1960, and C.D.SULLIVAN, *Standards and Standardization: Basic Principles and Applications*, Marcel Dekker, 1983.

flowing from repetitive tasks—in particular, how the specialization of workers into repetitive, specialized tasks on the production line helped increase output:

> *One man draws out the wire, another straits, a third cuts it, a fourth points, a fifth grinds it at the top for receiving the head; to make the head requires two or three distinct operations; to put it on is a peculiar business; to whiten it is another; it is even a trade by itself to put them into paper […] I have seen a small manufactory of this kind where ten men only were employed and where some of them consequently performed two or three distinct operations. But though they were poor, and therefore but indifferently accommodated with the necessary machinery, they could, when they exerted themselves, make among them about twelve pounds of pins in a day. There are in a pound upwards of four thousands pins of middling size. Those ten persons, therefore, could make among them upwards of forty-eight thousand pins in a day […]. But if they had all wrought separately and independently […] they could certainly not each of them make twenty, perhaps not one pin in a day.*

Economies of scale[8] are attained when the same (or at least, sufficiently similar) task is performed repeatedly.[9] Industrialization not only standardized work techniques, it standardized products. These similarities between products are necessary to achieve economies of scale, as each deviation from the standard procedure involves costs.

The range of products and processes which can be standardized is almost unlimited. For example, during World War II, such technical challenges as boats and airplanes were mass-produced on assembly lines.[10] Thus specialization often increases productivity and lowers the average cost per unit. Hence, as standards are used to simplify the production of more or less identical products, it might be argued there is an almost inherent link between industrialization and standardization.

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[8] According to the glossary of the EC DG Comp (www.europa.eu.int):

> *Economies of scale occur when firms achieve per unit cost savings by producing more of a good or service (i.e. when average costs decrease as output increases). Such effects arise when it is possible to spread fixed costs over a higher output. Examples of scale economies are the bigger lorry that transports more while still requiring only one driver or the larger plant that does not require more spare parts to be kept in stock than the smaller plant. Learning by doing economies encompass efficiency gains occurring when repetitive tasks are carried over several times.*

[9] Standardization might also give rise to economies of scope, which are defined in the glossary of the EC DG Comp (www.europa.eu.int) in the following manner:

> *Economies of scope occur when firms achieve cost savings by increasing the variety of goods and services that they produce (joint production). Such effects arise when it is possible to share components and to use the same facilities and personnel to produce several products. For example, a bank may sell retail insurance products in its local branches in order to spread the fixed costs (like the office rent) over a larger number of products.*

[10] See, e.g., R.OVERY, *Why the Allies Won*, W.W. Norton, 1997, in which the author argues that the Allied superior production capacities made Allied victory in the long run almost certain.

1.2.3. Specialisation and interdependence

From a social perspective, specialization also means interdependence. When each actor focuses on one narrowly defined task, there is a need for a common "language" to ease the interactions. Moreover, as one does not necessarily produce the tools one uses and the products one consumes, there is a need for communicating quickly about the characteristics of the products. Standards can play this role exactly by allowing two actors interested in the same product to communicate efficiently.

Modern productive techniques have reinforced both specialization and interdependence, and thus social interaction. As Heilbroner and Milberg[11] point out, there is a striking paradox when one compares modern industrialized societies with ancient or developing ones:

> *For it is a curious fact that as we leave the most primitive peoples of the world, we find the economic insecurity of the individual many times multiplied. The solitary Eskimo, Bushman, Indonesian, or Nigerian peasant, left to his or her own devices, will survive a considerable time. […] Communities numbering only a few hundred can live indefinitely. Indeed, a considerable percentage of the human race today lives in precisely such fashion – in small, virtually self-contained peasant communities that provide for their own survival with a minimum of contact with the outside world. This large portion of mankind may suffer great poverty, but it also knows a certain economic independence. If it did not, it would have been wiped out centuries ago.*
>
> *When we turn to the New Yorker or the Chicagoan, on the other hand, we are struck by exactly the opposite condition, by a prevailing ease of material life coupled with an extreme dependence on others. […]*
>
> *The overwhelming majority of Americans have never grown food, caught game, raised meat, ground grain into flour, or even fashioned flour into bread. Faced with the challenge of clothing themselves or building their own homes, they would be hopelessly untrained and unprepared. Even to make minor repairs in the machines that surround them, they must call on other members of the community whose business it is to fix cars or repair plumbing, for example. Paradoxically, perhaps, the richer the nation, the more apparent is this inability of its average inhabitant to survive unaided and alone.*
>
> *There is, of course an answer to the paradox. We survive in rich nations because the tasks we cannot do ourselves are done for us by an army of others on whom we can all call for help […]. This enormous* division of labor *enhances our capacity a thousand fold, for it enables us to benefit from other people's skills as well as our own. […]*
>
> *Thus, along with the abundance of material existence as we know it goes a hidden vulnerability: our abundance is assured only insofar as the organized cooperation of huge armies of people is to be counted upon.*

[11] R.HEILBRONER/W.MILBERG, *The Making of Economic Society*, 10th ed., Prentice Hall, p. 17, 1998.

> *Indeed, our continuing existence as a rich nation hinges on the tacit precondition that the mechanism of social organization will continue to function effectively. We are rich, not as individuals, but as members of a rich society, and our easy assumption of material sufficiency is actually only as reliable as the bonds that forge us into a social whole.*[12]

1.3. Definitions and typology of standards

This section begins with a presentation of the TBT definition of standards. Although many other definitions exist, the TBT definition has the advantage of being accepted by all members of the WTO; thus it will be used as the basis of the definition of different concepts used in this study[13] (Subsection 1.3.1). Subsection 1.3.2. then presents an overview of the various categories of standards.

1.3.1. A general definition of "standards"

Paradoxically, although standards are almost pervasive, there is no single, generally accepted definition of the term "standard" itself.[14] As the Research National Council put it, "there is no single simple definition of *standard* that captures the broad range of meanings and uses of the term."[15] However, the lowest common denominator of the term seems to be that product standards are used to specify the characteristics of a product.[16]

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[12] According to C.SHAPIRO/H.R.VARIAN, *Information Rules. A Strategic Guide to the Network Economy*, Harvard Business School Press, 1999, although less reliant on economies of scale, even the New Economy cannot do without standards. The main reason for this probably lies in the fact that increased interdependence requires interoperability between systems; for example, interoperability has long been of crucial importance in the computer industry, and it cannot exist without clearly defined standards. However, standardization is often a costly and complex endeavour. This might explain why standardization has sometimes lagged many years behind technological developments. In such cases, standards are adopted in the market as each enterprise (or group thereof) strives to impose its own standards. Thus, the rapidly evolving technologies of the New Economy have called for new strategies in the setting of standards. As will be shown in the next chapter, interoperability is only one of the benefits that standards can bring.

[13] The definition of standard used in the WTO Agreement on the application of Sanitary and Phytosanitary measures ("SPS") will be presented later in Chapter 6 WTO law.

[14] Although the words "norm" and "normalization" are sometimes used as a substitute for "standard" and "standardization," it is not entirely clear whether these terms are perfect substitutes. For example, the *New Shorter Oxford English Dictionary*, Oxford University Press, 4th ed., 1993 does not give "norm" and "normalization" the same definitions as "standard" and "standardization" and indicates the former are Anglicized from the French. Indeed, while Annex 1 to the TBT uses the word "standard" in the definition of standards *stricto sensu* in English, it uses the word "norme" in its French version. However, in its English text, the TBT never uses the terms "norm" or "normalization."

[15] NATIONAL RESEARCH COUNCIL, *Standards, Conformity Assessment, and Trade into the 21st Century*, National Academy Press, 1995.

[16] Other definitions than the ones given by the TBT include for example, the ISO and EU's CEN ("Comité Européen de Normalisation" or "European Committee for Standardization") definition:

> *Document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. [Original emphasis] [ISO/IEC Guide 2 (6th ed., 1991)]*

The 1978 US National Standards Policy Advisory Committee provides this alternate definition:

The TBT offers this more detailed definition of "standards" in its Annex 1 (§ 2):

> *Document approved by a recognised body that provides for common and repeated use, rules guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*

Standards have to be distinguished from technical regulations, which are defined as follows (§ 1 TBT):

> *Document which lays down products characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*[17]

> *A prescribed set of rules, conditions, or requirements concerning definitions of terms, classification of components; specification of materials, performance or operations; delineation of procedures; or measurement of quantity and quality in describing materials, products, systems, services or practices.*

Standardization in turn has been defined by CEN as:

> *The activity of establishing, with regard to actual or potential problems, normative documents for common and repeated use, aimed at the achievement of the optimum degree of order in a given context.*

[17] The WTO Appellate Body clarified the meaning of this definition in the *Asbestos* case (WT/DS135/AB/R, § 67-70):

> *67. The heart of the definition of a "technical regulation" is that a "document" must "lay down"—that is, set forth, stipulate or provide—"product **characteristics**." The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features.", "qualities," "attributes." or other "distinguishing mark" of a product. Such "characteristics" might relate, inter alia, to a product's composition, size, shape, color, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the TBT Agreement itself gives certain examples of "product characteristics"—"terminology, symbols, packaging, marking or labelling requirements." These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics," such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the TBT Agreement, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics." Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal **exclusively** with terminology, symbols, packaging, marking or labelling requirements." (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a technical "regulation" may be confined to laying down only one or a few "product characteristics."*
>
> *68. The definition of a " technical regulation" in Annex 1.1 of the TBT Agreement also states that "**compliance** with the 'product characteristics'" laid down in the "document" must be "**mandatory**." A "technical regulation" must, in other words, regulate the 'characteristics' of products in a binding or compulsory fashion. It follows that, with respect to products, a*

The main difference between "technical regulations" and "standards" is that a producer or an importer must comply as a matter of law with technical regulations, while compliance with standards is not legally mandatory to access a market. The general understanding of the term "mandatory" seems to be that the non-respect of a technical regulation can be sanctioned by law. In other words, compliance with technical regulations is a *de jure* condition for the entry of a product in a particular market, while standards on the other hand are "enforced" through market compliance (*de facto* compliance.) Thus, such standards are sometimes referred to as voluntary standards. Non standard-compliant products enjoy market access, but they might be at a significant disadvantage vis-à-vis standardized products. This can be the case when market actors require a producer to comply with a defined standard before entering into a commercial relationship.[18]

Certification is a concept close to standards that is generally considered to be a natural consequence of standardization. Once a standard is established, it is often necessary to ensure that production complies with it. Certification (or in TBT parlance, conformity assessment procedures) is defined by the TBT as follows (§ 3):

> *Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.*
>
> *[Explanatory note]*
> *Conformity assessment procedures include,* inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.*

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*"technical regulation" has the effect of **prescribing** or **imposing** one or more "characteristics" —"features,." "qualities," "attributes,", or other "distinguishing mark."*

*69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products **must possess** certain "characteristics." or the document may require, negatively, that products **must not possess** certain "characteristics." In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.*

*70. A "technical regulation" must, of course, be applicable to an **identifiable** product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the TBT Agreement, for Members to notify other Members, through the WTO Secretariat, "of **the products to be covered** by a proposed 'technical regulation.'" (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "**given'** products which are actually **named**, identified or **specified** in the regulation." (emphasis added) Although the TBT Agreement clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise **expressly** identified in a "technical regulation." Moreover, there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does **not** expressly identify products by name, but simply makes them identifiable—for instance, through the "characteristic" that is the subject of regulation.* [emphasis added]

[18] For example, compliance with the ISO 9000 series of management standards is usually not mandated by law, but in practice it might be almost impossible for a producer to enter into a business relationship without complying with such a standard.

As with standards, certification procedures might be used anticompetitively. To gain a complete view of competitive issues arising out of standardization, it will therefore be necessary to analyze the approach of antitrust authorities not only towards standards, but towards certification.

1.3.2. Typology of standards

1.3.2.1. Enforcement and elaboration of standards

Standards can be classified according to various criteria.[19] The TBT draws a distinction between technical regulations and voluntary standards according to the nature of their enforcement. Voluntary standards are often further distinguished according to the refinement process by which they are elaborated on, with those being refined within an SSO sometimes being referred to as **institutional standards**. These institutional standards differ from *de facto* standards in that they are the result of a coordinated process in which they are approved by a "recognized body" rather than simply being imposed by one or more market actors. A recognized national or regional trade association might typically provide the forum for the refinement of such standards with the refinement process being conducted through a broad consensus-seeking consultation in which the standards' promoters usually try to persuade a large share of competing firms to approve them.

On the other hand**, *de facto* standards** become standards not because a recognized body has approved them, but because they are regarded by market actors as a necessary feature of a product. *De facto* standards are usually brought to the market unilaterally or collectively through enterprises.[20] There comes a point where such standards are widely recognized as an important feature of the product[21] so that producers start incorporating them in their products and consumers start requesting product compliance.[22] Network externalities[23] might help in imposing a *de facto* standard on the market. As Saloner puts it:

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[19] For a detailed description of each category of standards, see H.DE VRIES, *Standards for the Nation: Analysis of National Standards Organizations*, Kluwer, 1999.

[20] Other mechanisms might also help render private standards necessary for accessing or competing in a market. Beyond the cases where private standards are incorporated into law (becoming technical regulations), compliance might be induced by other, not necessarily governmental mechanisms. As described in A.O.SYKES, *Products Standards for Internationally Integrated Product Markets*, Brookings Institution, p. 15:

> *Compliance with standards may also be encouraged by insurers and insurance underwriters. The French building tile standards are [...] illustrative here, as French insurers evidently refused to insure against any hazards materializing to or from any tiles that did not meet the national thickness standard. In the United States, theft policies with burglary coverage routinely rely on the standards to determine the adequacy of the insured's alarm system.*
>
> *[...] noncompliance with standards may have adverse legal consequences in the event of product-related accidents. In the United States, a product alleged to be defective in design may well be judged against industry standards, and civil liability can then turn on compliance or noncompliance.*

[21] See, e.g., the Underwriters Laboratory (UL) seal of approval in the US or the "CE" markings in the EU.

[22] As explained in P.SWANN, *The Economics of Standardization*, Manchester Business School, report for Standards and Technical Regulations Directorate, Department of Trade and Industry, 2000:

> *Typically,* de facto *standards emerge as more and more agents adopt a focal alternative. The bandwagon process builds on its own momentum as the set of adopters of the standard grows making it even more attractive for others.*[24]

This distinction is particularly important in the context of an antitrust analysis as institutional standards are often the product of an agreement between enterprises, whereas *de facto* standards usually do not give rise to such agreements, which are rather considered to be the product of unilateral behavior (or possibly the result of uncoordinated collective behavior.)

Furthermore, a standard's elaboration process must be distinguished from its enforcement; mandatory standards are not necessarily only those elaborated on and refined by governments, and *de facto* standards are not necessarily the product of the behavior of private parties. Indeed, the relationship between the enforcement and elaboration criteria is not as straightforward as it might seem, as governments may establish both technical regulations and public recommendations which are not legally compulsory (public voluntary standards). On the other hand, standards promulgated by private parties are generally voluntary standards, although they might become technical regulations if legislation makes them legally compulsory.

Note that at times, it might be difficult to determine whether a standard has been produced through private or public means. Some private SSOs are at least partly publicly funded. In addition, many public authorities consult private parties before imposing a technical regulation, and many experts serve both on private and public boards. The TBT has bypassed this difficulty by dividing technical barriers into legally enforced (technical regulations) and non-legally enforced standards (standards.)

Accordingly, the following categories of standards have to be distinguished according to the nature of their enforcement and their promulgation process:

> *[*De facto*] standards are not defined by committee, but rather are proprietary designs that win a position of market dominance - and hence earn the title of de facto (or informal) standards. Indeed when a compatibility standard is a proprietary design rather than a public document, then the owner of the proprietary design can develop undue and undesirable monopoly power. For that reason, it is generally preferable if standards are public and open rather than proprietary, even though it cannot be denied that some huge industries have grown on the back of proprietary standards (such as MS-DOS® and Windows®.)*

[23] Positive network externalities have been defined as "a change in the benefit, or surplus, that an agent derives from a good when the number of other agents consuming the same kind of good changes." S.J.LIEBOWITZ/S.E.MARGOLIS, "Network Externalities", in: *New Palgrave's Dictionary of Economics and the Law*, MacMillan, 1998. For a discussion of these terms, see Chapter 2, Subsection 2.1.2. Efficiency and competition litt.d) Network externalities.

[24] G.SALONER, "Economic Issues in Computer Interface Standardization: The Case of UNIX", in: *Economics of Innovation and New Technology*, 1/2, pp. 135-156, 1990.

Table 1 Standards Typology

Elaboration \ Enforcement		By Law	By the Market
By private parties	Uncoordinated process	Technical regulations[25]	*De facto* standards*
	Institutional process		Institutional standards or standards *stricto sensu**
By government bodies			Public recommendations*[26]

* (voluntary) standards

Voluntary standards depend on market acceptance for their implementation, as their source of authority lies in the acceptance of their characteristics by the marketplace. "Enforcement" of voluntary standards can occur through different devices. The main way of establishing a private standard is by securing its acceptance by a sufficient share of market actors. As voluntary standards are not made compulsory by law, the respect given them usually stems from the fact that producers perceive an advantage in complying with the standard or that consumers perceive the product's compliance with the standard as an advantage.

In the case of compatibility standards, an obvious advantage is the product's compatibility with other similar or complementary products. Such compatibility might help increase the network of products or services with which one might interact (network externalities). For example, when a telephone complies with the standard used by the existing telecommunication network, the user can communicate with all other users. In the case of quality standards, consumers can rely on the fact that the product embodies certain characteristics important to them, as consumers generally tend to value standards as a guarantee of the quality and/or compatibility of a product.

The adoption of a standard is not necessarily the result of its being imposed by consumers or producers only, as other market actors can provide very effective enforcement mechanisms. For example, insurers might refuse to reimburse damages if a certain security standard has not been followed. Tribunals might also render the use of a certain standard very convenient by refusing or diminishing the award of damages when a certain standard has not been followed. Government procurement procedures also often include references to standards.[27]

[25] According to the TBT of the WTO, standards enforced by law are technical regulations irrespective of their promulgation process.

[26] There may be situations where a public authority proposes a standard which has been refined without the help of private parties, but refuses to give it legal force. This may be the case when the authority merely sets a standard as a goal to be attained, but not as a necessary requirement to enter a market. The enforcement of these standards thus depends on market acceptance, as is the case for other voluntary standards. Such standards are sometimes referred to as "public recommendations" or "public (governmental) voluntary standards."

[27] In the two last cases, one might wonder whether the standards have not in fact been made compulsory by law and therefore have become technical regulations. As the Appellate Body indicated in the *Asbestos* case (WT7DS135/AB/R, § 69, quoted above at footnote 17): "A 'technical regulation' must, in other words, regulate the 'characteristics' of products in a binding or compulsory fashion."

1.3.2.2 Compatibility and quality standards

It is customary to distinguish between compatibility and quality standards[28] given that these two types of standards have a different impacts on the market, as will be discussed in Chapter 2. Compatibility standards specifiy the characterics necessary for the interoperability of different products. On the other hand, quality standards simply determine the characteristics which a product should have in order to belong to a certain category of products. As the 2005 World Trade Report[29] makes clear:

> *"[p]roduct standards specify the characteristics of a product. By nature product standards therefore play a role in markets of differentiated products, i.e. products that appear in different varieties. Economists distinguish between two types of product differentiation: "vertical" product differentiation and "horizontal" product differentiation. In the case of vertical differentiation, different varieties can be ordered according to a certain scale. One variety is better than another, larger than another, safer than another, etc. Examples of such varieties are chocolates with higher or lower contents of cacao butter, or cars that use more or less petrol per kilometre. The differentiation is based on content of cacao butter in the first case and petrol use in the second case. This differentiation always appears in varying degrees among the different product varieties. One feature of vertical differentiation is that it often leads to price differences among varieties. Consumers will, for instance, agree that a computer with a memory of 512 MB is better than one with a memory of 256 MB and they will be willing to pay a higher price for the first one. This does not imply, however, that all consumers will buy the computer with the higher memory, as this decision depends, among others, on consumers' disposable income.*
>
> *In the case of horizontally differentiated products, the characteristic that is responsible for the differentiation cannot be ranked. Colour is an example of such a characteristic, or flavour. A red t-shirt is different from a blue t-shirt, but the two varieties cannot really be ranked according to an objective scale. The same for strawberry ice-cream and vanilla ice-cream. Horizontal differentiation is not necessarily associated with price differences among varieties. In the real world many products are differentiated along both lines. Cars for instance appear in different colours and differ in their use of petrol.*
>
> *The concept of a "minimum standard" only makes sense in the context of vertically differentiated goods. It implies that only products reaching a certain level of "quality or attainment" or higher are considered to meet the relevant standard. The introduction of a minimum standard therefore does*

[28] See, P.A.DAVID, 'Some New Standards for the Economics of Standardization in the Information Age', in: P.DASGUPTA/P.STONEMAN (EDS.), *Economic Policy and Technological Performance*, Cambridge University Press, 1987, F.NICOLAS/J.REPUSSARD, *Common Standards for Enterprises,* Luxembourg: Office for Official Publications of the EC. (1988), A.O.SYKES, *Products Standards for Internationally Integrated Product Markets*, quoted above at footnote 20, p. 31, P.SWANN, *The Economics of Standardization*, Manchester Business School, report for Standards and technical Regulations Directorate, Department of Trade and Industry, 2000.

[29] WTO SECRETARIAT, *World Trade Report 2005, Exploring the links between trade, standards and the WTO,* 2005.

not necessarily reduce the number of product varieties in the market to just one (the minimum standard), as products exceeding the standard are also allowed to circulate in the market."

1.3.2.3. Product and process standards

Standards are not limited to products, as they might also specify the characteristics of the production process. In such cases, they are referred to as "process" or "production standards." The 2005 WTO Report distinguishes between three types of process standards.[30] Process standards affect:

> *(a) the goods that are produced (e.g., hygiene standards);*
>
> *(b) the efficiency of the production process (e.g. in the case of network externalities);*
>
> *(c) the environment (e.g. pollution standards.)*
>
> *It is only in the first case that process standards may be reflected in the final good and thus have a direct impact on trade. WTO terminology would refer to such standards as "incorporated processes and production methods (PPMs)" and their relevance for trade policy is relatively straightforward. The relevance of unincorporated PPMs for trade policy is less straightforward as they do not directly affect anything that is traded. Yet at the same time, consumers or governments in an importing country may care about the way in which an imported good is produced—for instance, because they care about the environmental impact of the production process.*

1.4. Scope of the study

The multiple issues arising out of private standardization cover a wide variety of situations. For example, an SSO might refuse to grant access to a standard to a market actor, or a dominant firm might impose a standard which *de facto* excludes competitors from a market. Moreover, as technical standards often include technologies protected by a patent, the conditions for the use of such a technology by third parties must not be any more anticompetitive than necessary. Such cases might be analyzed under competition rules through the control of agreements between enterprises or the control of unilateral conduct of trade associations or leading market actors. Such competition law concepts as refusal to deal, raising rivals' costs, and essential facility play a central role in the comprehension of anticompetitive effects of standardization. Consequently, the study of competition law issues related to standardization requires the knowledge of a very broad range of competition law concepts (with the notable exception of merger control tools, which play almost no role in this context.)

[30] Id. at pp. 34-35.

The current study aims at presenting the approaches followed by US, EU and Swiss antitrust authorities towards private standardization issues. Although the main focus of the study will thus be on competition law, it must be stressed that as a matter of public international law at least, national competition authorities have to comply with WTO law dealing with standardization issues. In particular, under the TBT, WTO members have contracted a specific framework (the Code of Good Practice) for the disciplining of SSOs.

Moreover, the present study presents the reach of each antitrust system. In today's globalized markets, it is critical to understand which competition system might assert jurisdiction over a particular issue. The tendency of each of these three competition systems to become applicable extraterritorially often takes place through a variation of the so-called "effects doctrine." A detailed analysis of this doctrine is necessary given that the influence of standards on competitive conditions may extend beyond national boundaries.

Accordingly, the structure of the study will be as follows: Chapter 2 will offer a brief overview of the economic theory on standardization, thus providing the necessary conceptual tools for the analysis. Chapters 3 through 5 constitute the core of this study in presenting in detail the US, EU, and Swiss approaches towards standardization. Chapter 6 will present an overview of the current discussion at the WTO level, while Chapter 7 reflects our conclusions.

True to the theme of the present study, the three chapters analyzing the approach adopted by US, EU, and Swiss antitrust authorities towards standardization have been, well, standardized, in that they follow a similar structure. All three chapters begin with a very brief presentation of the historical development of national/regional antitrust statutes (Section 1), which is then followed by an overview of the delimitation of scope of these statutes (Section 2). The study of each antitrust system's exemptions to the reach of antitrust laws is of particular interest for a comparative approach such as the one followed in the present study. Indeed, although one might notice a great degree of convergence in relation to material concepts, exemptions have been left untouched by the pressures of convergence, as they differ from one jurisdiction to another. Arguably, this might be explained by the fact that exemptions often reflect industry-specific lobbying and are rarely grounded on sound, long-term economic arguments.

The third section will offer a general presentation of the main substantial national/regional antitrust concepts used in the standardization disputes. The subsequent section (Section 4) is dedicated to the analysis of the case law on standardization issues. Thus, the analysis of the substantial legal provisions is divided into two parts. This division is necessary because the case law on standardization is not a self-contained regime, but rather reflects the application of general antitrust concepts to the specific context of standardization. Moreover, the antitrust case law on standardization issues often does not encompass all the types of anticompetitive behavior in which enterprises might engage in the context of standardization. It is thus necessary to refer to a general presentation of antitrust concepts, including situations which have not yet been decided in the case law dealing with standardization issues.

With the adage of Judge Basdevant in mind,[31] whereby legal systems are to be judged by their system of remedies, the fifth section of each chapter is dedicated to the remedies available in an antitrust dispute. The last section offers a quick introduction to the procedures and the

[31] As quoted by S.BASDEVANT, "La clause de la nation la plus favorisée", in: A.G.DE LAPRADELLE/J.P.NIBOYET, *Répertoire de droit international*, Sirey, 1929.

enforcement agencies of each antitrust system. Finally, Section 7 briefly summarizes each chapter.

Chapter 2 Economics of standards

The present chapter is divided into three sections. The first purports to present the basics of economic theory on private standardization issues. Such a summary is necessary to understand the *ratio legis* of the antitrust bodies' intervention in this area. The main focus will be on the impact of standardization on competition and social welfare, although trade aspects will also be briefly sketched out.

The second section provides a summary of the main competition law issues arising out of standardization. Such a summary will be useful for the analysis of the case law of competition authorities provided in the next chapters.

The third section brings a very short summary on the question whether standards should be private, public, or a mix of both. The point of focus here will be on who among private and public bodies are best equipped to promote social welfare.

Yet before reviewing the economic theory on standardization, it is necessary to offer at least two caveats:

(a) Economists themselves admit it is often hard to determine precisely (in particular *ex ante*) whether a standard has a positive or a negative effect on a market.[32] In particular, it might be difficult to reconstruct a counterfactual model of the conditions in which the market would be without the standard. It should also be stressed that as standardization generally influences many aspects of a product (and in turn, has an impact on many variables of the market), its aggregated effects on competitive relations might be hard to predict. In particular, it might not always be obvious (especially in rapidly evolving technological markets) whether a specific standard might grant market power to a firm. One might hesitate over which standards better answer certain technical needs, or *a fortiori*, the expectations of consumers.[33] Furthermore, standardization often entails a good deal of expert knowledge on technical issues on which typically experts might disagree. This is all the more so when standardization concerns novel technology or new products.

(b) The analysis provided in this study is of a limited nature. On the one hand, empirical studies of market and trade effects of standardization issues are increasing,[34] but most studies do not distinguish between the type of standards being studied or the market in which they are

[32] For a summary of economic theory in relation to standardization issues (albeit with a focus on trade issues), see WTO SECRETARIAT, *World Trade Report 2005, Exploring the Links Between Trade, Standards and the WTO,* 2005. The current chapter draws heavily on this report.

[33] Economists refer to the absence of revealed preferences.

[34] For a summary of the literature, see P.SWANN, *The Economics of Standardization*, Report for Standards and Technical Regulations Directorate, Department of Trade and Industry, Manchester Business School, 2000. For one of the most recent economic analyses of standardization, see P.TEMPLE/R.WITT/C.SPENCER/K.BLIND, A.JUNGMITTAG/P.SWANN, *The Empirical Economics of Standards*. DTI Economics Paper No. 12, June 2005. For further studies, see, e.g., DEUSTCHES INSTITUT FÜR NORMUNG (DIN), *Economic Benefits of Standardization*, Berlin, 2000, P.SWANN/P.TEMPLE/M.SHURMER, "Standards and Trade Performance: the UK Experience", in: *Economic Journal,* 106:1297-1313, J.WILSON/T.OSTUKI, "Standard and Technical Regulations and Firms in Developing Countries: New Evidence from a World Bank Technical Barriers to Trade Survey", The World Bank, 2004, and K.BLIND, *The Economics of Standards: Theory, Evidence, Policy*, Edward Elgar Publishing, 2004.

present.[35] Given that as previously mentioned, the impact of a standard is generally difficult to assess, studies in this area often rely on the number of standards in order to value their impact on the market. However, this quantitative criterion might be only an imperfect proxy for evaluating the general impact of standards on a market as there is no linear relationship between the number of standards and the level of trade or hindrance to competition. Some standards are easy to comply with and do not distort trade, while others do. On the other hand, the analysis provided hereunder purports only to present the (very) basic economics of standards necessary for understanding the antitrust case law on standardization.

2.1. Why are standards set?

2.1.1. Ambivalent nature of standards

Traditionally, intent has played an important role in the assessment of the legality of a given behavior. However, the subjective intent behind the setting of a standard may be hard to establish, notably because standards are often adopted by associations and groups of enterprises. The "intent" of a group of enterprises may be plural, and individual declarations may not always be easily attributable to the association or the enterprise as such. Independently of the intent followed by standard setters, economists have developed a body of theoretical and empirical reasons justifying the use of standards. Briefly stated, economists tend to take a positive stance on standardization as it allows the overcoming of various market issues, favors a decrease of production and transaction costs, and tends to promote trade. However, standardization is not always a recipe for success (or enhanced welfare), as in certain circumstances, standardization may have a negative impact on a market.

In short, on the positive side standards can help resolve market failures and the asymmetry of information issues. Moreover, the increased substitutability of products often entailed by standardization may even allow the remedying of issues linked with the concentration of power. Standards might thus have welfare-enhancing results. However, on the negative side, standards may reduce diversity or be captured by dominant firms. The present section provides an overview of these potential positive and negative effects.

It is important to understand the effects of standards may be analyzed under at least three different perspectives. A standard might have an influence on **trade**, on **competition** between enterprises, and on **social welfare**. However, as the 2005 WTO Report[36] makes clear, an increase in trade does not necessarily entail an increase in social welfare, and conversely, a decrease in trade does not necessarily imply a decrease in social welfare. Similarly, an increase in competition among competitors does not necessarily imply an increase in social welfare, as a non-competitive market might (albeit inefficiently, as other measures are usually preferable) promote social values that, given a market failure, competition does not promote

[35] In A.O.SYKES, *Products Standards for Internationally Integrated Product Markets*, quoted above at fn 20, the author underscored the lack of systematic research in this field in 1995:

> *One inescapable conclusion is that the trading community needs more information about technical barriers. Their importance, sector by sector, is generally unknown, as is their impact on economic welfare.*

The 2005 WTO Report reaches a similar conclusion (pp. 57 and ff.).

[36] Cited above, fn 32.

(or does so only imperfectly). If the benefits of the newly defended social values outweigh the social loss due to diminished competition, some might be tempted to benefit from using a less competitive market structure to promote certain social values.[37]

Therefore, positive effects of a standard have to be understood in a certain perspective (trade, competition, or social welfare), while such perspective may, under specific circumstances, bring results which conflict with another perspective's results. However, it remains clear that as a rule, competitive market conditions and international exchanges tend to bring a higher level of social welfare than non-competitive market conditions and protectionism.

2.1.2. Efficiency and competition

The main advantages that derive from the homogeneity of standards can broadly be divided into the following categories:[38]

a) Economies of scale

The first advantage standards might bring is that standardized products can be produced according to the same processes, leading to substantial cost reductions. Economists speak of these as economies of scale, which occur when product characteristics are identical (or at least sufficiently similar) to allow repetition of the processes and infrastructure. For example, such economies can be found when the work force specializes in certain tasks (learning-by-doing efficiency gains) or when the fixed costs can be shared among different products or processes.[39/40]

b) Lowering of transaction costs

A standard is a communication shortcut for a set of characteristics. As characteristics do not need to be spelled out or controlled in detail every time one uses a standardized product or process, a substantial amount of time can be saved. For example, when building a house, it is usually much faster and less burdensome to rely on construction standards than to describe in detail every feature which needs to be met by each material.[41] Hence, in industries where products are largely nonstandardized, there might be a strong incentive for producers to lower the costs of communication by setting standards which offer to business partners coherent, reliable information on the characteristics of complex products. This was the case in the computer industry where a myriad of noncompatible standards required a consumer to invest an extensive amount of time to assemble a computer or to find a compatible peripheral.[42] In

[37] Again, such a society would probably be better off letting competition follow its course and promoting its social values with another policy instrument such as subsidies, taxes, or regulation.

[38] Of course, these categories are conceptually not totally unrelated, so a standard might carry more than one of these advantages. Yet these categories allow us to better distinguish the reasons behind the advantages having standards brings.

[39] For an analysis of the impact of standards on productivity in manufacturing, see P.TEMPLE/R.WITT, C.SPENCER/K.BLIND/A.JUNGMITTAG/P.SWANN, *The Empirical Economics of Standards*. DTI Economics Paper No. 12, p. 61, 2005.

[40] Economists call such cost reductions "economies of scope."

[41] This is particularly the case for measurement standards, G.TASSEY, "The Role of Government in Supporting Measurement Standards for High-Technology Industries", in: *Research Policy*, 11, pp. 311-320, 1982.

[42] See M.HERGERT, "Technical Standards and Competition in the Microcomputer Industry", in: H.LANDIS GABEL, *Product Standardization and Competitive Strategy*, Elsevier Science Publishers B.V., 1987. Note

economic parlance, the use of a standard reduces transaction costs.[43] A potential downside is that the standard may not necessarily be self-explanatory or easy to pick up, or its adoption may entail adaptation costs to integrate its new characteristics. In such cases, the adoption of the standard is subject to a trade-off between the benefits and the costs of standardization.

Identical characteristics of products also bring higher product substitutability. When two products are seen by consumers as being substitutable, the prime factor determining their choice becomes price, thus simplifying the comparison between product characteristics and enhancing competition. However, this might also have a downside, as simplified product characteristics might lead to easier cartel policing. In such cases, the risks for competition have to be weighed against the benefits to competition and the increase in social welfare brought by the standard.

c) Remedy against asymmetry of information issues

A further positive aspect of standards is that as communication shortcuts, they can help overcome the asymmetry of information issues that arise when a party to an agreement possesses information on the quality of a product to which the other party has no access: for example, when a seller of a product holds information on its quality[44] that the consumer does not possess.

As Shapiro[45] and Viscusi[46] point out, incentives exist to bring quality to the market. Given that consumers frequently are not indifferent towards product quality, producers tend to address these consumer needs. However, because quality generally entails costs, producers do not provide unlimited levels of quality. Instead they tend to provide the consumer with an optimal level, which might be schematically defined as the equilibrium between the marginal cost of further investment in quality and the marginal revenue stemming from the higher price that consumers agree to pay.

Yet there might be some instances where only a suboptimal level of quality is provided. In particular this might be the case in asymmetry of information situations, as consumers may be unaware of the quality of a product or unable at a low cost to determine it. In such a situation, the consumer is unlikely to pay a premium for a product as he does not know whether it has the required qualities.[47] Instead the consumer might be tempted to acquire only the best priced

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however that many diverging standards are still present in the computer industry, leaving open the question of whether they reflect an optimal level of diversity. Certain computer retailers circumvent the issue of consumer transaction costs by selling complete operational systems.

[43] CH.KINDLEBERGER, "Standards as Public, Collective and Private Goods", *Kyklos*, 36, pp. 384-385, 1983, and J.HUDSON/P.JONES, "The Gains of Standardization from Reduced Search Costs", in: M.J.HOLLER/E.NISKANEN, (EDS.) *EURAS Yearbook of Standardization Volume 1*, Munich Institute of Integrated Studies, 1997.

[44] Higher quality means any characteristic that a reasonable consumer would prefer, such as higher safety, better durability, or enhanced properties.

[45] C.SHAPRIO, "Premiums for High Quality Products as Returns to Reputations", *Quarterly Journal of Economics*, pp. 659-679, 1983.

[46] W.K.VISCUSI, *Regulating Consumer Product Safety*, American Enterprise Institute, 1984, Washington DC.

[47] This is all the more so in the presence of "credence goods" (see hereunder, the quotation from the 2005 WTO Report), or goods whose quality the consumer cannot fully assess even after having consumed them (for example, medical or legal services, or the health value of certain foods). See M.DARBY/E.KARNI, "Free Competition and the Optimal Amount of Fraud", *Journal of Law and Economics*, 16:67-88 and B.J.SELDON/C.JUNG/R.J:CAVZOS, "Market Power Among Physicians in the US, 1983-1991", *The Quarterly Review of Economics and Finance*, 38(4), pp. 799-824, 1998.

product. This was first described by Akerlof[48] in an often-cited paper in which he argued that when sellers of high quality products were unable to disclose the higher quality of their products to the buyers, low quality products were likely to capture the market.[49] As an uninformed buyer tends to assume the products he intends to buy are of only average quality, he is unwilling to offer a premium price. Hence, the high quality seller is likely to give up his investment in quality because he is deprived of the possibility to recoup it.

Such situations of market failures are even likelier to arise with certain types of goods. As the 2005 WTO Report indicates, economists divide goods into three categories (p. 44):

> *These are **search goods**, **experience goods** and **credence goods**. In the case of **search goods**—for example, clothing—quality can be ascertained by consumers before purchase. In other cases, the quality may be learned after the good is bought and consumed. This is the case for instance with the quality of food or washing machines. The literature refers to these goods as experience goods. For still other goods, aspects of quality (e.g. the amount of fluoride in toothpaste or the amount of calories in a snack) are rarely learned, even after consumption. This last type of product is referred to as credence goods in the economic literature. Note that credence goods have above all been analysed in the context of services: the timeliness of a doctor's intervention, the quality of a lawyer's advice and the reliability of car repairs are typical examples of credence good characteristics.*
>
> *In the case of **credence goods**, consumers rely to a large extent on government intervention to ensure the quality of products provided in the market, reflecting both the difficulty for consumers to evaluate a product's safety or to take recourse against producers if the product turns out not to meet expectations. If the government has serious reasons to believe there is a demand for (what is perceived by consumers as) higher quality goods, it may want to introduce voluntary standards in order to increase the range of qualities provided in the market. But where deceptive practices by producers have such serious effects as to endanger the health of consumers, the government may wish to take preventive action in order to rule out such cases. In these circumstances, the government will choose mandatory standards.*
>
> *In the case of **experience goods**, producers have an incentive not to sell unsafe or unreliable products in order to avoid a consumer backlash against the firm, as described above. Government intervention could be minimal in such cases and, for instance, take the form of product liability legislation, which allows a consumer who has been injured by a defective product to claim damages from the producer through the courts. In some ways, this is a less intrusive form of public action than specifying what types of technical specifications a product must have before it can be sold in the market […].*[emphasis added]

[48] G.AKERLOF, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, in "Quarterly Journal of Economics", 84(3), pp. 488-500, 1970.

[49] Such situations have also been labelled as Gresham's Law ("bad drives out good") after the 16th century financier Sir Thomas Gresham.

However, market failures are not necessarily a certainty in an asymmetry of information context. In fact, as long as the seller is able to inform the buyer inexpensively, he will do so as he has an incentive to try to recoup his investment in the quality of his product. Once a seller has used such a device, competitors are likely to use the same technique and the equilibrium quality might be attained even without regulatory intervention. As Leland[50] showed, in such situations standardization[51] can help solve the asymmetry of information problem either by imposing the perceived optimal level of quality or by providing a label which transmits important information to the consumer.

Grossman[52] showed that warranties are also an efficient means to redress market failures, with high quality sellers typically finding it convenient to offer such a warranty as the probability of their actually being held liable is likely to be low. In contrast, low quality sellers find it hard to provide such warranties as their probability of being found liable is likely to be higher. However, Grossman explains that when such informational devices are neither inexpensive nor easily usable, market failures may occur.

Liability legislation has been put forward as a way of solving the asymmetry of information problem. However, there are cases in which product liability legislation would not result in a satisfactory outcome. For example, the impact of a product defect may be so unacceptable (such as people experiencing severe injury or death) that the survivors can never be entirely compensated for their suffering, or firms might not have the right incentives to correct product defects.[53] Finally, manufacturers who face a large number of lawsuits and claims may go into bankruptcy before payments to claimants are ever made.

Standards help resolve another asymmetry of information issue, namely the asymmetry of technological know-how between producers. Standards seem to have a positive impact on innovation because they embody a certain type of technology which can be quickly adopted by other market actors. Blind et al.[54] found that standards played an important role in the diffusion of technology as the diffusion of a standard generally entails a more widely spread use of the technology it embodies. Ultimately the study further found that one third of Germany's growth between 1960 and 1996 was attributable to the use of standards.[55]

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[50] H.E.LELAND, "Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards", in *Journal of Political Economy*, 87, pp. 1328–1346, 1979.

[51] Trademarks or labels may also allow the consumer to know who produced the product, how the product was produced, and what qualities it contains.

[52] S.GROSSMAN, *The Informational Role of Warranties and Private Disclosure about Product Quality*, in *Journal of Law and Economics*, 24, pp. 461-483, 1981.

[53] For an example in the automotive industry, R.NADER, *Unsafe at Any Speed; The Designed-In Dangers of the American Automobile*, Knightsbridge Pub. Co. Mass., 1991.

[54] K.BLIND/H.GRUPP/A.JUNGMITTAG, "The Influence of Innovation and Standardization on Macroeconomic Development: the case of Germany", in: K.JACOBS/R.WILLIAMS (EDS.), *Proceedings of the First IEEE Conference on Standardization and Innovation in Information Technology*, 1999.

[55] K.BLIND, *The Economics of Standards: Theory, Evidence, Policy*, Edward Elgar Publishing, 2004. The author notes: "researchers, developers, construction engineers and marketing experts utilize [...] standardization documents as important sources of information about the state of the art in technology."

d) Network externalities

Economists distinguish two types of network externalities. *Direct* network externalities arise when the number of participants to a network increases: the more telephone users, the more opportunities the owner of a telephone has to reach another user, thereby increasing the telephone's value. *Indirect* network externalities occur when complementary goods are made available for a given product. The latter type of externalities arises when the value of a product increases with the addition of other complementary products. For example, a car alone might be useful notwithstanding the fact that only a few roads have been built. However, its value increases with the creation of more roads as further and more destinations may be reached. As standards allow the interplay of different products, they can take a decisive role in the development of such network externalities.

Economists use the phrase "positive network externalities" to describe the increase in value arising out of an increase in the network of products, which might be associated either directly or indirectly with another product. Network externalities might also lead to unsatisfactory effects. As the 2005 WTO Report notes:[56]

> *The market,* [in case of network externalities]*, may fail to deliver an efficient outcome because the marginal benefit of one more consumer joining the network differs from the social benefit. The private marginal benefit determines whether a consumer joins the network or not. The social benefit of one more user joining the communication network includes the private benefit of the new user and the increase in benefits of the old users. Since social marginal benefits exceed private marginal benefits, the equilibrium network size is smaller than the socially optimal network size, and the perfectly competitive equilibrium is not efficient […]. In the case of indirect network externalities, a consumer decision to choose a certain product does not affect the utility of other consumers at present but impacts on future variety and prices of compatible components. Again, it is in the interest of consumers to purchase the most popular product to benefit from an improvement in the supply of complementary goods. However, lack of information, different preferences and firms' marketing actions (such as promotional pricing and advertisements) may generate a non-optimal outcome […].*
>
> *In all these cases, setting a single standard solves the problem of coordination among consumers. Compatibility standards are standards that promote network effects. They can increase welfare because they increase the network of users adopting the same good or compatible ones. Moreover, compatibility standards allow each consumer to "mix and match" components from different manufacturers. Therefore, consumers may enjoy a greater variety of available systems […]. A classic real world example is that of home HiFi stereos, where all components are compatible and the consumers are free to combine components from different brands to assemble the stereo most preferred. To the extent that compatibility standards reduce the costs to consumers of switching between different interfaces and thereby promote competition.*

[56] Id. at p. 36.

However, standardization in markets with high network externalities does not necessarily lead to more competition. As compatibility between products can rarely be achieved by more than one standard,[57] the incentive to agree on a single standard is high. Thus, markets characterized by high network externalities tend to be dominated by only one standard. Trouble might therefore arise from the fact that if a firm owns proprietary rights in a technology embodied in the standard, there may be a risk that such a firm acquires a competitive advantage,[58] which might in turn grant it sufficient market power to become dominant.[59] In the presence of dominance, the risk of anticompetitive behavior naturally increases.

Moreover, as Katz and Shapiro[60] as well as Scherer[61] point out, network externalities may lead to inefficient outcomes as they may prevent consumers from adopting a superior technology (*excess inertia*), or unduly push consumers towards an inferior standard for fear of losing network externalities if they stay away from the standard (*excess momentum*).[62/63/64/65]

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[57] Compatibility between different standards may be achieved through the use of adapters or interfaces; however, such adapters are usually not costless. See, e.g., J.FARRELL/G.SALONER, "Converters, Compatibility, and the Control of Interfaces", in: *Journal of Industrial Economics*, 40(1), pp. 9-36, 1992, and B.J JONES/J.R.TURNER, "Can an Operating System Have a Duty to Aid Its Competitors?", in: *Jurimetrics*, 37(4), pp. 355-394, 1997.

[58] Note that the presence of a single standard does not necessarily mean that one or more enterprises is dominant, as competition within the standard may still be important.

[59] In a first phase, when two or more standards are competing for dominance, the market power of the firm supporting the technology is generally low. However, once the market share of a standard increases, network effects tend to induce a "tipping" of the market. In such cases positive network externalities become so important that consumers have a strong incentive to prefer the market-leading products over other products. As other products are usually incompatible with the market-leading products, fewer and fewer consumers will choose the other products.

[60] M.L.KATZ/C.SHAPIRO, "Network Externalities, Competition and Compatibility", American Economic Review 75(3), pp. 424-440, 1985.

[61] F.M.SCHERER, *Industrial Market Structure and Economic Performance*, Houghton Mifflin Company, 1980. See also J.FARRELL/G.SALONER, "Standardization, Compatibility and Innovation", in *RAND Journal of Economics*, 16(1), pp. 70-83, 1985.

[62] As the authors explain in P.TEMPLE/R.WITT/C.SPENCER/K.BLIND/A.JUNGMITTAG/P.SWANN, *The Empirical Economics of Standards*. DTI Economics Paper No. 12, 2005:

> *Too early, and a standard may effectively shut out promising and ultimately superior technologies. Too late and the costs of transition to the standard may be too high – preventing diffusion. A perceived shortening of product cycles suggest that the latter problem may be increasingly important. Indeed, standards bodies have already started to respond to the demand for a shorter time frame.*

[63] Of course, such scenarios are all the more likely when one (or more) enterprise is dominant and tries to capture costumers.

[64] Economists are divided on the question whether such "lock-in scenarios" are likely to occur. See P.A.DAVID, "Path-Dependence and Predictability in Dynamic Systems with Local Network Externalities: A Paradigm for Historical Economics", in: D.FORAY/C.FREEMAN (Eds.), *Technology and the Wealth of Nations: The Dynamics of Constructed Advantage*, Pinter Publishers, 1993, R.A.COWAN/S.HULTÉN, "Escaping Lock-In: The Case of the Electric Vehicle", *Technological Forecasting and Social Change*, 53(1), pp. 61-79, 1996. But see contra: S.J.LIEBOWITZ/S.E.MARGOLIS "Network Externality: An Uncommon Tragedy", in: *Journal of Economic Perspectives*, 8(2), pp. 133-150, 1994, and S.J.LIEBOWITZ/E.MARGOLIS, "Should Technology Choice be a Concern of Antitrust Policy?", in: *Harvard Journal of Law and Technology* 9(2), pp. 283-318, 1996.

[65] For an analysis of whether standardization—and, in particular, the multiplication of different standards—has a positive impact on the economy, see P.SWANN, *The Economics of Standardization*, Manchester Business School, Report for Standards and Technical Regulations Directorate, Department of Trade and Industry, 2000, and P.TEMPLE/R.WITT/C.SPENCER/K.BLIND/A.JUNGMITTAG/P.SWANN, *The Empirical Economics of Standards*. DTI Economics Paper No. 12, 2005.

Network externalities might also be reinforced by the fact that the cost of adaptation to a standard can only rarely be used for another technology; thus business partners tend to stick with their initial choice. The costs for adoption of a standard are in principle to be considered sunk costs, as they generally cannot be used in another market. As the costs for switching may be high, they may impede the adoption of another (superior) standard.[66]

The inertia flowing from network externalities and adaptation costs may also have an influence on the adoption of *de facto* standards. Indeed, aggressive market strategies may help in tipping the market in favor of a specific standard, which might not be the best one.[67] For example[68], this was the case in the competition for the establishment of the video recorder standard: JVC wanted to establish its VHS video standard in the market, whereas Sony supported the Betamax. Competition took place for a while, but when JVC started licensing its standard on more liberal terms (i.e., it probably "subsidized" the adoption of its standard), it rapidly took the lead, with Sony's Betamax not being able to catch up even though some considered it to be the better standard. As more and more users were choosing the VHS standard and network externalities started to rise, the Betamax standard ultimately lost the battle.[69]

In particular in the case of dominance, network externalities might also entail *excess inertia* on the supply side. As the introduction of the new standard is not costless but rather often a make-or-break endeavor, a firm that wishes to introduce a new standard but is competing with a dominant firm may hesitate to do so as the dominant firm may react by proposing its own new technology. In such cases, the competitor of the dominant firm may prefer cooperating with the dominant firm over engaging in risky competition.

e) Structural effects

Barriers to entry[70] are a major factor in determining whether competitors are likely to enter a market. When products are standardized and there are no distinctions among products of

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[66] C.VON WEIZACKER "The Costs of Substitution", *Econometrica*, 52, pp. 1085-1116, 1984, and J.FARRELL/C.SHAPIRO "Dynamic Competition with Switching Costs", in: *RAND Journal of Economics*, 19, pp. 123-137, 1988.

[67] As described in P.SWANN, *The Economics of Standardization*, Manchester Business School, Report for the Standards and Technical Regulations Directorate, Department of Trade and Industry, p. 5, 2000:

> *In some of the standards races that have taken place in network technologies (such as personal computers, audio recording media, video cassette recorder formats, and so on) the winner is not necessarily the 'best' technology from the perspective of technological performance […]. The winner is the one that has been most effective and building a wide network of followers, and of support products from third party producers (e.g. software) that conforms to his standard.*

[68] Similar situations arose as different second generation mobile phone standards or the IBM and Apple standards competed for world dominance. See J.FARRELL/G.SALONER, 'Standardization, Compatibility and Innovation', in: *RAND Journal of Economics*, 16(1), pp. 70-83, 1985.

[69] As it helps to lock a business partner into a technology, licensing strategy currently plays an important role in the adoption of a market standard and is considered central in the establishment of almost any market standard. Clearly, JVC traded off the benefits it could have earned if it kept the technology for itself (factored against the risks their standard would not prevail) for its (reduced) benefits if its technology was attractively licensed and spread over a larger basis. See also M.SHURMER/P.SWANN, "An Analysis of the Process Generating *De Facto* Standards," *Journal of Evolutionary Economics*, 5(2), pp. 119-132, 1995.

[70] Barriers to entry are presented in more detail in Chapter 3, 3.3.1.1.2. Barriers to entry, and Chapter 4, Subsection 4.3.4.2.1. Relevant market.

different firms (such as trademarks), all a newcomer needs to do to persuade a consumer to buy its products is to comply with the standard, thus arguably lowering the barriers to entry into the market. Conversely, the existence of substantial network externalities and adaptation costs might constitute a substantial barrier to entry for any product incompatible with the incumbent standard.

Moreover, ideally, standards might have an influence on the vertical integration of enterprises, as providers of components might sell their products to different firms and therefore be less dependent on the sales to be realized from a single purchaser.[71]

Furthermore, at the international level, the absence of homogeneous standards might favor price discrimination. Indeed, certain enterprises have taken advantage of differing standards in discriminating among markets.

f) Promotion of social values

Standards and technical regulations are often used for the promotion of **social values**. A technical regulation directly determines the characteristics products need to have in order to be legally marketed. It may thus be used to impose product (or process) characteristics, which may promote certain social goals such as environmental or safety objectives. However, economic theory holds that at least theoretically, regulation is not always the best way of dealing with such issues; for example, economists generally favor taxes over plain regulation.[72] Taxes often impose the internalization of social costs so that a producer agrees to produce only the socially desirable amount of certain goods.[73] However, for various reasons[74] governments sometimes prefer regulations over taxes.

Voluntary standards can also be used to promote social welfare. Such standards usually take the form of labels which convey information to consumers or promote group interests, such as in the case of fair trade ("Max Havelaar") or organic labels ("Organic"). As the qualities of a product might not always be obvious[75] at first sight, the standards help overcome the asymmetry of information issue by conveying standardized information which is easily recognized by consumers.

[71] Of course, the presence or absence of standards is not the only factor determining the level of vertical integration; however, it is a factor to be taken into account as it generally reduces the dependence of market actors.

[72] Subsidies might even have a less trade-distorting effect, but their costs often make them unattractive to governments.

[73] Such taxes are often called Pigouvian taxes by economists, in reference to A.C.PIGOU, *The Economics of Welfare*, 1920, republished by Cosimo, 2006.

[74] Administration costs and the difficulty of valuing the total costs of an environmentally unfriendly practice can be cited as examples. For a summary, see A.L.BOVENBERG/L.H.GOULDER, "Environmental Taxation and Regulation", in: A:AUERBACH/M.FELDSTEIN (EDS.), *Handbook of Public Economics*, 2001. Note also that environmental policies might differ from country to country. For example, it has been argued that developing countries might be less willing to protect the environment by imposing environmental burdens on their economy.

[75] For a summary of the effects of environmental standards on trade, see the WTO SECRETARIAT, *World Trade Report 2005, Exploring the Links Between Trade, Standards and the WTO,* pp. 50 and ff, 2005.

2.1.3. Effects on trade

a) Standards heterogeneity

In order to assess their desirability, standards need to be considered not only under an efficiency and competition perspective, but also under a trade perspective. Under the latter, most issues linked with standardization arise out of the heterogeneity of standards. As homogeneous standards between two countries rarely give rise to trade issues, they have attracted only limited attention.[76]

At the regional level, the EC took pains to eliminate regulatory hindrances arising out of standards heterogeneity when it was creating its internal market. In the 1985 White Paper[77] that purported, *inter alia*, to set out the main impediments to the completion of the internal market, technical barriers (regulations and standards) were classified as non-tariff barriers to trade. This category also included physical border checks, public procurements issues, intellectual property rights ("IPR"), state aid, fiscal barriers, and barriers to the movement of labor and capital. In another seminal study, a group of well-known economists rated technical regulations "as the most important single category of trade barriers"[78] in the EC internal market. In the 1988 "Cecchini Report"[79] which aimed at quantifying the benefits resulting from the establishment of the single market, numerous industry actors cited standards heterogeneity as a major hindrance to the free movement of goods.

In its 1985 White Paper, the Commission justified its negative position towards standard heterogeneity by arguing that heterogeneity of technical regulations:

> *Add[s] extra costs, […] distort[s] production patterns; increase[s] units costs; increase[s] stock holding costs, discourage[s] business co-operation and fundamentally frustrat[es] the creation of a common market.*[80]

When the various components of a product are standardized, the enterprise, which does not produce the product as a whole but only some of its components, is in a position to compete for the production of such components. In other words, the basis of potential suppliers of a standardized product generally seems to increase (as more producers are potentially able to enter the previously opaque, protected market). For example, if the characteristics of brake systems for cars are standardized and clearly defined, production can be outsourced to enterprises that have a competitive advantage in producing brake systems, but that do not have the capacity to or interest in producing cars as a whole. This has many implications. For instance, firms producing a complex product may let producers of components compete in the components' market. Such a competition may entail a decrease in production costs as producers may be in a position to use their comparative advantage. As comparative advantages usually differ among different countries and market actors have an incentive to exploit such differences, standardization is likely to promote international trade.

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[76] However, as briefly discussed in the previous section, homogenous standards might raise some trouble under a competition perspective (see the discussion on excess inertia and excess momentum above, Section 2.1.2. Efficiency and competition e) Structural effects).

[77] COMMISSION OF THE EC, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 final, June 14, 1985.

[78] M.EMERSON, ET AL., *The Economics of 1992*, (Oxford University Press, Oxford), p. 49, 1988.

[79] CECCHINI, PAOLO AND OTHERS, *The European Challenge 1992: The Benefits of a Single Market*, Gover, 1988.

[80] COMMISSION OF THE EC, White Paper, cited above at fn 77, § 60.

This is true unless the standard is construed so as to exclude certain foreign competitors. In cases where an enterprise obtains market power from the adoption of a standard (for instance, in the form of a costly licensing agreement), competition might be diminished and competitors might be impeded in their efforts to enter the market.

b) Overcoming heterogeneity

It is often a reality that standards differ from country to country. This is not necessarily the result of protectionism, but may rather reflect differing social preferences and levels of development. However, where national standards offer similar level of protection, global social welfare might be improved by eliminating unnecessarily trade restrictive aspects of national or international standardization. Mutual (or unilateral) recognition and harmonization are the two main ways for overcoming standards heterogeneity. As the 2005 WTO Report provides (p. 52):

> *In the case of full harmonization both the policy objective and the detailed technical provisions required to achieve the objective are commonly defined. A country can, however, simply recognize as "equivalent" the exporting country's product standard (that is, for example, the product of the exporting country provide the same level of health protection as what is achieved by the importing country's requirements). Recognition can be unilateral or mutual. Mutual recognition implies that countries simply accept each others' standards. This policy option carries the risk of a race to the bottom if countries pursue significantly different policy objectives. In practice, mutual recognition will therefore only be observed among countries with "equivalent" policy objectives. This policy option also presupposes a fair amount of trust among trading partners. If countries, instead, prefer to control the risk of variation in policy objectives among partners, they may opt for a third approach—harmonization of essential requirements. This approach implies that countries accept (mutually recognize) each others' design/specific technical details, given a commonly agreed policy objective.*[81]

Economists differ on which strategy is best suited to overcome standards heterogeneity as there are advantages and disadvantages to using either. At the **welfare level**, mutual recognition offers each nation the ability to choose its national welfare-optimizing standard and allows a certain degree of competition among standards. This competition may assist in discovering consumer preferences as different standards compete in the market. The main risk associated with mutual recognition is that each country is tempted to provide its economy with a competitive advantage by lowering its standards (and thus the compliance costs of its industries). This can lead to a "race to the bottom"[82/83] which may not be welfare enhancing.

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[81] WTO SECRETARIAT, *World Trade Report 2005, Exploring the Links Between Trade, Standards and the WTO,* 2005.

[82] Some have argued that overcoming standards heterogeneity does not necessarily imply a race to the bottom. On the contrary, it has been pointed out in D.VOGEL, Trading Up: Consumers and Environmental Regulation in a Global Economy, Harvard University Press, 1995, and *Barriers or Benefits? Regulation in Transatlantic Trade*, Brookings Institution Press, 1997, that the desire to access a market may lead a country to unnecessarily raise its standards, thus harming its welfare.

This gives strong support for the view that mutual recognition agreements require a substantial level of trust between signatories as to the similarity of the policy objectives being pursued by all countries involved.

The case for harmonization of standards seems less convincing. As the 2005 WTO Report mentions,[84] harmonization of standards is the preferred solution in only two cases. First, in case of cross-border externalities, a country generally has no incentive to internalize the policy effects taking place outside its borders. As the exporting country generally has little incentive to internalize such costs in its regulatory regime, mutual recognition is likely to be impractical; hence, a cooperative solution needs to be negotiated. However, as Sykes[85] and Pelkmans[86] point out, given the heterogeneity of production technologies, the use of a single international standard is not absolutely necessary, as differing standards can reach the same objective. Second, in situations where network externalities are important, harmonization is often required as mutual recognition may be inadequate to provide compatibility between products.

At the **trade level,** both mutual recognition and harmonization can foster trade; however, their impact is complex. *Prima facie*, harmonization brings more advantages to foreign products than mutual recognition, as the substitutability of products is usually higher in harmonization scenarios. The higher substitutability of products also has efficiency advantages[87] which might also promote trade. On the other hand, mutual recognition offers more flexibility, as it allows a producer to directly export its product without adaptation costs. Moreover, mutual recognition avoids overstandardization as well as a reduction of valuable diversity while not blocking competition (and thus innovation) between standards. As the 2005 WTO report notes[88]:

> *To the extent that demand for foreign goods is driven by love of variety, a reduced degree of differentiation of production would then reduce trade. In addition, harmonization to a specific standard may imply a higher cost of compliance for some countries. If countries lack expertise that would allow them to take full part in the setting of international standards or if they lack bargaining power, harmonization can generate asymmetric compliance costs for different countries. Gains from harmonization will not be distributed equally among participating countries. In general, the impact of harmonization on the firm of a specific country depends on how the costs of meeting the new harmonized standard compare with the benefits from economies of scale in integrated economies […].*[89]

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[83] In the EU, the race to the bottom scenario has not materialized, D.NEVEN, "Regulatory Reform and the Internal Market", in OECD, Regulatory Reform and Regulatory Market Openness, Paris, 1996.

[84] p. 52.

[85] A.O.SYKES, "Regulatory Competition or Regulatory Harmonization? A Silly Question?", *Journal of International Economic Law*, 2, pp. 257-264, 2000.

[86] J.PELKMANS, "Mutual Recognition in Goods and Services: An Economic Perspective", EUROPEAN NETWORK OF ECONOMIC POLICY RESEARCH INSTITUTES, Working Paper 16, www.enepri.org, 2003.

[87] For example, as mentioned in Subsection 2.1.2. Efficiency and competition, an increased compatibility of products intensifies competition between producers and helps avoid issues related to market segmentation and price discrimination.

[88] p. 54.

[89] The impact of regional harmonization and mutual recognition agreements on trade with third countries in particular has been analyzed in R. BALDWIN, "Regulatory Protectionism, Developing Nations and Two-Tier World Trade System, CENTRE FOR ECONOMIC POLICY RESEARCH, Discussion Paper Series 2574, 2000, and in M.X.CHEN/A.MATTOO, "Regionalism in Standards: Good or Bad for Trade", mimeo, 2004.

These remarks are valid both for public and private endeavors for overcoming standards heterogeneity. However, the role played by private actors should not be underestimated. As Sykes explains:

> *If product incompatibilities result in a significant increase in production costs and prevent firms from taking advantage of profitable opportunities to sell to consumers in other markets, an incentive to eliminate trade barriers will arise at least on the part of some market participants. Even when profits will be competed down to a competitive level in the long run, opportunities to expand sales and reduce costs yield at least transitory gains that justify the efforts to attain them.*[90/91]

In short, standards can be good or bad depending on the circumstances or perspective as they may lead to both market foreclosure and market opening. Obviously, although the latter is not an issue and will be judged favorably, the former is extremely sensitive from an antitrust perspective.

2.2. Typical antitrust issues arising out of standardization

The present section summarizes issues raised by standardization in the context of competition laws.[92] The typology brought here is not exhaustive, as anticompetitive behavior always takes forms which have not been thought of before; however, it provides a summary of the issues which have already been dealt with in the case law which may be helpful in assessing the level of sophistication of antitrust approaches between competition authorities. The following list of potential issues intends to help identify potential loopholes in the case law.

2.2.1. A typology of issues

Anticompetitive behavior in relation to standardization can be divided into the following categories:[93]

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[90] A.O.SYKES, *Products Standards for Internationally Integrated Product Markets*, quoted above at fn 20, p. 31, 1996.

[91] Pursuant to A.CASELLA, "Products Standards and International Trade. Harmonization through Private Coalitions?", in *Kyklos*, 54, pp. 243-264, 2001, a private SSO's membership may not always follow national boundaries, thus helping to overcome issues of products heterogeneity. She argues that the role of the private SSO in overcoming such hurdles has been underestimated in the previous literature.

[92] This section obviously focuses on voluntary standardization. Private standards which at a latter stage are incorporated into law are usually considered to be outside the scope of competition laws.

[93] In P.AREEDA, Antitrust Law, Little Brown and Company, at § 1503, p. 373, 1986, Harvard Law Professor Phil Areeda previously outlined the main dangers of standardization:

> *[P]roduct standardization might impair competition in several ways....[It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.*

a) Hold-up of a standard

The hold-up of a standard might be construed as encompassing all acts which impede the adoption of a standard or render its adoption unreasonably burdensome. Such instances might occur when one or more enterprises refuse to open up to the competition to be created by the introduction of a new standard and instead do their best to impede its adoption. Such a "hold-up" of a standard takes place, for example, when an enterprise owns a patent on a necessary technology ("patent hold-up") and refuses to license it under reasonable terms. An important debate exists on whether enterprises should grant compulsory licenses in such cases. In particular, there exists a strong difference between the US and EC approaches in this area, with US antitrust authorities being very reluctant to impose compulsory licensing, and instances of such impositions being construed very narrowly in the case law. On the other hand, EC competition authorities have taken a different stance on this issue, at times using the theories of "refusal to deal" and "essential facilities" to force an enterprise to grant access to a patent.

A similar situation might also arise when firms abuse their powers in a standard-setting body in order to prevent adoption of a standard. These issues have attracted less attention, partly because voluntary standards might be set up by an alternative SSO.[94] However, the prestige associated with a specific SSO, the costs of renegotiation, or an insufficient market power of the standard promoters may allow an opponent of the standard to block its adoption, at least temporarily.[95]

b) Abuse of the standard-setting process

The second set of cases,[96] possibly the most important, encompasses all kinds of anticompetitive abuses of the standardization process. In such case, the effect or intent behind

[94] A further reason might be that the link between the obstruction in the standard-setting process and the loss of competitive potential of the objecting firm might be difficult to prove, especially in the absence of any standard.

[95] A single dominant firm may also use its market power to prevent a competitor from entering a market. For example, a dominant firm may induce consumers not to switch to a competing standard by preannouncing the introduction of a new or improved product well before such product is available in reality ("vaporware"). See J F.M.FISHER./J.J.MCGOWAN,/J.E.GREENWOOD, *Folded, Spindled, and Mutilated: Economic Analysis and U.S. v. IBM*, MIT Press, 1983, FARRELL/G.SALONER, "Installed Base and Compatibility: Innovations, Product Pre-announcements, and Predation", in: *American Economic Review,* 76, pp. 940-955, 1986, and S.C.SALOP/R.C.ROMAINE, "Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft", in *Geo. Mason L. Rev*., 7(/617), 1999. As Commissioner Mary L. Azcuenaga stated in the panel discussion on "Technological Innovation, International Trade and Competition Policy" before the Japan Fair Trade Commission 50th Anniversary Symposium (available under www.ftc.gov):

> *Product preannouncement, or "vaporware" as it is called in the software industry, is still another issue that may raise monopolization concerns. The theory is that an entrenched dominant firm may be able to freeze competition from a rival that has introduced an innovative new product by preannouncing its own version of the innovative new product, which may be different or better, thereby inducing customers to withhold purchases until the product of the dominant firm reaches the market.*

[96] Note that the difference between the two first categories of issues is more one of degree than of nature as both might be seen as an "abuse" *lato sensu* of the standardization process. The first encompasses cases where the adoption of a standard is impeded, whereas the second involves the manipulation of standardization to obtain an economic advantage.

the abuse is to grant an **undue competitive advantage** to an enterprise (horizontal advantage) or to mislead consumers on the qualities of a product (vertical advantage).

Such abuses might take multiple forms;[97] for example, an enterprise might manipulate the standard-setting process in order to lead the SSO to adopt a suboptimal or competition-restrictive standard. In these cases, it might be interesting to determine whether antitrust rules have been violated. By manipulating the standard-setting process, a violator primarily violates an SSO's private procedural rules, but the question arises whether he also violates antitrust rules.

On the one hand, if the violation of the standardization process entails an agreement (for example, if competitors agree to abuse the process by consenting to anticompetitive conduct), it will be necessary under most antitrust laws to prove the agreement is anticompetitive. Further, a link must be shown between the violation of SSO rules and the accruing advantage.[98] As it obvious that the violator would not have obtained the purported anticompetitive advantage without the standardization process (and, most of the time, without the abuse of such a process), it seems reasonable that antitrust laws have been violated by means of a violation of the standard setting rules when the advantage obtained is of a competitive nature. The damage to the competitive process (or conversely, the undue advantage) is directly linked with the violator's abusive conduct.

However, if standardization does not entail an agreement (for example, in the case of a *de facto* standard originating in the behavior of a market leader or collectively dominant firms), it is necessary to determine whether the standard setting firms abuse their market position in doing so. The answer to this question might vary according to the circumstances of the case or the legal tradition of the enforcing authorities.[99] It is important to determine whether an abuse of private rules is to be considered as a case of unfair competition or as a violation of the antitrust laws.[100] If the latter is true, it will be necessary to prove the violation aims at excluding competition.[101] In this context, the hard question is whether a dominant firm's determination of its products' characteristics is to be considered as excluding competition (and thus as abusive), or as just the result of its permissible commercial activity. On the one hand, the setting of a standard inherently involves the exclusion of an incompatible competitive standard. On the other, there might be evidence the standard has been primarily

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[97] See, P.C.GRINDLEY ET AL., Standards Wars: The Use of Standard Setting as a Means of Facilitating Cartels, in *Int'l J. Comm. L & Pol'y*, 3, pp. 1-32, 1999.

[98] An agreement to violate private rules is not in itself an anticompetitive agreement as would be an agreement on prices or output.

[99] The following chapters present the antitrust case law on this issue.

[100] In accordance with the case law of the US First Circuit, the author is of the opinion that if the advantage granted is of a competitive nature, it should be construed as a violation of the antitrust laws. See *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1150 (1st Cir.1994):

> *We label as improper that conduct which harms the competitive process and not conduct which simply harms competitors.*

and *Town of Concord v. Boston Edison Co.*, 915 F2d 17, 21 (1st Cir. 1990):

> *[A] practice is not anticompetitive simply because it harms competitors. After all, all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is anticompetitive only if it harms the competitive process.*

[101] Standardization is usually not considered as exploitative except in the rare case of overstandardization.

designed to exclude competition or that a less competition-restrictive standard might have been chosen.

Furthermore, a competitive advantage may be obtained by an enterprise even in the absence of a formal procedural violation. In *Allied Tube*[102], the Second Circuit (as affirmed by the U.S. Supreme Court) established that Section 1 of the Sherman Act (governing anticompetitive agreements) might be violated, even in the absence of a violation of the private SSO's rules. However, the Court stressed that in this case, the violators had circumvented the SSO's rules, violated the integrity of its procedures, and subverted its overall process "for the sole purpose of achieving an anticompetitive result."[103] Consequently, in the US an abuse of an SSO's rules is neither sufficient[104] nor necessary for a finding of anticompetitive behavior under Section 1 of the Sherman Act.[105] The question whether an enterprise might violate the antitrust laws even in the absence of a formal procedural violation was not dealt with under Section 2 of the Sherman Act (attempt at monopolization, or in EC parlance, an abuse of a dominant position).[106]

If, as the *Allied Tube* case law seems to hold, an antitrust violation might occur even in the absence of a formal violation of the procedures of an SSO, one might wonder where the line has to be drawn. What constitutes a circumvention of the decision rules? Does the mere acquisition of a competitive advantage of an SSO violate the antitrust laws? In practice, this might turn out to be a quixotic test. Indeed, a firm almost always votes—and tries to have others vote—in favor of the standard it supports. But which practices are acceptable and which are not? The violation of a private rule standard appears to have offered a clearer and more practical legal standard.

However, it is almost always the case that a firm draws benefits from the adoption of a standard, be it because it holds a patent on an incorporated technology or has a cost or technological advantage. The adoption of a standard thus often entails a redistribution of competitive advantages among firms. Should the advantages that some firms acquire through standardization be held as an unacceptable anticompetitive advantage? If so, which ones are to be regarded as such, and on what criteria? Furthermore, it might be difficult for judges to ascertain whether a specific standard is superior to another,[107] thus making it hard for the judge to rule that the new standard is not optimal or that it is unduly trade restrictive. This is

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[102] *Allied Tube & Conduit Corp. v. Indian Head, Inc,* 486 U.S. 492, 509, 108 S. Ct. 1931 (1988). "We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability."

[103] Id. at 946-947.

[104] In the absence of an undue competitive advantage, a violation of an SSO's rules is unlikely to trigger antitrust responsibility.

[105] Note that *Allied Tube* was a Section 1 (of the Sherman Act) case.

[106] Note that in such an eventuality, a link between the abuse and the "monopoly power" (dominant position) of the violating firms should have been proved.

[107] One might wonder whether the mere fact a standard is suboptimal might constitute an antitrust violation. Such a point of view is not absolutely without basis, as such an agreement might be considered as a restraint on competition, because consumers are damaged when the quality of the standardized product is diminished. At any rate, the assessment of whether a standard is suboptimal is one a judge would be ill-suited to make in the absence of a clear-cut case of abuse. Indeed, as the judge lacks the necessary expertise, such assessment might probably only be made *ex post* once the inferiority of a standard has become sufficiently obvious. Optimally, it would enhance efficiency to strike down suboptimal standards, although one might wonder whether antitrust is the right tool to conduct such a sorting out process. However, for all practical purposes, the "abuse" benchmark still seems to be a decent proxy or substitute for suboptimality that judges have used in order to intervene in standardization cases.

so not only because standards usually draw heavily on technological expertise, but also because as standards are a compromise between differing interests, the judge is rarely in a position to evaluate whether another (potentially superior) standard could have been agreed upon. In the absence of any type of abuse, the judge might be hard-pressed to consider the adoption of a standard has brought an undue benefit.[108]

In a nutshell, standards often bring with them some competitive advantage to one or more firms. As long as an abuse of the decision-making process has not been substantiated, it seems difficult for antitrust rules to intervene. Such an abuse may take the form of a violation of the SSO's rules or "a circumvention" of the "spirit" of its rules, but the exact specification of abuse might be difficult to pin down. Moreover, it seems there must be some kind of link between the abuse and an "undue" competitive advantage. Thus, the definitions of "undue," "advantage," and "abuse" still need to be further clarified both in theory and in the case law.

Additionally, to guarantee the standardization process is not abused, antitrust authorities have required that standardization procedures be based on "non-discriminatory, open and transparent"[109] procedures, or that each participant be granted a form of "**due process**." Again, these concepts are not self-explanatory, and antitrust authorities do not seem to be willing to tackle the hard question of a standard's suboptimality. To guarantee standards are chosen on the basis of clear and fair criteria, it should be requested that the reasons that led to the choice of one standard over another be clearly set out.[110]

Interestingly enough, there seems to be little case law on the question whether adoption of a standard for which a certain group of competitors might have to support **higher adaptation costs** may constitute a violation of antitrust laws. It is also not clear whether such standards may be abusive. As mentioned, adaptation costs are likely to differ between firms, as the new characteristics the newly standardized products need to have might be more easily met by certain enterprises than by others. As mentioned, this is in particular the case when an enterprise holds a patent or is otherwise familiar with the technologies underlying a standard, but it may also be the case when a firm is simply better endowed to meet the new challenges. We are thus back to the question of which advantages should be considered abusive—and on the basis of what criteria.

At any rate, it seems that when the new standard cannot reasonably be justified and that its characteristics seem to discriminate against a specific group of firms, some form of intervention shall be mandated. For example, domestic producers may be able to easily comply with a particular standard that imposes far higher adaptation costs on foreign producers. Such standards have trade distorting effects; they may also restrict competition if they cannot easily be circumvented by the competitors who have been discriminated

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[108] In the *Allied Tube* case (fn 102) the evidence was sufficiently clear: the SSO's decision-making bodies were stuffed with people who voted en masse in the interests of the abusers. The advantage issue was also clear, as the abuse had the effect of refusing the extension of a certification to competing firms.

[109] The EC Guidelines on the applicability of Article 81 ECT to horizontal cooperation agreements, OJ 2001 C 3/02 ("Horizontal Guidelines") (§ 163).

[110] Note, however that this requirement is probably not mandated by the antitrust laws; however, one might consider whether it should not be imposed by other law, as this requirement would help guarantee that losers in the standardization process be better protected procedurally. This is reminiscent of the *Heylens* judgment in the field of free movement of workers, C-222/86, [1987] ECR I-238, where the ECJ held the decisions of authorities of Member States had to specify the grounds on which the decision was based. See in the US, *Silver v. New York Stock Exchange (NYSE)*, 373 U.S. 341, 83 S. Ct. 1246 (1963).

against.[111] In such cases, foreign competitors are put at a disadvantage, and the concept that is the result of anticompetitive, protectionist intentions of domestic standard-setters cannot be excluded.[112]

As already mentioned, standardization might bring better substitutability of products. In turn, better substitutability usually brings pro-competitive effects, although it might also serve anticompetitive goals. Indeed, in concentrated industries, standardization might facilitate collusive behavior; as the monitoring of prices is rendered much easier, customers are likely to be attracted to the cartel violator.

c) Exclusion from the standardization process or its benefits

The rules of access to an SSO might be tailor-made to restrict access of competitors. Hence, all or certain advantages of standardization might benefit only a limited number of competitors. One should probably distinguish between access to the standardization process as such, where joining firms would bear the costs and risks of the standardization process, and access to the results of standardization. On the one hand, voluntary standard-setting firms have an incentive to seek as large a support for their standard as possible as this will allow the standard to be adopted more easily. However, the more heterogeneous the interest represented in the standardization process, the more difficult it usually is to reach a compromise. On the other hand, it is debatable whether the results of standardization should be as accessible as possible, as standardization is a process which usually entails costs, particularly when it involves expert knowledge. If outside firms are allowed to "free ride" on the costs borne by other enterprises, the *ex ante* incentive to invest in standardization might be lacking. At the same time, being part of the standardization process may bring with it the potential to influence the process.

In any case, it seems there should be a certain margin of discretion when determining the necessary degree of openness an SSO should have. The EC has taken the view that access to the standardization process should be "as open as possible."[113] As what this means has not been clarified, it certainly leaves some area of interpretation to the antitrust authorities.

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[111] It must be stressed that unlike mandatory standards, voluntary standards still need to be "imposed" in the market. If a standard is not accepted by consumers (i.e., consumers do not wish to pay a premium for a higher standard or do not want to be deprived of the former product's network externalities), competitors might still propose alternative products and gain market share. Thus, unless a voluntary standard is made mandatory by private mechanisms, discriminated against competitors might still be in a position to compete.

[112] The European Court of Justice ("ECJ") has clearly ruled that when standardization or certification processes are used to impede imports between Member States, these schemes will be struck down.

[113] The EC Horizontal Guidelines provide (§ 174):

> *There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.*

The Commission also clarified (§ 163):

> *Where participation in standard setting is unrestricted and transparent, standardisation agreements […], which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition.*

d) Exchanges of information

As standards are generally cooperative endeavors, they frequently require the collaboration of different enterprises. Moreover, it is often the case that enterprises need to exchange substantial technical information in order to agree on a standard; however, to avoid anticompetitive collusion, the information exchange must be curtailed to what is necessary for the standardization process. When sensitive commercial information has to be exchanged, it might be necessary to set up third-party bodies entrusted with the task of rendering the information anonymous or of aggregating sensitive information.

e) Input restriction

Standards might help enterprises with monopsony power drive the prices down for the inputs they need. A telling example is the *National Macaroni Mfrs. v. FTC*[114] case, where US producers of macaroni managed to drive prices down by agreeing to only produce macaroni with a 50% content of premium "*durum*" wheat instead of 90% as previously. As pasta producers were dominant buyers of such type of wheat, they drove prices for *durum* wheat down. However, such situations can only occur when the producers can fully impose their standard on the downstream market. If this is not the case, fringe competitors might better answer the needs of consumers and therefore gain market shares.

f) Overstandardization

By overstandardization, economists mean the reduction of product diversity below its optimal level. Producers might reduce product diversity by agreeing on a particular standard even though consumers might find value in consuming different products, or different consumers might have different preferences. Under competitive market conditions, consumers are usually in a position to make their preferences heard by producers, as the latter strive to respond to consumer needs. However, when standard-setting producers wield a particularly significant amount of market power, they can impose on consumers a reduction of product diversity by agreeing to produce only products that comply with a specific standard. As higher standards often yield a higher margin of benefits, producers might increase their revenues at the expense of consumers by agreeing to raise the quality of their products. In such cases, diversity in the market might be inefficiently restricted, as consumers who are unable to pay a premium for these products will not be in position to buy them. However, producers must be able to avoid having lower standard products being brought into the market, or the producers of such lower-standard products may be able to gain an important market share.

g) Price discrimination

Different standards might be used by producers to segment a market and impose discriminatory prices. For example, a producer may decide to price its products differently merely because such products have to comply with different standards, although costs would not mandate such a difference. However, in such cases the anticompetitive behavior lies more in price discrimination than in the realm of different standards.

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[114] 65 F.T.C. 583 (1964), aff'd, 345 F.2d 421 (7th Cir. 1965).

2.2.2. Case by case approach towards analysis of standards

The treatment of standardization often requires a sophisticated analysis of the market effects of a standard. As the EC Commission puts it:

> *The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardization […] on the other.*[115]

Thus, in the absence of absolutely blatant abuses of the standardization process which grant a clear-cut competitive advantage to a violator, a rule of reason approach (i.e. an analysis of the market effects of a standard) is often necessary.

2.3. Voluntary or mandatory standards?

It has been briefly sketched out why the absence (or sometimes, the very use) of standards may lead to market failures, particularly when consumers lack information about the qualities of a product.[116] However, it remains to be clarified whether mandatory or voluntary standards best address such market failures. This hotly debated issue is of course central in an antitrust perspective, as usually mandatory standards cannot be reviewed under antitrust statutes.

As the 2005 WTO report explains, risk aversion might command regulatory intervention (p. 42):

> *Perhaps, the most typical example of standards that work against the undersupply of "quality" output relates to product safety. Indeed, a wide range of consumer goods—food, drugs, vehicles, electrical appliances, safety equipment—face many types of requirements, from design (e.g. toys), to ingredients (e.g. chemicals), to the process of manufacture or production (e.g. pasteurization of milk), and to performance (e.g. helmets.) Mandatory standards act in these situations like minimum standards, as they rule out the supply of products not meeting the quality (e.g. safety) level determined by the standard. Voluntary standards in combination with a label, e.g. child-safe toys, have the effect of guaranteeing the supply of higher quality products next to the supply of lower quality products. Voluntary standards thus do not rule out the supply of lower quality products, but ensure that higher qualities are not pushed out of the market. The fact that lower quality products are not banned from the market can be considered more "market-friendly", but also more "risky." Voluntary standards will therefore be preferable to mandatory standards if the risks involved are considered to be acceptable to society.*

[115] EC Horizontal Guidelines (§ 166).

[116] In cases of standards incompatibility, private agents might sometimes have a stronger incentive to provide compatibility standards. In such cases, regulatory intervention might speed up agreement on a single standard and favor network externalities by mandating a given standard. However, the risks of a suboptimal standard being imposed are high.

Mandatory standards are generally established by a government (often with the technical help of private experts), whereas voluntary standards can be drafted both by private parties and the government (public recommendations), although voluntary standards are predominantly set by private parties, with public recommendations being rather an exception.

It has already been revealed that regulation (*inter alia*, through technical regulations) might not always be the optimal way of intervening in a field, although regulators often tend to favor such a form of intervention. When intervention is mandated, the government may play different roles such as enforcing mandatory standards or promoting privately set ones.[117] Leaving the drafting of a standard to private experts may have the advantage of making use of their experience, as most of the time, governments do not possess the knowledge needed to develop standards and thus often must rely on private expertise. Although private agents might be tempted to favor their own private interests,[118] some kind of collaboration with private experts seems inevitable. However, this does not prejudge the form of intervention to be used, as the regulators may choose to render a private standard mandatory or leave compliance with it to the discretion of the market.

Yet there are both situations where mandatory standards might have advantages and those where disadvantages appear more important. As the 2005 WTO Report explained (p. 45):

> *There are a number of advantages to mandatory product standards which lead to their wide application by governments. An extensive set of safety-related standards exist for many consumer products […]. The use of technical standards can build on accumulated experience and scientific knowledge about the likely effect of a product standard on consumer safety. Second, conformity with technical standards provides an objective and easily monitored benchmark for the regulator. Third, the imposition of product standards is more likely to convey to consumers that public attention is being paid to important safety issues and that action is being taken by responsible authorities.*
>
> *However, this benign view of regulatory action does not go unchallenged. An important argument against the use of mandatory product standards is that they can create moral hazard, creating an impression in the public mind that government-mandated standards have succeeded in eliminating all the risks from a given product. Given what is essentially a public guarantee about the safety of the product, consumers may then become less cautious in their use of it. So if this induced change in consumer behaviour is taken into account, there may be no significant difference in accident and mortality rates arising from the mandatory adoption of product standards. In the meantime, the requirement for manufacturers to configure their products according to government specifications increases the costs of production.*

[117] State intervention might also aim at supporting interest groups that do not aggregate easily, such as consumers. In many countries, the government financially supports consumer group participation in standard-setting activities.

[118] On the other hand, the possibility exists that governmental regulation will be captured by private lobbyists, especially in cases where domestic producers seek protection from foreign competitors.

Generally, it is not an easy question to determine whether public or private action is warranted in a given case or whether it should take the form of a mandatory or voluntary standard. In principle, in case of particular risk aversion or when voluntary standardization is likely to lead to an undesirable fragmentation of a market between incompatible standards and therefore hinder the benefits of positive network externalities, public mandatory intervention seems to be justified. However, in cases where state intervention is not necessary, the regulator should leave it to the private sector to determine its standards.

Chapter 3 US antitrust law

3.1. Overview of the principal antitrust statutes and their *ratio legis*

3.1.1. Introduction

This chapter presents the US antitrust approach towards standards and SSOs.[119] As discussed in Chapter 2, standards can have an ambiguous impact on the economy, as most of the time it is hard to predict which kind of influence they will have on the market. The antitrust analysis of standardization issues is therefore complex. In order to rule on the compatibility of standards with the antitrust statutes, antitrust authorities often need to conduct an in-depth investigation of the market consequences. The heterogeneity of antitrust issues arising out of standardization has led to the application by antitrust authorities of various general antitrust concepts, in particular "attempt to monopolize," "joint venture," and "refusal to deal." Notwithstanding the complexity of the antitrust analysis in this area, it should be stressed from the outset that, as a general rule, it is unlikely an antitrust authority will strike down a standard when it has an aggregate positive impact on competition.

In general, the inspirational value of US antitrust law should not be underestimated. Although some substantial policy differences between the three antitrust systems considered in this study remain, they tend towards convergence.[120] Two of the reasons for such a convergence are certainly the more widespread use of economics for antitrust analysis and the globalization of the economy. In the context of the present study, it is an inescapable conclusion that US antitrust law contains the most diversified and sophisticated case law on standardization issues. Moreover, it traditionally uses economic tools to analyze and devise antitrust policy, thus providing a background of experience for the policy in this area. Therefore, the US antitrust approach on standardization may be viewed as a benchmark for appreciating the approaches followed by other countries.

3.1.2 US Statutes and their origins

During the nineteenth century, American society went through a structural economic revolution. Since its colonial origins, America had overwhelmingly been a nation of farmers and small town entrepreneurs. Colonists had accepted the idea that economic property and power had to be widely diffused and decentralized, as after fighting a war for their independence from Britain (1776-1783), the former colonies were very reluctant to accept a strong, centralized administration. This was clearly reflected by the loose type of union devised by the Articles of Confederation (1781) and is still reflected in the architecture of the

[119] The primary sources for this chapter are H.HOVENKAMP, *Federal Antitrust Policy; The Law of Competition and its Practice*, 3d ed., 2005 and H.HOVENKAMP, *Antitrust*, Black Letter Series, 3d ed., 1999 (a fourth edition has been published in 2005).

[120] For a presentation of the remaining divergences between the main antitrust systems, see, e.g., R.A.EPSTEIN/M.S.GREVE (EDS.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, American Enterprise Institute for Public Policy Research, 2004, S.J.EVENETT/A.LEHMANN/B.STEIL (EDS.), Antitrust Goes Global: What Future for Transatlantic Cooperation?, Royal Institute of International Affairs, October 2000.

1787 Constitution, which only grants power to Congress, as long as such a delegation is expressly provided for in the Constitution (Article I Section 8) [121]

However, in the last three decades of the nineteenth century, economic assets were found concentrated in the hands of a few to such a degree that the democratic model of the Founding Fathers appeared to be seriously threatened. Small town entrepreneurs were rendered almost obsolete by the emergence of wide-ranging corporations. Economic behemoths such as Standard Oil, the Sugar Cartel, and Carnegie Steel enjoyed wide economic power, and consequently a substantial political influence. It is with such a political background that the US Congress adopted the Sherman Act of 1890,[122] arguably the most famous antitrust statute. The promoter of the bill, Senator John Sherman, warned his colleagues that corporations left alone threatened to produce "a trust for every production and a master to fix the price for every necessity of life."[123] Hovenkamp convincingly argues that, although the language of the Sherman Act does not explicitly support such an interpretation, the main *ratio legis* beyond the Sherman Act was the anti-bigness movement and the protection of small businesses.[124]

As Hofstadter puts it, this led to significant political pressure for limiting the concentration of economic power:

> *Since it had been widely assumed that competition, being "natural," would be largely self-perpetrating, the classical theory had not reckoned with the possible necessity of underwriting competition by statute. But by the 1880s the old confidence in the self-sustaining character of competition was dead, and there seemed no adequate protection for competition in existing law. As soon as it became clear that the common-law tradition against restraints of trade had ceased to have any force and that state laws on the subject were altogether inadequate to the purpose, the demand for federal action arose.*[125]

Whereas Section 1 of the Sherman Act prohibits some forms of concerted behavior (i.e., contracts, combinations, and conspiracies in restraint of trade), Section 2 prohibits anticompetitive unilateral behavior (i.e., monopolization and attempts and conspiracies to monopolize.)

The second federal antitrust law was the Clayton Act[126] passed in 1914. As its subtitle indicates, it was aimed at completing the Sherman Act. Section 1 of the Act defines important antitrust terms, Section 4 grants a private action for treble damages, and Section 7 prohibits certain mergers and acquisitions.

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[121] For a seminal work on the evolution of American law and its influence on American economic development, see M.J.HORWITZ, *The Transformation of American Law*, 2 volumes, 1977.

[122] Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. § 1-7, "An Act to protect trade and commerce against unlawful restraints and monopolies."

[123] Debates of the Senate: March 21, 1890, Sherman's Defense of Bill.

[124] H.HOVENKAMP, *Federal Antitrust Policy; The Law of Competition and its Practice*, supra at fn 119, p. 48 ff.

[125] R.HOFSTADTER, "What Happened to the Antitrust Movement?", in: E.F.CHEIT (ED.), *The Paranoid Style in American Politics and Other Essays*, p. 196, 1964.

[126] Act of October 15, 1914, c. 323, 38 Stat. 730; 15 U.S.C.A. § 12-27, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

1914 also saw the adoption of the Federal Trade Commission Act[127] which not only created the Federal Trade Commission ("FTC"), but condemned unfair methods of competition.[128]

Moreover, any omissions in these statutes are filled in by various other pieces of legislation that precisely define the scope of the Sherman Act or clarify certain concepts.[129] The statutes are also enhanced by the case law and the guidelines published by the antitrust authorities. For example, the FTC and the Antitrust Division of the Department of Justice have published joint guidelines in various fields, some of which contain principles applicable in the standardization context, in particular the 2000 Antitrust Guidelines for Collaborations Among Competitors[130] ("Competitors Collaborations Guidelines") and the 1995 Antitrust Guidelines for the Licensing of Intellectual Property[131] ("IP Guidelines.")

3.2. Scope of antitrust laws in federally regulated markets

The current section offers a brief overview of the scope of application of US antitrust statutes. Although the "regime of competition" constitutes the fundamental framework within which US commerce is structured and regulated, limits have been set regarding the scope of antitrust statutes. Indeed, under US law, some industries are kept completely outside the reach of antitrust laws while antitrust principles are not applicable to the same extent in every market. These limits have different underlying rationales, as they may be due to the belief the application of antitrust principles would not allow another constitutional policy (e.g., free speech) to be satisfactorily protected, the intensity of governmental legislation in a special market, the distribution of powers imposed by the US Constitution, or the intervention by Congress or the courts to protect a specific industry (sports, newspapers, shipping, etc.)

The first five subsections of this chapter present a discussion on the "horizontal" scope of US antitrust statutes. In these subsections, the focus will be on the reach of the statutes in different industries at the federal level. The US Congress has carved out from the scope of antitrust statutes express and implied exemptions and limitations for specific industries. Subsection 3.2.6. deals with the "vertical" reach of antitrust laws by sketching their reach as regards State[132] and municipal legislation, while Subsection 3.2.7. describes the international reach of US antitrust laws. This latter subsection is of particular importance in today's globalized markets given that US courts have at times tended to adopt a rather expansive interpretation of the reach of US antitrust statutes.

[127] Act of September 26, 1914, c. 311, 38 Stat. 717; 15 U.S.C.A. § 41-61, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."
[128] Note, however, that technically the FTC Act is not always considered to be one of the "antitrust laws." See, e.g., the interpretation of these terms in Section 5 (a) of the Clayton Act, in which violation of Section 5 of the FTC Act does not authorize an action for treble damages.
[129] In the standardization context, see in particular the Standards Development Organization Advancement Act of 2004, 15 U.S.C. § 4301-05, discussed in Subsection 3.4.2. Characterization.
[130] 4 Trade Reg. Rep. (CCH) para. 13,161.
[131] 4 Trade Reg. Rep. (CCH) para. 13,132.
[132] In this study as a convention, when the word "State" is written with a capital "S," it refers to a US State.

3.2.1. Exclusive and primary agency jurisdiction

As mentioned above, as a result of various legislative repeals, US antitrust statutes do not apply to the same extent in each market. However, it must be noted from the outset that the Supreme Court adopts an extremely cautious approach when it restricts the reach of antitrust laws, and does so only when the Congressional intent is clear.[133] As Hovenkamp puts it:

> *Many American markets are not subject to free and open price competition, but rather are regulated as to price, output and other aspects of performance. In these regulated markets the antitrust laws generally occupy a somewhat smaller place than they do in unregulated markets. Nevertheless, an industry is not exempt from antitrust laws merely because it is regulated, and there is still substantial room for antitrust enforcement in the regulated industries.*
>
> *The extent to which the federal antitrust laws apply in regulated markets varies with the comprehensiveness of the regulatory scheme in that market. In some cases the regulatory agency in charge of overseeing a certain market has the exclusive right to protect competition in that market. In other cases the agency shares that power with the antitrust laws.*[134]

In some federally regulated industries, the application of antitrust laws is expressly restricted either entirely or partially.[135] Such markets are often regulated by agencies that enjoy "exclusive agency jurisdiction." In such cases, courts are left only with the task of determining whether the conduct at stake is encompassed by the exemption.

Beyond express repeals, courts may accept that the antitrust laws have been implicitly repealed by Congress either because regulation of the industry is so dense that there is no room left for antitrust laws, or because antitrust laws would put the regulatory scheme in danger ("implied immunity").[136]

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[133] *Lafayette v. La. Power & Light Corp.*, 435 U.S. 389 (1977) and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351, 83 S.Ct. 1715, 1735 (1963):

> *Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provision.*

In certain cases, the regulatory agency has the power to grant antitrust immunity as an administrative decision. See, e.g., the Motor Carrier Act of 1980 (49 U.S.C.A. § 10706b), *FMC v. Seatrain Lines*, 411 U.S. 726, 733, 93 S.Ct. 1773 (1973) or *Springfield Terminal Ry. v. Canadian Pacific Ltd.*, 133 F.3d 103 (1st Cir. 1997). However, under such schemes the agency's power is usually limited, as courts can second guess both the agency's interpretation and its appraisal of facts. See *Coal Exporters Ass'n of U.S. v. United States*, 745 F.2d 76 (D.C.Cir. 1984).

[134] H. HOVENKAMP, *Antitrust*, Black Letter Series, 3d ed., pp. 267-268, 1999 (a fourth edition was published in 2005.)

[135] The labor market is exempted by the antitrust statutes themselves (see Sections 6 and 20 of the Clayton Act) and by specific statutes (see the National Labor Relations Act, the Labor Management Relations Act, and the Norris-La Guardia Act (see fn 142), all which play an important role in the interpretation of the limits of antitrust principles in this area.) Other express exemptions can be found in specific statutes, such as the sports broadcasting, securities, energy or insurance sectors. See more specifically hereunder Subsection 3.2.2. Exemptions.

[136] Note however, that the Supreme Court has made clear that an implied repeal of the antitrust laws will not be easily found. See *Verizon Communications, Inc. v. Law Offices of Curtis Trinko,* 124 S.Ct. 872 (2004).

In other markets, the application of antitrust statutes is left to the market's regulatory agency. In such cases, commentators speak of the "primary" responsibility of the regulatory agency for the application of antitrust laws.[137] However, under certain circumstances, courts can apply antitrust laws when the regulatory agency has not thoroughly evaluated the effects on competition of the behavior it has approved[138] or when the issues at stake are essentially legal and do not require expert, market-specific knowledge.

Primary jurisdiction might not so much be seen as an exemption from the antitrust laws as a procedural mechanism for taking on a case that may contain an antitrust claim.[139] Even when courts have jurisdiction over a case, they may take a deferential stance towards the regulatory agencies, and leave it to these agencies to rule on issues linked with antitrust claims.[140] In such cases, the deferential stance may be justified by the fact that regulatory agencies often have the expert knowledge that antitrust agencies lack.

3.2.2. Exemptions

Congress has limited the scope of the antitrust laws with regard to the industries mentioned below, often granting the regulatory agency exclusive (or at least primary) jurisdiction.

3.2.2.1. Labor

Section 6 of the Clayton Act states:

> *The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor agricultural or horticultural organizations, […] nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.*

In the same vein, Section 20 of the Clayton Act provides that strikes are not "violations of any law of the United States."[141/142]

Moreover, when the conduct at stake has not been submitted to the regulatory agency for review, courts may be reluctant to recognize an implicit repeal of the antitrust laws; see, e.g., *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), cert. denied, 464 U.S. 891.

[137] See, e.g., *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573 (1973) and *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963), where the Supreme Court held the Securities and Exchange Act of 1934 partially repealed the antitrust laws and entrusted regulatory agencies with powers to oversee competition issues.

[138] See *Arizona Publ'g Servs. Co. v. United States*, 742 F.2d 644 (D.C.Cir. 1984). But note "the filed rate" (or "Keogh") doctrine, first affirmed in *Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156 (1922) and confirmed in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922 (1986), in which a rate filed with a regulatory agency usually cannot be challenged by consumers.

[139] H.HOVENKAMP, *Federal Antitrust Policy; The Law of Competition and Its Practice*, supra at fn 119, p. 720.

[140] See, e.g., *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573 (1973).

[141] It must be emphasized however, that the scope of this exemption is not absolutely clear and has given rise to a substantial body of case law. See, e.g., *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463 (1941) where the US Supreme Court held the exemption applied only "so long as a union acts in its self-interest and does not combine with non-labor groups."

3.2.2.2. Sports

In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,*[143] the Supreme Court held that antitrust laws did not encompass baseball because it did not constitute interstate commerce. However, as this exemption has been understood as being valid only as to baseball, it does not apply to other sports. Amateur athletic associations are partially exempted from antitrust liability through the Amateur Sports Act.[144] Moreover, the Sports Broadcasting Act[145] exempts football, baseball, basketball and hockey leagues from antitrust prosecution when they are dealing for all members in selling television rights.

3.2.2.3. Agricultural cooperatives and fisheries

Section 6 of the Clayton Act, the Capper-Volstead Agricultural Producers Association Act,[146] and the Fisheries Cooperative Marketing Act[147] exempt agricultural and fishing cooperatives from antitrust law liability.[148]

3.2.2.4. Insurance

The McCarran-Ferguson Act[149] authorizes States to regulate the insurance business and exempts that industry from federal antitrust laws as soon as (and to the extent that) States have regulated it.[150] However, this exemption has been interpreted as not extending to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation" on the part of insurance companies.[151]

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[142] See also the Norris-La Guardia Act (29 U.S.C.A. § 101 and ff.) which deprives the federal courts of jurisdiction to issue injunctions in labor disputes, the National Labor Relations Act (29 U.S.C.A. §§ 151-169) and the Labor Management Relations Act (29 U.S.C.A. §§ 151-169) ("non-statutory exemptions"). See *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965) and *Connel Constr. Co. v. Plumber Local*, 421 U.S. 616, 95 S.Ct. 1830 (1975), where the Court accepted that a collective bargaining agreement with an employer could be granted at least a limited exemption. However, what exactly constitutes a labor union self-interest is still a matter of judicial and doctrinal debate.

[143] 259 U.S. 200, 42 S.Ct. 465 (1922).

[144] 36 U.S.C.A. § 371 and ff.

[145] 15 U.S.C.A. § 1291 and ff.

[146] 7 U.S.C.A. § 291-292.

[147] 15 U.S.C.A. § 521.

[148] Note that the exemption does not apply if the members of the cooperative engage in exclusionary practices, restraint of trade directed at competitors, or coercion of non-member firms. See *United States v. Borden Co*., 308 U.S. 188, 60 S.Ct. 182 (1939) and *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847 (1960).

[149] 15 U.S.C.A. § 1011-1015.

[150] The exact boundaries of what constitutes the insurance business are not entirely clear. For a definition, see *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002 (1982) and *Hartford Fire Ins. v. California*, 509 U.S. 764, 113 S.Ct. 701 (1990).

[151] See *St.Paul Marine Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923. (boycott under the McCarran-Ferguson Act is equivalent to boycott under the Sherman Act) and *In re Workers Comp. Ins.*, 867 F.2d 1552 (8th Cir. 1989) (exclusionary practices). See also P.M.DANZON, "The McCarran-Ferguson Act: Anticompetitive or Procompetitive?", in: Regulation, the Cato Review of Business and Government, available at: http://www.cato.org/pubs/regulation/reg15n2b.html.

3.2.2.5. Export associations

The Webb-Pomerene Act[152] exempts American firms from antitrust liability for joint activity among competitors when they are joining together into export associations with the view towards competing with similar foreign associations. However, export associations are not allowed to engage in unfair methods of competition as defined by the FTC Act, and cannot restrain trade within the United States or damage other American exporters. Moreover, the antitrust exemption might be suspended in the case where the association joins a foreign cartel.

Since 1982, the Department of Justice ("DoJ") has been empowered to issue a certificate exempting each export association from public antitrust prosecution. Private plaintiffs are allowed to lodge a complaint, but could face severe remedies if they lose.

3.2.2.6. Other exemptions

The Charitable Donation Antitrust Immunity Act of 1997[153] immunizes charitable gift annuities and charitable remainder trusts from liability under antitrust laws.[154]

The federal Shipping Act of 1984[155] governs ocean common carriers. Carriers may file a common rate with the Federal Maritime Commission ("FMC"). These rates are exempt from antitrust liability, but behavior falling outside the scope of the Shipping Act may still be the object of a complaint.[156] Note that although the Shipping Act of 1984 expressly prohibits private antitrust actions, it also contains specific public prosecution provisions against anticompetitive practices, the wording of which is similar to that of the Sherman Act and which are exclusively enforced by the FMC.

The Newspaper Preservation Act[157] foresees a limited exemption for joint operating agreements entered into by newspapers in situations where the Attorney General finds that "not more than one of the newspaper publications involved in the agreement is a publication other than a failing newspaper and that approval of such agreement would effectuate the policy and purpose" of the Act.

Although the banking industry may not enjoy a formal antitrust exemption, several laws set out special antitrust provisions for the banking sector[158] that may take precedence over the general antitrust laws.[159]

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[152] 15 U.S.C.A. § 6145.
[153] 15 U.S.C. § 37(a).
[154] See, e.g., *Ozee v. Am. Council on Gift Annuities*, 143 F.3d 937 (5th Cir. 1998) (immunizing an agreement between universities and other charities to suppress competition.)
[155] 46 U.S.C.A § 1701-1720.
[156] See *Am. Ass'n of Cruise Passengers v. Carnival Cruise Lines*, 31 F.3d 1184 (D.C. Cir. 1994).
[157] 15 U.S.C. §43.
[158] See, e.g., the Bank Merger Act of 1960, 12 U.S.C.A. § 1828 (c), the Bank Holding Company Act of 1970, 12 U.S.C.A. § 1971-1978, and the McFadden Act, 12 U.S.C.A. § 36. Moreover, securities and futures dealing have been partially exempted from antitrust liability by the Securities Exchange Act of 1934, 15 U.S.C. 78a and ff. See, e.g., *Gordon v. NYSE*, 422 U.S. 659 (1975) and *United States v. Nat'l Ass'n of Sec. Dealers, Inc. (NASD)*, 422 U.S. 694 (1975).
[159] Congress has also carved out particular antitrust exemptions in specific situations. See, e.g., *United States v. Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999) where motor carriers operating only within the Philippines were considered to be exempted from antitrust liability by the Shipping Act of 1984, 46 App. U.S.C. § 1701 and ff., or

3.2.3. Statute of limitations

Section 4B of the Clayton Act introduces a four-year statute of limitations for private antitrust damages actions. The statute usually runs from the moment the cause of action "accrues" (i.e., from the moment damages are ascertainable.) If damages are merely speculative or unknown, the statute of limitations does not begin to run.[160]

3.2.4. **"In pari delicto***" and "unclean hands" doctrines*

Under common law, the *in pari delicto* doctrine grants a defense to the defendant if it can prove the plaintiff has engaged in the same unlawful activities for which the plaintiff is now seeking a remedy. However, in *Perma Life Mufflers, Inc. v. International Parts Corp.,*[161] the Supreme Court established that the *in pari delicto* doctrine was not available in private antitrust litigation. There is also substantial disagreement among lower courts whether the defense is available in public enforcement actions.

The defense of "unclean hands" also bars the plaintiff from obtaining a remedy if the defendant proves that the plaintiff engaged in a different antitrust violation than the one the defendant is accused of committing. Again however, the Supreme Court held this type of defense was not available[162]

3.2.5. Noerr-Pennington doctrine

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,*[163] several railroad companies agreed on a joint political lobbying campaign to restrict competition from trucks by inducing consumers to use trains. The Supreme Court held that antitrust laws do not prohibit people from associating together[164] to petition the legislature or the government to act, even though the petitioned measure might be considered anticompetitive under such laws. The Noerr-Pennington doctrine, which emerged from this jurisprudence, was grounded in the First Amendment as it was originally based on free speech considerations.[165] According to the Supreme Court, to conclude otherwise "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."[166]

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the Year 2000 Information and Readiness Act, 15 U.S.C. § 1, where information sharing related to the "millennium bug" was expressly exempted from antitrust liability.

[160] According to Section 5(i) of the Clayton Act, a federal public prosecution suspends the statute of limitations from running for the duration of the public procedure and for one year thereafter.

[161] 392 U.S. 134, 88 S.Ct. 1981 (1968).

[162] See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc*., 340 U.S. 211, 71 S.Ct. 259 (1951).

[163] 365 U.S. 127, 81 S.Ct. 523 (1961). The Supreme Court repeated its holding in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965). Hence the Noerr-Pennington name for the doctrine.

[164] In *City of Columbia, Columbia Outdoor Advertising v. Omni Outdoor Advertising*, 499 U.S. 365, 111 S.Ct. 1344 (1991)., the Supreme Court held the Noerr-Pennington doctrine protected a private person even when it was alleged the private party was "conspiring" with the government in the Sherman Act meaning of the term (i.e., plotting a measure that might have an anticompetitive effect.)

[165] Note however in the Noerr-Pennington case, the US Supreme Court does not refer to the First Amendment but rather bases its reasoning on its understanding of the reach of the antitrust laws themselves.

[166] Id. at 134.

Although the Noerr-Pennington doctrine has a wide scope, the Supreme Court has established a "sham" exception to its application.[167] Thus, when "baseless and repetitive" judicial or administrative actions are taken with the intent of excluding a rival from the market, the doctrine cannot be successfully invoked.[168]

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.,*[169] the Supreme Court had to consider whether the Noerr-Pennington doctrine might apply to a petition made to an SSO that had a wide influence on legislation, as many of its standards were turned into law. The Supreme Court accepted the view that the doctrine may apply to petitions to private SSOs. However, it held that to enjoy immunity, the petition must "actually seek governmental action." This was not the case in *Allied Tube* as the enforcement of the standard depended merely on market forces.[170] Thus, the Court seemed to imply the Noerr-Pennington doctrine applied in cases involved in technical regulations, but not in petitioning for a standard.

The *Allied Tube* case law leaves many questions open. In particular, one might wonder what public mandate is sufficient to trigger a Noerr-Pennington exemption. For example, is the exemption applicable when the government states *ex ante* that it will adopt an SSO's standards so that such an adoption becomes merely ministerial?[171] The Court held:

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[167] See the *Noerr* case itself, where the Supreme Court held:

> *There may be situations where a publicity campaign, ostensibly directed towards influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.* Id. at 135

[168] See *Cal, Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972). Still, a lawsuit with an objectively valid basis cannot be a sham, *Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 113 S.Ct. 1920 (1993). However, the federal circuits do not agree on whether deception or fraud in the judicial process should trigger forfeiture of the Noerr-Pennington immunity. Compare *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995) (loss of immunity) and *Cheminor Drugs Ltd v. Ethyl Corp*., 168 F.3d 119 (3d Cir. 1999) (immunity available where misrepresentation does not affect the core of the petitioner's case.)

[169] 486 U.S. 492, 108 S.Ct. 1931 (1988). For another more recent discussion in the context of standardization, see the FTC's decision In re *Union Oil Company of California* (Unocal), Docket N° 9305.

[170] The Supreme Court held:

> *We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. 817 F.2d, at 943-944. Whatever de facto authority the Association enjoys, no official authority has been conferred on it by any government, and the decision making body of the Association is composed, at least in part, of persons with economic incentives to restrain trade.* Id. at 497.

[171] See *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713 (1985) and *Southern Motor Carriers Rate Conference v United States*., 471 U.S. 48, 105 S. Ct. 1721 (1985) where the Supreme Court held (albeit not in a Noerr-Pennington case), that when an anticompetitive behavior was authorized by State legislation and was a "foreseeable consequence" of State regulation, it could not be reached by antitrust laws. See also H.HOVENKAMP, *Federal Antitrust Policy*, supra at fn 119, § 18.4, p. 711, who explains that legislators sometimes lack the expert knowledge for adopting technical standards and thus delegate their power to private parties. Hovenkamp argues that when the adoption of the standard is "ministerial" (i.e., the legislator does not, in practice, review the quality of the SSO's standard, but automatically turns it into law), corruption of the SSO decision-making process should not be covered by Noerr-Pennington immunity. On the other hand, it is argued that even when the State does not review the quality of the standard, it should be considered as an express legislative delegation. In such a case, it would seem hard to consider the standard as not amounting to governmental action, and thus in our view the Noerr-Pennington doctrine should apply. Of course, this is not a satisfactory policy outcome, but it should be remedied by State legislation (increased governmental control of

> *[T]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious. But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.*[172]

The trouble with this ruling is that the SSO's decision-making bodies are almost always staffed by competitors of the market. Should this mean that SSOs can, as a general rule, not benefit from Noerr-Pennington immunity if they have competitors as members? The Supreme Court rejected such a view in the preceding paragraph:

> *When […] private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, […], those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations.*

To which extent these two paragraphs might be contradictory has not been clarified in subsequent case law. However, the fact that steel interests had unduly manipulated the SSO's decision process played a significant role in the definition of the scope of the Noerr-Pennington exemption in this case. At any rate, defining "petitioning" may be helpful in understanding the scope of the Noerr-Pennington doctrine. As Justice Black explained:

> *The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] […] in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others though the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements."*[173]

In summary, even if market participants are sometimes able to "capture" the public decision-making process in such a way as to give themselves wide, unsupervised regulatory powers over a market, courts have separated the activities of individuals in a public context from their market activities. Although the Noerr-Pennington doctrine was grounded in First Amendment considerations, the assumption that Congress hardly intended to use antitrust laws to cure the

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the standardization process, second opinions by external experts, criminal rules, etc.) rather than by antitrust rules.

[172] Id. at 498.

[173] See also *Mass. School of Law v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997), *Session Tank Liners, Inc. v. Joor Mfg., Inc*., 17 F.3d 295 (9th Cir. 1994) and In re *Union Oil Company of Cal.* (Unocal), Docket N° 9305.

capture of public decision-making bodies probably also played a decisive role. Had Congress wished to subject market actors' behavior within public bodies to antitrust law, it is very doubtful it would have drafted the antitrust laws as forbidding any "monopoly" and "combinations in restraint of trade" without explicitly mentioning abuses of the State decision-making process. Although antitrust laws may arguably be used for regulating the behavior of private parties outside the market, courts (and perhaps Congress) denied them such a wide application. Instead, courts seem to have favored the market actors' quality of citizenship over their status of market actors, thus granting them the wide protection of free speech instead of imposing the more restrictive antitrust rules.[174] As a result, substantially different rules regulate behavior in the market than in the public decision-making process.[175]

Thus it should be kept in mind that, in the standard-setting context, the Noerr-Pennington doctrine which generally exempts petitioning activities directed at a governmental body from antitrust laws, is applied with a twist. When directed at an SSO, petitioning is unlikely to be exempted when:

(a) the SSO enjoys no official authority; and

(b) the SSO's decision-making process has not been "captured" by one or more market actors.

3.2.6. Federalism and State regulation

As a rule, the antitrust statutes (and foremost the Sherman Act) have not been construed to allow Congress to infringe upon powers reserved to the States by the US Constitution. It is a well-grounded American constitutional principle that States remain free to legislate in fields not forbidden under the Constitution. In particular, States have the potentiality to restrain trade as regards various social policy goals which they are competent to pursue under the US Constitution. Therefore, as a matter of principle, antitrust statutes cannot be applied to acts of a State, as long as such acts remain within the State's constitutional competence.

Moreover, one of the conditions for the application of most antitrust statutes is that the anticompetitive behavior at stake "affects" interstate commerce.[176] However, as we shall see, the concept of what affects interstate commerce has been interpreted very widely. Only a few very localized activities, such as intra-city trash collection, can arguably lie outside the reach of interstate commerce and thus the antitrust statutes.

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[174] See also C.L.SAGERS, "Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction," in: *Cardozo Law Review*, 25/1393, 2004.

[175] In an international perspective, it is not entirely clear whether the Noerr-Pennington doctrine may be invoked when the petitioning is done to a foreign government. See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404 (1962), *Occidental Petroleum Corp. v. Buttes Gas Oil*, 461 F.2d 1261 (9th Cir. 1972), contra: *Coastal State Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983).

[176] There is an exception for the Robinson-Patman Act, and perhaps Section 3 of the Clayton Act, both of which require the violation be "in commerce" (i.e., that it involve either the interstate movement of goods or persons in different states.)

3.2.6.1. Regulation by a State

In *Parker v. Brown,*[177] the Supreme Court put forward the so-called "State Action" or "Parker" doctrine, in which antitrust laws are not to be construed to interfere too substantially with a regulatory scheme mandated or authorized[178] by a State.[179] Thus when a State adopts a standard it has developed[180] or that has been privately developed,[181] the State's (and the SSO's[182]) conduct is in principle held to be immune from antitrust liability.

In *California Retail Liquor Dealers Association v. Midcal Aluminium Co.*,[183] the Supreme Court had the opportunity to clarify its understanding of the *Parker* case law. It put forward a two-pronged test:

> In order to be covered by the Parker doctrine:
>
> (a) the challenged restraint must be "one [that is] clearly articulated and affirmatively expressed as state policy […]"; and
>
> (b) the policy must be "actively supervised" by the State itself.

The Supreme Court clarified the term "active supervision" in *Patrick v. Burget*[184] where it held:

> *[T]he active supervision prong requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.*

In *FTC v. Ticor Title Insurance Co.*,[185] the Court went even further by explaining the *Midcal* test required that:

> *State officials undertake the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.*

[177] 317 U.S. 341, 63 S.Ct. 307 (1943).
[178] See *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713 (1985) and *Southern Motor Carriers Rate Conference v United States*, 471 U.S. 48, 105 S. Ct. 1721 (1985).
[179] Regulation (and thus, standard setting) by federal government agencies and their officials falls outside the scope of the antitrust laws when the actions occur in an official capacity. *Rex Systems v. Holiday*, 814 F.2d 994 (4th Cir. 1987), *Gordon v. NYSE*, 422 U.S. 659 (1975).
[180] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
[181] See, *Mass. School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997).
[182] When the SSO's standard is not expressly adopted by the State, the SSO is exempted from antitrust liability only if it satisfies the *Midcal* test, presented hereunder; see, e.g., *Columbia Steel Casting Co. v. Portland GE*, 111 F.3d 1427 (9th Cir. 1996) or *Sandy River Nursing Care v. Aetna Casualty and Surety Co.*, 985 F.2d 1138 (1st Cir. 1993).
[183] 445 U.S. 97, 100 S.Ct. 937 (1980).
[184] 486 U.S. 94, 108 S.Ct. 1658 (1988).
[185] 504 U.S. 621, 112 S.Ct. 2169 (1992).

3.2.6.2. Regulation by a municipality

As a preliminary note, it must be kept in mind that the US Constitution recognizes States, but not other State subdivisions (including counties and municipalities) as members of the Union. Consequently, the powers of these subdivisions can extend only as far as the State delegation allows.[186] This delegation of powers needs to be precise if a municipality's acts are to be covered by the Parker doctrine; for example, in *Community Communications Co. v. City of Boulder,*[187] the Supreme Court held that a general regulatory grant was insufficient, and that the State must pass a statute specifically authorizing the municipality to regulate a specific market.

However, in *Town of Hallie v. City of Eau Claire,*[188] the US Supreme Court held that the delegation did not need to be explicit. Indeed, the scheme cannot be reached by antitrust laws if the displacement of competition is a "foreseeable consequence" of the regulation. Moreover, the statute does not need to compel the municipality to regulate, as it is sufficient that the municipality simply be authorized to do so.

In *City of Columbia, Columbia Outdoor Advertising v. Omni Outdoor Advertising,*[189] the Supreme Court indicated that as soon as a municipality has received adequately delegated powers, its regulatory motives become irrelevant. In an obiter dictum, the Court seemed to refuse to accept the view that bribery of a state or municipal official by a private party could remove the exemption.

Moreover, in accordance with the *Midcal* test, a municipal regulatory scheme must be supervised. In the *Town of Hallie v. City of Eau Claire* decision, the Supreme Court accepted the view that municipal officials rather than State officials could supervise the scheme. There was no need for State officials to do so, as the Court held it to be widely accepted that "the sovereign that creates a regulatory scheme is generally also responsible for supervising it."[190]

States and their subdivisions have the power of repealing the antitrust laws within regulated industries. However, to do so they must thoroughly express their intentions in the statute (either expressly or implicitly) and make sure their schemes are actively supervised.

3.2.7. Public international law limitations on the reach of the antitrust laws

3.2.7.1. Introduction

After a review of the limitations to antitrust laws imposed by the American legal order, it is necessary to examine whether the antitrust laws can be limited as to their international applicability. The reach of US antitrust laws is not only limited by other federal statutes, State legislation and the US Constitution, but also by international law. It is undisputed that acts which take place and have their effects only on the territory of one State can be regulated by

[186] In *Lafayette v. La. Power & Light Co*., 435 U.S. 389, 98 S.Ct. 1123 (1978), the Supreme Court held that municipalities exceeding their powers could be held liable for treble damages. As a result, in 1984 Congress passed the Local Government Antitrust Act, which limited the remedy against municipalities to injunctive relief.
[187] 455 U.S. 40, 102 S.Ct. 835 (1982).
[188] 471 U.S. 34, 105 S.Ct. 1713 (1985).
[189] 499 U.S. 365, 111 S.Ct. 1344 (1991).
[190] H.HOVENKAMP, *Antitrust*, supra at fn 119, p. 273.

its laws (territoriality principle.) However, the question arises whether the antitrust statutes should also be applicable when a violation takes place or has impacts abroad (extraterritoriality.)

Basically, antitrust jurisdiction might potentially apply to two categories of events involving an international environment: *inbound trade* (i.e., acts which have taken place abroad, but have domestic effects or an impact on imports, and *outbound trade* (i.e., acts which have taken place domestically, but have effects abroad or an impact on exports.)

As a matter of public international law, it is undisputed that a country may assert jurisdiction on imports coming into its territory. Yet, US antitrust authorities have gone one step further by applying antitrust laws to activities which involve no imports or exports to the US, but which have an "adverse effect" on US foreign commerce.[191]

What constitutes an "adverse effect" has been at times construed very broadly. For example, in *United States v. Nippon Paper Industrial Co*.,[192] the U.S. Court of Appeals for the First Circuit approved the application of certain criminal provisions of the Sherman Act to companies engaged in price-fixing in Japan. The Court considered that such anticompetitive behavior had affected the US, as the products which were the object of the price-fixing scheme were later to be sold in the US. Yet the trouble with such an interpretation is its expansive definition of the scope of "adverse effects," as one might argue that at least since the discovery of chaos theory by Edward Lorenz in 1961[193] and the advent of the global economy, events in almost any location on the globe may have repercussions anywhere else. Thus if American antitrust laws are construed as applying to every activity that could potentially have an adverse effect on US commerce, their scope would be almost unlimited.[194]

Another difficulty is determining what jurisdiction is competent to rule on which transaction. Public International Law ("PIL") offers many instruments to decide this question[195]; however, PIL commentators often disagree about the extent of the limits imposed to national legislative freedom. In addition, as the US legal system is rather dualistic,[196] technically limitations

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[191] See also hereunder Subsection 3.2.7.4. Excursus: the DoJ's Guidelines for International Operations and the deletion of footnote 159 in the DoJ's Guidelines for International Operations.

[192] 109 F.3d 1 (1st Cir. 1997).

[193] I.STEWART, *Does God Play Dice? The Mathematics of Chaos,* Penguin Books Ltd, p. 141, 1989 (a second revised edition has been published in 2002), famously described it in the following manner:

> *The flapping of a single butterfly's wing today produces a tiny change in the state of the atmosphere. Over a period of time, the atmosphere actually does diverges from what it would have done. So, in a month's time, a tornado that would have devastated the Indonesian coast doesn't happen. Or maybe one that wasn't going to happen, does.*

This phenomenon is also known as "sensitive dependence on initial conditions," in which a small change in the conditions of a system can drastically change its long-term evolution.

[194] Judge Hand made this point clear in its famous opinion in *U.S. v. Aluminium Co. of America,* 148 F.2d 416 (2d Cir. 1945).

[195] The main bases of jurisdiction are: territorial, nationality, protective, passive personality, universal and effects (also called extraterritorial jurisdiction.)

[196] As L.HENKIN, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny", in: *100 Harv. L. Rev. 853,* p. 864, 1987, put it:

> *[D]ualists view international law as a discrete legal system [which] ... operates wholly on an inter-nation plane.*

imposed by PIL still have to be translated into domestic American law. In practice, this means American courts are not absolutely bound by the PIL definition of these concepts, but enjoy a certain degree of freedom when defining them themselves. US courts have recognized that a number of internalized PIL principles such as the Act of State, Foreign Sovereign Compulsion, and Foreign Sovereign Immunity doctrines, as well as the principle of comity (besides the so-called "effects" theory) limit the reach of US antitrust laws. However, their application has not always been totally consistent.

3.2.7.2. Extraterritorial reach of the antitrust laws

Although the text of the Sherman Act provides that conspiracies to restrain competition or to attempt to monopolize either the interstate trade within the US or US trade "with foreign nations shall be prohibited," historically federal courts were reluctant to give an extraterritorial scope to American trade laws.[197] In 1945, this view was challenged in *United States. v. Aluminium Co. of America*,[198] where Justice Hand indicated that foreign acts which "were intended to affect [US] imports and did affect them" should be reached by US antitrust laws.[199/200] *Alcoa* set this test:[201]

> *It is settled law [...] that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognize.*

But under PIL, the limits of the extraterritorial application of laws are not defined clearly. For example, the Restatement of Foreign Relations Law, Sections 402(1)(c) and 403(1) provide:

> *[S]ubject to § 403, a state has jurisdiction to prescribe law with respect to*
> *(1) [...]*
> *(c) conduct outside its territory that has or is intended to have substantial effect within its territory.*
>
> *Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.*

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[197] See, e.g., Justice Oliver W. Holmes's decision in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511 (1909):

> *[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.*

The *American Banana* opinion had already been limited by subsequent judgments. See, e.g., *United States. v. Sisal Sales Corp*., 274 U.S. 268, 47 S.Ct. 592 (1927).

[198] 148 F.2d 416 (2d Cir. 1945) (a.k.a. the *Alcoa* decision.)

[199] Id. note 8 at pp. 443-444.

For an application of the *Alcoa* test, see, e.g. the *Swiss Watchmakers* case, *United States v. Watchmakers of Switz. Info. Centre, Inc*, 133 F. Supp. 40, (S.D.N.Y. 1955) and *Zenith Radio Corp. v. Hazeltine Research, Inc*. 395 U.S. 100, (1969).

[200] Note that at least since *United States v. Nippon Paper Indus. Co*. 109 F.3d 1 (1st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998), the First Circuit seems to hold the view that if the effects test would be fulfilled in a civil liability setting, it would also be fulfilled in a criminal case.

[201] Id. at 441.

What is to be understood under "substantial effects" and "unreasonable" is ambiguous;[202]however, a look into subsequent practice helps in clearing up the picture.

[202] The compatibility of the effects doctrine with PIL is not absolutely clear. The famous *Lotus* case law (Permanent Court of International Justice *Lotus* decision, PCIJ, September 7, 1927) is often cited as a starting point by both supporters and adversaries of the doctrine. Indeed, the wording of the Permanent Court of International Justice does not seem to bring a perfectly clear answer. On one hand, the PCIJ considered that:

> *[I]nternational law governs relations between independent States. The rules of law binding upon States therefore emanates from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.*
>
> *Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.*
>
> *It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case, which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.* (pp. 18-19)

See also, Sir Gerald Fitzmaurice's separate opinion in the International Court of Justice ("ICJ") *Barcelona Traction* decision of February 5, 1970, International Court of Justice, Reports of Judgments, "Advisory Opinions and Orders," 1970, p. 65, at p. 105:

> *It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others—for instance in the fields of shipping, "anti-trust" legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.*

However, on the other hand in *Lotus*, the PCIJ also pointed out:

> *The offense for which Lieutenant Demons [the officer in charge on the Lotus, a French boat, at the moment of the collision with the Boz-kourt, a Turkish boat] appears to have been prosecuted [in Turkey] was an act—of negligence or imprudence—having its origin on board the Lotus, whilst its effects made themselves felt on board the Boz-kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offense inexistent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two*

In 1982, the Alcoa test was translated in the Foreign Trade Antitrust Improvements Act ("FTAIA"),[203] which provides that conduct involving exports[204] with foreign nations will not be reached by the Sherman Act[205] unless it has a "direct, substantial, and reasonably foreseeable effect" on trade with the United States.[206] The FTAIA states in pertinent part:

> *Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce with foreign nations unless:*
>
> *(1) such conduct has a direct, substantial, and reasonably foreseeable effect*
> *(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or*
> *(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and*
> *(2) such effect gives rise to a claim under the provisions of this Act, other than this section.*

As the Supreme Court clarified:

> *[T]his technical language initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e., the "effect" must "giv[e] rise to a [Sherman Act] claim."*[207/208]

> *States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.* (p. 33)

This has led some commentators to conclude that the extraterritorial application of laws was forbidden when the elements of a situation were not "entirely inseparable"; see, e.g., M.AKEHURST, "Jurisdiction in International Law", in: *BYIL*, 1972-73, p. 145, and in particular pp. 195 and 196.

[203] 15 U.S.C.A. § 6a.

[204] The *Alcoa* test is still applicable to imports. See, e.g., *Hartford Fire Ins Co.. v. California*, 509 U.S. 764, 113 S.Ct. 701 (1990) at 796, and *Restatement Third of Foreign Relations Law* § 415 (1987), which provide that antitrust statutes apply to agreements and conducts predominantly made and carried outside the US: (a) if they have as "a principle purpose" to interfere with US trade and commerce and if there is "some" effect, and (b) in the absence of a principle purpose to interfere with US trade and commerce, if the agreement or the conduct at stake has a substantial effect on US trade, provided that the exercise of jurisdiction is not "unreasonable." Moreover, the *Alcoa* test is still applicable in criminal cases; see, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998).

[205] For an example, see *Waldbaum v. Worldvision Enterprises,* 84 FRD 95 (S.D.N.Y. 1979),

[206] Note that consistent with previous case law, the FTAIA does not require proof of the intent of adverse effects, or it does so only indirectly through the objectified "foreseeable" requirement.

[207] *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S.Ct. 2359 (2004).

[208] Pursuant to H.HOVENKAMP, *Federal Antitrust Policy*, cited herein at fn 119, § 21, p. 768:

> *Read together, subsections (A) and (B) mean that the requisite effect must be on one of the following:*
>
> *(1) an American domestic market;*

The nature of the "claim" has been clarified by federal courts, which have generally interpreted this test as requiring the plaintiff to show not merely an injury to his own interests, but to trade or commerce with the United States as well. As Hovenkamp indicates, this point has been confirmed by *Eurim-Pharm GmbH v. Pfizer.*[209] In this case, a European firm was denied standing in a suit against a US exporting firm allegedly engaged in territorial restraints in Europe. The following conclusion can be drawn: although one might argue that these firms still have the possibility of invoking their own domestic antitrust statutes, American antitrust laws fall short of vindicating an evil accruing from the anticompetitive behavior of American firms acting on American soil when these effects are felt abroad, unless an American exporting business is injured. Thus, foreign firms have no standing under US laws: (a) when a US antitrust violator imposes on them an antitrust injury; or (b) when they are injured by a foreign antitrust violation that deprives them of the possibility of importing an American product. Of course, these two possibilities are subject to the caveat that no American exporting interests be hurt. Although situation (b) can be reached by a territorial application of foreign antitrust laws, it could well be the case that situation (a) needs to be dealt with under an extraterritorial application of foreign laws, because as the antitrust violation takes place on American soil, it would probably not be covered by a classical territorial application of foreign antitrust laws. In this respect, one might wonder whether the FTAIA does not render an extraterritorial application of foreign antitrust laws necessary.

The reach of the US antitrust laws, and especially of the FTAIA, was further discussed in *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*[210]. This decision deals with the economically biggest worldwide price-fixing conspiracy ever detected, the vitamins cartel, which had fixed prices at a worldwide level for several years. As an action regrouping US victims had already vindicated domestic plaintiffs, only the plaintiffs who had suffered their injuries outside the US market were still before the courts. In determining the scope of US antitrust laws, the Supreme Court described the *ratio legis* of the FTAIA as follows:

> *The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however*

> *(2) a market for importing goods into the United States; or*
> (3) *a market for exporting goods from the United States, but only if the injury occurs to the exporting business within the United States.*
>
> *Under (3), foreign firms who receive American exported goods abroad [and which are victims of an antitrust violation] would generally not have a cause of action for injuries suffered abroad [whereas the American exporting firm would probably have one.] For example, suppose a concerted refusal to deal orchestrated by foreign firms in a European country excluded an American export to that country. Under (3), the American exporter who lost business would have a cause of action [see United States v. C.Itoh & Co Ltd, (1982-83 Trade Cas. (CCH) (W.D. Wash. 1982)], but the European importer of the American goods (assuming that it had no injured domestic American interests) would not have an antitrust action under American law. Perhaps more interestingly, (3) also prohibits a foreign firm with no American domestic interests from suing an American for a restraint allegedly created by the American firm which injured export commerce.*

[209] 593 F.Supp. 1102 (S.D.N.Y. 1984). See also *Caribbean Broadcasting Sys. v. Cable & Wireless*, 148 F.3d 1080 (D.C. Cir. 1998).
[210] 542 U.S. 155, 124 S.Ct. 2359 (2004). This case law must be read in light of the deletion of footnote 159 in the DoJ's Guidelines for International Operations, see Subsection 3.2.7.4. Excursus: the DoJ's Guidelines for International Operations.

anticompetitive, as long as those arrangements adversely affect only foreign markets.

The Supreme Court also confirmed that no actual exports were necessary for the exemption to apply:

> *Respondents make a threshold argument. They say that the transactions here at issue fall outside the FTAIA because the FTAIA's general exclusionary rule applies only to conduct involving exports. The rule says that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce)* ***with*** *foreign nations." § 6a (emphasis added). The word "with" means between the United States and foreign nations. And, they contend, commerce between the United States and foreign nations that is not import commerce must consist of export commerce—a kind of commerce irrelevant to the case at hand.*
>
> *The difficulty with respondents' argument is that the FTAIA originated in a bill that initially referred only to "export trade or export commerce." H. R. 5235, 97th Cong., 1st Sess., § 1 (1981). But the House Judiciary Committee subsequently changed that language to "trade or commerce (other than import trade or import commerce)." 15 U. S. C. § 6a. And it did so deliberately to include commerce that did not involve American exports but which was wholly foreign.*

This is especially interesting in the standard-setting context, as the setting of a standard might not necessarily involve the export of goods.

The Supreme Court went on to refuse to apply the Sherman Act in cases where "**the adverse foreign effect** [of an antitrust violation] **is independent of any adverse domestic effect**."[211] [emphasis added]. The Court began by stating that the international reach of the Sherman Act should not be interpreted extensively as it must be assumed that Congress did not want to impose its laws extraterritorially, and that considerations of comity may only be overruled by an express intent of Congress.[212]

> *This Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nation […]. This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow […].*

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[211] Id. at 162. See also fn 213 hereunder. Note that such a wording is reminiscent of the language used by the Permanent Court of International Justice ("PCIJ") in the *Lotus* case at p. 33, supra at fn 202:

> *[T]he offense for which Lieutenant Demons [the officer in charge on the Lotus at the moment of the collision] appears to have been prosecuted [in Turkey] was an act—of negligence or imprudence—having its origin on board the Lotus [a French boat], whilst its effects made themselves felt on board the Boz-kourt [a Turkish boat, with which the Lotus collided.] These two elements are,* ***legally, entirely inseparable****, so much so that their separation the offense inexistent […].*[emphasis added]

[212] This view was already defended by Justice Scalia in its concurring opinion in *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 113 S.Ct. 701 (1990).

> *This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.*
>
> *No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress* ***domestic*** *antitrust injury that foreign anticompetitive conduct has caused.*
>
> *[…]*
>
> *We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of American companies, […]; and some of the anticompetitive price fixing conduct alleged here took place in* ***America****. But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct* ***that Congress sought to forbid****, for Congress did not seek to forbid any such conduct insofar as it is here relevant, i.e., insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct also causes domestic harm.*
>
> *[…]*
>
> *Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.* [emphasis added]

The Supreme Court added that the FTAIA was to be understood as a limitative statute:

> *[T]he FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not* ***to expand*** *in any significant way, the Sherman Act's scope as applied to foreign commerce.* [emphasis added]

Accordingly and given that the Sherman Act was unlikely to apply to a similar situation before the FTAIA, the Supreme Court reiterated:

> *[T]aken together, these two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.*

The Supreme Court also considered the respondent's argument that the wording of the FTAIA would allow a plaintiff to invoke the Sherman Act provisions if the plaintiff could point to "a" claim that an American plaintiff might have, even if the respondent as a foreigner did not have one. In other words, the respondent was claiming that the Sherman Act had to apply if even "one" potential plaintiff might have invoked the FTAIA exception. However, the US Supreme Court clearly rejected this view:

> *The FTAIA says that the Sherman Act applies to foreign "conduct" with a certain kind of harmful domestic effect. Why isn't that the end of the matter? How can the Sherman Act both apply to the conduct when one person sues but not apply to the same conduct when another person sues? The question of who can or cannot sue is a matter for other statutes (namely, the Clayton Act) to determine.*
>
> *Moreover, the exception says that it applies if the conduct's domestic effect gives rise to "a claim," not to "the plaintiff's claim" or "the claim at issue." […] The alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to "a" claim. Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically speaking, they say, that is beside the point.*
>
> *[…]*
>
> *At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language. But those arguments do not show that we* ***must*** *accept that reading. And that is the critical point. The considerations previously mentioned—those of comity and history—make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it. And, for the reasons stated, we believe that the statute's language permits the reading that we give it.* [emphasis added]

Having acknowledged the restricted scope of the Sherman Act (i.e., the Sherman Act shall not be applied extraterritorially unless an express Congressional intent pointed in that direction) and having rejected the view that a foreign plaintiff might derive its right to invoke the Sherman Act from an "American" claim, the Supreme Court should have gone on to define what it understood as an "independently caused foreign injury."[213] But as the Court of Appeals had not had the opportunity to rule on this issue, it simply remanded the case.

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[213] The court merely stated:

> *[W]e have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm.*

As Hovenkamp[214] points out:

> *In any cartel the harm suffered by different customers is "linked" in the sense that one cartel member's prices depend on the cooperation of other cartel members in keeping up their price as well. If "linkage" meant no more than this, then the Court's qualifier would have swallowed up the remainder of the opinion. More likely the Court was referring to situations in which the defendant committed exclusionary practices targeting a domestic rival, resulting in higher prices when the rival was destroyed or injured. In such a case one could say that the domestic injury* ***caused*** *the foreign injury.*

3.2.7.3. Principle of comity

The principle of (negative[215]) comity stands for the proposition that an antitrust judge should not rule on or become entangled in the public policy of a foreign state. Although the *Alcoa* and FTAIA tests are intended to be the outside limits of the jurisdictional reach of antitrust laws, courts nevertheless also forbid themselves to rule on certain international matters and decline jurisdiction out of comity concerns. This principle reflects the idea that American courts should act in a neighborly fashion with respect to the different policies of other nations. Comity might be seen as setting a reasonableness standard to jurisdiction assessment: first, the court establishes its jurisdiction according to the FTAIA or the *Alcoa* case law, and second, it satisfies itself that the intervention is reasonable (comity.) Hence, under comity the court will assess whether the intervention of another jurisdiction would not be more reasonable.

In the *Timberlane*[216] case, the Ninth Circuit developed a "rule of reason" for determining when a court shall apply comity—that is, when it should refuse to hear an antitrust case challenging conduct abroad.[217]

1. *Did the alleged restraint affect, or was it intended to affect, United States foreign commerce?*
2. *Is the alleged restraint "of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?"*

> *Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.* Id. at 173-174.

[214] H.HOVENKAMP, *Federal Antitrust Policy;* 3d ed., supra at fn 119, pp. 770-771.

[215] Negative comity must be distinguished from positive comity which requires that antitrust agencies consult other foreign antitrust agencies when they apply their domestic antitrust laws to foreign interests. Positive comity is mandated by international agreements. See, e.g., the US-EU 1991 Cooperation Agreement in antitrust matters, Chapter 4, Subsection 4.2.2.4.2. Bilateral cooperation.

[216] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*), on remand, 574 F.Supp. 1453 (N.D.Cal.1983), aff'd, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032, 105 S.Ct. 3514 (1985) (*Timberlane II*).

[217] It is an open question whether such a balancing of differing criteria is a requirement of international law. See F.MANN, "The Doctrine of International Jurisdiction Revisited After Twenty Years," in: *Recueil des Courts de l'Académie de Droit International,* pp. 12 and ff, 1984.

3. *Do consideration of international comity counsel against exercising jurisdiction in this case? This question involves consideration of the following factors:*

    a. *the degree of conflict with foreign law or policy;*
    b. *the nationality or allegiance of the parties, and their place of doing business;*
    c. *the extent to which either states could expect compliance with its judicial orders;*
    d. *the effects on the various sovereigns involved;*
    e. *whether there was an explicit intent to harm or otherwise affect United States commerce and the foreseeability of such an effect;*
    f. *the relevant weight to be given to any conduct that occurred inside the United States.*[218]

This test has generally been well received.[219] However, as Hovenkamp remarks:[220]

> *One must question the wisdom and practicability of any test that lists numerous factors that are to be balanced in some unspecified way, with little direction as to how things should be measured or weights assigned. The degree of conflict with foreign law cannot be measured in pounds, and the relevant weight to be given to conduct in the United States cannot be measured in inches. Even if they could be, we could still not balance pounds against inches. Further, the test seems extraordinarily complex given the insubstantiality of the complaint. At the very least, before launching into such a test a court should inquire whether the antitrust claim should be dismissed on more readily apparent grounds.*[221]

In *Hartford Fire Ins. Co. v. California,*[222] the Supreme Court held that concerns of comity did not require dismissal of an antitrust claim as long as there was no positive conflict between the aspect of American antitrust and the aspect of foreign law. Thus, an anticompetitive activity abroad may be challenged even if it is lawful in the country in which it was performed, as long as the violator was not legally required to engage in the activity at stake. When the violator had the discretion not to violate US antitrust laws, comity considerations did not need to be taken into account.

In *Hartford*, the Court had to review the applicability of the Sherman Act to an agreement between insurers concluded in London, in which American risks would not be covered. Although British law traditionally considered such agreements between insurers legal, the US Supreme Court considered the Sherman Act to apply; thus the insurers had to respect its provisions as long as they were not compelled by foreign law to violate them.[223]

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[218] 549 F.2d at 614 (*Timberlane I*) as cited by H.HOVENKAMP, *Federal Antitrust Policy*, § 21.2, p. 772, 2005.
[219] *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), *Trugman-Nash v. New Zealand Dairy Bd.,* 954 F.Supp. 733 (S.D.N.Y. 1997), *Montreal Trading v. Amax*, 661 F.2d 864 (10th Cir. 1981), *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F.Supp. 1161, 1187 (E.D.Pa. 1980). However, the *Timberlane* holding was restricted by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 701 (1990), presented hereunder.
[220] See also, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (DC Cir. 1984).
[221] H.HOVENKAMP, *Federal Antitrust Policy*, at § 21.2, p. 772, 2005.
[222] 509 U.S. 764, 113 S.Ct. 701 (1990).
[223] See also the dissenting opinion by Justice Scalia, who argues that Congressional intent may not have encompassed an extraterritorial application of the Sherman Act.

It must be underlined that as the boundaries of comity concerns are not precisely drawn, comity principles grant the court broad powers. Although the *Timberlane* and *Hartford* case law have been criticized by commentators,[224] it remains difficult to find a clear-cut criterion for defining the optimal international boundaries of antitrust statutes.

Moreover, it would seem that a certain tension divides the *Hartford* and *Empagran* case law over the approach towards comity issues. Indeed in *Hartford*, the Court takes an expansive view of the reach of the Sherman Act, whereas it seems to defend the opposite position in *Empagran*. Yet the two cases may be distinguished. In *Hartford*, the Court considered there to be no conflict with foreign law, so comity issues need not arise, whereas in *Empagran*, the anticompetitive behavior clearly run afoul of foreign antitrust laws. It must also be stressed that in *Empagran*, American interests were not very important,[225] whereas in *Hartford*, the American antitrust injury was quite substantial. It is a matter of debate whether the significance of the injury plays a role in the weighing of comity interests (*Timberlane* does not expressly list it as a factor to be weighed in) or in the definition of the independence of a foreign injury (*Empagran.*) Furthermore, it is also an open question whether the *Empagran* holding (an FTAIA case) bears an influence on the application of the comity principle in areas other than the FTAIA, namely in import cases. Although the Supreme Court has heavily insisted on comity principles, *Empagran*'s real impact will probably only be assessable once the concept of "independent foreign harm" has been clarified.

3.2.7.4. Excursus: the DoJ's Guidelines for International Operations

In 1988, the DoJ adopted the Enforcement Guidelines for International Operations ("International Guidelines") as a complement to the FTAIA. As part of a plan to relieve US enterprises from excessive government regulation, American exports were to be freed from antitrust overview.[226] Accordingly, footnote 159 of the International Guidelines stated:

> *The Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.*[227]

However, when President George H.W. Bush decided to tackle Japanese business obstructionism, the limited reach of the US antitrust laws was seen as a disadvantage. Japanese markets were allegedly protected from foreign competition by a mix of public and private behavior. To put pressure on Japanese anticompetitive conduct, the Bush administration looked to the antitrust statutes as a mighty "market opener." When footnote 159 stood in the way, the DoJ decided to simply erase it. Thus in April 1993, the DoJ announced that US antitrust statutes would be applied "to US and foreign commerce" and to harm incurred by US exporters.[228] The Clinton Administration endorsed such a policy, with

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[224] See, e.g., the Agora of the American Journal of International Law on this subject.
[225] American plaintiffs had already been vindicated in a parallel legal proceeding.
[226] See, E.FOX, "Towards World Antitrust and Market Access", in: *American Journal of International Law*, 91, 1997, p. 1, E.FOX, "The End of Antitrust Isolationism—The Vision of One World", in: *U.Chi. Legal* F 221, 1992, and J.DAVIDOW, "The Sherman Act and Outward Bound Commerce", in: *George Mason Law Review*, 6/447, 1998, and J.DAVIDOW, "Application of U.S. Antitrust Laws to Keireitsu Practices," in: *World Competition*, 18/5, 1994.
[227] Note that the International Guidelines apply to both imports and exports.
[228] In *United States v. C. Itoh & Co Ltd*, (1982-83 Trade Cas. (CCH) (W.D.Wash.1982), the DoJ had already brought a civil action against eight Japanese importers of Alaskan seafood products, charging that they had agreed to temporarily boycott US exporters in order to drive prices down. The Attorney General had announced the DoJ would no longer comply with footnote 159. See J.DAVIDOW, "The Sherman Act and Outward Bound

the 1995 International Guidelines containing various examples where the US antitrust statutes are construed as applying to harm suffered by US exporters.[229]

Under the International Guidelines, comity considerations have to be taken into account. The Agencies have established their own criteria for such an analysis (§ 3.2):

> *In performing a comity analysis, the Agencies take into account all relevant factors. Among others, these may include:*
>
> *the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;*
> *the nationality of the persons involved in or affected by the conduct;*
> *the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;*
> *the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;*
> *the existence of reasonable expectations that would be furthered or defeated by the action;*
> *the degree of conflict with foreign law or articulated foreign economic policies;*
> *the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and*
> *the effectiveness of foreign enforcement as compared to U.S. enforcement action.*
>
> *The relative weight that each factor should be given depends on the facts and circumstances of each case. With respect to the factor concerning conflict with foreign law, the Supreme Court made clear in Hartford Fire that no conflict exists for purposes of an international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both. Bearing this in mind, the Agencies first ask what laws or policies of the arguably interested foreign jurisdictions are implicated by the conduct in question. There may be no actual conflict between the antitrust enforcement interests of the United States and the laws or policies of a foreign sovereign. This is increasingly true as more countries adopt antitrust or competition laws that are compatible with those of the United States. In these cases, the anticompetitive conduct in question may also be prohibited under the pertinent foreign laws, and thus the possible conflict would relate to enforcement practices or remedy. If the laws or policies of a foreign nation are neutral, it is again possible for the parties in question to comply with the U.S. prohibition without violating foreign law.*

Finally, the International Guidelines indicate that antitrust agencies will take comity into consideration when assessing jurisdiction. However, the DoJ believes that courts should not interfere with its decisions in this matter. Once the decision is made, it (§ 3.2):

Commerce," in: *George Mason Law Review*, 6, p. 447, 1998, and after the deletion of footnote 159, *United States v. Pilkington PLC,* 994-2 Trade Cas. (CCH) (D.Ariz.1994).

[229] See, e.g., Illustrative Examples D and E.

> *[R]epresents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to "second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances." To date, no Commission cases have presented the issue of the degree of deference that courts should give to the Commission's comity decisions. It is important also to note that in disputes between private parties, many courts are willing to undertake a comity analysis.*

3.2.7.5. Act of State doctrine

The Act of State doctrine is defined by the Restatement Third of Foreign Relations Law § 443 (1987). Under this definition, American courts should avoid "sitting in judgment on the acts of a governmental character done by a foreign state within its own territory and applicable there." The Act of State doctrine distinguishes between "public" and "commercial" acts of a foreign sovereign. When the solution of an antitrust case requires the court to pass judgment on—or to become entangled in—the validity of a foreign non-commercial act (i.e., a public policy decision of another sovereign state), the court should decline jurisdiction. For example, in *Hunt v. Mobil Oil Corp.*,[230] the Hunt brothers alleged that Mobil Oil Corp. and others conspired with the Libyan government to have the Hunts' properties in that country expropriated. The Second Circuit ruled that the Act of State doctrine barred the adjudication of the claim, as it would have necessitated review of Libya's motives and the legality of its sovereign act. On the other hand, subsequently the US Supreme Court has strictly limited the discretion of a judge to simply dismiss a claim on Act of State grounds merely because the case might produce uncomfortable relations with a foreign sovereign. In *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*,[231] the Supreme Court stated:

> *[T]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereign taken within their own jurisdictions shall be deemed valid.*[232]

3.2.7.6. Foreign Sovereign Compulsion doctrine

The Foreign Sovereign Compulsion doctrine is somewhat akin to the Act of State doctrine. It provides that an antitrust defendant can invoke compulsion of a foreign sovereign to avoid application of the antitrust laws. However, the foreign state must actually compel compliance with its laws for the doctrine to be validly invoked; if the state merely tolerates[233] or approves the activity or unduly compels extraterritorial acts,[234] the doctrine cannot be invoked.

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[230] 550 F.2d 68 (2d Cir. 1977), cert. denied, 434 U.S. 984, 98 S.Ct. 608 (1977).
[231] 493 U.S. 400, 110 S.Ct. 701 (1990).
[232] Id. at 409.
[233] *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706, 82 S.Ct. 1404 (1962):

> *There is no indication that the [State regulating entity] or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.*

[234] Id. at 707:

However as the compulsion's *onus probandi* generally lies with the plaintiff, the court may elect to review the anticompetitive conduct anyway.

3.2.7.7. Foreign Sovereign Immunity doctrine

The Foreign Sovereign Immunity doctrine stands for the proposition that foreign states themselves (and not private parties as under the Foreign Sovereign Compulsion doctrine[235]) are not reached by antitrust laws as long as they engage in non-commercial activities. The application of the Foreign Sovereign Immunity is regulated by the Foreign Sovereign Immunities Act of 1976.[236] Under the Act, Foreign Sovereign Immunity is generally denied when: 1) commercial activities are carried on in the US by a foreign state; 2) acts are performed in the US in connection with a foreign sovereign's commercial activities elsewhere; or 3) acts are committed outside the US in connection with commercial activities elsewhere if the act causes a "direct effect" in the US.

In summary, although each of these four doctrines use different tools and is applicable in different circumstances, they all converge on one point: in principle, antitrust intervention is not welcome when the wrong being challenged is the policy choice of a sovereign government.

3.3. Substantial concepts

The two main substantial provisions of the Sherman Act, Sections 1 and 2, operate to create a conceptual division between first, a situation where a plurality of firms agree to restrain trade, and second, the behavior of a single firm seeking "monopolization." Thus, the present section is also divided into two parts, with the first presenting the approach of the US antitrust law on "cartels" *lato sensu* (i.e., anticompetitive behavior that is the result of acts of more than one firm.) The second part then provides a summary of the US approach on monopolization attempts. Of course, what follows is not an exhaustive discussion of antitrust issues, but merely represents a small subset of the antitrust analysis in these areas. In fact, the present section purports to treat these issues in a functional manner, i.e. to the extent relevant for the discussion in the standardization context.

> *Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.*

See also, *Matsushita Elec. Indu. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

[235] The Foreign Sovereign Immunity doctrine is relevant when the foreign government itself (or one of its entities) is sued. The State of Action doctrine is applied in lawsuits between private parties.

[236] 28 U.S.C.A. § 1602 and ff.

3.3.1. "Cartels"

Section 1 of the Sherman Act forbids contracts, combinations, and conspiracies in restraint of trade or commerce. A cartel is a group of companies who should be competitors, but who have "agreed"[237] to cooperate so as to avoid competition at one or more levels. Most cartels involve price-fixing with the view of extracting monopoly profits.[238] However, the members of a cartel can also agree on other competitive factors such as output, investment spending, or product characteristics. The link with standardization agreements does not need to be explained in detail, as such agreements inherently entail a form of collaboration between undertakings which m involve an agreement on one of the above-mentioned factors.

This subsection is divided into three parts: first, we present an overview of circumstances which favor cartel agreements; second, we provide a basic analysis of a particular market structure, oligopoly;[239] and, third, we take a look at joint ventures and the risks they may entail for competition.

3.3.1.1. Conditions favoring cartels

Price cartels seem at first sight to be easily enforceable, as the cartel members merely need to agree on a price and stick with it. However, it is not always easy to monitor prices in the market and make certain everyone follows the fixed price. Nevertheless, this is crucial for the survival of the cartel given that cartel members usually have a strong individual incentive to undercut the cartel price to sell more products. As a result, cartels are more likely to appear in markets with certain specific features which allow the participants to police the cartel more efficiently. The present subsection provides a brief presentation of such features.[240]

3.3.1.1.1. Ability to raise market prices

A cartel must possess the ability to raise the market price. The most straightforward way for a cartel to reach such a position is to regroup firms possessing a large aggregated market share. If the cartel members are the only producers able to respond to consumer needs, consumers will have no other choice but to buy their products at the price imposed by the cartel members. However, a higher price usually means lower sales as consumers are turned off. Thus, a cartel has a strong incentive to determine the price (or output) level which guarantees

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[237] As we will see, what constitutes an agreement has received extensive interpretation in the case law. Cartels *stricto sensu* generally refer to explicit agreements in contrast to situations where the agreement is only implicit.

[238] Price-fixing is said to be "naked"—and therefore *per se* illegal—when it is not accompanied by any integration of the participants' business activities. *U.S. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 S.Ct. 540 (1897).

[239] An oligopoly is a market where only a few firms hold most or all of the market share. However, an oligopoly is not a form of cartel as there can be as much competition in one as in an atomistic market. Oligopolies have attracted special antitrust interest, as risks of anticompetitive behavior are generally much higher. In such markets, anticompetitive behavior can take the form either of a cartel *stricto sensu* (through an express agreement) or of an implicit agreement to avoid competition. This makes oligopolies particularly suspicious as implicit agreements are more stable than explicit agreements (as they constitute a reasonable strategy), and further because implicit agreements are hard to detect and very unlikely to occur under atomistic competition. As a result of the increased risks for competition aroused by oligopolistic market conditions, oligopolies are often treated under rules similar to cartel rules. Consequently, oligopolies are discussed under the same section as cartels in this study.

[240] See generally, D.W.CARLTON/J.M.PERLOFF, *Modern Industrial Organization*, 3d ed., pp. 125 and ff, 1999.

the highest profits. However, if consumers have no choice but to buy the product (for example, a drug), the cartel price might reasonably be higher than the equilibrium price (product inelasticity.) As Carlton and Perloff put it:

> *Only if a cartel is expected to raise the price and keep it high do firms join. The more inelastic the demand curve facing a cartel, the higher the price the cartel can set and the greater the profits. If the cartel's demand curve is inelastic (relatively vertical at the current price), raising price can significantly raise revenues (that is, quantity demanded falls by a smaller percentage than price rises) and profits. In contrast, if a potential cartel faces an elastic demand curve (relatively horizontal), raising price causes revenues to fall (because quantity would fall by more than price increases, and profits may rise only slightly).* [241]

Limited excess capacity by competitors can be an additional important factor in determining the ability of a competitor to raise prices. When a dominant firm (or a group of them) knows that competitors do not have the opportunity to raise their output (or have it only at an unreasonable cost or with a substantial delay), it might be in a position to confidently raise its prices, as it knows its competitors can only undercut prices on a limited quantity.[242]

3.3.1.1.2. Barriers to entry

The fact that a market is protected by relatively high barriers to entry is generally an advantage for the policing of the cartel. Given such barriers, new entrants may be less inclined to enter a cartelized market, so the cartel may instead focus its attention on actual competitors. However, not all costs necessary to enter a market are entry barriers, as "some "barriers" simply reflect costs that existing companies must assume in order to be competitive."[243] The term "barrier to entry" may be understood as a factor that renders costs of doing business higher for an entering firm than for an incumbent.[244] Entry barriers are central for the duration of a cartel as they will influence the intensity of the external threats a cartel faces. As the cartel increases its revenues, outsiders have incentives to enter the market. The higher the entry barriers, the higher prices have to be raised above the competitive level to induce entry by potential competitors.

As Salop[245] explains, the principal barriers to entry related to the characteristics of the market are the following:

(a) natural monopolies and economies of scale;
(b) cost and demand disadvantages;
(c) slow speed of entry (also called "mobility barriers"); and
(d) risks of sunk costs.

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[241] D.W.CARLTON/J.M.PERLOFF, supra at fn 240, p. 126.
[242] For a brief discussion of Cournot's equilibrium issues, see fn 263.
[243] Note of J.SALOP in: M.HANDLER/R.PITOFSKY/H.J.GOLDSCHMID/D.P.WOOD, *Trade Regulation, Cases and Materials*, University Casebook Series, 4th Ed., Foundation Press, Westbury, New York, p. 229, 1997.
[244] Economists do not agree on a single definition of entry barriers. For a presentation of the distinction between the Stiglerian and Bainian schools, see Chapter 4, Subsection4.3.4.2. Dominant position.
[245] SALOP, supra at fn 244.

(a) With respect to the first, plants often face u-shaped average cost curves. On the declining side of the curve, every item produced diminishes the average costs. To be profitable, a firm must try to minimize its average costs. This can best be achieved by selling the amount of items which does so, which in turn implies there must be a sales threshold under which it is not profitable to enter a market. Economists call this threshold "the Minimum Viable Scale" ("MVS.")

As Salop puts it:

> *If MVS is large, entry is less likely for two reasons. First, the entrant is less likely to achieve the MVS sales level, and so is less likely to enter. Second, when MVS is high, an entrant attempting to reach MVS is more likely to induce a competitive price reaction by incumbent firms, a price reaction that will reduce the profitability of the entry (i.e., at a lower price MVS is higher)*[246]

(b) Further, an entrant can face a different cost structure and a different demand curve than an incumbent. Cost disadvantages can stem from various sources:

(1) *Legal monopolies and licenses*: in some markets the government has reduced the number of competitors by legislation. This is the case in a legal monopoly[247] or when the number of competitors is legally limited.[248]

(2) *Superior access to key resources*: an incumbent may earn superior profits because it has access to most of an essential material, has a locational advantage, or is vertically integrated when duplication of integration is costly.

(3) *Customer loyalty*: trademarks allow customers to recognize the producer of a specific product and often serve as an indication of the properties of the product. Once an incumbent has generated enough trust in its products, customers may be reluctant to switch to another product unless there is a significant price savings.

(c) The slow speed of entry[249] into a market clearly favors a cartel. When entry into the market is slow, the cartel has ample opportunity to prepare for the new entrant and fall back to competitive pricing to counter it. On the other hand, when cartel members fear sudden entry into the market of potential competitors, they may be forced to price their products at only minimally supracompetitive levels. Thus a new entrant would not be able to benefit from its lower prices and/or able to fully benefit from the entry.

(d) "Sunk costs" are costs that are irreversible, such as investments that cannot be recovered if entry into the market fails. In order to predict rational behavior of outsiders to the market, sunk costs have to be factored *ex ante* in the following way: sunk cost multiplied by the risk of entry failure equals the expected amount of sunk costs:

f(x);x = {expected risk of sunk costs}= E {expected sunk costs} x 1/R {risks of sunk costs}

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[246] SALOP, supra at fn 242.
[247] See state concessions or legal monopolies such as patents and copyrights.
[248] See, e.g., the third generation mobile telecommunication licensing schemes.
[249] The speed of entry can be defined as the time necessary for a new entrant to enter a market relative to the time necessary for the incumbent to adapt its strategy to the new entrant.

The higher the expected risk of sunk costs, the higher the expected profits have to be in order to provide incentives to enter the market. Sunk costs can therefore discourage market entry.

3.3.1.1.3. Market concentration

Market concentration has no clear-cut impact on the likelihood of a cartel's emergence, as cartels can appear both in concentrated markets and in those where competition is almost atomistic. However, empirical studies have outlined some general conclusions.

As a general empirical observation, the fewer actors in a market, the more conducive the market is to cartelization.[250] Hay and Kelley[251] found that in 42% of the US Department of Justice price-fixing cases, the sum of the market shares of the four biggest firms was over 75%, while in another 34% of the cases, their market share was between 51 and 75%. Therefore, in 76% of the cases, price-fixing agreements were obtained in markets where the four leading firms controlled the majority of the market.[252]

This may be explained in at least three different ways. First, as it is difficult to control everyone, cartel-policing costs increase with the number of cartel participants.[253] Second, because every member of the cartel has an incentive to cheat, the more cartel participants, the greater the likelihood that cheating will in fact occur. Moreover, as the effect of a cheater's increase in market share is likely to be spread among a greater number of cartel participants, cheating is less likely to cause much alarm. Third, transaction costs increase with the number of participants, as participants have generally to agree on a wide range of issues. Because their preferences are likely to differ from one another, more participants make it less easy to reach a compromise.

3.3.1.1.4. Producer homogeneity

If not all producers are equally efficient, those members who are less efficient will want to set a higher cartel price than the more efficient.[254] It is also easier to agree on an output reduction when all participants have approximately the same market share.[255]

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[250] J.T.SCOTT, "Multimarket Contact among Diversified Oligopolists", in: *International Journal of Industrial Organization,* 9/225-238, 1991, shows that for largely diversified firms, cartel policing costs can be significantly reduced as communication costs may be divided across different markets. Moreover, cheating is less likely as it would put all cartel agreements in danger. Therefore, when cartel members agree on prices for multiple market contacts, market concentration in a single market can be misleading. This insight might be likened to the repetitive aspects of game theory. When people play more games, cooperation is more likely (especially when the number of games is infinite.)

[251] G.HAY/D.KELLEY, "An Empirical Survey of Price-Fixing Conspiracies", in *Journal of Law and Economics* 17:13-38, 1976.

[252] R.POSNER, *A Statistical Study of Antitrust Enforcement*, in *Journal of Law and Economics*, 13/365, 1970, shows that cartels tend to arise in smaller geographical markets. Among antitrust cases litigated by federal antitrust authorities from 1890 to 1969, 47.4% involved conspiracies in local or regional markets, 37.6% in national markets, and 8.7% in international markets.

[253] Note, however, that even if there are many firms in a market, the largest ones (dominant firms) may meet and establish a cartel that does not explicitly include the smaller fringe firms. This is especially true if the fringe firms cannot easily increase their production or sales.

[254] This is so because each firm desires to equate its marginal costs with its marginal revenues. However, it could also be stated as a normative proposition that the larger the number of participants with more or less an equivalent market share and capacity, the larger the incentive to cheat.

3.3.1.1.5. Sales methods

Sales methods have an important impact on a cartel's feasibility and durability. As cartel members all individually have incentives to cheat, the cartel has to incur policing costs to ensure that all participants abide by the rules. Moreover, some sales practices are easier to monitor than others. Cartels work best in auction markets where the cartel members can discuss *ex ante* who is going to win the auction[256] and a cheater would quickly be discovered. When transaction prices and terms have to be published and are nonnegotiable,[257] policing costs are lowered. But when sales conditions are kept secret, detection is less likely and incentives to cheat increase. As a result, publicly announced prices and terms are generally believed to suggest that a market is conducive to express or tacit collusion.

3.3.1.1.6. Product homogeneity

When consumers are indifferent regarding the producer of a given product and product characteristics are identical, competition takes place only on price. On the other hand, when the quality products produced by cartel members is heterogeneous, it may be difficult for members to agree on a single price, as the better products are likely to attract more consumers. In such cases, cartel members need to agree on various prices for each level of quality (or on output levels, which may be even more difficult to control.) An agreement for such a cartel would have to include not just one price but rather a range of prices so that participants could maintain their market share. Moreover, each time a product is modified, a new relative price would have to be agreed upon, so transaction costs are likely to be substantial.

In such situations, product standardization might help in solving the problem of product heterogeneity and thus facilitate the cartel's price policing.

3.3.1.1.7. Trade associations

> *People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.*

Surprisingly, the author of this quotation is one of the founding fathers of modern economics, Adam Smith,[258] who supported liberalism but was also conscious of some of its limitations. Trade associations lower transaction costs by providing opportunities for meeting competitors and coordination of market activities. Hay and Kelley[259] found that 7 out of 8 price-fixing cases where more than 15 firms conspired involved trade associations. In all cases of

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[255] Empirically, big cartel members have had to give up a proportionately larger share of their markets to persuade smaller members to join the cartel.
[256] This is often the case for government procurement contracts.
[257] For example, this is the case when prices need to be advertised.
[258] A.SMITH, *The Wealth of Nations*, Vol. 1, p. 141, 1776.
[259] G.HAY/D.KELLEY, supra at fn 251.

conspiracies involving more than 25 firms, trade associations provided the discussion forum. When fewer firms conspired, the involvement of trade associations was lower, but still made up for 29 to 36% of the overall cases.

SSOs are not only a form of trade association, but they are a potentially troublesome one, as they inherently require that members collaborate on technical matters in order to adopt and promote standards. Standardization often involves exchanges of information that go beyond what is normally disclosed in the competitive process. This information often pertains to data sensitive to the competitive process, such as innovation or research and development.

3.3.1.1.8. Detecting and punishing cheating

The costs of the cartel must not exceed its expected benefits. On the one hand, organizational costs for the cartel must be kept as low as possible, while policing and transaction costs should also be minimal. On the other hand, expected punishments for antitrust violations should not be too high, otherwise no market actor other than an extreme risk taker[260] would enter the cartel.[261]

When cartel members have strong incentives to cheat, it is necessary for the cartel's viability that it be able to detect when cheating occurs and take adequate measures to prevent further undercutting of prices or output. This can be done in dozens of different ways, ranging from purchases between members of the cartel to transparency mechanisms. The higher and likelier it is that cheaters will be caught and punished, the fewer participants are likely to cheat.

3.3.1.2. Oligopolies: standardization of products and terms as evidence that collusion is occurring

An oligopoly is a market in which only a few firms hold most or the entire market share. As firms usually hold substantial market power by themselves and the costs of reaching an agreement in this type of market is likely to be very low, the risk of anticompetitive behavior is higher than in markets where competition is atomistic, i.e., where competitors are price-takers. In the 1960s, some have argued that it could be rational for oligopolists to avoid competition and try to extract as much profit as they can from their market.[262] In oligopolies, anticompetitive behavior can occur even in the absence of an express agreement among market actors; for example, this is the case in "follow-the-leader" or in Cournot's equilibrium[263] scenarios.

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[260] Empirical evidence shows cartels are more likely in low-profit industries. See, e.g., G.HAY/D.KELLEY, quoted above at fn 251, or R.POSNER, "A Statistical Study of Antitrust Enforcement," quoted above in fn 252. The fact that in such industries, the prospect for profits is low may induce market participants to enter a cartel in order to increase their benefits.

[261] R.POSNER, supra at fn 252, shows that price-fixing agreements have been more numerous during lax enforcement periods by the DoJ.

[262] See D.TURNER, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, in *Harvard Law Review*, 75/655, 1962, in which the author also argued that noncompetitive oligopolies are beyond the reach of the Sherman Act because given the structure of the market, they are both rational and virtually inevitable.

[263] The term "Cournot's equilibrium" describes a situation where firms reach an anticompetitive equilibrium without needing to enter into an agreement about their level of output. Cournot's equilibria have been modeled in game theory as a one-period game, in which two firms produce an undifferentiated product with a known demand curve. The two firms compete only by simultaneously choosing their respective level of output. Each firm determines its level of output assuming their opponent's output is fixed. Equilibrium is reached when each

However, Section 1 of the Sherman Act only prohibits contracts, collusion or conspiracies in restraint of trade. In the absence of such an agreement, Section 1 of the Sherman Act cannot be violated. The US Supreme Court has clearly established that prosecution under the Sherman Act can only take place in the presence of an agreement,[264] although evidence of an agreement may sometimes be circumstantial.[265] This has almost unanimously been criticized as being unfortunate, because some types of anticompetitive behavior do not always require an agreement.[266] If companies naturally move to a cooperative equilibrium which entails the same effects as a cartel, why do they need an agreement to formalize what they would be doing anyway? There seems to be no quick answer to this question in the literature.

Antitrust enforcers have nevertheless striven to circumvent this impediment. Their strategy is threefold:

First, they have tried to persuade courts that direct proof of an agreement was not necessary and that circumstantial evidence was sufficient. Case law in this area has varied, but it seems that recent legal standards have become more restrictive.

Second, enforcers have argued that in some cases firms could be prosecuted even in the absence of an agreement. The FTC (which enjoys powers granted by Section 5 of the FTC Act[267]) has championed this point of view. However, its views have not been met with much enthusiasm.

Third, authorities have tried to challenge certain devices whereby competition could be endangered, as well as practices that could facilitate anticompetitive endeavors.

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firm correctly assumes the opponent's output and chooses a level of output that maximizes its own profits. In such situations, there is no incentive for either firm to modify its output. For an introduction to this concept, see CARLTON/PERLOFF, supra at fn 240, at pp. 156 and ff., and H.R.VARIAN, *Intermediate Microeconomics; A Modern Approach*, 5th ed., pp. 478 and ff., 1999; for a more in-depth survey, see C.SHAPIRO, "Theories of Oligopoly Behavior," in: R.SCHMALENSEE/R.WILLIG (EDS.), *Handbook of Industrial Organization,* 1989. Cournot equilibria are particularly dangerous for competition as they are usually much more stable than other cartels. Indeed, in these scenarios, each oligopoly member equates its own marginal cost and marginal revenues. This means that each firm is maximizing its profits so no one has an incentive to deviate. This is not the case in "ordinary" cartels where each firm has incentives to cheat, as a firm's marginal cost is much smaller than its marginal revenue. However, to be viable, Cournot's equilibria need to have prices made across the board. Standardization of products and terms is therefore central in Cournot's equilibria as they usually aim at increasing transparency of prices and limit competition on payment methods. In particular, secret discounts can greatly undermine a Cournot's equilibrium as they imply that price can be tailored for each client so no across-the-board pricing will occur.

[264] The FTC has at times tried to interpret § 5 of the FTC Act (which does not require proof of an agreement) as forbidding conspicuously parallel behavior; however, it has not been particularly successful. See the discussion below under Subsection 3.3.1.2.2. b). See also, e.g., *Conduit and Cable Co. v. FTC*, 168 F.2d 175 (7th Cir.1948), aff'd sub nom, 336 U.S. 956 (1949); *Clayton Mark & Co v. FTC*, 336 U.S. 956, 60 S.Ct. 888 (1949), *In re Kellog Co*., 99 F.T.C.8 (1982); or *National Lead Co*., F.T.C. 791, 876 (1953), aff'd on other grounds, 352 U.S. 419, 77 S.Ct. 502 (1957).

[265] See *First Nat'l Bank of Arizona v Cities Services Co*., 391 U.S. 253, 88 S.Ct. 1575 (1968) or *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp*., 346 U.S. 537, 74 S.Ct. 257 (1954).

[266] For a survey of economic theory on oligopoly, see F.M.SCHERER/D.ROSS, *Industrial Market Structure and Economic Performance*, Chapters 6-8, 3d ed., 1990.

[267] Section 5 of the Sherman Act does not require express proof an agreement, only evidence of an "unfair method of trade."

3.3.1.2.1. Proof of "agreement" by circumstantial or indirect evidence and tacit collusion

Proof of collusion[268] can be brought through direct evidence of an agreement or through circumstantial or indirect evidence, which allows a court to conclude that an agreement must have taken place. This means that as direct proof of an agreement is not always necessary,[269] proof may be provided by indirect evidence. However, in the absence of circumstantial evidence (i.e., in the case of mere parallel behavior), courts are unlikely to find that an agreement has been reached.[270]

In parallel behavior cases (for example, when a competitor acts as a price leader), firms can be induced to behave in a similar manner without creating a restriction to competition in the legal sense, as no "agreement" in the antitrust statutes' meaning of this term has taken place.[271] Thus, courts have generally admitted that parallel behavior alone is not sufficient to prompt prosecution, as some evidence of an agreement or additional circumstances is still necessary.

Courts have been persuaded that an agreement existed through circumstantial evidence when elements such as a history of price-fixing, an oligopolistic market structure, or exchanges of price information[272] were added to parallel behavior. Alternatively, a plaintiff can bring evidence: 1) that price increases would not have been in the individual interests of the parallel-behaving firms if they were acting independently; and 2) that the activity can only be reasonably explained by an anticompetitive purpose.[273] Even invited common action is not enough to establish an agreement when firms have good commercial reasons for engaging in a particular practice.[274]

Furthermore, the nature of the market is an important factor. For example, when consumers are indifferent regarding from which producer they purchase (i.e., the product is fungible), all producers have great incentives to react quickly to price falls. In this case, an agreement cannot be inferred as the reaction is perfectly rational and serves a competitive purpose.

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[268] An agreement under Section 1 of the Sherman Act must be entered into "between separate entities." *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984).

[269] See *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp*., 346 U.S. 537, 74 S.Ct. 257 (1954) and *First Nat'l Bank of Arizona v Cities Serv. Co*., 391 U.S. 253, 88 S.Ct. 1575 (1968).

[270] In *Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990), the Appellate Court for the Ninth Circuit held that "parallel pricing alone" was sufficient to prove an agreement. However, this conclusion seems to be in conflict with consistent Supreme Court case law. If in the 1940s, courts came close to accepting that parallel behavior could be proof of an agreement (see *American Tobacco*, 328 U.S. 781, 66 S.Ct. 1125 (1946) discussed in the next subsection), the recent case law is much more restrictive. Lower courts are nevertheless divided as to whether parallel behavior constitutes a violation of the Sherman Act. In such situations, they usually prefer to challenge the necessity of devices facilitating collusion. See, in particular, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002), cert. denied (Year).

[271] Of course, the economic effects of such conduct might be identical to those of a Sherman Act violation.

[272] Evidence of an agreement was rejected when exchange of price information was required by the nature of the market, for example, when prices need to be publicized. Of course, parallel behavior in markets where prices are determined individually or secretly for each customer are more suspicious. Very detailed identical behavior is also more suspicious. See *FTC v. Cement Inst.*, 333 U.S. 683, 68 S.Ct. 793 (1948) where prices were identical down to 1/10, 000 of one cent.

[273] *In re Beef Indus. Antitrust Litig.,* 713 F.Supp. 971 (N.D.Tex.1988).

[274] *Interstate Circuit Inc., v. United States*, 306 U.S. 208, 59 S.Ct. 467 (1939).

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,*[275] the Supreme Court took a restrictive stance on circumstantial evidence. According to the Court, evidence must "tend to exclude the possibility" that the defendants were acting independently.[276] In such cases, the Court ruled the defendant is entitled to summary judgment. This test has also been termed the "but for" test, which means that the parallel behavior of two or more economic agents will only be punished under Section 1 of the Sherman Act if it cannot be explained but for the participation of the agents in a cartel. Of course, if individual behavior represents an attempt to monopolize, it may be punished under Section 2 of the Sherman Act.

Somewhere in between an express agreement[277] (which is punishable) and conscious parallelism (which is not) lies tacit collusion (which is also deemed punishable.) According to Hovenkamp, two situations are generally encompassed by the concept of tacit collusion:

> *1) price-fixing, where the terms of agreement are communicated by informal or nonverbal means;* [and] *2) cooperative oligopolies that consist in a series of repeated actions and reactions until the parties settle upon an equilibrium.*[278]

One might wonder whether there is indeed a difference in nature between these two situations. In the absence of a formal agreement, firms adapt their behavior to signals sent by competitors with the goal of forming an oligopoly and thus maximizing their profits. Broadly speaking, although this would not be in accordance with the common law definition of "agreement," one might argue that in fact there has been an informal offer and informal acceptance, thus creating an informal agreement.

3.3.1.2.2. Antitrust prosecution without proof of an agreement

a) Under the Sherman Act

As already mentioned, case law consistently indicates that offenses based on Section 1 of the Sherman Act need an "agreement" in order to be prosecuted. However, in *American Tobacco Co. v. United States,*[279] the Supreme Court stated that no "formal" agreement was necessary:

> *Where the conspiracy is proved […] from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be*

[275].475 U.S. 574, 106 S.Ct. 1348 (1986).
[276] See also, *Eastman Kodak Co. v. Image Technical Services, Inc*. 504 U.S. 451, 112 S.Ct. 2072, where the Supreme Court seems to have slightly mitigated its view on what was to be held sufficiently plausible:

> *[Matsushita] did not hold that if the moving party enunciates any economic theory supporting its behaviour, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgement. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury […].*

[277] This expression includes agreements proved by circumstantial evidence.
[278] H.HOVENKAMP, *Federal Antitrust Policy*, supra at fn 119, § 4.4.b, p. 169.
[279] 328 U.S. 781, 66 S.Ct. 1125 (1946).

> *found in a course of dealings or other circumstances as well as in any exchange of words.*[280]

In this case, evidence showed that the three major firms that controlled 90% of the market suddenly and simultaneously modified their prices. However, this otherwise ambiguous statement appears to have been distinguished by subsequent case law. It does not seem to mean that no agreement whatsoever is necessary, but rather that an agreement according to the usual common law definition of the concept is not required.

b) Under Section 5 of the FTC Act

Section 5 of the FTC Act condemns "unfair methods of competition," but does not on its face seem to require an agreement between violators. The FTC has tried many times to argue that it has the power to challenge a practice which is anticompetitive without having to bring proof of an agreement between competitors. However, courts have not been very quick to embrace such a view. In *E.I. du Pont De Nemours & Co. v. FTC,*[281] the government argued that if a practice affects competition adversely and violates the "basic legislative goals of the Sherman Act," it can be subject to the FTC Act. The Supreme Court was not persuaded, requiring instead that the FTC show either [1] "evidence of anticompetitive intent or purpose on the part of the challenged producers, or [2] absence of an independent legitimate business reason for its conduct."[282]

3.3.1.2.3. Facilitating devices

Although they do not seem to be directly linked with the setting of prices and outputs, certain agreements between competitors can favor such price or output setting, with exchanges of information about prices and output among competitors and standardization of products or terms of sale often being mentioned as such devices. As a result, courts have sometimes intervened to strike them down. These factors are especially suspicious when prices seem unresponsive to market demand[283] and when market shares remain stable over time.

There is no doubt that agreements to exchange price or output information[284] or to standardize products constitute an agreement under the Sherman Act. However, it must be emphasized

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[280] 328 U.S. at 809-810, 66 S.Ct. at 1139 (1946).

[281] 729 F.2d 128 (2d Cir. 1984). See also*, Triangle Conduit and Cable Co. v. FTC*, 168 F.2d 175 (1948) aff'd sub nom., 336 U.S. 956 (1949); *Clayton Mark & Co v FTC*, 336 U.S. 956, 69 S.Ct. 888 (1949).

[282] *Du Pont*, 729 F.2d at 139 (2d Cir. 1984).

[283] A cartel also has incentives to tailor its price to the changing demand. It will not do so, however, until the members of the cartel agree. Generally, cartels are far slower to respond to demand variations than firms in a competitive market.

[284] On competitor exchange of information generally, see, e.g., E.FOX/L.SULLIVAN/R.PERITZ, *Cases and Materials on U.S. Antitrust in Global Context*, American Casebook Series, Thomson/West 2d ed., Chapter 5 D., 2004 at p. 392:

> *[C]ompetitors have exchanged information—for salutary and conspiratorial ends—since the beginning of market economies. For purposes of antitrust, the ambiguities are poignant. Knowledge and information is good Firms must have good market information to compete effectively. But recall: collecting the most sensitive market information about the competitors is one of the major tasks of cartelists; they need this information to set the joint profit-maximizing price and to police cheating. Moreover, in highly concentrated markets susceptible to lock-step*

that courts have rarely condemned product standardization agreements alone,[285] especially if the market at stake is not highly concentrated. They have, however, been very wary of any agreement on standardization of prices or other transaction terms.

In *Catalano, Inc. v. Target Sales, Inc.,*[286] the US Supreme Court condemned an agreement to eliminate short-term credits. The Court reasoned that an agreement to fix prices would be facilitated by this ban as competition at the credit level would be impossible; thus it was treated under the *per se* rule.[287] In *Sugar Institute, Inc. v. United States,*[288] the Court condemned a trade association rule prohibiting secret discounts and requiring producers to publicize their prices in advance. This apparently had the purpose of providing more information to the producers as to which strategy was being taken by other producers. The Court held that secret discounts are harmless in competitive markets, whereas in markets where collusion is present, secret discounts can actually help in breaking a cartel. The Court further reasoned that allowing secret discounts would increase the chances of a successful enforcement against a cartel. In *American Medical Association v. FTC,*[289] the Court affirmed the general view of the FTC whereby ethical rules established by trade associations should be met with deference under the antitrust laws and therefore examined under a rule of reason approach. *In casu*, the Supreme Court (and the Second Circuit) nevertheless struck down a medical association's provision generally forbidding doctors to advertise their services. Finally, in *National Macaroni Manufacturers v. FTC,*[290] the FTC condemned an agreement among pasta manufacturers that pasta should be made of 50% semolina (durum wheat) and 50% farina (hard wheat). Before standardization, some pasta was made of more than 50% semolina. As pasta manufacturers were by far the biggest consumers of semolina, the standardization agreement had the result of depressing its price. Thus pasta manufacturers were acting as monopsonists. The FTC noted that such product standardization could have three different outcomes: 1) it could be a pro-competitive device by which consumers receive products of higher quality; 2) it could be a mechanism for facilitating collusion, making the product more homogeneous and removing market diversity; or 3) it could be used for suppressing prices, as in the case at hand.[291]

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oligopoly behavior, perfect information even without conspiracy can entrench interdependence and cause prices to rise.

See also, *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *United Stated v. U.S. Gypsum Co*., 438 U.S. 422 (1978); and *Todd v. Exxon Corporation*, 275 F.3d 191, (2d Cir. 2001).

[285] This is not the case when product standardization is not the only potentially anticompetitive agreement between competitors. Hence, standardization agreements which were enforced by means of a refusal to deal with competitors have often triggered a rather stringent review; see Subsection 3.4.3.3.2. Private SSOs' enforcement after Northwest.

[286] 446 U.S. 643, 100 S.Ct 1925 (1980).

[287] For a presentation of the *per se* rule, see Subsection 3.3.1.3.1. Standards of review.

[288] 297 U.S. 553, 56 S.Ct. 629 (1936).

[289] 638 F.2d 443 (2d Cir. 1980), aff'd by an equally split Court, 455 U.S. 676, 102 S.Ct. 1744 (1982).

[290] 65 F.T.C. 583 (1964), aff'd 345 F.2d 421 (7th Cir.1965).

[291] See also, *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974 (4th Cir. 1949), where the Fourth Circuit held that a product standardization agreement used in conjunction with other market-restricting practices was a violation of antitrust laws. Both cases are discussed in more detail in Subsection 3.4.3.4.1. Monopsony power (or "cartel of buyers").

Most of these facilitating devices have also been analyzed through the joint venture theory. In fact, most of them are not purely anticompetitive, and they may actually be pro-competitive.[292]

3.3.1.2.4. Consequences of standards

a) Standardization agreements and Section 1 of the Sherman Act

Standards agreed upon among competitors, be it under the auspices of an SSO or at a private meeting, are potential candidates for prosecution under the antitrust laws as agreements between competing firms. Similarly, when through the use of a standard an enterprise (or a group of enterprises) monopolize or attempt to monopolize a market, US antitrust statutes may mandate prosecution. Indeed, US courts have consistently held an SSO may be liable under the antitrust laws either as a conspirator under Section 1 or as a monopolist under Section 2 of the Sherman Act.

In *American Society of Mechanical Engineers v. Hydrolevel Corp.,*[293] the question before the Court was whether the American Society of Mechanical Engineers ("ASME") could be held liable under Section 1 of the Sherman Act for acts of its agents. The Supreme Court went as far as to hold that a SSO may be liable under the antitrust statutes even when its decision-making process had been captured by members who sought to unduly restrict access of one of their competitors to a standard. It considered that under agency and antitrust laws, a trade association may be liable for treble damages for acts of its agents if the agents acted with apparent authority in the name of the association and the SSO failed to prevent a misuse of its procedures. It is irrelevant that the association did not obtain any benefit from the actions of the agents or that it had not ratified their conduct. In deciding the case, the judges seemed to greatly emphasize the fact that "only the ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for the ASME to take those steps."[294] It also seemed afraid of the market power of the ASME:

> *ASME wields great power in the Nation's economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country" as well as entire segments of an industry. H.R.Rep. No.1981, 90th Cong., 2d Sess., 75 (1968). ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce [...] When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace [...] a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity."*[295]

[292] For a more in-depth analysis on this score, see hereunder Subsection 3.3.1.3. Joint ventures and "co-ompetition".
[293] 456 U.S. 556.
[294] Id. at 572.
[295] Id. at 571.

b) Standards suggested by trade associations

Various antitrust cases have challenged the trade association practices of publishing suggested prices, common transaction terms, or product standards. Such standards are often considered to violate antitrust statutes when they are effectively followed by their addresses and when they are anticompetitive. If the first condition is rather a matter of factual evidence (and one of determining the threshold for considering the suggestion as "followed"), the second question is typically a substantial antitrust issue.

In *Jays Foods v. National Classification Committee,*[296] the Fourth Circuit refused to condemn a classification manual emanating from a national truckers' association that enabled truckers to compute the freight rates for agricultural products. As such calculations may be quite complex, consumers of transport services were offered a tool to readily assess the level of transportation costs. The question arose whether such a standardized calculation rate might facilitate a cartel. The court found no evidence of either effect or intent with regard to fixing prices, as these computations are often efficiency enhancing because they palliate an asymmetry of information. Thus these manuals would certainly be used even if other competitors did not employ them.[297]

As regards product standards, one might thus argue that courts may be reluctant to strike down such a standard when they are efficiency enhancing (i.e., when they would be used even if other competitors did not.) The hard question arises when such standards would not be used unless other competitors or other producers used them as well (most likely when they are compatibility standards.) In such a case, it is possible the standard has been adopted in order to police a cartel.

c) Differences between parallel behavior in relation to pricing and standards: price leadership and *de facto* standards

When no direct proof of an agreement between competitors can be found, one might wonder whether parallel standardization may not be used as circumstantial evidence of an agreement or as a facilitating device for an anticompetitive agreement. In fact, it is often unlikely that firms spontaneously come up with the same, sometimes detailed technical standard without some kind of prior information exchange. Although as indicated in Subsection 3.3.1.2.3. Facilitating devices, mere standardization alone is generally not considered proof of an anticompetitive agreement between competitors, it would seem the simultaneous parallel adoption of a complex anticompetitive standard by a large number of competitors may trigger a finding they had agreed even without evidence of a formal agreement. In such a case, one might argue that an anticompetitive agreement may be inferred from circumstantial evidence (Subsection 3.3.1.2.1. Proof of "agreement" by circumstantial or indirect evidence and tacit collusion.)

Yet *de facto* standards present an interesting twist on this issue. These standards are introduced to a market by a single (often dominant) firm (i.e., without an agreement between

[296] 646 F.Supp. 604 (E.D.Va.1985), aff'd, 801 F.2d 394 (4th Cir. 1986).
[297] See also *In re Beef Indus. Antitrust Litig.,* 713 F.Supp. 971 (N.D.Tex. 1988), aff'd, 907 F.2d 510 (5th Cir. 1990) and *United States v. Am. Soc'y of Anesthesiologists*, 473 F.Supp. 147 (S.D.N.Y. 1979).

firms[298]), then gradually adopted by other market participants. As the introduction of the *de facto* standard by its first promoter may arguably be interpreted as signaling and the adoption of the standard be seen as a tacit agreement, the question arises whether such a *de facto* standard amounts to a violation of Section 1 of the Sherman Act.[299]

Prima facie, the pattern of assumption of *de facto* standards seems similar to price leadership, but in reality they differ substantially. Under price leadership, a firm (usually with a large share of the market) decides to increase its prices. Other firms react to this change according to their business incentives but may be tempted to follow the leader and reap supracompetitive profits.[300] Thus price leadership can be a threat to proper competition in the same way as a cartel or a Cournot equilibrium[301] although it involves much uncertainty about the reaction of other firms in the market. In order to take part in a scheme, firms need to be sufficiently confident that other firms will follow the leader. Market conditions must therefore be conducive to cartelization, as a price leader may have only limited opportunities to police its "tacit cartel."

The classic pattern of price leadership is to announce prices in advance.[302] If other firms stick to the raise, the dominant firm upholds the increase. If they do not, the raise is rescinded. In contrast, a *de facto* standard usually does not offer so much flexibility as generally it is not costless to abandon a standard. It is therefore likely that a *de facto* standard will only be adopted by either a follower or its creator if it allows a firm to reduce its costs or improve its quality (i.e., if it is efficient.) Moreover, to avoid uncertainty as to the behavior of other firms relative to its standard, the leader will need to find mechanisms for making certain that other firms will follow its lead. Among them, the promulgation of a standard through a trade association is certainly a very attractive option.

Nevertheless, the prospective of gaining a competitive advantage can sometimes also constitute a substantial incentive for the adoption of a standard. *De facto* standards are not different from other standards. The adoption of *de facto* standards cannot rely on an agreement between producers, but rather on a common conviction that the new standard is superior to the old. However, the superiority of the new standard may reside in its anticompetitive properties.

The following example entails the possibility of raising rivals' costs more than those of the standardizing firms: domestic firms produce fire blankets between 1.95 and 2.05 meters long and between 0.95 and 1.05 meters in width. Foreign firms produce fire blankets 1.5 meters long and 0.8 meters wide. Both types of fire blankets can be sold in the domestic country, but although dominant, domestic blankets are expected to lose market share in the future against foreign blankets. As fire insurers are eager to promulgate a safety standard for fire blankets, national fire blankets producers know that if they can settle on a common standard, domestic fire insurers are likely to adopt it as their safety standard, thus giving them a competitive advantage. National producers decide to follow the lead of the largest national producer and *de facto* adopt the 2 x 1 meter(s) standard. Assuming that domestic producers can easily adapt

[298] Naturally, if proof of an anticompetitive agreement can be brought forward, the scheme may be condemned under Section 1 of the Sherman Act even if the standard at stake is a *de facto* one.
[299] See as well, the discussion in the next litt., Subsection 3.3.1.2.4. d) *De facto* standards and "agreement".
[300] Of course, a market leader can signal its willingness to raise prices and hope that others will follow its lead. It may even signal its willingness to engage in a price war, but that is often a weaker alternative than cartel policing rules.
[301] For a definition, see the preceding subsection at fn 263.
[302] See the *Sugar Institute* case, supra at fn 288.

to the new standard and that foreign producers would incur substantial adaptation costs to retool their production lines for this market, the standard may serve to avoid future competition by foreign firms. To assess the competitive impact of the standard, the loss of foreign competition must be weighed with the benefits accruing from standardization. It may well be the case that the latter are, at an aggregate (social welfare) level[303] smaller than the former.[304]

In sum, *de facto* standardization seems to be a less flexible alternative to a cartel than a homogenization of price conditions because standardization generally entails higher adaptation costs. However, under specific conditions, the adoption of an anticompetitive *de facto* standard may represent an alternative strategy for a cartel.

d) *De facto* standards and "agreement"

Courts have not yet ruled on the question whether an enterprise deciding to follow the standard of a competitor represents conscious parallelism or tacit collusion. On the one hand, when a competitor retools its production capacity to meet a new standard, it may send a signal to the market leader that it has accepted its standard (this is especially true if retooling involves sunk costs.) The "characteristics" of the new standard need to be "received" by the market follower; however, the market follower can simply discover the new standard by examining the product itself. Could this be considered as "a communication by informal means"? On the other hand, the adoption of the standard (assuming one understands that it constitutes an equilibrium) is not a series of "repeated actions and reactions."[305] Moreover, the enterprise which merely adopts the *de facto* standard set by a market leader may have only limited choices, or may have business reasons which were not anticompetitive (thus it would arguably survive a "but for" test.) In summary, the jury seems to be still out on this issue.

At any rate, when reviewing a *de facto* standard, a court is likely to follow a rule of reason approach,[306] meaning it will make an in-depth inquiry into the competitive effects of the standard even when it has evidence an agreement has been concluded. *De facto* standards do not affect prices directly, but rather only indirectly. It is unlikely a court would deal in the same way with parallel behavior at the level of prices and parallel behavior at the level of standards as the effects of price-fixing are infinitely more likely to have solely anticompetitive effects than an agreement on characteristics of standards.[307] Moreover, prices are a far more flexible candidate for agreement than standards, which often necessitate costly retooling. As many *de facto* standards make commercial sense, it is sometimes difficult to provide proof that they have been taken for no reasonable business reason without inquiring about their effects on the market.

[303] Note however, that, at least in the short run, it might well be the case the welfare of the producers increases.
[304] Note however, that most of the trouble stems from the adoption of the safety standard. If foreign blankets are as good as domestic ones in extinguishing fire, one may think the safety standard is inefficient. Whether the insurers could be prosecuted will be dealt with later.
[305] See H.HOVENKAMP, supra at fn 119.
[306] For a discussion of the rule of reason approach, see Subsection 3.3.1.3.1. Standards of review.
[307] Furthermore, as *de facto* standards are usually deprived of enforcement devices, it is unlikely they could severely restrict competition.

3.3.1.3. Joint ventures and "co-ompetition"

3.3.1.3.1. Standards of review

a) *Per se* rule or rule of reason?

Social welfare is not always best promoted by a policy of only all-out competition. As Nash[308] demonstrated mathematically, under specific circumstances cooperation between competitors can produce better results than non-cooperative strategies. Modern economists have coined the term of "co-ompetition" to reflect this type of competition where firms pool resources to seek common competitive benefits. Antitrust courts and enforcers have consequently come to accept that firms may cooperate, albeit their dealings are usually subject to an in-depth scrutiny as risks of collusion can be high.

Joint ventures are a common means to create competitive benefits between firms. The US definition of the concept is particularly broad and encompasses various types of collaboration.[309] Firms may enter into a joint venture for different reasons. Price-fixing and output restriction may be a concern, but most joint ventures have other purposes than mere restriction of competition, as among the many other goals of a joint venture, firms can seek to achieve economies of scale or share risks and costs (be they operational, marketing, transactional, R&D, etc.). Thus these agreements can range from restrictions on competition to pro-competitive devices, or a mix.

The social judicial cost for assessing the impact of joint ventures on competition may be quite high, as this kind of information is not costless and the asymmetry of information between the judge and the collaborating firms may be quite significant. As antitrust courts do not have unlimited means to conduct their analysis, to be more efficient, they have set up a system whereby violations are classified into three categories:

1) *"Naked" restraints*: These are collusive agreements deemed by antitrust authorities to have little or no potential for social benefit. Hence, courts deal with such restraints according to the so-called *per se* rule, which does not require an in-depth inquiry into actual competitive effects or market power.[310] Price-fixing agreements typically belong to this category.[311]

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[308] J.NASH, "Equilibrium Points in N-Person Games", in *Proceedings of the National Academy of Science*, 1950.

[309] H.HOVENKAMP, supra at fn 119, defines the concept as follows:

> *Agreements among competitors that include coordination of research, production, promotion or distribution are commonly referred to as "joint ventures."*

Id. at p. 200. They may be concluded between competitors or between firms at different levels in the distribution chain, or firms producing related or similar products in different geographical markets.

[310] *Per se* violations are defined as "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).
The Competitors Collaboration Guidelines define them as follows (§ 1.2, p. 3):

> *[A]greements of a type that always or almost always tends to raise price or to reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The courts conclusively presume such agreements, once*

2) "*Ancillary" restraints*: these restraints are at the other extreme of the spectrum, as they are usually considered as having pro-competitive rather than anticompetitive effects.[312] Ancillary restraints encompass those which are usually considered necessary for firms to agree on a pro-competitive collaboration and reap the benefits of a joint venture. Under such circumstances, courts go through a much more elaborate process called the "rule of reason."[313] This process

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> *identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.*

[311] The way in which price-fixing schemes are structured is not relevant. In *United States v. McKesson & Robbins, Inc.,* 351 U.S. 205, 309-310, 76 S.Ct. 937, 940 (1956), the court stated:

> *(P)rice fixing is contrary to the policy of competition underlying the Sherman Act and […] its legitimacy does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motive of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.*

Unqualified use of the *per se* rule in price-fixing agreements has been criticized; see, e.g., the dissents in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 102 S.Ct. 2466 (1982), and *Cal. Dental Ass'n v. FTC*, 119 S.Ct. 1604 (1999). It has also at times been distinguished by the Supreme Court; see *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc. (BMI),* 441 U.S. 1, 99 S.Ct. 1551 (1979), where the Supreme Court applied the rule of reason to a price-fixing case, and *Nat'l Soc'y of Prof'l Eng'rs v. United States*., 435 U.S. 679, 98 S.Ct. 1355 (1978) where although not using the *per se* rule, the Court imposed on the defendant the burden of proving that the practice was not anticompetitive. Note as well that the agreement must explicitly fix prices. For example, exchanges of information may affect price, but do so only indirectly. These are usually dealt with under a rule of reason approach (see hereunder fn 313.)

[312] This is often true in joint venture cases unless the joint venture contains particular restraints to competition. As Justice Taft explained in *United States v. Addyston Pipe & Steel Co*., 85 Fed. 271, 280 (6th Cir. 1898), modified and aff'd, 175 U.S. 211:

> *[W]hen two men become partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital enterprise […] and […] useful to the community.*

[313] The Competitors Collaboration Guidelines define the agreements analyzed under the rule of reason as follows (§ 1.2, p. 4):

> *Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.*
>
> *Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.*
>
> *Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.*

involves a much more careful analysis of competitive effects and of market power.[314] Under this approach, defenses are also more numerous.[315]

3) *"Nearly naked" restraints*: this category encompasses practices which seem at first glance to be naked restraints, but which are likely to have pro-competitive effects as well. Courts are not always at ease with this practice, perhaps because they lack experience with it, but also because it may be difficult to define precisely which type of agreement should be classified in this category. Therefore courts generally grant an opportunity for the alleged violator to present a *prima facie* case showing evidence of social benefits. However, if the defendant fails to make its case, the way to summary judgment is open. This practice is referred to as the "quick look" or the "truncated rule of reason."[316/317]

b) Characterization

Historically, the *per se* rule applied to a wide range of agreements; however, the current tendency is to allow more cases to be tried under the rule of reason.[318] Although there are no general rules for deciding whether a *per se* rule or a rule of reason approach should be applied to a joint venture, the following factors often play a decisive role:

In practice, under the rule of reason, the plaintiff usually bears the burden of proving that the agreement has anticompetitive effects while the defendant has to show the restrictions on competition created by the agreement also entail pro-competitive effects. However, only restraints that are "reasonably necessary" are accepted by courts. Courts and enforcement agencies have tended to take a relatively deferential stance towards the necessity of restraints. Indeed, the IP Guidelines provide as an example (§ 4.2):

> *The existence of practical and significantly less restrictive alternatives is* ***relevant*** *to a determination of whether a restraint is reasonably necessary. If it is* ***clear*** *that the parties could have achieved similar efficiencies by means that are* ***significantly*** *less restrictive, then the Agencies will not give weight to the parties' efficiency claim. In making this assessment, however, the Agencies will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.* [emphasis added]

If both parties succeed in bringing evidence of the above-mentioned elements, the plaintiff will be required to prove that the anticompetitive effects outweigh the pro-competitive ones.

[314] Courts are divided on the issue of whether a finding of market power is necessary under the rule of reason for a Section 1 violation, although the Supreme Court stated in *FTC v. Indian Fed'n of Dentists*, 476 U.S. 447, 106 S.Ct. 1009 (1986), that "proof of detrimental effects can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects" (at 460-461).

[315] In particular, the Competitors Collaboration Guidelines (§ 4.2) and the IP Guidelines (§ 4.3) provide a "safety zone" for agreements between enterprises that hold no more than twenty percent of the relevant market. However, such safe harbor provisions are not applicable when the conduct would be subject to a *per se* rule.

[316] For a short description of these methods of review, see E.GELHORN/W.E.KOVACIC/S.CALKINS, *Antitrust Law and Economics in a Nutshell*, 5th ed., 2004 and *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 102 S.Ct. 2466 (1982).

[317] As the IP Guidelines put it (§ 3.4):

> *[I]f a restraint facially appears to be of a kind that would always or almost always tend to reduce output or increase prices, and the restraint is not reasonably related to efficiencies, the Agencies will likely challenge the restraint without an elaborate analysis of particular industry circumstances.* See Indiana Federation of Dentists*, 476 U.S. at 459-60;* NCAA*, 468 U.S. at 109.*

[318] Regarding this evolution, see the survey by E.T.SULLIVAN/J.L.HARRISON, *Understanding Antitrust and its Economic Implications*, Legal Text Series, Matthew Bender and Co, 3d ed., New York, pp. 116-176, 1988.

1) *Boycott of competitors*: The *per se* rule is generally applicable to agreements between competitors to boycott specific market actors;[319] however, this does not mean that it necessarily will be applied.[320] When the parties to the agreement are not competitors, the situation is usually analyzed using the rule of reason (unless the agreement involves resale price maintenance schemes or tying.)

2) *Network industry*: When the agreement pertains to a market where collaboration between competitors is necessary for the market to exist at all, agreements are reviewed under the rule of reason.

3) *Explicit price-affecting conduct*: In *United States. v. Socony-Vacuum Oil Co.,*[321] Justice Douglas held that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price for a commodity […] is illegal *per se.*"

4) *Publicity*: Courts are especially mindful of agreements done in secret. When agreements receive certain publicity, they are rarely found to be clearly anticompetitive (although they might still be reached by the rule of reason.)

3.3.1.3.2. Concerted refusal to deal in the joint venture context

a) Transaction costs, free riding and exclusivity

As a matter of principle, under common law a firm is free to deal with whomever it chooses. In *United States. v. Colgate & Co.*,[322] the Supreme Court held that a private entrepreneur is allowed to "exercise his own independent discretion as to parties with whom he will deal."[323]

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[319] See next subsection on concerted refusals to deal (3.3.1.3.2.).

[320] The Competitors Collaboration Guidelines provide that (§ 3.2):

> *[I]f, […], participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal. […] In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entity created by the collaboration or by one or more participants or by a third party acting on behalf of other participants) one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits […]. Such procompetitive benefits may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies.*

In *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 964 (10th Cir. 1994), the Court of Appeal noted that in joint venture cases, the court has usually remanded cases to appellate courts "to judge whether [the joint venture agreement] represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output and whether it affects price." See also *Addamax Corp. v. Open Software Found.*, 888 F. Supp. 274 (D. Mass. 1995), aff'd 152 F.3d 48 (1st Cir.1998) at pp. 50 and ff.

[321] 310 U.S. 150, 60 S.Ct. 811 (1940).

However, this holding was limited in two important ways. First, discretion must be independent; in other words, concerted refusals to deal are not covered by the *Colgate* holding. Second, even if unilateral, a refusal to deal has to be made "[i]n the absence of any purpose to create or maintain a monopoly" in order to avoid being illegal.

As already mentioned, joint venture agreements are often entered into to share costs or improve quality. However, they usually involve a limitation of the competitive possibilities of the participants. This exclusivity can be twofold. On the one hand, members may be prevented from engaging in certain activities (internal effects); on the other, the joint venture's membership may be limited to certain market actors. A standard-setting joint venture may aim at creating an anticompetitive standard for a new product and set rules which exclude competition by outsiders. By so doing, the members' behavior may be deemed as producing external effects. Moreover, standardization agreements sometimes involve a commitment to produce a certain (minimal) amount of (or all) products according to the new standard. This type of commitment inherently involves internal effects.

It is often argued that these kinds of limitations are necessary to reap the cooperative benefits accruing from the venture. Consequently, courts are left with the difficult task of evaluating whether these limitations are in fact worth the expected benefits stemming from the collaboration between the members of the joint venture. However, courts are ill-equipped to carry out such an analysis, as it is extremely difficult and resource-intensive to balance efficiency and injury to competition. Moreover, this task is rendered even more cumbersome because as with merger cases, it involves a prospective look at market conditions.

The main justifications for both internal and external effects of a refusal to deal within a joint venture setting (exclusive membership and the exclusion of certain non-venture activities) are the reduction of costs and the threat of free riding. The costs of agreeing on a standard may be directly related to the number of participants. Usually, the more firms that participate in an agreement, the higher the costs will be of settling on the terms of the agreement (economists call these "transaction costs.") As benefits stemming from a joint venture are not necessarily linked to the number of firms participating in the standardization process,[324] it may be profit-maximizing to limit the number of participants.

Free riding occurs when someone unduly takes advantage of investments paid for by others. If entry into a joint venture is open, a free rider would wait until the risk-to-reward ratio of the joint venture is the lowest before entering. If a firm knows that it can refuse to share risks at the beginning of a joint venture, yet still be able to enter it later when the project has become a success, no firm would accept its share of costs; instead, all would wait until the joint venture had proved its potential for profit. This would certainly drastically diminish the number of joint ventures.[325] One the other hand, exclusivity is not always the less

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[322] 250 U.S. 300 (1919). The Supreme Court has consistently confirmed the *Colgate* holding, e.g. in *Reeves Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271 (1980). See also H.HOVENKAMP, *Federal Antitrust Policy*, p. 295, 2005.

[323] Id. at 307.

[324] In industries characterized by high network externalities, there may be a higher correlation between the benefits brought by standardization and participation by a wide range of enterprises.

[325] M.A.LEMLEY, "Property, Intellectual Property, and Free Riding," *Texas Law Review*, 82/1031, 2005, argues that in the IPR context, third party users have positive rather than negative externalities and that protection of IPR against free riding should thus be much less all-encompassing. Indeed, the use of IPR allows the spread of knowledge without impeding the ability of the holder of the IPR itself to use it (although one might argue the value of the IPR to its holder may be lower in case of third party use. as the holder would lose its monopoly

competition-restrictive means to prevent free riding as the first-hour investor can simply ask for a higher admission charge or user's fee to be assessed later, which may allow the investor to recoup on his original investment.

Although it is largely accepted that exclusivity may address costs and free riding issues that may otherwise make a joint venture unattractive, it also carries certain risks for competition, but only when the participating enterprises reach a certain market share. For example, this may be the case when the members of the joint venture acquire a dominant position (monopoly power) by aggregating their market power. In the absence of market power, an exclusive joint venture rarely entails a risk for competition, as to reap monopolistic or cartel profits, it is necessary to reduce output within and outside the venture.

However, if market power is generally a necessary condition for an exclusive joint venture to produce noncompetitive results, it is not a sufficient one. Dominant firms can have good reasons to engage in exclusive joint ventures without abusing their position, as just as other firms, they may gain by avoiding transaction costs or producing economies of scale. However, courts must pay attention to these reasons as they may conceal anticompetitive motives.

b) Standard of review in concerted refusals to deal cases

Concerted refusals to deal are a common means by which trade association standards are enforced. Disciplining a violator often involves denying the usage of a "seal of approval," excluding a member from membership, or generally denying a market actor some advantage in terms of market access or competitive benefits.

Concerted refusals to deal are often only a secondary offense, as they are frequently used to enforce another type of violation. As Hovenkamp notes:

> *Many antitrust complaints brought by victims of refusals to deal allege that the defendants were involved in illegal monopolization, tying, price fixing, resale price maintenance or vertical non-price restraints or an illegal merger. […] If this "supporting" antitrust violation is not apparent, often the plaintiff is unable to offer any explanation why the refusal to deal is anticompetitive.*
>
> *So the refusal to deal might more appropriately be considered a type of antitrust harm than a substantive violation. For example, if a firm engaging in resale price maintenance refuses to sell to a non-complying retailer, the alleged antitrust violation is the attempt to control resale prices. If the plaintiff's theory of injury is that the defendant refused to deal because the plaintiff was a price cutter, then the plaintiff must prove illegal resale price maintenance in order to recover.*[326]

rents.) The opposite is true for other proprietary rights, as third party use usually diminishes their value to its owner.

[326] H.HOVENKAMP, *Federal Antitrust Policy,* supra at fn 119, p. 218.

Traditionally, concerted refusals to deal were considered *per se* illegal;[327] however, this issue has been distinguished in so many cases that today it is more of an exception than a rule. For all practical purposes,[328] concerted refusals to deal can be considered as being handled under a rule of reason approach with a few exceptions. In fact, concerted refusals to deal are dealt with under the *per se* rule only when no reasonable argument can be made in favor of the refusal.[329]

3.3.2. Monopolization

Monopolization is condemned under Section 2 of the Sherman Act:

> *Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.*

The Supreme Court ruled in the *Grinnell*[330] case that the offense of monopolization consists of two elements: "[1] the possession of monopoly power in the relevant market and [2] the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[331]

Therefore, possession of monopoly power alone does not constitute a violation of Section 2 of the Sherman Act. This is not an anecdotal conclusion, especially in the standardization context. Indeed, (compatibility) standards tend to be "winner-takes-all" games where the value of a standard increases with the number of users (network externalities), thus inducing market actors to adopt only a single standard for their products.[332]

Possession of monopoly power becomes an infraction only when the monopolist engages in exclusionary practices. It is thus necessary first to define what "monopoly power" is by identifying the relevant market and the level of market power which qualifies as monopolistic,

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[327] For a general presentation of the case law on refusal to deal cases, see K.L.GLAZER, "Concerted Refusals to Deal under Section 1 of the Sherman Act", in: *Antitrust Law Journal*, 70/1, 2002.

[328] However, when the refusal to deal is used to enforce a price-fixing agreement, the scheme is likely to be examined under a *per se* approach. *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co*., 472 U.S. 284, 105 S.Ct. 2613 (1985).

[329] See, e.g., *FTC v. Super. Ct. Trial Lawyers Ass'n.,* 493 U.S. 411, 110 S.Ct. 768 (1990), where although the Supreme Court acknowledged the boycott was a "classic restraint of trade" in violation of Section 1 of the Sherman Act, it vacated an FTC order ruling that the boycott was illegal *per se*. Although the Court admitted the *per se* rule could have been applied, it seemed, *in casu*, to greatly emphasize the fact the boycott contained an element of freedom of expression warranting First Amendment protection; thus the Court declined to apply the *per se* rule. The Court explained that a restriction to freedom of expression may not be justified unless it is no greater than is essential to an important governmental interest. In ruling that such a test may not be satisfied by a mere presumption of illegality, the Court required the agency to prove the alleged violation had anticompetitive effects in the market.

[330] *United States v. Grinne, Corp.,* 384 U.S. 563, 86 S.Ct. 1698 (1966).

[331] Id. at 570-571.

[332] For an explanation of the "tipping" (or "winner-wins-all") mechanism in standardization races, see M.A.LEMLEY, "Antitrust and the Internet Standardization Problem", in: *Connecticut Law Review*, 28/1041, 1996. Such a phenomenon is mostly linked with the existence of important network externalities.

and second to present the exclusionary practices which might constitute a violation of the Sherman Act in the context of standardization.

3.3.2.1. Monopoly power in a relevant market

Economists define "market power" as a firm's ability to make a profit by reducing output and raising prices above marginal cost. However, although it would be theoretically possible to do so, it is practically impossible for courts to measure market power directly as a function of the relationship between a firm's marginal cost and its profit-maximizing price. This mainly stems from the fact that courts cannot predict marginal cost with reasonable confidence.

Courts therefore tend to look for proxies. The most widely used proxies are certainly market shares,[333] but to use them necessitates the difficult determination of the relevant market, which is defined by the product market[334] and by the territory[335] in which sales are made. A market share is equal to the percentage of the total sales made in the relevant market.

"Monopoly power" is defined as qualified market power, i.e., a substantial amount of market power. The amount of market power needed to qualify as monopoly power is not uniformly defined, but most courts agree that a market share in excess of 80 to 90% is proof of monopoly power.[336] On the other hand, market shares of less than 50% are almost never held to constitute monopoly power.[337]

3.3.2.2. Attempt to monopolize and monopolization

In *Swift & Co. v. United States,*[338] Justice Holmes described the attempt to monopolize as including three elements: 1) specific intent to control prices or eliminate competition in some market; 2) predatory or anticompetitive conduct directed at accomplishing this unlawful purpose; and 3) a dangerous probability that the conduct, if permitted to run its course, would have created a monopoly.[339]

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[333] For a discussion of other proxies, see Chapter 4, Subsection 4.3.4.2.2. Dominance.

[334] Economists define a product market by looking at the demand and supply elasticity of a product. This is done by modifying the price of a product and looking at whether consumers (or in case of supply elasticity, producers) turn to another product. If consumers (producers) turn in mass to the other product, the product in question is said to be in competition with the product being analyzed. This allows a determination that both products belong to the same product market. On the other hand, if consumers (producers) do not tend to switch to the other product, the products being analyzed are not in competition and they belong to different product markets. Note however, that product substitutability generally involves the use of benchmarks, as products are all often said to be at various degrees substitutable for each other.

[335] Similarly to the product market, a geographical market is defined as the geographic area in which a firm can increase price without large numbers of customers turning to an alternative supplier outside the area (elasticity of demand is low) and without producers outside the area entering the market with substitute products (elasticity of suppliers is low.)

[336] At least unless entry is uninhibited.

[337] In "attempt to monopolize" cases the market power requirement is lower, but the conduct requirement is more strictly defined (see hereunder.)

[338] 196 U.S. 375, 25 S.Ct. 276 (1905).

[339] Furthermore, with regard to the evidence on the damage created by the practice necessary for a violation, it is important to distinguish between a public and a private suit. A private plaintiff has the burden of proving causation and a quantifiable injury. This is not the case for a governmental action where the public plaintiff is required to show only a "substantial and threatened" injury to the competitive process. In government cases, the injury also does not need to be precisely quantifiable. The causation requirement is also more relaxed as conduct

3.3.2.2.1. Intent

As Judge Hand put it in the *Alcoa* case,[340] "no monopolist monopolizes unconscious of what he is doing." Although many courts in monopolization cases have tended to require only evidence that an exclusionary practice has taken place, other courts[341] (mainly based on considerations of criminal law principles) have categorically required evidence of an anticompetitive intent.[342] However, such evidence is generally not unambiguous, as firms inherently intend to do better than their competitors and to increase their market share at their expense. Although practice has stressed that what courts condemn is an "illegitimate" intent, the definition of what exactly constitutes an illegitimate intent remains obscure. For example, the Supreme Court stated that the:

> *(M)ere intention […] to exclude […] is insufficient to establish specific intent to monopolize by some illegal means […]. To conclude otherwise would contravene the very essence of a competitive market place, which is to prevail against all competitors.*[343]

Indeed, much evidence of intent is consistent with both competition and monopolization.[344] This ambiguity has certainly led to the loss of the significance of the intent requirement in monopolization cases, although in attempt to monopolize cases, courts still take a closer look at the evidence on this score. However, the devising of a sensible test to distinguish illegitimate and legitimate intent seems to remain a quixotic endeavor.

3.3.2.2.2. Conduct requirements

Various exclusionary practices have been alleged to be sufficient to justify a monopolization claim.[345] Among those, the following are especially worth attention in a standard-setting environment and thus will be analyzed below:

(a) Refusal to deal with a competitor: unilateral refusal to deal can be illegal if the motive of the dominant firm (or SSO) is to drive a competitor from a market.[346]

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that harms competitors without being justified by a reasonable business purpose is generally held as sufficient to support a government's suit in equity.

[340] *United States. v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[341] See, e.g., *United States v. Grinnel Corp.*, 384 U.S. 563, 86 S.Ct. 1698 (1966).

[342] For a presentation of the role of intent in the antitrust context, see R.A.CASS/K.N.HYLTON, "Antitrust Intent," in: *Southern California Law Review*, 74, 2000.

[343] See *United States v. Empire Gas Corp.,* 537 F.2d 296 (8th Cir. 1976), cert. denied, 429 U.S. 1122, 97 S.Ct. 1158 (1977).

[344] For example, should the fact that an enterprise aggressively markets its products when it knows that a competitor is on the fringe of bankruptcy be considered an illegitimate intent to exclude a competitor?

[345] Section 2 of the Sherman Act forbids both monopolization and attempts to monopolize. Monopolization implies that the enterprise already possesses monopoly power, whereas an attempt to monopolize is simply an attempt to acquire such power. As attempts to monopolize do not yet involve monopoly power, the conduct requirements leading to a violation of the Sherman Act are much more stringent, and an attempt to monopolize assessment usually requires a more in-depth analysis of the alleged illegitimate conduct. In any case, the conduct must be capable of leading to a monopoly. Thus any practice supporting a charge of attempt will also support a charge of monopolization; however, the contrary is not true. At another level, it has long been held that any practice in restraint of trade according to Section 1 of the Sherman Act would also be a violation of Section 2 of the Sherman Act. See *American Tobacco Co. v. United States*, 221 U.S. 106 at 181-184, 31 S.Ct. 632 at 648-650 (1911).

[346] See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847 (1985).

(b) "Essential facility" doctrine: the owner or operator of an essential competitive item, such as a natural monopoly facility or a scarce resource, can be forced to share its access to the facility.[347]

(c) Predatory product or predatory innovation: the monopolist engages in research and development that has the potential of excluding other firms from the market.[348]

(d) Raising rivals' costs: engaging in activities that make it more expensive for a competitor to do business.[349]

3.3.2.2.3. High probability of success

In any attempt case, a high probability of success must be established and a relevant product and geographic market in which the attempt is likely to succeed must be defined.[350]

3.3.2.3. Cases of monopolization

3.3.2.3.1. Unilateral refusal to deal (monopolization)

As mentioned under the concerted refusal to deal analysis, under common law, firms are in principle free to choose any business partner.[351] However, as the Supreme Court held in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[352] a refusal to deal has to occur "in the absence of any purpose to create or maintain a monopoly." The Court stressed that in that case, the monopolist was unable "to offer any efficiency justification whatever for its pattern of conduct"[353] and that the refusal to deal took place within the framework of an existing relationship in which for many years, the monopolist has participated in a joint venture with the plaintiff. Upon request by the Court, the plaintiff also brought proof of injury to the consumer rather than only to itself as a competitor. These three factors taken together led the Court to rule that the defendant's refusal to deal was illegal.

However, the holding in *Aspen* has to be interpreted strictly, as it seems clear the Supreme Court did not intend to provide a broad exception to *Colgate* in which all unjustifiable

[347] See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973).
[348] *C.R. Baird, Inc. v. M3 Sys., Inc.,* 157 F.3d 1340, 1371 (Fed.Cir. 1998). As this theory has been mainly developed in the *de facto* standard-setting context, it will be analyzed under the subsection dealing with the case law on standardization issues.
[349] *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951 (10th Cir. 1990). Note however, that the Supreme Court does not seem yet to have adopted such a theory.
[350] *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Spectrum Sports v. McQuillan*, 506 U.S. 447, 113 S.Ct. 884 (1993).
[351] See *U.S. v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465 (1919).
[352] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 105 S.Ct. 2847 (1985).
[353] The Supreme Court explained that the refusal to deal was probably only profitable based on the assumption that it would cause the competitor to lose substantial market share to the monopolist.

refusals to deal would violate Section 2 of the Sherman Act, as harm to consumers and a pre-existing joint venture were also necessary elements for condemning the refusal.[354]

Yet in *Verizon Communications, Inc. v. Trinko,*[355] the Supreme Court seemed to distinguish its *Aspen* holding.[356] Indeed, the Court refused to force an incumbent to grant immediate access to its telecommunications network to a local rival on the same conditions that it used for the provision of services to its own customers. However, it considered that Verizon, the incumbent, had not previously engaged in a business relationship with the firm requesting access to its services.[357] Moreover, the Court noted that Verizon had not publicly marketed such services.[358] One might therefore wonder whether the *Trinko* case was not a mere repetition of the *Aspen* holding in which termination of an existing relationship is a condition for creating a violation of Section 2 of the Sherman Act.

With regard to standard-setting, it is possible to construct a case in which an SSO could be successfully prosecuted for a refusal to deal under Section 2 of the Sherman Act. However pursuant to the *Aspen* holding, it would be necessary for the plaintiff to prove that a joint venture was pre-existing, that the refusal to deal could not be reasonably justified (i.e., was not efficient), and that the refusal to deal harmed consumers. Yet this could occur when a SSO that has already granted a seal of approval to a producer has no reasonable justification for its subsequent refusal on an extension.[359]

3.3.2.3.2. Essential facility doctrine

The essential facility doctrine is not an easy-to-define antitrust concept. It stands for the proposition that a dominant firm that controls an "essential facility" may be forced to share access to it with competitors.[360]

What constitutes an "essential facility" has not been entirely clarified by case law. It may be defined as a productive asset which is "central" to trade in a specific (generally downstream[361]) product and which cannot be easily duplicated by competitors. For such a

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[354] In *SmileCare Dental Group v. Delta Dental Plan*, 88 F.3d 780 (9th Cir. 1996), cert. denied, 519 U.S. 1028, 117 S.Ct. 583 (1996), the Ninth Circuit ruled that illegal unilateral refusals to deal could occur only in the presence of a pre-existing relationship.

[355] 124 S.Ct. 872 (2004).

[356] See also, E.FOX, "Is there Life in Aspen after Trinko? The Silent Revolution of Section 2 of the Sherman Act" in: *Antitrust Law Journal*, 73/3, 2005.

[357] Id. at 880.

[358] Id.

[359] See also *Intel Corp. v. VIA Technologies, Inc.* No. C 99-03062 (N.D. Cal. March 20, 2001), In re *Dell Computer Corp*, 121 F.T.C. 616, Complaint (1996), 60 Fed. Reg. 57,870 (Nov. 22, 1995) and *Infineon Technologies AG*, 164 F. Supp.2d 743 (E.D. Va. 2001) appeal dismissed, 32 Fed. Appx. 568 (Fed. Cir. 2002) (available at 2002 WL 541629).

[360] For a more in-depth presentation, see R.PITOFSKY/D.PATTERSON/J.HOOKS, "The Essential Facilities Doctrine Under the U.S. Antitrust Law", in: *Antitrust Law Journal*, 70/443, 2002 and A.LIPSKY/G.SIDAK, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1999. As R.PITOFSKY/D.PATTERSON/J.HOOKS put it:

> *[T]he essential facility doctrine has been articulated as a subset of the so-called "refusal to deal" case which place limitations on a monopolist's ability to exclude actual or potential rivals from competing with it. The doctrine is one long-standing limitation on the general rule that a firm has no obligation to deal with its competitors.*

[361] A downstream market is a market at the subsequent stage of the production or distribution chain of a product.

finding to be made, it is necessary that the owner of the essential facility has a (quasi-) monopoly power in the upstream market; otherwise, the facility would not be indispensable and the essential facility doctrine would not be applicable. When a firm is found to hold an essential facility, it is generally required to share access to it under fair and non-discriminatory ("FRAND") terms.[362] For instance, electric utilities and public sports stadiums have been considered essential facilities.[363]

The rationale beyond the doctrine of essential facility is to avoid the situation where the owner of the essential facility is able to monopolize or unduly impede access to a downstream market. As these situations would probably entail social welfare loss, antitrust intervention seems *prima facie* justified. However, it must be borne in mind that forcing an essential facility holder to grant access to its facility may reduce its incentives to invest in the facility in the first place.

Basically, essential facilities can be grouped into three categories: 1) natural monopolies (or monopolistic joint ventures with high economies of scale); 2) valuable productive assets arising from a regulatory regime (legal monopoly); and 3) productive assets subsidized by the government (subsidized facility.) These three categories have in common that they grant a significant cost advantage to the owner of the facility.

In *MCI Communications Corp. v. AT&T,*[364] the Seventh Circuit defined what legally constitutes an essential facility in terms that have been widely used in subsequent cases. Four elements must exist for the essential facility doctrine to apply:

1° Control of the essential facility by a monopolist;
2° Inability to practically or reasonably duplicate the essential facility;
3° Denial of use by the monopolist; and
4° Feasibility of granting access to the competitor.

In *Verizon Communications, Inc. v. Trinko*[365], the Supreme Court refused either to recognize or repudiate the essential facility doctrine.[366] However, the Court severely limited the application of such a doctrine to only cases where: (a) the facility is essential in the sense that competitors are unable to supply it by themselves; (b) the facility is fully developed and access to it is actually sold by the owner to others; and (c) the sale to others would be rational (i.e., at least as profitable as sales to other users.)

The essential facility doctrine is usually limited to refusals to deal with competitors[367] in the downstream market.[368] In fact, a refusal to deal with a non-competitor would not make much

[362] Obviously courts have a wide margin of discretion in defining such conditions. In *Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980 (7th Cir. 1983), the 7th Circuit held that absolute equality between competitors is not required.
[363] See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973) and *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).
[364] 708 F.2d 1081 (7th Cir. 1983), cert. denied, 464 U.S. 891, 104 S.Ct. 234 (1983).
[365] 124 S.Ct. 872 (2004).
[366] The Court held the essential facility doctrine was not applicable as a governmental body (the FCC) regulated the sharing of the facility.
[367] See, e.g., *Interface Group v. Mass. Port Auth.*, 816 F.2d 9 (1st Cir. 1987); *Garshman v. Universal Res. Holding*, 824 F.2d 223 (3d Cir. 1987).
[368] Refusal to deal with a non-competitor (at any level) rarely has anticompetitive effects, although this could be the case if the essential facility's owner "conspires" with its other customers. In this case, the concerted refusal to deal case law usually suffices for granting relief.

"anticompetitive sense" and is usually better explained by other motives (full capacity, insolvency, strategic behavior, etc.) However, among competitors, the upstream firm may be tempted to refuse access to its essential facility to a competitor to avoid competition in the downstream market.

It must be underlined that the exact border between the essential facility and legitimate refusal to deal doctrines is not clear.[369] One important line seems to be that the concerted refusal to deal doctrine applies to refusals by more than one market actor (i.e., a Sherman Act Section 1 offense) while the essential facility doctrine is limited to refusals by one market actor (but joint ventures are usually considered as single market actors), which would be a Section 2 offense.)[370] As Hovenkamp points out:

> *Today the essential facility doctrine is concerned mainly with unilateral refusals to deal. Of course, once a properly defined "essential facility" is at issue, it really should not matter whether a single firm or a group of firms acting in concert controls the facility. But if someone is dubious about the essential facility doctrine as a distinct principle of antitrust liability, then the difference between concerted and unilateral action becomes quite important. Concerted refusals to deal are condemned more easily than unilateral refusals, with less elaborate proofs of actual competitive effects. For this reason, the new focus on unilateral conduct has made it critical that "essential facility" be defined with rigor.* Federal Antitrust Policy, supra at fn 116, § 7.7, p. 310.

The relationship between the unilateral refusal to deal and the essential facility doctrine seems harder to define. It seems that the unilateral refusal to deal case law requires the termination of an existing relationship, whereas the essential facility case law does not require such a pre-existent relationship. Perhaps for this reason, the essential facility doctrine foresees stricter qualifications for the market position of the refusing firm (i.e., it strictly defines the concept of essential facility.)

3.3.2.3.3. Raising rivals' costs

Some economists contend that instead of engaging in aggressive pricing by undercutting its competitors' prices to gain market share and eventually throw its competitors out of a market, a dominant firm (or in US parlance, a monopolist) may as an alternate strategy try to raise its rivals' costs ("RRC.")

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[369] H.HOVENKAMP, *Federal Antitrust Policy*, supra at fn 119, § 7.7, p. 309, remarks:

> *[T]he so-called "essential facility" doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman § 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning general doctrine of monopolist's refusal to deal to fill in the resulting gaps.*

[370] The essential facility doctrine is sometimes said to originate in the *United State v. Terminal R.R. Ass'n*. (224 U.S. 383, 32 S.Ct. 507 (1912)) or the *Associated Press v. United States* (326 U.S. 1, 65 S.Ct. 1416 (1945)) decisions. However, these cases involve concerted activities. See instead *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973).

For example, among these strategies,[371] a dominant firm may file a legal action for the purpose of raising the costs of its competitors. Indeed, it might be a good strategy for a dominant firm to raise the fixed costs imposed on all (or some) competitors, even though it may have to bear such costs itself. As fixed costs need to be divided per unit and monopolists have more units to spread these costs over, competitors usually see their costs per unit rise more than the costs per unit of the dominant firm. Moreover, when prices rise across a market, the percentile price difference between low-priced and more expensive products diminishes, thus generally rendering the price difference less attractive.[372]

An often-used strategy is linked with IPR. As the recognition of a patent grants a monopoly to its holder, competitors are forced either to invent around the patent or challenge it via litigation. This is all the more damaging when the patents at stake concern nonexistent or marginal innovations. Another strategy would be to petition the government to take legislative action. Imagine that the government decides to increase the safety of flying by requiring that three pilots are needed per plane. This would impose lower per unit (passenger) costs on companies flying large planes (usually the monopolist) than the small companies flying smaller planes. Note that such a strategy would probably be exempted under the Noerr-Pennington doctrine, if it concerns technical regulations, but not if it concerns standards.[373] Hence, standards potentially could be a good means for a monopolist (or a cartel) to impose higher costs on a competitor.

Furthermore, it has been argued that incumbent firms may use different devices to signal to a new entrant that it will impose high costs on its competitors (e.g., by lowering its prices) in case of entry. Baird presents a summary of the game theory analysis on pre-emptive strategy[374] in antitrust cases using the facts of the *DuPont* case[375] to show that in strategic interactions, first movers[376] sometimes have a substantial advantage. However, the mere fact that DuPont, a cost leader in the titanium dioxide[377] market, decided to expand its production capacity but then gave up on using it may not necessarily be a proof of anticompetitive behavior. In pertinent part, Baird shows that in an extensive form game model, sunk costs and first mover's advantage can sometimes induce an incumbent to take seemingly anticompetitive steps without in fact intending to raise new entrants' costs. Even in competitive markets, efficient firms may be the ones most likely to expand their capacity.

At any rate, economists do not unanimously accept the RRC theory. In particular, there is substantial disagreement whether such strategies can lead to success.[378] The RRC theory has been met by even more scepticism from the courts. Most significantly, the US Supreme Court has failed to adopt it. Thus, the potential impact of the RRC theory on standardization issues is not entirely clear.

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[371] For a survey, see T.KRATTENNMAKER/S.SALOP, "*Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*", in: *96 Yale L.J. 209*, 1986.
[372] On the other hand, a price increase may render consumers more price sensitive.
[373] See the *Allied Tube* case law discussed in Subsection 3.2.5. Noerr-Pennington doctrine.
[374] D.G.BAIRD, *Game Theory and the Law*, Harvard University Press, pp. 57 and ff, 1994.
[375] *Federal Trade Commission v. DuPont de Nemours and Co.* 96 F.T.C. 653 (1980).
[376] In some instances, last movers are the ones with an advantage.
[377] A whitener used mainly in paintings and plastics.
[378] See e.g., G.NEUMANN/J.NELSON, "Safety Regulation and Firm Size: Effects of the Coal Mine Health and Safety Act of 1969", in: *25 J.L. & Econ. 183*, 1982; E.T.SULLIVAN, "On Nonprice Competition: an Economic and Marketing Analysis", in: *45 U.Pitt.L.Rev. 771*, 1984.

Only a few judicial decisions refer to the RRC literature;[379] yet in some the theory seems to have found a tacit application. In the *Alcoa* case,[380] aluminium producer Alcoa had purchased exclusionary rights from electric companies whereby the latter would not sell electricity to Alcoa's competitors. Alcoa had not purchased electricity from these utilities before, so the Second Circuit felt free to rule that Alcoa had engaged in exclusionary practices. Similarly in *Reazin v. Blue Cross and Blue Shield of Kansas,*[381] the Tenth Circuit held that Blue Cross used cost-cutting techniques with respect to its own customers to raise the costs of others. Blue Cross is an insurance company which managed to persuade hospitals to grant particularly low rates to Blue Cross subscribers, thus forcing the hospitals to impose higher rates on other patients. However, the Tenth Circuit's decision is troublesome because the court failed to find market power on the part of Blue Shield.

3.4. Case law on standardization issues

The US case law on standardization covers a wide range of issues[382] which may be schematically divided into two categories: cases set in a collaborative environment (most of which arise in a SSO context) (Section 3.4.2) and cases dealing with unilateral conduct (which often involve *de facto* standards or an abuse of an SSO by a firm) (Section 3.4.3.)[383]

Further, antitrust issues arising in a collaborative environment may be roughly divided into two additional categories: issues linked with the procedures used by an SSO (such as membership requirements, decision making, and enforcement of the standards) and more substantial issues linked with the pro- or anticompetitive nature of the standard itself (such as IPR-related issues and monopsony power.) After a brief introduction regarding the approaches followed by antitrust agencies towards standardization issues, each will be examined in turn.

3.4.1. Possible approaches

As Anton and Yao[384] have suggested, there are at least three types of approaches when dealing with antitrust issues regarding an SSO:

> *These approaches differ in the extent to which the institutions focus on the technical merits of the standard itself.*
>
> *It is possible, of course, for the agencies and courts to take on the task of examining and evaluating the relative technical merits of the standard in question. Under such an approach unmeritorious standards would fall, but*

[379] See, e.g., *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Assoc*., 814 F.2d 358 (7th Cir. 1987).
[380] *United States v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945).
[381] 635 F.Supp. 1287 (D. Kan. 1986), aff'd, 899 F2d 951 (10th Cir. 1990), cert. denied, 497 U.S. 1005, 110 S.Ct. 3241 (1990).
[382] For a presentation of the same issues, see ABA SECTION OF ANTITRUST, *Handbook on the Antitrust Aspects of Standard Setting*, 2004. The present subsection freely draws on its case law.
[383] Note that the proposed division does not overlap perfectly with the division between Section 1 and Section 2 cases, as, for example, a firm might violate Section 2 of the Sherman Act (monopolization) even within the framework of an SSO (for instance, in the case of a patent hold-up, see subsection 3.4.3.4.2. IPR-related issues.
[384] J.J.ANTON/D.A.YAO, "Standard Setting Consortia, Antitrust and High-Technology Industries," in: *Antitrust L.J.*, 64/247, 1995. Mr. Yao is a former Federal Trade Commissioner.

given the relative lack of technical expertise of the agencies and courts, the approach seems likely to demand substantial litigation resources and may result in increase in the proportion of bad decisions.

A less technically demanding approach, but one with some capability to reject anticompetitive standards, is for the agencies and courts to determine if there existed a reasonable basis for the existing standard. A reasonable basis approach involves an examination of whether the decision can be reasonably supported on the merits (e.g., based on information at the time that would be credible to experts, and which does not ignore contrary evidence proffered by opponents of the standard). Other considerations would include the procedures and quality of the decision making process and apparent motivations of participants (based on documents and market position). Using the reasonable-basis approach, a standard would be supportable even if conclusions leading to a different standard might be drawn, as long as the evidence reasonably supports the actual standard.

Finally, one could limit one's concerns exclusively to determining if procedural defects in the standard-generating process exist. While unformed judgments about such procedures will still be necessary, technical judgments will be avoided. Of course, such an approach would require, ultimately, some indication of competitive effect.

As the authors argue, the FTC seems to have adopted a reasonable basis approach in its investigations. However, this does not mean this approach has been explicitly chosen in practice, as the FTC never clearly explained its approach, and second consent orders concerning standard-setting issues are not numerous.[385]

3.4.2. Characterization

As previously mentioned, the issues linked with standardization are manifold and can involve many antitrust concepts. Depending upon the concepts used, the characterization of the review made by the courts may vary. When the standard-setting process is considered to be a mere disguise for *price-fixing* schemes, the case is usually analyzed under a ***per se* rule**.[386](387

However, in *Cal. Dental Ass'n v. FTC,*[388] the Supreme Court declined to apply a truncated *per se* rule in a case where an association had limited price and quality advertising. The Court stressed that the risk of asymmetry of information was an important issue, seeming afraid a "lemons' problem" might become a reality.[389] According to the Court, the association's

[385] Similarly, S.P.GATES ("Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting," in: *Emory Law Journal*, 47/583, 1998) argues that courts have adopted a deferential stance towards standard-setting bodies.

[386] See above regarding the general presentation of joint ventures, Subsection 3.3.1.3. Joint ventures and "co-ompetition". For a definition, see fn 310.

[387] See, e.g., *Nat'l Macaroni Mfrs v. FTC*, 65 F.T.C. 583 (1964), aff'd, 345 F.2d 421 (7th Cir.1965) and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

[388] 119 S.Ct. 1604 (1999).

[389] See Chapter 2, Subsection 2.1.2. Efficiency and competition, litt. c) Remedy against asymmetry of information issues, and the description of G.Akerlof's article, "The Market for Lemons: Qualitative Uncertainty and the Market Mechanism", in: *Quarterly Journal of Economics*, 48, pp. 488-500, 1970.

directives aimed more at combating unfair practices than restricting competition, so possibly, they had no effect on competition.[390] The Court held the restrictions were "at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient." In light of these circumstances, the Supreme Court rejected the "quick look" approach of the FTC and reversed the Commission's decision under a rule of reason analysis.[391]

A fair share of standardization cases refer to the case law on *refusal to deal*. As Kattan[392] pointed out, "virtually every case in which a defendant was found liable for abuse of the standard-setting process involved the promulgation of a safety standard that declared a competitor's product unsafe and made it unsalable." Most of these cases involve a plaintiff that has been denied certification from a standard-setting authority and has thus incurred a market disadvantage. Consequently, many cases are tried under the refusal to deal doctrine. Collective refusal to deal was often considered as a group boycott, which has traditionally warranted a *per se* approach,[393] especially if it involved the coercion of other market actors.[394] However, in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,[395] the Court admitted that a rule of reason approach may be warranted in refusal to deal cases when the market position of the standard-setters was not "dominant." It distinguished its former case law in the following way:

> *See , e.g., Silver […](denial of necessary access to exchange members); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., […](denial of necessary certification of product); Associated Press et al. v. United States, […] (denial of important sources of news); Klor's, Inc., […] (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, Silver, supra; Radiant Burners, Inc., supra, and frequently the boycotting firm possessed a dominant position in the relevant market. E.g., Silver, supra; Associated Press, supra; fashion Originator's Guild of America, Inc. v. FTC, […]. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances*

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[390] Id. at 771.

[391] See also *Wilk v. Am. Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), where the 7th Circuit adopted a rule of reason approach in analyzing a physicians' association prohibition regarding associating with chiropractors.

[392] Remarks before the ABA Antitrust Section Annual Meeting, New Orleans, La. (Aug. 8, 1994).

[393] See not-so-recent cases such as *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963), where the Supreme Court found a *per se* violation of Section 1 when the NYSE discontinued the provision of wire connections to a non-member without granting due process, *Fashion Originator's Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941), and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* 365 U.S. 656, 81 S.Ct. 365 (1961) where the Supreme Court seemed to hold as a *per se* violation the members' concerted refusal to sell gas to consumers not equipped with burners approved by a trade association:

> *The alleged conspirational refusal to provide gas for use in plaintiff's burners interferes with the natural flow of interstate commerce [and] clearly has, by its "nature" and "character." a "monopolistic tendency."*

On the other hand the *per se* characterization of *Silver* is put into doubt in *United States v. Reality Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

[394] See the *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* 365 U.S. 656, 81 S.Ct. 365 (1961) case presented hereunder, in Subsection 3.4.3.3.2. Private SSOs' enforcement after Northwest.

[395] 472 U.S. 284, 105 S.Ct. 2613 (1985) (albeit not a standardization case.)

> *the likelihood of anticompetitive effects is clear and the possibility of countervailing pro-competitive effects is remote.*[396]

In the standardization context, the "**quick look"**[397] approach has been applied in particular when trade associations have set *deontological standards.*[398]

When a court is required to analyze the legality of a standardization agreement between firms, it may elect to do so under the framework of a *joint venture* analysis and thus apply a **rule of reason** approach.[399] Moreover, the rule of reason is usually applied to conduct affecting the *admission to an SSO* or its composition. In *National Association of Review Appraisers & Mortgage Underwriters v. Appraisal Foundation,*[400] the Court of Appeals for the Eighth Circuit held that when an exclusion from an organization is based on criteria which may "serve some legitimate purpose necessary to the proper functioning of the [trade association] and overall efficiency of the market," a rule of reason shall be applied. However, when the admission rules do not serve such purposes, the older case law holding that group boycotts are to be analyzed under a *per se* rule is likely to still apply.[401] Finally, communications to the public or the SSO's members about the certification or denial of certification of a product is usually appreciated under the rule of reason.[402]

When the Court engages in a rule of reason analysis, it will generally enquire about the market power of the alleged violators. In the standard-setting context, the relevant market may typically include the market for the standardized product,[403] the market for the technology (or its close substitutes) embodied in the standard,[404] and the "innovation market." Concerning the latter, the IP Guidelines provide in pertinent part (§ 3.2.3):

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[396] The reason behind the lack of clarity in refusal to deal cases may lie, as R.POSNER, *Antitrust Law*, 2d ed., University of Chicago Press, p. 238, 2001, put it, in the fact that they "involve an extraordinarily heterogeneous body of practices."

[397] For a definition, see fn 316.

[398] See, e.g., *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp*., 456 U.S. 556, 102 S.Ct. 1935 (1982) (trade association prohibition of unfair competition) and *FTC v. Indian Fed'n of Dentists*, 476 U.S. 447, 106 S.Ct. 1009 (1986) (trade association prohibition of transmitting the dental x-rays of patients to dental insurers.)

[399] For a definition see fn 313.

[400] 64 F.3d 1130 (8th Cir. 1995).

[401] See *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705 (1959).

[402] See, e.g., *Eliason Corp v. Nat'l Sanitation Found.,* 614 F.2d 126 (6th Cir.1980), cert. denied, 449 U.S. 826, 101 S.Ct. 89 (1980), *Structural Laminates, Inc. v. Douglas Fir Plywood Assoc*., 261 F.Supp. 154 (D.Or. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024, 89 S.Ct. 636 (1969) and *Moore v. Boating Indus. Associates* (*Moore II*) 819 F.2d 693 (7th Cir.1987), where the 7th Circuit held the notification by an SSO to its members of a competitor's failure to comply with legal safety standards was to be appreciated under a rule of reason approach.

[403] The IP Guidelines, (§ 3.2.1), relevantly provide, albeit in an IP context:

> *A restraint in a licensing arrangement may have competitive effects in markets for final or intermediate goods made using the intellectual property, or it may have effects upstream, in markets for goods that are used as inputs, along with the intellectual property, to the production of other goods.*

The analogy with the IPR analysis may be warranted not only because standards often entail technologies that are protected by IPR, but also because anticompetitive standards themselves may often have impacts in more than one market.

[404] The IP Guidelines defines this market as (§ 3.2.2.):

> *Technology markets consist of the intellectual property that is licensed (the "licensed technology") and its close substitutes—that is, the technologies or goods that are close enough*

> *[A]n innovation market consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development. The close substitutes are research and development efforts, technologies, and goods that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to retard the pace of research and development. The Agencies will delineate an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.*

Moreover, the case law on the characterization of standardization issues must now be interpreted in light of the recently adopted Standards Development Organization Advancement Act of 2004.[405] This act exempts SSOs (but not their members[406]) who register with the Department of Justice and the FTC within 90 days of the standard-setting activity from the treble damages provisions of the antitrust laws.[407] Furthermore, the Act mandates that most SSOs'[408] activities be evaluated using only the rule of reason.[409] However, activities that amount to price-fixing and market allocation will continue to be analyzed under a *per se* rule.

To qualify as an SSO, the organization must "incorporate the attributes of openness, balance of interest, due process, appeals process and consensus," and its activities must be intended to result in a voluntary consensus. However, such requirements are not further defined in the Act.[410]

> *substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed. When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may rely on technology markets to analyze the competitive effects of a licensing arrangement*

[405] 15 U.S.C. § 4301-05.

[406] As K.M.ELOVITZ, "A New Law Affects Standards Writing," available at www.reedconstructiondata.com, remarks:

> *Section 8 of the new law makes it clear that antitrust protection applies only to the standards-developing organizations. It does not extend to parties (individual committee members or their employers) who participate in standards development activities. Therefore, individual engineers who attempt to use their positions on standards writing committees for personal financial or competitive gain still face potential antitrust liability. Whether an individual engineer would be an attractive target for an antitrust action is a question most of us would prefer not to ponder.*

[407] Additionally, the SSO must set or maintain:

> *(V)voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus […].*

[408] Note that the Act speaks of "standard developing organizations" ("SDO.")

[409] § 104.

[410] Although they are based on the Office of Management and Budget ("OMB") requirements for standards available for government use, their precise meaning still needs to be clarified by the courts.

3.4.3. Collaborative standards

3.4.3.1. Membership and composition of organs

Membership criteria are generally analyzed using the rule of reason. It is often difficult to determine whether membership criteria serve an exclusionary objective or are necessary for the attainment of the association's goal. Hence, courts usually weigh the anticompetitive effects of an exclusion from membership against the benefits the association may gain from the refusal. As mentioned in the last subsection, this was confirmed in *National Association of Review Appraisers & Mortgage Underwriters v. Appraisal Foundation,*[411] where the Court of Appeals for the Eighth Circuit adopted a rule of reason approach in refusing to strike down an exclusion from an SSO. The court reasoned that although these membership criteria were "inherently exclusionary and thereby necessarily restrict[ed] competition to some degree," the membership criteria on which the refusal was based might "serve some legitimate purpose necessary to the proper functioning of the [trade association] and overall efficiency of the market."[412]

Under a rule of reason approach, courts are likely to take into account the market power of the SSO.[413] If the exclusion from the association has no anticompetitive effect on the market, no violation of antitrust statutes is likely to be found. In *United States v. Visa U.S.A., Inc.*,[414] Visa and Mastercard prohibited their partner banks from issuing competing Discover and American Express cards. The Court of Appeals for the Second Circuit struck the prohibition down as Visa and Mastercard held a substantial market power (20,000 partner banks) and the prohibition was detrimental to competition. On the other hand, in *Clamp-All Corp. v. Cast Iron Soil Pipe Institute,*[415] the Court of Appeals for the First Circuit ruled that although a certification body held substantial market power and was exclusively composed of competitors, it was under no duty to certify another competitor's products.[416/417]

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[411] 64 F.3d 1130 (8th Cir. 1995).
[412] Id. at 1133.
[413] The issue of market power is often decisive; see e.g., *Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc*., 40 F.3d 247, 251 (7th Cir. 1994) where the Court held that there could be no violation of the antitrust laws when the Board of an association without substantial market power refused to certify competitors (*in casu,* psychiatrists) as:

> *[P]laintiffs already are sellers in the market for psychiatric services; turning down their application for certification does not remove their output from the market and therefore does not raise prices to consumers.*

See also, *Schachar v. Am. Academy of Ophthalmology, Inc*., 870 F.2d 397 (7th Cir. 1989).
[414] 344 F.3d 229 (2d Cir. 2003).
[415] 851 F.2d 478 (1st Cir. 1988).
[416] In *Consol. Metal Products, Inc. v. Am. Petroleum Inst.,* 846 F. 2d 284, 293 (5th Cir. 1988), the court similarly held:

> *It is a natural part of a competitive market that products, firms, and—sometimes—entire sectors of the economy fail. A plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products.*

[417] In *Conso. Metal Products, Inc. v. Am. Petroleum Inst.,* 846 F. 2d 284 (5th Cir. 1988), the SSO (API) was not condemned even though it was a trade association representing all sectors of the American petroleum industry that was:

The composition of the SSO is sometimes taken into account in the antitrust analysis. In the absence of proof of exclusionary intent, the fact that an SSO is composed not only of competitors but also of consumers of the standardized products may be held to be a factor in favor of the defendant SSO.[418] In *Consolidated Metal Products, Inc. v. American Petroleum Inst.,*[419] Consolidated was a producer of sucker rods for oil companies. It patented an innovative design of sucker rods that could be rolled threaded, which made the rods more competitive than hot-forged ones. The American Petroleum Institute ("API") initially refused to certify Consolidated's design, but finally accepted it after a year-and-a-half delay. Many members of the API were competitors of Consolidated. The U.S. Court of Appeals for the Fifth Circuit had to consider whether the API's standards were anticompetitive, *inter alia*, on the grounds that many of API's members were competitors. The court held the fact that the committee, which had adopted an allegedly anticompetitive standard, was "composed not of [plaintiff's] competitors but of buyers of sucker rods—businesses who could have no motive for driving [the plaintiff] from the market" played in the defendant's favor. According to the court, even if there were a possibility the members of this committee might have been influenced, the plaintiff had not brought any evidence in this regard.[420]

Conversely, the fact an SSO is composed solely of competitors may be held against the collaborating standard-setters. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[421] the Supreme Court noted:

> *[A] standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic*

> *[T]he only domestic body that sets standards for oil field equipment. Equipment manufacturers [could] apply to API for approval of their products and, if API [found] that the equipment [met] its standards, it [would] (for an annual fee) grant a license to display the API monogram on the equipment. [...] The API monogram ha[d] commercial value in that its use enhance[d] product sales.* Id. at 286.

[418] See also, the October 3, 2002 Business Review Letter from Charles A. James (Assistant Attorney General, Department of Justice, Antitrust Division) to Douglas W. Macdonald:

> *[The SSO] is made up of producers and consumers of robotic welding systems, and there is little reason to believe that the latter would knowingly deprive themselves of reasonable competitive options.* (p. 3)

[419] 846 F. 2d 284 (5th Cir. 1988) at 294.
[420] As the Court noted:

> *API's user committee, which found that Consolidated's rod design did not meet Spec. 11B, is composed not of Consolidated's competitors but of buyers of sucker rods—businesses who could have no motive for driving Consolidated from the market. Although it is at least conceivable that the API staff in charge of licensing the monogram might have been influenced by competing manufacturers to drive Consolidated from the market, Consolidated presents no evidence suggesting this possibility. The evidence in the written record suggests nothing more than a technical debate among engineers.* Id. at 294-295.

[421] 456 U.S. 556, 102 S.Ct. 1935 (1982).

of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.

Nevertheless, the importance of the composition of an SSO should not be overstated. Courts have never condemned or exempted a standard solely on the face of SSO participation. At best, this is simply a factor among others.

3.4.3.2. Corruption of the decision-making process

3.4.3.2.1. Plaintiff's burden of proof

Particularly in the context of compatibility standards and certification issues, the preference for one given standard over another or the acceptance or refusal of a seal of approval may have important consequences regarding competitive conditions in the market. When the standard or the seal of approval enjoys a substantial influence on market actors (e.g. buyers or insurers), the non-complying products may be *de facto* denied market access.[422]

In such cases, the rejected producer may be tempted to see an anticompetitive intent in the SSO's decision. The plaintiff must, however, put forth evidence sustaining this claim.

In *DM Research, Inc. v. College of American Pathologists,*[423] the First Circuit held:

> *It is commonplace, and often very useful, for organizations to recommend quality standards […] or adopt them as part of a certification process […]. Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as "unreasonable" under the Sherman Act. A few cases say this explicitly, see, e.g., Consolidated Metal Products, Inc. v. American Petroleum Inst., 846 F.2d 284, 294 (5th Cir. 1988)*[424]*, but more important, something else or more extreme is generally present in the cases that have condemned quality standards as anticompetitive.*[425]

In *Consolidated Metal Products, Inc. v. American Petroleum Inst.,*[426] the U.S. Court of Appeals for the Fifth Circuit had to decide, *inter alia*, whether the delayed certification of Consolidated products by the American Petroleum Institute ("API") had violated antitrust laws. Consolidated claimed that API had unreasonably restricted competition by refusing to certify Consolidated's design immediately. Under a rule of reason approach, the court noted

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[422] See also the Code of Good Practice of the WTO Agreement on Technical Barriers to Trade, which aims at reducing abuses in this respect, in Chapter 6.

[423] 170 F.3d 53 (1st Cir.1999).

[424] In *Consolidated Metal Products, Inc. v. American Petroleum Inst.*, 846 F. 2d 284 (5th Cir. 1988). the Court held: "*[…] a showing that the defendants harmed the plaintiffs is not enough to prove a violation of section 1 under the rule of reason."* Id. at 293.

[425] See also, *Greater Rockford Energy and Tech. Corp. v. Shell Oil Co*., 998 F.2d 391 (7th Cir. 1993) and *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999):

> *[I]t is not intrinsically an antitrust violation for an organisation to limit its endorsement to those who meet its published standards unless the standard itself is shown to be anticompetitive in purpose or effect*. Id. at 58.

[426] 846 F. 2d 284 (5th Cir. 1988).

that to prove "the defendant's conduct adversely affected competition" under a conspiracy theory, the plaintiff had to establish two basic elements: "(1) that the defendant engaged in some form of joint action and (2) that this joint action amounted to an unreasonable restraint of trade."[427] In examining the alleged joint action prong, the court noted:

> *A trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a "walking conspiracy," its every denial of some benefit amounting to an unreasonable restraint of trade. […] To survive summary judgment on the issue of conspiracy, the plaintiff must present evidence that tends to exclude both the possibility of conduct consistent with permissible competition and the possibility that the alleged conspirators acted independently. API's delay in licensing its monogram to Consolidated, even if hindsight shows it to be unjustified, is not enough in itself to fall within the forbidden category. It is axiomatic that trade standards must exclude some things as substandard and it is unsurprising that standard-setting bodies sometime err.*[428] *A single such error does not amount to conspiracy.*[429]

The court therefore rejected on evidentiary grounds Consolidated's allegation that API members conspired against it. However, the court indicated an unreasonable restraint of trade could be shown "*by proof of* either *an unlawful purpose or an anticompetitive effect."*[430] In the instant case, no proof of an unlawful purpose had been brought as:[431/432]

> *Consolidated offers scant evidence suggesting an unlawful purpose behind API actions. The evidence suggests that in processing Consolidated's applications for the monogram, API* ***followed its normal procedure*** *for analysis of a new product. Although the user subcommittee's initial verdict on Consolidated's application does not make clear how [Consolidated's design] could be made to comply with API's standards,* ***it did not foreclose the possibility****. There are* ***no indications that approval was delayed in bad faith****. Indeed, that API certified the three-piece welded rod design [another similar design] at the same time it passed over Consolidated's three-piece threaded design suggests the absence of any desire to suppress innovative products.*[433] [emphasis added]

The court further held that Consolidated had failed to prove that API's refusal had anticompetitive effects. The fact the seal of approval was crucial for the access to the market

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[427] Id. at 293.

[428] See also *Structural Laminates, Inc. v. Douglas Fir Plywood Assoc.*, 261 F.Supp. 154, 159 (D.Or. 1966): "Mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade."

[429] Id. at 294.

[430] The Court cited *McLain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, 243, 100 S.Ct. 502, 509-10 (1980).

[431] For a presentation of the role of intent in the antitrust context, see R.A.CASS/K.N.HYLTON, "Antitrust Intent," in: *Southern California Law Review*, 74, 2000.

[432] For an application of the same test prong, see also *Roofire Alarm Co. v. Royal Indemnity Co.*, 202 F.Supp. 166 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir. 1963), cert. denied, 373 U.S. 949, 83 S.Ct. 1678 (1963) and *Worthen Bank and Trust Co. v. Nat'l Bankamericard Inc*., 485 F.2d 119 (8th Cir. 1973).

[433] Id. at 294-295.

was not held to be decisive, as compliance with it was voluntary, and it was not in the API's interest to approve bad products:

> *Consolidated offers no evidence that its customers were coerced by API or otherwise constrained to buy only monogrammed products. Absent evidence of coercion, there is no reason to assume that buyers do not rely voluntarily on the API monogram. Product information is crucial to a competitive market. […] This information saves buyers the trouble of investigating products themselves and the risk of trying untested products. API product approval may be important to user acceptance of new sucker rods just as a favourable review in Consumer Reports magazine, the "Good Housekeeping Seal of Approval", and the seal of the Underwriters Laboratories are important to buyer acceptance of new consumer goods. Even if user reliance gives API significant influence over the market, that influence may enhance, not reduce, competition and consumer welfare.*
>
> *Although there is some danger that API could use its influence to reduce competition, this danger is small so long as users rely voluntarily upon the API monogram. If users choose freely to rely on API approval, API has influence principally because it has done a good job evaluating products. If API fails to evaluate products accurately, consumers free to sample non-monogrammed goods will gradually discover the monogram's diminished usefulness and cease relying upon it. Thus, the greatest threat to competition is in the short run, before a significant number of buyers shop around. Even this threat is mitigated to the extent that producers of unmonogrammed equipment have alternative means of reassuring consumers of the quality of their products. They may, for example, offer warranties, commission product tests by someone other than API, provide free (or low-cost) samples of their products, and advertise.*[434]

The court summarized the case as follows:

> *In sum, it is not enough to meet the plaintiff's burden under the rule of reason that the plaintiff was harmed because the defendant refused without justification to promote, approve, or buy the plaintiff's product. Neither anticompetitive animus nor the other elements of a section 1 claim can be inferred solely form the incorrectness of a single business decision by a standard-setting trade association. The "reasonableness" of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability.*
>
> *Were this not so, the federal courts would become boards of automatic review for trade association standards committees, product testing services, and countless other business transactions. Not only would this tax the abilities of the federal courts, but fear of treble damages and judicial second-guessing would discourage the establishment of useful industry*

[434] Id. at 296.

> *standards. Under such a regime, the antitrust laws would stifle, not protect, the competitive market.*[435]

However, one might seriously wonder whether such a *laissez-faire* approach would be optimal in cases of asymmetry of information between consumers and producers (especially in cases of credence goods.[436]) It would seem that a court should at least review the grounds under which the seal was refused, something the courts did not seem to undertake in detail in the *Consolidated* case.

At any rate, U.S. antitrust authorities consistently hold that the mere fact that a standard may give a certain advantage to some producers over others is not automatically to be considered evidence of a conspiracy. As mentioned in a Business Review Letter of the FTC:[437]

> *[…The] fact that the proposed standard is based on technology that is not widely-used does not by itself render the proposed standard unreasonably anticompetitive. Nor does the fact that adoption of the proposed standard might give some producers some advantage over others automatically compel a conclusion that competition will be unreasonably restrained in the future.*

In sum, plaintiffs in these cases are in a rather uncomfortable position. Although they need to prove that a conspiracy[438] has taken place within an SSO, they often lack the needed insider information to make their case,[439] as they may not be a member of the SSO or the information may be held by the parties who have captured the SSO's decision-making process. Thus it is somewhat odd that the burden of proof is imposed on the uninformed party.

3.4.3.2.2. Examples of corruption of the SSO process

Courts have clearly stated that manipulation of standard-setting procedures may lead to antitrust liability. In *American Society of Mechanical Engineers v. Hydrolevel Corp.,*[440] the Supreme Court held a trade association liable for the conduct of its agents. The American Society of Mechanical Engineers ("ASME") is a group with over 90,000 members drawn from all fields of mechanical engineering. ASME has published 400 codes and standards for the engineering industry. Although these codes were merely advisory at the moment of their adoption, they had a great impact on the market as many federal, state, and local regulating bodies have incorporated them by reference. As the Court remarked, "[o]bviously if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the market place."[441]

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[435] Id. at 297.
[436] For a definition, see Subsection 2.1.2. Efficiency and competition, litt. c) Remedy against asymmetry of information issues.
[437] October 3, 2002 Business Review Letter from Charles A. James (Assistant Attorney General, Department of Justice, Antitrust Division) to Douglas W. Macdonald (p. 3.)
[438] For a presentation of the role of intent in the antitrust context, see R.A.CASS/K.N.HYLTON, "Antitrust Intent", in: *Southern California Law Review*, 74, 2000.
[439] Under US law, and under specific circumstances, the plaintiff may invoke the procedural instrument of discovery to request information from another party.
[440] 456 U.S. 556, 102 S.Ct. 1935 (1982).
[441] Id. at 559.

For example, the ASME Boiler and Pressure Vessel Code encompassed a standard governing "low-water cutoff" devices in heating boilers.[442] For many years, McDonnell & Miller ("M&M") had dominated this product market. But in the mid-1960s, Hydrolevel entered the market with a new design that included a revolutionary time delay. M&M was represented by one of its agents (vice-chairman and later chairman of the committee) and by an agent of an affiliated company (chairman of the committee) in the relevant committee of the ASME responsible for the interpretation, formulation, and revision of the Boiler and Pressure Vessel Code.

M&M took steps to protect itself from the competitive threat represented by Hydrolevel's new device by using its position in the ASME decision-making bodies. The vice-chairman of the committee (an M&M agent) addressed a letter to the chairman of the committee (an M&M affiliate's agent) putting into question the compliance of Hydrolevel's fuel-cutting device with the ASME standard. The chairman answered with an unofficial letter that implied Hydrolevel's device did not comply with the ASME code. M&M salespersons were instructed to render their customers aware of Hydrolevel's non-compliance, and Hydrolevel sales promptly diminished. It was beyond doubt the behavior of the chairman and vice-chairman violated Section 1 of the Sherman Act, as it constituted a conspiracy in restraint of trade.

It must be emphasized, however, that the Supreme Court was divided on the issue whether apparent authority liability should be imposed on trade associations, with three Justices dissenting, arguing that such a decision was contrary to both agency and antitrust law.[443]

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.,*[444] the Supreme Court had to rule on a decision by an SSO excluding a product from its list of approved products. The National Fire Protection Association ("NFPA") was a private SSO with more than 31,500 members representing a wide range of interests (industry, labor, academia, insurers, organized medicine, firefighters, and government.) Through consensus standard-making, the NFPA created safety standards that were often adopted by private and political entities. Among those was the National Electrical Code (the "Code"), which was the most influential electrical code in the US as most market actors would refuse to deal with non-approved products.

Indian Head was a producer of plastic conduit made of polyvinyl chloride ("PVC.") It claimed that such conduits offered significant competitive advantages over traditional steel conduits. However, PVC conduits were said to emit toxic fumes during fires in high-rise buildings. Indian Head initiated a proposal to include PVC conduits in the 1981 Code, but the steel interests enrolled in the NFPA decision-making bodies' 230 trade associates (employees, executives, sales agents, and the agents' employees) were unsympathetic to Indian Head's

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[442] The Court noted:

> *If the water in a boiler drops below a level sufficient to moderate the boiler's temperature, the boiler can "dry fire" or even explode. A low-water fuel cutoff does what its name implies: when the water in the boiler falls below a certain level, the device blocks the flow of fuel to the boiler before the water level reaches a dangerously low point. To prevent dry firing and boiler explosions [the Code] provides that each boiler "shall have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water gage glass.* Id. at 559-560.

[443] See dissenting opinion of Justice Powell, with whom Justice White and Chief Justice Rehnquist joined. Id. at 578 and ff.

[444] 486 U.S. 492, 108 S.Ct. 1931 (1988).

arguments. This resulted in the NFPA narrowly (394 to 390) rejecting the Indian Head proposal. Indian Head appealed the decision to the Association's Board of Directors, with the Board ruling that the steel interests had circumvented the rules of the NFPA but had not violated them. When the Board thus rejected Indian Head's arguments, Indian Head filed an antitrust complaint claiming that the steel interests packing the meeting had violated Section 1 of the Sherman Act.

At the hearings, the steel interest acknowledged that they had conspired to exclude Indian Head's product from the Code and that they had a pecuniary interest for doing so. Although the jury found that Allied Tube had "acted, at least in part, based on a genuine belief that plastic conduit was unsafe," it nonetheless had "subverted" the consensus standard-making process of the Association.[445] The District Court granted a judgment n.o.v.[446] for Allied Tube, reasoning that Noerr-Pennington immunity applied. However, the appellate court reversed and the US Supreme Court granted certiorari to "address important issues regarding the application of Noerr-Pennington immunity to private standard-setting associations."[447/448]

3.4.3.3. Enforcement

3.4.3.3.1. Self-regulating entities and due process

Self-regulation occurs when entities have been entrusted either via an express legal provision or tacitly to regulate an industry. *A priori*, as the standard is rendered compulsory by legislative fiat (making them technical regulations), rules on self-regulating entities do not

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[445] Id. at. 498.

[446] Judgment notwithstanding the verdict.

[447] The Noerr-Pennington immunity was described in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523 (1961), see Subsection 3.2.2. Exemptions. The Supreme Court held: "The Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry." This has been interpreted as meaning that the antitrust laws should not apply to activities by market actors aimed at requiring a modification of the legislation. Furthermore, "concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability" Allied Tube & Conduit Corp. v. Indian Head, Inc. 486 U.S. 492, 499 (1988).

[448] The US Supreme Court did not formally rule on the question whether the conduct of the steel interests violated the Sherman Act, as the sole purpose of its analysis was justifying the rule of reason approach. However, the Court provided some guidance in relation to the competitive effects of a private SSO:

> *There is no doubt that the members of [private standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. […] Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. […] When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, […] those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations.* Id. at 500-501.

The Supreme Court also took pains to distinguish this case from *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co,* 365 U.S. 656, 81 S.Ct. 365 (1961), presented hereunder, holding that "concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny." Id. at fn 2.

seem relevant in a standardization context. However, for a time, the scope of the case law on self-regulating entities encompassed voluntary standardization efforts as well.

In *Silver v. New York Stock Exchange (NYSE),*[449] the Supreme Court seemed to introduce "due process" as a benchmark for judging the compatibility of powers of self-regulating entities with the antitrust laws. Although the scope of *Silver*'s holding (if it was binding at all) was later drastically limited,[450] it is necessary to determine the legal importance of "due process" in the standard-setting process. In the heyday of due process, some could have thought that granting due process rendered activities of trade associations immune from antitrust liability even in areas where no regulatory powers were granted. As the Sherman Act speaks of "unreasonable restraints" on trade, due process could have been construed as the benchmark for interpreting the reasonableness of the restraint. In such a case, due process would have become a benchmark not only for legally mandated technical regulations, but for standards as well.

In this case, Silver was a competitor of a private self-regulating entity, the New York Stock Exchange ("NYSE"). Silver contracted with several members of the NYSE to provide them with certain physical connections. Although the NYSE granted Silver temporary approval for the provisions of its services, the arrangement was later disapproved without Silver being heard or provided with an explanation. NYSE also required its members to discontinue their relationship with Silver. The Supreme Court held that although the NYSE was acting under the Securities Exchange Act, it not immune to antitrust laws;[451] therefore the acts of the NYSE had to be justifiable.[452] It further held that *in casu* denial of any due process "occurred under totally unjustifiable circumstances." The Supreme Court reasoned that allowing the NYSE to deal without due process with its competitors would put the Securities Exchange Act in danger:

> *[...No] justification can be offered for self-regulation conducted without provision for some method of telling a protesting non-member why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. [...] the aims of the statutory scheme of self policing—to protect investors and promote fair dealing—are defeated when an exchange*

[449] 373 U.S. 341, 83 S.Ct. 1246 (1963).

[450] As we will see below, in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct 2613 (1985), the Supreme Court swept away the "due process" standard as a benchmark for determining whether an antitrust violation should be examined under the rule of reason or the *per se* rule.

[451] The Supreme Court reasoned:

> *There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to "the influences of (improper collective action) over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted." Georgia v. Pennsylvania R.Co., 324 U.S. at 460, S.Ct. at 727.* Id. at 358 and ff.

[452] The Court stated:

> *Our decision today recognises that the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act.* Id. at 264.

> *exercises its tremendous economic power without explaining its basis for acting, for the absence of an obligation to give some form of notice and, if timely requested, a hearing creates a great danger of perpetuation of injury that will damage public confidence in the exchanges. The requirement of such a hearing will, by contrast, help in effectuating antitrust policies by discouraging anticompetitive applications of exchange rules which are not justifiable as within the scope of the purposes of the Securities Act.*[453]

Lower courts began to develop what became known as the "Silver exception" whereby an SSO could avoid antitrust liability by granting sufficient due process.[454]

In *Moore v. Boating Industry Associates* (*Moore I*)[455], the Appellate Court of the Seventh Circuit explained:

> *[U]nder this exception, an industry's attempt at self-regulation will […] usually be found lawful as long as procedural safeguards are employed to assure that the restraints are no more extensive than necessary to accomplish the association's legitimate purpose.*[456]

The Supreme Court distinguished its holding in 1985 in the *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*[457] case, where it stated "the absence of procedural safeguards can in no sense determine the antitrust analysis."[458] Northwest was a purchasing cooperative in which stationery was sold at the same price to both members and non-

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[453] Id. at 361 and ff.

[454] However, this doctrine seems at odds with the wording of the *Silver* decision in which the Court took great pains to limit the scope of its holding:

> *The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority* ***under the Securities Act*** *to engage in self-regulation and therefore has not even reached that threshold of justification under that statute for what would otherwise be an antitrust violation.* [emphasis added] Id. at. 364-365.

Moreover, the court later clarifies that the benchmark of what constitutes proper due process will have to be defined in another case:

> *Since it is perfectly clear that the Exchange can offer no justification under the Securities Exchange Act […] and that the Exchange has therefore violated Section 1 of the Sherman Act […], there is no occasion for us to pass upon the sufficiency of the reasons which the Exchange later assigned for its action. Thus, there is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises.* Id. at 365-366.

[455] 754 F.2d 698 (7th Cir. 1985). For other examples of the "*Silver* exception," see also *U.S. Trotting Ass'n v. Chicago Downs Ass'n., Inc*., 665 F.2d 781 (7th Cir. 1981), *McCreery Angus Farms v. Am. Angus Ass'n*, 379 F.Supp. 1008 (S.D. Ill. 1974), aff'd., 506 F.2d 1404 (7th Cir. 1974).

[456] Id. at. 707.

[457] 472 U.S. 284, 105 S.Ct 2613 (1985).

[458] Id. at 295.

members; however, members received a share of the cooperative benefits at the end of the year, thus in effect purchasing their stationery at a discounted price.[459]

Pacific had been a member of Northwest, but when it was suddenly expelled without being afforded a hearing or given a justification, Pacific filed a complaint under Section 1 of the Sherman Act[460]. Applying the *Silver* exception, the Ninth Circuit condemned Northwest for failing to provide due process.

However, the Supreme Court reversed, restricting severely the scope of *Silver*. It held that *Silver* implied a repeal of the antitrust laws by the Securities Exchange Act. In *Northwest*, no such repeal could be brought forward,[461] and thus due process could not be a benchmark for judging whether an antitrust violation occurred as no requirement of due process exists under the antitrust laws:[462]

> *If the challenged concerted activity of Northwest's members would amount to a per se violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a per se violation because the antitrust laws do not themselves impose on joint ventures a requirement of due process. Id. at 293.*

Due process therefore became unhelpful in determining whether a trade association's behavior violated antitrust laws.

3.4.3.3.2. Private SSOs' enforcement after Northwest

a) Access to the standardization process

In *American Society of Sanitary Engineering,*[463] the FTC had to review the allegedly anticompetitive conduct of the American Society of Sanitary Engineering ("ASSE"), an association setting and selling plumbing product standards and seals of approval. ASSE's standards are widely known and highly regarded, with numerous legislatures having adopted them into their building codes. Evidence of compliance with an ASSE standard thus confers important competitive benefits.

A small producer of toilet components had developed an innovative toilet tank fill valve. The main advantage of such a device was that it protected against backflow and water

[459] The Northwest case does not involve standard-setting activities, but is likely to extend to such activities.
[460] The 9th Circuit noted that in the absence of a regulatory delegation, Northwest's behavior would have constituted a concerted refusal to deal which would be a *per se* violation of the antitrust laws. As Section 4 of the Robinson-Patman Act specifically approves the price discrimination occasioned by such expulsion and gives a mandate to Northwest for self-regulation, Northwest's conduct should be examined under a rule of reason. However, in applying *Silver*, the 9th Circuit held that Northwest violated its obligation to provide due process to the plaintiff, thus making the *per se* rule applicable.
[461] Section 4 of the Robinson-Patman Act was deemed "no more than a narrow immunity" and therefore cannot be "plausibly construed as an exemption to or repeal of any portion of the Sherman Act." Id. at 292-293.
[462] According to the Court in Northwest, the "due process" benchmark was introduced in *Silver* because of "the interpretative maxim disfavoring repeals by implication," which led the Court "to narrow permissible self-policing to situations in which adequate procedural safeguards had been provided." Id. at 292.
[463] 106 F.T.C. 324 (1985).

contamination. However, as the new device did not comply with ASSE's standard for toilet tank fill valves, the producer petitioned the ASSE for a new standard. The ASSE refused to grant one, arguing that it had "a policy of refusing to develop a standard for a product which is patented or manufactured by only one manufacturer." The FTC entered into a consent agreement with the ASSE, whereby it requested, *inter alia*, that the ASSE stop refusing requests for issuance of a standard or modification of an existing standard for a product merely because only one or a small number of manufacturers held the patent or made the product.

b) Anticompetitive enforcement methods: a rather stringent review

Courts have consistently made clear that product standards cannot be enforced by unlawful means. In particular, anticompetitive means cannot be used even if they seek to defend valuable goals. In *Fashion Originators' Guild of America v. FTC,*[464] the Fashion Originators' Guild of America ("FOGA") tried to enforce its clothes design by requiring its sellers to refuse to sell copies of FOGA's designs. However, the Supreme Court emphasized that clothes designs are not legally protected. Albeit desirable from the producers' perspective, the protection of FOGA's design could not save it from the anticompetitive effects of its enforcement. Consequently, the Supreme Court held that FOGA's pressure on its sellers violated antitrust laws. *Per analogiam*, standards which are not protected by an IPR cannot be protected by illegal means, no matter how valuable they may be.

In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,*[465] Radiant Burners was a manufacturer of ceramic gas burners used in home heating systems. The American Gas Association ("AGA") was a group composed of public utilities and gas distributors. It adopted a seal of approval to gas burners that had passed certain tests. Radiant twice requested AGA to approve its burners and grant it a seal; however, both times the AGA ruled that Radiant's burners were not in compliance with AGA standards, something Radiant contested vehemently. As a result, two members of the AGA **refused to provide** gas to houses equipped with Radiant burners.

Radiant filed a complaint with the District Court and an appeal to the Appellate Courts, which was rejected, with the Seventh Circuit reasoning that Radiant's damage was not tantamount to public damage:

> *[S]ince (the) allegations of (the) plaintiff's complaint fail to establish that there has been any appreciable lessening in the sale of conversion gas burners or gas furnaces or that the public has been deprived of a product of overall superiority.*

However, on appeal, the Supreme Court granted *certiorari* and reversed.:

> *The conspiratorial refusal "to provide gas for use in the plaintiff's Radiant burner(s) because they are not approved by AGA" […] falls within one of the classes of restraints which from their nature or character are unduly restrictive, and hence forbidden by both the common law and the statute. […] The alleged conspiratorial refusal to provide gas for use in plaintiff's*

[464] 312 U.S. 457, 61 S.Ct. 703 (1941).
[465] 365 U.S. 656, 81 S.Ct. 365 (1961).

> *Radiant Burners interferes with the natural flow of interstate commerce and clearly has, by its "nature" and "character," a monopolistic tendency. As such it is not to be tolerated merely because the victim just one (manufacturer) whose business is so small that his destruction makes little difference to the economy.*[466/467]

Although the Supreme Court did not explain what made the "nature and character" of AGA's behavior unduly restrictive, it nevertheless greatly emphasized two factors: (a) that Radiant's Burners product was not evaluated fairly by the AGA, thus discriminating between products;[468] and (b) that AGA enforced its standard by forcing customers not to deal with the non-approved producer, thus providing the element of coercion which might lead to a finding of violation of the antitrust laws.[469]

However, when only one of these two factors is present, courts have rarely considered a standard-setting body's behavior under the *per se* rule. In *Consolidated Metal Products, Inc. v. American Petroleum Institute,*[470] the Fifth Circuit first analyzed whether API's conduct qualified as a *per se* violation of antitrust laws. Taking into account the fact that API did not enforce its standard by coercing buyers to purchase only API-approved rods, and that API standards were not approved by government entities,[471] the court held that no *per se* violation had occurred.[472]

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[466] Id. at 659-660.

[467] See as well, *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705 (1959), cited by the US Supreme Court.

[468] The US Supreme Court remanded the case to the Court of Appeals for the Seventh Circuit, but it clearly stated that if the Seventh Circuit were to conclude that AGA members had conspired to exclude Radiant's product from the market, their behavior would run afoul of antitrust laws ("The conspiratorial refusal 'to provide gas for use in the plaintiff's Radiant Burner(s) are … forbidden by both the common law and the statute.'")

[469] See also *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* 472 U.S. 284, 294, 105 S.Ct. 2613 (1985) (albeit not an SSO case), where the Supreme Court held (quoting L. SULLIVAN, *The Law of Antitrust,* pp. 261-262, 1977) that the *per se* rule should be reserved for "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'"

[470] 846 F. 2d 284 (5th Cir. 1988), at 294.

[471] In sum, the Court held:

> *Atrade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not* per se *violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer. Here, denial of API certification in no real sense "excludes" Consolidated from the market: without certification, Consolidated admits that it is still free to sell its products and consumers are free to buy them.* Id. at. 292.

[472] In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* 472 U.S. 284, 105 S.Ct. 2613 (1985), the Supreme Court similarly held that a concerted refusal to deal involving discipline and expulsion of a member of a buying cooperative should not be analyzed under a rule of reason approach, because when the cooperative had no market power, no antitrust harm might occur. The Court noted that "wholesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects" (at 295), and held that in such cases:

> *[U]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted*. (Id. at 296)

Moreover, the Supreme Court subsequently held in *Allied Tube*[473] that c*oncerted efforts to enforce (rather than just agree upon) private product standards face more rigorous scrutiny.* Then, in *American Medical Association v. United States,*[474] the Supreme Court seemed to go even further by deciding that an SSO was not allowed to retaliate against a price-cutter.

In sum, beyond refusal of a seal of approval (or another benefit accruing from membership or standard compliance) after a fair hearing, an SSO seems to have very limited power to enforce its own standards. In particular, it would seem that **retaliation** and **coercion** of economic actors are unlikely to be tolerated (although they are unlikely to constitute a *per se* violation), at least when the SSO holds substantial market power.

In *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*,[475] the First Circuit had to decide whether **promotional activities** on behalf of a standard could violate antitrust laws. The Cast Iron Pipe Institute ("CISPI") was a standard-setting association active in the hub-less pipe couplings industry. It promulgated and licensed a pipe-coupling standard, the "NO-HUB" collective mark. Although CISPI's standard was only one of the standards available for pipe couplings, CISPI managed to persuade several private SSO and several state and local authorities to adopt its standard.

Clamp-All was the producer of a higher-quality coupling that had the disadvantages of being more expensive and of not complying with the CISPI standard. Clamp-All lodged an antitrust complaint claiming that CISPI's promulgation efforts unreasonably restrained trade. The First Circuit disagreed, providing the following rule regarding burden of proof:

> *The joint practices and agreements that appellant attacks here are not per se unreasonable. Thus, appellant must show that the likely anticompetitive effects of these practices outweigh their business justifications, or at least that the defendants might achieve any legitimate business objectives in a significantly less restrictive way.*[476]

When weighing the importance of each argument, the court held:

> *[A]ppellants seem to say that CISPI's very promulgation of this standard and its efforts to secure its adoption by certifying authorities amounts to an unreasonable restraint of trade. We do not see how that can be so. The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer or a buyer to determine whether a particular coupling is, in fact, (generically considered) a CISPI coupling. The adoption by certifiers helps users quickly and effectively determine that a particular coupling (which meets CISPI standards) also meets state, local, or private certifiers' standards of acceptability.[…] the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without standard. It may also help to assure product quality. […][This kind of conduct] brings about the very benefits that the antitrust laws seek to promote. That is to*

[473] See *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 501, 108 S.Ct. 1931, 1937 (1988).
[474] 359 U.S. 207, 79 S.Ct. 705 (1959).
[475] 851 F.2d 478 (1st Cir. 1988).
[476] Id. at 486.

> *say, activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.*[477]

Nevertheless, the First Circuit made clear that such favorable treatment of promulgation efforts regarding standards was warranted only for "legitimate" standard-setting activity:

> *There could be special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful. […] But the plaintiff would have to show the existence of such circumstances […].*[478]

In *Eliason Corp v. National Sanitation Found.,*[479] the Sixth Circuit established that the **adoption of a standard or of a seal of approval and publication of lists of approved products** were not in themselves a violation of antitrust laws, at least to the extent that no discrimination took place, assuming the standards and testing procedures were reasonable and not manifestly anticompetitive.

The National Sanitation Foundation ("NSF") was a non-profit organization whose activities included setting standards in the field of health and sanitation. The National Sanitation Foundation Testing Laboratories ("NSFTL") was a subsidiary of NSF engaging in special research projects and testing products to examine their compliance with NSF standards. Products approved by the NSFTL received a seal of approval, with the NSFTL also publishing and distributing a list of approved products.

Eliason Corporation was a producer of walk-in refrigerators who submitted one of its refrigerator designs for approval by the NSFTL. The NSFTL informed Eliason at an early stage that the design must be modified in order for the approval to be granted. Although the NSFTL indicated that substantial health considerations motivated the modifications, Eliason refused to implement them, instead filing an antitrust complaint alleging NSFTL's behavior constituted a group boycott.

The U.S. Court of Appeals for the Sixth Circuit rejected the group boycott argument by applying the following test:

> *Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable.*[480]

Eliason could not provide proof of either requirement. Rather it contended that the very testing of the products together with the seal of approval and the listing programs were a *per se* violation of the antitrust laws. But the court disagreed:

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[477] Id. at 487.
[478] Id. at 488.
[479] 614 F.2d 126 (6th Cir. 1980), cert. denied, 449 U.S. 826, 101 S.Ct. 89 (1980). A similar case is *Structural Laminates, Inc. v. Douglas Fir Plywood Assoc*., 261 F.Supp. 154 (D. Or. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024, 89 S.Ct. 636 (1969).
[480] Id. at 129. See also Section 3.4.2.2.1. on a plaintiff's burden of proof in standard-setting cases.

> *We are of the opinion that the testing services and the seal of approval and listing programs cannot so easily be separated from the standard they are designed to supplement and enforce. […] NSFTL's testing program helps to promote uniformity in the interpretation and application of the standards. The fixation of a seal of approval on the product or the listing of the product in a widely distributed publication only further assures the pro-competitive goal of nationwide acceptance of the product. These are legitimate means of promoting NSFTL's testing services.* [481,482]

Other factors for evaluating the reasonableness of the scheme led the court to the same result, as NSF standards were periodically revised so that innovation was protected, and NSF and NSFTL did not refuse their seal of approval without testing the product. In addition, neither was dominated by manufacturers of any one product. Finally, although Eliason also claimed the NSF had violated Section 2 of the Sherman Act, the court could not find any proof of such conduct.[483]

3.4.3.4. "Substantive" violations of the antitrust laws

3.4.3.4.1. Monopsony power (or "cartel of buyers")

The US antitrust analysis of standardization is not limited to procedural issues such as abuses of the standardization process or the methods of enforcement of a standard, as it may be the case that the standard itself represents a restriction on competition, notwithstanding that its adoption or enforcement procedures are not anticompetitive.

In *Bond Crown & Cork Co. v. FTC,*[484] the Court of Appeals for the Fourth Circuit was called to review a cease and desist order of the FTC. In this matter, the bottle cap trade association, Crown Manufacturers Association of America ("CMAA"), represented approximately 85% of the market. Of this number, Bond Crown & Cork Co. alone held 50% of the market share, whereas other members of the association made up the remaining 35%. Through patent licensing agreements, Bond Crown & Cork Co. managed to impose uniform product standards and trading terms (the court held the scheme was equivalent to base point pricing.) The Fourth Circuit refused to consider each anticompetitive practice independently, instead taking this approach in upholding the FTC's order:

> *[I]nnocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as*

[481] At fn 6 the Court noted: "We do not intend to foreclose the possibility that some standards may be so unreasonable in content that their net effect injures competition even though some policies of uniformity are served. This is not the case here."
[482] Id. at 130.
[483] See also *Intel Corp. v. VIA Technologies, Inc.* No. C 99-03062, (N.D.Cal. March 20, 2001), *Dell Computer Corp*, 121 F.T.C. 616, Complaint (1996), 60 Fed. Reg. 57,870 (Nov. 22, 1995) and *Infineon Technologies AG*, 164 F.Supp. 2d 743 (E.D. Va. 2001) appeal dismissed, 32 Fed. Appx. 568 (Fed.Cir. 2002) (available at 2002 WL 541629) and *In re Rambus, Inc*. (June 18, 2002) (available at 2002 WL 1436415).
[484] 176 F.2d 974 (4th Cir. 1949).

> *to their sufficiency to support the findings and conclusions of the commission. The standardization of product, for example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere.* Id. at 97.[485]

Thus the Court of Appeals did not condemn standardization as such,[486] but concluded from the different anticompetitive activities (including price harmonization and *ex ante* exchange of information about prices) that the Sherman Act had been violated.

In *National Macaroni Manufacturers. v. FTC,*[487] the U.S. Court of Appeals for the Seventh Circuit dealt with a standard established by the National Macaroni Manufacturers Association ("NMMA"), a group of producers of macaroni, spaghetti, noodles, and related items amounting to 70% of American pasta production. Pasta producers would have agreed that to produce the best quality of pasta, only durum wheat should be used, as other types of wheat would result in lower quality pasta. However, irregular production of durum wheat in the 1950s and early 1960s resulted in shortages; its price was also irregular and often reached substantial levels. The NMMA thus required durum wheat millers to offer only blends of wheat using 50% durum wheat. This had the foreseeable result of diminishing demand for durum wheat and lowering price competition for it. However, the FTC examined this standard-setting under the *per se* rule and condemned it as a price-fixing agreement. The Court of Appeals for the Seventh Circuit affirmed, citing a Commission conclusion:

> *[W]here all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court.* Id. at 326.

Nonetheless, the Seventh Circuit emphasized:

> *[I]t seems appropriate to note here that, in the instant case, [the] Commission did not hold "that all efforts at product standardization […] are unlawful under the antitrust laws."* Id. at 427.

3.4.3.4.2. IPR-related issues

a) Patent ambush

Patent ambush may take place when firms do not disclose they hold IPR (generally, a patent) on a technology used in a standard. As its IPR usually remain valid, the firm is in a position to gain control over the standard and erect a potentially unjustified barrier to entry in the market

[485] For similar conclusions see *Addamax Corp. v. Open Software Found.*, 888 F.Supp. 274 (D.Mass. 1995), appealed, 152 F.3d 48 (1st Cir. 1998).
[486] If at all, standardization *in casu* enabled competition.
[487] 65 F.T.C. 583 (1964), aff'd, 345 F.2d 421 (7th Cir. 1965). See above Subsection 3.3.1.1. Conditions favoring cartels.

for the standardized product.[488] This issue is becoming more and more important as the number of patents rapidly increases worldwide.[489]

In re Dell Computer Corp.,[490] Dell allegedly breached its commitment to disclose patents to a SSO (the Video Electronics Standards Association, VESA) before the organization developed a standard relying on those patents. Dell brought several actions against VESA members who used the technology embodied in the VESA standard. To settle charges brought by the FTC, Dell agreed not to enforce its patent rights against computer manufacturers complying with the standard.[491] In a dissenting statement, Commissioner Mary L. Azcuenaga concluded that to require members of a SSO to agree to disclose all relevant IPR before a standard is chosen would place too great a burden on businesses and thus deter firms *ex ante* from participating in the SSO, thereby hindering innovation. The FTC subsequently issued a statement clarifying that the consent order was limited to the specific circumstances presented in the case, stressing that it did not intend to signal that there should be a general duty to search for patents when a company engages in a standard-setting activity.[492]

In *Townshend v. Rockwell International Corp.*,[493] Townshend and 3Com owned certain patents regarding a modem technology standardized by the International Telecommunications Union ("ITU"), an entity of the United Nations. Connexant, a competitor of Townshend and 3Com, was in practice prevented from manufacturing standard-compliant products. However, the District Court rejected Connexant's claim that an antitrust injury had occurred, stating that Townshend and 3Com had disclosed to the ITU that they held patents over the technology, and thus distinguishing the case from *Dell.*[494]

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[488] As J.M.MUELLER, "Potential Antitrust Liability Based on a Patent Owner's Manipulation of Industry Standard Setting", paper prepared for ABA Section on Antitrust Law, Spring meeting 2003, notes (p. 12):

> *The mere fact that a firm owns a patent on a particular invention does not in and of itself demonstrate the requisite market power, because the antitrust law of market definition recognizes the possibility of non-infringing substitutes for the patented technology.*

[489] See C.SHAPIRO, "Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting", in: NATIONAL BUREAU OF ECONOMIC RESEARCH, *Innovation Policy and the Economy*, 2001.

[490] 121 F.T.C. 616 (1996), 1996 FTC LEXIS 291 (1996).

[491] For a similar case, see In re *Union Oil Company of Cal. v. Atlantic Richfield* (Unocal), Docket No. 9305, 208 F.3d 989 (Fed. Cir. 2000), cert. denied, 121 S.Ct. 1167 (2001), where Unocal discussed the standardization by a public body of a cleaner-burning gasoline formulation, although it had a patent pending on such a standard. The latter case, however, involved petitioning before a public body, the California Air Resource Board. The administrative law judge applied the Noerr-Pennington doctrine and dismissed the case, with the Federal Circuit also upholding the validity of Unocal's patent.

[492] See FTC Statement of June 17, 1996, available at http://www.ftc.gov/opa/1996/06/dell2.htm:

> *[…] commenters asked whether the Commission intended to signal that there is a general duty to search for patents when a firm engages in a standard-setting process. The relief in this matter is carefully limited to the facts of the case," the statement says. "[T]he relief in this case should not be read to impose a general duty to search.*

[493] 2000 U.S. Dist. LEXIS 5070 (N.D. Cal.), 2000-1 Trade Cas. (CCH) P72,890.

[494] The court clarified:

> *The [ITU] Patent Policy provides that if a standardization proposal incorporates technology which is patented or is part of a pending patent application, the patent holder should either waive his rights or "be willing to negotiate licenses with other parties on a non-discriminatory basis on reasonable terms and conditions." […] However, the policy goes on to state that "such negotiations are left to the parties concerned and are performed outside the ITU-T […].*

In the *Rambus*[495] case, Rambus failed to disclose that it held a patent on technology that was subsequently incorporated in a standard.[496] Moreover, the FTC alleged that Rambus had amended a patent application in order to make certain the new patent would cover the technology embodied in the standard. The FTC argued that by remaining silent about its patents during the standardization process, Rambus had violated Article 5 of the FTC Act (unfair methods of competition) and the SSO disclosure rules, even though in contrast to the *Dell* case, Rambus never stated that it did not hold a patent over the technology. The FTC administrative judge dismissed the complaint on various grounds, including the fact that Rambus's conduct could not be considered as anticompetitive, as among other reasons, Rambus was under no duty to disclose the patents and did not intentionally mislead the SSO. The case is currently before the full Commission.[497]

SSOs face a real dilemma. Requiring that members fully disclose their patents (including pending patents) *ex ante* may be quite burdensome for the patent holders, particularly if they hold substantial patent portfolios, which would thus diminish their incentives to participate in the standard-setting process.[498] Requiring that members agree *ex ante* to license their

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Moreover, the court held:

> *At the hearing and in its papers, Conexant has argued that the licensing terms are injurious to competition because 3Com and Townshend sought unfair royalty rates, double-charging of customers and manufacturers, mandatory cross-licenses, and reservation of the right to condition licenses on the resolution of litigation.*
>
> *Under the terms of the Patent Act, a patent owner has the legal right to refuse to license his or her patent to others. Pursuant to 35 U.S.C. § 271(d), "no patent owner otherwise entitled to relief...[shall be] deemed guilty of...illegal extension of the patent right by reason of his having...(4) refused to license or use any rights to the patent." 35 U.S.C. § 271(d). The Federal Circuit has indicated that "the antitrust laws do not negate a patentee's right to exclude others from patent property." In re* Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000)(internal quotations and citations omitted). Given that a patent holder is permitted under the antitrust laws to completely exclude others from practicing his or her technology, the Court finds that 3Com's submission of proposed licensing terms with which it was willing to license does not state a violation of the antitrust laws.*
>
> *Even if the Court were to consider the unfair terms alleged by Conexant, the Court finds that these terms do not state an injury to competition. […] with respect to the proposed royalty rates, the Court notes the initial licensing proposal dated September 1997 sought a maximum $ 1.25 per-unit royalty for client-end products and a maximum $ 9.00 per-port royalty for server-end products. See Rees Decl., Ex. B at 4. In September 1998, after the V.90 standard had been adopted, 3Com submitted a revised licensing proposal which sought a maximum $ 1.25 per-unit royalty for client-end products and a maximum $ 2.50 per-port royalty for server-end products. See Rees Decl., Ex. C at 4. Conexant has not explained how the royalty rates state unfair terms. A patent owner's pursuit of optimum royalty income is not an act in restraint of trade which violates the antitrust laws. See Genentech v. Eli Lilly, 998 F.2d 931, 948 (Fed. Cir. 1993).*

[495] *In re Rambus, Inc. v. Infineon Technologies AG*, 2003 U.S. App. LEXIS 1421 (Fed. Cir. Jan. 29, 2003), and FTC's administrative complaint, Docket N° 9302.

[496] For a more in-depth analysis, see D.ALBAN, "Rambus v. Infineon: Patent Disclosures in Standard-Setting Organizations", in: *Berkeley Technology Law Journal*, 19/309, 2004.

[497] See also, *Rambus, Inc. v Infineon Technologies* AG, 318 F.3d 1081 (Fed. Cir. 2003), cert. denied, 124 S.Ct. 227 (2003), where the Federal Circuit concluded that Rambus was under no duty to disclose as it had withdrawn from the SSO before the beginning of the procedure for the adoption of the standard.

[498] One way of solving this problem would be to agree that an undisclosed patent will be licensed on terms which take into account only the costs which the patent holder has incurred in the development of the technology

technology on Fair Reasonable and Non-Discriminatory ("FRAND")[499] terms may also not be a panacea, as the definition of such terms is very imprecise which may leave the SSO with a clause that is difficult to enforce.[500] This is without taking into consideration that the economic value of a patent included in a standard may be strongly correlated with the level of adoption of the standard and its importance for the development of a new product (both of which are usually higher after the adoption of the standard than before.)[501] On the other hand, an agreement in advance on the price at which a technology would be licensed may run afoul of price-fixing prohibitions.[502] However, Skitol[503] puts this view into doubt in arguing that according to *Hydrolevel* and *Allied Tube*, SSOs are liable under the antitrust laws when they fail to take measures to prevent their employees from misusing their processes, and thus for not formulating an adequate policy against patent hold-ups.

b) Cross-licensing and patent pooling

Such agreements are defined by the IP Guidelines[504] as follows (§ 5.5):

> *[C]ross-licensing and pooling arrangements are agreements of two or more owners of different items of intellectual property to license one another or third parties.*
>
> *These arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive.*
>
> *Cross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances. For example, collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual*

(although this might also be an imprecise standard and would need to be further clarified) with the burden of proving such costs shifted onto the patent holder.

[499] What FRAND means is not entirely clear. For a presentation of different methods of calculation such as cost-based pricing, same firm price comparison, market-based pricing, profit comparison, and efficient component pricing rule, see M.DOLMANS, *Standards for Standards*, Paper for the American Bar Association, Section of Antitrust, Spring meeting 2002, Session on Trade Associations, Washington DC, April 26, 2002. pp. 30 and ff and D.G.SWANSON/W.J.BAUMOL, "Selection of Compatibility Standards and Control of Market Power Related to Intellectual Property", in: *Antitrust Law Journal*, 73/1, 2005, providing a model for determining FRAND terms.

[500] One possibility would be to require patent holders to propose a price range for their technology *ex ante* so that the SSO members might have an idea of the patent costs when they decide which technology to adopt.

[501] See, generally, M.A.LEMLEY, "Intellectual Property Rights and Standard-Setting Organizations", in: *California Law Review*, 90/1889, 2002.

[502] See Testimony of Amy A. Marasco, Vice President and General Counsel, ANSI, before the FTC and DOJ (April 12, 2002), available at: www.ftc.gov. or www.usdoj.gov/atr, D.J.TEECE/E.F.SHERRY, "Standards Setting and Antitrust", in: *Minnesota Law Review*, 87/1913, 2003, and M.A.CARRIER, "Why Antitrust Should Defer to the Intellectual Property Rules of Standard-Setting Organizations: A Commentary on Teece and Sherry", in: *Minnesota Law Review*, 87/2019, 2003.

[503] R.A.SKITOL, "Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard-Setting", in: *Antitrust Law Journal*, 72/2, pp. 727 and ff., 2005, but see *United States v. Line Material Co.*, 333 U.S. 287, 68 S.Ct. 550 (1948), *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 68 S.Ct. 525 (1948), and *Compton v. Metal Prod.*, 453 F.2d 38 (4th Cir. 1971) cert. denied, 406 U.S. 968, 92 S.Ct. 2414 (1972), where agreements between competitors over patents licensing were considered abuses of patent rights.

[504] Quoted at fn 131.

property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants. […] When cross-licensing or pooling arrangements are mechanisms to accomplish naked price fixing or market division, they are subject to challenge under the per se rule. See United States v. New Wrinkle, Inc., 342 U.S. 371 (1952) (price fixing).[505]

c) Patent grantbacks

Grantback agreements are defined by the IP Guidelines as follows (§ 5.5):

A grantback is an arrangement under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee's improvements to the licensed technology. Grantbacks can have procompetitive effects, especially if they are nonexclusive. Such arrangements provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation. Grantbacks may adversely affect competition, however, if they substantially reduce the licensee's incentives to engage in research and development and thereby limit rivalry in innovation markets.

A non-exclusive grantback allows the licensee to practice its technology and license it to others. Such a grantback provision may be necessary to ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology. Compared with an exclusive grantback, a non-exclusive grantback, which leaves the licensee free to license improvements technology to others, is less likely to have anticompetitive effects.

The Agencies will evaluate a grantback provision under the rule of reason, see generally Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 645-48 (1947) (grantback provision in technology license is not per se unlawful), considering its likely effects in light of the overall structure of the licensing arrangement and conditions in the relevant markets. An important factor in the Agencies' analysis of a grantback will be whether the licensor has market power in a relevant technology or innovation market. If the Agencies determine that a particular grantback provision is likely to reduce significantly licensees' incentives to invest in improving the licensed technology, the Agencies will consider the extent to which the grantback provision has offsetting procompetitive effects, such as (1) promoting dissemination of licensees' improvements to the licensed technology, (2) increasing the licensors' incentives to disseminate the licensed technology, or (3) otherwise increasing competition and output in a relevant technology or innovation market. […] In addition, the Agencies will consider the extent

[505] See also June 10, 1999 Business Review Letter from Joel Klein to Glenn A. Mitchell to Carey A. Ramos.

to which grantback provisions in the relevant markets generally increase licensors' incentives to innovate in the first place.

3.4.3.4.3. Exchanges of information

Collaboration among enterprises is essential to the private standard-setting process; however, it is necessary to make certain this collaboration does not turn into anticompetitive behavior. SSOs are well advised to take safeguards to avoid exchanges of information which may be punishable under antitrust law. Such safeguards can take the following forms: rendering the collected data anonymous,[506] avoiding disclosure of data that is not essential to the standard-setting process, signing non-disclosure agreements, and requiring counseling from an antitrust lawyer.

The current position of US case law on exchanges of information seems to be that there is no *per se* rule against them, and that such exchanges are evaluated under the rule of reason. However, in oligopolistic markets, exchanges of information are not reviewed very favorably.[507]

The Competitors Collaborations Guidelines provide in pertinent part (§ 3.31b):

> *Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. The Agencies recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration. Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.*
>
> *Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.*

[506] May 30, 1997 Business Review Letter from Joel Klein to Glenn A. Mitchell.
[507] See, e.g., S.S.DE SANTI/E.A.NAGATA, "Competitor Communications: Facilitating Practices or Invitations to Collude?", in: *63 Antitrust Law Journal 93*, 1994 and *United States v. United States Gypsum Co.*, 438 US 422 (1978).

3.4.3.5. Excursus: should deference in sports standards be duplicated in products standards?

Courts often refer to sports cases when dealing with standard-setting issues.[508] In these cases, courts frequently adopt a very deferential stance when dealing with rules established by sporting associations.[509] As sports rules often entail non-objective criteria, judges do not substitute their judgment for that of the experts. For example, in *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n,*[510] the District Court of Nebraska accepted the concept that the United States Tennis Association could validly forbid tennis players from using double-strung rackets in order to preserve the essential character and integrity of the game of tennis. In *Hatley v. Am. Quarter Horse Ass'n,*[511] the Fifth Circuit likewise authorized the American Quarter Horse Association to define which horses were allowed to take part in its races because it helped in improving the quarter horse breed. The court held that the quarter horse standard was not unreasonable because it was not applied in a discriminatory manner.[512]

Courts usually uphold sports rules as reasonable even when they have substantial anticompetitive effects. In *Weight-Rite Golf Corp. v. U.S. Golf Ass'n,*[513] the United States Golf Association was authorized to forbid certain types of shoes because they would have put in danger "the traditions of the game."[514] The court emphasized that the plaintiff had failed to show that the standard had substantially restrained competition.

It has been admitted that sports teams or associations enjoy a certain kind of leniency when enforcers examine whether a violation of the antitrust laws has occurred.[515] The rationale lies in the fact that sports inherently involve a form of collaboration among actors stemming from positive network externalities. However, this leniency cannot be applied in the same way to commercial activities, especially when they are deprived of positive network externalities. Although one can understand why judges may adopt a deferential stance when sports associations give their expert opinions on what constitutes the "traditions of a game," the same cannot be true when judges value the reasonableness of commercial standards. Of course, trade associations remain the experts in their field, but judges should not hesitate to review the sufficiency of the standard and the association's conduct.

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[508] See, e.g., fn.6 in *Eliason Corp v. Nat'l Sanitation Found.,* 614 F.2d 126 (6th Cir. 1980), cert. denied, 449 U.S. 826, 101 S.Ct. 89 (1980), at 129.

[509] Standards set by sports associations are very rarely reviewed under the *per se* rule as they are often held central to the sports they support. See, e.g., *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

[510] 511 F.Supp. 1103 (D.Neb. 1981).

[511] 552 F.2d 646 (5th Cir. 1977).

[512] See also, *Bridge Corp. of Am. v. Am. Contract Bridge League, Inc.,* 428 F.2d 1365 (9th Cir. 1970); *M&H Tire Co.. v. Hoosier Racing Tire Corp.,* 733 F.2d 973 (1st Cir. 1984); *Weight-Rite Golf Corp. v. U.S. Golf Ass'n*, 766 F.Supp. 1104 (M.D. Fla. 1991); *Urethane, Inc. v. Prof'l Bowling Ass'n*, 746 F. Supp. 915 (E.D. Mo. 1990).

[513] 766 F.Supp. 1104 (M.D. Fla. 1991);

[514] For a similar distinction, see the European Court of Justice judgments in *Gaetano Donà v Mario Mantero*. C-3/76 [1976] ECR 1333, *Deliège v. Asbl Ligue Francophone de Judo and others*, joined cases C-51/96 & C-191/97, [2000] ECR I-2549, *Jyri Lehtonen and Castors Canada Dry Namur-Braine v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*, C-176/96, [2000] ECR I-2681, *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, C-265/03, OJ C 132, 28.05.2005, p. 9, and the Commission decisions in *Mouscron*, IP/99/995, of December 9, 1999 and in *UEFA Champions League* COMP/C.2-37.398, of July 23, 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement - Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L/291/46, of November 8, 2003.

[515] See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948 (1984).

A hands-off approach towards sports rules is understandable. True, most sports have become commercial activities, but their value for consumers depends highly on the quality of the competition presented. Thus sports rules are often there to ensure that consumers are offered an adequate level of competition.

3.4.3.6. Positive effects

The rule of reason requires defendants to make a *prima facie* case that the standards will have a pro-competitive effect. Agencies and courts have taken a favorable view of the pro-competitive effects entailed by standardization. For example, the improvement of product quality,[516] reduction of costs,[517] elimination of asymmetry of information between consumers and buyers,[518] and creation and enforcement of intercompatibility[519] have all been accepted as valid pro-competitive effects of standard-setting endeavors under a rule of reason approach.

3.4.4. Unilateral behavior

When trying to establish or to protect a *de facto* standard, firms (in particular dominant firms) sometimes use anticompetitive means. Moreover as *Eliason Corp v. National Sanitation Foundation*[520] made clear, even an SSO can be prosecuted under Section 2 of the Sherman Act.[521]

3.4.4.1. Unilateral refusal to deal and essential facility doctrines

As mentioned above,[522] firms are in principle free to choose their contractual partners. However, courts have considered exceptions in which a firm may be obliged to enter into a commercial relationship with other market actors.

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[516] *Ass'n of Review Appraisers & Mortgage Underwriters v. Appraisal Found.,* 64 F.3d 1130, 1133 (8th Cir.1995).

[517] October 3, 2002 Business Review Letter from Charles A. James (Assistant Attorney General, Department of Justice, Antitrust Division) to Douglas W. Macdonald.

[518] *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.,* 851 F.2d 478, 487 (1st Cir. 1988) and February 2, 2006 Business Review Letter from Thomas Barnett (Acting Assistant Attorney General, Department of Justice, Antitrust Division) to Evans J. Plowden, Jr.:

> *The Trading Rules appear to use general commercial language that should enhance the ability of parties to enter into contracts to buy and sell peanuts. In addition, the grade standards, which have been in effect since at least 1989, appear to be used only as base standards, whereas buyers of shelled peanuts frequently apply their own standards. Finally, because use of the Trading Rules and Grade Standards is voluntary, buyers and sellers of peanuts will remain free to compete by using their own contract terms and standards for peanuts instead of those in the APSA Trading Rules and Grade Standards.*

[519] *Eliason Corp. v. Nat'l Sanitation Found.*, 614 F.2d 126 (6th Cir. 1980) at 129-130.

[520] Id. at 126..

[521] A similar case is *Structural Laminates, Inc. v. Douglas Fir Plywood Assoc*., 261 F. Supp. 154 (D.Or. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024, 89 S.Ct. 636 (1969).

[522] See Subsections 3.3.1.3.2. Concerted refusal to deal in the joint venture context, 3.3.2.3.1. Unilateral refusal to deal (monopolization) and 3.3.2.3.2. Essential facility doctrine. In particular the *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 105 S.Ct. 2847 (1985) and *Verizon Communications, Inc. v. Law Offices of Curtis Trinko* cases.

One might wonder whether the essential facility doctrine finds application in standards cases[523] as its use against a SSO remains cumbersome for at least two reasons. First, industry delegates usually staff an SSO's decision-making bodies with employees of several different firms. As the essential facility doctrine's scope is limited to monopolization cases (i.e., those where the antitrust violation is caused by a single market actor in the absence of an agreement with other market actors), this doctrine seems ill-suited to encompass a situation where several market actors agree on a standard and thus to target "agreeing" firms, as the concerted refusal to deal doctrine seems better suited to deal with such issues.

Second, *prima facie*, application of the essential facility doctrine seems more promising when the target of the antitrust action is the SSO itself. In such cases, the plaintiff would argue the antitrust violator is a single entity, namely the SSO. However, it must be borne in mind that this doctrine is generally limited to refusals to deal towards competitors, while competitors of the SSO would probably be other SSOs rather than victims of the refusal to deal. The question whether a victim of a refusal to deal by a SSO can be seen as a downstream competitor has not been dealt with until now. It seems this matter may be resolved by assessing whether the employees of the SSO enjoy a sufficient degree of independence from the upstream market firms. If they do not, courts might be favorable to an essential facility argument. One might argue that the SSO is a joint venture of the upstream market firms, so if the SSO's employees enjoy a sufficient degree of independence, it seems difficult to prove the SSO itself is competing in the downstream market, which would thus prevent the application of the essential facility doctrine.

A more promising use of the essential facility doctrine would exist when a dominant firm sets a standard and then refuses to license its use to a competitor. In this case, only one firm is attempting to monopolize. Although an essential facility does not need to be a tangible asset,[524] courts have held since *Continental Paper Bag Co. v. Eastern Paper Bag Co*.[525] that a patent holder is not compelled to grant a license to a competitor. However, in 1997 the Ninth Circuit held in *Image Technical Services, Inc. v. Eastman Kodak Co*. [526] that a patent holder's unilateral refusal to deal may violate the antitrust statutes where it is motivated by an anticompetitive purpose rather than an intent to protect patent rights, with a patent holder

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[523] For an example of partial application, see *Eliason Corp v. Nat'l Sanitation Found.*, 614 F.2d 126 (6th Cir. 1980), cert. denied, 449 U.S. 826, 101 S.Ct. 89 (1980).

[524] See *Poster Exchange, Inc. v. Nat'l Screen Services Corp*., 431 F.2d 334 (5th Cir. 1970) (exclusive licensee of movie promotional materials may be required to supply others distributors), *Serv. & Training, Inc. v. Data Gen.*, 737 F.Supp. 334 (D.Md. 1990) (diagnostic software may be considered as an essential facility for a repair services provider) and *Bellsouth Advertising v. Donnelly Inf. Pub*., 719 F.Supp. 1551 (S.D.Fla. 1988), rev'd on other grounds, 999 F.2d 1436 (11th Cir. 1993) (the subscribers' list of a telephone company can be an essential facility.) The Court held:

> *Although the doctrine of essential facilities has been applied predominantly to tangible assets, there is no reason why it could not apply, as in this case, to information wrongfully withheld. The effect in both situations is the same: a party is prevented from sharing in something essential to compete.*

[525] 210 U.S. 405 (1908). Referring to *Connolly v. Union Sewer Pipe Co*., 184 U.S. 540 (1902), the Supreme Court stated:

> *As to the suggestion that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive.*

[526] 125 F.3d 1195 (9th Cir. 1997).

being presumed to intend to protect its patent rights; however, such a presumption was rebutted in this case.[527]

In the *CSU v. Xerox*[528] case, the Federal Circuit distanced itself from the *Image* case law, holding:

> *(N)o court has ever held that the antitrust laws require a patent holder to forfeit the exclusionary power inherent in his patent the instant his patent monopoly affords him monopoly power over a relevant product market.*

However, in holding the patent holder's intent is irrelevant, the court admitted three exceptions may exist in the cases where the patent holder: (a) acquires the patent by fraud on the Patent and Trademark Office; (b) engages in "sham" patent litigation (i.e., sues to enforce a patent knowing that the patent is invalid, unenforceable, or not infringed upon); or (c) engages in unlawful "tying" (that is, seeks to force buyers to purchase products which are not protected by the patent along with patented products.)[529]

3.4.4.2. Exclusionary practices in vertical relations

US courts have consistently condemned attempts to foreclose competition with a standard. For example, in *United States v. Microsoft Corp.,*[530] the Appellate Court considered that Microsoft had engaged in anticompetitive conduct by, *inter alia*, preventing equipment manufacturers from distributing other browsers than Microsoft's Explorer, concluding various deals with key actors to prevent competitors from reaching a viable scale of operations, and preventing consumers from deleting the Explorer browser from their computers.[531/532]

3.4.4.3. Leveraging and predatory innovation

Leveraging occurs when a firm takes advantage of its monopoly power in a market in order to extend its monopoly power to another market.[533] Such a situation may arise in tying cases where a firm induces a consumer to buy both a product for which the seller enjoys special market power and another product for which the seller does not necessarily enjoy such a power.[534]

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[527] The *Kodak* court adopted this approach in *Serv. & Training, Inc. v. Data General*, 737 F.Supp. 334 (D.Md. 1990).
[528] In re *Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed.Cir. 2000).
[529] Id. at 1327. The Federal Circuit held in relation to copyrights:

> *(T)he owner of the copyright, if [it] pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using [its] property.* Id. at 1328,

[530] 253 F.3d 34 (D.C. Cir. 2001), cert. denied, 534. U.S. 952 (2001).
[531] See also the *IBM* series of case law hereunder.
[532] See also, G.WERDEN, "Network Effects and Conditions of Entry: Lessons from the Microsoft Case," in: *Antitrust Law Journal*, 69/1, 2001.
[533] *Carbice Corp. of America v. Am. Patents Dev. Corp*., 283 U.S. 27 (1931), *United States v. Paramount Pictures*, 334 U.S. 131 (1948), *United States v. Griffith*, 334 U.S. 100 (1984) and *Kerasotes Mich. Theatres v. Nat'l Amusements*, 854 F.2d 135 (6th Cir. 1988).
[534] See, e.g., *Eastman Kodak Co. v. Image Technical Services*, Inc., 504 U.S. 451 (1992), *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980), *Bob Maxfield, Inc. v. Am. Motors Corp*., 637 F.2d 1033 (5th Cir.) cert. denied, 454 U.S. 860 (1981) and *A.I. Root Co. v. Computer/Dynamics, Inc*., 806 F.2d 673 (6th Cir. 1986). W.S.GRIMES,

Such a situation may also exist in the standardization context when the producer of a product designs the compatibility requirements for complementary products in a manner that allows it to gain market power in the market for complementary products.[535] In the 1980s, some private plaintiffs brought complaints on the basis that the defendant had engaged in "predatory" research and development (R&D), or had used R&D to exclude other competitors. Courts have generally rejected such claims, although some commentators have argued that they may be justified under special circumstances.[536] As a matter of principle, courts seem to hold that R&D is a valuable activity that must be encouraged even when it is a monopolist who is conducting it.

In *California Computer Products, Inc. v. IBM Corp.*,[537] the court held that IBM's integration of a disk controller designed for its own disk drives into its central processing unit ("CPU") was a useful innovation and not an impermissible attempt to monopolize. The plaintiff manufactured only disk drives, a type of memory device, whereas IBM manufactured everything from CPUs to monitors, memory units and controllers. When IBM decided to modify its sale standards by introducing a new line of computers in which the memory and the CPU were assembled as a single product, the plaintiff lodged a complaint against it because the new computer line practically eliminated the market for separate memory units. Although IBM enjoyed considerable market power, the court rejected the plaintiff's claim, as IBM brought evidence that the new line of computers constituted an improvement in terms of speed and cost. The court also stated that IBM had the right to improve its products[538] and that "it was under no duty to help Cal Comp or other peripheral equipment manufacturer to survive or expand."[539]

But what if the proposed product were not superior to the old product, or were even inferior? Then IBM probably would have trouble selling its new computer line and would experience a loss in market share. However, the answer might be different if the product change increased rival costs even if it did not appear to be superior.

In *United States v. Microsoft Corp.,*[540] the D.C. Circuit clearly stated:

"Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections", in: *Antitrust Law Journal*, 62, p. 565, 1994; W.S.GRIMES, "The Antitrust Tying Law Schism: A Critique of Microsoft III and A Response to Hylton and Salinger", in: *Antitrust Law Journal*, 70/1, 2002 and G.WERDEN, "Network Effects and Conditions of Entry: Lessons from the Microsoft Case", in: *Antitrust Law Journal*, 69/1, 2001.

[535] This is also referred to as predatory product development or predatory innovation. See H.HOVENKAMP, *Federal Antitrust Policy*, § 7.8, pp. 314 and ff, 2005.

[536] See J.FARRELL/G.SALONER, "Installed Base and Compatibility: Innovation, Product Pre-Announcements and Predation", 76 *Am. Econ. Rev*. 940, 1986, and *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1371 (Fed.Cir. 1998), where the court admits that when the claim of monopolization or attempt is based on an innovation in product or process, inquiries into the innovator's intent should generally be dismissed as irrelevant, except for a few exceptions that should be interpreted very narrowly in which: 1) the innovation at stake clearly excludes a rival from a market (or raises its costs); 2) it cannot be demonstrated the innovation is or could have been intended to be an improvement from the former standard; and 3) the defendant has substantial market power in the upstream market (note 12 at 1370), cited by HOVENKAMP, *Federal Antitrust Policy* at § 7.8a, pp. 311 and ff., 2005.

[537] 613 F.2d 727 (9th Cir. 1979).

[538] Id.at 744.

[539] Id. at 741.

[540] 253 F.3d 34 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001).

> *[A] monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals. In order to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design.*

In *Berkey Photo, Inc. v. Eastman Kodak Co.*,[541] the Court of Appeals for the Second Circuit held that a firm was under no duty to preannounce changes to its design in order to allow competitors to adapt to the new requirements.[542]

Many plaintiffs tried to argue that the modification of a standard by a firm with monopoly power did not bring advantages to the consumers and was therefore to be considered as merely anticompetitive. However, courts have often declined to judge whether the new standard should be considered superior to the old. In *Automatic Radio Manufacturing v. Ford Motor Co.*,[543] the Federal District Court of Massachusetts held that whether a new product is superior or inferior is entirely a matter of consumer preference, not a judicial decision. Similarly, in *ILC Peripherals Leasing Corp. v. IBM Corp.*,[544] the District Court for the Northern District of California held:

> *[W]here there is a difference of opinion as to the advantages of two alternatives which can both be defended from an engineering standpoint, the court will not allow itself to be enmeshed "in a technical inquiry into the justifiability of product innovations.* [quoting Leasco, 537 F.2d at 1330.][545]

However, in *IBM Peripheral EDP Devices Antitrust Litigation,*[546] the same court reversed its stance: it admitted that courts may assess whether a product design is superior to another.[547] Nevertheless, it declined to condemn IBM's interface changes if "the contested changes were improvements in the products [and] were not unreasonably restrictive of competition."[548]

In *United States v. Microsoft Corp.*,[549] the Appellate Court for the D.C. Circuit noted:

> *[A]ntitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust law.*

The court further noted that:

> *(I)ntegration may be considered genuine if it is beneficial when compared to a purchaser combination. But we do not propose that in making this inquiry the court should embark on product design assessment. In antitrust law,*

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[541] 603 F.2d 263 (2d Cir. 1979).
[542] Id. at 437. Note that the European Commission seems to have reached an opposite conclusion in the *IBM* case, Commission XIVth Report on Competition Policy, 1984.
[543] 272 F.Supp. 744 (D.Mass. 1967).
[544] 458 F.Supp. 423 (N.D. Cal. 1978), aff'd per curiam sub nom, *Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980).
[545] .Id. at 439.
[546] 481 F. Supp. 965, (N.D. Cal. 1979), aff'd sub nom. *Transamerica Computer Co. v. Int'l Bus. Mach. Corp.*, 698 F.2d 1377 (9th Cir. 1983).
[547] Id. at 1003.
[548] Id. at 1382.
[549] 147 F.3d 935, 948 (D.C. Cir. 1998).

from which this whole proceeding springs, the courts have recognized the limits of their institutional competence and have on that ground rejected theories of "technological tying." A court's evaluation of a claim of integration must be narrow and deferential. As the Fifth Circuit put it,

"[S]uch a violation must be limited to those instances where the technological factor tying the hardware to the software has been designed for the purpose of tying the products, rather than to achieve some technologically beneficial result. Any other conclusion would enmesh the courts in a technical inquiry into the justifiability of product innovations." Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir.1976).[550]

In *C.R. Bard, Inc. v. M3 Systems, Inc.*, [551] Bard, a dominant producer of biopsy guns, allegedly modified its guns to prevent its competitors' needles from being used in them. The Federal Circuit determined that "substantial evidence supported the jury's verdict that this behavior was "predatory" in violation of antitrust laws."[552] However, the court took pains to explain that it was not in a position to rule on the issue of whether the modification of a patent's design might constitute an antitrust violation:

[…], the patent bar may, at first glance, be alarmed that the majority opinion opens the floodgates with respect to a new antitrust cause of action. However, it is important for the bar to note that the only argument Bard made on appeal regarding the antitrust violation was directed to the sufficiency of the evidence on this issue. Bard did not argue to this court that modification of a patented product within the scope of the claims by a patentee cannot, as a matter of law, constitute an antitrust violation. Nor did Bard challenge the jury instructions. See C.R. Bard, 157 F.3d at 1382 ("Because Bard did not challenge the court's instructions…the legal sufficiency of the jury charge on the antitrust issues is not properly before us on appeal.") In light of our limited review of jury findings, the majority affirmed the jury verdict based on its determination that there was substantial evidence to support the verdict. See id. at 1383.

Consequently, this case does not establish or endorse a new antitrust theory. The majority opinion turns solely on Bard's argument regarding the sufficiency of the evidence and its failure to challenge the propriety of the jury instructions. The question of whether or not a cause of action premised upon the antitrust laws exists when a patentee redesigns a patented product within the scope of the patent claims, awaits another day.[553]

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[550] Id. at 428.
[551] 157 F.3d 1340, 1383 (Fed. Cir. 1998).
[552] Order on suggestion for rehearing en banc.
[553] The Appellate Court had already stressed the following in its judgment:

It is without precedent to find antitrust liability premised on a theory that development of new products is illegally anticompetitive when the new product requires competing suppliers to adjust their product accordingly. Commentators who have considered the question of "whether product innovation can ever be unlawfully `predatory'" have concluded that "no administrable rule could be fashioned that would not exact an unreasonably heavy toll." 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 705b (rev. ed. 1996). If this court deems it appropriate

3.5. Antitrust remedies

As a superficially plausible proposition, one might argue that very high penalties against an antitrust violator would be the most efficient way of preventing antitrust violations, rendering such a violation economically unattractive. This proposition would be true if at least the following assumptions were accurate:

1. Antitrust enforcement by means of damages actions are costless;
2. Courts never make an error in deciding whether a specific action is an antitrust violation; and
3. Antitrust violations so identified are socially inefficient (i.e. efficiencies stemming from the violation do not compensate for the social loss.)[554]

In fact, it is clear by now that none of these assumptions is realistic. First, antitrust enforcement is not costless; in fact, it is rather expensive as it involves many specialists and often necessitates elaborate inquiries into facts and their economic meaning. Moreover, antitrust enforcement is probably subject to diminishing returns and increasing costs. If there is to be only a small amount of enforcement, it would probably be directed at egregious (maybe *per se*) antitrust violations, which are relatively easy to prove.

As courts are not always able to accurately distinguish competitive from anticompetitive conduct, social costs of enforcement loom even larger. For example, predatory pricing is an area where it is not always easy to determine whether an antitrust violation has occurred, or if so, whether it is socially efficient. When courts commit errors, firms may be deterred from engaging in certain conduct even if it is not anticompetitive. For example, a firm may decide to give up on hard competition overpricing if it fears antitrust retaliation.

Another question when assessing the appropriate level of remedies to be granted is whether they should aim at compensating the victims of the violation or deterring potential violators from infringing on the law. Courts have not taken a side on this issue, as the US Supreme Court has said that both compensation and deterrence are legitimate goals of private treble damages actions.[555] The trouble is that the two goals are inconsistent with each other.[556] Nonetheless, some authors argue that in the vast majority of litigated cases, damages are assessed in ways far more consistent with a compensation rather than any deterrence model.[557]

> *to add this burden to patent-based innovation, there should at least be some overriding public benefit. However, antitrust jurisprudence has well understood that the enforcement of the antitrust laws is self-defeating if it chills or stifles innovation*

[554] See, e.g., R.POSNER, *Economic Analysis of Law*, § 7.2. 5th ed., 1998 and W.BREIT/K.ELZINGA, "Antitrust Penalty Reform: An Economic Analysis", *J. of L. & Econ*., 1986

[555] See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 97 S.Ct. 690 (1977).

[556] For example, in a predatory pricing case, there is usually little correlation between the expected profitability of the predatory price and the harm caused to the injured plaintiffs.

[557] See L.SULLIVAN, *Handbook of the Law of Antitrust*, Minneapolis, 1977, and J.HARRISON, *The Lost Profits Measure of Damages in Price Enhancement Cases*, in: *64 Minn. L. Rev. 751*, 1980.

At any rate, beyond damages,[558] plaintiffs may request equitable relief.[559] Such remedies are often sought in order to remedy futures effects of antitrust violations and to re-establish a situation compatible with the antitrust laws. The first type of equitable relief is to forbid the SSO to enforce an illegal standard or to adopt similar new standards.[560] Of course, it may be necessary to make certain the standard-setters do not keep on communicating to others that the illegal standard should still be observed[561] or even that they take positive steps to communicate that it should no longer be observed.[562] Against unilateral anticompetitive conduct, as an *ultima ratio*, the court may additionally take structural remedies for ensuring that the anticompetitive conduct does not take place in the future.[563] For example, in refusal of membership cases, the court may order that the rejected competitor be admitted to the SSO or that its product be certified.[564] In IPR-related cases, the equitable relief may compel the violator to grant access to the IPR.[565]

3.6. Enforcers

Public enforcement of antitrust statutes in the US is principally the task of two governmental bodies: the Department of Justice and the Federal Trade Commission. However, these two bodies do not enjoy exclusive competence as some other federal agencies are also entrusted with antitrust powers.[566]

Today, most antitrust enforcement does not originate in either of those two institutions. Rather, about 90% of antitrust actions are filed by private parties, which usually have great incentives to intervene as Sections 4 and 5 of the Clayton Act authorize treble damages actions. State Attorneys General also play an important role in the enforcement of federal antitrust statutes.

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[558] See the next subsection for a more detailed and enforcer-specific analysis. For damages in the standard-setting context, see *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp*. 456 U.S. 556, 102 S.Ct. 1935 (1982) and *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988).

[559] See, generally, Section 16 of the Clayton Act 15 U.S.C. § 26.

[560] See, e.g., *Nat'l Macaroni Mfrs. v. FTC*, 65 F.T.C. 583 (1964), aff'd, 345 F.2d 421 (7th Cir. 1965).

[561] *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 98 S.Ct. 1355 (1978).

[562] *Wilk v. Am. Med. Ass'n*, 895 F.2d 352 (7th Cir. 1990).

[563] This type of remedies was discussed in the *Microsoft* case, but the judge finally refused it. *United States v. Microsoft Corp.*, 224 F.Supp.2d 76 (D.D.C. 2002).

[564] See, e.g., *McCreery Angus Farms v. Am. Angus Ass'n*, 379 F.Supp. 1008 (S.D. Ill. 1974), aff'd, 506 F.2d 1404 (7th Cir. 1974).

[565] In *Dell Computer Corp*, 121 F.T.C. 616 (1996), the FTC prohibited Dell from enforcing its patent, equating the remedy to an equitable estoppel case. Alternatively, the order may request that the violator license its technology on fair and nondiscriminatory terms ("FRAND"), *New York v. Microsoft Corp.*, 224 F.Supp. 2d 76 (D.D.C. 2002). For a detailed discussion on this issue, see D.G.SWANSON/W.J.BAUMOL, "Selection of Compatibility Standards and Control of Market Power Related to Intellectual Property," in: *Antitrust Law Journal*, 73/1, 2005, providing a model for determining FRAND terms. See also Chapter 4 for a discussion on FRAND terms in the EU.

[566] See above the discussion in Subsection 3.2.1. Exclusive and primary agency jurisdiction.

3.6.1. Enforcement by the Department of Justice

3.6.1.1. Organization

The Antitrust Division of the DoJ is headed by an Assistant Attorney General, nominated by the President of the United States and confirmed by the Senate. For fiscal year 2005, the Antitrust Division of the Department of Justice was staffed with 880 permanent employees (of which approximately 450 were lawyers and economists), with its budget reaching approximately 139 million USD.[567]

3.6.1.2. Powers

3.6.1.2.1. Criminal enforcement

The DoJ, together with the United States Attorneys, has exclusive authority to enforce the criminal provisions of the antitrust laws (Sections 1 and 2 of the Sherman Act, Section 3 of the Robinson-Patman Act,[568] and Section 14 of the Clayton Act.)

The Antitrust Procedures and Penalties Act[569] provides sanctions for individuals of up to ten years imprisonment and criminal fines of up to 1 million USD. Corporations can be punished with a fine of up to 100 million USD.[570]

3.6.1.2.2. Civil enforcement

The Antitrust Division enjoys wide investigative powers against businesses. By issuing a Civil Investigative Demand (CID), the DoJ can request documents in the hands of suspected antitrust violators, as well as third parties under certain circumstances.[571] As soon as the DoJ has sufficient evidence, it may file a civil action in the federal district court where the defendant is found or transacts its business. Beyond damages, the DoJ also has the power to seek injunctive relief under Section 15 of the Clayton Act.

3.6.1.2.3. "Consultative" enforcement

When issues pertaining to competition are at stake, the DoJ is also sometimes required or authorized to intervene before the federal regulatory agencies. For example, the DoJ can intervene in markets wholly or partially regulated by the Commodities Futures Trading

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[567] Source: US Treasury Department.

[568] Officially called the Robinson-Patman amendments of 1936 to Section 2 of the Clayton Act, 49 Stat. 1526 (1936), 15 U.S.C.A. § 13. The amendments are a clarification and extension of the concept of differential pricing (i.e., charging a different price to two different buyers for like products.) Differential pricing is called "price discrimination" in the Robinson-Patman amendments.

[569] Antitrust Procedures and Penalties Act ("Expediting Act"), 15 U.S.C.A. § 1.

[570] The DoJ generally files criminal actions only for clear, intentional violations of the antitrust laws. The Supreme Court clarified in *United States. v. U.S. Gypsum Co*., 438 U.S. 422, 98 S.Ct. 2864 (1978) that a criminal intent should be established as a separate element in criminal antitrust cases. The test for liability is therefore more stringent in criminal than in civil cases.

[571] See the Antitrust Civil Process Act, 76 Stat. 548 (1962), 15 U.S.C.A. § 1311-14, which authorizes "the Attorney General to compel production of documentary evidence required in civil investigations for the enforcement of the antitrust laws."

Commission, the Federal Reserve Board, the Federal Maritime Commission, the Federal Commerce Commission, the Surface Transportation Board, the International Trade Commission, and the Securities and Exchange Commission. The Antitrust Division also participates to civil proceedings involving competition issues through *amicus curiae* briefs.

Moreover, although the DoJ is not authorized to give advisory opinions to private parties, it has at times given advice on certain types of business conduct under so-called "Business Review Letters." Such letters may provide interesting insights into the Antitrust Division's views on certain specific antitrust issues.

3.6.2. Enforcement by the Federal Trade Commission

3.6.2.1. Organization

The FTC is an independent regulatory agency headed by a chair and four commissioners appointed by the President of the United States with the advice and consent of the Senate; they serve staggered terms of seven years. No more than three members of the Commission may come from the same political party. For FY 2005, the FTC operated under a 205 million USD budget and was staffed with 1,100 employees, of which approximately 650 were attorneys or economists.

3.6.2.2. Powers

The FTC was expressly granted concurrent jurisdiction with the DoJ to enforce the Clayton Act, and exclusive jurisdiction to enforce the FTC Act. However, Section 5 of the FTC Act is the main provision regulating the FTC's powers:

> *The Commission is empowered to prevent persons, partnerships, or corporations [...] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts as practices in or affecting commerce.*

This provision has been interpreted broadly, with "unfair methods of competition" clearly including any violation of the antitrust laws.[572] Moreover, in *FTC v. Brown Shoe Co.*,[573] the Supreme Court interpreted this provision as going beyond violation of the antitrust laws to include trade practices "which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."

[572] For example in *FTC. v. Cement Institute*, 333 U.S. 683, 690, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), the Supreme Court held that violations of the Sherman Act also constitute violations of Section 5 of the FTC Act.

[573] 384 U.S. 316, 321 (1966). See also, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) where the Supreme Court held that the FTC has authority "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws." In *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 106 S.Ct. 2009 (1986), the Court explained that the "standard of "unfairness" under the FTC Act by necessity is an elusive one, encompassing not only practices that violate the Sherman Act and other antitrust laws, but also those the Commission determines are against public policy for other reasons.

However, more recent decisions of the Supreme Court appear to take a more critical look at the efforts by the FTC to widen its powers.[574] In *E.I. Dupont de Nemours & Co. v. FTC,*[575] the FTC was challenging various "facilitating practices" allegedly leading to restraints similar to collusion, albeit no price-fixing agreement could be shown. The Commission's decision was overturned by the Supreme Court, which held:

> *[B]efore business conduct in an oligopolistic industry may be labeled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.*[576]

As the debate stands today, it is difficult to determine precisely the boundaries of the FTC's powers as it is not easy to define what constitutes "evidence of anticompetitive intent or purpose" or a "legitimate business reason." However, it has been argued that this is a foreseeable consequence of the wording of the FTC Act. As the legislative history of this act shows,[577] the intended result may even have been to leave to the courts the task of defining what constitute "unfair methods of trade."[578]

Overall, the FTC's powers remain rather limited. In most cases, the FTC issues orders similar to an injunction, called "cease and desist" orders.[579] If the FTC finds a practice infringes § 5 of the FTC Act without infringing on another antitrust law, a subsequent action for treble damages is not available, which Hovenkamp[580] argues limits the social cost of an error.

The FTC can bring an action in court and has authority to assess civil penalties of up to 10,000 USD for violations of previously given "cease and desist" orders or explicit violations of the FTC antitrust laws ("knowing violations.")

Further legislation also empowers the FTC to enforce laws with respect to a broad variety of other statutes.[581] Section 5 of the FTC Act makes the FTC the:

> *[P]rincipal regulatory force at the federal level dealing with unfair and deceptive advertising and general consumer exploitation and abuse*[582]*. Partly in response to the consumer movement of the 1970's, FTC activities in the consumer protection area have increased to the point where, in terms*

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[574] More remote case law has interpreted the FTC Act as granting great powers to the FTC. See, e.g., *Atlantic Refining Co. v FTC,* 381 U.S. 357, 85 S.Ct. 1498 (1965) (granting the FTC power to condemn tying arrangements in the absence of market power) and *FTC v. Brown Shoe Co*., 384 U.S. 316, 86 S.Ct. 1501 (1966) (granting the FTC power to condemn exclusive dealing without a showing of likely injury to competition.)

[575] 729 F.2d 128 (2d Cir. 1984).

[576] Id. at 132.

[577] See, e.g., the classical study of G.HENDERSON, *The Federal Trade Commission: A Study in Administrative Law and Procedure,* 21, 48, 1924.

[578] The issue is of course which cases belong to the FTC and which ones to the DoJ. Practice has enabled some understanding so there are now fewer and fewer arguments in favor of a two institutions approach.

[579] The FTC may also seek injunctive relief in district courts under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

[580] H.HOVENKAMP, *Federal Antitrust Policy*, supra at fn 119, § 15, p. 588.

[581] Fair packaging and labelling legislation (15 U.S.C.A § 1451-1461), consumer credit statutes (15 U.S.C.A § 1601-1665), and laws regulating debt collection (15 U.S.C.A § 1692).

[582] 15 U.S.C.A § 45(a)(1).

of budget and total personnel, they now rival the agency's antitrust efforts. The FTC has certain rulemaking powers, regulatory intervention responsibilities and information gathering functions.[583]

3.6.2.3. Procedure

Although it may take good notice of evidence and suggestions made by private or public parties, only the FTC can initiate its own proceedings (monopoly of initiative.) This process begins with an adversary proceeding within the FTC itself before an administrative law judge ("ALJ".) The ALJ files an "initial decision" within 90 days after the first hearing. The decision is reviewed by the FTC, which can then either dismiss the complaint or issue a "cease and desist order" for which the respondent may seek review by the Federal Court of Appeals. The Court of Appeals is generally bound by the finding of facts of the FTC[584] but not by the Commission's interpretation of the law, although the court usually adopts a deferential stance.

3.6.3. "Quasi-public" enforcement: State Attorneys General

Aside from the Antitrust Division and the FTC, State Attorney Generals ("SAG") also have authority to enforce the federal and state antitrust laws. The Hart-Scott-Rodino Act[585] authorizes SAGs to sue as *parens patriae* for treble damages, costs and attorney's fees for any Sherman Act violation.[586] For violations of other antitrust statutes, injunctive relief is available.

SAGs are considered to play a dual role when enforcing federal antitrust laws. On the one hand, when bringing an action under the federal statutes, they are usually subject to most of the restrictions imposed on private parties. On the other hand, they do not usually act in defense of their own direct interests, but rather indirectly on behalf of their constituents. Furthermore, SAGs can only sue on behalf of injured consumers, not on behalf of injured producers.

As SAGs are not bringing a case on their own behalf, the Hart-Scott-Rodino Act permits more liberalization in proof of damages:

[D]amages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the

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[583] M.HANDLER/R.PITOFSKY/H.J.GOLDSCHMID/D.P.WOOD, *Trade Regulation, Cases and Materials*, University Casebook Series, 4th ed., Foundation Press, Westbury, New York, p. 103, 1997.

[584] At least in so far as facts are supported by substantial evidence in the record as a whole: see *RSR Corp v. FTC*, 602 F.2d 1317 (9th Cir. 1979).

[585] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. No. 94-435, 90 Stat. 1383; 15 U.S.C.A. § 15, 1311-1314.

[586] However, the amount collected must be reduced by any damages paid for the same injury in actions brought by the injured private persons themselves. If the SAG action is litigated to a final judgment, the private person on whose behalf the action was litigated is barred from bringing his or her own action. Once an aggregate damage (see below) has been awarded, each injured person can prove his/her own damages.

individual claim of, or amount of damage to, persons on whose behalf the suit was brought.[587]

In addition, the court may authorize payments to be made directly to the State as a civil penalty.

3.6.4. Enforcement by private parties

The vast majority of antitrust enforcement is the result of private action. Private parties can take various paths to obtain a remedy (treble damages actions, refund of attorney fees, injunctive relief, class action, summary judgment, etc.) although not all are available for each type of violation or each type of plaintiff.

This subsection purports to present various interpretative doctrines that aim at determining which type of damages ought to be compensated under antitrust laws. The *locus standi* or causation link jurisprudence and the "antitrust injury" doctrine attempt to clarify the link between the antitrust violation and the damage by limiting compensation to damages having the closest link with the violation.

Locus standi jurisprudence seems to operate by means of a presumption related to the personal link between the violator and the victim. In reality, the "direct injury" test and the "target area" test can be summarized by stating that the plaintiff has to be the immediate victim of the violator rather than being damaged on the rebound.[588]

The *antitrust injury* doctrine focuses on the legislative goals of the antitrust acts.[589] Plaintiffs can claim a damage only if it is also part of a restraint to competition. In the overwhelming majority of cases, damage to competitors by means of a violation of antitrust laws that has not restricted competition has not been compensated. Of course, this is a matter of interpretation.[590/591] For example, in the standardization context, in *ESS Technology, Inc. v. PC-Tel, Inc.,*[592] the District Court rejected the plaintiff's claim as it had not proved that consumers had "been forced to pay higher prices or that the quality of choices available to them ha[d] been adversely affected."

The *causation* doctrine limits damages to the ones that predominantly stem from the violations and are not attributable to another factor.[593/594]

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[587] Hart-Scott-Rodino Act, supra at fn 585. See also, *In re Mid-Atlantic Toyota Antitrust Litig*., 525 F.Supp. 1265 (D.Md. 1981), aff'd sub nom. *Pennsylvania v. Mid-Atlantic Toyota Distribs*., 704 F.2d 125 (4th Cir. 1983).
[588] See however, the exception in *Blue Shield of Virginia*, cited below.
[589] Section 4 of the Clayton Act provides that damages may be sought if the plaintiff is "injured in his business or property by reason of anything forbidden in the antitrust laws […]."
[590] See *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328 (1990), *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 97 S.Ct. 690 (1977), and *Nat'l Ass'n of Review Appraisers & Mortgage Underwriters v. Appraisal Found.*, 64 F.3d 1130 (8th Cir. 1995).
[591] Plaintiffs invoking Section 16 of the Clayton Act face a relaxed standard, namely only "threatened injury." See *Cargill, Inc. v. Monfort of Colo., Inc*. 479 U.S. 104 (1986).
[592] N.D. Cal. Nov. 4, 1999.
[593] See, e.g., *Greater Rockford Energy & Technology Corp. v. Shell Oil Co*., 998 F.2d 391 (7th Cir. 1993), *Nat'l Ass'n of Review Appraisers & Mortgage Underwriters v. Appraisal Found.*, 64 F.3d 1130 (8th Cir. 1995) and *Zenith Radio Corp. v. Hazeltine Research, Inc*. 395 U.S. 100, 89 S.Ct. 1562, on remand, 418 F.2d 21 (7th Cir. 1969), cert. denied, 397 U.S. 979, 90 S.Ct 1105 (1970). The violation of the antitrust laws does not have to be

Class actions will be dealt with at the end of this section as they are also part of the standing issues treated hereinafter.

Considerations on the right to sue (*locus standi*), the nature of the compensable damage ("antitrust injury") and the causation between violation and injury are conceptually linked. In fact, they all define which party is entitled to be granted some sort of judicial compensation from an antitrust violation. However, it must be pointed out that many different categories of persons can be affected by an antitrust injury. For example, when oil producers agree to set a price above the equilibrium price for their product, the "injured" consumers are not only their direct purchasers (oil distributors), but also all other downstream consumers (plastic producers, transport companies, oil consuming households, etc.), not to mention customers of these consumers[595]. As we have seen, because modern economic agents are increasingly interrelated, this heightens the risk that an antitrust injury may affect other economic agents.

Courts have tried to define the categories of plaintiffs who are entitled to claim an antitrust injury. As we will see in this section, not all types of damages resulting from an antitrust violation are compensated. Various justifications (computation difficulties, limited legislative scope, overdeterrence, etc.) have been put forward to limit the scope of compensable damages. Hovenkamp describes the situation:

> *Private enforcement is subject to the law of diminishing returns—the more there is, the less deterrence will be obtained per enforcement dollar. If a rule that gave direct purchasers a treble-damages action for cartel overcharges deterred 90% of price fixing, then any indirect purchasers, creditors, or employees could not do more than deter the remaining 10%. However, lawsuits by these more remote victims would be more costly to litigate than suits by direct purchasers. Furthermore, there are many more indirect purchasers than there are direct purchasers, so they might file many more lawsuits. The amount of increased efficiency in the form of deterrence of price fixing could be very low in proportion to the increased costs of litigation.*
>
> *A perfect deterrence system designed to maximize social wealth would locate that point at which the marginal social cost of an additional quantum of enforcement is equal to its marginal social value. If every dollar in increased litigation costs produced by a broader standing rule only yielded 75 cents in social gains, then the broader rule is inconsistent with the proposition that the goal of the antitrust laws is to maximize social wealth. Of course, it may be quite consistent with some alternative goal, such as providing compensation to injured victims or minimizing monopoly wealth transfers away from consumers.*[596]

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the sole cause of the damage, but it must appear as a "material" cause. Moreover, when the plaintiff merely requests injunctive relief under Section 16 of the Clayton Act, he must prove only that there is a threat of injury.

[594] Damages are conceived mostly as a compensatory device. Deterrence considerations are often not at the center of the debate in this area. For a discussion about the importance of constructing damages as a deterrence tool, see the section on antitrust remedies in the material concept chapter.

[595] Note, however, that under *Int'l Ass'on of Machinists v. OPEC* (649 F.2d 1354, cert. denied, 454 U.S. 1163, 102 S.Ct. 1036 (1982)), OPEC could not be prosecuted on Act of State grounds.

[596] H.HOVENKAMP, *Federal Antitrust Policy*, supra at fn 119, § 16.2, p. 596.

3.6.4.1. *Locus standi*

The exact benchmark for determining the right to sue in an antitrust proceeding is not clear, with many lower courts having different opinions about who is allowed to intervene before them. Although many categories of persons can be affected by an antitrust violation, only a few are granted a right to file an action. In order to bring an action, a private party has to show that it suffered an injury in its "business or property."[597]

Determining which categories of persons are allowed to do so is no easy task. Section 4 of the Clayton Act requires a plaintiff to be a "person." This encompasses individuals; corporations; unincorporated associations recognized by federal, state, or foreign law; municipalities; States; and foreign governments.[598] Foreign companies recognized by foreign law are therefore able to be a party in an antitrust proceeding in the US even if they do not have property in this country.[599]

Courts have put forward two main theories:[600]

When a court applies the "**direct injury**"[601] test, it requires the plaintiff to show that its injury is "direct" rather than "indirect." However, these concepts have not been clarified. Hovenkamp gives a series of categories that are usually unlikely to be granted *locus standi*:

> *Many people who have no market relationship with an antitrust violator can be injured by an antitrust violation. For example, if one firm drives another out of business by predatory pricing, the immediate victim is not the only*

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[597] Section 4 of the Clayton Act provides in pertinent part:

> *Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue […] and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.*

Note the very broad wording of this provision. Most plaintiffs claim an injury to both business and property, with "property" being broadly defined under common law as anything in which a person claims a legally recognized ownership interest.

[598] The latter are restricted to actual damages under 15 U.S.C.A. § 15 (b). The United States as a purchaser is not a "person" under the statute, but is allowed to seek treble damages via 15 U.S.C.A. § 15(a).

[599] As mentioned previously (Subsection 3.2.7.2. Extraterritorial reach of the antitrust laws), foreign firms that import goods from the US may not be in a position to invoke US antitrust statutes given the limitation imposed by the Foreign Trade Antitrust Improvements Act ("FTAIA") 15 U.S.C.A. § 6a.

[600] The Sixth Circuit has developed a third theory borrowed from torts case law that is based on the "zone of interests:; see *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975). The Third Circuit has used "a balancing test comprised of many constant and variable factors"; see *Bravman v. Bassett Furniture Indus., Inc.*, 552 F.2d 90, (3d Cir. 1977), cert. denied, 434 U.S. 823, 98 S.Ct. 69 (1977).

[601] The origin of the "direct injury" test goes back to *Loeb v. Eastman Kodak Co*., 183 Fed. 704, 709 (3d Cir. 1910) in which the US Supreme Court denied standing to a shareholder in a corporation allegedly victimized by an antitrust violation. The Court remarked first that the shareholder was only an "indirect" victim of the violation, and second, that antitrust statutes did not grant standing to thousands of shareholders "when their wrongs could have been equally well and far more economically redressed by a single suit in the name of the corporation." However, the *Loeb* case has been more often cited for the first of these remarks than for the second. The difference lies in the fact that according to a possible interpretation of the second remark, standing should be denied only when a suitable alternative remedy is available. On the contrary, courts have often used the *Loeb* decision to deny standing to employees, franchisers, landlords and stockholders although it is at best unconvincing that the firm always has the same incentive to sue as the people in these categories (see, e.g., *Jones v. Ford Motor Co*., 599 F.2d 394 (10th Cir. 1979), *Billy Baxter, Inc. v. Coca-Cola Co*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923, 91 S.Ct. 877 (1971).

> *person injured in its business or property. The victim's landlord, creditors, perhaps customers, the public entities to which it pays taxes, other firms with whom it had ongoing contractual relationships, terminated employees, its shareholders if it is a corporation—all of these entities could suffer injury as a result of the predatory pricing. Most likely, however, none of these would have standing to sue in this particular case. Only the immediate victim of the predatory pricing could bring an action, as well as consumers who were later forced to pay monopoly prices. Courts have consistently held that landlords, creditors, and shareholders of an antitrust victim do not have standing to sue for their losses, even if the losses are substantial. Likewise, courts have held that an employee of the victim who lost her job as a result of the victim's exit from the market has no standing.*[602]

The main reason behind this stringent approach lies in the difficulty of computing damages in such cases.[603] However, lower courts generally grant standing to an "indirect purchaser" (i.e., someone who purchased not directly from the antitrust defendant, but rather from someone who was the original purchaser) who is seeking only injunctive relief, as computation of damages is not an issue in this situation.[604]

The second test for granting standing is the "**target area**" test, which requires a plaintiff to show "that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[605] In this case, the Ninth Circuit held that a conspiracy between major motion picture producers and a trade union to drive smaller motion picture companies out of business did not target a second labor union and its members. However, it remains unclear whether this test grants standing only to the "intended" targets of an antitrust violation or whether it extends such a status to all "foreseeable" targets. The difficulty in answering the latter question is probably twofold: first, it is not always easy to determine the intended targets of an antitrust violation, and second, the intended targets criteria strictly restricts the number of plaintiffs, while the foreseeable targets theory may be unduly broadly construed.

Because the scope of both tests is difficult to assess precisely, they grant the court a wide degree of discretion in their use.[606] Customers and competitors of an antitrust violator are generally the favored classes of plaintiffs in antitrust trials, with other categories of victims usually being denied a cause of action. Nevertheless, some courts tend to go beyond this *prima facie* guideline, but they must have a good reason for either granting standing or denying it.

The main evolution to these two theories is set forth in *Blue Shield of Virginia v. McCready*.[607] Hovenkamp summarizes:

> *[T]he Court granted standing to a user of psychologists' services who claimed she was victimized by a conspiracy between psychiatrists and a*

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[602] H.HOVENKAMP, *Federal Antitrust Law*, supra at fn 119, p. 280.
[603] *Ill. Brick Co v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977).
[604] To the best of our knowledge, the Supreme Court has not yet expressly endorsed such a practice.
[605] *Conference of Studio Unions v. Loew's, Inc*., 193 F.2d. 51 (9th Cir. 1951), cert. denied, 342 U.S. 919, 72 S.Ct. 367 (1952).
[606] It is very difficult to design intelligent rules of thumb, if one wants to a have an informed judgment; certainly this practice involves accountability issues for the courts.
[607] 457 U.S. 465, 102 S.Ct. 2540 (1982).

health insurer (Blue Shield) to deny health care coverage on its insurance policy for treatment by psychologists. Unquestionably, the intended victim of this alleged antitrust violation was the psychologists. However, an insured patient whose policy excluded psychologists' services was undeniably injured as well. In granting standing, the Supreme Court appeared to require that:

(1) the plaintiff's injury be a "foreseeable" consequence of an antitrust violation; and
(2) that the plaintiff's injury be "inextricably intertwined with the injury the conspirators sought to inflict on psychologists…" (the intended victims of the violation); and
(3) the plaintiff was a victim of "antitrust injury," or of those things that made the alleged illegal act anticompetitive.[608]

Was *Blue Shield* the signal for an enlargement of antitrust liability, or should it be limited to special situations such as health services where a triangular relationship takes place among the insured, insurance company, and service provider? The US Supreme Court seemed to revert to the two previous tests (direct injury and target area) in *Associated General Contractors of California, Inc v. California State Council of Carpenters.*[609]

As a general rule, it is now accepted that consumers and competitors of the violator are presumptively granted standing. However, if one assumes *Blue Shield* is controlling law, some types of indirect victims of a violator may even be granted standing. But as already mentioned above,[610] the case law seems to hold there is a rebuttable presumption denying standing to labor unions, landlords, and creditors of victims.

3.6.4.2. Antitrust injury

Beyond standing issues, not all types of injury are subject to private actions. The plaintiff must show that it was injured by the anticompetitive consequences of the antitrust violation. Hence, the three following requirements have to be met: the private antitrust plaintiff has to prove (1) that it suffered an injury; (2) that its injury was caused by an antitrust violation; and (3) that the injury qualifies as an "antitrust injury."[611]

Note that under antitrust rules, a plaintiff may not claim profits it would have earned as a result of an antitrust violation as damages. The Seventh Circuit concluded in *Isaksen v. Vermont Castings*[612] that the plaintiff is entitled to be put into the position it would have been had there been no violation, not in the position it would have been had the antitrust violation

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[608] H.HOVENKAMP, *Antitrust*, cited above at fn 119, p. 280.
[609] 459 U.S. 519, 103 S.Ct. 897 (1983). In this case, the Supreme Court denied standing to a trade union, which can also be viewed as a part of a triangular relationship among employers, employee and the unions. It must be pointed out however, that in this particular case, the violation occurred between employers and did not affect the triangular nature of the relationship.
[610] See fn 602.
[611] Unfortunately, courts have not always consistently used this three requirement test. See, e.g., *Matsushita Elec. Indus. Co. v. Gen. Dynamics Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), where the court seems to confuse the "injury" and "antitrust injury" requirements.
[612] 825 F.2d 1158 (7th Cir. 1987), cert. denied, 486 U.S. 105, 108 S.Ct., 1729 (1988).

been imposed only on others. As Hovenkamp points out, this has at times led to a counterproductive effect:

> *In the Todorov case*[613] *defendant radiologists denied hospitals staff privileges to the plaintiff neurologist, who wished to administer head scans there. The radiologists had exclusive privileges at the hospital and the 11th Circuit reasoned that they were in fact a cartel that the plaintiff whished to join. The court concluded that denial of the right to participate in a cartel is not antitrust injury.*
>
> *But that conclusion seems completely counterproductive. Assuming the worst, suppose that the plaintiff had every intention of joining the cartel and charging an explicitly-agreed-upon price. After his entry, the cartel would have one more member, and no existing members would have to further reduce their output in order to accommodate him. The cartel would become less stable, and its profit-maximizing price would probably decline. More importantly, if one physician applied to join the cartel, anticipating its monopoly profits, others could be expected to follow suit. Few antitrust rules could more anticompetitive than one permitting a cartel to exclude potential entrants from its market.*[614]

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,*[615] the defendant had acquired an ailing bowling alley that was competing with the plaintiffs in a medium-sized community. The plaintiffs complained that without the merger, the bowling alley would have gone out of business, which would then have allowed them to realize larger benefits. The Supreme Court rejected their claim, holding the plaintiffs had not suffered an "antitrust injury" as the plaintiffs' injury was not "the type that the statutes was intended to forestall."[616] The Court reasoned:

> *Every merger of two existing entities into one, whether lawful or unlawful has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the merger was condemned. This holding would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.[…] The antitrust laws […] were enacted for "the protection of competition not competitors," Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). It is inimical to the purposes of these laws to award damages for the type of injury claimed here. […] Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should*

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[613] *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991).
[614] H.HOVENKAMP, *Federal Antitrust Policy*, cited above at fn 119, § 16.3d, p. 602.
[615] 429 U.S. 477, 97 S.Ct. 690 (1977).
[616] *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967).

> *in short, be "the type of loss that the claimed violations…would be likely to cause." Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S., at 125.*

The "antitrust injury" doctrine is not limited to merger cases, but is applicable to other antitrust violations as well.[617]

Substantial uncertainty also affects the causal link between the antitrust violation and the antitrust injury. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[618] the Supreme Court imposed a burden on the plaintiff to prove the antitrust violation was a "material cause" of its antitrust injury, which was interpreted as meaning the plaintiff had to prove only that the antitrust violation was one of the causes of its misfortunes, not necessarily the main one.[619] However, certain courts have been more demanding in requiring that the antitrust violation be a "substantial factor" in the plaintiff's injury, which may be understood as the requirement that the antitrust violation be the most important cause of the injury.[620]

3.6.4.3. Class actions

Class actions (sometimes also called representative actions) are legal proceedings brought in the name of a group of persons having common legal characteristics. The number of class actions in antitrust has increased rapidly over the last years; however, they require a certain number of plaintiffs to be practicable.

Under Rule 23(a) of the Federal Rule of Civil Procedure, plaintiffs can join their claims in a "class action" if:

> *1) the class is so numerous that joinder of all members is impractical,*
> *2) there are common questions of law and facts,*
> *3) claims or defenses of the representative parties are typical, and*
> *4) the representative parties will fairly and adequately protect the interests of the class. In addition, plaintiffs must satisfy one of the conditions of Rule 23(b). Subsection (3) requires that common questions of law and fact predominate and that a class action is superior to other available methods of adjudication.*

3.6.5. Powers of the enforcers: consequences for standards

Beyond public enforcement, private parties are also granted standing to introduce a claim. In standard-setting cases, the majority of enforcement actions stem from private parties, generally competitors or members of the standard-setting association. Criminal punishment

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[617] See, e.g., *J. Truett Payne Co. v. Chrysler Motors Corp*., 451 U.S. 557, 101 S.Ct 1923 (1981) where the US Supreme Court applied the doctrine in a predatory pricing case. Lower courts have applied the doctrine in other areas.

[618] 395 U.S. 100, 89 S.Ct. 1562, on remand, 418 F.2d 21 (7th Cir. 1969), cert. denied, 397 U.S. 979, 90 S.Ct 1105 (1970).

[619] See e.g., *Amerinet v. Xerox Corp*., 972 F.2d 1483, 1494 (8th. Cir. 1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1048 (1993).

[620] See e.g., *St. Louis Convention and Visitors Comm'n v. NFL*, 154 F.3d 851, 863 (8th Cir. 1998).

and the possibility that these private parties may recover treble damages render infringement of the antitrust laws particularly unattractive.

It is argued that firms petitioning an SSO for the right to use a standard should be granted standing in an antitrust trial under the assumption that they comply with the direct injury and target area tests. Although as discussed above, these tests are difficult to apply, these firms would be the first victims of the refusal to deal. However, arguably only the intended victims of the violation should be entitled to compensation.[621]

Do private consumers of a standardized product have standing? When the standardization has effects equivalent to a cartel or monopoly (see below for more of an introduction to this discussion), consumers are the direct victims of the violation, as they are obliged to pay a cartel/monopoly price. As we have just seen, consumers are generally granted standing under antitrust laws.

A situation similar to the *Blue Shield* case law may arise. Imagine that a consumer "C" complains that one of its furnishers, "F", has been denied the right to use a quality standard established by a cartel "M", and that the exclusionary practices of M oblige C (through market pressure imposed by C's own costumers) to buy products produced by M for which M charges a monopolistic price.[622] As a consumer, C may not be granted standing in an action based on M's refusal to deal with F, as C is not a direct victim of M's practice.[623] However, if *Blue Shield* is still good law, C could take advantage of it, as this situation would probably meet the three-pronged test set out above by Hovenkamp.[624]

On the other hand, it is possible to argue that *Blue Shield* is no longer good law or to distinguish it factually from a standardization case. Moreover, if both remarks of the Supreme Court in *Loeb v. Eastman Kodak Co*.[625] have to be taken into account, it could be argued that F is in a better position to sue M than C. Thus like Loeb, C should be denied standing.

3.7. Conclusions

The goal of this chapter was to present the US treatment of antitrust violations occurring in the field of standards. US antitrust authorities have different judicial tools at their disposal to punish anticompetitive behavior. Not only are these authorities staffed by many specialists, but they are also aided in their task by private plaintiffs often eager to request the damages available to them as an incentive to others not to violate the law.[626] It can thus safely be concluded that overall, antitrust enforcement is quite effective in the United States.

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[621] See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co* 365 U.S. 656, 81 S.Ct. 365 (1961) discussed in Subsection 3.4.3.3.2. Private SSOs' enforcement after Northwest at litt. b) Anticompetitive enforcement methods: a rather stringent review.

[622] Similarly, imagine that F loses the ability to use a widely regarded safety standard as a result of a forbidden exclusionary practice of M.

[623] Whether C would comply with the target area test depends on how broadly this test is interpreted. It could be difficult for C to prove that he is an intended victim of the violation (as M could argue that F is the intended victim of the refusal to deal), whereas C would probably be seen as a foreseeable victim of the violation.

[624] See Subsection 3.6.4.1. *Locus standi in fine*.

[625] 183 Fed. 704, 709 (3d Cir. 1910), discussed above at fn 601.

[626] Approximately 90% of antitrust cases are brought by private plaintiffs. See S.SALOP/L.WHITE, "Private Antitrust Litigation: An Introduction and Framework", in: *Private Antitrust Litigation: New Evidence, New*

However, in the standardization context, there are still areas where one might think competition is not being protected in the best way:

a) **The reach of US antitrust is not all encompassing, but is limited in many ways**. *Ratione personae*, it must be stressed that some industries are outside the reach of antitrust laws due to State or federal regulation. This is a mere statement of law, as the hard question of whether a regulated market is a better way of improving social welfare did not need to be dealt with in this study.

Ratione loci, the existence of a set of limitations affects the international reach of US antitrust laws. We have seen that judges still retain a wide margin of discretion as to the limits of their jurisdiction, which introduces a great deal of uncertainty. Given the relative harshness of US antitrust remedies compared to those of foreign antitrust laws, this might have the effect of deterring foreign firms from engaging in practices that could potentially be at odds with US antitrust laws. Some foreign countries have obviously seen this as an intrusion into their sovereignty. With respect to PIL compatibility with these limits, one can already point towards two important loopholes in the protection of foreign firms under US law. As we concluded when discussing the FTAIA, foreign firms have no standing under US laws:

1. when they are injured by a foreign antitrust violation that deprives them of the possibility of importing an American product; and
2. when a US antitrust violator imposes on them an antitrust injury.[627]

It must then be concluded (especially from point 2 here above) that under US antitrust laws, American firms can safely conspire to distort competition in a foreign country unless they hurt another American exporting interest; for example, this may be done through an export cartel.

b) Concerning the **material concepts** of US antitrust laws, we have seen that many are likely to play a role in the antitrust analysis of standards. However, some are more likely to be used than others. The following summary can be made:

1. Courts sometimes interpret standardization as evidence that a cartel exists. Of course, standardization alone is not conclusive. However, when other factors are also present ("proxies"), standardization has sometimes been interpreted as a proof of a cartel's existence.

2. In cases where a trade association is used to promulgate a standard, many strategies can be used to review the compatibility of the standard with antitrust rules. As a matter of principle, a rule of reason approach will be used. Exceptions to this principle may arise when an SSO exercises unwarranted pressure to exclude products of a competitor (either of the SSO or of the members of the SSO) from a market. Under the rule of reason, and taking into account the SSO's market power, courts will usually try to assess whether the exclusion is justified by reasonable SSO policies, or conversely, if it is due to anticompetitive purposes of its members. It must also be emphasized that capture of a SSO rule-making process has been clearly judged to be a violation of

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Learning (L. WHITE, ED.) 1988, and R. POSNER, "A Statistical Study of Antitrust Enforcement", in: *Journal of Law and Economics*, 13/365, 1970.

[627] These two possibilities are subject to the condition that no US exporting interests are hurt.

antitrust laws,[628] thus rendering the capture of a trade association decision-making process an unattractive strategy. However, one should not lose sight of the fact that in practice, it remains quite difficult to gather evidence that a SSO has been captured. One may wonder whether a reversal of the burden of proof would not trigger more suits and enable a more equilibrated decision-making process.[629] In particular, one wonders whether this would favor a more representative presence of foreign competing firms in US trade association decision-making bodies.

3. In cases where a single firm promulgates a standard, antitrust case law is more limited. The *Eliason* case[630] has confirmed that even an SSO can be prosecuted under Section 2 of the Sherman Act.[631] Various grounds have been put forward to prove an attempt at monopolization (or in EC parlance, an "abuse of dominant position"); for example, unilateral refusal could lead to prosecution. However, according to the *Aspen*[632] case law, stringent conditions must be met.[633] Moreover, claims based on the essential facility doctrine or the RRC theory have been met very well by courts up to now. The RRC, a favored theory among economists, may thus play a more important role in the future.

Beyond these summarizing remarks, two further points need to be stressed. First, with the caveat mentioned above, foreign firms are protected by US antitrust laws and can bring a suit before US courts. Second, as explained in Chapter 1, the difference between standards and technical regulations lies in the fact that technical regulations are rendered mandatory by legislative fiat, whereas standards are "imposed" by external factors such as tort principles and insurance reimbursement policies. The adoption of a market standard by such a third party can have a very important competitive impact, but it is interesting to note that no antitrust prosecution has been directed at them[634] ever though the trade distortion potential seems at least as high as when competitors select their standards with a view to materializing their anticompetitive purposes.

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[628] *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp*. 456 U.S. 556, 102 S.Ct. 1935 (1982).

[629] The author is aware that a reversal of the burden of proof is granted only in exceptional cases and that proving that a decision-making process is fair may be viewed by some as a *probatio diabolica* if taken literally. However, a reasonable standard of proof could force trade associations to disclose more information on their decision-making process, as practically speaking, access to this kind of information is decisive in these sort of suits.

[630] *Eliason Corp. v. Nat'l Sanitation Found.*, 614 F.2d 126 (6th Cir. 1980), cert. denied, 449 U.S. 826, 101 S.Ct. 89 (1980).

[631] In addition to the SSO, the individuals may be prosecuted both criminally and civilly, although it seems necessary that such individuals have actual knowledge of and take part in the violation; see, e.g., *Kline v. Coldwell Banker & Co.*, 508 F.2d 226 (9th Cir. 1974).

[632] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 105 S.Ct. 2847 (1985).

[633] It would be necessary for the plaintiff to prove: 1) that a joint venture was pre-existing; 2) that the refusal to deal could not be reasonably justified (i.e., was not efficient); and 3) that the refusal to deal harmed consumers.

[634] Of course if collusion occurs, for example between an insurer which must choose a safety standard and a producer of safety devices, they may both be reached by antitrust laws. The trouble here is that there seem to be no remedies, at least under antitrust laws, when the insurer alone decides to adopt an inefficient standard. It may be argued that such practices would fall under Section 5 of the FTC Act ("unfair or deceptive acts or practices in or affecting commerce"), but proof of an agreement is necessary.

Chapter 4 EC competition rules

4.1. An overview of EC competition law

The central provisions of EC competition law are set out in Articles 81 to 89 of the Treaty establishing the European Community ("ECT.")[635] As an integral part of the ECT, their meaning cannot be fully appreciated without referring to their context, namely their place in the ECT and the goals the ECT purports to reach. After a very brief presentation on the historical events leading to the creation of the European Community[636] (Subsection 4.1.1.), the main provisions of the ECT having an influence on the interpretation of competition rules will be examined (Subsection 4.1.2). Subsection 4.1.3 then offers an overview of the EC competition rules.

4.1.1. Origins of EC competition law

The idea of peacefully uniting Europe that was most forcefully put forward in the 19th century has been the work of many European historical figures.[637] However, most accounts of European integration consider the Second World War and its catastrophic impact on Europe to be the triggering factor for the acceptance by a wider audience of a European supranational political architecture, and hence for the foundation of European cooperative institutions. As evidenced by the two World Wars, the risks for world peace arising out of aggressive nationalism prompted more international and regional integration. Indeed, many international institutions favoring closer cooperation between states were created in the years following WWII. Among them, the following are of particular interest because they provided a cooperative framework for dealing with sensitive economic and security (i.e., stability) issues: the Bretton Woods institutions (GATT, IMF, and the World Bank), the Organization for European Economic Cooperation (OEEC, now, the Organization for Economic Development, OECD), the Council of Europe, and at the military level, the North Atlantic Treaty Organisation (NATO) and the West European Union (WEU).

Some countries were looking for even more wide-reaching (positive) cooperation. In 1950, based on a plan by French historical federalist figure Jean Monnet, the French foreign minister Robert Schuman proposed to Germany the idea of putting their strategic productive capacities under the authority of a supranational authority. The "Schuman" plan (as it became known) purported to create a High Authority entrusted with the supervision of French and German coal and steel production, with an option for other European powers to join in.[638]

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[635] For more, see Consolidated version of the treaty establishing the European Community, OJ 2002 C325/33 December 24, 2002.

[636] For a more detailed description of the events leading to the Treaties of Paris and Rome, see, e.g., R.J.MAYNE, *The Recovery of Europe: From Devastation to Unity*, Weidenfeld & Nicolson, 1970.

[637] As a way to achieve unity beyond simple conquest by dominant powers, various thinkers have favored cooperative integration. For a presentation of the various historical European cooperation movements, see D.URWIN, *The Community of Europe: A History of European Integration*, 2d ed., Longman, 1995.

[638] One of the main rationales was to put the production of such crucial elements of any modern (mechanized) conflict beyond direct control of potentially war-eager nations.

In 1952, the Schuman plan led to the creation of the European Coal and Steel Community ("ECSC"[639]) with the signature of the Treaty of Paris, which by then comprised Italy, the Netherlands, Belgium, and Luxemburg as well. The Treaty of Paris already included provisions on "competition policy." Article 4 contained a list of practices which were considered incompatible with the ECSC. In particular, items b) and d) forbade:[640]

> *b) measures which discriminate between producers, purchasers, or consumers relating to prices, delivery terms, or transports rates and conditions, or which interfere with the purchaser's free choice of supplier;*
>
> *[…]*
>
> *d) restrictive practices "which tend toward the sharing or exploiting of markets."*

Article 5 went even further by requiring the High Authority to take positive steps to "ensure the establishment, maintenance and observance of normal competitive conditions."

Concerning the introduction of competition rules in the ECSC, Goyder[641] remarks:

> *[I]t is appropriate to consider the principal reasons for according so much importance to the value of pro-competitive measures within the framework of the Treaty. The chief element was of course that the absence of, or at least the major imperfections of, competition readily visible in the markets covered by the 1951 Treaty of Paris were felt to be major weaknesses in industries that needed the spur of rivalry in order to achieve a higher level of performance. Beyond that element, however, lay the known example of the United States, an economy that had apparently reached its position of pre-eminent industrial strength by its reliance over many decades on free competition, the principle that provided the mainspring of antitrust. If the Coal and Steel Community were to avoid the need for a form of supranational control, involving management on a completely centralized basis, then allowing to its undertakings a fuller freedom of exposure to the forces of competition was unavoidable. This conclusion was accepted even though the individual Member States had little tangible evidence from their own national experience to support a wholesale move towards the uncertainties of a freer and less regulated market. (FN: On the other hand, the Freiburg School, favouring the social market economy as the only means of combinating individual liberty with social justice, had substantial influence on the policies of the Christian Democrats under Ludwig Erhard at this time, which in turn led to the enactment of the German Law against Restraints of Competition with effect from January 1958.)*[642]

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[639] The ECSC had a limited life span of fifty years. On July 23, 2002, the ECSC came to an end and the coal and steel production was integrated into the EC Treaty.

[640] See also Articles 60, 65 and 66 of the Treaty of Paris.

[641] D.G.GOYDER, *EC Competition Law*, Oxford University Press, 4th ed., 2004.

[642] The German cartels played a substantial role in Hitler's rise to power. See, e.g., W.MANCHESTER, *The Arms of Krupp: The Rise and Fall of the Industrial Dynasty that Armed Germany at War*, Little Brown and Co., 1968, and updated edition, Back Bay Books, 2003. Competition rules with their supposed "anti-bigness" role may have been seen as preventing too-high a concentration of power.

The trust in market forces among the signatories of the Treaty of Paris was not without limits, and some features of centralized management remained. In case the supply and demand for coal and steel were not in a reasonable relationship (what the Treaty of Paris terms a "crisis"), the High Authority was entitled to intervene (i.e., mainly by manipulating price or output) in order to restore a better balance.

The success of the ECSC led the way for integration in other fields. Setting aside the failure of the European Defence Community (which was rejected in 1954 by the French National Assembly), the "Six"[643] (inspired by the Benelux Memorandum[644]) gathered in Messina in Sicily in 1955 to discuss the possibility of extending the principles of the ECSC to other economic domains, thus laying the foundation of the European Economic Community. The Messina declaration further acknowledged the critical importance of competition policy by noting the drawing of the EEC Treaty necessitated, *inter alia*, the "elaboration of rules to ensure undistorted competition within the Community."

The Six instructed a group of senior officials under the presidency of Paul-Henry Spaak to gather the principles and ideas necessary for the drafting of a new treaty. The ensuing Spaak report reiterates the importance of competition rules. At paragraph 55, the report states:

> *In the final period, the elimination of trade barriers will lead to the disappearance of the opportunities for discrimination by competing enterprises. The problem only remains because there are enterprises, which, owing to their size or specialization or the agreements they have concluded enjoy a monopoly position. The action against discrimination, therefore, links up with the action that will be necessary to counteract the formation of monopolies within the Common Market. The Treaty will have to lay down basic rules on these points. […] More generally, the Treaty will have to provide means of ensuring that monopoly situations or practices do not stand in the way of the fundamental objectives of the Common Market. To this end, it will be necessary to prevent:*
>
> *A division of markets by agreement between enterprises, since this would be tantamount to re-establishing the compartmentalization of the market.*
> *Agreements to limit production or curb technical progress because they would run counter to progress and productivity.*
>
> *The absorption or domination of the market for a product by a single enterprise since this would eliminate one of the essential advantages of a vast market, namely that it reconciles the use of mass production techniques with the maintenance of competition.*

The drafting of the provisions on competition of the Treaty of Rome closely followed these principles. However, at the moment when the precise wording of these provisions was being drawn, heated discussion arose, as the French and German representatives diverged on the

[643] I.e., the six founding nations of the ECSC, namely France, Germany, Italy, the Netherlands, Belgium and Luxemburg.
[644] The Benelux Memorandum was a document analyzing various scenarios for the development of European integration. Presented by Paul-Henri Spaak, one of Europe's founding fathers, on behalf of Belgium, the Netherlands and Luxembourg, it argued forcefully for the adoption of a community embracing more economic industries.

enforcement strategy to be followed. French officials favored an approach in which anticompetitive conduct would remain legal until and unless a decision had been rendered against it (i.e., the "exception légale" system); conversely, the Germans defended the view that anticompetitive behavior had to be illegal unless an administrative body cleared it. In the end, neither approach prevailed, and the question was left unanswered.[645] However, these discussions did not prevent the Treaty of Rome from being signed in 1957. Although this debate certainly shows a divergence in the way competition policy was reviewed, the Six never questioned the importance of competition rules as a cornerstone of the new Treaty. Thus from the outset, competition has been an undisputed guiding principle for the economic integration of the European community.

4.1.2. The "free-market structure" of the ECT

The 1957 Treaty of Rome was the legal basis for the European Economic Community.[646] Beyond Articles 81-89 of the Treaty[647] which deal specifically with competition policies, other provisions have an impact on the competitive environment of the European market.[648] The Treaty contains many provisions concerned with the removal of trade barriers,[649] basically setting forth four main freedoms: the free movement of goods, services, persons, and capital. Policies later developed by the EC such as the monetary union[650] and the establishment of a public procurement régime[651] also had a substantial impact on the European competition framework.

Specific provisions on competition are reflected in Title VI, Chapter 1 ECT. Chapter I is itself divided into two sections: Articles 81 to 86 ECT embody the "rules applying to undertakings," whereas Section 2 (Articles 87 to 89 ECT) deals with "aids granted by states." Title VI is further elaborated on by Chapters II and III, which focus on matters that have an important impact on the promotion of "a high degree of competitiveness,"[652] namely taxation and the approximation of laws.

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[645] The question was later answered by Article 9(1) of Regulation 17/62, which adopted a system of authorization granted exclusively by the Commission.

[646] The present denomination of "European Community" was adopted by the Maastricht Treaty in 1992 as a sign that European integration went beyond mere economic issues.

[647] Under the new European Constitution, the competition provisions should have been renumbered as Articles 47-55.

[648] By "free-market structure," we do not intend to mean that the ECT is biased in favor of private markets as opposed to public ownership. In fact, the ECT is neutral in this regard as it does not prejudge Member States' choices (Article 265 ECT), but merely lays down precise disciplines once such a choice has been made.

[649] It should be emphasized that the ECT was concerned with the removal of trade barriers and not with deregulation. Through the protection of the four fundamental economic freedoms, the ECT allows a freer movement of mobile productive factors (workers and capital) and of products (goods and services.) However, it provides exceptions to such freedoms, as it sets forth circumstances under which Members States are still free to regulate. These exceptions are often linked with social values which Member States are expressly authorized to pursue (public morals, human health, protection of the environment, etc.; for these in the context of the free movement of goods, see Article 30 ECT.)

[650] In particular, the introduction of the Euro brings a greater comparability of prices among the markets of the Member States.

[651] The adoption of common rules in this field aims at avoiding indirect subsidization of firms active in governmental markets. J.ARROWSMITH, "The Community's Legal Framework on Public Procurement: The Way Forward at Last?", CML Rev 13, 1999.

[652] This is one of the main goals of the EC as set out in Article 2 ECT.

Part of the general context in which rules on competition must be interpreted is also provided by the first articles of the Treaty.[653] For example, Article 3 ECT sets out the means necessary to reach the goals of the EC as laid out in Article 2 ECT. Among these, Article 3 litt. g) sets forth "a system ensuring that competition in the internal market is not distorted." Article 4 ECT is the legal basis for the establishment of "an economic policy, which is […] conducted in accordance with the principle of an open market economy with free competition."

One of the main instruments of the ECT for reaching its goals is creation of a single market within the Community (Article 2 ECT.) The influence of such a tool on the interpretation of competition rules has been stressed on numerous occasions. From its very first decisions in the competition field, the European Court of Justice ("ECJ") has striven to use competition rules in a way that would further the creation of a single market.[654] The importance of market integration is likely to remain high, as the EC is facing the challenges of integrating the economies of ten new Members, with more countries (some of whom are still far from fully complying with the requirements of a free-market economy in all economic sectors) being expected to join in the foreseeable future. However, the more the EC market integrates, the less the need becomes to use antitrust as a market integrating device. Thus to a large extent, arguably the focus is now on how to keep rivalry in a market in order to promote social welfare.

4.1.3. Specific competition provisions of the EC Treaty

Article 81(1) ECT prohibits "all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect [the restriction of competition.]" Article 81(2) ECT clarifies that such agreements are to be automatically void.[655] However, Article 81(3) ECT specifically declares the prohibition of Article 81(1) ECT inapplicable to some types of agreements or decisions, mainly those that "contribute to improving the production or distribution of goods or to promoting technical or economic progress." Since the entry into force of Regulation 1/2003, the application of Article 81(3) ECT is not the sole prerogative of the Commission but has been decentralized, as national antitrust courts are themselves now being authorized to exempt agreements. Article 82 ECT prohibits abuses of dominant positions by one or more undertakings. Article 83 ECT specifically grants legislative powers to the Commission and the Council of Ministers with respect to secondary legislation in the field of competition law. Article 85 ECT[656] attributes to the Commission the authority to apply the principles laid down in Articles 81 and 82 ECT. In particular, the Commission is authorized to start investigations and issue reasoned decisions.[657] Article 86(1) ECT deals with the competition measures Member States are required to take in relation to public sector undertakings. Article 86(2) ECT imposes the respect of competition disciplines to

[653] For one example of the teleological interpretation of competition provisions by the ECJ, see *Gencor Ltd v. Commission*, T-102/96, [1999] ECR II-753. Note that the Commission and the CFI have also interpreted the Treaty teleologically.
[654] See, e.g., *Consten & Grundig v. Commission* (C-56 & 58/64) [1966] ECR 299, where the ECJ qualifies market integration itself as a goal of the ECT. Market integration has been almost mechanically pursued by the ECJ, sometimes even at the cost of reduced competition (see *Consten & Grundig.*).
[655] For a presentation of the legal consequences of voidness, see Subsection 4.5.3. Voidness.
[656] Article 84 ECT has essentially been rendered moot. It provided that until the secondary legislation as set out in Article 83 ECT became effective, Member States would rule on the admissibility of anticompetitive behavior.
[657] For a more detailed description of the Commission's actual investigative powers, see Regulation 2003/1, Chapter V.

"undertakings entrusted with the operation of services of general economic interests or having the character of a revenue-producing monopoly" subject to the condition that "the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."[658]

4.2. Scope of EC competition law

This section purports to present the limits of competition laws both with regard to national and international law.

4.2.1. Horizontal reach of EC competition law

EC competition rules apply to most economic activities taking place in the EC. However, such rules apply in a special way to certain markets. **Nuclear energy** is dealt with by a specific agreement (the "Euratom Treaty") which was signed the same day as the ECT. Article 305 (2) ECT specifically provides that the ECT shall not be interpreted in a manner which deviates from the provisions of the Euratom Treaty. As a result, Articles 81 and 82 ECT apply only to areas where the Euratom Treaty is not applicable.

Coal and steel were originally also dealt with under a specific agreement, the Treaty of Paris, which expired on July 23, 2002. The coal and steel sectors were integrated in the ECT, and EC competition law now applies to these sectors as well.[659]

In relation to **military equipment**, Article 296 I ECT provides in pertinent part:

> *The provisions of this Treaty shall not preclude the application of the following rules:*
>
> *no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;*
>
> *any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.*

Agriculture is heavily regulated with Articles 32 to 38 ECT subjecting it to a special regime. However, Article 36 ECT states "the provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council." The Council has long enacted Council Regulation 26/62,[660] which provides a exemption for certain products (Article 2(1) of the Regulation), the production of which is

[658] Article 87 ECT and ff constitute Section 2 of the Chapter on Competition Rules. However, as they impose disciplines on States rather than on undertakings, their analysis is not central when discussing private standards.
[659] See the Commission Communication concerning certain aspects of the treatment of competition cases resulting from the expiration of the ECSC Treaty, [2002] OJ C 152/5.
[660] [1962] JO 993.

specifically exempted from Article 81 ECT review (there is no exemption from Article 82 ECT review.)

Article 2(1) of the Regulation provides that Article 81 ECT shall not apply to agreements that form an integral part of a national[661] or common market organization—i.e. agreements that are necessary for the attainment of the objectives of the common agricultural policy (CAP).

The ECT also contains special provisions on road, rail and inland waterways, and sea and air **transport** (Articles 70 to 80 ECT.)[662]

Utilities (water, gas and electric supplies) have been heavily regulated in the past with many utility providers having long been state monopolies. Although since the 1980s many Member States have decided to liberalize some or all of these industries, substantial regulation remains. In particular, one of the challenges consists in forcing the former monopolist to behave in a competition-friendly manner and to prevent it charging excessive prices (price control.) Various EC legislative acts provide specific competition rules for these sectors.

In various sectors (for example, **telecommunications, posts, professional services, insurance, and the motor industry**), the EC has enacted sector-specific regulations. These regulations usually do not limit the reach of EC Competition law but may provide for a special application of its principles.

4.2.2. Vertical reach of EC competition law

Geographically, the scope of EC competition law almost perfectly overlaps with the scope of the Treaty.[663] Yet, when assessing the vertical reach of EC competition law towards Member States, several caveats are necessary: first, competition law does not apply to every type of anticompetitive behavior taking place in the EC. Indeed, as anticompetitive behavior must be such as to "affect trade between Member States," purely intra-state anticompetitive behavior usually escapes EC prosecution. Moreover, only anticompetitive behavior which has an "appreciable" anticompetitive[664] effect is forbidden under EC competition law. Second, it must be stressed that EC competition rules apply both to private and public actors, although some public activities cannot be reached by them.[665] Third, as Member States also have competition laws of their own, it is necessary to examine how coordination occurs between EC and national competition authorities. Finally, under some specific conditions, EC competition law can reach anticompetitive behavior that has taken place abroad but has effects in the EC (international reach.) These issues are examined in turn.

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[661] Regional market organizations do not qualify for exemption; see *Scottish Salmon Board*, [1992] OJ L246/81.

[662] In the road, rail and inland waterways sector, see Council Regulation 1017/68, [1968] JO L175/1 and the various implementing directives in the rail sector.
In the maritime sector, see Council Regulation 4056/86, [1986 OJ L 378/4.
In the air transport sector, various regulations and directives are in place. For a quick summary, see R.WHISH, *Competition Law*, 5th ed., pp. 931 and ff, 2003.

[663] One might take the view that EC law applies even outside the EC through the so-called "effects doctrine"; see Subsection 4.2.2.4. International reach of EC competition laws.

[664] See, e.g., *Stergios Delimitis v. Henninger Brau*, C-234/89, [1991] ECR I-935.

[665] See Subsection 4.2.2.2. State measures which thwart competition.

4.2.2.1. Anticompetitive behavior which affects trade between Member States

4.2.2.1.1. The affection of trade condition

a) Case law

Although the condition that an anticompetitive practice must "affect trade between Member State" ("affection of trade condition") in order for EC competition rules to apply is expressly reflected in the text of Articles 81 and 82 ECT, its wording is hardly self-explanatory. In its first review of a Commission decision, the *Consten*[666] case, the ECJ gave it the following interpretation (§ 6):

> *The concept of an agreement "which may affect trade between Member States" is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law. In this connection what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential[667], to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between states. Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may "affect" such trade in the above-mentioned manner.* [668]

Although in *Consten*, sales of Grundig products rose after the conclusion of the litigated agreement, the ECJ rejected the view that the agreement had a positive effect on trade. In striking it down, the ECJ thus adhered to the goal of the free movement of goods, i.e., the treatment of the entire territory of the EC as a single market.[669] This gives the "affection of trade condition" a very broad scope which few agreements escape.[670] Two types of cases involving anticompetitive behavior may be distinguished:

(a) Anticompetitive behavior whose scope overlaps national boundaries: this has often been deemed to fulfill the affection of trade condition, especially when it simultaneously involves the erection of trade barriers.

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[666] *Consten & Grundig v. Commission* (C-56 & 58/64) [1966] ECR 299.

[667] For a similar wording and a similarly broad interpretation, albeit ten years later and within the framework of the free movement of goods, see the famous *Dassonville*, 8/74, [1974] ECR 837 case.

[668] This wording seems unfortunate. Pursuant to V.KORAH, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, p. 49, 2004, the ECJ clarified in *Walt Wilhelm v. Bundeskartellamt* (C-14/68, [1969] ECR 1 (one of the leading cases on the uniform application of EC law) that the affection of trade condition limits the scope of only EC law. National law is limited by this condition only to the extent that national law materially conflicts with Community law. Thus, some agreements may be reachable by both EC and national competition law. However, in more recent case law, the ECJ seemed to take a more clear-cut approach; for example, in *Hugin Kassarregister Ab v. Commission*, 22/78, [1979] ECR 1869, p. 1899, it held that the affection of trade condition defines "the boundary between the areas respectively covered by Community law and the law of the Member States." See also *Stergios Delimitis v. Henninger Brau*, C-234/89, [1991] ECR I-935.

[669] This holding was followed in various instances by the Commission. See *Re Central Stikstof Verkoopkantoor,* OJ [1978] L 242/15, or *Napier Brown – British Sugar*, OJ [1988] L 284/41.

[670] See however, fn 684.

(b) Anticompetitive behavior whose scope is restricted to only a part of a national territory: the question whether the condition has been fulfilled seems to have prompted quite unpredictable answers.

In situations where the scope of a restriction coincides with the territory of a Member State, EC competition authorities have considered that the affection of trade condition was fulfilled even when only very limited levels of trade between Member States were affected, and in certain cases even when no present trade at all was affected. In *AEG-Telefunken v. Commission,*[671] the ECJ indicated the fact there was only limited trade between Member States for a particular product at a certain point in time was not enough to avoid prosecution under Article 81 ECT, because as trade patterns could reasonably be expected to be changed in the future, the agreement could potentially affect competition. In *Instituto Chemioterapeutico Italiano SpA and Commercial Solvents Corp v. Commission,*[672] the ECJ noted that the affection of trade condition was fulfilled even by only potential trade, as the elimination of a competitor could affect trade between Member States by taking away the mere possibility of this competitor exporting to another Member State.[673] Thus as the mere possibility of a reduction is sufficient, no proof of an actual reduction of trade is necessary.[674]

In recent cases, the ECJ has rendered it even easier to fulfill the affection of trade condition. For example, in *Windsurfing International Inc. v. Commission*,[675] the ECJ ruled that this condition was met when the agreement as a whole affected trade, even if the specific anticompetitive provision did not do so.[676]

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[671] 107/82, [1983] ECR 3151.

[672] C-6&7/73)[1974] ECR 223

[673] See also, *BNIC v. Clair*, C-23/83, [1985] ECR 391, § 28-29, where the ECJ accepted the view that even if a violation concerns an upstream product for which no significant trade between Member States takes place, the mere fact that trade of the downstream product occurs interstate is enough to meet the affection of trade condition.

[674] Further examples of such a "possible threat" approach can be found in *Miller International Schallplatten GmbH v. Commission*, C-19/77, [1978] ECR 131, and *Irish Sugar*, T-228/97, [1999] ECR II-2969, appealed, C-497/99, [2001] ECR I-5332.

[675] C-193/83, [1986] ECR 611, § 96-97; see also, *Vereninging van Grootenhandelaren in Bloemkwekerijproducten*, C-77/94, [1977] ECR-II 759, § 126 and § 142 to 144, where as summarized by the Commission, the ECJ indicates:

> *(I)n cases where the contractual relations between the same parties cover several activities, these activities must, in order to form part of the same agreement, be directly linked and form an integral part of the same overall business agreement. (§ 14 Commission Notice)*

However, under Article 82 ECT:

> *(I)t is the abuse that must affect trade between Member States. This does not imply, however, that each element of the behaviour must be assessed in isolation. Conduct that forms part of an overall strategy pursued by the dominant undertaking must be assessed in terms of its overall impact. Where a dominant undertaking adopts various practices in pursuit of the same aim, […] in order for Article 82 to be applicable to all the practices forming part of this overall strategy, it is sufficient that at least one of these practices is capable of affecting trade between Member States." (Commission Notice § 17, summarizing Hoffman-La Roche AG v. Commission, C85/76, [1979] ECR 461, § 126.)*

[676] See also the Commission Notice on the effect on trade concept contained in Articles 81 and 82 ECT, § 15, where the Commission holds as immaterial whether the participation of a particular undertaking in the agreement has an effect on trade between Member States:

It has been argued that in adopting such a broad definition of the affection of trade condition, the ECJ intended to protect the goal of the creation of a single market. In *Vereeniging van Cementhandelaren v. Commission*,[677] the ECJ pointed out:

> *An agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic inter-penetration which the treaty is designed to bring about and protecting domestic production.*
>
> *In particular, the provisions of the agreement which are mutually binding on the members of the applicant association and the prohibition by the association on all sales to resellers who are not authorized by it make it more difficult for producers or sellers from other Member States to be active in or penetrate the Netherlands market.*

Underscoring the ECJ's attachment to the goal of a single market, Korah[678] remarks:

> *The more the Cement Dealers' Trade Association restrained price cutting in the Netherlands by established dealers, the more other dealers there would be encouraged to import cement and undercut them. The agreement in issue must have increased imports rather than restrained them. That was irrelevant. The ECJ was concerned that the common market should be treated as a unit, and price fixing throughout the Netherlands affects the pattern of trade by creating a distortion along the Dutch border.*

Pursuant to ECJ's case law, the mere fact that an agreement's scope overlaps with national boundaries should not alone be a sufficient ground for ruling that it affects trade between Member States, as trade barriers must also be erected (or at least made easier) by the agreement. In *Belasco v. Commission,*[679] the ECJ in explaining the *Dutch Cement Dealers* case makes clear that cartels tend to take measures keeping products from other Member States outside their markets, which mandates their prohibition.[680] Examples of such barriers include collective aggregate rebates[681] (but not trade fairs[682]) and the standardization of the conditions for opening bank accounts.[683] When these barriers are not erected by the cartel

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> *An undertaking cannot escape Community law jurisdiction merely because of the fact that its own contribution to an agreement, which itself is capable of affecting trade between Member States, is insignificant.*

[677] C-8/72, [1972] ECR 977, § 29-30.
[678] V.KORAH, supra at fn 668, p. 63.
[679] *Société coopérative des asphalteurs belges (Belasco) v. Commission*, C-246/8, [1989] ECR I-2117, §§ 33-35.
[680] In *Pronuptia de Paris v. Schillgalis*, 161/84, [1986] ECR 353, the ECJ accepted the view that territorial repartition of markets in distribution franchises are capable of affecting trade between Member States as they prevent the franchisees from setting themselves up in other Member States.
[681] *German Ceramic Tiles – Re the Discount Agreement of the Interessengemeinschaft der Deutschen Keramischen Wand und Bodenfiesenwerke*, (71/23/EEC), JO 1971, L/10/15, [1971] CMLR D6.
[682] *SMM&T Exhibition Agreement*, OJ 1983, L/376/1.
[683] *Carlo Bagnasco and others v. Banca Popolare di Novara Soc Coop arl*, C-215/96, [1999] ECR I-135.

members, it can be argued that an agreement whose scope overlaps with national boundaries does not affect trade between Member States.[684]

This is an important conclusion in the standardization context, as the scope of a national SSO's standards often coincides with national frontiers. It therefore must be emphasized that standards affect trade between Member States only when they **simultaneously erect barriers to trade**.

In relation to cases where the anticompetitive behavior is limited to a region of a Member State, the ECJ case law does not seem absolutely consistent. In some cases, it appears that the

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[684] However, ECJ case law is not without its tensions. In *Carlo Bagnasco and others v. Banca Popolare di Novara Soc Coop arl*, C-215/96, [1999] ECR I-135, the ECJ refused to consider that the requirement of trade between Member States had been fulfilled. The Court seemed to exclude restraints which had only a limited impact on trade between Member States, thus insisting on the level of appreciability of the restraint (§ 51):

> *It must be borne in mind that the Commission, when approached by the ABI concerning the compatibility of the clauses governing the provision of general guarantees in relation to Article [81] of the Treaty, found that the banking service in question involved economic activities which have* ***a very limited impact on trade between Member States*** *and that the participation of the subsidiaries or branches of non-Italian financial establishments was limited (see paragraph 15 of this judgment). Moreover, the Commission has made clear, in reply to a question put to it by the Court, that potential recourse to contracts for credit facilities and contracts for the provision of general guarantees by the main customers of foreign banks, that is to say large undertakings and foreign economic operators, is not great and, in any event, is* ***not a factor of decisive importance*** *in the choice made by foreign banks as to whether or not to establish themselves in Italy, in so far as contracts of the kind at issue in the main proceedings are* ***only rarely used by customers*** *of that kind. The Commission's findings to that effect have not been called in question in the present proceedings. [emphasis added]*

However, the restraint was able to influence the competitive possibilities of foreign banks. Indeed, the ECJ noted (§ 49):

> *[...] as far as the effects of the rules on the provision of general guarantees on intra-Community trade are concerned, it is conceivable that the subsidiaries or branches of banks of other Member States which are established in Italy might be obliged, in order to benefit from the advantages of membership of the ABI, to apply the NBU and thus* ***forego the possibility of applying more favorable conditions****. Similarly, having regard to the fact that the great majority of Italian banks are members of the ABI, customers wishing to conclude a contract for a current-account credit facility might find that* ***their choice of bank was restricted*** *where the conclusion of such a contract depended upon the provision of a surety governed by the NBU, to which, for the most part, no exceptions are possible. [emphasis added]*

However, in the later *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*, C-309/99, [2002] ECR I-1557, case, the ECJ seemed again to champion a relaxed standard of appreciability (§ 95):

> *As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, paragraph 29; Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22; and CNSD, paragraph 48).*

Arguably a higher requirement for appreciability would have brought a better balance between the competition law areas of authority of the Members and the EC. At any rate, in the context of the impending decentralized enforcement of competition law, it has been suggested the *Wouters* case be seen as a vote of non-confidence in national competition authorities.

ECJ accepted the position that an agreement affected trade between Member States even without a clear mechanism for trade restriction.[685] In other cases, it requested the Commission to give proof of such a mechanism and sometimes rejected the Commission's proof of a trade restriction.[686] This uncertainty is further complicated by the fact the ECJ sometimes[687] refers to the concept of "appreciable" effect on trade between Member States.[688]

b) Commission Notice

In April 2004, the Commission issued a notice on the effect on trade concept contained in Articles 81 and 82 ECT[689] ("Effect on Trade Notice.") The Effect on Trade Notice divides the application of the effect on trade criteria into three aspects:

1) The concept of "trade between Member States";
2) The notion of affection of trade; and
3) The concept of "appreciability."

As to the first concept, the Effect on Trade Notice states:

> *The concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity including establishment. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods and services, persons and capital.*[690]

In addition, the Effect on Trade Notice indicates the concept of trade also encompasses cases where anticompetitive behavior affects the competitive structure of the market, for example, by eliminating or threatening to eliminate a competitor.[691] The Effect on Trade Notice further emphasizes the lack of any requirement that the anticompetitive behavior affect trade between the whole of one Member State and the whole of another Member State.

The interpretation of "may affect" in the second concept is no easy task, as the case law has not evolved in a linear manner. The Commission provides a formula by which it purports to clarify the existing case law:

> *The function of the notion "may affect" is to define the nature of the required impact on trade between Member States. According to the standard test developed by the Court of Justice, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factor of law or fact that the agreement or practice*

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[685] See, e.g., *Nederlandse Vereniging voor de Fruit en Groenenimporthandel "FRUBO" v. Commission and Vereniging de Fruitunie*, C-71/74, [1975] ECR 563.
[686] See *Tepea BV v. Commission*, C-28/77, [1978] ECR 1391 and *Hugin v. Commission*, 22/78, [1979] ECR 1869. However, the CFI rejected the Commission's finding about the affectation of trade in *Groupement des Fabricants de Papiers Peints de Belgique v. Commission*, 73/74, [1975] ECR 1491.
[687] See, e.g., *Béguelin Import Co v. GL Import Export SA*, C22/71, [1971] ECR 949, § 16 and *BPB Industries Plc and British Gypsum Ltd* v. Commission, T-65/89, [1993], ECR II-389.
[688] This concept should not be mistaken with the "appreciable effect on competition" presented below.
[689] Guidelines on the effect on trade concept contained in Articles 81 and 82 ECT, OJ 2004 C 101 p. 81 and ff.
[690] Id. at § 19.
[691] Id. at § 20.

> *may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. […] the Court of Justice has in addition developed a test based on whether or not the agreement or practice affects the competitive structure. In cases where the agreement or practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established.*[692/693]

The Effect on Trade Notice goes on to clarify the understanding of this definition. In relation to the term "a sufficient degree of probability on the basis of a set of objective **factors** of law or fact," the Commission makes the following points:

(a) Subjective intent to create a barrier to trade is not required, but if present, it can be a relevant factor.
(b) Anticompetitive behavior merely has to be "capable" of hindering trade.
(c) It follows from the precedent that no calculation of the actual volume of trade is required.
(d) Beyond subjective intent, the following factors may, *inter alia,* be taken into account: the nature of the agreement or practice (§ 29), the nature of the products covered by the agreement or practice (§ 30), the market position of the undertaking concerned (§ 31), and the legal and factual environment in which the agreement or practice operates (§ 32). These factors may not be individually decisive. If one takes into account the wording of the Notice, the first three factors give a mere indication, whereas an analysis of the last factor must be conducted in any case.

As concerns the "direct or indirect, actual or potential" **influence** on the "pattern of trade between Member States," the Commission adopts a very broad interpretation (§ 33-43) with only the following limitation:

> *The inclusion of indirect or potential effects in the analysis of effects on trade between Member States does not mean that the analysis can be based on remote or hypothetical effects. The likelihood of a particular agreement to produce indirect or potential effects must be explained by the authority or party claiming that trade between Member States is capable of being appreciably affected. Hypothetical or speculative effects are not sufficient for establishing Community law jurisdiction. For instance, an agreement that raises the price of a product which is not tradable reduces the disposable income of consumers. As consumers have less money to spend they may purchase fewer products imported from other Member States. However, the link between Member States is generally in itself too remote to establish Community law jurisdiction.* [694]

Finally, as to the third concept, as defined by the EC competition authorities, the concept of "appreciability" is a quantitative criterion that limits the EC jurisdiction to anticompetitive

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[692] The ECJ has predominantly applied this structural test in Article 82 ECT cases (*Instituto Chemioterapeutico Italiano SpA and Commercial Solvents Corp v. Commission*, C-6&7/73)[1974] ECR 223, *Greenwich Film Production v. SACEM*, 22/79, [1979] ECR 3275, and *GVL v. Commission*, 7/82, [1983] ECR 483), although the Commission has applied it in Article 81 ECT cases as well, *Polypropylene*, OJ [1986] L 230/1.
[693] Id. at § 23. Note that at least in part, this wording is not new. See *Société Technique Minière v. Maschinenbau Ulm*, 56/65, [1966] ECR 235. The ECJ has consistently applied this test afterwards.
[694] Id. at § 43.

practices of a certain magnitude.[695] To clarify what constitutes an "appreciable" effect on trade, the Commission follows a two-prong strategy. On the one hand, the Commission tries to summarize the criteria which may be taken into account when deciding whether an anticompetitive behavior has an appreciable effect on trade. The Commission lays weight in particular on the fact that some agreements or practices can by their very nature affect trade (for example, agreements that concern imports and exports or cover several Member States) as well as the market position of the undertakings behaving anticompetitively. On the other hand, the Commission defines a "safe harbor" within which an agreement or practice is rebuttably presumed not to affect trade between Member States (the Non-appreciable affectation of trade" or "NAAT" rule):

> *The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:*
>
> *The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and*
>
> *In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned (39) in the products covered by the agreement does not exceed 40 million euro. In the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement. […]*
>
> *[…] In cases where the agreement concerns an emerging not yet existing market and where as a consequence the parties neither generate relevant turnover nor accumulate any relevant market share, the Commission will not apply this presumption. In such cases appreciability may have to be assessed on the basis of the position of the parties on related product markets or their strength in technologies relating to the agreement.*[696/ 697]

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[695] No absolute magnitude is defined. The Commission argues that magnitude can differ according to the qualification given to the following circumstances: nature of the agreement and practice, the nature of the products covered by the agreement or practice, the market position of the undertaking concerned, and the legal and factual environment in which the agreement or practice operates (see § 45-49 of the notice.)

[696] Id. at § 52. The fact that such behavior is not being punished under competition law is not tantamount to no punishment at all, as typically such behavior might be sanctioned via domestic contract law.

[697] For some types of agreements, the presumption is inverted:

> *The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs 52 and 54 exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5 % threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State. Id. at § 53.*

The Effect on Trade Notice is also applicable to agreements or practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community.[698] The Commission notes:

> *For the purposes of establishing Community law jurisdiction it is sufficient that an agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the Community. Import into one Member State may be sufficient to trigger effects of this nature. Imports can affect the conditions of competition in the importing Member State, which in turn can have an impact on exports and imports of competing products to and from other Member States. In other words, imports from third countries resulting from the agreement or practice may cause a diversion of trade between Member States, thus affecting patterns of trade.*[699]

The Effect on Trade Notice distinguishes between anticompetitive behaviors which have as their object the restriction of competition inside the Community and those whose object is not to so restrict competition. The former are "normally by their very nature capable of affecting trade between Member States."[700] In the case of the latter:

> *(I)t is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.*[701]

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[698] The ECJ case law in this area includes the following cases: *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission*, 29 and 30/83, [1984] ECR 1679 and *Javico v. Yves Saint Laurent*, C-306/96, [1988] ECR-I 1983.

[699] Id. at § 101. The Commission cites as reference the *EMI Records Ltd v. CBS UK Ltd*, C-51/75, [1976] ECR 811 case and the Commission decision in *Siemens/Fanuc*, OJ L 376, 31.12.1985, p. 29.

[700] Id. at § 103.

[701] Id. at § 106. The Notice makes the following clarifications:

> *In this regard it is relevant to examine the effects of the agreement or practice on customers and other operators inside the Community that rely on the products of the undertakings that are parties to the agreement or practice. In Compagnie maritime belge [T-24/93, [1996] ECR II-1201], which concerned agreements between shipping companies operating between Community ports and West African ports, the agreements were held to be capable of indirectly affecting trade between Member States because they altered the catchments areas of the Community ports covered by the agreements and because they affected the activities of other undertakings inside those areas. More specifically, the agreements affected the activities of undertakings that relied on the parties for transportation services, either as a means of transporting goods purchased in third countries or sold there, or as an important input into the services that the ports themselves offered.*
>
> *Trade may also be capable of being affected when the agreement prevents re-imports into the Community. This may, for example, be the case with vertical agreements between Community suppliers and third country distributors, imposing restrictions on resale outside an allocated territory, including the Community. If in the absence of the agreement resale to the Community would be possible and likely, such imports may be capable of affecting patterns of trade inside the Community.*
>
> *However, for such effects to be likely, there must be an appreciable difference between the prices of the products charged in the Community and those charged outside the Community, and this price difference must not be eroded by customs duties and transport costs. In addition,*

4.2.2.1.2. "De minimis" or "appreciable effects on competition" doctrine

For an anticompetitive behavior to be caught by the prohibition of Article 81 ECT, it must not only affect trade between Member States, but also have an "appreciable" impact on competition. This requirement has been referred to as the *de minimis* (or appreciable effects) doctrine, meaning that anticompetitive behavior has to reach a certain level of anticompetitive effect in order to be prohibited. In *Völk v. Vervaecke,*[702] the ECJ noted:

> *[A]n agreement falls outside the prohibition of Article [81(1)] where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question.*[703]

Although it is of real significance in practice, the *de minimis* doctrine appears in only a few formal decisions as the Commission usually settles such cases informally. However, the Commission has issued a Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) ECT (*de minimis*)[704] ("*De minimis* Notice") that is relevant in understanding its scope. As with other notices, the *De minimis* Notice is not legally binding; hence, compliance with it does not warrant *ipso iure* that an anticompetitive behavior will be immune to prosecution;[705] conversely, there are cases where such behavior may be held to be insignificant even if it does not respect the conditions of the *De minimis* Notice. However, as the Notice does roughly indicate the Commission's thinking on an issue, noncompliance is extremely risky.[706]

> *the product volumes exported compared to the total market for those products in the territory of the common market must not be insignificant. If these product volumes are insignificant compared to those sold inside the Community, the impact of any re-importation on trade between Member States is considered not to be appreciable. In making this assessment, regard must be had not only to the individual agreement concluded between the parties, but also to any cumulative effect of similar agreements concluded by the same and competing suppliers. It may be, for example, that the product volumes covered by a single agreement are quite small, but that the product volumes covered by several such agreements are significant. In that case the agreements taken as a whole may be capable of appreciably affecting trade between Member States. It should be recalled, however […], that the individual agreement or network of agreements must make a significant contribution to the overall effect on trade. Id. at § 107-109.*

[702] C-5/69, [1969] ECR 295.

[703] This doctrine also applies to practices or agreements which have as their specific object the reduction of competition. In *Völk*, the anticompetitive practice at stake was a hardcore restriction (absolute territorial protection.) However, according to the Commission, hardcore restrictions are excluded from the notice's protection (§ 11 of the notice.)

[704] OJ 2001, C 386/13. The Commission published this Notice on December 22, 2001; it replaces a previous 1997 notice (OJ 1997, C 372/3).

[705] See, e.g., *Distillers Co Ltd v. Commission*, 30/78, [1980] ECR 131, in which the ECJ rejected a purely quantitative approach to the *de minimis* question in holding that an anticompetitive distribution agreement for a product possessing only a relatively small market share had an appreciable impact on competition when the producer also had other products and held an important market share in the general drinks market. On the other hand, in *Pavel Pavlov v. Stichting Pensionenfonds Medische Specialisten*, C-180/98, [2000] ECR-I 6451, the CFI concluded that an agreement was *de minimis* not because the parties to it had only a small market share, but because the nature of the infringement was insignificant. See also the Commission decision in *UEFA Broadcasting regulations*, OJ L171, 2001 p. 12.

[706] There is a certain overlap between the *De minimis* Notice and the Notice on the effect on trade between Member States. Indeed, the EC competition authorities generally first try to assess whether trade between Member States is affected; if this is not the case, they decline their jurisdiction. However, if trade between

Paragraph 7 provides the general definition of *de minimis*:

> *The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):*
>
> *if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreement between competitors); or*
>
> *if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings, which are not actual or potential competitors on any of these markets (agreement between non-competitors).*
>
> *In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10% threshold is applicable.*[707]

Paragraph 11 clearly states that hardcore restrictions such as horizontal price-fixing, limitations on output or sales, and some vertical agreements between competitors are not covered by the safe harbor threshold provided by the *de minimis* notice.

4.2.2.2. State measures which thwart competition

Article 10 ECT provides:

> *Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from the action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.*

As previously mentioned above, Article 3 (1) ECT provides a list of Community activities. Among those, litt. g foresees "a system ensuring that competition in the internal market is not distorted." The Treaty on the European Union adopted at Maastricht provides in Article 4(1)

Member States is affected, then the authority will review whether the effect on competition is more than *de minimis*.

[707] A special rule has been issued in relation to sectors where the cumulative effect of many parallel vertical agreements may lead to foreclosure of the market (5% threshold, at § 8); for example, this is the case in the beer and petrol sectors. Note as well that when the thresholds are exceeded by no more than 2%, marginal relief may be sought under § 9. Market shares are to be calculated according to the Commission's Notice on the definition of relevant market for the purpose of Community law, OJ 1997 C 372/5, while what constitutes an "actual or potential competitor" has to be interpreted in accordance with the Guidelines on the applicability of the EC Treaty to horizontal cooperation agreements, OJ 2001 C 3/02.

ECT that Member States have an obligation "to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition."[708]

The ECJ has interpreted Article 10 ECT as forbidding Member States from sustaining policies (implemented by legislation, administrative measures or a combination thereof) which may render the EC competition rules ineffective. However, given that the ECT is neutral towards public or private ownership (Article 295 ECT), the ECJ has sought not to intervene too abruptly in the regulatory choices of Member States, although Member States can have a negative effect on the competitive environment in many different ways (imposition of maximum and minimum prices, regulatory barriers to market access, discriminatory taxation, etc.)[709] Thus, case law in this area is not without its grey areas and subtle distinctions.[710]

4.2.2.2.1. State measures reinforcing the effects of anticompetitive agreements are forbidden

Undertakings might not violate competition rules as long as their behavior is compelled by law. This kind of "state compulsion doctrine" has often been invoked but rarely been accepted by European courts. Indeed, the ECJ refuses to apply this doctrine when national laws leave to the undertakings a degree of discretion sufficient to comply with EC competition law.[711]

In *Inno v. ATAB,*[712] the ECJ made clear that a Member State breached its obligations under Articles 3(1)g, 10 and 81 ECT combined when its government maintained in force legislation that deprived the competition rules of their "effet utile."[713] This holding was clarified in subsequent decisions. In *BNIC v. Clair*,[714] the ECJ ruled that an association (BNIC) which recommended minimum prices for its products (cognac and eau-de-vie) was still subject to Article 81 ECT, even if it was set up by ministerial order and even when the recommended prices were subsequently made legally binding on all traders by legislative fiat. The national law procuring legislative force to the agreement was held contrary to EC law and was therefore deemed inapplicable to a private citizen.[715] In *BNIC v. Yves Aubert*,[716] the ECJ

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[708] As K.LENAERTS/P.VAN NUFFEL/R.BRAY, *Constitutional Law of the European Union*, Sweet & Maxwell, 2d ed., 2005 point out, the ECJ used to apply Article 10 ECT in conjunction with other ECT provisions, but has also applied Article 10 ECT alone in certain cases. Consequently, the authors argue that Article 10 ECT has a bite of its own rather than being a mere auxiliary provision.

[709] State regulation often reflects more a genuine desire to protect social values than a competition-distorting intent; however, it is hard to come up with a clear-cut distinction to this effect.

[710] For a more detailed analysis, see e.g., BACON, "State Regulation of the Market and EC Competition Rules: Articles 85 and 86 Compared", [1997] 18 ECLR 283.

[711] See, e.g., the *Woodpulp I* case, *A Ahlström OY and Others v. Commission*, C-89, 104, 114, 116, 117 & 125-129/85, [1988] ECR 5193 and *French-West African Shipowners' Committee*, [1992] OJ L 134/1.

[712] 13/77, [1977] ECR 2115.

[713] Although not entirely clear as to its practical consequences, paragraph 31 of this judgment reads:

> *Whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under [Article 10 ECT] not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures, nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.*

[714] 136/86, [1987] ECR 4789.

[715] The ruling in the Flemish Travel Agents case, *VZW Vereniging van Vlaamse Reisebureaus v. VZW Sociale dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, 311/85, [1987] ECR 3801, contains a similar

struck down a law which fixed quotas for winegrowers and imposed fines on the non-complying producers. In this case, the legislation strengthened a prior agreement reached under the aegis of the BNIC board.

4.2.2.2.2. Cases where a Member State delegates to private parties the power of determining competitive conditions: substantial uncertainty

The ECJ has usually refused to strike down state regulatory interventions when no evidence of an agreement between private parties under Articles 81 or 82 ECT has been found. In *Associations des centres distributeurs Edouard Leclerc v. Au blé vert*[717] the French Lang Act allowed publishers and importers to fix a minimum price for their books. These prices were protected by a criminal provision which imposed hefty fines on everyone selling books 5% less than the fixed price. Leclerc argued that although no evidence of an agreement could be brought forward, the Lang Act rendered agreements unnecessary in practice,[718] as distributors and importers of books were required to fix a price for each book with deviation from such a price being a criminal offense, which thus renders collusion "superfluous." However, the ECJ rejected this point of view[719] in concluding Articles 3(1)g, 10 and 81 ECT were not sufficiently clear to condemn the French scheme.[720/721]

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holding. For a summary, see J.TEMPLE LANG, "The Duties of Cooperation of National Authorities and Courts under Article 10", in: [1998] 23 EurLR 109.

[716] 136/86, [1987] ECR 4789.

[717] 229/83, [195] ECR 1.

[718] The ECJ considered at § 15:

> *The question arises as to whether national legislation which renders corporate behaviour of the type prohibited by Article 85 (1) superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices , detracts from the effectiveness of Article 85 and is therefore contrary to the second paragraph of Article 5 of the Treaty.*

[719] V.KORAH, supra at fn 668, p. 186, makes the following comment:

> *Judge Joliet has since argued [FN René Joliet, "National anticompetitive legislation and Community law", in Barry Hawk (ed) [1988] Fordham Corporate Law Institute, Chapter 16.] that the ECJ objected in principle to national measures, such as the Lang Act, for depriving Article 81 of its effect. A private firm should not be able to dictate the terms on which other firms deal. Nevertheless, he says that the Court declined to strike down the Act as unconstitutional on grounds of legal certainty. The tide of thought in the ECJ seems to have shifted since then in favour of state rights, so whether he was right at the time or not, it is less clear that the ECJ would now strike out such legislation.*

[720] The ECJ held at § 20:

> *It is […] apparent that the purely national systems and practices in the book trade have not yet been made subject to a community competition policy with which the member states would be required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty, it follows that , as community law stands , member states ' obligations under Article 5 of the EEC Treaty, in conjunction with Articles 3 (f) and [81] , are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books , provided that such legislation is consonant with the other specific treaty provisions , in particular those concerning the free movement of goods.*

The ECJ similarly refused to strike down another French law whereby the French government set prices for petrol; see *Cullet v. Leclerc*, 231/83, [1985] ECR 305. In this case, private parties were not granted the power to set prices.

In *Arduino*,[722] the ECJ ruled that the involvement of a private association in the drawing of legislation does not necessarily imply an infringement of Article 10 ECT as long as the public delegating body still retains a sufficient margin of discretion and control.[723] However, in other cases the ECJ has taken a different direction. For example, in *P van Eycke v. ASPA SA*,[724] the ECJ stressed that a Member State would breach its obligation under Article 3(1)g, 10 and 81 ECT combined when it required or favored:

> *[T]he adoption of agreements, decisions or concerted practices contrary to Article [81] or [reinforced] their effects, or [deprived] its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.*[725/726]

In this case, the ECJ ruled that a delegation of power to private banks to decide on the interest rates had to be struck down.

Some have argued that the *Van Eycke* and *Au blé vert* decisions cannot be reconciled.[727] Clearly there is a tension between these two rulings, as *Van Eycke* seems to extend the ECJ's review to areas where *Au blé vert* has arguably forbidden it. The distinguishing consideration between these two cases may lie in the criteria put forward in *Arduino*, namely that the public delegating body must retain a sufficient margin of discretion. As these criteria are less than self-explanatory, substantial uncertainty remains whether a state can lawfully delegate its power of decision-making regarding the fixing of prices, and if so, under which conditions.

4.2.2.2.3. Undertakings do not escape liability merely because of state action

As long as state action is non-binding on undertakings, mere pressure or persuasion on the side of the government[728] to reach an agreement is not a valid defense for undertakings engaging in anticompetitive activities.[729] In such cases, it is crucial to understand whether

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[721] However, the scheme was held to be partially incompatible with Articles 28 and 30 ECT.
[722] *Arduino v. Compagnia Assicuratrice RAS Spa*, C-35/99, [2002] ECR I-1529.
[723] For a similar holding but in the context of Article 81 ECT (and not 10 ECT, as the measure was of a private nature), see *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*, C-309/99, [2002] ECR I-1557, also discussed in Subsection 4.3.1.3.1. General definition.
[724] 267/86, [1988] ECR 4769.
[725] Note that in this case, the legislation merely provided that the holders of savings deposits were entitled to tax relief as long as the interest rate did not exceed 7%. Van Eycke had argued that this reinforced an alleged agreement between banks not to offer rates higher than 7%. The ECJ seemed uncertain as to whether this was a delegation of the power of setting interest rates; as it lacked sufficient evidence, the ECJ referred the case back to the national court with the above-cited instructions.
[726] This wording was applied in other cases: *Reiff- Bundesanstalt für den Güterfernverkehr*, C-185/91, [1993] ECR-I 5801, *Delta Schifffahrts- und Speditionsgesellschaft*, C-153/93, [1994] ECR I-2517, and *Commission v. Italy*, C-35/96, [1998] ECR-I 5955.
[727] See V.KORAH, quoted above at fn 668, p. 187. Some have argued that *Van Eycke's* rulings are not even reconcilable among themselves: See L.GYSELEN, "Anticompetitive State Measures Under the EC Treaty: Towards a Substantive Legality Standard", [1994] EL Rev., p. 55, as quoted by Korah.
[728] See, e.g., the *Aluminium cartel* case, [1987] 3 CMLR 813, where the Commission clearly stated the (at least implicit) encouragement of the British government (at that time not a Member of the EC) was no defense.
[729] See, e.g., the Commission decision in *Pabst and Richard KG v. BNIA*, [1976] 2 CMLR D63, and the ECJ case law in *BNIC v. Clair*, cited in footnote 712, where although the board through which competition restrictive behavior had occurred was set up by the government, the ECJ accepted the concept that an agreement between competitors had taken place.

private undertakings still have sufficient discretion to compete despite state intervention. It may be the case that certain markets are so highly regulated that undertakings are not left with much discretion as to their commercial policies. In *Cooperatieve Vereiniging 'Suiker Unie' UA v. Commission*,[730] this argument succeeded, but it has consistently failed in subsequent cases such as *Inno/ATAB*,[731] *SSI*,[732] and *FEDETAB*.[733] In the latter case, the ECJ found that although the price for cigarettes comprised up to 70% of excise taxes, competition could still take place in other business areas such as profit margins vis-à-vis wholesalers and retailers, rebates, and terms and conditions of supply (including credit terms.)[734]

4.2.2.2.4. Conclusions on Article 10 ECT

Korah summarizes the ECJ case law on Article 10 ECT:

> *There is considerable regulation in Europe that might interfere with "undistorted competition," but the ECJ has become cautious in applying Article 10. It has not accepted that government persuasion is a defence to an agreement that infringes Article 81. It has condemned as contrary to a combination of Article 3(1)(g), 10 and 81 government measures that require, favor or reinforce agreements that infringe Article 81. It has gone further and condemned national measures that delegate to a private firm or trade association the fixing of terms on which outsiders may trade.*
>
> *It has, however, drawn back from ruling that a government measure might be invalid when there had never been any agreement between undertakings restricting competition in the common market. Where prices are fixed by government on the basis of advice from industry, the ECJ no longer states that that amounts to collusion between undertakings. It examines whether the advisors were looking to criteria set by the state rather than to their own interest. Further action against anti-competitive regulation must probably be left to measures of harmonisation under Articles 94 and 95 of the treaty, and to Article 86, which empowers the Commission to take action against state monopolies.*[735]

4.2.2.2.5. Article 86 ECT

Article 86(1) ECT imposes obligations on Member States in relation to "public undertakings and undertakings to which Member States grant special or exclusive rights." In particular, these undertakings are bound to comply with the competition rules set out in the Treaty. Article 86(2) ECT provides a narrow exemption by stating that "undertakings entrusted with the operation of services of general economic interests or having the character of revenue-

[730] 40/73, [1975] ECR 1663.
[731] Supra.
[732] *Stichting Sigarettenindustrie v. Commission*, 240-242, 261, 262, 268 & 269/82, [1985] ECR 3831.
[733] *GB Inno-BM SA v. Fédération Belgo-Luxembourgeoise des industries du tabac*, 78/670/EEC, OJ 1978, L224/29.
[734] Indeed, governmental regulation is rarely so pervasive as to impede any type of competition. The only example seems to be the *Suiker Unie* case, *Re the European Sugar Cartel: Cooperatiëve Vereniging Suiker Unie UA v. Commission*, 40/73 [1975] ECR 1663.
[735] V.KORAH, quoted above at fn 668, pp. 189-190.

producing monopoly"[736] are subject to competition rules, but only "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." The latter condition has been construed narrowly by the ECJ.[737]

The context in which the terms "services of general economic interest" have to be interpreted would seem *prima facie* to have been modified by the introduction of a new Article 16 by the Amsterdam Treaty. This article would have provided that the EC and the Member States were to "take care that such services operate on the basis of principles and conditions which enable them to fulfil their mission." Yet as Goyder remarked,[738] the adoption of the new article would not have altered the language or legal effect of the phrase,[739] although the Commission would have had to adopt a more cautious approach in its interpretation. As a result, on January 19, 2001, the Commission published a Communication on Services of General Interest[740] which defines these services as:

> *(C)overing both market and non-market services, which member states have classified as of general interest and subject to specific public service obligations, having an economic nature but not necessarily profit-making.*[741]

Although the Commission did not draw up a list of these services, it admitted that Member States were free to lay down on all operators standards of security, quality, and regularity by way of nondiscriminatory legislation.

Finally, it should be noted that the obligations stemming from EC competition rules are applicable only to the extent the anticompetitive behaviors of the undertakings affect trade between Member States.

4.2.2.2.6. Consequences for standards

The case law dealing with the relationship among Articles 3(1)g, 10, 81 and 82 ECT often relates to price-fixing. The question whether anticompetitive standards should be dealt with

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[736] This category does not embrace the same scope as the terms "public undertakings and undertakings to which Member States grant special or exclusive rights" in Article 86(1) ECT. As D.G.GOYDER, supra at fn 642, Chapter 22, p. 486, notes:

> *[S]ome bodies falling within 86(1) would not meet the requirements for exemption under 86(2), though it is also possible that some private undertakings which would not fall under 86(1) (as neither "public" nor having "special or exclusive rights") might nevertheless qualify for exemption under (2) if carrying out tasks of sufficient "general economic interest."*

[737] See, e.g., *Italy v. Commission*, aka *"Telespeed: British Telecommunications"*, 41/83, [1985] ECR 873, *Höfner and Elser v. Macroton*, C-41/90, [1991] ECR I-1979, and P.C.MAVROIDIS/P.A.MESSERLIN, "Has Article 90 ECT Prejudged the Status of Property Ownership?", in: P.C.MAVROIDIS/TH.COTTIER (EDS.), *State Trading in the 21st Century*, The World Trade Forum Series, Volume I, 1998, pp. 345 and ff.

[738] D.G.GOYDER, supra at fn 642, p. 489.

[739] See also, P.C.MAVROIDIS/P.A.MESSERLIN, supra at fn 738, p. 358:

> *[T]he vagueness of the article [16] terms reinforces the opinion that the EC is more comfortable with the retreat of the jurisprudence as evidenced in the post-Höfner case law of the ECJ—and in particular in the Corbeau case.*

[740] [2001] OJ C17/4.

[741] Id. at § 14.

under the same rules has not been expressly answered by the ECJ; however, it seems logical that anticompetitive conduct reinforced by state intervention should fall under this combination of articles, regardless of whether the agreement or the practice at hand entails price-fixing or the tinkering of other competitive aspects. Yet ECJ case law has failed to say as much.

Thus, the mere fact that state regulation endorses the activities of a SSO should not immunize it from competition law prosecution. On the other hand, standards drawn up by a private body on a mandate from a regulatory body seem to be immunized provided that the private body did not act in its self-interest and that the regulatory body still uses sufficient discretion in the establishment of the standard.[742]

It should also be emphasized that under specific circumstances (Article 86(2) ECT), "undertakings entrusted with the operation of services of general economic interests or having the character of revenue-producing monopoly" can be exempted from antitrust obligations. Thus it seems such an exemption may also be granted in instances where such undertakings draw up standards.

4.2.2.3. Relationship between EC and national competition authorities

4.2.2.3.1. Relationship between Articles 81 and 82 ECT and national competition law[743]

a) Historical perspective

The Treaty itself does not go much in-depth as regards procedural aspects of competition law. Thus, in the years after the signature of the Rome Treaty, the Commission and the Council of Ministers were left with the task of drawing up a regulation defining the procedural rules governing the field of competition. At that time, Member States often held conflicting views on procedural aspects of competition law, with the French and German positions in particular giving rise to many disputes.[744] As a result, the drafting of the first procedural regulation was not completed until February 6, 1962; however, "Regulation 17,"[745] as it came to be known, then remained in force almost unaltered for more than 40 years.[746] It provided a firm procedural foundation for inquiries and investigations conducted by the Commission[747] (more precisely, by its Directorate-General responsible for competition policy, called until 1999 "DG IV" and currently "DG Comp.") Basically, the Regulation clarified that all agreements and abuses of dominant position were deemed to be illegal without a subsequent decision

[742] The case law does not draw a distinction between discretion as to the means or to the ends. However, it seems important for the exemption to be granted that the State have substantial freedom to review the SSO's product (perhaps at both the "ends" and "means" level.)

[743] Only the vertical relationship between the EC and national competition bodies will be dealt with here, as the horizontal relationship between national competition bodies is not fully relevant for the present study.

[744] For a brief description of the dispute, see 4.1.1. Origins of EC competition law *in fine*.

[745] Council Regulation 17/62, JO 1962, 204, and *Re Paul Corbeau*, [1993] ECR I-2533, where the ECJ clearly stated that a national law prohibiting competitors of a public monopoly from providing services that were not offered by the national monopoly was incompatible with Article 86, unless the state monopolist can prove the private provider would endanger its whole economic basis and equilibrium.

[746] Minor amendments took place, but until Regulation 1216/99 which widened the scope of the categories of agreements that did not need to be notified in order to benefit from an exemption, no major modification of Regulation 17 occurred.

[747] See especially, Articles 10 to 14 of Regulation 17.

being made by an administrative body. However, private parties were allowed upon notification of an agreement between undertakings (but not in the context of an abuse of dominant position) to request: (a) an individual or "block" exemption under Article 81(3) ECT;[748] or (b) a declaration by the Commission stating that the agreement was free from anticompetitive effects ("comfort letters.")[749]

Yet during the 1990s, many voices were raised (including officials within the Commission itself) requesting modernization of the procedural rules in competition proceedings. In particular, beyond the material treatment of horizontal cooperation agreements and vertical restraints, the procedure regarding individual exemptions was widely criticized. Indeed, the process of notification not only imposed significant costs on undertakings, but also diverted a substantial part of the already limited DG Comp's resources from supposedly more profitable investigations such as the surveillance of cartels or important abuses of a dominant position.[750]

As a result, Regulation 17 was abandoned and on May 1, 2004, the so-called Modernization Regulation[751] ("Regulation 1/2003") entered into force.[752] Among the novelties introduced, the Regulation renounced the Commission's monopoly on exempting an agreement from Article 81(3) ECT liability. Thus, assuming there are gains from such cooperation, it becomes even more important to clarify the way the Commission and Member States are to collaborate on their shared applying of Article 81(3) ECT.

b) Supremacy of EC law: the law of conflicts between the EC and national competition laws

Most Member States of the EC and of the EEA[753] have modeled their competition laws on Articles 81 and 82 ECT.[754] Moreover, under the regime introduced by Regulation 1/2003, national competition authorities ("NCAs") and national courts are to share the authority of applying Articles 81 and 82 ECT.[755] However, such an approach is not in itself a warranty that no conflicts will arise in the joint application of these provisions as their interpretation

[748] See, e.g., Regulation 19/65, which granted the Commission the power of determining what categories of agreements were exempted from competition law prosecution.

[749] In practice, the Commission (whose means were somewhat restricted) often avoided issuance of a formal decision by negotiating modifications to a possibly anticompetitive behavior (also referred to as "informal settlement"). For a very early example, see the *Belgian Tiles Cartel* case, JO 1167/64. Indeed, a decision requires a substantial investment of resources as different formal steps must be taken: the preparation of a statement of objections to the parties, probably an oral hearing and a presentation of a draft decision to the Advisory Committee, and finally a formal decision. Parties were often eager to collaborate as this led to a quicker clearance for the remainder of an agreement.

[750] P.C.MAVROIDIS/D.J.NEVEN, "From the White Paper to the Proposal for a Council Regulation: How to Treat the New Kids on the Block?", in: *Legal Issues of Economic Integration*, pp. 151 and ff, 2001 take a grimmer view of the reform in arguing that (almost) the only reason was the overwhelming burden imposed on the Commission by the notification process; these authors contend that decentralization is wrong as they take the view that national authorities do not always have incentives to act in the EC-interest.

[751] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 0f the Treaty, OJ [2003] L 1/1.

[752] A "Modernization package" comprised of notices further clarifying certain procedural issues of EC competition law was adopted on April 27, 2004.

[753] European Economic Area, which regroups beyond EC Member States, Norway, Iceland and Liechtenstein.

[754] M.DRAHOS, *The Convergence of Competition Law and Policies in the European Community*, Kluwer Publishing, 2001.

[755] Articles 1 and 6 of the Regulation specifically provide that Articles 81 and 82 are directly applicable in their entirety (formerly, the application of Article 81(3) was entrusted only to the Commission). See also, recitals 4 and 7 of the Regulation.

may diverge. Indeed, it could be (and is) the case that at times, national competition authorities are more stringent or more lax than EC competition law. Yet from its very first decisions, the ECJ has made it clear that EC law takes precedence over national laws.[756] Thus, in the event that a case resorts to the Commission's authority, EC law must be applied. On the other hand, the question has arisen whether national antitrust laws may be stricter than EC law, with Regulation 1/2003 clarifying the way the dual application of EC and national laws has to be understood in the field of competition law.[757]

Recital 8 of Regulation 1/2003, which comments on Article 3 of Regulation 1/2003,[758] provides:

> *In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field*

[756] See e.g., *Costa v. ENEL*, C-6/64 [1964] ECR 585, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 106/77, [1978] ECR 629 and *Walt Wilhelm v. Bundeskartellamt*, C-14/68 [1969] ECR 1.

[757] National courts are bound to apply EC competition law in all cases in which they can do so on their own motion:

> *According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute denied by the parties themselves and relying on facts and circumstances other than those on which the party an interest in application of those provisions bases his claim [FN Joined cases van Schijndel, C-430/93 and C-431/93, [1995] ECR I-4704]. Commission Notice on the cooperation between the Commission and the courts of the EC Member States in the application of Articles 81 and 82 EC, § 3.*

[758] Article 3 I and II of Regulation 1/2003 read:

> *1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.*
>
> *2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.*

for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2) (e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition laws covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws, which prohibit or impose sanctions on ***unilateral*** *conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced."* [emphasis added]

Thus, stricter national rules are possible when Article 82 ECT is applicable, whereas they are not allowed when the facts correspond to Article 81 ECT.[759]

c) Cooperation between the Commission and National Competition Authorities

Chapter IV of Regulation 1/2003 (Articles 11 to 16 inclusively) describes the legal context under which cooperation between the Commission and the National Competition Authorities ("NCAs") of the Member States is required. Article 11 provides that the Commission and the NCAs are to apply the competition rules in "close cooperation." In particular, NCAs are allowed to consult with the Commission over the application of Community competition law (Article 11(5)).

Basically, the Commission and the NCAs are mutually to inform themselves when significant steps are taken in a competition procedure.[760] Whereas the Commission must automatically transmit to the NCAs the most important documents that it used in its proceedings,[761] the NCAs must inform the Commission of the first formal investigative measures, the "adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation"[762] no later than 30 days before its adoption.[763/764.] Most importantly, Article 11(6) of Regulation 1/2003 provides:

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[759] Article 3(3) of Regulation 1/2003 states this prohibition of stricter national laws does not apply when national laws "predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty."

[760] The intention to make any information exchanges pursuant to Article 11 of Regulation 1/2003 available to other NCAs is expressed in the Joint Statement of the Council and the Commission on the functioning of the network of competition authorities, Document No 15435/02 ADD 1, http://register.consilium.eu.int.

[761] Other documents have to be transmitted upon request (Article 11 (2) of the Regulation.)

[762] Article 11(3) of the Regulation. Paragraph 17 of the Commission Notice on cooperation within the network of NCAs provides:

> *(T)he initiation by the Commission of proceedings for the adoption of a decision under Chapter III [Article 7 to 10 of Regulation 1/2003, i.e. finding and termination of infringement, decision on interim measures, commitments and finding of inapplicability] shall relieve the competition authorities of the Member States of their competence to apply Article 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with the national authority.*

Paragraph 51 of the Commission Notice on cooperation within the network of NCAs clarifies that:

> *[Article 11(6)] means that once the Commission has opened proceedings, NCA cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.*[765]

In administrative parlance, this is sometimes referred as a "droit d'évocation," whereby the Commission may decide to halt a proceeding before a NCA and take over the case itself.[766] Paragraphs 14 and 15 of the Commission Notice on cooperation within the Network of Competition Authorities[767] states to this effect that the Commission is "*particularly* well placed" to deal with a case:

> *(I)f one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets.)*
>
> *Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.*

> *The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case.[…] Network members will inform each other of pending cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs.*

[763] As to the judicial use of these documents, see Articles 12 (exchanges of information) and 28 (professional secrecy) of the Regulation 1/2003.
[764] Suspension or termination of proceedings by the Commission or the NCAs is dealt with under Article 13 of Regulation 1/2003.
[765] The mere fact that the Commission has received a complaint is not in itself sufficient to relieve an NCA of its authority. (Notice on cooperation within the framework of NCAs, at § 52.)
[766] See also Recital 17 of the Regulation.
[767] OJ 2004, C 1001/03.

Some commentators have been skeptical about the potential efficiency of the new system,[768] with Mavroidis and Neven[769] putting forward that the risk of conflict among the judgments of the various authorities is high. In particular, the authors are afraid the new framework may lead to more prohibitions than are desirable under an EC-wide efficiency analysis while the accountability standards on the NCAs may be lower than necessary. However, as things stand, it is still too early in the day to draw definitive conclusions on this score.

d) Cooperation with national courts

Cooperation between national courts and the Commission is not extensively dealt with by the Treaty. However, the ECJ has construed Article 10 ECT as imposing on the European institutions and the Member States a duty of cooperation.[770] Article 15 of Regulation 1/2003[771] provides the framework for cooperation between the Commission and the various national courts,[772] with Article 15(1) enabling national courts to ask for information in the Commission's possession or an opinion of the Commission on procedural or substantive issues. However, the scope of documents produced is not unlimited, as transmission of information covered by professional secrecy is restricted.[773]

National courts are also free to decide to request an opinion of the Commission (Article 15 and 16 and Recital 21 of Regulation 1/2003[774]). The request to the Commission for an opinion is without prejudice to the possibility of a national court making a preliminary reference to the ECJ under Article 234 ECT.[775]

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[768] See in particular, C-D.EHLERMANN/L.LAUDATI, European Competition Law Annual 1997: The Objectives of Competition Policy, 1998. Other commentators have been more positive, W.WILS/T.CALVANI, *eodem loco*. Note that Mr. Wils is a public servant of the EC Commission.

[769] P.C.MAVROIDIS/D.NEVEN, in: *Legal Issues of Economic Integration*, supra at fn 751.

[770] For the imposition of mutual cooperation duties on the Commission and national courts, see, e.g., *Imm: Re Zwartveld*, C-2/88, [1990] ECR I_3365 and *Roquette Frère v. Director General for Competition*, C-94/00, [2002] ECR 9011.

[771] The interpretation of Article 15 is completed by Recital 21.

[772] The Commission has also published a Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C101/4.

[773] See Article 28 of the Regulation. The Commission Notice on cooperation within the network of NCA provides at § 28 a) that:

> *(T)he legitimate interest of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Article 81 and 82 of the treaty. The term "professional secrecy" is a Community law concept and includes in particular business secrets and other confidential information.*

The question whether this view fully complies with Article 287 ECT which prohibits the transmission of business secrets by the Commission has not yet been dealt with by the ECJ. Moreover, Article 12(2) of Regulation 1/2003 provides a further safeguard by stating that the information so exchanged can be used only in evidence for the application of Article 81 and 82 ECT to the subject matter for which the information was collected (see also, the Commission Notice on cooperation within the Network of Competition Authorities, 2004 OJ C101/43, at § 28(b) and (c).

[774] See also, paragraphs 17 and ff of the Commission Notice on the co-operation between the Commission and the courts of the EC Member States in the application of Articles 81 and 82 EC.

[775] For a summary of the case law regarding which court is entitled to request a preliminary ruling, see *Schmid*, C-516/99, [2002] ECR I-4573, 34:

Article 15 (2) of Regulation 1/2003 imposes on national courts the obligation to transmit a copy of all their judgments regarding the application of Articles 81 and 82 ECT to the Commission. Article 15(3) enables NCAs (and "where the coherent application of Articles 81 or 82 ECT so requires," the Commission) to submit written observations to a national court. With the permission of the national court, the Commission may also make oral observations.

e) Uniform application of Community competition law

It remains to be determined to what extent NCAs should defer to Commission decisions or pending proceedings. Thus, two situations must be distinguished:

1. Effect of Commission decisions

Article 16(1) of Regulation 1/2003 provides:

> *[W]hen national courts rule on agreements, decisions or practices under Article 81 or 82 of the treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.*

Article 16(2) applies the same principle to NCAs. However, one could wonder whether courts of appeals in the Members States are also bound by the Commission decisions. In *Masterfoods,*[776] the ECJ gave a positive answer to this question.

2. Parallel proceedings

The second sentence of Article 16 (1) goes on to state:

> *[National courts] must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.*

Hence, national courts have some discretion on the question of whether to stay their proceedings. If they elect to do so, they are still free to request information from the Commission under Article 10 ECT. As mentioned in Article 16 of Regulation 1/2003, if national courts are not persuaded by the Commission decision, they are free to request a preliminary ruling of the ECJ under Article 234 ECT.[777] Paragraph 8 of the Commission Notice on the cooperation between the Commission and the courts of the EC Member States in the application of Articles 81 and 82 ECT reads in pertinent part:

> *The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter pares, whether it applies rules of law and whether it is independent.*

[776] *Masterfoods Ltd v. HB Ice Cream Ltd*, C-344/98, [2000] ECR I-11369.

[777] However W.WILS, "The Principle of 'ne bis in idem' in EC Antitrust Enforcement: A Legal and Economic Analysis", World Competition, No. 2, 2003, seems to argue that national courts may be restricted in their liberty by the *ne bis in idem* principle.

> *The application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission.*[778]

4.2.2.3.2. Judicial review of Commission's acts

Basically, any act of the EC Commission in the competition area can be brought before the Court of First Instance ("CFI")[779] (and ultimately, on points of law, before the ECJ) through the following three avenues.

First, under Articles 242 and 243 ECT, in a case that has been brought before them, the ECJ and the CFI have the power to take any interim measures which they deem necessary. It is also possible to file a request for interim measures with the CFI to suspend the operation of a Commission decision pending an appeal. Article 242 ECT provides:

> *Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.*

The Court's Rules of Procedure[780] clarify that interim measures are granted provided that the applicant establishes three conditions have been met:

1. There are circumstances giving rise to urgency and the interim measure is of such a nature as to prevent the alleged injury from arising;
2. The Commission's assessment is *prima facie* unlawful; and
3. The balance of interests favors the adoption of interim measures.[781]

Second, if the Commission is in breach of a duty under the Treaty to act, Article 232 ECT grants Community courts the power of requesting from the Commission that certain acts be

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[778] See also, § 13 of the Notice on the cooperation between the Commission and the courts of the EC, where the Commission states:

> *[W]here the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. […] if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary of the Court of Justice. Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the court of Justice for a preliminary ruling (Article 234 EC). […] However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national courts depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts […].*

[779] The Community courts are the only courts competent for judging the Commission's acts; *Masterfoods Ltd. v. HB Ice Cream Ltd*, C-344/98, [2000] ECR I-11369. In respect to the penalties imposed by the Commission, the CFI enjoys unlimited jurisdiction under Article 229 ECT, and the Commission itself may choose to cancel, reduce, or increase fines or periodic penalties imposed according to Article 31 of Regulation 2003/1.

[780] OJ L 136 of 30 May 1991.

[781] See e.g., *Magill TV Guide (Re the): Radio Telefis Eireann and Others v. Commission*, C-241 &242/91P, 6 April 1995, [1995] ECR I-743 and *IMS Health v. Commission: Interim Measures*, T-184/01, [2001] ECR-II-3193.

done. Article 232 ECT is often used for requesting that the Commission investigate complaints against undertakings.[782]

Third, Article 230 ECT provides the potential to request the annulment of an act of the Commission. Under Article 230 ECT, three procedural conditions have to be met in order for a complaint to be accepted:

a) Type of acts

The challenged act must produce a legal effect. Plaintiffs may challenge not only decisions, but other acts as well. Thus, according to the CFI, any measure which has a binding effect or produces legal effects can be reviewed.[783] The question whether a specific act produces such an effect may be controversial.[784] Comfort letters,[785] statements of objections,[786] letters which contains only provisional statements,[787] and mere silence on the part of the Commission[788] have been held not to be reviewable, whereas letters from the Commission finally rejecting a complaint[789] can be reviewed.

b) Locus standi

As a rule, only the addressees of a decision might file a complaint. However, Member States, the Council of Ministers and private undertakings are eligible to file a complaint against an act of the Commission provided a decision is addressed to them, or to another person when it is of "direct and individual concern"[790] to them. Thus, while it remains clear that the recipients of Commission's decisions are entitled to sue,[791] third parties have at times been authorized to file a complaint even when they were not the direct addressee of an act.[792]

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[782] V.KORAH, quoted above at fn 668, p. 140 notes:

> *[...] the Commission may [...] be sued in the CFI for failing to take action required by the Treaty, but few such actions have succeeded under the competition rules, largely because many of the Commission's power are discretionary and the Court considers that competition policy is primarily a matter for the Commission. Nevertheless, if there is undue delay such action may lie. [FN JCB service v. Commission, T-67/01, 13 January 2004, paras 36-46].*

[783] See *Commission v. Council*, C-22/70, [1971] ECR 263, and *Coca-Cola Co. v. Commission*, T-125/97 and T-127/97, [2000] ECR II-1733.

[784] See generally, T.C.HARTLEY, *The Foundations of European Community Law*, Oxford University Press, 3d Edition, pp. 346-353, 1994.

[785] *Lancôme v. Etos*, C-99/79, [1980] ECR 2511.

[786] *International Business Machines v. Commission*, C-60/81, [1981] ECR 2639.

[787] *Automec Srl v. Commission*, T-64/89, [1990] ECR-II 367.

[788] *Service pour le groupement d'acquisitions v. Commission*, T-189/95, [1999] ECR-II 3587.

[789] *Netfarma v. Commission*, T-113/89, [1990] ECR-II 797.

[790] A decision is of direct concern when it is the direct cause of a negative effect on the applicant. It is of individual concern when the decision affects the applicant either alone, or as a member of a fixed and closed class, and the applicant is individually concerned, "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons." (the so called Plaumann test).

[791] However, recipients of a negative clearance are not entitled to sue, as this act does not adversely affect their legal position, see *Nederlandse Bankiersvereinging v. Commission*, T-138/89, [1992] ECR II-2181.

[792] A complainant under Article 3(2) of Regulation 17 (now Article 7(2) of Regulation 2003/1) is entitled to proceed, *Metro-SB-Grossmärkte GmbH & Co. v. Commission & SABA*, C-26/76, [1977] ECR 1875. See also, *Bureau Européen des Unions des Consommateurs v. Commission*, T-37/92, [1994] ECR-II285. In other

c) Grounds of review

The grounds for challenging a decision are exhaustively listed in Article 230 (1) ECT:

> *(L)ack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.*

Challenges cannot be based on other grounds. In this regard, Korah notes:

> *It is not a rehearing of the merits, but the court is required to consider whether the Commission has violated the Treaty in substance or procedurally. Seldom did the ECJ go far in investigating the facts found by the Commission but, as was hoped, in several cases involving horizontal cartels and mergers the ECJ has gone very far in re-examining the evidence on which the Commission decision was based. It does not have to decide whether the decisions are correct, but rather whether they are manifestly inconsistent with the Treaty or based on inadequate reasoning. It has quashed some Commission decisions for not being adequately based on reasons expressed in the decisions, and this puts pressure on the Commission to improve the quality of its reasoning. Recently the CFI has more frequently quashed decisions by the Commission on both grounds.*
> *In merger cases the CFI has said that the Commission must get the facts right, although the CFI recognizes that the Commission has a margin of discretion in appraising complex economic matters such as a dominant position.*
>
> *In European Night services (ENS) and others v. Commission [FN (T-374/94 and others),[1998] ECR II-3141], the CFI quashed a Commission decision for not defining the relevant market or giving reasons, as required by article 253 (ex Article 190) of the Treaty, for finding that a joint venture restricted competition appreciably, contrary to Article 81(1). It also quashed the decision for failing to give sufficient reasons for holding that an exemption could last for less than would warrant the huge and risky investment in the joint venture.*
>
> *In several cases, including those relating to mergers, the CFI has required the Commission to get simple facts right, although it has allowed the Commission a considerable margin of appraisal for complex questions such as the existence or likely existence of a dominant position. Where the Commission has invoked an economic theory, the CFI has required it to establish the facts necessary to its application.*[793]

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instances, the ECJ has denied standing to a nonprivileged applicant, *Stork Amsterdam BV v. Commission*, T-241/97, [2000] ECR II-309.

[793] V.KORAH, supra at fn 668, pp. 27-28.

4.2.2.4. International reach of EC competition laws

In the last two decades, international trade has dramatically increased and now encompasses sectors that were previously excluded from international competition. In particular, the liberalization of investments,[794] the coming into effect of the EC internal market, and the rules established by the WTO have helped break national barriers to trade. Certain markets have completed the transition from national to international and in some instances indeed become global markets. As a consequence of the liberalization of trade, it has become even more obvious that anticompetitive behavior in one country may have far-reaching effects in another. For example, international cartels are able to control prices or output in several countries in cases where no agreement has been entered into. In contrast, competition authorities (with the exception of the European commission) remain within a national scope. The national limits to their reach entail some serious issues as regards their effectiveness and ability to fight (international or foreign) anticompetitive behavior. For example, issues related to evidence gathering can seriously hamper a competition proceeding when events have taken place abroad; the servicing of a legal document to a foreign undertaking can be hindered by the sovereignty of the state in which it is incorporated; and diverging views over a transnational merger can lead to conflicting legal decisions, all with the result of substantially increasing costs.

This section purports to define the international limits to the reach of EC competition law. The EC Commission has followed three main strategies for overcoming the above-mentioned issues related to the territorial application of competition law. The first endeavor is unilateral, namely the extension of European authorities' jurisdiction in ruling on anticompetitive conduct which, although it takes place abroad, has substantial impacts on the EC market. However, this "effects" or "extraterritoriality" doctrine is highly debatable, mainly because of its alleged inconsistency with PIL.

The second and third strategies are attempts at agreeing with other international actors on cooperative rules for dealing with transnational anticompetitive behavior. The second strategy is based on bilateral agreements such as those between the US and the EC, whereas the third aims at persuading more sovereigns to agree on multilateral competition rules. These issues will be examined in turn.

4.2.2.4.1. "Effects" and similar doctrines

In the chapter on US Antitrust, it has already been mentioned that the effects doctrine has been introduced in US law in decisions such as *Alcoa*[795] and *Hartford Insurance*.[796] In a nutshell, the doctrine allows US courts to extend their jurisdiction over anticompetitive behavior that takes place outside US territory, but has a direct, substantial, and reasonably foreseeable effect on US trade.

Given its alleged PIL inconsistency, the effects doctrine (at least when applied to inbound trade) has been met with substantial resistance by other jurisdictions. As a result, Canada[797]

[794] Notwithstanding the failure of the Multilateral Agreement on Investment under the auspices of the WTO.
[795] *United States v. Aluminium Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).
[796] *Hartford Fire Ins. Co. v. California*, 509 US 764 (1993).
[797] See the Foreign Extra-Territorial Measures Act, RSC CL F-29 (1985).

and the UK[798] have adopted so-called "blocking" statutes which aim at preventing foreign (mainly US) antitrust laws from causing effects in their territory. For example, such laws may restrict the possibility of recognizing the judgments or decisions of foreign competition authorities or forbid domestic undertakings from complying with the injunctions of a foreign authority when such acts endanger domestic trade. Although the EC has not enacted a blocking statute itself, it allows its Members to adopt such statutes. The EC has widely criticized the effects doctrine especially when it is applied to EC imports. However, the EC has at times been faced with situations in which it might have found it useful to assert its jurisdiction over foreign anticompetitive behavior. As a result, EC institutions have used doctrines which do not necessarily bear the name of "effects doctrine" and which may not be as far-reaching as the US doctrine, but may tend to have similar results.

Although the Commission has expressly endorsed such a doctrine,[799] the ECJ has not expressly adopted it. So far, the ECJ has been able to rely on other interpretations in order to assert its jurisdiction. We examine two of the most often-used theories in turn.

a) "Group economic unit" or "economic entity" doctrine

Goyder describes this theory as follows:

> *This test attributes to foreign parents responsibility for the anti-competitive activities of a subsidiary that is present and active in Europe and over which they supposedly exert some control; and owing to the supposed control that the parent can exert and should have exerted over the subsidiary, the parents, and other relevant members of the group may be brought within the jurisdiction of European law.*[800]

This doctrine originates with the *Dyestuffs* case[801]:

> *The fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company [...] In the circumstances, the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition.*[802]

This stance has been criticized because it seems to take little account of the legal independent personality of subsidiaries. Moreover, the fact that the parent company does not effectively control the activities of the subsidiary seems to be no defense while the exact level of control necessary has not been entirely clarified.[803]

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[798] See the Protection of Trading Interests Act, 1980.
[799] See, e.g., the Commission decision in *Woodpulp*, OJ [1985] L85/1 and the XIth Report on competition policy (1981), points 34-42.
[800] D.G.GOYDER, supra at fn 642, p. 499.
[801] *Imperial Chemicals Institute Ltd v. Commission*, 48/69, [1972] ECR 619.
[802] Id. at pp. 662-663.
[803] For an approach similar to the "effects doctrine" in relation to the Commission Notice on the effect on trade concept contained in Articles 81 and 82, see Section 5.2.2.1 litt. a), bb) *in fine* above.

b) Implementation doctrine

The doctrine outlined in the previous subsection is not unlimited and comes short of vindicating all anticompetitive effects in the EC market. In particular, anticompetitive behavior originating in undertakings outside the EC that have no subsidiary in the EC cannot be reached by the group economic doctrine (as it may be the case in cartel affairs.) As a result, the ECJ has developed another theory which seems very similar to the US effects doctrine, although in reality, the ECJ has not expressly used this doctrine and has come short of formally recognizing it.

In the *Woodpulp I*[804] case, the ECJ was confronted with a foreign cartel. The Commission had accepted its jurisdiction on effects grounds. The ECJ acknowledged its jurisdiction on other grounds without expressly discarding the effects doctrine by stating that:

> *(T)he producers in this case **implemented** their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.*[805] [emphasis added]

What "implementation" means was not further described. However, in the *Woodpulp I* case, a marketing organization within the territory of a Member State had coordinated the cartel. There remains substantial uncertainty as to whether the ECJ would assert its jurisdiction in cases where no subsidiary or agent whatsoever can be found in the EC (e.g., in the case of direct sales or of refusal to deal with EC companies.[806])

In *Gencor v. Commission*,[807] which albeit was a merger case, [808/809] the CFI forbade a merger between two South African undertakings although it had been cleared by the South African

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[804] *A Ahlström OY and Others v. Commission*, C-89, 104, 114, 116, 117 & 125-129/85, [1988] ECR 5193. See also, *Cheil Jedang Corporation v. Commission*, T-220/00, [2003] ECR II-2473.

[805] § 204.

[806] On these questions, see W.VAN GERVEN, "EC Jurisdiction in Antitrust Matters: the *Woodpulp* Judgment", *in:* 1989 Fordham Corporate Law Institute, pp. 451-483, and J.P.GRIFFIN, "Foreign Governmental Reactions to U.S. Assertion of Extra-Territorial Jurisdiction", *in:* [1998] ECLR p. 64-73, as cited by D.G.GOYDER, supra at fn 642, p. 502, FN 10.

[807] T-102/96, [1999] ECR II-753.

[808] The Merger Regulation (cited hereunder) seems to go further in the extraterritorial application of EC competition law. However, its analysis will be limited, as the scope of the Merger Regulation generally does not encompass standardization issues as defined in this study. Furthermore, beyond the fact that the Merger Regulation is almost inapplicable to standardization cases, the *Gencor* case law is hardly replicable in the context of Articles 81 and 82 ECT. These two Articles and their case law do not contain any thresholds. Thus, the *Woodpulp* holding seems still to be controlling law for standardization issues (i.e., a certain level of "implementation" is necessary to grant jurisdiction to the EC.) Nevertheless, the analysis of the EC Merger Regulation ("ECMR"), cited hereunder, may provide useful lessons for further developments, which may in turn be relevant to the standardization discussion. See in particular the conclusion in *Gencor* regarding the PIL compatibility of a ruling similar to the effects doctrine (see below), which leaves a door open for the adoption of the effects doctrine under Articles 81 and 82 ECT.

It remains, however, fully arguable whether such an adoption would be desirable. In particular, the ECMR is based on quantitative criteria (i.e., thresholds); these criteria have two disadvantages: First, some hardcore anticompetitive effects (of agreements between sub-threshold undertakings) may escape EC review (although probably not the review of Member States), and second, some agreements between foreign firms that do not have market power in the EC would have to be unnecessarily noticed to the EC (see Case N° IV/M.1138 below.) Quantitative criteria (based on sales or turnover thresholds) may be desirable in the context of mergers where the

merger authorities. The CFI did not stress the fact that the two firms were selling their product through brokers in Europe, which may have been understood as a confirmation of the *Woodpulp I* holding that it is immaterial whether foreign firms have recourse to subsidiaries, agents, or branches within the Community. The CFI seemed to imply that compliance with the sales threshold of Article 1 of the Merger Regulation[810] (at the same time the CFI acknowledged that sales thresholds are equivalent to production thresholds) is *a factor* (and in the *Gencor* case, a sufficient one)[811] to define the scope of the Merger Regulation (§ 78-80, 83-85):

> *The Regulation, in accordance with Article 1 thereof, applies to all concentrations with a Community dimension, that is to say to all concentrations between undertakings which do not each achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State, where the combined aggregate worldwide turnover of those undertakings is more than ECU 5 000 million and the aggregate Community-wide turnover of at least two of them is more than ECU 250 million*

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review is *ex ante*. In the context of an *ex post* review, they are likely to be insufficiently precise and impede transactions that are not anticompetitive.

[809] As mentioned above, the *Gencor* case probably needs to be limited to the merger review because it heavily draws on provisions of the Merger Regulation (in particular, the thresholds of Article 1.) However, the conclusion that PIL is not infringed by the application of EC law to foreign undertakings which are not producing in the EC (and rather only selling products in the EC) could be imported into other areas of competition law. However, it must be stressed that the "effects doctrine" has not been formally adopted by the CFI.

[810] Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings; OJ L 395, 30.12.1989, and now Council Regulation 139/2004 of January 20, 2004 on the control of concentrations between undertakings ("ECMR"); OJ L 24/1, 29.1.2004 and Commission Regulation 802/2004 of April 7, 2004, implementing Council Regulation 139/2004 on the control of concentrations between undertakings, OJ L 133/1, 30.4.2004.

The thresholds of Article 1 (2) and (3) are the following:

> *2. A concentration has a Community dimension where:*
> *(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and*
> *(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.*
> *3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:*
> *(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;*
> *(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;*
> *(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and*
> *(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.*

[811] This is the closest the CFI came to recognizing the effects doctrine.

Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory.

With regard to the criterion of turnover, it must be stated that, as set out in paragraph 13 of the contested decision, the concentration at issue has a Community dimension within the meaning of Article 1(2) of the Regulation. The undertakings concerned have an aggregate worldwide turnover of more than ECU 10 000 million, above the ECU 5 000 million threshold laid down by the Regulation. Gencor and Lonrho each had a Community-wide turnover of more than ECU 250 million in the latest financial year. Finally, they do not each achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

[…]

In particular, the applicant's view [that production activities outside the Community are excluded from the scope of Community Legislation] cannot be founded on the closing words of the 11th recital in the preamble to the Regulation [4064/89].

That recital states that "a concentration with a Community dimension exists …where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there."

By that reference, in general terms, to the concept of substantial operations, the Regulation does not, for the purpose of defining its territorial scope, ascribe greater importance to production operations than to sales operations. On the contrary, by setting quantitative thresholds in Article 1 which are based on the worldwide and Community turnover of the undertakings concerned, it rather ascribes greater importance to sales operations within the common market as ***a factor*** *linking the concentration to the Community. […]* [emphasis added]

Moreover, the CFI took pains to explain that its ruling accepting its competence ("Kompetenz Kompetenz") was not incompatible with PIL as "immediate, substantial and foreseeable effects" [812] of the merger were reasonably likely to occur within the Community. It also expressed the view that PIL was not infringed as South African authorities had only authorized, not ordered the merger. Thus, the CFI avoided the harder issue of whether PIL imposed more of an obligation than a mere attempt to avoid conflicting orders. The ECJ has not had the opportunity to give its point of view on the CFI judgment.[813]

[812] Id at § 92.

[813] For a discussion on the *ratio legis* behind the effects doctrine, see P.C.MAVROIDIS/D.NEVEN, "Some Reflections on Extraterritoriality in International Economic Law: A Law and Economics Analysis," in: M.DONY, *Melanges en homage à Michel Waelbroeck*, 1999. These authors also point out that one of the crucial issues is whether to assert jurisdiction, a court merely needs to comply with the letter of the Merger Regulation, or conversely, whether a court must construe the ECMR in the light of PIL.

However, it remains true that mergers between non-EC undertakings that fulfill the thresholds of the Merger Regulation have to be notified to the Commission even if they conduct only minor activities in the EC and their market shares in the EC are minimal. Thus, for example, the merger between the Royal Bank of Canada and the Bank of Montreal had to be notified to the Commission although they jointly claimed only a 2% market share.[814/815]

In *Boeing/McDonnell Douglas*,[816] the Commission seemed to take the view that EC law applies not because EC consumer welfare was affected, but because EC producers' welfare was affected as a result of an action occurring outside the EC.[817]

4.2.2.4.2. Bilateral cooperation

In an international perspective, the main advantage of (bilateral and multilateral) international treaties is their consistency with PIL, whereas the unilateral measures applying domestic law to conduct having taken place abroad may be inconsistent with such a law.

The two most important cooperation agreements in the field of competition policy have been those entered into between the EC and the US. The 1991 Cooperation Agreement[818] provides for regular meetings between officials of the EC and the US to discuss matters of mutual interest, exchanges of information (Article III), cooperation and coordination in enforcement matters (Article IV), and notification of the other authority whenever an authority's enforcement may affect an important trade interest of the other (Article II.)

The Positive Comity Agreement of 1998 develops the positive comity provision of the first agreement (Article V). According to this provision, an agency may request another agency to take appropriate action to remedy anticompetitive behavior of an undertaking in the former's territory.[819]

4.2.2.4.3. Multilateral cooperation

At the multilateral level, many harmonization endeavors have taken place under the auspices of diverse organizations. By 1980, the United Nations Conference on Trade and Development (UNCTAD) had adopted a voluntary code, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Trade Practices. The Organization for Economic Cooperation and Development (OECD) has published a Revised Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade which provides guidelines for notification and cooperation in

[814] Case N° IV/M.1138.
[815] Note however, the simplified procedure set forth in the Commission's Notice for treatment of certain concentrations under Council Regulation N°139/2004, [2004] OJ C 56/32.
[816] Case N°/M.877, OJ L 336, 08/12/1997, p. 16.
[817] If one sees this case as a case of protection of export trade, one may wonder whether the EC approach differs much from the US legislation on this score (see Chapter 3 and the discussion about the FTAIA in Subsection 3.2.7.1.).
[818] [1991] 4 CMLR 823.
[819] See also, Article 24 of the ECMR, which provides for the establishment of a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community.

competition matters. At the WTO, a working group has been established that has been entrusted with an analysis of the interactions between trade and competition policy.[820]

4.3. Substantial concepts

4.3.1. Article 81(1) ECT

Article 81 ECT[821] prohibits anticompetitive collusion that may affect trade between Member States. Article 81(1) ECT starts by forbidding all agreements in restraint of trade between Member States that have as their object or effect the restriction of competition. Article 81(3) ECT states that, notwithstanding Article 81(1) ECT, some types of agreements can be tolerated if they comply with certain conditions, namely that they contribute to an increased degree of competition.

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[820] However, the road towards common rules on antitrust matters seems to be a long one. See R.A.EPSTEIN/M.S.GREVE (EDS.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, American Enterprise Institute for Public Policy Research, 2004, S.J.EVENETT/A.LEHMANN/B.STEIL (EDS.), Antitrust Goes Global: What Future for Transatlantic Cooperation?, Royal Institute of International Affairs, October 2000. See also the failure of WTO Members to agree on common competition rules at the Cancun Ministerial Conference in 2003.

[821] Article 81 ECT reads:

> *1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:*
>
> *directly or indirectly fix purchase or selling prices or any other trading conditions;*
> *limit or control production, markets, technical development, or investment;*
> *share markets or sources of supply;*
> *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.*
>
> *3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
> *any agreement or category of agreements between undertakings,*
> *any decision or category of decisions by associations of undertakings,*
> *any concerted practice or category of concerted practices,*
>
> *which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
> *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

Article 81 ECT is composed of various legal concepts, which this section examines. The brief presentation will begin with concepts from Article 81(1) ECT and will then focus on aspects that are relevant when dealing with standards.

4.3.1.1. Collusion

Article 81(1) ECT prohibits "as incompatible with the common market" "all agreements between undertakings, decisions by associations of undertakings and concerted practices." First, the phrase "as incompatible with the common market" has been given a high degree of significance by the ECJ. As already mentioned above, from its very first judgments on, the ECJ has stressed that the goal of creating a common market is of central importance in its understanding of which kind of anticompetitive behavior has to be struck down. At times, the Court went as far as striking down seemingly efficient agreements solely on the basis of their alleged division of the common market. As regards the second set of terms, they have been regrouped under the concept of collusion, which will be analyzed hereunder.

4.3.1.1.1. Undertakings

a) The concept of "undertaking"

The concept of "undertaking" has been very broadly defined by the ECJ and is coextensive in Articles 81, 82 and 86 ECT.[822] It does not depend on the incorporated nature of the entity but may also embrace companies, partnerships, sole traders and associations, state-owned companies, and public bodies. In *Höfner and Elser v. Macroton GmbH*,[823] the ECJ stated:

> *The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed."*

Thus, even an employment office organized and funded by the state and providing free services was regarded as an undertaking:

> *The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been and is not necessarily, carried out by public entities. This finding applies in particular to executive recruitment.*[824]

The distinction between an economic activity and the exercise of powers of a public authority has been further stressed in *Aéroports de Paris v. Commission*[825] and *Wouters v. Algemene*

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[822] For an outstanding presentation of the case law on this score, see M.WAELBROECK/A.FRIGNANI, "Concurrence", in: *Commentaire J. Megret, Le droit de la CE*, tome 4, 2d ed., p. 542, 1997.
[823] C-41/90, [1991] ECR I-1979, § 21.
[824] Id. at § 22.
[825] C82/01 P, [2002] ECR I-9279, where ADP was held to be an undertaking for certain of its activities (of an economic nature) but not for others (which were held to be an exercise of official authority or an act of a public authority.)

Raad van de Nederlandsche Orde van Advocaten,[826] where the ECJ stated the competition provisions of the treaty:

> *[D]o not apply to an activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity [...] or which is connected with the exercise of the powers of a public authority.*[827]

In the above-mentioned cases, a publicly funded airport and a Dutch bar were considered as undertakings or an association of undertakings and were thus subject to the EC competition rules.

b) Group of undertakings

The ECJ has also decided that undertakings belonging to the same group are to be treated as a single entity, i.e. as a single undertaking. In *Corinne Bodson v. Pompes Funèbres des Régions Libérées SA*,[828] the Court held that Article 81 ECT would not apply if the undertakings:

> *[F]orm an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between undertakings.*[829]

It can be difficult to determine whether a firm is controlled by another. The ECJ has indicated that various factors must be taken into account, such as the distribution of shares, the composition of the board of directors, and the freedom that the subsidiary enjoys in devising its policies.[830]

4.3.1.1.2. Agreements

Beyond formal contracts, the concept of "agreement" encompasses gentlemen's agreements,[831] oral agreements,[832] circulars and guidelines to which another undertaking adheres,[833] and even expired agreements[834] (as long as their effects can still be felt[835]), and

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[826] C-309/99, [2002] ECR I-1557 where the ECJ held that Dutch lawyers were to be considered as undertakings and the Dutch Bar, an association of undertakings. The ECJ has also consistently ruled that trade unions and employees are not undertakings. The only "exception" is *Reuter/BASF*, [1976] 2 CMLR D44, where the Commission ruled that when employees carry on a business independently of their employer, they may be considered undertakings.
[827] Id. at § 57.
[828] 30/07, [1988] 2479, at § 19.
[829] This ruling was confirmed in *Viho v. Commission*, C-73/95, [1996] ECR I-5457 and by the CFI, in *Micro Leader Business v. Commission*, T-198/98, [1999] ECR II-3989, where the courts held that agreements between firms of a same group are not subject to Article 81, without prejudice to the fact that the group might be subject to Article 82 ECT.
[830] *AEG-Telefunken v. Commission*, 107/82, [1983] ECR 3151, § 47-53. Between an agent and its principal, the level of risk assumed by the subsidiary seems to be the main factor. The more an agent assumes risks, the likelier it is to be considered independent. See Commission's Guidelines on vertical restraints, OJ 2000, C291/01, [2000] CMLR 1074.
[831] *ACF Chemiefarma NV v. Commission*, 41/69, [1970] ECR 661
[832] *Tepea v. Commission*, 28/77, [1978] ECR 1391.
[833] *Anheuser-Busch Incorporated Scottish & Newcastle*, OJ [2000] L 49/37.
[834] *ACF Chemiefarma NV v. Commission*, 41/69, [1970] ECR 661.

conditional or partial agreements.[836] An enforcement mechanism is not a requisite. In *Bundesverband der Arzneimittel-Importeure eV and Commission v. Bayer*,[837] the ECJ provided:

> *[T]he CFI set out from the principle that the concept of an agreement within the meaning of Article 81(1) of the Treaty centres around the existence of a* ***concurrence of wills*** *between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention […] for there to be an agreement within the meaning of Article 81(1) […] it is sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way.* [838] [emphasis added]

Proof of an agreement is not always easy to put forth, but as with its US counterparts, EC competition authorities have tried to circumvent this difficulty. First, according to the ECJ, the exact boundaries between an "agreement," which seems to relate more to an express agreement, and a "concerted practice,"[839] which is more similar to a tacit agreement, do not need to be drawn,[840] and "joint classification" of a practice is acceptable.[841]

Second, probably in order to circumvent the difficulty of proving that each undertaking participated in a substantial number of meetings in which cartel policing was discussed, the concept of a "single, overall agreement" has been introduced.[842] As the membership and leadership of a cartel may change over time, it would require an almost impossible amount of research to establish precisely who participated in the cartel at which point in time.

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[835] However, in *Shell v. Commission*, T-11/89, [1992] ECR II-757, and *Rhône-Poulenc v. Commission*, T-1/89, [1991] ECR II-867, the CFI ruled in relation to an existing practice that intent is enough to establish a concerted practice, even if there are no actual effects. The ECJ confirmed this point of view in *Hüls AG v. Commission*, [1999] ECR I-4287. However, the CFI seemed to have changed its mind in a subsequent case, *Cimenteries CBR SA and Others v. Commission*, T-25/95, [2000] ECR II-491, where it stated there could be no infringement if the parties proved that no effects were felt in the market (§ 1865).

[836] *HFB Holding v. Commission*, T-9/99 etc, [2002] ECR II-1487.

[837] C-2 & 3/01, OJ 2001, 6 January 2004, C2004/653, [2004] 4 CMLR 653, a.k.a. the *Adalat* case. To be distinguished from *Sandoz prodotti farmaceutici v. Commission*, C277/87, [1990] ECR I-45. See, D.KRAUS, Précision de la notion d'entente au sens de l'article 81 du traité CE: remarques concernant l'arrêt Adalat, *Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht sic!*, p. 515, 2004.

[838] The CFI further indicated that for an agreement to be regarded as having been concluded by tacit acceptance, there must be an invitation from an undertaking to another undertaking (whether express or implied) to jointly meet a goal.

[839] Such a concept and the relationship with the concept of parallel behavior are explained in the next subsection.

[840] See, e.g., *Commission v. ANIC Partecipazioni*, C-49/92, [1999] ECR I-4125, at § 132-133, and the CFI in *NV Limburgse Vinyl Maatschappij v. Commission*, T-305/94, [1999] ECR II-931, at § 695-699.

[841] See, e.g., *Rhône-Poulenc v. Commission*, T-1/89, [1991] ECR II-867, where the CFI notes (§ 127):

> *The Commission was also entitled to characterize that single infringement as "an agreement and a concerted practice,", since the infringement involved at one and the same time factual elements to be characterized as "agreements" and factual elements to be characterized as "concerted practices."*

[842] See *Commission v. ICI plc*, (86/398/EEC), OJ 1986, L230/1, a.k.a the *Polypropylene* case, see also *Hercules v. Commission* , T-28/89, [1991] ECR II-1711, § 262-264.

Under the "single agreement" approach, an undertaking can be fined for infringement of Article 81 ECT even though it took part in only one of the meetings discussing the various aspects of the infringement.[843] In *Sigma Technologie v. Commission*,[844] the CFI noted:

> *[T]he mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global cartel. It is only if the undertaking knew or should have known when it participated in the cartel that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel.*[845]

Third, the Commission has in some cases tried to bring proof of the existence of an agreement by way of circumstantial evidence. However, the ECJ has set stringent requirements for the evidentiary standard for such proof. In some cases, the CFI and the ECJ have not hesitated to consider that the evidence brought by the Commission on the existence of an agreement or participation in a cartel was insufficient.[846]

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[843] *Rhône-Poulenc v. Commission*, T-1/89, [1991] ECR II-867, and *NV Limburgse Vinyl Maatschappij v. Commission*, T-305/94, [1999] ECR II-931. In *Rhône-Poulenc*, the CFI stated (§ 126)

> *Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part—over a period of years— in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.*

[844] T-28/99, [2002] ECR 1845, at § 45.

[845] It seems the only way for an undertaking to avoid full responsibility when attending a meeting where competition-distorting agreements are discussed is to publicly distance itself from what has been agreed upon; see *Tréfileurope Sales Sarl v. Commission*, T-141/89, [1995] ECR-II 791, § 85.

[846] In *Petrofina SA v. Commission*, T-2/89, [1991] ECR II-1087, the CFI noted for example:

> *The question is […] whether the applicant' s participation in the infringement between 1980 and March 1982 may […], as the Commission claims, be established on the strength of the fact that its name appears in the tables containing sales volume targets for that period.*
>
> *In the absence of any evidence of Petrofina' s participation in the regular meetings of polypropylene producers during the period in question, the Court finds that the Commission has not demonstrated that the applicant participated in the drawing up of the tables relating to sales volume targets or, therefore, in the setting of those targets. The fact that the name of the applicant or of Montefina is mentioned in those tables must be regarded as insufficient evidence since at the material time all Petrofina' s polypropylene production was marketed by Montefina, a joint subsidiary of the applicant and Monte, and since the data relating to Montefina' s production capacity and sales and to Petrofina' s aspirations must have been known to its partner in the joint enterprise and must have been disclosed by its partner at the regular meetings of polypropylene producers with a view to participating effectively in the setting of sales volume targets.*

In *Enichem Anic SpA*, T-6-8/89, [1991] ECR II-1623, the ECJ indicated (§§ 69-73):

> *The Court finds that, […] the only evidence put forward by it to prove the applicant' s participation in the meetings during the period in question is its reply to the request for information […], in which it is stated: […]*

Furthermore, in *Volkswagen AG v. Commission*,[847] the ECJ specified that for a "meeting of minds" to be proved under Article 81 ECT, it must be shown beyond the mere existence of an agreement with anticompetitive effects that at least two parties intended to pursue the anticompetitive objective. In this case, Volkswagen had a policy of delivering only a minimal number of cars to a country in order to avoid re-imports in higher-priced Member States. Although the distributorship agreement referred to this possibility, the distributors persistently objected to such a practice. Under these conditions, a meeting of minds may not be inferred (§§ 54-55):

> *[…], in its judgment in Case T-41/96 Bayer v Commission [2000] ECR II-3383, at paragraph 169, the Court of First Instance expressly stressed that the subjective element of a meeting of minds is an absolute condition for the application of Article [81](1) of the Treaty. It is therefore not sufficient to refer to the dealership contract in order to establish the acceptance by dealers of an allegedly restrictive supply policy.*
>
> *In the present case, even if the dealership contract provided for the possibility of supplying dealers below their declared requirements, the reason for this supply below declared requirements, as established by the Court of First Instance, that is to say, the barrier to exports, was not covered by the dealership contract. Under that contract, distributors were free to sell the vehicles delivered by the appellant both to foreign end-users and to other dealers. The restrictions confirmed by the Court of First Instance were not desired by dealers because they rejected reductions in supplies and such restrictions had, in so far as they existed, the character of a unilateral measure falling outside the scope of Article [81](1) of the Treaty. The judgment under appeal disregards the wording of that provision and removes the distinction between that provision and article 86 of the EC Treaty (now article 82 EC).*[848]

> *"Meetings between the European polypropylene producers began during the 1970s, towards the end of that period. We are not in a position to determine precisely the date on which Anic began to take part, but we think it was close to the beginning of the meetings in question."*
>
> *The applicant' s reply cannot be regarded as a clear admission of participation in the meetings from November 1977 onwards. The applicant gives a perfectly plausible literal and contextual interpretation of its reply which is corroborated by ICI' s reply to the request for information […] according to which the "bosses" and "experts" meetings began at the end of 1978 or the beginning of 1979 and Anic participated regularly in those meetings during the period of its presence on the polypropylene market between 1979 and 1983, that is to say after the period now under consideration [1977].*
>
> *It follows from the foregoing that since it has not been able to put forward any evidence of such a kind as to support any participation in the infringement on the part of Anic before the end of 1978 or the beginning of 1979 the Commission has not proved its participation to the requisite legal standard.*

[847] C-338/00, [2003] ECR-I 9189.

[848] In *Adalat*, C-2 & 3/01, OJ 2001, January 6, 2004, C2004/653, [2004] 4 CMLR 653, the ECJ expressly confirmed that a non-dominant undertaking had a right to implement a unilateral policy design to restrict parallel trade.

4.3.1.1.3. Decisions by associations of undertakings

According to the text of Article 81 ECT, trade associations (in the word of the Treaty "associations of undertakings") are considered to be subject to the rules on competition. In the standardization context, it is obvious trade associations can also play an anticompetitive role by controlling the standardization and certification[849] process.

Mere recommendations may be found to be in breach of the competition rules, as long as in the past, the association's members have generally followed the recommendations of the association.[850] Beyond the fining of the trade association members, trade associations themselves can be fined and held responsible[851] even when they have no legal personality.[852] An agreement between a trade association and an undertaking may also be held to be an agreement in the sense of Article 81 ECT.

Associations may also be instrumental in the policing of cartels, as various European cartel cases deal with the behavior of trade associations in cartel policing.[853] In particular, trade associations may play an important role in the exchange of information useful for cartel policing.[854]

In *NV IAZ International Belgium v. Commission*,[855] the trade association was granted the power of issuing recommendations for the approval of appliances to be connected to the public water system. Certification was granted only to producers who were members of certain trade associations. In turn, access to these associations was restricted so that importers of foreign appliances had *de facto* no access to certification.

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[849] Commission's decision in *van Marwijk v. FNK and SCK*, [1996] 4 CMLR 565, upheld by the CFI, *Stichting Certificatite Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanverhuurbedrijven (FNK) v. Commission*, T-213/95 and 18/96, [1997] ECR II-1739. See also a more in-depth analysis under Section 4.4.

[850] See, e.g., *NV IAZ International Belgium v. Commission*, a.k.a. *Community v. Anseau-Navewa*, 96-102, 104-105. 108, 110/82, [1983] ECR 3369.

[851] *AROW v. BNIC*, OJ [1982] L 379/1, [1983] 2 CMLR 240, *Société Coopérative des Asphalteurs Belges (Belasco)* v. Commission, 246/86, [1989] ECR 2117, and *NV IAZ International Belgium v. Commission*, a.k.a. *Community v. Anseau-Navewa*, 96-102, 104-105. 108, 110/82, [1983] ECR 3369, where the trade association ANSEAU received one of the highest fines in spite of its having a nonprofit status and not deriving direct economic benefits from the certification process:

> *[...] it is clear from the statement of reasons contained in the decision that the fine imposed on ANSEAU, being equal in amount to the highest fines imposed on the undertakings which were parties to the agreement, was fixed by reference to the fact that on the one hand ANSEAU bore most of the responsibility, but that on the other it was necessary to take account of the fact that it was a non-profit-making association.*
>
> *That approach must be regarded as justified, notwithstanding the fact that ANSEAU is a non-profit-making association, particularly in view of the fundamental role which it played in the drawing-up and implementation of the agreement. § 57-58.*

[852] *Compagnie maritime belge*, T-24/93, [1996] ECR II-1201.

[853] See, e.g., *Cimenteries CBR SA and Others v. Commission*, T-25/95, [2000] ECR II-491, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) v. Commission*, [1995] ECR II-289, *FEG/TU*, [2000] 4 CMLR 1208.

[854] See Commission's decisions in *Re fatty acids*, 87/1, OJ L3, p. 17, [1989] 4 CMLR 445, *Re VNP and Cobelpa*, 77/592, OJ L242, p. 10, [1977] 2 CMLR D28, and *Cimenteries and Others v. Commission*, T-25/95, [2000] ECR II-491.

[855] A.k.a. *Community v. Anseau-Navewa*, 96-102, 104-105. 108, 110/82, [1983] ECR 3369

Goyder notes in this context:

> *The Commission and Court both held that where a trade association is a party to a restrictive agreement of this kind but does not have formal power to order its members to conform, if its recommendations are in practice followed because of the grave practical problems which the manufacturers and dealers will otherwise encounter, then the agreement will be regarded as binding on the members and treated as a "decision" under Article 81. The grave practical disadvantage in this case was that foreign manufacturers of washing machines were forced to use sole agents to handle imports into Belgium; any other kind of importer, e.g. a distributor of a variety of such machines, would not be eligible to obtain the necessary certificate.*[856]

4.3.1.1.4. Concerted practices and exchanges of information

One should not expect a formal agreement for cooperation to occur each time collaborative anticompetitive behavior takes place. In some instances, firms may be able to "communicate" about or signal an anticompetitive conduct without the necessity of an agreement with competitors. In such cases, undertakings do not rely on an agreement but are otherwise sufficiently confident that the competitor will pursue an anticompetitive purpose. As industrial organization theory suggests,[857] assuming information symmetry, repeat players will naturally move to a cooperative equilibrium, without having to sign a formal agreement to this effect. In such cases, it is a true challenge to come up with a meaningful legal test to punish collusion.

In the *Dyestuffs*[858] case, the ECJ explained that the terms "concerted practices" were brought into Article 81 ECT in order to prohibit (§ 64):

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[856] D.G.GOYDER, supra at fn 642, p. 160. See also the in-depth analysis under Section 5.6.

[857] See, e.g., K.BAGWELL/S.ATHEY, *Optimal Collusion with Private Information*, published online, June 2001, and K.BAGWELL/S.ATHEY/CH.SANCHIRICO, *Collusion and Price Rigidity*, published online, December 2002. See e.g. in an oligopoly context, the Cournot equilibrium discussion in Chapter 3, Subsection 3.3.1.2, or a Stackelberg (market leadership) equilibrium situation. In the Discussion Paper on the Review of Article 82 ECT, available at www.europa.eu.int, the Commission points out, albeit in an Article 82 ECT context (see as well Subsection 4.3.4.3.3.):

> *Undertakings in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. The simpler and more stable the economic environment, the easier it is for undertakings to reach a common understanding. Indeed, they may by able to coordinate their behaviour on the market by observing and reacting to each other's behaviour. In other words, they may be able to adopt a common strategy that allows them to present themselves or act together as a collective entity. Coordination may take various forms. In some markets, the most likely coordination may involve directly coordinating on prices in order to keep them above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market. Firms may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts in bidding markets.*

[858] *Imperial Chemicals Institute Ltd v. Commission*, 48/69, [1972] ECR 619.

> *[A] form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.*[859]

In paragraph 118, the ECJ seemed to limit the scope of paragraph 64:

> *Although every producer is free to charge his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the treaty for a producer to co-operate with his competitors,* ***in any way whatsoever****, in order to determine a coordinated course of action relating to a price increase and to ensure its success by* ***prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action****, such as the amount, subject-matter, date and place of the increases.*[860] [emphasis added]

Paragraphs 65 to 68 of the same judgment are more precise:

> *By its very nature, […] a concerted practice does not have all the elements of a contract but may, inter alia, arise out of coordination which becomes apparent from the behaviour if the participants.*
>
> *Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such practice if* ***it leads to conditions of competition which do not correspond to the normal conditions of the market,*** *having regard to the nature of the products, the size and number of the undertakings.*
>
> *This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.*
>
> *Therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested*

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[859] Should every substitution of the risks of competition be held as a violation of competition laws? V.KORAH, quoted above at fn 668, p. 54, offers this tentative explanation:

> *This passage might have been intended to distinguish the German practice at that time, according to which only a binding written agreement infringed the earlier sections of the German cartel law.*

[860] The Commission Guidelines on the application of Article 81(3) ECT, *OJ 2004, C 101/08*, similarly provide:

> *The type of co-ordination of behavior or collusion between undertakings falling within the scope of Article 81(1) is that where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as their conduct on the market is eliminated or at least substantially reduced.*

> *decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question.* [emphasis added]

Obviously the ECJ wanted undertakings to stick to market conditions when determining their market behavior. The ECJ also established that mere parallel behavior (i.e. a pattern of symmetric competitive behavior) does not automatically amount to a concerted practice and is thus not punishable.[861]

However, if, in addition to parallel behavior, it can be proved that competitive conditions are not "normal," and undertakings are not in a situation of uncertainty about their competitors' competitive behaviour, the existence of a concerted practice may be inferred. Such situations may arise when competitors signal their future behavior, for example through the publication of price lists,[862] or alternatively, it may be sufficient that "each infers commitments from the other on the basis of conduct."[863]

This test was confirmed in *Cooperatieve Vereiniging 'Suiker Unie' UA v. Commission*,[864] when the Court approved the condemnation of two undertakings that had tried to keep competitors outside their markets although no precise coordination plan of their efforts had been put in place. The ECJ held the working out of a common plan was not necessary for a condemnation as Article 81 ECT strictly precludes (§ 174):

> *[A]ny direct or indirect contact between such operators, the object or effect whereof is either to* ***influence*** *the conduct on the market of an actual or potential competitor or to* ***disclose*** *to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.* [emphasis added]

The role of exchanges of information in this context is not entirely clear. Although exchanges of information can facilitate collusion between undertakings, deciding whether competition authorities should intervene regarding such exchanges can be cumbersome.[865] As to exchange of price information (usually the most sensitive competitive information), the Commission seems to focus on the structure of the market in order to answer such a question. For

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[861] This was further confirmed in *Züchner v. Bayerische Vereinsbank AG*, C-172/80, [1981] ECR 2021 and by the Commission in the *Zinc Producer Group* case, [1984] OJ L220/27.

[862] See, e.g., *Cimenteries CBR SA and Others v. Commission*, T-25/95, [2000] ECR II-491, where the CFI admitted that an undertaking (Lafarge) was part of a concerted practice merely by virtue of its receiving information at a meeting about the future conduct of a competitor.

[863] Commission decision in *Soda-ash/Solvay*, OJ [1991] L151/1.

[864] 40/73, [1975] ECR 1663.

[865] It is unclear whether the mere disclosure of prices may amount to a competition law violation. See *Woodpulp II* (*A Ahlström OY and Others v. Commission*, C-89, 104, 114, 116, 117 & 125-129/85, [1988] ECR 5193. See also *Cheil Jedang Corporation v. Commission*, T-220/00, [2003] ECR II-2473), in which the ECJ stated that the price announcement in this case was not to be regarded as a competition law violation:, as it did not (§ 64-65):

> *[…] lessen each undertaking's uncertainty as to the future attitude of its competitors.*
>
> *In this case, the communications arise from the price announcements made to users. They constitute in themselves market behavior which does not lessen each undertaking' s uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.*

example, in *UK Agricultural Tractor Registration Exchange*,[866] the Commission emphasized the fact that the market was oligopolistic,[867] whereas in its press release,[868] it declared that its decision would certainly have been different in the car industry, which is much more competitive. On the other hand, in *Woodpulp I*, [869] the ECJ stated that a price announcement was not, *in casu*, to be regarded as a violation of EC law, as it did not (§ 64-65):

> *[…] lessen each undertaking's uncertainty as to the future attitude of its competitors.*
>
> *In this case, the communications arise from the price announcements made to users. They constitute in themselves market behavior which does not lessen each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behavior, it cannot be sure of the future conduct of the others.*[870]

In line with its *Dyestuff* case law, the ECJ thus seems to insist more on the certainty or uncertainty under which competitors are operating rather than on the competitive structure of the market. Both factors probably play a role and are not easily separable.

Another view would be to distinguish the cases according to the moment of the disclosure. In *Woodpulp I,* the exchanges of information took place *ex ante* (before implementation) whereas the exchanges of information in the *Tractor* case took place *ex post*. When prices are exchanged *ex ante*, there still remains a certain degree of uncertainty about the conduct, whereas when prices have just been implemented (and are controllable), there may not be much uncertainty left. In market scenarios where demand is constant, this may easily lead to Cournot's equilibrium[871] scenarios. At any rate, it is argued that the moment of disclosure cannot be the only factor. The courts and the Commission did not insist on this aspect, and in the *Dyestuff* case, the scheme was condemned although prices were exchanged *ex ante*.

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[866] [1992] OJ L 68/19, § 37-43.

[867] See also *Thyssen Stahl AG v Commission*, T-141/94, [1999] ECR II-347 (§ 411):

> *With particular regard to the United Kingdom Agricultural Tractor Registration Exchange Decision, cited above, it must be pointed out that both this Court and the Court of Justice have ruled that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders (T-35/92 John Deere v Commission, cited above, paragraph 51, and C-7/95 P John Deere v Commission, cited above, paragraphs 88 to 90).*

[868] Commission Press Release IP/92/148, March 4, 1992, cited by R.WHISH, supra at fn 662, p. 491.

[869] *A Ahlström OY and Others v. Commission*, C-89, 104, 114, 116, 117 & 125-129/85, [1988] ECR 5193. See as well, *Cheil Jedang Corporation v. Commission*, T-220/00, [2003] ECR II-2473).

[870] However, it must be specified that price announcements were not the only way for competitors to know the prices of other firms active on the market for wood pulp, as a high degree of concentration in the wood pulp business existed, in part as the result of buyers' activities. Indeed, many agents were in contact with more than one producer, a typical buyer was always in contact with several pulp producers, and (§ 84):

> *[I]t should be noted that most of the pulp was sold to a relatively small number of large paper manufacturers. Those few buyers maintained very close links with each other and exchanged information on changes in prices of which they were aware.*

[871] See the Cournot equilibrium discussion in Chapter 3, Subsection 3.3.1.2. Oligopolies: standardization of products and terms as evidence that collusion is occurring.

Although what constitutes (un)certainty leaves a substantial degree of discretion to courts, it is the criterion that has been consistently applied by the ECJ so far.

It must also be noted that competitors can have excellent reasons to exchange and publicize information (even price information) about their products, which do not necessarily point to a concerted practice. As Korah mentions:[872]

> *There may be sensible commercial reasons for announcing price rises in advance. Customers may make fixed price contracts and want notice of a change in their costs; a temporary glut may be cleared; in markets where there are a few suppliers, price competition may take the form of tough negotiations for individual discounts and time may be needed for these to take place.*

The competition authorities therefore need to separate the grain from the chaff. In *Ministère public v. Jean-Louis Tournier*,[873] the ECJ adopted a test reminiscent of the "but for test" used by the US Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[874] (§ 24):

> *As the Court held in [Dyestuff], mere parallel behavior may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition. However, concerted action of that kind cannot be presumed where the parallel behaviour can be accounted for by reasons other than the existence of concerted action.*[875]

The similarity with the US test was already striking in *Woodpulp I* where the ECJ stated (§ 115, 126-127):

> *The experts analyze the structures of the market and price trends over the period at issue and maintain that several factors or mechanisms specific to that market are incompatible with an explanation based on concertation. Those factors are the existence of actual and potential outsiders not belonging to the group of undertakings alleged to have colluded, changing market shares and the absence of production quotas and the finding that producers did not take advantage of the differences between the various importing countries as regards elasticity of demand.*
>
> *[...]*
>
> *(I)t must be stated that, in this case, concertation is* ***not the only plausible explanation for the parallel conduct****. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt*

[872] V.KORAH, supra at fn 668, p. 58.
[873] C-305/87, [1989] ECR 2565.
[874] 475 U.S. 574, 106 S.Ct. 1348 (1986).
[875] The distinction between concerted practices and collective dominance will be discussed later, under the subsection presenting the latter concept (Subsection 4.3.4.2.3. Excursus: Abuse of collective dominance under Article 82 ECT).

by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission. [emphasis added]

It is not always easy to determine whether exchanges of information should be permitted under competition law. As Whish[876] remarks:

Not infrequently competitors agree to exchange information with one another. Such agreements can pose problems for competition authorities. They may be highly beneficial. Competitors cannot compete in a statistical vacuum: the more information they have about market conditions, the volume of demand, the level of capacity that exists in an industry and the investment plans of rivals, the easier it is for them to make rational and effective decisions on their production and marketing strategies. They may benefit by exchanging information on methods of accounting, stock control, bookkeeping or on the draftsmanship of standard-contracts. Benchmarking whereby companies measure their performance against the "best practice" in their industry, may enable them to improve their efficiency. Information may also be exchanged about new forms of technological know-how, information agreements can help to increase the number of firms capable of operating on the market. Buyers too will benefit from an increase in information: the more they know about the products available and their prices, the easier it will be to make satisfactory choices. Indeed perfect competition is dependent on consumers having perfect information about the market: market transparency is in general to be encouraged.

Against this the dangers of information agreements have to be borne in mind. The essence of competition is that each producer should act independently on the market and not co-ordinate its behaviour with that of its rivals. If competitors agree to divulge to one another detailed information about their pricing policies, investment plans or research and development projects, it becomes easier for them to act in concert. Indeed in some circumstances it may be that the mere exchange of information will in itself be sufficient to eliminate normal competitive rivalry. The problem for competition law is to distinguish those exchanges of information which have a neutral or beneficial effect upon efficiency from those which seriously threaten the competitive process by facilitating collusive behavior. The line between these situations is a fine one and proper characterization can be difficult.

[876] R.WHISH, supra at fn 662, pp. 486-487.

Of course, the nature of the information exchanged plays an important role. In *Re VNP and Cobelpa*,[877] the Commission established that exchanges of general statistical data on aggregate (not firm- or plant-specific) sales and output in a market were not forbidden. However, the fact the exchanged information is considered confidential by market participants and that such information is not accessible to buyers has often led the competition authorities to take a negative view of an exchange of information scheme. For example, in *John Deere v. Commission*,[878] the ECJ held (§ 91):

> *[I]n addition, this assessment does not conflict with the judgment in [Woodpulp I]. It is true that in that judgment the Court held, at paragraph 64, that the system of quarterly price announcements on the wood pulp market did not in itself constitute an infringement of Article [81](1) of the Treaty. However the system of quarterly announcements of paper pulp sale prices set up by the manufacturers involved the communication of information of use to purchasers, whereas the information exchange system in question in the present case enables information to be shared only by the undertakings which are members to the agreement.*

Moreover, the Commission has recognized in its *International Energy Agency*[879] decision that agreements to exchange information may be justified under Article 81(3) ECT. In this matter, the Commission approved a scheme among 21 OECD countries inviting exchanges of information on the capacities of oil-supplying companies in the event of disruption. The Commission considered that although such information is usually secret, the goal of coordinating the supply of oil in case of disruption overrode the risks to competition.

At any rate, standardization only rarely necessitates an exchange of price information (except in cases where a patent holder needs to disclose the terms under which it will license its technology.[880]) It is far more common, and indeed, almost inherent in any standardization process, for standard-setters to exchange technical information. Such exchanges can raise competitive issues especially in markets where research and development are decisive. In sum, although standard setting does not usually involve exchanges of price information, exchanges of technical information may violate the competition provisions of the Treaty; therefore, SSOs are well advised to establish clear guidelines for their exchanges of information policies.

4.3.1.1.5. Consequences for standards

The consequences for standards are pretty straightforward: standards can be encompassed by Article 81(1) ECT as long as they are the object of an agreement between undertakings or they emanate from a trade association. Moreover, participation in the setting of anticompetitive standards can lead to the undertaking being held liable even when its participation is only limited. However, arguably an undertaking that merely participates in standard-setting without actually applying the standard in practice should not be liable under

[877] 77/592, OJ L242, p. 10, [1977] 2 CMLR D28.
[878] C-7/95 P, [1998] ECR I-3111.
[879] Commission Decision 94/173, OJ L68/35, March 11, 1994.
[880] Such issues will be dealt with later under Subsection 4.4.5. Fair access to necessary information and FRAND Terms for use of IPRs.

antitrust laws,[881] as without application in practice, the standard can hardly have effects on competition.[882] This is an important evidentiary point, as it is difficult to prove whether a price is the result of collusion or of an internal process. In contrast as to standards, it is often difficult for an undertaking to argue that a standard it decides to follow is the result of an internal development when such standard is very similar to the (arguably anticompetitive) standard adopted by the industry. Indeed, standards usually entail more characteristics than prices, and thus, it is usually much easier to prove that a standard is the result of an agreement/[883]

4.3.1.2. "Which may affect trade between Member States"

This condition for the application of the EC competition provisions has been previously discussed in Subsection 4.2.2.1.1. The affection of trade condition.

4.3.1.3. "Have as their object or effect the prevention, restriction or distortion of competition within the common market"

4.3.1.3.1. General definition

This condition aims at defining the concept of "agreements between undertakings, decision by associations of undertaking and concerted practices"[884] in such a way that only those that are detrimental to competition under *any* point of view are caught by the prohibition of Article 81(1) ECT.[885] The assessment under Article 81(1) ECT takes into account the actual context in which competition would take place in the absence of the agreement and its alleged restrictions.[886] Agreements that do not fulfill this condition obviously do not violate competition law.[887]

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[881] See *NV IAZ International Belgium v. Commission*, a.k.a. *Community v. Anseau-Navewa*, 96-102, 104-105. 108, 110/82, [1983] ECR 3369, presented hereunder, in which the ECJ did not conduct an in-depth market analysis and considered that agreements which have as their object the prevention of parallel imports, *ipso facto* restrict competition. However, in that case, all members of the association were found to have applied the anticompetitive scheme. Therefore, it remains open to debate whether an undertaking that participated in the establishment of an anticompetitive standard without applying it in practice may be held liable.

[882] However, in oligopolistic markets the mere exchange of information necessary for standard setting may already involve a violation of competition laws and thus cause the standards-setting firm to be liable.

[883] For a discussion whether *de facto* standards may constitute proof of an agreement under US law, see Chapter 3, Subsection 3.3.1.2.4. Consequences of standards. Under EC law, the adoption of a *de facto* standard by a competitor certainly constitutes parallel behavior. The fact the standard is anticompetitive may be seen as constituting the additional element which renders the parallel behavior illegal. On the other hand, an undertaking that merely adopted the *de facto* standard set by a market leader may have had only little choice or may have had business reasons which were not anticompetitive.

[884] Unless otherwise mentioned, the word "agreement" will be used in this section as encompassing as well a "decision by associations of undertaking and concerted practices."

[885] The assessment whether the agreement taking into account all its effects on competition (positive and negative) is restrictive of competition is generally conducted under Article 81(3).

[886] *Société Technique Minière v. Maschinenbau Ulm,* 56/65, [1966] ECR 235, p. 76.

[887] Under Regulation 17, the Commission had a monopoly to rule on what kind of agreement, decision or practice was to be exempted under Article 81(3) ECT. Thus, the question whether an agreement fulfilled this condition was critical, as only the Commission had the power to exempt it from competition liability once the agreement was deemed to be forbidden by Article 81(1) ECT. This must be read in conjunction with the fact that if an agreement had not been notified to the Commission, it had to be encompassed by a block exemption in order to be exempted. Now that individual exemptions under Article 81(3) ECT may also be granted by NCAs, the procedural importance of this condition has lost some significance.

The wording of the condition seems to draw a distinction between practices which have as their *object* the restriction of competition and those which have the *effect* of restricting competition. According to the ECJ in *Société Technique Minière v. Maschinenbau Ulm*,[888] the condition is fulfilled whenever one of these alternatives is satisfied.[889] It also clarified that it is only when an agreement does not have as its object the restriction of competition that the competition authorities have the duty of analyzing whether it has the effect of doing so.

The practice of the EC competition authorities has established that some agreements have the potential to threaten competition by their mere objective; these agreements are often referred to as "hardcore cartels." When an agreement falls into such a category,[890] it is not necessary to analyze whether it in reality has the effect of restricting competition.[891] Agreements may be deemed to have as their objective the restriction of competition when they tend to fix prices (either horizontally or vertically),[892] operate to create market- or customer-sharing, limit output, limit sales, aim at exchanging extensive price information,[893] or impose export bans[894].

If an agreement does not contain such provisions, it must be determined whether it nonetheless has the effect[895] of restricting competition. The ECJ has indicated that such an analysis is an empirical process that involves an appreciation of the market in which the agreement is purported to operate. In particular, the mere fact that an agreement entails a contractual restriction of the parties' freedom does not *ipso facto* indicate that competition has been restricted,[896] as the restriction of competition has to occur at the market level rather than

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[888] 56/65, [1966] ECR 235.

[889] See, similarly, *ANIC Partecipazioni* v. Commission, C-49/92 P, [1999] ECR I-4125, § 99.

[890] The Commission Guidelines on the application of Article 81(3) of the Treaty, supra at fn 860, provide at paragraph 22:

> *The assessment whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.*

[891] It must be noted that in these situations, in contrast with what occurs under the *per se* rule under US law, some kind of market analysis may still be required under EC law, as parties may argue that 1) no appreciable restriction of competition has taken place, and 2) the agreement must be exempted under Article 81(3) ECT as, on balance, it is profitable.

[892] See e.g., *European Night Services v. Commission*, T-374//94, [1998] ECR II-3141. Under some specific conditions, price-fixing may require some market analysis, see *Visa International-Multilateral Interchange Fee*, 2002 OJ L318/17.

[893] *Cimenteries CBR SA and Others v. Commission*, T-25/95, [2000] ECR II-491.

[894] *Consten Grundig v. Commission* (C-56 & 58/64) [1966] ECR 299, and *BASF v. Commission*, T-175 and T-176/95, [1999] ECR II-1581. But note that in *Javico v. Yves Saint Laurent*, C-306/96, [1998] ECR I-1983, the CFI analyzed an export ban under the effect approach.

[895] Both actual and potential anticompetitive effects are forbidden; see *John Deere v. Commission*, C-7/95 P, [1998] ECR I-3111.

[896] *Métropole Télévision (M6) and others*, [2001] ECR II-2459, § 76 and 77.

only the individual level.[897]. Moreover, an agreement can restrict competition even in the absence of a contractual restriction (for example, in information exchange cases.)[898]

The ECJ tends to regard favorably contractual restrictions that are necessary to reach a competitive goal (for example, the granting of exclusive rights necessary for the penetration of a market,[899] or the restriction of future competition from a vendor in relation to the purchaser of a business.[900]) This situation is often referred to as (business) "ancillary restraints."[901/902]

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[897] For a discussion of the criteria leading to the definition of the market, see Subsection 4.3.4.2.1. Relevant market.

[898] In assessing whether an agreement restricts competition, it is necessary to take into account the real competition possibilities of the parties. Thus, if due to the financial risks involved and the technical capabilities of the parties, it is unlikely on the basis of objective factors that each party would be able to carry out on its own the activities covered by an agreement, the parties cannot be considered as competitors for that activity. Commission Decision in *Elopak/Meral Box – Odin*, OJ 1990 L 209, p. 15. Note that the Commission considers that the parties must bear the burden of proving they do not have such capabilities.

[899] *Société Technique Minière v. Maschinenbau* Ulm, 56/65, [1966] ECR 235.

[900] *Remia BV and Verenidge Bedrijven and Nutricia v. Commission*, 42/84, [1985] ECR 2545.

[901] Under the Commission Guidelines on the application of Article 81(3) of the Treaty, supra fn 860, ancillary restraints are defined as follows (§ 29):

> *In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it. If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction fall outside Article 81(1). These related restrictions are called ancillary restraints. A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it. […]*

[902] R.WHISH/B.SUFRIN, "Article 85 and the Rule of Reason", in: [*1987] 7 Ox YEL 1*, and R.WHISH, supra at fn 662, pp. 124 and ff., are of the opinion that this does not amount to an introduction of the US rule of reason. Indeed, the CFI seems to have put such an import in doubt in *Métropole Télévision v. Commission*, T-112/99, [2001] ECR II-2459, where it stated (§ 72):

> *According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article 85 (1) of the Treaty is applied it is necessary to weigh the pro and anticompetitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that article. It should, however, be observed, first of all, that contrary to the applicant's assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instances have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful.*

The fact that, under the effect test, some cases seem to engage in a detailed analysis of the circumstances in which an agreement has been taken does not amount *ipso facto* to importing the US rule of reason. Whish argues that "rather, the more flexible judgments of the Courts demonstrates that they are not willing to find a restriction 'wholly abstractly'; instead a full market analysis is required" (supra at fn 662, p. 127). The authors went further by observing that if a full-fledged rule of reason was introduced into Article 81(1) ECT, Article 81(3) would lose much of its substance. In sum, even if the level of the effect analysis that has to be conducted under Article 81(1) is not absolutely clear, some kind of market analysis has to be conducted by the courts. When a pro-competitive (or, as in the *Wouters* case, a regulatory) objective are the real result of the agreement, and when the anticompetitive aspects of the agreement are necessary to pursue the pro-competitive objective, the agreement may be held to fall outside Article 81(1) ECT.

In *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*,[903] the ECJ was faced with a case where the Dutch Bar had established rules whereby lawyers were not allowed to represent clients in front of a court if they worked for an accountancy firm. The Dutch Bar, which was considered an association of undertakings, argued that it had created such a rule in order to protect, among other things, the lawyers' independence. The ECJ seemed to create a rule for appreciating situations where an undertaking or an association thereof "regulated" certain aspects of competition ("regulatory ancillary restraints"[904]):

> *Not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81(1)] of the Treaty. For the purposes of applications of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organization, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience […] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objective.*

This passage calls for a balancing between regulatory objectives and anticompetitive aspects of an agreement. The trouble is that Article 81(3) ECT seems better suited to accomplish such a task (or, at least, would lose much of its substance if such an analysis would already have been conducted under Article 81(1) ECT.) We have seen that under Regulation 17, the weighing of pro- and anticompetitive effects under Article 81(1) or 81(3) had important procedural consequences.[905] With the entry into force of Regulation 1/2003, such procedural consequences have been much attenuated, if they have not disappeared altogether.[906] Thus it is still too early to judge whether EC competition authorities may revert to a more inflexible approach towards Article 81(1) ECT.[907]

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[903] See as well fn 826.

[904] The terms of "business ancillarity" and "regulatory ancillarity" were used first by Justice Taft in *Addiston Pipe & Steel Company*, 85 F. 271 (6th Cir. 1898) and by R.WHISH, supra at fn 662, pp. 119 and ff.

[905] Agreements that violate Article 81(1) could only be exempted by the Commission either by a block or by an individual exemption. Individual exemptions were granted only if the agreement had been noticed previously, a process which was burdensome for both the undertakings and the Commission.

[906] Note that the burden of proof lies on the Commission under Article 81(1) ECT but on the parties under Article 81(3) ECT.

[907] In the Guidelines on the application of Article 81(3) of the Treaty, supra, the Commission states "the balancing of anti-competitive and pro-competitive effects is concluded exclusively within the framework laid down by Article 81(3)" and further cites recent CFI case law to that end (FN 10: "Case T-65/98, *Van den Bergh Foods*, [2003] ECR II-…, paragraph 107, and Case T-112/99, *Métropole Télévision (M6) and others*, [2001] See ECR II-2459, paragraph 74, in which the CFI held that it is only in the precise framework of Article 81(3) that the pro- and anticompetitive aspects of a restriction may be weighed." However, the rest of the notice does acknowledge at a later point the relevance of the ancillary restraint case law (§ 28 and ff.). Paragraph 30 reads:

> *The application of the ancillary restraint concept must be distinguished from the application of the defence under Article 81(3) which relates to certain economic benefits produced by restrictive agreements and which are balanced against the restrictive effects of the agreements. The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article 81(3).*

4.3.1.3.2. Consequences for standards

Standards could fall, in principle, under:

- the "object" approach,
- the "effect" approach of Article 81(1) ECT with its more-detailed market analysis, or
- the Article 81(3) ECT approach.

Concerning the first approach, genuine standards rarely involve the direct fixing of prices or the restriction of output; however, they may entail market sharing, extensive exchanges of information, or export bans. Thus, in *NV IAZ International Belgium v. Commission,*[908] in condemning a certification scheme the ECJ adopted an "object approach" although it also went through a very brief analysis of the effects of the agreement (§ 23,25,27):

> *[23] The agreement, regard being had to its content, its origin and the circumstances in which it was implemented, clearly expresses the intention of treating parallel imports less favorably than official imports with a view to hindering the former.*
>
> *[25][… the] purpose of the agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties, is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks. That finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the agreement to restrict competition.*
>
> *[27] It is clear from the foregoing considerations that the agreement is of such a kind as to make parallel imports […] more difficult, if not impossible, and that it is therefore capable of affecting trade between Member States. In view of the fact that, according to the observations submitted in these proceedings, signatory undertakings' share of the market is approximately 90% and is therefore very considerable, the conclusion must be drawn that the agreement had a restrictive effect on competition.*

The economic analysis was therefore extremely limited, if not abstract.[909] However, standards commonly require a more in-depth analysis of their economic impact. This kind of analysis has to be conducted either only under Article 81(1) ECT (if they are not considered to restrict competition) or under Article 81(3) ECT) as well (if they are considered to violate Article 81 (1) ECT, but are arguably justifiable under Article 81(3) ECT.) As we have seen, it is too early to tell under which paragraph standards will be judged by courts. At any rate, the pro-competitive effects of standards must be such as to outweigh their anticompetitive ones if they are to withstand an Article 81 ECT challenge.

No reference to the *Wouters* case law has been made in the Guidelines on Article 81(3) ECT.

[908] A.k.a. *Community v. Anseau-Navewa*, 96-102, 104-105. 108, 110/82, [1983] ECR 3369.

[909] Pursuant to J.FAULL/A.NIKPAY, *The EC Law of Competition*, Oxford, OUP, 1999, this judgment stands for the proposition that agreements that "by their very nature" restrict competition are treated as having that object.

4.3.2. Article 81(3) ECT

4.3.2.1. Overview

Even when an agreement falls within the scope of Article 81(1) ECT, it can still escape the sanction of Article 81(2) ECT ("automatic voidness") if it complies with the following four cumulative conditions set out in Article 81(3) ECT. The agreement must:

(a) improve the production or distribution of goods, or promote technical and economic progress; and
(b) allow consumers a fair share of the resulting benefits;

while it must not:

(c) impose on the concerned undertakings restrictions that are not indispensable to the attainment of these objectives; and
(d) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Parties to all types of agreements captured under Article 81(1) ECT are entitled to put forward proof that their agreement fulfills the conditions of Article 81(3) ECT. Thus, parties may argue that even hardcore restrictions are justified under Article 81(3) ECT, although practice does not reveal that the Commission is more than exceptionally willing to listen to such arguments.[910/911]

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[910] Under some specific circumstances, even price-fixing has been deemed justified. See, e.g., *Visa International-Multilateral Interchange Fee*, 2002 OJ L318/17, or Council Regulation 4056/86 on maritime transports, which provides a block exemption for horizontal price-fixing in the sector of international liner conferences.

[911] As to the scope of Article 81(3) ECT, the Guidelines on Article 81(3) ECT provide this comment (§ 43 and 44):

> *The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same. Indeed, in some cases only consumers in a downstream market are affected by the agreement in which case the impact of the agreement on such consumers must be assessed. This is for instance so in the case of purchasing agreements.*
>
> *The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case. When applying Article 81(3) in accordance to these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without taking due account of such ex ante investment. The risk facing the*

4.3.2.2. Improve the production or distribution of goods, or promote technical and economic progress

In interpreting this condition, it is necessary to understand which types of improvement can justify an agreement. It is clear from the wording of Article 81(3) ECT that agreements that increase efficiency should be tolerated.[912/913] The question is whether objectives other than economic efficiency such as social ones (employment, culture, environment, industrial policy, etc.) can justify the anticompetitive aspects of certain agreements. However, in *Ford/Volkswagen*,[914] the Commission noted that the social benefits accruing from increased employment could be taken into account when considering a joint venture.[915] In *Métropole Télévision SA v. Commission*,[916] the CFI went as far as stating:

> *(I)n the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [81(3)].*

This is of course crucial in the standardization discussion, as standards often go beyond economic objectives to pursue social goals as well. However, subsequent practice has not yet fully clarified to which extent this case law remains generally applicable to standards.

The Commission has published Guidelines on the application of Article 81(3) ECT[917] ("Guidelines on Article 81(3) ECT"). The Commission seems to take an exclusively economic view of the first condition, as at paragraph 59, it notes:

> *The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective economic efficiencies. There is considerable overlap between the various categories mentioned in Article 81(3) and the same agreement may give rise to several kinds of efficiencies.*

The Guidelines on Article 81(3) ECT further provide (§ 49-51):

> *It follows from the case law of the Court of Justice that only objective benefits can be taken into account. This means that efficiencies are not assessed from the subjective point of view of the parties. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share*

> *parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.*

[912] D.G.GOYDER, supra fn 642, p. 121, argues the agreements that fall within the first two categories of this condition (the improvement of production or distribution of goods) are much more tangible than the last two categories (the promotion of technical and economic progress.)

[913] It is an open question whether mere Caldor-Hicks efficiencies are enough to justify an exemption. At any rate, consumers are to be provided with a "fair share" of the benefits according to the second condition.

[914] [1993] 5 CMLR 617.

[915] A similar approach can be found in *Métro v. Commission*, 26/76, [1977] ECR 1875, § 43, in which the ECJ stated that the agreement was "a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavorable, comes within the framework of the objectives to which reference may be had pursuant to Article [81(3)]."

[916] T-528/93 etc, [1996] ECR II-649, § 118.

[917] OJ 2004, C 101/08.

markets they reduce output and thereby production costs. Reduced competition may also lead to lower sales and marketing expenditures. Such cost reductions are a direct consequence of a reduction in output and value. The cost reductions in question do not produce any pro-competitive effects on the market. In particular, they do not lead to the creation of value through an integration of assets and activities. They merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Article 81(3).

The purpose of the first condition of Article 81(3) is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for Article 81(3) to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.

All efficiency claims must therefore be substantiated so that the following can be verified:

(a) The nature of the claimed efficiencies;
(b) The link between the agreement and the efficiencies;
(c) The likelihood and magnitude of each claimed efficiency;
and
(d) How and when each claimed efficiency would be achieved.

4.3.2.3. Allow consumers a fair share of the resulting benefits

The concept of "consumer" has been interpreted relatively widely. The Commission defines it (§ 84):

> *The concept of "**consumers**" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.* [emphasis added]

The terms "fair share" have been interpreted by EC courts as giving a substantial degree of discretion to the competition authorities.[918] Based on the wording of *Consten Grundig*[919] and

[918] See, e.g., *Société d'hygiène dérmatologique de Vichy v. Commission*, T-19/91, [1992] ECR II-415.
[919] *Consten & Grundig v. Commission* (C-56 & 58/64) [1966] ECR 299.

Metro (I),[920] the Commission took a stricter view of these terms in its Guidelines on Article 81(3) ECT (§ 85-86):

> *The concept of "**fair share"** implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement. If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers. When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.*
>
> *It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits. If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits. If not, the second condition of Article 81(3) is not fulfilled.*[921]

The Commission seems therefore to refer to a compensation benchmark when assessing the "fair share" of benefits to consumers. Obviously, such a determination necessarily entails a certain degree of discretion. Courts have been very unwilling to put the Commission's discretion into discussion.

4.3.2.4. Not impose on the concerned undertakings restrictions which are not indispensable to the attainment of these objectives

The Commission Guidelines on Article 81(3) ECT provide the following framework for the interpretation of this condition (§ 73-74):

> *According to the third condition of Article 81(3) the restrictive agreement must not impose restrictions, which are not indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.*
>
> *In the context of the third condition of Article 81(3) the decisive factor is whether or not the restrictive agreement and individual restrictions make it*

[920] *Metro-SB-Grossmärkte GmbH & Co. v. Commission & SABA*, C-26/76, [1977] ECR 1875.
[921] This principle is further detailed under the subsequent paragraphs of the Guidelines on Article 81(3) ECT.

> *possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned. The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction.*[922]

Under the first prong of the test, competition authorities must determine whether in the "market conditions and the business realities" at stake, there are "no other economically practicable and less restrictive means of achieving the efficiencies" ("necessity test") (§ 75). In so doing, the Commission emphasizes that "undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical or theoretical alternatives" and that it "will not second guess the business judgment of the parties." Thus it will only intervene when it is reasonably clear that there are realistic and attainable alternatives (§ 76).

For the second prong of the test, the Guidelines on Article 81(3) ECT provide that "a restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialize" ("equal effectiveness.") (§ 79)[923]

4.3.2.5. Not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

If the agreement has the effect of threatening to eliminate, or eliminating, competition in respect of a substantial part of the products in question, it cannot be exempted under Article 81(3) ECT. It is important to understand that it is not necessary that a monopoly be created for the elimination of competition within the meaning of Article 81(3) ECT. Thus, in *Heintz Van Landewyck Sàrl v. Commission*,[924] the ECJ ruled that an agreement which affected 80% of a market could not be exempted under Article 81(3) ECT, as it would fail the fourth condition of this paragraph.

The Guidelines on Article 81(3) ECT on the application of Article 81(3) ECT provide (§ 107):

> *Whether competition is being eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about. The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated*

[922] This last sentence seems to highlight the main distinction as opposed to the concept of ancillary restraint. Under the latter concept, one must determine objectively whether the ancillary restraint is necessary for the agreement to be concluded by the parties, whereas under the indispensability test, one has to determine whether the agreement creates more efficiencies than its absence. Under this approach, one could view the ancillary restraint test as viewing necessity from the subjective perspective of the parties and the indispensability test as viewing necessity from a more objective global welfare perspective. The two categories may of course encompass different situations.

[923] Paragraph 79 further provides "[r]estrictions that are black listed in block exemption regulations or identified as hardcore restriction in Commission guidelines and notices are unlikely to be considered indispensable."

[924] 209-215, 218/78, [1980] ECR 3125.

within the meaning of Article 81(3). Moreover, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.

According to the Guidelines on Article 81(3) ECT, the following factors are relevant when assessing whether competition has been eliminated:[925] market shares, market conduct of the parties (in particular, past competitive interaction), the level of product substitutability, potential competition, and entry barriers.

4.3.2.6. Individual exemptions

Under Regulation 17, undertakings could request an individual exemption from the Commission, which had the exclusive power to this effect. As a result, the Commission was overloaded with agreements to be analyzed, although this system allowed it to shape a rather coherent policy towards many types of agreements. Regulation 1/2003 brought an end to this system as of May 1, 2004. However, Regulation 1/2003 does not require that Member States bring to an end their own system of exemptions under domestic law.

4.3.2.7. Group or block exemptions

Group (or block) exemptions regulations essentially set out the criteria under which agreements or practices are presumed to comply with Article 81 ECT. In relation to group exemptions, the Guidelines on Article 81(3) ECT provide (§ 35):

[W]hen an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Article 2 of Regulation 1/2003 of showing that their individual agreement satisfies each of the conditions of article 81(3). They only have to prove that the restrictive agreement benefits from a block exemption. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope 4fulfil each of the four conditions of laid down in Article 81(3).[926]

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[925] Note that in evaluating the level of post-agreement competition, Article 82 ECT must be taken into account. As the Commission hints (§ 106):

> *[I]n the application of [the concept of elimination of competition in respect of a substantial part of the products concerned], it is necessary to take account of the relationship between Article 81 and Article 82. According to settled case law the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty. Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of a dominant position.*

[926] Paragraphs 36 and 37 further provide:

> *If in an individual case the agreement is caught by Article 81(1) and the conditions of Article 81(3) are not fulfilled the block exemption may be withdrawn. According to Article 29(1) of Regulation 1/2003 the Commission is empowered to withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption regulation has certain effects which are incompatible with Article 81(3) of the Treaty. Pursuant to Article*

The following regulations are of particular interest in relation to standards:[927]

(a) Council Regulation 2821/71, which authorizes the Commission to grant block exemptions to standardization, research and development and specialization agreements. The Commission has made use of these powers and has issued Regulation 2658/2000 on specialization agreements and Regulation 2659/2000 on the application of Article 81(3) ECT to categories of **research and development agreements.**[928]

(b) Council Regulation 19/65, which authorizes the Commission to grant block exemptions to vertical agreements and licenses of intellectual property rights. The Commission has issued, *inter alia*, Regulation 772/2004 on the application of Article 81(3) ECT to categories of **technology transfer agreements**.[929]

Regulation 2659/2000 on research and development agreements may be of special significance as to standards. Dolmans[930] has argued that the R&D exemption could apply to most standardization programs as research and development is defined very broadly (Article 2.4. of the Regulation):

> *"Research and development" means the acquisition of know-how relating to products or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products and processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results.*

However, one should not take this statement too seriously, as at least some standardization does not necessarily include the "acquisition of know-how" or the "carrying out of theoretical analysis, systematic study or experimentation." Caution must therefore be used as long as the competition authorities have not issued any clear ruling.[931] This is all the more so when one

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> *29(2) of Regulation 1/2003 a competition authority of a Member State may also withdraw the benefit of a Commission block exemption regulation in respect of its territory (or part of its territory), if this territory has all the characteristics of a distinct geographic market. In the case of withdrawal it is for the competition authorities concerned to demonstrate that the agreement infringes Article 81(1) and that it does not fulfil the conditions of Article 81(3).*
>
> *The courts of the Member States have no power to withdraw the benefit of block exemption regulations. Moreover, in their application of block exemption regulations Member State courts may not modify their scope by extending their sphere of application to agreements not covered by the block exemption regulation in question (47). Outside the scope of block exemption regulations Member State courts have the power to apply Article 81 in full (cf. Article 6 of Regulation 1/2003).*

[927] The Horizontal Guidelines, which have a specific section on standardization agreements, will be dealt with later.
[928] OJ 2000 L 304/7.
[929] See also the Technology Transfer Guidelines of the Commission, OJ 2004 C 101/2.
[930] M.DOLMANS, *Standards for Standards*, Paper for the American Bar Association, Section of Antitrust, Spring meeting 2002, Session on Trade Associations, Washington DC, April 26, 2002.
[931] For a clear distinction between standardization and R&D agreements, see *X/Open Group* case, 87/69/EEC, Commission Decision, § 32, in which the Commission stated:

takes into account the fact the Commission has not made use of the potential to issue a regulation on standardization according to Council Regulation 2821/71. Moreover, the Commission has consistently ruled that agreements which do not conform to the spirit and the letter of a block exemption are not to be granted an exemption.[932/933]

To the extent standardization is nonetheless encompassed by such a definition, it could benefit from the exemption. As a result, the following advantages may be granted to standardization programs (Article 4 of the Regulation):

> *Where the participating undertakings are not competing undertakings, the exemption […] shall apply for the duration of the research and development. Where the results are jointly exploited, the exemption shall continue to apply for seven years from the time the contract products are first put on the market within the common market.*
>
> *Where two or more of the participating undertakings are competing undertakings, the exemption […] shall apply for the period referred to in paragraph 1 only if, at the time the research and development agreement is entered into, the combined market share of the participating undertakings does not exceed 25% of the relevant market for the products capable of being improved or replaced by the contract products.*
>
> *After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the combined market share of the participating undertakings does not exceed 25 % of the relevant market for the contract products.* [emphasis added]

Thus, it has to be concluded that some standards could come under this exemption whereas others will have to be assessed individually.

> *The [first mover] advantage […] is different in nature from the competitive advantage which the participants in a research and development project naturally hope to get over their competitors by offering a new product on the market; they hope that their new product will result in a demand from users but their competitors are not prevented from developing a competing product whereas in the present case non-members wanting to implement the standard cannot do so before the standard becomes publicly available and, therefore, are placed in a situation of dependence as to the members' definitions and the publication thereof.*

[932] See R.WHISH, supra at fn 662, p. 172 and the Commission decisions cited.

[933] It may also be argued that the Commission seems to clearly differentiate between standardization agreements and R&D agreements in its Horizontal Guidelines (§ 173):

> *As a general rule there should be a clear distinction between the setting of a standard and, where necessary, the related R & D, and the commercial exploitation of that standard. Agreements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality. For instance, it should be very clearly demonstrated why it is indispensable to the emergence of the economic benefits that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.*

4.3.3. Two special situations under Article 81 ECT

4.3.3.1. Oligopolies

One of the most important criticisms of monopolies is that monopolists are able to restrict output and raise prices above competitive levels[934] so that consumers are deprived of the suppressed output and competitive prices.

Oligopolies and their economic consequences have already been presented in Chapter 4. Remember, oligopolies are not necessarily bad from a competition perspective, as there are very competitive duopolies (see, e.g., the diaper industry in the US.) Thus, merely counting the number of competitors (market structure) does not necessarily indicate the level of competition. Much more important is the economists' concept of "power over a market," which is the power of one or more undertakings to diminish output and raise prices above the market equilibrium, thus harming consumers. This kind of power is much more likely to occur in oligopolistic markets as competitors are much more "aware" of each other given their restricted number and the possibility of signaling their market behavior more efficiently.

The economic and legal discussion on oligopolies is characterized by conflicting theories.[935] The competition authorities often face a difficult task when they have to proceed against oligopolies, as antitrust provisions usually require proof that undertakings positively "collude" (at least, tacitly) before sanctions can be imposed. In turn, proof of collusion is hard to put forward, as firms generally do not leave hard evidence of meetings where anticompetitive behavior has been agreed upon. However, what can be observed is parallelism in firm behaviors (mostly price parallelism.) The question whether (conscious) parallelism in itself is proof of collusion is answered negatively at least under EC and US law; therefore, there needs to be additional circumstantial evidence of collusion for sanctions to be triggered.[936] The elements beyond parallel conduct that are necessary for a violation of Article 81 ECT have been presented above under Subsections 4.3.1.1.2. Agreements and 4.3.1.1.4. Concerted practices and exchanges of information. However, as already emphasized, in the case of only a few market actors, the risks for competition often increase. Moreover, as explained in Chapter 3, the policing of a cartel can be greatly facilitated when product characteristics are standardized. Under specific circumstances, standardization agreements can thus be a tool for helping to police a cartel.

4.3.3.2. Collective refusals to deal (group boycott)

When cartels impose prices above the market equilibrium, outside firms may be tempted to enter the market to get a share of the supra-competitive benefits. Of course, when pondering whether to take such a step, outside firms will consider how cumbersome the entry into the market will be and what risks will have to be taken into account (barriers to entry.) However, cartel members generally do not sit by idly and wait for a new entrant; rather they will try to prevent the entrance of a new player with whom they will have to share their benefits. For example, incumbent firms may agree to refuse to provide access to a product essential for

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[934] This usually happens through price leadership schemes.

[935] See, among other critics, R.POSNER, *Antitrust Law*, 2d ed., University of Chicago Press, 2001 and R.BORK, *The Antitrust Paradox: A Policy at War with Itself*, Free Press, 1993.

[936] When the parties have communicated, the Commission has easily inferred collusion between them, *Shell v. Commission*, T-11/89 [1992] ECR II-757.

competitors to compete. Such schemes, which take many forms, are likely to violate Article 81 ECT.[937] For instance, in the standardization context, the ECJ condemned in *Chauffage Central*[938] a double exclusivity scheme between Belgian producers of washing machines and Belgian plumbers in which compulsory standards imposed on washing machines were used to keep imports largely out of the market.[939]

4.3.4. Article 82 ECT

4.3.4.1. Introduction

Article 82 ECT reads:

> *Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*
>
> *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *limiting production, markets or technical development to the prejudice of consumers;*
> *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contacts.*

Article 82 ECT is a necessary complement to Article 81 ECT. Whereas the latter focuses on agreements, decisions of associations of undertakings and concerted practices restrictive of competition, the former aims at forbidding unilateral conduct that could restrain competition. The assumption is that under some specific conditions and in the absence of express or tacit collusion, undertakings acting independently may reduce competition in an undesirable manner. However, it is important to take into account that dominance itself is not perceived as an evil, as only the abuse of a dominant position is condemned by Article 82 ECT. The perspective that an undertaking may gain market shares due to its competitive qualities is the central point of competition in a market, and the fact that it may expand its market share up to the point where other competitors are thrown out of the market seems to be only a natural

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[937] Unilateral refusal to deal may violate Article 82 ECT, see hereunder Subsection 4.3.4.3.2. Refusal to supply. As the Discussion Paper on the Review of Article 82 ECT provides, collectively dominant undertakings may also violate Article 82 ECT (§ 211):

> *A refusal to supply by several companies that are in a collectively dominant position can also be an abuse. This could take the form of refusing access to an input that is collectively owned by a group of companies. In addition, several collectively dominant companies refusing access to their individually owned inputs also could be abusive.*

[938] Décision de la Commission du 20 octobre 1972 relative à une procédure au titre de l'article 85 du traité CEE (IV/496-498-532-511-26238-26577 – "Chauffage central"), 1972 OJ L 264/22, Not available in English.

[939] See also e.g., *Van Landewyck v. Commission*, C-209/78, [1980] ECR 3125, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, T-4, 5/00, ECR II-5761.

consequence. However, competition theory tends to view this path to dominance with circumspection, as greater market shares are usually accompanied by greater power over the competitive conditions of the market. Indeed, the more an undertaking gains in market share, the greater the risk that it could use its market power to pursue its own material improvement rather than the fulfillment of consumer desires. Article 82 ECT can thus be seen as defining the limits imposed on undertakings that enjoy a dominant market position.[940]

Articles 81 and 82 ECT share many similarities in wording, with many concepts being defined similarly under both articles. The concepts of "undertakings," "effect on trade between Member States," "public undertakings," and "undertakings entrusted with exclusive or special rights" have already been analyzed under the previous sections dealing with Articles 81 and 86 ECT. Unlike these terms, the concept of a "substantial part of the common market" does not appear in Article 81 ECT and is found only in Article 82 ECT. This concept encompasses dominant positions which although they may not have an influence on trade between Member States, do have an impact on a substantial part of the common market. What constitutes such a substantial part has not been defined precisely; however under specific circumstances, even single facilities may have an influence on a substantial part of the common market.[941/942]

4.3.4.2. Dominant position

4.3.4.2.1. Relevant market

A preliminary step for an analysis under Article 82 ECT is to define the relevant market. The Commission has issued a Notice on the Definition of the relevant market for the purposes of Community competition law.[943]

Although the definition of the relevant market plays an important role in competition law,[944] it is often difficult to ascertain its exact boundaries.[945] European courts have at times quashed Commission decisions for their lack of a precise definition of the relevant market,[946] yet only rarely have they substituted their methods for determining a relevant market for those of the Commission.[947]

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[940] As already mentioned, under the Regulation 1/2003, Member States are free to apply or adopt, under their own national laws, stricter rules in relation to abuses of a dominant position that have an effect on inter-state commerce.

[941] See, e.g., *Merci Convenzionali Porto di Genova v. Siderurgica Gabriella*, C-179/90, [1991] ECR I-5889.

[942] Note also that the abuse (and its effects) does not need to take place in the same market as the dominant position, *Tetra Pak International SA v. Commission*, a.k.a. Tetra Pak II, C-333/94, [1994] ECR I-5951, and that the abuse does not need to entail any use of market power at all, *Europemballage Inc. & Continental Can Co. Inc. v. Commission*, 6/72, [1973] ECR I-2533.

[943] Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 on December 9, 1997, OJ 1997 C 372/5.

[944] For a brief summary of the multiple applications of this concept in EC law, see R.WHISH, supra at fn 662, pp. 26-27 and 46-48.

[945] For a summary of evidence accepted by the EC Commission, see Notice on the definition of relevant market for the purposes of Community competition law, supra, § 25 and ff., and *Britsih Leyland v. Commission*, 226/84, [1986] ECR 3263, where the ECJ remarked that regulatory intervention could create wholly separated markets, as well as *Nederlandsche Banden-Industrie Michelin v. Commission*, 322/81, [1983] ECR 3461, in which the ECJ analyzed the structure of supply and demand in remarking that customers bought and fitted replacement tires under other circumstances than for new tires, thus leading to a differentiation in the market.

[946] *Europemballage Inc. & Continental Can Co. Inc. v. Commission*, 6/72, [1973] ECR I-2533.

[947] For an example, see *Kish Glass & Co Ltd v. Commission*, T-65/96, [2000] ECR II-1885.

Traditionally, the definition of a relevant market is divided into two parts: the determination of a) the product and b) the geographic market.[948] The three main criteria for determining the boundaries of a relevant (product and geographic) market are demand substitutability, supply substitutability, and potential competition. These issues will be examined below.

a) Product market

According to European courts, in determining the relevant product market, the key concept is product substitutability (or "interchangeability.")[949] In its Notice on the relevant market,[950] the Commission states (§ 13):

> *[F]rom an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographic location of suppliers.*

The first important criterion is *demand substitutability*,[951] whose concept is defined by the Notice on the relevant market (§ 15-18):

> *The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed, as a thought experiment, postulating a hypothetical small, non-transitory change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant to define markets.*
>
> *Conceptually, this approach implies that starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included into or excluded from the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.*

[948] The further issue of temporal market (variation of substitutability in time) has been dealt with in *United Brands v. Commission*, 27/76, [1978] ECR 207. However, it is hardly relevant in the standardization context.
[949] See e.g., *United Brands v. Commission*, 27/76, [1978] ECR 207, § 22.
[950] Supra at fn 943.
[951] Supply substitutability can also play an important role,, but the market analysis usually begins with an appreciation of demand substitutability.

The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to an hypothetical small (in the range 5%-10%), permanent relative price increase in the products and areas being considered. If substitution would be enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographic areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test allows to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations […].[952]

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[952] It may happen that the actual market price cannot be relied on so as to apply the SSNIP test. In such cases, the market price is already distorted and a substitutability test may falsely indicate there is no (or only very limited) substitutability with another product. The reason lies in the fact that consumers are not likely to follow an increase in price because the dominant undertaking was already pricing at a monopoly level. This was pointed out in *US v. EI du Pont de Nemours and Co*., 351 U.S. 377 (1956). In order to avoid this so-called "Cellophane fallacy" (Du Pont produced cellophane)—the Commission has added in its Notice (§ 19):

> *Generally, […] the price to take into account will be the prevailing market price. This might not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.*

The Discussion Paper on the Review of Article 82 ECT, December 2005, available at http://www.europa.eu.int/comm/competition, further provides (§ 13):

> *The price charged by the allegedly dominant undertaking—if it is indeed dominant—will almost inevitably have been raised above the competitive level. Unless appropriately accounted for, this can lead to markets being defined too widely. This problem relates to the so-called SSNIP test and the "cellophane fallacy", [...]. The existence of the cellophane fallacy implies that market definition in Article 82 cases needs to be particularly carefully considered and that any single method of market definition, including in particular the SSNIP-test, is likely to be inadequate. It is necessary to rely on a variety of methods for checking the robustness of possible alternative market definitions.*

Other methods for checking possible alternative market definitions include the following (§ 18):

> *Another approach is to examine the characteristics and intended use of the products concerned and to assess whether they are capable of satisfying an inelastic consumer need. It is thus examined whether the characteristics of the products and their intended use are such that they differentiate the products in question from other products to such an extent that they are only to a small degree interchangeable with such other products and therefore not effectively constrained by them at competitive prices. In making this assessment regard must in particular be had to the needs of marginal consumers. In most cases it is not decisive that a certain group of consumers does not consider the products in question to be good substitutes. What matters is that a sufficiently large number of consumers do consider that a product is a good substitute for the product supplied by the undertaking concerned. If so, the two products form part of the same market, unless a single supplier of the product in question would be able to sell to consumers with less elastic demand at a higher price and prevent consumers with more elastic demand from reselling to the former group of consumers. In that case the group of consumers with less elastic demand may be in a market of their own.*

This test was first used in the US under the name of Small but Significant Non-transitory Increase in Price (or "SSNIP" test). Under this test, the competition agencies try to establish the behavior of consumers when the price is increased in a small but significant manner (i.e., between 5 and 10%). The products in whose favor a critical mass of consumers consistently switch are held to be part of the same market.

Nevertheless, it must be pointed out that the SSNIP test can be rendered illusory when market information is limited or inexistent. This is particularly so in "new" markets where standards might play a crucial role. In *British Interactive Broadcasting*,[953] the Commission ruled that it was not in a position to use the SSNIP test and thus had to use other tools. Among these, product characteristics and intended use have been cited in the Notice on the relevant market (§ 36).

Supply-side substitutability and *potential competition* may also be taken into account for the definition of the relevant product market (§ 20-24 of the Notice on the relevant market):

> *Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This requires that suppliers be able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.*
>
> *These situations typically arise when companies market a wide range of qualities or grades of one product; even if for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market provided that most of the suppliers are able to offer and sell the various qualities under the conditions of immediacy and absence of significant increase in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be summed to calculate the total value or volume of the market. The same reasoning may lead to group different geographic areas.*
>
> *[…]*
>
> *When supply side substitutability would imply the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply side substitution did not lead the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times*

[953] OJ [1999] L 312/1.

involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply side substitutability and other forms of potential competition would then be examined at a later stage.

The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and such position is indicative of concerns from a competition point of view.

b) Geographic market

In the Notice on the relevant market, the Commission declared (§ 29-30):

The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics [...] in order to establish whether companies in different areas do really constitute an actual alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

If necessary, a further check on supply factors will be carried out to ensure that those companies located in distinct areas do not face impediments to develop their sales on competitive terms throughout the whole geographic market. [...] In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

4.3.4.2.2. Dominance

Absolute monopoly does not occur frequently unless triggered by legislative intervention or very special market conditions.[954] However, even in the presence of competitors, some undertakings may behave independently from their competitors. The situation in which an undertaking is able to act independently is usually referred to as a dominant position.[955]

[954] For example, that is the case when the minimum viable scale (MVS) is so high that only one firm can reach it.
[955] C-27/76, *United Brands*, [1978] ECR 207.

A dominant firm necessitates a high degree of market power, i.e., the potential to influence the market in which it competes. The way such market power is measured has evolved through case law. Today, no unique factor exists for conducting such an assessment; however, market shares[956] have been and still are an indication of market power.

Concerning market shares, the ECJ stated in *Hoffman-La Roche v. Commission*[957] (§ 41):

> *Although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for—without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share —is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.* [emphasis added]

The ECJ decided that large market shares may be decisive in establishing market power.[958] However, it put forth two caveats:

1. In exceptional circumstances, market shares may not alone be conclusive (for example, in case of high barriers to entry, even smaller market shares may be a sufficient ground for accepting a dominant position.)

2. Market shares must be maintained for some time, as a large market share for only a short period of time generally does not allow an undertaking to act independently.

However, the ECJ has not precisely defined the terms "large market share" and "exceptional circumstances." In *AKZO v. Commission*,[959] the ECJ stated (§ 60):

> *With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment in Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41). That is the situation where there is a market share of 50% such as that found to exist in this case.*

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[956] Market shares are usually based on the turnover of undertakings, although sales volumes may also be taken into account, in particular for base products, Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] C 372/5, nr. 53-55.

[957] 85/76, [1979] ECR 461.

[958] For example, in *Hoffman La Roche*, supra at fn 210, the ECJ stated (§ 41):

> *[…] although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.*

[959] C-62/86, [1991] ECR I-3359.

Thus, in the absence of exceptional circumstances, a market share of 50% creates a presumption of dominance. The question whether market shares under 50% can also be sufficient for creating a dominant position has been dealt with on numerous occasions by the EC courts. In *United Brands Co. v. Commission*,[960] market shares between 40 and 45% were held to be dominant in conjunction with other factors leading to the same conclusion. The Commission has held that a dominant position is generally affirmed when an undertaking controls a market share of 40 to 45%, but that it cannot be ruled out for undertakings controlling only 20 to 40% of a market.[961]

At the other extreme of the spectrum, it would seem undertakings that control very large shares of a market may have a "special responsibility" not to abuse their position.[962] In *Compagnie Maritime Belge de Transports SA v. Commission*,[963] the ECJ stated (§ 114):

> *[T]he actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened (Case C-333/94 P Tetra Pak v Commission [1996] ECR I-5951, paragraph 24).*

However, this case related to a market where special circumstances existed. The maritime transport market was regulated by a specific EC regulation with EC competition law being only partially applicable. The ECJ condemned the selective price-cutting *in this market* and *in this case* as it could have allowed an undertaking in a dominant position to protect its position (i.e. to exclude competitors.)[964] In its decision, the ECJ described the special position and responsibility bestowed on undertakings that hold very high market shares, but it did not rule out the legality of some selective pricing schemes (even in the maritime transport market), specifying that it constituted an abuse only in the case at hand, as the market share of the dominant firm exceeded 90%.[965]

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[960] 27/76, [1978] ECR 207.
[961] Commission's Xth report on competition Policy (1980), point 50.
[962] *Michelin v. Commission*, [1983] ECR 3461, § 57.
[963] C-395/96, [2000] ECR I-1365.
[964] The ECJ clarified (§ 116-117):

> *[T]he authorisation to fix rates was granted to liner conferences because of their stabilising effect and their contribution to providing adequate efficient scheduled maritime transport services. The result may be that, where a single liner conference has a dominant position on a particular market, the user of those services would have little interest in resorting to an independent competitor, unless the competitor were able to offer prices lower than those of the liner conference.*
>
> *It follows that, where a liner conference in a dominant position selectively cuts its prices in order deliberately to match those of a competitor, it derives a dual benefit. First, it eliminates the principal, and possibly the only, means of competition open to the competing undertaking. Second, it can continue to require its users to pay higher prices for the services which are not threatened by that competition.*

[965] Id. at § 117-118:

> *It is not necessary, in the present case, to rule generally on the circumstances in which a liner conference may legitimately, on a case by case basis, adopt lower prices than those of its advertised tariff in order to compete with a competitor who quotes lower prices, or to decide on the exact scope of the expression uniform or common freight rates in Article 1(3)(b) of Regulation No 4056/86.*

In new markets characterized by rapid technological development, a high market share does not automatically lead to a dominant position when such a position is only temporary, and when the rest of the market is open to competition.[966]

Among the factors that might reinforce a claim of dominance, barriers to entry are particularly important. Indeed, even when controlling a high market share, an undertaking may have almost no market power when entry into the market is immediate and without cost. In this case, supra-competitive prices would give other firms strong incentives to enter into the market.

The definition of entry barriers[967] is controversial among economists. Stigler[968] defines it as "a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry. On the other hand, the "Bainian"[969] school of economists which is very influential among competition authorities defines barriers to entry as "the extent to which, in the long run, established firms could elevate their selling prices above the minimal average costs of production and distribution without inducing potential entrants to enter the industry." A third view is that any cost that may render entrance costly is an entry barrier, without directly comparing costs of the incumbent and of the new entrant. Examples of barriers to entry may include sunk costs, legislative intervention, favorable access to capital (deep pockets), minimum viable scale (MVS), vertical integration, or superior technology.[970/971] In practice, it is difficult to

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> *It is sufficient to recall that the conduct at issue here is that of a conference having a share of over 90% of the market in question and only one competitor. The appellants have, moreover, never seriously disputed, and indeed admitted at the hearing, that the purpose of the conduct complained of was to eliminate G & C from the market.*

[966] *MSG Media Service* case, case IV/M.469, [1994] OJ L 364/1, 94/922/EC, Commission Decision of November 9, 1994, (§ 55):

> *MSG will be the first supplier of technical and administrative services for pay-TV and other payment-financed communication services in Germany. Apart from Selco, an undertaking established in a special market segment, MSG will probably be the only supplier of such services on the German market in the near future and will thus have a monopoly. Although a monopoly in a future market that is only just beginning to develop should not necessarily be regarded as a dominant position within the meaning of Article 2 (3) of the Merger Regulation, the assumption that no market dominance exists presupposes in such a case that the future market in question remains open to future competition and that the monopoly is consequently only temporary. However, this condition is not met in the present case. One can expect that the market for the services offered by MSG is being sealed off already in the development phase by the establishment of the joint venture and that MSG will acquire a long-term monopoly.*

[967] In spite of the importance of such a concept, there is no specific Commission Notice on these terms. However, a quick discussion may be found in the Commission Guidelines on Vertical Agreements, OJ [2000] C/291/1, § 126-129.

[968] G.J.STIGLER, *The Organization of Industry*, Irwin Publishers, 1968.

[969] J.BAIN, *Barriers to New Competition,* Harvard University Press, 1956 and *Industrial Organization*, John Wiley & Sons Inc., 1968. Instead of average costs, marginal costs have been suggested by some as an alternative benchmark, J.M.FERGUSON, *Advertising and Competition: Theory, Measurement, Fact*, Ballinger Publ. Co., 1974.

[970] For a brief presentation on possible barriers to entry, see Chapter 3, Subsection 3.3.1.1.2. Barriers to entry.

[971] The Discussion Paper on the Review of Article 82 ECT, December 2005, available at http://www.europa.eu.int/comm/competition, mentions (§ 40):

determine which definition is applicable, although the Bainian definition seems to be slightly more favored. As Jenny[972] puts it:

> *Competition agencies in most OECD countries are comfortable with either a general, imprecise definition of barriers to entry or no definition at all, and they focus instead on analyzing actual market situations.*[973]

4.3.4.2.3. Excursus: Abuse of collective dominance under Article 82 ECT

Article 82 ECT condemns abuses of a dominant position "by one or more undertakings." A narrow reading would suggest that these terms refer only to the possibility that a dominant position may be the result of actions of different firms within a group of undertakings. However, under a broader view, the term encompasses situations where undertakings, although legally and economically independent, *collectively* enjoy a dominant position.

The Commission endorsed this broader view in the *Italian Flat Glass*[974] case, in which it decided that Italian producers of glass held a collective dominant position in addition to infringing Article 81 ECT on grounds of price-fixing.[975] The CFI admitted that a collective dominant position may exist when firms are "united by such economic links that, by virtue of that fact, together they hold a dominant position," but cautioned that the Commission was not allowed to recycle the fact of an infringement under Article 81 ECT in order to prove an infringement under Article 82 ECT.[976] After this case, the concept of collective dominance

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> *When identifying possible barriers to expansion and entry it is important to focus on whether rivals can reasonably replicate circumstances that give advantages to the allegedly dominant undertaking.*

The following are identified by the Discussion Paper as a cause of such barriers (§ 40): legal barriers, capacity constraints, economies of scale and scope, absolute cost advantages, privileged access to supply, highly developed distribution and sales networks, established position of incumbent firms where experience and reputation is necessary to compete effectively, and situations where it is costly for customers to switch to a new supplier (sunk costs.).

[972] F.JENNY, *Barriers to Entry and the Assessment of Dominance*, CRA Conference on Economic Development in European Competition Policy, December 15, 2005.

[973] Note however that New Zealand has expressly adopted the Stiglerian definition while the British OFT authority seems to have endorsed the Bainian view.

[974] [1989] OJ L33/44.

[975] The Discussion Paper on the Review of Article 82 ECT, December 2005, also endorses the broader view (§ 43):

> *Article 82 prohibits any abuse by one or more undertakings of a dominant position. It follows that the application of Article 82 is not confined to cases where a single undertaking holds a dominant position; it is also applicable where two or more undertakings together hold a dominant position.*

[976] *Società Italiana Vetro SpA v. Commission*, *Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA*, joint cases T-68/89, T-77/89, T-78/89, [1992] ECR II-1403 (§ 358, 360):

> *The Court considers that there is no legal or economic reason to suppose that the term "undertaking" in Article [82] has a different meaning from the one given to it in the context of Article [81]. There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market**, united by such economic links*** *that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have,*

was often applied by the Commission,[977] although it remained difficult to understand what it actually encompassed, as the decisions repeat themselves without elaborating on a more detailed definition.

In *Compagnie Maritime Belge Transports v. Commission*,[978] the ECJ finally had the occasion to provide its understanding of the concept. The ECJ makes clear that (§ 36-37):

> *[T]he expression one or more undertakings in Article [82] of the Treaty implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. That is how the expression collective dominant position, as used in the remainder of this judgment, should be understood.*
>
> *However, a finding that an undertaking has a dominant position is not in itself a ground of criticism but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see Michelin, paragraph 57.)*

With this statement, the ECJ seemed to give the *ratio legis* of the collective dominance concept.[979] The reference to the *Michelin* case (which relates to the "special responsibility" of

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> *through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers (judgment of the Court in Hoffmann-La Roche, cited above, paragraphs 38 and 48.)*
>
> *[...]*
>
> *However, it should be pointed out that for the purposes of establishing an infringement of Article [82] of the Treaty, it is not sufficient, as the Commission' s agent claimed at the hearing, to "recycle" the facts constituting an infringement of Article [81], deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position.* [emphasis added]

[977] For example *Port of Rödby*, [1994] OJ L 258/1, *CEWAL*, [1993] OJ L 34/2, [1995] 5 CMLR 198, on appeal *CMBT v. Commission*, or *French-West African Shipowners' Committees*, [1992] OJ L134/1, as well as paragraph 79 of the Notice on Access Agreements in the Telecommunications Sector, [1998] OJ C265/2:

> *In addition, for two or more companies to be jointly dominant it is necessary, though not sufficient, for there to be no effective competition between the companies on the relevant market. This lack of competition may in practice be due to the fact that the companies have links such as agreements for cooperation, or interconnection agreements. The Commission does not, however, consider that either economic theory or Community law implies that such links are legally necessary for a joint dominant position to exist (59). It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations. There does not seem to be any reason in law or in economic theory to require any other economic link between jointly dominant companies. This having been said, in practice such links will often exist in the telecommunications sector where national TOs nearly inevitably have links of various kinds with one another.*

[978] C-395/96, [2000] ECR I-1365.

[979] One may wonder whether the distinction between parallel behavior (which is not illegal) and concerted practice (which is illegal) operated under Article 81 ECT is not duplicated under Article 82 ECT as well.

dominant undertakings) is certainly not random. Collective dominant firms may be subject to Article 82 ECT as according to the ECJ, they bear a special responsibility towards other firms and the market itself. Unfortunately, the ECJ does not go into detail as to the rationale for the imposition of a special responsibility, instead just further indicating (§ 41-45):

> *In order to establish the existence of a collective entity as defined above, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned.[…]*
>
> *In particular, it must be ascertained whether economic links exist between the undertakings concerned which enable them to act together independently of their competitors, their customers and consumers (see Michelin, cited above).*
>
> *The mere fact that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article [81](1) of the Treaty does not, of itself, constitute a sufficient basis for such a finding.*
>
> *On the other hand, an agreement, decision or concerted practice (whether or not covered by an exemption under Article 85(3) of the Treaty) may undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers.*
>
> *The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.*

Thus, it is clear from the above the existence of a "legal link" between undertakings is not indispensable to a finding of a collective dominant position as long as other economic links bind them.[980] As the Discussion Paper on the review of Article 82 ECT[981] summarizes (§ 44-46):

> *For collective dominance to exist under Article 82, two or more undertakings must from an economic point of view present themselves or act together on a particular market as a collective entity. It is not required that*

However, under Article 81 ECT an agreement is a legal condition to prosecution whereas no agreement is necessary under Article 82 ECT. Economists would respond that from a welfare maximization point of view, it does not matter whether parallelism is "concerted" or independent; what matters is that equilibrium prices are not reached.

[980] This is also in line with the jurisprudence on collective dominant positions in merger cases: e.g., *Gencor Ltd v. Commission*, T-102/96, [1999] ECR II-753, *France v. Commission* (a.k.a. *Kali und Salz* case) C-68-94 and 30/95, [1998] ECR I-1375, *Airtours v. Commission*, T-342/99 [2002] ECR II-2585.

[981] Available at: http://www.europa.eu.int/comm/competition.

the undertakings concerned adopt identical conduct on the market in every respect. What matters is that they are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.

In order to establish the existence of such a collective entity on the market, it is necessary to examine the factors that give rise to a connection between the undertakings concerned. Such factors may flow from the nature and terms of an agreement between the undertakings in question or from the way in which it is implemented, provided that the agreement leads the undertakings in question to present themselves or act together as a collective entity. This may, for instance, be the case if undertakings have concluded cooperation agreements that lead them to coordinate their conduct on the market. It may also be the case if ownership interests and other links in law lead the undertakings concerned to co-ordinate.

However, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position. Such a finding may be based on other connecting factors and depends on an economic assessment and, in particular, on an assessment of the structure of the market in question. It follows that the structure of the market and the way in which undertakings interact on the market may give rise to a finding of collective dominance.

The relationship between the concepts of concerted practices in Article 81 ECT and collective dominance in Article 82 ECT is not clear-cut. Under Article 81 ECT, the Commission or the complainant need to bring forth proof of an agreement between undertakings while under Article 82 ECT, they must only bring evidence of a "link" between the parties which renders the undertakings a "single entity." The main advantage of Article 82 ECT lies in the fact that it does not require proof of an agreement between undertakings. This may be extremely helpful in cases such as oligopolies where proof of an agreement may turn out to be a quixotic endeavor. The proposition has not been tested whether a standard (in particular a *de facto* standard) may be considered as a sufficient link for a finding of a collective dominant position.

The next step is to determine whether collective dominance *per se* constitutes abuse under Article 82 ECT, or whether a finding of exploitative or exclusionary[982] behavior is also necessary. This is not a rhetorical question as collectively dominant firms are able to raise prices above market equilibrium. As mentioned above, the ECJ found that collective dominance alone was not enough for a finding of abuse. This is certainly consistent with the jurisprudence on Article 81 ECT, where in the absence of an agreement between undertakings (even a tacit one), mere parallelism does not constitute a violation of competition rules. However, this does not mean that excessively high prices would not be considered an abuse of

[982] An abuse of collective dominance (such as a single firm's abuse of dominance) may be anticompetitive in the situation where dominant firms engage in practices that aim at fending off the possibility of new firms entering the market. This was the case in *CEWAL*, [1993] OJ L 34/2, [1995] 5 CMLR 198 and *TACA* (Trans-Atlantic Conference Agreement), [1999] L 95/1, where the Commission condemned the practice of a liner conference member (in the transport sector, Article 81 ECT is not applicable to certain cartels) refusing to provide individual contracts to customers and inducing new entrants to enter into the cartel (however, these findings were not entirely upheld by the CFI in *TACA*, joined cases T-191/98, T-212/98 to T-214/98 [2002] ECR II-875.)

a collective dominant position. As Whish notes, in such cases "the abuse would lie not in the *parallelism* of the prices, but in their *level*."[983] The trouble lies obviously in determining whether prices are excessively high or whether they are the mere result of "intelligent parallelism," with it being of course extremely difficult to distinguish between the two. In practice, a "but for" test would suggest this question be asked: would a company individually decide to price at this level, or would it decide to do so in light of some form of concerted practice?

The discussion on oligopolies and collective dominance is especially relevant in the context of *de facto* standards set by a single firm and followed by competitors. In case of collaborative standards, an agreement on product characteristics or performance requirements has been entered into so that the standardization process can usually be analyzed under Article 81 ECT. Although there is not much case law on this issue,[984] it seems clear that the fact the abuse of dominance is enacted through the characteristics of the product instead of its price should not be an obstacle to its being sanctioned.

4.3.4.3. Abuse

4.3.4.3.1. Generally

The mere fact a firm holds a dominant position is not forbidden, as legal firms exist with a market share above 50%. What Article 82 ECT forbids is the abuse of such a dominant position. Competition law should not forbid competition "on the merits," but only practices that have the result of hindering competition in an unfair way.

In *Hoffman-La Roche v. Commission*,[985] the ECJ defined the concept of abuse of a dominant position (§ 91):

> *The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in product or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*

Beyond the list given by Article 82 ECT, the definition of abuse has given rise to abundant case law. Schematically, it can be divided into cases: a) where the dominant firm tries to exploit its position to extract extra-competitive benefits (exploitative abuse or exploitation, which usually has vertical effects); b) where the dominant firm takes advantage of its clout to avoid even potential competition from its competitors (anticompetitive, exclusionary abuse or

[983] R.WHISH, cited above at fn 662, p. 527.
[984] Unless one sees the *CEWAL*, [1993] OJ L 34/2, [1995] 5 CMLR 198 and *TACA* (Trans-Atlantic Conference Agreement), [1999] L 95/1, discussed in fn 982, cases as being standards case law, as they deal with standard terms of supply.
[985] 85/76, [1979] ECR 461.

exclusion, which usually has horizontal effects); and c) where the dominant firm is an impediment to the goal of a single market.[986]

a) Exploitative abuse

Unfair prices are expressly prohibited by Article 82 (2) litt. a ECT. Courts have not defined unfair prices in detail,[987] as it is often difficult for a court to reconstruct prices, and proxies have sometimes been held unreliable.[988] However, it is evident unfair prices are those above the market equilibrium which thus allow the dominant firm to extract supra-competitive profits from the market.

b) Anticompetitive abuse

The dominant undertaking may also be in a position to influence the competitive process, as it may thus be protected not only from price competition but from quality competition as well. Community courts have not only condemned the practices of dominant undertakings who *actively* pursue the reduction of competition[989] but have also called into question the contention that a dominant undertaking could merely *passively* be a hindrance to competition, notably to the use of better technology. In *British Telecommunications*,[990] the ECJ decided that BT impeded had the use of a new technology, which was an abuse under Article 82 ECT(§ 34):

> *[…] the new restriction […] which prohibits UK message-forwarding agencies from using their telephone lines for relaying telex and other visual messages between countries outside the United Kingdom, is an abuse under Article [82] (b) of the [EC] treaty as it both limits the development of a new market and the use of new technology to the prejudice of relay operators*

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[986] J.TEMPLE LANG, "Some Current Problems in Applying Article 82 EC", in C.BAUDENBACHER (ED.), *Neuste Entwicklungen im europäischen und internationalen Kartellrecht*, Schulthess, 2000, sees another third category, retaliatory abuses, which are used by a dominant firm to discourage a competitor from entering into competition. Note that such distinctions are purely theoretical, and in practice some behavior may be deemed both exclusionary and exploitative (for example, the two phases of predation.)

[987] See e.g., C-26/75, *General Motors Continental NV v. Commission*, [1975] OJ L 29/14, (§ 250, "charging a price which is excessive because it has no reasonable relation to the economic value of the product is […] an abuse.") In the *United Brands Co. v. Commission* case, C- 27/76, [1978] ECR 207, the ECJ stated the Commission had the burden of proving that a price was unfair. The ECJ also clarified that one should determine "whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, to consider whether a price has been charged which is either unfair in itself or when compared to other competing products." (§ 252)
Excessively low prices can also be an abuse of a dominant position. See in particular, *AKZO Chemie BV v. Commission*, C-62/86, [1991] ECR I-3359; the *Tetra Pak II* case, C-333/94, *Tetra Pak International SA v. EC Commission*, [1996] ECR I-5951; and the *Wanadoo* case, Case N° IP/03/1025.
Price discrimination has been dealt with in the *Irish Sugar* case, T-228/97, [1999] ECR II-2969, appealed, C-497/99, [2001] ECR I-5332.

[988] This may be one of the reasons why the American approach towards monopolization (in particular, Section 2 of the Sherman Act) does not prohibit exploitive behavior but merely exclusionary conduct.

[989] Whether Article 82 ECT was intended to protect anyone beyond consumers (including competitors) has raised controversy (contra: R.JOLIET, *Monopolisation and Abuse of Dominance*, 1970, in particular placing special emphasis on the divergent wording of the ECSC and EC Treaty.) In *Europemballage Inc. & Continental Can Co. Inc. v. Commission*, 6/72, [1973] ECR I-2533, the ECJ clearly adopted the view that the competitive process should also be protected.

[990] OJ [1982] L 360/36. Upheld on appeal in *Italy v. Commission*,, 41/83, [1985] ECR 873.

> *and their customers who are thus prevented from making more efficient use of existing telecommunication systems. The fact that in so doing the message-forwarding agencies are simply exploiting the tariff differentials existing between telex and telephone services provided by the telecommunication authorities is irrelevant. Even if this were to result in fewer telex messages, thereby providing savings in costs to the users, this would not put the entire international telex system at risk. The maintenance of obsolete systems through measures taken by an undertaking in a dominant position is an abuse under Article [82] (b) of the [EC] Treaty in that it limits technical development to the prejudice of consumers.*

In *Merci Convenzionali Porto di Genoa v. Siderurgica Gabrieli*,[991] the ECJ stated (§ 19-20):

> *[I]t appears from the circumstances […] that the undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question are, as a result, induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, which involves an increase in the cost of the operations and a prolongation of the time required for their performance, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers.*
>
> *In these circumstances it must be held that a Member State creates a situation contrary to [Article 82] of the Treaty where it adopts rules of such a kind as those at issue before the national court, […].*

Note however, that these cases mainly deal with restrictions imposed by legislative fiat. In a case relating to standards, it may be quite conceivable that such imposition could result from network externalities, thus creating a situation very similar to the above-mentioned cases.

c) Obstacles to the single market

Practices of a dominant firm which impede the realization of the single market have been held as abuses within the meaning of Article 82 ECT.[992] Undertakings enforcing export[993] or import[994] bans have been held liable under the competition rules, and rebates and discounts with the same objectives have also been condemned.[995] In the *British Leyland* case,[996] the ECJ ruled that a motor vehicle manufacturer may not rely on the selective distribution system it had set up in a Member State in order to create (by not renewing type approval) obstacles to the re-importation of vehicles from another Member State by retailers outside its distribution network. Specifically, Leyland produced both cars with a left-hand drive and those with a

[991] 179/90, [1991] ECR I-5889.
[992] Other practices have also been ruled as an abuse (for example, tying); however, as these practices are rarely relevant for standardization, they will not be dealt with hereunder.
[993] *Cooperatieve Vereiniging 'Suiker Unie' UA v. Commission,* 40/73, [1975] ECR 1663. *United Brands Co. v. Commission,* 27/76, [1978] ECR 207.
[994] *British Leyland PLC v. Commission*, 226/84, [1986] ECR 3263 and *Amministrazione Autonoma dei Monopoli dello Stato*, T-139/98, [2001] ECR II-3413.
[995] *BPB Industries plc and British Gypsum v. Commission*, 310/93, [1995] ECR I-865.
[996] *British Leyland PLC v. Commission*, 226/84, [1986] ECR 3263.

right-hand, but omitted to renew the authorization for left-hand drive cars to protect its distribution network from re-imports.

d) Justifications

In determining whether a practice can constitute an abuse, EC competition authorities are likely to analyze whether the practice can be objectively justified or is proportionate to a pro-competitive goal.[997] However, practice suggests that EC competition authorities do not accept such justifications easily. By granting the possibility of justifying a potentially abusive behavior, competition authorities seem to interpret the word "abuse." Indeed, there seems to be no other interpretative room for justifications in Article 82 ECT, in contrast to Article 81 ECT which expressly refers to such a possibility.

As Goyder points out:

> *Since [under Article 82 ECT] the prohibited action is an "abuse" of existing market power, logically there can be no exceptions of the kind available under the "four conditions" contained in Article 81 (3). If the dominant company wishes to raise arguments of the kind considered by DG Comp when reviewing the application of these four conditions, it will have to do so by contesting the Commission's claims that the acts which it admits to performing are an "abuse." and establishing that they are no more than the normal use of its economic strength within the boundaries of legitimate competition, or justified on other grounds. Whilst there is a right in at least refusal to deal cases to rely on "commercial justification" as a defense, this is considerably more limited in scope than the exemptions made available under Article 81(3).*[998]

4.3.4.3.2. Refusal to supply

a) Generally

Under certain circumstances, competition law forbids a dominant undertaking *not* to entertain fair commercial relationships with other economic entities.[999/1000] This is naturally at odds

[997] See, e.g., *British Midland v. Aer Lingus*, Commission Decision of February 26, 1992, 1992 OJ L96, or *Hilti AG v. EC Commission*, C-53/92, [1994] ECR I-666, where the ECJ examined in detail whether the tying in of a product could be justified by security reasons, concluding there was no such reason. The CFI in *Hilti AG v. Commission*, T-30/89, [1991] ECR II-1439) went so far as to state that public laws in the UK forbade the sale of dangerous products and that, therefore, Hilti was not required to take its own steps to eliminate such products. In *Centre belge d'études de marché Télémarketing v. CLT*, 311/84, [1985] ECR 3261, § 26, the ECJ held that a dominant undertaking excluding competition in a downstream market would constitute an abuse if there was no objective necessity to do so. See also the case of *Tetra Pak I (BTG Licence)* of 26.07.1988, N° IV/31043, § 49-52, upheld by *Tetra Pak Rausing SA v. Commission* (a.k.a. *Tetra Pak I*), T-51/89, [1990] ECR II-309, especially the opinion of the AG on proportionality, which was upheld by the ECJ in *Tetra Pak International SA v. Commission*, C-333/94, [1994] ECR I-5951, in particular § 37 and ff. See also more recently the *TACA* (Trans-Atlantic Conference Agreement) case (CFI judgment in joined cases T-191/98, T-212/98 to T-214/98 [2002] ECR II-875, of September 30, 2003, where the CFI negated the existence of objective justifications.

[998] D.G.GOYDER, supra at fn 642, p. 325.

[999] The doctrine forbids not only an outright refusal to deal, but also dilatory tactics which amount to refusal to deal; see *Deutsche Post AG*, Decision of July 25, 2001, 2001 OJ L331, 15.12.2001. Discriminatory pricing can

with the freedom to choose one's commercial partners. However, it is generally justified by the idea that in refusing to deal with others, the dominant undertaking is trying to take advantage of its market position.

The foundational case is *Instituto Chemioterapeutico Italiano SpA and Commercial Solvents Corp v. Commission*.[1001] *In casu*, Commercial Solvents, a company producing various chemical specialties, refused to continue[1002] to supply Zoja, a competitor in the downstream market,[1003] with aminobutanol, an important input for the drugs Zoja produced. The commercial motive behind the cessation of supply was probably that ICI, Commercial Solvents' subsidiary, intended to produce drugs itself. The ECJ took pains to state its prohibition precisely (§ 25):

> *[A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the common market. Since such conduct is contrary to the objectives expressed in Article 3 (f) of the treaty and set out in greater detail in Articles [81] and [82], it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article [82].*

In *United Brands Co. v. Commission*,[1004] the ECJ similarly held a refusal to supply a former customer incompatible with Article 82 ECT even though the former customer had participated in the promotion of another brand. Given the market position of United Brands (which also

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also be seen as an abuse in itself, see Commission Decision in the *Clearstream* case, cited hereunder. In this study, the terms "refusal to deal," "refusal to sell," and "refusal to supply" are used synonymously.

[1000] Note that in the telecommunications sector, special rules on refusals to deal have been established by the Notice on the application of competition rules to the telecommunications sector—framework, relevant markets and principles ("Access Notice"), OJ C 265, pp. 2-28, in particular § 83-130.

[1001] A.k.a. the *Commercial Solvents* case, C-6&7/73)[1974] ECR 223.

[1002] The refusal to supply doctrine applies to both old and new customers. See, e.g., *London European Sabena*, OJ [1988] L 317/47. As R.WHISH, supra at fn 662, p. 667, notes:

> *The essence of [the doctrine] is not the protection of a customer who is dependent on supplies from a dominant supplier, but the maintenance of competition in the downstream market: for this reason, no distinction needs to be drawn between supply to existing customers and supply to new ones [FN However, when withdrawing supplies from an existing customer, a dominant firm should do so in a reasonable manner; an abrupt cessation of supplies would be likely to be regarded as disproportionate].*

[1003] According to the Commission's glossary of terms used in competition-related matters (available at http://europa.eu.int/comm/competition/general_info/glossary_en.html#top) a downstream market is a market:

> *[A]t the next stage of the production/distribution chain, e.g. the distribution and sale of motor vehicles would be a downstream market in relation to the production of motor vehicles.*

[1004] 27/76, [1978] ECR 207.

impeded resale between distributors), the ECJ considered that a cessation of supply was not proportionate, and thus punished United Brands's conduct as an abuse of a dominant position.[1005]

In the *Clearstream*[1006] case, the Commission specifically referred, *inter alia*, to the "special responsibility" born by undertakings holding a dominant position to justify Clearstream's duty to deal.[1007] While the "special responsibility" wording was not new in itself,[1008] its use in the context of refusal to deal was a novelty:

> *[…] an undertaking in a dominant position (in this case also a de facto monopolist) has a special responsibility not to allow its conduct to stifle the smooth operation of competition within the common market. The Court of First Instance and the Court of Justice have ruled, for instance in the "Tetra Pak II" case, that the actual scope of the dominant firm's special responsibility must be considered in relation to the degree of dominance held by that firm and to the special characteristics of the market which may affect the competitive situation. In the present case, both the degree of dominance enjoyed by [Clearstream] and the special characteristics of the market, lead the Commission to consider that [Clearstream] should have treated [the downstream firm's] request […] expeditiously, in the absence of objective reasons to the contrary. […Clearstream's] dominant position was not built through commercial growth in competition with other [Clearing and Settlement Providers], but mainly through concentration in combination with a number of regulatory and quasi-regulatory measures. In addition, the special characteristics of the clearing and settlement business make it indispensable for certain providers of secondary clearing and settlement, such as [the complaining downstream firm], to have direct supply of the primary clearing and settlement services provided by [Clearstream], in order to be able to compete efficiently in the supply of innovative cross-border trade in securities.* (§ 300, pp. 95-96)[1009]

One may wonder whether the Commission should not rather have applied the essential facility doctrine[1010] instead of taking the path of "special responsibility" which does not seem to correspond to any clear economics concepts.

b) Refusal to sell spare parts and consumables

Various cases concerned the question whether the producers of spare parts and consumables have a duty to supply undertakings that need these items (repair services, sales of consumables, etc.). In these cases, the definition of the relevant market is decisive. If the market is defined narrowly (i.e., the consumables or spare parts for one specific product), a dominant position will be easy to establish. However, it may be the case that the producers of spare parts face substantial competition at the main product level. For example, in *Liptons*

[1005] In relation to the use of disproportionate measures by a dominant undertaking, see also *BBI/Boosey and Hawkes: Interim measures*, OJ L 286, Sept. 10, 1987, p. 36, § 19.
[1006] Commission Decision Case COMP 38.096. (IP/04/705) 2004 C 1958 of June 2, 2004.
[1007] CBI was held to be a *de facto* monopolist and an "unavoidable trading partner"; see § 224 and ff.
[1008] See, e.g., 322/81, *Michelin v. Commission*, [1983] ECR 3461, § 57.
[1009] An appeal to the CFI is pending (T-301/04.)
[1010] On essential facilities, see the next section.

Cash Registers and Business Equipment Ltd v. Hugin,[1011] Liptons sought spare parts to repair Hugin's cash machines. The Commission condemned Hugin's refusal to supply Liptons with spare parts, but the ECJ quashed the decision on the ground that there was no effect on trade between Member States, leaving unaddressed the issue of the refusal to supply.[1012]

c) Refusal to deal in an IPR context: duty to license?

In 1992, the Commission stated that if a standard was adopted, implemented, and made mandatory by a Community instrument, a refusal to license an "essential" technology necessary to use the standard would raise serious questions under Article 82 ECT.[1013]

Undertakings may enjoy a dominant position in relation to proprietary rights, in particular, intellectual property rights ("IPR"). Many IPR include a monopoly over the use of such rights. In *Volvo AB v. Erik Veng* the ECJ held (§ 8-9):

> *It must […] be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes* ***the very subject-matter of his exclusive right****. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.*
>
> *It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article [82] if it involves, on the part of an undertaking holding a dominant position,* ***certain abusive conduct*** *such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States. [emphasis added]*

In *Magill*,[1014] the ECJ also reiterated that mere ownership of IPR is not tantamount to a dominant position (§ 46), but that under *exceptional circumstances*, this could be the case (§ 49). *In casu*, ITP, BBC and RTE were TV broadcasting companies who used to publish their individual weekly program guide themselves. When Magill published an aggregated TV guide, it was successfully sued by the three broadcasters on IPR grounds. The ECJ stated (§ 54):

[1011] 76/68/EEC, OJ [1978] L 284/41.

[1012] Additional case law in this area includes *Pelikan/Kyocera*, Commission's XXVth Report on Competition Policy, p. 87, 1995; *Volvo AB v. Erik Veng (UK) Ltd*, C-237/87, [1988] ECR 6211; and *CICRA v. Régie Nationale des Usines Renault*, 53/87, [1988] ECR 6039, a.k.a. *Renault v. Maxicar*.

[1013] EC Communication on IPRs and Standardization, COM 92/445, October 22, 1992, para. 5.1.11.

[1014] *ITP, BBC and RTE v. Commission*, T-69/89. [1991] ECR II-485, on appeal *Radio Telefis Eireann and Others v. Commission*, C-241 & 242/91, [1995] ECR I-743.

> *The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article [82] of the Treaty.*

This ruling potentially might have been interpreted very broadly ("the compulsion to grant a license when the essential facility would be necessary for a new product.") However, most of the subsequent case law, although formally referring to *Magill*, introduced a somewhat narrower reading.[1015] In particular, the *Bronner* and *IMS Health* cases (presented hereunder) defined more narrowly the essential facility doctrine (which is, at least, very similar to the refusal to deal doctrine). As a result, IPR now seems to be a safer ground to deny a license.[1016] However, pursuant to other earlier decisions, a dominant undertaking has a certain duty to disclose proprietary information to enable competitors to compete. In the *IBM*[1017] case, the Commission reached a settlement whereby IBM was obliged to supply sufficient interface information in time to allow competitors to produce hardware compatible with IBM's central processing unit and operating system, for which IBM may have held a dominant position. Similarly in *Tetra Pak International*,[1018] the Commission imposed on Tetra Pak the obligation of publishing information to enable competitors to produce cartons compatible with its machines.[1019] Finally in *ITT/Promedia/Belgacom*,[1020] the Commission reached a settlement with allegedly dominant undertakings in the telecommunications sector that provided crucial customer data to a new entrant under unfair conditions.

In *Microsoft/Windows 2000*,[1021] the Commission found that Microsoft had abused its dominant position by "deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers and by tying its Windows Media Player (WMP), a product where it faced competition, with its ubiquitous Windows operating system."[1022] The Commission stressed that Microsoft disrupted the supply of information (*Commercial Solvents*) that was indispensable for competitors to compete with Microsoft. The Commission

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[1015] *Tiercé Ladbroke v. Commission*, T-504/93, [1997] ECR II-923, and *Oscar Bronner v. Mediaprint*, C-7/97, [1998] ECR I-7817, § 40:

> *In Magill, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56.).*

See also the presentation below on the essential facility doctrine.

[1016] For a further discussion of these issues, see hereunder the discussion on the *IMS Health* case.

[1017] Commission XIVth Report on Competition Policy, 1984.

[1018] OJ 1992 L 72/1.

[1019] Similarly, see the Commission decision in *Decca Navigation Systems*, OJ [1989] L 43/27, in which Decca, a dominant firm in maritime electronics, was condemned by the Commission when it modified the signals emitted by its product without informing its competitors who produced appliances for its systems.

[1020] Commission XXVIIthe Report on Competition Policy, 1997.

[1021] COMP/37.792, March 24, 2004.

[1022] Press release, March 24, 2004.

was of the opinion that the four conditions of the *Magill* and *Bronner*[1023] cases were fulfilled *in casu*. The Commission imposed a Euro 497.2 million fine and ordered Microsoft to disclose complete and accurate interface documentation allowing non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers and, in addition, to offer PC manufacturers a version of the Windows operating system which did not include WMP.[1024] However, the Commission stressed that Microsoft was entitled to reasonable remuneration to the extent the disclosed information was protected by IPR.

To verify Microsoft's compliance with its order, the Commission appointed a Monitoring Trustee and engaged in intensive discussions with the company. In light of the poor results of a market test conducted by the Commission, which apparently showed that Microsoft was not fully complying with its obligations, the Commission issued a decision on November 10, 2005 whereby Microsoft would face a daily fine of up to Euro 2 million so long as it did not supply the requested information. In spite of a submission of new information, the Trustee reported that the information provided by Microsoft so far "continues to be incomplete, inaccurate and unusable."[1025] This was confirmed by the Commission on July 12, 2006, when it found that Microsoft was still not complying with its 2004 decision, imposed a penalty payment of Euro 280.5 million and increased the daily penalty payment up to a maximum amount of Euro 3 million per day.

d) Interoperability

The Commission seems to take the view that in interoperability cases, dominant undertakings may more easily be found to have a duty to share their information than in other IPR cases. In the Discussion Paper on the Review of Article 82 ECT, it was stressed (§ 241-242):

> *A special case arises when an undertaking refuses to supply information in a way that allows it to extend its dominance from one market to another. This is the case for information necessary for interoperability between one market and another. Although there is no general obligation even for dominant companies to ensure interoperability, leveraging market power from one market to another by refusing interoperability information may be an abuse of a dominant position.*
>
> *Even if such information may be considered a trade secret it may not be appropriate to apply to such refusals to supply information the same high standards for intervention as those [applied in cases of refusal to license intellectual property rights.]*

[1023] See Subsection 4.3.4.3.2. Refusal to supply, litt.e) Refusal to deal by an essential-facility-holding undertaking, hereunder.
[1024] Thus, PC manufacturers are free to include WMP or another competing media player in their PCs. Microsoft was forbidden to use any commercial or technological term that would have the effect of rendering the unbundled version of Windows less attractive, notably by offering a discount for the bundled version.
[1025] Press release, March 10, 2006.

e) Refusal to deal by an essential-facility-holding undertaking

The distinction between the refusal to supply and essential facility doctrines has not been precisely drawn. Formally, it may be argued that the refusal to deal doctrine is applied when an undertaking is in a dominant position, whereas the essential facility doctrine is applied when an undertaking disposes of an essential facility, which can be defined as a proprietary right on a facility that is "necessary" for conducting business in a downstream market. The case law seems to draw the following line between the two concepts: it defines an essential facility by using a set of stringent criteria (as will be illustrated later), while a firm holds a dominant position when it has so much market power it may behave independently from other firms.[1026]

The question remains open of how much market power is necessary for an abuse of dominant position to take place in the form of a refusal to deal, as it does not seem certain that a refusal to deal by any dominant firm is sufficient for such a finding. In the seminal cases where a refusal to deal has been considered an abuse of a dominant position (i.e., *Commercial Solvents*, *United Brands*, and *Clearstream*[1027]), the firms were (almost) monopolists. Therefore it may be argued that the refusal to deal doctrine applies to quasi-monopolists without necessarily questioning what grounds their dominant position is based, whereas the essential facility doctrine applies to undertakings that enjoy a special market position in relation to their possession of a special, non-reproducible proprietary right.

However, one may wonder whether such a distinction makes sense, as because both dominant positions are the result of an investment, it seems irrelevant whether dominance occurred because of a special asset or because of superior business acumen when both hinder competitors in their competitive development. Of course, it is psychologically easier to impose the sharing of a non-reproducible physical asset (especially, if it was publicly funded or based on natural resources), as authorities may take the view that the essential facility-holding firm is receiving "unreasonable and antisocial" profits, than it is to impose the sharing of a product whose producer is dominant as the result of superior business acumen. The anticompetitive effects of a refusal to deal do not depend on the ground on which the dominant position is based. Arguably, the question whether an undertaking owns an essential facility should be answered, at least in part, when authorities determine the relevant market and the presence of a dominant position, rather than when they determine whether an abuse has taken place. The essential facility theory involves two phases of findings: first, that an essential facility grants a special market position,[1028] and second, that this special position is being abused.[1029] Such an abuse would be presumed unless the essential facility-holding firm sets forth legitimate business reasons.

[1026] See the general case law on the abuse of dominant position mentioned above in Subsection 4.3.4.3.1. Generally, in particular *United Brands*, supra. On the other hand, it may be argued that a dominant position based on product monopoly (for example, Commercial Solvents) may be more easily contested than a dominant position based on a non-reproducible asset.
[1027] All supra.
[1028] Hence the indispensability requirement of the *Bronner* case law, cited hereunder. The fact that an undertaking owns an indispensable asset is not an abuse in itself, but rather a criterion for determining whether it holds so much market power that it may behave independently.
[1029] Hence the exclusion of the competition requirement of the *Bronner* case law, cited hereunder.

The essential facility doctrine which originated in the US was first imported[1030] into EC competition law in *Sealink/B&I—Holyhead: Interim measures*[1031] in which the Commission defined the doctrine as follows:

> *A dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure* ***without access to which competitors cannot provide services to their customers****, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services,* ***thereby placing the competitors at a comparative disadvantage****, infringes Article [82], if the other conditions of that Article are met […] The owner of an essential facility which* ***uses its power in one market in order to strengthen its position on another related market****, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article [82] where a competitive disadvantage is imposed upon its competitor without objective justification.*[1032] [emphasis added]

Sealink owned and operated a port (Holyhead) in North Wales from where it operated ferries to and from Ireland. B&I also used this port, but it complained to the Commission that the schedules were drawn up so as to give a competitive advantage to Sealink. Based on these considerations, the Commission ordered Sealink to modify its schedules for the use of the port.

Although the essential facility doctrine may help in opening up markets which are protected by natural or legal monopolies, forced licensing might not always be the best way to intervene. For instance, when the "bottleneck" of facilities in the telecommunications sectors has been paid for by public funds, it may be understandable that the facility should not only benefit the former monopolist,[1033] but that access should be granted to competitors as well.[1034] However, this may not be the case when the facility is the fruit of private investments and risks. If the would-be competitor is allowed to take advantage of someone else's investments, there may not be enough incentives to invest in the first place. In *Oscar Bronner v. Mediaprint*,[1035] this argument was put forward by Advocate General Jacobs.[1036] In this case, Oscar Bronner was the publisher of a newspaper who wanted to take advantage (through paid access) of Mediaprint's nationwide distribution infrastructure. In considering whether the essential facility doctrine should be applied, the ECJ noted (§ 40-41, 43-46):

> *In Magill, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly*

[1030] The *Magill* case law (and, in some way, *Veng* as it speaks embryonically of "certain abusive conduct"*)* also brings forth a qualification of the dominant position. Therefore, it may be argued that the *Magill* case is the first introduction of the essential facility doctrine, although the decision does not expressly refer to this concept.
[1031] [1992] 5 CMLR 255.
[1032] In *European Night Services v. Commission*, T-374/94, [1998] ECR II-3141, the CFI ruled "a product or service cannot be considered necessary or essential unless there is no real or potential substitute" (§ 208).
[1033] This may be debatable when the former state monopolist has been privatized by way of a fair auction.
[1034] In *Clearstream*, the Commission seems to make such a distinction; see above.
[1035] C-7/97, [1998] ECR I-7817.
[1036] Other grounds for taking precautions in the application of the essential facility doctrine were also put forward by AG Jacobs; these included the freedom of choosing one's trade partners and the protection of property being a constitutional right.

schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56).

Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article [82] of the Treaty in a situation such as that which forms the subject-matter of the first question, ***not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.***

[...]

In the first place, it is undisputed that other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers, exist and are used by the publishers of those daily newspapers.

Moreover, it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.

It should be emphasised in that respect that, in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.

For such access to be capable of being regarded as indispensable, it would be necessary ***at the very least*** *to establish, as the Advocate General has pointed out at point 68 of his Opinion, that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.*

> *In the light of the foregoing considerations, the answer to the first question must be that the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.* [emphasis added]

The ECJ seems to reject the application of the essential facility doctrine to the facts at hand on the grounds that it had not been proven it was economically not possible to create a viable alternative. The criterion of replicability is therefore objectivized: it does not matter whether the actual competitor, Mr. Bronner, did not have the means to create such a network, as it is sufficient that an alternative is possible for *any* (even a potential) competitor.[1037]

In *NDC Health/IMS Health:Interim measures*,[1038] IMS as the world's leading provider of information solutions to the pharmaceutical and healthcare industries developed a copyrighted format for processing regional sales, the so-called "1860-brick structure." The Commission alleged that the IMS' structure had become a *de facto* standard and ordered IMS to license its use to competitors, in particular NDC Health. However, the presidents of the CFI and the ECJ suspended the Commission's decision.[1039]

In 2004, the ECJ was called to answer a preliminary ruling request from Germany on this same issue. The ECJ stated the *Bronner* conditions for the application of the essential facility doctrine in the following terms (§ 37):

> *According to the summary of the Magill judgment made by the Court at paragraph 40 of the judgment in Bronner, the exceptional circumstances [necessary to apply the essential facility doctrine] were constituted by:*
>
> *[1] the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels), the supply of which was* ***indispensable*** *for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (Magill, paragraph 53), [2] the fact that such refusal prevented the emergence of a* ***new product*** *for which there was a potential consumer demand (paragraph 54), [3] the fact that it was not justified by* ***objective considerations*** *(paragraph 55), and [4] was likely to* ***exclude all competition*** *in the secondary market of television guides (paragraph 56).* [emphasis added]

[1037] Note, however, that this seems at odds with § 41, where the ECJ states that the refusal of the service must "be likely to eliminate all competition in the daily newspaper market *on the part of the person requesting the service* and previous case law" (in particular, *Magill*). See P.C.MAVROIDIS/D.NEVEN, "Bronner Kebab: Beyond Refusal to Deal and Duty to Cooperate", in C.-D.EHLERMANN/I.ATANSIU (EDS.), *European Competition Law Annual 2002: Constructing The EU Network Of Competition Authorities*, Hart Publishing, 2003.

[1038] OJ 2002 L 59/18, T-184/01, [2001] ECR-II-3193.

[1039] *IMS Health v. Commission*, T-184/01 R, [2001] ECR II-3193, on appeal C-481/01 P (R), [2002] ECR I-3401.

One might wonder whether condition 1 (the upstream product refused is indispensable for competition in the downstream market) does not imply condition 4 (the refusal of an upstream product excludes competition in the downstream [secondary] market), as it is difficult to see how any competition in the downstream market may exist without access to a product "indispensable" for *any* downstream competitor.[1040/1041/1042] Note that in paragraph 38 of *IMS*

[1040] See § 56 of *Magill*, where the ECJ condemned the refusal because it excluded "all competition on [the downstream market] *since* they denied access to the basic information which is indispensable for the compilation of such a guide," thus entailing that fulfillment of the "indispensability" condition implied fulfillment of the "elimination of competition" condition. See also, P.C.MAVROIDIS/D.NEVEN, "Bronner Kebab: Beyond Refusal to Deal and Duty to Cooperate", supra, fn 1037, p. 10.

[1041] Note that in *Bronner*, the ECJ had added the words "competition *on the part of the person requesting* [access]" to condition 4. This meant that the fulfilling of condition 1 did not necessarily imply the fulfilling of condition 4, as a refusal to deal with a weak specific competitor did not necessarily mean that *any* other competitor (possibly in a better financial or competitive situation) would be unable to compete. Note that this discussion is reminiscent of the discussions between the two schools (Stigler and Bain) for defining barriers to entry, mentioned above in Subsection 4.3.4.2. Dominant position. However, the words inducing this subjectivation do not seem to reappear in the *IMS Health* case, § 38, which uses the expression "to exclude **any** competition on a secondary market."
One way of explaining why the requisite of competitive exclusion "on the part of the person requesting the service" was used is that it is necessary for *locus standi* purposes that a refusal to deal has **effectively** taken place against the claimant. Indeed, one may wonder whether this requirement was not embodied into the legal test of essential facilities in order to avoid the situation where a firm may be found to be abusing its position merely by owning an essential facility without its having refused to supply a competitor.

[1042] In its Discussion Paper on the Review of Article 82 ECT, the Commission draws a distinction between cases where the refusal to deal concerns products which were already supplied and cases where the product had not been supplied before by the dominant undertaking. Note that, pursuant to the *Aspen* and *Trinko* holdings, US case law seems to reject the view that a refusal to deal may be illegal in the absence of a termination of an existing relationship, see Chapter 3, Subsection 3.3.2.3.1. Unilateral refusal to deal (monopolization). In cases involving the termination of an existing relationship, the Commission noted the following four conditions must exist for an abuse to found (§ 218):

> *(i) the behavior can be properly characterised as termination; (ii) the refusing undertaking is dominant; (iii) the refusal is likely to have a negative effect on competition; (iv) the refusal is not justified objectively or by efficiencies.*

In cases where the dominant undertaking refuses to start supplying an input (§ 224):

> *Five conditions normally have to be fulfilled in order for a refusal to start supplying to be abusive: (i) the behavior can be properly characterized as a refusal to supply; (ii) the refusing undertaking is dominant; (iii) the input is indispensable; (iv) the refusal is likely to have a negative effect on competition; (v) the refusal is not objectively justified.*

The most striking difference between these two approaches is that the second set of conditions adds the indispensability condition, which is defined by the Commission on the basis of the *Bronner* case law. A product is indispensable when without it (§ 228):

> *[C]ompanies cannot manufacture their products or provide their usual service levels. Therefore, when real or potential substitutes exist in the market, the input of the dominant company is not indispensable.[…] A facility is an indispensable input only when duplication of the existing facility is impossible or extremely difficult, either because it is physically or legally impossible to duplicate, or because a second facility is not economically viable in the sense that it would not generate enough revenues to cover its costs.*

In turn, the refusal is likely to have a negative effect on competition, when (§ 231):

> *The likely exclusion of **one individual** competitor from the downstream market does not in itself constitute an abuse. An abuse only may arise when the exclusion of competitors is likely to*

Health, the ECJ only speaks of three conditions, although those are used to define the indispensability of the product:

> *It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a* ***new product*** *for which there is a potential consumer demand, that it is* ***unjustified*** *and such as to* ***exclude any competition*** *on a secondary market.*

When it examines the condition related to the emergence of a new product (condition 2), the ECJ states that (§ 48-49):

> *As the Advocate General stated in point 62 of his Opinion, that condition relates to the consideration that, in the balancing of the interest in protection of copyright and the economic freedom of its owner, against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers.*
>
> *Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by copyright, where that product is indispensable for operating on a secondary market, may be regarded as abusive* ***only*** *where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce* ***new goods or services not offered by the owner of the right and for which there is a potential consumer demand****.* [emphasis added]

Here the ECJ seems to emphasize the fact that the essential facility is based on IPR and not on another proprietary right. Indeed, the new product condition was not applied in non-IPR cases although it was imposed in *Magill*, another IPR-related case.[1043]

> *have a negative effect on competition in the downstream market. This should however not be understood to mean the complete elimination of all competition. The extent to which the exclusion of* ***one*** *competitor has an impact on the level of competition depends on the pre-existing competition on the downstream market.* [emphasis added]

Thus, the Commission seems to distinguish the indispensability and effect on competition condition in the following manner: A dominant firm must not only refuse to provide an indispensable product to a competitor, but such refusal must additionally lead to a certain lessening of competition. In other words, no abuse may occur when a product is indispensable to one competitor, but the refusal to supply it does not, *in casu*, lead to a lessening of competition. This may arguably be the case when a competitor of the dominant undertaking is refused access to an indispensable product, but the dominant undertaking does not refuse such access to other competitors (obviously, if the victim of the refusal to deal is the only competitor of the dominant firm, its elimination would lead *ipso facto* to an elimination of competition.) However, one may wonder whether in such cases, the dominant undertaking would not automatically abuse its dominant position by imposing discriminatory terms between trading partners (Article 82 II litt. c) ECT).

[1043] Note that paragraph 40 of the *Bronner* case, which is not an IPR case, refers to the "new product" condition; however paragraph 40 of *Bronner* is a summary of *Magill*.

Should one then understand that the condition of the existence of a new product only be applied in IPR cases? At least two issues may be addressed in this context. First, why should IPR be better defended than other property rights?[1044] Second, the undertaking may avoid forced licensing by merely producing a limited amount of the downstream products, as this would arguably suffice to prevent the new product condition from being fulfilled.[1045]

The special treatment of IPR-related refusal to deal seems to be confirmed by the Discussion Paper on the Review of Article 82 ECT. Not only did the Commission reiterate the case law stating that competition law does not oblige the holder of an IPR to license its technology (even when the holder is offered a reasonable compensation), but it also added an additional requirement for the application of the refusal to deal (essential facility) doctrine in the context of IPR. The refusal to license IPR may constitute an abuse under Article 82 ECT (§ 239):

> *For example, the refusal by a dominant company to license access to the IPR could be considered abusive when the five conditions [quoted in footnote 1042, here above] are all fulfilled and, furthermore, the refusal to grant a licence prevents* ***the development of the market for which the licence is an indispensable input, to the detriment of consumers****. This may only be the case if the undertaking which requests the licence does not intend to* ***limit itself essentially to duplicating the goods or services*** *already offered on this market by the owner of the IPR, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.*[1046] [emphasis added]

Finally, when it examines whether IMS's refusal to grant a license was justifiable under objective considerations (condition 3), the ECJ notes (§ 51):

> *As to that condition, on whose interpretation no specific observations have been made, it is for the national court to examine, if appropriate, in light of the facts before it, whether the refusal of the request for a license is justified by objective considerations.*

[1044] One answer may be that IPR are made to protect innovation, which is a value highly regarded in modern societies. However, other property rights are also likely to have a substantial impact on societal welfare, for example risky investments or investments in areas where positive externalities may be high (educational infrastructure or communications.) It may as well be the case that IPR do not foster innovation particularly (see e.g. the IPR in *Magill*.) Another, albeit related point is that IPR can generally be duplicated easily and that the granting of a license could allow competitors to engage rapidly in a competition which may erode the *ex ante* incentives for investment. However, this is not entirely persuasive as the level of competition would depend highly on the level of the royalties.

[1045] However, as in the *IMS Health* case, this may force the owner of the facility to scout for potential downstream products. If it does not do so, it may be unable to produce such a product even in limited quantities. This might be a heavy burden, as it often difficult to predict which innovation may be extrapolated from an essential facility.

[1046] Note as well that the Commission seems to define the requirement of indispensability somewhat more narrowly in the IPR context (§ 230):

> *In the case of IPRs it must not be possible for competitors to turn to any workable alternative technology or to "invent around" the IPR. Such a requirement would likely be met where the technology has become the standard or where interoperability with the rightholder's IPR protected product is necessary for a company to enter or remain on the product market.*

Thus, indispensability has been strictly construed in the IMS case and, as a result, the essential facility doctrine seems to have been narrowed.[1047] In the Discussion paper on the Review of Article 82 ECT, the Commission indicates beyond objective reasons such as the poor financial condition of a would-be partner or a facility's already being at full capacity), it might take into account the fact that an investment was particularly risky (§ 235-236):

> *In the assessment of a refusal to supply it must also be kept in mind that the indispensable input, be it a raw material, an essential facility or an intellectual property right, often is the result of substantial investments entailing significant risks. In order to maintain incentives to invest and innovate, the dominant firm must not be unduly restricted in the exploitation of valuable results of the investment. For these reasons the dominant firm should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking the risk of failed projects into account. To achieve such compensation, it may be necessary for the dominant firm to exclude others from access to the input for a certain period of time. The risks facing the parties and the sunk investment that must be committed may thus mean that an dominant firm should be allowed to exclude others for a certain period of time in order to ensure an adequate return on such investment, even when this entails eliminating effective competition during this period.*
>
> *The circumstances in which a refusal to supply by a dominant company may be abusive are therefore more likely to be present when it is likely that the investments that have led to the existence of the indispensable input would have been made even if the investor had known that it would have a duty to supply. This could be the case if the input is indispensable only because the owner enjoys or has enjoyed until recently special or exclusive rights within the meaning of Article 86(1) EC. Another example could be that the original investment primarily was made for reasons not related to the market in which the company asking access to the input intends to use the input. The original investment in a facility may also have been made by a public authority using investment criteria that likely would have led to the*

[1047] For an economic analysis of the *Bronner* test, see P.C.MAVROIDIS/D.NEVEN, "Bronner Kebab: Beyond Refusal to Deal and Duty to Cooperate", supra at fn 1037, 2003. The authors criticized the Bronner test by arguing in particular

- The test does not provide enough protection of the investment *ex post*, for example when a monopoly is necessary for making the facility economically profitable. In this case, a duty to deal would impede the creation of the facility.
- The test may provide excessive protection of the investment, as duopoly rents may not be reached by the test.
- By focusing on the reduction of competition in the upstream market, the ECJ may: (a) impose a duty to deal on an undertaking that had no incentives to restrict competition in the downstream market (for example in cases where the upstream owner of the facility has no interest in the downstream market); and (b) may impose a duty to deal even in the absence of a restriction to competition in the downstream market.
- Furthermore, a mere duty to deal cannot be seen as a panacea, as an upstream owner of an essential facility may extract rents even when dealing with competitors (see the "scissors" prices case law cited by the authors, in particular, *British Sugar/Napier Brown*, 88/518, OJ L 284/41, decision of July 18, 1988.)

> *investment being made even if there would have been a duty to supply. And the investments behind innovations leading to intellectual property rights may not have been particularly significant, in which case it may be likely that the investment would have been made even knowing that a duty to supply would be imposed. In making such assessments the Commission will take account of the respective values that are at stake, including the possible positive effects on incentives to follow-on investment from allowing access.*

Independently of which test is chosen for the application of the essential facility doctrine,[1048] two core elements seem necessary for the application of the refusal to deal/essential facility doctrine:[1049]

1) There must be an upstream and a downstream market,[1050] both of which are interconnected by the fact that the use of the upstream market's product is indispensable for competition in the downstream market. This means that if access to the "essential facility" is not granted, no competition[1051] in the downstream market for the new product is reasonably possible.[1052] The unreasonableness of the duplication may be legal or economical (although the latter has been strictly construed in *Bronner.*)

2) The refusal to supply (or mere discrimination) cannot be justified objectively (full capacity, insolvency of the licensee, insufficient returns on investment, etc.)

In addition, in our view at some point of the analysis there should be an assessment whether the refusal to deal would lead to a substantial loss of social welfare. Indeed, in the absence of such a loss, it may be contrary to most constitutional definitions of ownership rights to restrict

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[1048] Such tests have been presented above. As we have seen, they bring their own additional elements for the application of the essential facility doctrine.

[1049] The following policy question remains open: what should be considered an essential facility, and which type of essential facilities should trigger a duty to deal? In particular, should the owner of an essential facility which is the result of superior business acumen or business investment be forced to share her/his success? In addition, should the owner of a dominant position acquired by better business skills be required to share its success, even in the absence of an essential facility?

[1050] These markets may be merely potential or hypothetical See *IMS Health*, C-418/01, [2004] ECR I- 5039, § 44, where the ECJ states:

> *It appears, therefore, as the Advocate General set out in points 56 to 59 of his Opinion, that, for the purposes of the application of the earlier case-law, it is sufficient that a* potential *market or even* hypothetical *market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable.* [emphasis added]

[1051] The "elimination of competition" requirement does not seem to protect the competition brought by each single competitor (unless there is only one competitor). It rather aims at ensuring that the downstream market will have sufficient level of competition from several sources, see the Commission Discussion paper on the review of Article 82 ECT, quoted above.

[1052] See *IMS Health*, C-418/01, [2004] ECR I-5039, § 30, where the ECJ states:

> *[…] for the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by copyright which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost […] are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind.*

such a right without a prevailing public interest. Finally, it should also be analyzed whether imposing access would have entirely eliminated the incentives for the investment. Of course such an analysis entails delicate elements of proof and it may be difficult to reconstruct a counterfactual situation. However, in some cases, *ex ante* incentives may play only a very limited role in the original decision to invest in the construction of the facility. For example, this is the case when the original investments have been publicly funded or when the investment was clearly to be entered into from a business point of view.

4.3.5. Commission Guidelines on horizontal cooperation

4.3.5.1. Scope of the Guidelines

Regulation 2821/71 of the Council of December 20, 1970 on the application of Article 81(3) to categories of agreements decisions and concerted practices[1053] empowered the Commission to "declare that Article [81](1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object the application of standards or types." The Commission has not made use of this competence, but has instead published Guidelines on the applicability of Article 81 ECT to horizontal cooperation agreements ("Horizontal Guidelines"),[1054] which deal with this subject matter.

The Horizontal Guidelines apply to cooperation agreements of a "horizontal nature"; i.e., to "agreements or concerted practices entered into between companies operating at the same level(s) in the market"[1055]; e.g. at the same level of production or distribution.[1056] The term "competitors" as used in the Guidelines includes both actual[1057] and potential[1058] competitors.

[1053] OJ 1971 L 285/46.
[1054] OJ 2001 C 3/02.
[1055] FN 13 makes clear that both products and services markets are encompassed by the principles of the Horizontal Guidelines.
[1056] Guidelines, § 1 and 9.
[1057] FN 8 of the Guidelines clarifies:

> *A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). The same reasoning may lead to the grouping of different geographic areas. However, when supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, to make additional investments, to take strategic decisions or to incur time delays, a company will not be treated as a competitor but as a potential competitor (see below). See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p. 5, paragraphs 20-23).*

[1058] FN 9 of the Guidelines clarifies:

> *A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient (see Commission Notice on the definition of the relevant market for the purposes of Community competition law (paragraph 24)0; see also the Commission's Thirteenth Report on Competition Policy, point 55 and Commission Decision 90/410/EEC in case Elopak/Metal Box-Odin (OJ L 209, 8.8.1990, p. 15).*

Agreements between undertakings, which are not at the same level, should be analyzed under Regulation 2790/99[1059] and the Guidelines on vertical agreements.[1060]

4.3.5.2. Horizontal Guidelines and standards

The Horizontal Guidelines deal with six different types of agreements: production agreements (including specialization agreements), purchasing agreements, commercialization agreements, environmental agreements, and agreements on R&D and standards. In practice, undertakings sign cooperation agreements which may encompass one or more of these categories. To determine which type of rules has to be applied, case law makes it necessary to identify where the "center of gravity" lies:

> *In the determination of the center of gravity, account is taken in particular of two factors: firstly, the starting point of the cooperation, and, secondly, the degree of integration of the different functions which are being combined. A cooperation involving both joint R & D and joint production of the results would thus normally be covered in the section on Agreements on Research and Development as the joint production will only take place if the joint R & D is successful. This implies that the results of the joint R & D are decisive for production. The R & D agreement can thus be regarded as the starting point of the cooperation. This assessment would change if the agreement foresaw a full integration in the area of production and only a partial integration of some R & D activities. In this case, the possible anti-competitive effects and economic benefits of the cooperation would largely relate to the joint production, and the agreement would therefore be examined according to the principles set out in the section on "Production Agreements." More complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation in varying ways are not covered by the guidelines. The assessment of each individual area of cooperation within an alliance may be carried out with the help of the corresponding chapter in the guidelines. However, complex arrangements must also be analysed in their totality. Due to the variety of areas an alliance may combine, it is impossible to give general guidance for such an overall assessment. Alliances or other forms of cooperation that primarily declare intentions are impossible to assess under the competition rules as long as they lack a precise scope.*

Basically, the Horizontal Guidelines put forward the same general analysis presented above in the context of Article 81 ECT. However, the Horizontal Guidelines provide special guidance for the six special types of agreements mentioned earlier. In the case of standards agreements,

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> *Market entry needs to take place sufficiently fast so that the threat of potential entry is a constraint on the market participants' behaviour. Normally, this means that entry has to occur within a short period. The Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1, paragraph 26, consider a period of maximum 1 year for the purposes of application of the Block Exemption Regulation on Vertical Restraints (see footnote 11). However, in individual cases longer time periods can be taken into account. The time period needed by companies already active on the market to adjust their capacities can be used as a yardstick to determine this period.*

[1059] OJ 1999 L 336/21.
[1060] OJ 2000 C 291/1.

the Horizontal Guidelines summarizes the Commission's globally favorable approach in the following manner (§ 22):

> *Certain types of agreement, for instance most R & D agreements or cooperation to set standards or improve environmental conditions, are less likely to include restrictions with respect to prices and output. If these types of agreements have negative effects at all these are likely to be on innovation or the variety of products. They may also give rise to foreclosure problems.*

Agreements on standards are defined as follows (§ 159):

> *Standardization agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply [FN 47: Standardization can take different forms, ranging from the adoption of national consensus based standards by the recognized European or national standards bodies, through consortia and fora, to agreements between single companies. Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.]. Standardization agreements can cover various issues, such as standardization of different grades or sizes of a particular product or technical specifications in markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard.*

In a passage that seems to clear the way for the *Wouters*[1061] case, standards are defined negatively in the following way (§ 160):

> *Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these guidelines.*

As regards to the markets that might be affected by standardization agreements, the Commission recognizes three: the market for the product itself, the service market for the setting of the standard, and the market for testing and certification (§ 161). In relation to market power and market structures, § 168 provides somewhat cryptically:

> *High market shares held by parties in the market(s) affected will not necessarily be a concern for standardisation agreements. Their effectiveness is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may discriminate or foreclose third parties or segment markets according to their geographic scope of application. Thus, the assessment whether the agreement restricts competition will focus,*

[1061] *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*, C-309/99, [2002] ECR I-1557. Note that paragraph 160 merely states the Horizontal Guidelines are not applicable to rules of admission to a liberal profession, and does not go as far as the subsequent *Wouters* case, which holds that such rules do not restrict competition under Article 81 (1) ECT if they are justified by their objective.

necessarily on an individual basis, on the extent to which such barriers to entry are likely to be overcome.

4.3.5.2.1. Article 81(1) ECT

At the first stage of an Article 81 ECT analysis, it must be determined whether the agreement falls under Article 81 ECT. The Horizontal Guidelines divide the analysis of standardization agreements into three categories:

(a) Agreements that do not fall under Article 81 ECT;
(b) Agreements that almost always fall under Article 81(1) ECT; and
(c) Agreements that may fall under Article 81(1) ECT.

(a) Standardization agreements that have no appreciable effect on the market[1062] are exempted from liability under Article 81 ECT.[1063] Furthermore, an agreement does not fall under Article 81 ECT in the following case (§ 163 of the Horizontal Guidelines):

> *Where participation in standard setting is unrestricted and transparent, standardisation agreements […], which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by the recognised standards bodies, which are based on non-discriminatory, open and transparent procedures.*

Recognized standards bodies are defined by Directive 98/34/EC of the European Parliament and of the Council of June 22, 1998 which lay down a procedure for providing information in the field of technical standards and regulation.[1064] These include CEN, CENELEC, ETSI, and various national standardization bodies.

(b) An agreement almost always falls under Article 81(1) ECT when it aims at excluding other actual or potential competitors (§ 165 of the Horizontal Guidelines):

> *Agreements that use a standard, as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors will almost always be caught by Article 81(1). For instance, an agreement whereby a national association of manufacturers set a standard and put pressure on third parties not to market products that did not comply with the standard would be in this category.*

[1062] As defined above in Subsection 4.2.2.1.2. "De minimis" or "appreciable effects on competition" doctrine.
[1063] Paragraph 164 provides:

> *No appreciable restriction exists for those standards that have a negligible coverage of the relevant market, as long as it remains so. No appreciable restriction is found either in agreements which pool together SMEs to standardize access forms or conditions to collective tenders or those that standardise aspects such as minor product characteristics, forms and reports, which have an insignificant effect on the main factors affecting competition in the relevant markets.*

[1064] OJ 1998 L 204/37

The section on the case law on standardization hereunder deals more specifically with this question.

(c) Agreements may fall under Article 81(1) ECT when they affect the parties' freedom to develop alternative standards or products (§ 166 of the Horizontal Guidelines):

> *Standardization agreements may be caught by Article 81(1) insofar as they grant the parties joint control over production and/or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or purchasers of the standardized products. The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardization, as defined above, on the other.*

One might wonder whether the "center of gravity" of an agreement, which "grant[s] the parties joint control over production and/or innovation" indeed lies in a standardization agreement. Moreover, the review standard is not clear-cut and does even entail elements of an Article 81(3) ECT review (indispensability and economic benefits.) In any case, as the *VCR*[1065] case shows, standardization agreements sometimes contain a covenant whereby the parties to the agreement are allowed to produce only goods that comply with the agreement's standard. However, the Commission seems to take a grim view of such covenants. It goes on by stating (§ 167 of the Horizontal Guidelines):

> *The existence of a restriction of competition in standardization agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardization agreements may restrict competition where they prevent the parties from either developing alternative standards or commercializing products that do not comply with the standard. Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.*

4.3.5.2.2. Article 81(3) ECT

The second part of the analysis logically has to do with the issue of whether the agreement satisfies the conditions of Article 81(3) ECT. As to the first condition for the application of Article 81(3) ECT (economic benefits), the Commission stated (§ 169-170 of the Horizontal Guidelines):

> *The Commission generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. To materialize those economic benefits, the* ***necessary information to apply the***

[1065] 78/156/EEC, Commission Decision of December 20, 1977 relating to a proceeding under Articles 85 of the EEC Treaty (IV/29.151 – Video cassette recorders), OJ L 047, Dec. 18, 1978, pp. 42-47.

> ***standard*** *must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in* ***a transparent manner****. It will be for the parties to demonstrate that any restrictions on the setting, use or access to the standard provide economic benefits.*
>
> *In order to reap technical or economic benefits, standards should not limit innovation. This will depend primarily on the lifetime of the associated products, in connection with the market development stage (fast growing, growing, stagnant…). The effects on innovation must be analyzed on a case-by-case basis. The parties may also have to provide evidence that collective standardization is efficiency-enhancing for the consumer when a new standard may trigger unduly rapid obsolescence of existing products, without objective additional benefits.* [emphasis added]

Concerning indispensability, the Commission clearly explained (§ 173 of the Horizontal Guidelines):

> *(A)greements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality. For instance, it should be very clearly demonstrated why it is indispensable to the emergence of the economic benefits that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.*

Furthermore, in order to be eligible for an exemption under Article 81(3) ECT, the agreement should not eliminate competition. The Commission's Horizontal Guidelines read (§ 174-175 of the Horizontal Guidelines):

> *There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are* ***as open as possible and applied in a clear non-discriminatory manner****. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.*
>
> *To the extent that private organizations or groups of companies set a standard or their proprietary technology becomes a de facto standard, then competition will be eliminated if third parties are foreclosed from access to this standard.* [emphasis added]

Note that the Commission speaks of "access to the standard" and does not seem to include access to the standardization process. This might have been in contradiction with paragraph 172, where it admitted that access to the standardization process may be restricted if the parties can demonstrate important inefficiencies.

Moreover, the requirement that standards should be "as open as possible" is hardly self-explanatory[1066] and seems to be almost at odds with the sentence that follows it, which states that access should be granted on FRAND terms[1067]. It would appear the Commission grants itself (and now, national competition authorities) a certain degree of discretion.

One may also wonder whether the requirement that standards be as open as possible implies that functional specifications have to be used instead of design specifications (as it is generally the case under the New Approach for technical regulations and under the TBT.)

More importantly, it has not been clarified how the competitive qualities of a standard have to be weighed with its technical qualities. As Dolmans[1068] remarks:

> *Unfortunately, the EC Commission is neither well equipped nor does it appear to be ready to apply the same principles as vigorously to formal standards organizations. When ETSI developed the standards for private digital mobile radio communication (TETRA), different technology providers vied to have their technology used as the basis for the standardized voice coder/decoder ("codec"). The main choice was between the algorithm and high-level software specifications of US firm DVSI that could be implemented in various ways, and the bit-specific software program of France's Thomson Electronics that would exclude all choice of implementation and freeze further development.*
>
> *Even though objective tests consistently showed the DVSI algorithm resulted in better quality products, ETSI selected the latter because DVSI refused to place its software implementation in source code form in the public domain —although the use of its software was not part of the specification of the standard, and DVSI was willing to license its code on fair, reasonable and non-discriminatory ("FRAND") terms and conditions to implementers who did not want to write their own code. In these circumstance, the ETSI members arguably misused their collective technology buying power to force DVSI to make its software public, and to punish it with foreclose when DVSI refused to give in to this pressure. The result was selection of lesser-quality Thomson technology.[1069]*

[1066] Compare with the US case *Moore v. Boating Industry Associates* (*Moore I*), 754 F.2d 698 (7th Cir. 1985), where the U.S. Court of Appeals for the Seventh Circuit ruled:

> *[…] an industry's attempt at self-regulation will […] usually be found lawful as long as procedural safeguards are employed to assure that the restraints are no more extensive than necessary to accomplish the association's legitimate purpose.*

[1067] Indeed, the requirement of the greatest possible openness seems superfluous or at best, very limited if the FRAND requirement is to be taken as the main benchmark.

[1068] M.DOLMANS, quoted above at fn 499, p. 11.

[1069] See, N49, in M.DOLMANS, supra at fn 499:

> *DVSI pointed out that there were indications of possible collusion, but no disclosure or discovery proceedings existed in Europe, and the EC Commission did not investigate whether Thomson and others might have illegally coordinated their vote with a view to exclude DVSI.*

The EC Commission refused to intervene on the ground that a bit-specific standard allowed better testing, development of compatible products, and type approval in this instance. At the same time, the EC Commission in its letter closing the case stated that:

"It is, of course, clear that overstandardization can have extremely negative effects on market development and competition: my services have already indicated to ETSI that ETSI should carefully examine standards and standards procedures in light of any potential impact on competition."

The Commission concludes its Horizontal Guidelines by giving practical examples of application of these principles (§ 176-178):

Example 1

Situation: EN 60603-7:1993 defines the requirements to connect television receivers to video-generating accessories such as video recorders and video games. Although the standard is not legally binding, in practice manufacturers both of television receivers and of video games use the standard, as the market requires so.

Analysis: Article 81(1) is not infringed. The standard has been adopted by recognized standards bodies, at the national, European and international level, through open and transparent procedures, and is based on national consensus reflecting the position of manufacturers and consumers. All manufacturers are allowed to use the standard.

Example 2

Situation: A number of videocassette manufacturers agree to develop a quality mark or standard to denote the fact that the videocassette meets certain minimum technical specifications. The manufacturers are free to produce videocassettes, which do not conform to the standard and the standard is freely available to other developers.

Analysis: Provided that the agreement does not otherwise restrict competition, Article 81(1) is not infringed, as participation in standard setting is unrestricted and transparent, and the standardization agreement does not set an obligation to comply with the standard. If the parties agreed only to produce videocassettes which conform to the new standard, the agreement would limit technical development and prevent the parties from selling different products, which would infringe Article 81(1).

Example 3

Situation: A group of competitors active in various markets which are interdependent with products that must be compatible, and with over 80 % of the relevant markets, agree to jointly develop a new standard that will be introduced in competition with other standards already present in the market, widely applied by their competitors. The various products

complying with the new standard will not be compatible with existing standards. Because of the significant investment needed to shift and to maintain production under the new standard, the parties agree to commit a certain volume of sales to products complying with the new standard so as to create a "critical mass" in the market. They also agree to limit their individual production volume of products not complying with the standard to the level attained last year.

Analysis: This agreement, owing to the parties' market power and the restrictions on production, falls under Article 81(1) while not being likely to fulfill the conditions of paragraph 3, unless access to technical information were provided on a non-discriminatory basis and reasonable terms to other suppliers wishing to compete.

Examples 1 and 2 are straightforward and do not require additional comments. As mentioned above, as long as the procedure is fair and access to the standard is warranted, the Commission does not seem to see anticompetitive evils.

However, Example 3 appears more complicated. The restriction on output is certainly very problematic, as it would constitute a hardcore restriction. Interestingly, the Commission seems to be of the opinion that even such a hardcore restriction may be exempted under Article 81(3) ECT if "access to technical information were provided on a non-discriminatory basis and reasonable terms to other suppliers wishing to compete."

4.4. Case law on standards-setting

4.4.1 Introduction

The range of different antitrust issues which may arise in connection with standardization has already been presented in Chapter 3. The EC case law is not as developed as the US jurisprudence, although unlike the US agencies, the Commission has published the Horizontal Guidelines[1070] which provide a basic document outlining the Commission's general approach towards standardization issues that is also intended as a summary of the case law in this area.

The EC case law may be divided into the following categories:[1071]

1. Transparency and issues linked with the SSO's decision process;
2. Restriction of access to the standardization process;
3. Access to a label, fair testing, conformity assessment procedures;
4. Fair access to necessary information and FRAND terms for use of IPR;
5. Issues of information exchanges; and
6. Overstandardization: Reduction of product differentiation.

These categories may be divided into three sometimes overlapping groups:

[1070] For a general presentation, see the previous section.
[1071] Issues linked with IPR distribution have been dealt with before; see Subsection 4.3.4.2.3. Excursus: Abuse of collective dominance under Article 82 ECT.

- The first two categories mainly deal with membership and structural issues in relation to SSOs. Their primary objective is ensuring effective participation of interested parties in the standardization process (avoidance of capture.) Thus, their focus is on the SSO's decision-making process.

- Categories 2 to 4 can be appreciated within the framework of the refusal to deal doctrine, although EC authorities have not always explicitly referred to such a concept. Indeed, all three concern a refusal to provide access or information to an outsider. Issue 4 focuses on the access to proprietary information necessary for acceding to the standard. The focus is therefore on the safeguard of fair competition conditions in the market for standardization, i.e. on measures that aim at ensuring a competitor is able: a) to join the standardization process (category 2); and b) to make use of the standard even if it has not (or not fully) participated in the standardization process (category 3).

- The last two categories purport to present the case law on potential anticompetitive effects of standards from a material perspective. The view may be taken that these two categories of issues occur even in the presence of fair procedural rules. Issue 5 deals with information exchanges during the standardization process; i.e., to prevent cartelization, participants should avoid exchanging information not necessary to the standardization process. The last category also addresses a material, albeit rare issue of anticompetitive standardization—overstandardization, which may occur when producers jointly decide to reduce product variety in a way which does not satisfy customers.

4.4.2. Procedural safeguards against discrimination: transparency and majority rule

4.4.2.1. Transparency

Paragraph 169 of the Horizontal Guidelines provides that standards must be set in "a transparent manner." The Commission holds the view that transparency (along with the availability of technical information on standards and the participation of an appreciable part of the concerned industry) is necessary to materialize the benefits of standardization. The SSO bears the burden of proving that a restriction to the transparency principle (or to the availability of technical information on the standards and the participation of an appreciable part of the concerned industry) provides economic benefits. What transparency means (and which degree of transparency is necessary) will certainly need to be clarified. In the absence of case law on this score, a substantial degree of discretion is left to the competition authorities.

Further, paragraph 174 provides that a standard "must be set in a non-discriminatory manner. […] In any event, it must be justifiable why one standard is chosen over another." The first sentence arguably means that each draft standard shall be given a "fair chance" to be adopted by the SSO. In other words, an SSO shall take into account a wide variety of technologies when it decides to adopt a standard, and shall not favor a technology merely because it is supported by some of its members. The nondiscrimination requirement probably finds its limits with the reasonable justifications an SSO gives when it chooses one standard over another. Although the second sentence cited above requires that such grounds be "justifiable,"

it is unclear whether this grants a right to the promoter of a non-adopted standard to require a justification by the SSO.

4.4.2.2. Majority rule?

One might wonder whether the Commission intended to impose the majority rule (as opposed to weighed majority) in the *X/Open* case when it mentioned:[1072]

> *It is […] required that new members be approved by a majority vote.*

Such a majority rule requirement is not mentioned in the Horizontal Guidelines. Note the statement relates only to the way in which new members are approved and not (expressly) to the way standards are adopted, although one may wonder whether the imposition of such a rule for the access of new members does not imply *a fortiori* its imposition for the adoption of the standard. Note as well that many SSOs function according to the consensus rule (the majority rule in such cases is *a fortiori* respected.) Moreover, although such a requirement does not seem to be strictly mandated by the four conditions of Article 81(3) ECT, its logical alternative, weighed majority, would imply a certain degree of discrimination. The courts have not yet ruled on this matter.[1073]

4.4.3. Restriction of access to the standardization process

This subsection deals with the question of who should be allowed to join in the standardization process. In particular, one must bear in mind that SSOs are often private agents staffed by persons who have at least some kind of link with the industry for which standardization is sought. Hence, issues of "capture" and conflicts of interest are pervasive.

Ideally, all interest holders are involved in the standardization process, including producers, consumers, producers of complementary and substitutable products, and more generally victims/beneficiaries of negative/positive externalities. The involvement of all interest holders should ensure that the standard will be widely accepted and should allow a wide variety of technologies to be taken into account. Such a wide acceptance basis may be necessary to reach the critical mass necessary to overcome an established (less efficient) standard in favor of a technologically better one. This is particularly important in markets where network externalities are high, as the new standard usually has to overcome the advantages of the installed basis. Of course, wide participation does not always ensure a wide level of acceptance, while conversely, wide participation is not always necessary to reach wide acceptance.

In reality, it must be stressed that wide participation is rarely practical so this objective is often unfulfilled. Indeed, the more people involved, the more transaction costs increase, as it

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[1072] *X/Open Group*, 87/69/EEC, Commission Decision.

[1073] Note that under US law, the Standards Development Organization Advancement Act of 2004, 15 U.S.C. § 4301-05, also sets forth that, in order to be protected, the SSO must "incorporate the attributes of openness, balance of interest, due process, appeals process and consensus." The case law presented under Chapter 3 did not seem to go that far, even holding that due process was not a benchmark for judging the compatibility of a standardization agreement with the antitrust laws (*Northwest* case). However, US case law clearly stated that an SSO which failed to adopt measures to prevent the capture of its decision-making process was liable under the Sherman Act (*Hydrolevel* case.)

is difficult to find a standard that satisfies all diverging interests. Practically, as standards often involve the drafting of complex technical requirements, such a drafting can only be realized by a smaller committee (with the possibility at a later stage of having the wider body decide whether the standard is acceptable.) Moreover, even if the standardization process with a wider basis may entail the possibility of sharing the standardization cost on a wider basis, it almost necessarily entails the risk of increasing the cost of standardization as well.

Beyond cost and logistical issues, single actors may have various incentives not to accept other participants into the process. First, the standardization process can grant in-depth knowledge of a standard, which may allow a particular firm to get a head start in the market for the new product (first mover advantage.) Second, in semi-mature markets where various technologies are vying for supremacy, the establishment of a standard can substantially benefit the firm that first developed it (avoidance of adaptation costs and increase in rivals' costs). Third, in technology intensive markets, standardization often involves IPR issues, especially the licensing of proprietary technology.[1074]

In sum, although there may be incentives for broad participation in standardization, private incentives may push for only limited participation. Given that private SSOs usually heavily draw on industry-specific expertise, it is at least plausible that such experts may pursue their own interests without fully taking into account the interests of the wider public. As the correction of standards can be quite costly and it is sometimes difficult to construct the counterfactual evidence of a better standard once one is in place, it is necessary to provide safeguards to avoid such a capture of the standardization process. If one assumes the private SSO themselves as composed by industry experts do not necessarily have the incentives to provide such safeguards, it may be useful to have public regulatory provisions requesting such safeguards. As SSOs are a convening of private firms, regulation by the antitrust statutes seems a logical solution. The EC Commission has stressed that its positive attitude towards standardization was dependant on the finding that "an appreciable proportion of the industry is involved in the setting of the standard in a transparent manner."[1075]

However, the EC Commission has recognized that in some instances, it may be justifiable to refuse the addition of participants to the standardization process. In *X/Open Group*,[1076] a group of computer manufacturers intended to establish an open computer operating system which would have the benefit of being accessible to the public and being compatible with the equipment of various computer manufacturers. The Commission accepted the view that a closed membership SSO could be justified under Article 81 (3) ECT even though it restricted competition under Article 81(1) ECT:[1077]

[1074] Those concerns were expressed in the *X/Open Group* case, 87/69/EEC, Commission Decision, § 32.
[1075] Horizontal Guidelines, OJ 2001 C 3/02, § 169.
[1076] *X/Open Group*, 87/69/EEC, Commission Decision.
[1077] The Commission provided that the mere exchange of technical information was *in casu* not a restriction to competition (§ 38) (the issue of information exchange is discussed in more detail below):

> *The exchange of information does not restrict the parties in their freedom to determine their market behavior independently. In the context of the present case, there is no reason to assume that the exchange of information will go further than provided in the agreements nor that it will result in concerted behavior by the parties. As far as the exchange of market information in particular is concerned it may be noted that, in the absence of more far-reaching cooperation between the parties, joint market research to collect information and ascertain facts and market conditions does not in itself affect competition.*

The aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed. The way in which access to the Group is limited is indispensable to the attainment of the positive objectives of the Group. According to the Group Agreement, it is required that the members be major manufacturers in the European information technology industry with Unix experience. Only such companies can normally be expected to be able to provide resources of all kinds appropriate to the support of the Group's activities. It is, moreover, required that new members be approved by a majority vote. This enables a majority of the members to prevent admission of companies which might have an adverse effect on the cooperation and the achievement of the objectives of the Group. The members are the best to ascertain and weigh the advantages and disadvantages of admitting a new member for the efficiency of the work of the Group. The practical difficulties of bringing together representatives of the members with authority to commit their companies without endless discussions increase considerably with the number of members. The requirement of a majority vote also gives the members a further possibility of limiting the number of members to a manageable size. The fact that the members are in a position to admit applicants who do not fulfil the general criteria means, on the other hand, that it is possible to admit companies which are not major manufacturers but which may be able to make a substantial contribution to the work of the Group. Because qualitative as well as quantitative judgments may be called for in order to ensure that the work of the Group will not be hindered by new members, some discretionary power of admission is necessary.

The Commission confirmed this point of view in its Horizontal Guidelines,[1078] where it stated (§ 171-172):

By their nature, standards will not include all possible specifications or technologies. In some cases, it would be necessary for the benefit of the consumers or the economy at large to have only one technological solution. However, this standard must be set on a non-discriminatory basis. Ideally, standards should be technology neutral. In any event, it must be justifiable why one standard is chosen over another.

All competitors in the market(s) affected by the standard should have the possibility of being involved in discussions. Therefore, participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation or unless recognised procedures are foreseen for the collective representation of interests, as in formal standards bodies.

When weighing the overall balance of advantages and disadvantages, the Commission stressed in the *X/Open Group* decision (§ 42):

[1078] The Guidelines on the applicability of Article 81 ECT to horizontal cooperation agreements, OJ 2001 C 3/02.

> *In the present case, the Commission considers that the advantages involved in the creation of an open industry standard (in particular the intended creation of a wider availability of software and greater flexibility offered to users to change between hardware and software from different sources) easily outweigh the distortions of competition entailed in the rules governing membership which are indispensable to the attainment of the objectives of the Group Agreement. In fact, the competitive advantages conferred on members by their ability to restrict access to the Group and the distortions of competition this entails, are reduced by the Group's professed aim of making available* ***as widely and quickly as possible*** *the results of the cooperation. This same aim also increases the objective advantages the cooperation will promote. The Commission considers that the* ***willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption***. [emphasis added]

Furthermore, in *TACA*[1079] (albeit a transportation case[1080]), the CFI ruled that the liner conference inducing competitors to join an association may be an abuse of a (collective) dominant position, although in that case, the Commission had not proven that TACA had induced its competitors to join it (§ 1256):

> *It is apparent […] that, in the Commission's view, the intention of the TACA parties was ... to ensure that if a potential competitor wished to enter the market it would only do [so] after it had become a party of the TACA. The Commission states […] that the TACA parties actively took measures to assist those potential competitors successfully to enter the market as parties to the TACA. […] the Commission states that:*
>
> *Each of these acts would have constituted inducements to potential competitors to enter the transatlantic trade, not as independent carriers but as parties to the TACA. In so far as the existence of potential competition may have worked as a restraint on the TACA's market power (theory of contestable markets), the elimination of this source of competition would have worked in two ways: the elimination of potential competition and the anticipatory elimination of actual competition. The Commission considers that such behavior, which was not disclosed in the Application for Exemption, has damaged the competitive structure of the market and amounted to an abuse of the TACA parties' collective dominant position in 1994, 1995 and 1996.*

Of course, the *TACA* case is special because it occurred within the framework of Regulation 4056/86 which foresees a kind of "regulated cartel/collective dominant position"; however, it may not be irrelevant for situations in the standardization context, as in such situations, a certain amount of collaboration is also necessary between members to create social benefits. In a wide interpretation of its holding, the *TACA* decision may thus be understood as forbidding liner conferences (respectively, standardization associations) actively to induce

[1079] *TACA* (Trans-Atlantic Conference Agreement) case (CFI judgment in joined cases T-191/98, T-212/98 to T-214/98 [2002] ECR II-875, of September 30, 2003.

[1080] Under Council Regulation EEC N° 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transports (OJ 1986 L 378, p. 4), liner conferences are allowed to determine prices on a given route provided certain conditions are met. This Regulation is currently under review.

nonmembers to become members of their association in the case where membership is the only way of entering a market, which thus eliminates potential competition.[1081]

4.4.4. Access to label, fair testing and conformity assessment procedures

Sometimes the members of a cartel are tempted to use the standardization process as a pretext to protect themselves from competition, as by using their market power, they may try to impose a standard that they control. However, EC competition authorities have not tolerated standardization processes being used to cover up cartel purposes. For example, the Commission indicated in the Horizontal Guidelines (§ 165):

> *[A]greements that use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors will almost always be caught by Article 81(1). For instance, an agreement whereby a national association of manufacturers set a standard and put pressure on third parties not to market products that did not comply with the standard would be in this category.*

In *NV IAZ International Belgium v. Commission*,[1082] the Commission declared an agreement between manufacturers and sole importers of washing machines and dishwashers affiliated with certain national trade organizations in Belgium incompatible with Article 81 ECT. The agreement regulated the conditions under which a safety label (the NAVEWA-ANSEAU label) would be distributed. Further, the agreement excluded importers other than sole importers from obtaining a conformity check for the products they imported into Belgium.

The ECJ ruled (§ 23, 25):

> *[The] agreement, regard being had to its content, its origin and the circumstances in which it was implemented, clearly expresses the intention of treating parallel imports less favourably than official imports with a view to hindering the former.*
>
> *[…]*
>
> *[T]he purpose of the agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties, is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks.*

Early in *Chauffage Central*,[1083] most of the Belgian heating plumbers and the main Belgian heating equipment producers agreed the plumbers would exclusively purchase standardized

[1081] One might wonder whether the Commission did not actually want to attack the cartel as such but just wanted to avoid having the cartel's anticompetitive rules applied to more market actors. The Commission announced on December 14, 2005 that it would propose the repeal of Regulation 4056/86. Press release IP/05/1586. However, the Commission's decision in *TACA* was not upheld by the CFI as it denied the liner conference had abused its dominant position in this account.

[1082] A.k.a. *Community v. Anseau-Navewa*, 96-102, 104-105. 108, 110/82, [1983] ECR 3369.

[1083] Décision de la Commission du 20 octobre 1972 relative à une procédure au titre de l'article 85 du traité CEE (IV/496-498-532-511-26238-26577 – "Chauffage central"), 1972 OJ L 264/22, Not available in English.

products directly (thus circumventing wholesalers, a small fraction of whom had only subscribed to the agreement) from members of the heating equipment trade association, which regrouped most Belgian heating equipment plumbers and producers. In exchange, Belgian producers agreed to standardize all their products. Given that the lengthy standardization procedures were used in a discriminatory way and that they had almost no possibility of selling their products to most of the Belgian plumbers, foreign producers were *de facto* prohibited access to 70% of the Belgian market. The Commission treated the scheme as a clear restriction of competition under Article 81 (1) ECT. When examining whether to grant an exemption under Article 81(3) ECT, the Commission stressed in particular first that the standardization process did not produce a better quality of products as the standardization requirements were the same as those of the public national standardization body, and second that no proof had been brought forward that the circumvention of wholesalers had the effect of reducing prices or improving distribution. The Commission thus condemned the scheme. In this case, one could view the standardization agreement as a mere **pretext** for covering up what was in reality a concerted refusal to deal with foreign competitors. One can also imagine the scheme would have been possible even in the absence of standardization (just more blatantly anticompetitive.)[1084]

4.4.5. Fair access to necessary information and FRAND Terms for use of IPRs

These two issues focus on the relationship between participants to the standardization process rather than that between a participant and the SSO. Worries about capture are here less important, because what really matters is how much private parties may be affected in order to allow a "fair" access to the standards. These issues are naturally very sensitive and may be compared to a certain extent with the discussion on essential facilities. Interestingly, and contrary to what happens in the field of essential facilities, the case law on these two issues is quite limited.

[1084] Note this case is very similar to *NV IAZ International Belgium v. Commission* and that the latter would probably have been judged in a similar way if the ECJ had reviewed its compatibility with Article 81(3) ECT. The value-added of the former case is precisely that it presents the ECJ approach to standards in the context of Article 81(3) ECT. A further difference lies in the fact that the *IAZ* case focuses on access to the label while *Chauffage central* focuses more on the access to the certification process. Both cases nevertheless are very similar.
Moreover, note that these cases are very similar to their US counterparts, *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974 (4th Cir. 1949) and in particular, *Nat'l Macaroni Mfrs. v. FTC,* 65 F.T.C. 583 (1964), aff'd, 345 F.2d 421 (7th Cir. 1965). However, the *Bond Crown* case is different as it seems to rest on the proposition that standardization alone would not have been struck down, only when it is "in combination with" other elements:

> *Innocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the commission.* ***The standardization of product, for example, would be innocent enough by itself****, but not when taken* ***in connection*** *with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere.* [emphasis added]

In the EC cases, the standardization itself is struck down.

4.4.5.1. Technical information

The Commission mentioned in the Horizontal Guidelines that the availability of technical information is necessary to realize the benefits of standardization. The Horizontal Guidelines provide (§ 169):

> *"[…] To materialise [its] economic benefits, the necessary information to apply the standard must be available to those wishing to enter the market […]. It will be for the parties to demonstrate that any restrictions on the setting, use or access to the standard provide economic benefits.*

Albeit in an Article 82 context, the *Microsoft* case[1085] will certainly provide by analogy some useful clarifications on what amount of information is necessary to fulfill this provision.

4.4.5.2. FRAND terms

The Horizontal Guidelines provide that standards *"*which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products" emanating from these organizations are "normally" exempted from Article 81 ECT liability "where participation in standard setting is unrestricted and transparent" (§ 163). But does that mean a standard that complies with these formal requirements is exempt *per se* from antitrust liability, *no matter how restrictive of competition it may actually be*? As we have seen in Chapter 2, the mere fact that a standard does not *itself* create an obligation to comply does not guarantee that other market actors or contingencies (insurance companies, state legislation, market acceptance) will not render its observation economically mandatory. From the point of view of economic theory, it is irrelevant whether the mandatory character of a standard is imposed by the law or the market, as the potential for anticompetitive standards exists in both cases in the same way. The mere fact a standard "ensures compatibility of products" does not exclude the possibility of a trade-restrictive standardization agreement.[1086] Thus, a certain level of control needs to be kept of the material conditions of a standard.

Paragraph 174 of the Horizontal Guidelines seems[1087] to imply that formal requirements may not be the outer limits of the review:

> *There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s),* ***access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms****.* [emphasis added]

[1085] COMP/37.792, 24 March 2004.

[1086] In particular, the issue of network externalities (excessive momentum and excessive inertia) hardly seems to be addressed.

[1087] Note that this paragraph refers to the analysis under Article 81(3) ECT of the condition of the elimination of competition. Thus, if one interprets the Guidelines strictly, a *de facto* standard established by jointly dominant parties that does not eliminate competition completely should not be held anticompetitive, even if it unfairly reduces competition.

Even though the Commission may be in a position to impose an obligation to license as a condition for clearing the standard-setting agreement under Article 81(3) ECT, it may be obliged to do so on "fair, reasonable and non-discriminatory" terms, as an obligation to license on a royalty-free basis is likely to conflict with Article 13 of the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which provides in pertinent part:

> *Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*

Obviously, one of the central difficulties is to determine exactly what are the FRAND terms, as the Horizontal Guidelines and the case law[1088] offer little guidance on this subject. Thus, substantial uncertainty remains in particular as to what level of recoupment the technology-owning firms are to be allowed to maintain.[1089] In practice, most of the information regarding the costs of technology development will come from the firm forced to license its technology, with such a firm evidently having little incentive to present data which tends to diminish its costs.

Many SSO internal rules now set forth that IPR will be licensed (with the possibility of opting-out in order to guarantee a certain flexibility and to avoid foreclosure.) An SSO may also judicially request the grant of a license. In extreme cases, the case law on essential facilities and refusal to deal presented above may represent the last hope of bypassing a deadlock. However, patent holders are generally eager to promote the conclusion of a standard as it generally creates a market for its technology.

[1088] In *IMS Health*, quoted above, the Commission skirted the issue by requiring the parties to negotiate. For somewhat more guidance in the music industry, see *Ministère public v. Jean-Louis Tournier*, C-305/87, [1989] ECR 2565, § 34-46.

[1089] For a presentation of different methods of calculation such as cost-based pricing, same firm price comparison, market-based pricing, profit comparison, and efficient component pricing, see M.DOLMANS, supra at fn 499, pp. 30 and ff and D.G.SWANSON/W.J.BAUMOL, "Selection of Compatibility Standards and Control of Market Power Related to Intellectual Property", in: *Antitrust Law Journal*, 73/1, 2005, providing a model for determining FRAND terms. D.NEVEN, "On the Interface Between Competition and Regulation", Conference of Reykjavik, September 10, 2004, notes:

> *[T]he dominant firm may sometimes be in a position to extract the entire surplus (monopoly profits) that can accrue in markets using the essential facility without refusing to deal. This arises when the facility is "absolutely necessary (a strict complement to other inputs in downstream markets) and when appropriate contracts can be designed and enforced. […] If a dominant firm refuses to deal, it is likely that access contracts will yield lower rents. Access contracts will involve an increase in competition.*

Neven argues three concerns must be taken into account:

> *[T]he marginal cost of providing access, the financing of the fixed cost of the essential facility (the development of the innovation) and the need to ensure efficient entry (if entrants operate in the downstream markets with lower margins than the dominant incumbent firm, they may profitably enter even when they are less efficient.*

Neven further notes that these principles may not be easy to implement in practice as market information may be difficult to estimate, and there may be little room for a particular treatment of IPR in an essential facility context (as opposed to the treatment of other proprietary rights) given "the IP regime already reflects the particular characteristics of intellectual assets."

4.4.5.3. Patent hold-ups

As a patent which is found to be essential for the implementation of a standard has a higher value after rather than before the adoption of a standard, undertakings may be tempted to disclose their IPR on a technology only after a standard embodying it has been adopted (a situation often called "patent ambush" or "submarine" patents.) As presented under Chapter 3, to prevent such scenarios, SSOs have adopted policies to require undertakings that participate in the standard-setting process to disclose their IPR (and sometimes, that they give an indication of the level of royalties they intend to request.)

Concerning the obligation to *ex ante* disclose the IPR held by a standard-setter, the European Telecommunications Standardisation Institute ("ETSI") case law has provided some guidelines on what it considers acceptable. As Ohana, Hansen and Shah[1090] report:

> *In an earlier case involving ETSI interim IPR policy, the European Commission approved an ex ante disclosure rule as well as an ex ante commitment to license on FRAND terms in ETSI's procedural rules. However, the Commission did not approve of "licensing by default" rules whereby patent holders would agree ex ante, as a condition of participation in the [SSO], that their patents must be incorporated in any subsequent standard if deemed essential. Although these rules were clearly aimed at deterring potential hold-up strategies, it is understood that the Commission took the view that such rules would be likely to restrict innovation and would therefore be prohibited under Art. 81(1) EC*

Competition authorities also have an interest in such behavior, as arguably it may constitute a violation of the competition laws. As Ohana, Hansen and Shah[1091] put it:

> *[I]t is thought that Art. 81(1) would prohibit a standard-setting agreement resulting from a patent ambush because of its effect of excluding actual or potential competitors from the market as a result of non-transparent procedures. […] Under Art. 82, the Commission could only intervene if the offending patent holder were (i) dominant and (ii) either applied discriminatory licensing terms, demanded excessive royalties or refused to license in order to monopolize a downstream market.*[1092]

However, at the EC level, case law on this subject matter has not been extensive. It seems firms that try to enforce an IPR against other standard-setters after knowingly having concealed the IPR in a standard-setting process are probably liable under Articles 81 or 82 ECT,[1093] and such IPR may be unenforceable under national contract or IP law. However, if the non-disclosure is not intentional, the IPR holder may receive limited royalties.[1094] Moreover, the essential facility doctrine may be used to overcome issues of patent hold-up. The chances of application of this doctrine seem greater under EC than US law. Indeed,

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[1090] G.OHANA/M.HANSEN/O.SHAH, "Discolsure and Negotiations of Licensing Terms Prior to Adoption of Industry Standards: Preventing Another Patent Ambush?", in: [2003] E.C.L.R. 644.
[1091] G.OHANA/M.HANSEN/O.SHAH, "Discolsure and Negotiations of Licensing Terms Prior to Adoption of Industry Standards: Preventing Another Patent Ambush?, in: [2003] E.C.L.R. 644.
[1092] Id. at fn 16, p. 646.
[1093] See, e.g., *Micro Leader Business v. Commission*, T-198/98, [1999] ECR-II-3989.
[1094] Generally, see M.DOLMANS, supra at fn 499, pp. 18 and ff.

whereas under US law, courts have clearly stated that patent holders are almost never obligated to license their technologies,[1095] the ECJ has taken a much more relaxed approach, which seems to accept more easily that the holders of an essential facility will be forced to share their technology. However, the exact contours of the doctrine, and, in particular, the conditions for its application still seem relatively imprecise and therefore grant a substantial degree of discretion to the EC courts.

4.4.6. Issues regarding information exchanges

Exchanges of information are inherent in the standardization process. When they take place between competitors, exchanges of information are obviously seen as potentially competition restrictive;[1096] therefore SSOs are advised to ensure that no *anticompetitive* exchanges of information are made during the standardization process. One way of reaching this goal is for an SSO to adopt competition guidelines. In such, the SSO is advised to make certain that no information is exchanged that is not strictly necessary for the standardization process. In particular, information on sales (prices, volumes and customers) and output or distribution capacity of competitors is rarely necessary for the standardization process. Should this be the case, some procedures may be put in place to avoid a broad distribution of such information; for example, to render the information anonymous,[1097] to avoid firm- or plant-specific information, and to severely limit its distribution.

Beyond these formal requirements, we have seen that the Commission takes the market structure into account when determining whether an exchange of information is anticompetitive. Thus, exchanges of information in oligopolistic markets tend to be reviewed more closely than those in markets where competition is atomistic. This must certainly be kept in mind when the level of the exchange of information allowed under the auspices of a SSO has to be determined.

4.4.7. Overstandardization: Reduction of product differentiation

By definition, standardization involves making product characteristics uniform and thus inherently brings with it the risk of a decrease in product variety. Product diversity may be valuable to a consumer either because consumer preferences are not homogeneous or because product variety in itself is valuable to the consumers (for example, one might be glad to be able to choose among Italian, Greek or French foods without being limited to only one.)

Product standardization also carries the risk that competition on product characteristics be eliminated. As product characteristics become standardized, competitors can no longer try to seduce costumers with better ones. It is therefore necessary to make sure the standardization process does not jeopardize further development of a product or "lock in" the producers.[1098]

Competition authorities have indicated that although standardization did actually bring about economic benefits, some of its features were not acceptable as they unreasonably limited product diversity. In the Horizontal Guidelines, the Commission stated (§ 167):

[1095] See Chapter 3, Subsection 3.4.4.1. Unilateral refusal to deal and essential facility doctrines
[1096] See also Subsection 4.3.1.1.4. Concerted practices and exchanges of information.
[1097] See the *EWIS* case, OJ [1987] C 339/7.
[1098] Guidelines on the applicability of the EC Treaty to horizontal cooperation agreements, OJ 2001 C 3/02, Horizontal Guidelines, § 167.

> *[T]he existence of a restriction of competition in standardization agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardization agreements may restrict competition where they prevent the parties from either developing alternative standards or commercializing products that do not comply with the standard. Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.*

In the 1978 *VCR*[1099] case, a group of European consumer electronics producers agreed to adopt a standard established by Philips for video recorder products (the VCR standard.) The parties to this standardization agreement also agreed to cross-license without charge all of their IPR over the technology embodied in the VCR standard and to manufacture and distribute only VCR cassettes and recorders. The Commission ruled that such a scheme was nonetheless restrictive of competition under Article 81 (1) ECT, because (§ 23):

> *[T]he basic agreement required the parties to observe the technical standards […] for the manufacture and distribution of video cassette recorders and video cassettes. As these standards were for the manufacture of VCR equipment, the parties were obliged to manufacture and distribute only cassettes and recorders conforming to the VCR system licensed by Philips. They were prohibited from changing to manufacturing and distributing other video cassette systems, Sony's U-MATIC for example, as long as these obligations continued. They were not even allowed to use other systems at the same time. This constituted a restriction of competition under Article 85 (1) (b), which was designed to limit the technical development, production and sale of other videocassette systems.*

Moreover, the Commission saw the cross-licensing scheme (in particular, its termination clause) as a restriction on competition (§ 24-25):

> *(A) party terminating the agreement would forfeit immediately its licenses […] under the patents of the other parties. On the other hand the remaining parties kept their licenses under the patents of the terminating party. This constituted an additional restriction of competition, reinforcing the restriction [under § 23].*
>
> *In view of the pre-eminent market position held by Philips, the leading licensor at the time, these restrictions of competition were particularly marked. The existing restriction on the freedom of action of Philips' partners arising from the termination requirements would have been enough, given the relative strength of the companies, to dissuade them from any attempt to adopt another system.*

[1099] 78/156/EEC, Commission Decision of December 20, 1977 relating to a proceeding under Articles 85 of the EEC Treaty (IV/29.151 – Video cassette recorders), OJ L 047, 18/12/1978, pp. 42-47.

The Commission went on to examine whether the conditions of Article 81(3) ECT were fulfilled (§ 29-31):

> *On the positive side, this requirement entirely achieved its main purpose: the use of VCR videocassettes on the machines of other manufacturers. To this extent it may have been assumed that there were advances in manufacture which led to an improvement in the distribution to the benefit of the consumer in that suitable videocassettes were made more readily available. In fact no significant improvement in production or distribution was achieved since compliance with the VCR standards led to the* ***exclusion of other, perhaps better, systems****. Such an exclusion was particularly serious in view of the* ***pre-eminent market position*** *enjoyed by Philips.*
>
> *Moreover consumers were not allowed a fair share of the resulting benefits. For the agreement* ***denied them the opportunity*** *to buy videocassettes or videocassette recorders of a different system from any of the parties. The parties were not even in a position to offer the consumer cassettes or machines of another system which had been manufactured by firms outside the agreement. For the mere distribution of products which did not meet VCR standards was also forbidden […].*
>
> *At the same time* ***restrictions*** *were imposed upon the parties* ***which were not indispensable to the attainment of these improvements****. The compatibility of VCR video cassettes with the machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment. As much is evident from the less restrictive obligation which is all that is required by the separate licensing agreements that Philips has entered into with other European and non-European manufacturers.* [emphasis added]

In this case, the Commission has struck down the scheme on multiple grounds. It seems the following features had a decisive weight:

- Competitors agreed to apply the standard of a **market leader** and were forbidden to use any other technology, thus preventing both the improvement of the standard and competition for the adoption of a new standard.

- The termination clause captured the participating firms for a long period of time in that it deprived leaving firms of IPR which could have been of interest in another technology, and granted a "definitive" license to its competitors over its own technology, thus **locking** the participating firms through a "sunk costs/competitive disadvantage" strategy.

- The agreement also contained provisions **not necessary** for the attainment of the standardization goal. In particular, according to the Commission the possibility of granting non-exclusive licenses would have been sufficient to meet the competitive goal.

The Commission did acknowledge that consumers might benefit from the adoption of a standard that grants them increased interoperability; however, it took pains to emphasize that such an advantage may not come at the cost of excluding competition from better technologies or from other suppliers.[1100] The Commission did not clarify whether the exclusivity clauses were necessary for the establishment of the standard, instead merely stating that competition (from better technologies and other manufacturing sources) should be guaranteed as a matter of principle, even among firms that are party to a standardization agreement. The Commission has not ventured itself in the much more dangerous field of weighing the positive benefits of standardization with its anticompetitive evils.

Interestingly, the Commission did not justify its decision with the fact that the standardization agreement would have had the result of eliminating all competition in the market, which is the fourth point to be analyzed under Article 81 (3) ECT. Although Philips was the leader in the European market, competition between standards (in particular Sony's) was not insubstantial. The Commission imposed competitive standards which go much further than the requirement that competition should not be eliminated, as it even imposed competition among standardizers.

Briefly stated, this case can be seen as the imposition by the Commission of non-exclusivity requirements to standardizing ventures. Standardization inherently involves the abandonment of competition on certain competitive features by competitors. However, standardization agreements must not reduce product diversity any more than reasonably necessary to achieve their aims. Necessary facts are missing on which to judge whether the Commission has gone too far in imposing non-exclusivity requirements to co-standardizers, because if competition between standards is strong enough, it may be economically unjustifiable to impose non-exclusivity requirements on co-standardizers.[1101] At any rate, in this case the Commission set stringent criteria as to what it considers necessary for the attainment of the standardization goals.

The Horizontal Guidelines bring their own benchmark on this score (§ 171-173):

> *By their nature, standards will not include all possible specifications or technologies. In some cases, it would be necessary for the benefit of the consumers or the economy at large to have only one technological solution. However, this standard must be set on a non-discriminatory basis. Ideally, standards should be technology neutral. In any event, it must be justifiable why one standard is chosen over another. […]*
>
> *[…] Agreements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality. For instance, it should be* ***very clearly demonstrated*** *why it*

[1100] In some way, this is almost a contradiction in terms. In order to grant benefits (interoperability, economy of scales, etc.) standardization involves the elimination of diversity and thus the production of a single standardized type of products. What might be understood as the Commission's holding here is that standardization cannot be used without boundaries. The fact that standardization gives a benefit to consumers cannot be used to justify provisions that create an unnecessarily strong market position (or reinforce the leading position of a competitor.)

[1101] This decision was taken at a moment when intra-brand competition (which may be seen as intellectually linked with standardization agreements) was thought to be important in itself (*per se*) almost without taking into account inter-brand competition. One might take the view that given the evolution of the Commission's approach on vertical restraint, the non-exclusivity requirements of the Commission may now be somewhat looser.

> *is indispensable to the emergence of the economic benefits that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.* [emphasis added][1102]

4.5. Remedies

4.5.1. Penalties and fines

Chapter VI of Regulation 1/2003 (Articles 23 and 24) empowers the Commission to impose fines and penalties of up to 10% of the undertaking's turnover when it among other things violates Articles 81 and 82 ECT (Article 23(2) of Regulation 1/2003), contravenes a decision ordering interim measures, fails to comply with a commitment made binding by a decision (Article 23(2) of Regulation 1/2003), or supplies incorrect, incomplete, or misleading information in a proceeding (Article 23(1) of Regulation 1/2003; maximum 1% of the undertaking's turnover (17 and 18 of the Regulation.)

Article 23(2) of Regulation 1/2003 further provides:

> *[W]here the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.*

The level of fines has varied. In 1998, the EC Commission announced a policy of higher fines in its Guidelines on the method of imposing fines.[1103] In 2002, the Commission published a Notice on the reduction of cartel fines,[1104] which set forth an important reduction of fines for undertakings who cooperated with antitrust authorities by blowing the whistle on cartel leaders. In 2006, the Commission revised its 1998 Guidelines[1105] with a view toward increasing the deterrent effect of fines; however, the maximum level of fines remained unchanged.

As regards penalties and fines imposed by Member States, paragraph 10 of the Commission Notice on the cooperation between the Commission and the courts of the EC Member States in the application of Articles 81 and 82 ECT provides:

> *In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and—to the extent that they are competent to do so—impose sanctions provided for under national law. However, the application of these national provisions must be compatible*

[1102] See, as well, M.DOLMANS, supra at fn. 1068.
[1103] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9, January 1,1998.
[1104] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, February 19, 2002, pp. 3-5, also known as the "leniency program."
[1105] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C210/02, Sept. 1, 2006.

with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

(a) where there is an infringement of Community law, national law must provide for sanctions, which are effective, proportionate and dissuasive;
(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages;
(c) the rules on procedures and sanctions which national courts apply to enforce Community law
— must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness) and they
— must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence)
On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

It must be noted that a certain level of asymmetry exists concerning the level of fines imposed under national laws.

4.5.2. Statute of limitations

According to Article 25 of Regulation 1/2003 (and Article 26 as regards enforcement of penalties), the Commission cannot impose fines in relation to an infringement that ended more than five years before the fine is decided. However, any action taken by the Commission or by a NCA that is notified to at least one of the violators interrupts this period, with the consequence that the starting time begins running afresh. Proceedings before the ECJ also suspend the limitations period.

4.5.3. Voidness

In addition to fines, Article 81(2) ECT provides that agreements in restraint of competition (and which are not justified under Article 81(3) ECT) are void. This is not always a credible threat for competition law violators, as no cartel members would seek enforcement of a cartel agreement in court. However, the consequences of voidness can hit a violator hard, especially for vertical agreements, as parties to such agreements often rely on the legality of an (exclusive) license or distribution right and calculate the royalties accordingly. In such cases, the fact that a key clause of an agreement is unenforceable in court may render the agreement worthless.[1106]

However, the entire agreement is not necessarily affected by voidness. As long as severance is possible, only the anticompetitive clause is deemed void, and the rest of the agreement continues to be valid.[1107] As it is not always easy to determine whether a clause may be severable from the rest of a contract, and as the ECJ has not established a Community-wide doctrine for severance, national courts retain substantial discretion in these matters.

[1106] See C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, [1999] ECR I-3055.
[1107] See, e.g., *Société Technique Minière v. Maschinenbau Ulm*, 56/65, [1966] ECR 235.

Moreover, according to Waelbroeck/Frignani[1108] and Emmerich,[1109] the voidness of contracts concluded with third parties by a party who is part to an illegal agreement is not mandated by Article 81(2) ECT, but rather depends on the type of sanction provided by the applicable national contract law.

4.5.4. Damages

Should a victim of anticompetitive behavior be able to request damages from the infringing undertaking? At the national level, various national antitrust laws foresee such a possibility,[1110] although significant obstacles exist within the Member States to the effective operation of damage actions for infringement of Community competition law.[1111] At the EC level, the Commission itself does not have the power to grant damages, and for a long time it remained unclear whether EC competition law imposed on Member States the obligation of providing damage remedies in case of violations of Articles 81 and 82 ECT.[1112] However, in 2001 in the *Courage Ltd v. Crehan*[1113] case, the ECJ clarified (§ 26):

> *The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*

Even if the ECJ ruled that Member States have to provide for damages to be awarded, the scope of the Court's ruling still needs to be further clarified. For instance, as we have seen under the chapter on US antitrust, the right to sue for damages has been limited under US law, and only plaintiffs who have a sufficiently proximate cause of action can successfully claim remedies (e.g. direct and target tests or issues of *locus standi*.) As is the case under US law, it seems unlikely that a system of competition law would provide remedies for every kind of plaintiff, including remotely linked persons such as landlords, shareholders, or lenders of a violator's victim. Such clarifications will probably need to be brought in the following years by the European courts or EC legislation.[1114]

[1108] M.WAELBROECK/A.FRIGNANI, "Concurrence", in: *Commentaire J. Megret, Le droit de la CE*, tome 4, 2d ed, p. 542, 1997.
[1109] Id. at pp. 542 and ff., 1997; V.EMMERICH, *Kartellrecht*, 9th ed., C.H.Beck, pp. 417-420, 2001.
[1110] For an overview, see the following series of works: P.BEHRENS (ED.), *EEC Competition Rules in National Courts*, 1992-1997.
[1111] On this topic, see the Commission's Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672 final.
[1112] For cases involving the issue of remedies in damages in other areas, see the *Francovich v. Italy* case, C-6 and 9/90, [1991] ECR I-5357, and the following case, *HR v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* , C-5/94, [1996] ECR I-2553.
[1113] C-453/99, [2001] ECR I-6297.
[1114] On this topic, see the Commission's Green Paper on damages actions for breach of the EC antitrust rules, COM (2005) 672 final.

4.6. Authorities

4.6.1. Council of Ministers

As its name indicates, the Council of Ministers is composed of ministers of the Member States. It is the supreme legislative body of the EC, although recent reforms have pushed for a greater sharing of its legislative powers with the European Parliament. In competition matters, the Council is still the legislative body of the EC. According to Article 83 ECT, the Council has powers to implement competition rules by regulations and directives on merely consulting the Parliament and on making a proposal to the Commission. However, it is not often active in competition matters and has delegated many legislative powers in this area to the Commission.

4.6.2. European Commission

The European Commission represents the interests of the EC. It is composed of 25 members with each Member State having the right to nominate a member. Each member of the Commission is responsible for a specific policy area, although important decisions are taken by the Commission as a whole.

Currently, Nelly Kroes from the Netherlands is responsible for Competition. She is assisted by the Directorate General Competition (DG Comp), which is headed by Philip Lowe. DG Comp is divided into various directorates: Directorate A deals with policy and strategic support. Directorates B, C, D, and E specialize in dealing with certain branches of the economy (B: Energy, Basic Industries, Chemicals and Pharmaceuticals; C: Information, Communication, and Media; D: Services; and E: Industry, Consumer Goods, and Manufacturing.) Directorate F specifically deals with cartels, while Directorates G, H, and I focus on state aid. Directorate R is responsible for strategic planning and resources. Directorates are further divided into units. Additionally, there are two Hearing Officers who are responsible for ensuring that the proceedings are conducted in accordance with the ECMR and that defendants are granted a fair hearing in respect to their rights of defense.

In 2002, DG Comp had only 608 public servants, of which only 344 were case handlers or involved in policy development (A Grade.)[1115] In 2004, DG Comp had a budget of approximately Euro 85 Mio.

The Commission is responsible for taking action against violators for infringements, establishing the facts of competition cases, proposing amendments to or adopting competition rules, and entertaining international relationships in the field of competition law. Its role in EC Competition is therefore crucial.

4.6.3. The European Courts

In the original ECT, only the ECJ was foreseen; however, the CFI was created in 1989 to deal with competition and staff cases. Its jurisdiction was extended in 1993 and 1994 and now includes many other areas such as state aid and anti-dumping (except for cases brought by or

[1115] Source: http://www.europa.eu.int/comm/dgs/competition/index_en.htm

against Member States.) The CFI is the court of last resort on factual questions as an appeal to the ECJ can be brought only on legal grounds.[1116]

Each Member State appoints two judges, one each for both the ECJ and the CFI for a renewable term of six years, with the judges expected to be totally independent from the Member States. Each judge is assisted by three legal clerks.

Cases before the ECJ are prepared by Advocate Generals who give opinions on the issue to be decided; although not binding, these are often followed by the ECJ. The opinions of the Advocate Generals are usually of very high legal quality and contain many references.

ECJ and CFI judges deliver their decisions as a single collegiate judgment; there are no dissenting opinions, and the decisions rarely entail a statement of policy reasons.

The CFI is not extremely well-equipped to conduct detailed inquiries in factual matters. Nevertheless, it reviews (sometimes with great care, particularly in merger and cartel cases) the factual evidence on which the Commission based its decisions. In many instances, the CFI has stressed that the Commission needs to get simple facts right, whereas it has granted the Commission some degree of discretion in appraising complex economic matters.[1117]

4.6.4. ACRPDP/ACC

The Advisory Committee on restrictive Practices and Dominant Positions is referred to in Regulation 1/2003 (Article 14). According to § 58 of the Commission Notice on cooperation within the network of NCAs, "the Advisory Committee is the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law." The ACRPDP is thus composed of officials of the Member States, who attend oral hearings and give their comments on Commission cases, legislation, and policy development in general. The Commission is bound to hear the Committee when it makes certain important decisions (e.g., decisions related to case allocation.) In this case, its opinions are published.

4.6.5. National courts

As has already been described above, national courts are taking an increasingly important role in the application of EC competition law. Notably, since the abandonment of the Commission's monopoly on Article 81(3) ECT, national courts have received greater competition law powers.

4.6.6. European Parliament and ECOSOC

Although the European Parliament does not play such an important role in competition matters as it does in other legislative areas, it is customary to consult it (and in particular, its Standing Committee on Economic and Monetary Matters and the Economic and Social Committee ("ECOSOC")) regarding important pieces of legislation.

[1116] See *John Deere v. Commission*, C-7/95, [1998] ECR I-3111.
[1117] See, e.g., 210/01 *Schneider/Le Grand*, [2002] ECR II-4071.

4.7. Conclusions

The way standards are dealt with under EC law seems to be very similar to US law, at least in relation to procedural safeguards. However, it seems EC law is more attached to procedural aspects of standardization.

The Commission lays so much emphasis on procedural aspects of standardization that it is not entirely clear whether it would act as long as the establishment of a standard respects procedural rules (transparency, open participation both in the standardization process and to the standard itself.) [1118] The trouble is that a standard may nonetheless be materially anticompetitive.[1119] Indeed, even when a standard is adopted by a majority of the participants, and even if access to the standards is guaranteed, the standard in itself may restrict competition. It may be the case that a majority of the firms (domestic firms) have a cost advantage when using a specific national standard (e.g. low adaptation costs) whereas the minority of firms (foreign firms) do not have such an advantage. If the lower adaptation costs of domestic firms can be more than compensated by the economies of scale that would occur if the international standard had been accepted, the national standard would be inefficient unless it brings other benefits than those of the international standard[1120] (it may be the case that domestic consumers are especially risk-averse and want to avoid any health or security risks, and thus need a special standard.) This is exactly the reason the TBT foresees that national standardization bodies should refer to international standards when available and that they need to bring proof of an additional advantage of their national standard if they depart from international standards. However, such a reference to international (or for that matter, European standards) does not appear in the Horizontal Guidelines. Of course, the TBT (and in particular, its Code of Good Practice) applies to EC Member States, but this indirect application may be problematic.

If the standardization process can be captured by domestic firms to the disadvantage of foreign firms and domestic consumers, a group of (non-origin specific) firms may be able to capture a standardization venture for their own interests, even in the presence of procedural safeguards.

Of course, the procedural safeguards offer easily judiciable guarantees and are very helpful in addressing the most blatant capture issues. However, this does not mean that more subtle

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[1118] See, e.g., the facts of the US *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 108 S.Ct. 1931 (1988) case law presented in Chapter 3.

[1119] As D.BALTO/R.PITOFSKY, "Antitrust in High Tech Industries: The New Challenge," in: *43 Antitrust Bull. 583*, 598 (1998) put it regarding US case law:

> *Most standard–setting cases focus on relatively narrow procedural issues. They provide guidance on how to meet procedural standards to alleviate any competitive concerns, but these strictures may be so wooden as to stifle the ability to develop standards in a prompt and effective fashion.*

[1120] This is all the more true when one takes into account that participation in an SSO is often not free but rather involves substantial transaction costs which are unlikely to be recouped fully (free rider issues.) Under such circumstances, a risk of adverse selection may occur: indeed, protection-seeking (national) firms have an incentive to participate (as they would be recouped by being granted protection), whereas foreign firms would have to weigh their odds of imposing the view that international standards should be complied with instead (which odds would usually be high, as in such a case, there would be no need for a standardization process in the first place.)

anticompetitive issues (such as the one illustrated here above) should not be addressed. Even though it involves a good deal of expertise, competition authorities should not renounce reviewing an issue just because experts may be called in.[1121] At any rate, it seems the blanket exemption granted under paragraph 163 of the Horizontal Guidelines[1122] may arguably be put into question.

The US approach is much friendlier towards potential material adverse effects of standardization agreements as opposed to procedure. Recall the U.S. Supreme Court swept away the "due process" (procedural approach) benchmark in its *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*[1123] decision.

However, the EC approach is not strictly limited to procedural issues. On the one hand, paragraph 166 of the Horizontal Guidelines defining the agreements that may fall under Article 81 (1) ECT contains the following sentence:

> *[…] The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardization […] on the other.*

Although it is stated in very broad terms in this first sentence of a paragraph that deals with formal concerns,[1124] this language does not hinder a review of the more material effects of standardization. On the other hand, the case law of EC competition authorities leaves room for a more substantial analysis of standardization issues. The case law is stated in sufficiently general terms sp as to allow a more detailed analysis of markets where products are standardized. Indeed, a *Bond Crown & Cork Co. v. FTC*,[1125] or an *Allied Tube*[1126] approach is not expressly excluded and would most likely be followed.[1127]

[1121] See also, J.J.ANTON/D.A.YAO, *Standard Setting Consortia, Antitrust and High-Technology Industries*, 64 Antitrust L.J. 247 (1995), presented under Chapter 3.

[1122] Which reads as follows:

> *Where participation in standard setting is unrestricted and transparent, standardisation agreements […], which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition.*

[1123] 472 U.S. 284, 105 S.Ct 2613 (1985). See Chapter 3, in particular, Subsection 3.4.3.3.1. Self-regulating entities and due process.

[1124] "*Standardization agreements may be caught by Article 81(1) insofar as they grant the parties joint control over production and/or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or purchasers of the standardized product."*

[1125] 176 F.2d 974 (4th Cir. 1949).

[1126] 486 U.S. 492, 108 S.Ct. 1931 (1988).

[1127] Note also that paragraph 174 of the Guidelines provides:

> *There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are* ***as open as possible and applied in a clear non-discriminatory manner****. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.* [emphasis added]

In the case of *de fac*to standards, the approach therefore seems to be less formal than under Article 81 ECT; however, the terms remain somewhat obscure.

One should also not forget that procedural issues are often linked with substantial ones,[1128] so the fact that an agreement is struck down on procedural grounds is not absolutely dispositive. The Commission and the courts do not seem to have reached wrong decisions in the cases presented; the only difficulty is that materially anticompetitive (but procedurally sound) standardization processes may not have been submitted. However, there should not be any unsurpassable obstacle in the law for such a finding.

Thus it seems the US and EC approaches are not separated by a theoretical gap but rather share many similarities. However, EC authorities tend to show a greater deference towards SSOs than have US authorities. In particular, whereas US authorities have repeatedly stressed that the procedural soundness of a standardization process was not a defense against an allegation of a standard's anticompetitive effect, EC authorities do not yet seem to have made such a clear declaration.

Finally, EC law contains only limited guidelines concerning the treatment of *de facto* standards, as the Horizontal Guidelines are merely applicable to collective standards. Indeed, beyond the previously mentioned possibility of dealing with such issues under a concerted practices or collective abuse of dominant position,[1129] the case law on unilateral abuses of a dominant position is extremely limited.

[1128] As the ABA SECTION OF ANTITRUST LAW, *Handbook on the Antitrust Aspects of Standards-Setting,* 2004, provides even for US law:

> *Absent evidence of corruption or improper motive in the standard-setting process […], claims based upon the "exclusionary" effect of the selection or enforcement of a standard may be difficult to advance. This is so because, by definition, a "standard" will be comprised of certain terms and conditions and will exclude other terms and conditions. The fact that a standard may give some advantage to one competitor over another is not sufficient to demonstrate the standard is anticompetitive. Indeed, in advancing a rule of reason claim, it may be insufficient to show that a trade association erred in declining to certify a product, absent some evidence that the error was made with an anticompetitive purpose.*

[1129] See Subsection 4.3.1.1.5. Consequences for standards.

Chapter 5 Swiss competition rules

Swiss federal and cantonal authorities have adopted very few provisions regulating private standardization issues, whereas the federal legislator has recently started regulating the adoption of technical regulations more intensively. Competition authorities have, so far, only infrequently been confronted with issues linked to standardization. Indeed, there does not seem to exist any formal policy towards standardization issues in Switzerland comparable to the EC Horizontal Guidelines[1130] or the US body of case law in this area. The discussion will therefore primarily rely on the application of general competition law concepts and the limited relevant case law.

5.1. Swiss competition rules

5.1.1. Material sources of Swiss competition law

The primary source of Swiss competition law is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995[1131/1132]("ACart"). Although the ACart contains all material competition law provisions, the following statutes are also relevant in competition matters[1133]:

[1130] Guidelines on the applicability of Article 81 ECT to horizontal cooperation agreements, OJ 2001 C 3/02, Section 6.

[1131] SR 251.

[1132] English is not an official language in Switzerland and is therefore not used by Swiss authorities in Swiss competition proceedings. However, an English translation of the Swiss Act on Cartels and certain other relevant competition pieces of legislation are published on the official website of the Swiss Competition Commission (www.weko.ch). Basically, the terms used in these translations have been used for this study. However, as far as feasible, EC terminology has been used to translate similar Swiss concepts.
Swiss decisions in competition matters are published in the review: *Recht und Politik des Wettbewerbs / Droit et politique de la concurrence en pratique*, (RPW/DPC). Decisions are quoted in the language in which they have been published (German or French). Note, however, that "decisions" taken on notified agreements are in the vast majority of cases not published, see as well fn 1359.

[1133] Swiss federal statutes (and, sometimes, modifications thereof) are usually accompanied by an official commentary of the draft regulation which is established by the federal administration. Such commentaries are called in French "message" or in German "Botschaft". In the present study, the term "Commentary" will be used to refer to such a document. The Commentaries for the ACart of 1995 can be found under FF 1995 I 472 (French) BBl 1995 I 498 (German). Unless specifically precised, the term "Commentary" refers to this first Commentary. A further commentary concerning the 2003 Revision is to be found under FF 2002 1991 and 5128 (French) and BBl 2002 2022 and 5506 (German). It will be referd to as the "2003 Commentary".

1. Federal Act on Price Surveillance of 20 December 1985[1134]
2. Federal Act on Public Procurements of 16 December 1994[1135]
3. Federal Act on the Internal Market of 6 October 1995 ("FAIM")[1136]
4. aFederal Act on Technical Barriers to Trade of 6 October 1995 ("FATBT")[1137]

The ACart is completed by ordinances of the Swiss Federal Council[1138] and notices of the Swiss Competition Commission ("Commission")[1139]. The following are relevant for the present study:

(a) Ordinance on the Control of Concentrations of Undertakings of 17 June 1996 ("Merger Ordinance")[1140]
(b) Ordinance regarding the Sanctions for Unlawful Restrictions of Competition of 12 March 2004 ("Ordinance on Sanctions")[1141]
(c) Notice regarding Certification and Sponsoring of Sporting Goods of 15 December 1997 ("Sporting Goods Notice")
(d) Notice Regarding the Competition Law Treatment of Vertical Agreements of 18 February 2002 ("Vertical Notice")
(e) Notice on Small and Medium Undertakings of 19 December 2005 ("SMU Notice")
(f) Communication on Dawn Raids[1142/1143]

[1134]SR 942.20. The Federal Act on Price Surveillance was adopted at the same time as the previous Act on cartels ("1985 ACart"). It was intended as a complement to the 1985 ACart. The Act empowers the Price Surveillance Authority to supervise price levels, which are part of government market or price systems in Switzerland. Moreover, the Price Surveillance Authority might also supervise price levels in non-regulated markets when one or more undertaking are part to an agreement between undertakings to fix prices or in a dominant market position (Article 6 of the Federal Act on Price Surveillance). The Price Surveillance Authority can issue recommendations and start investigations when it considers prices too high. The Competition Commission remains free to start an investigation even though the Price Surveillance Authority has deemed a price abusive (Article 16 Federal Act on Price Surveillance). Furthermore, according to Article 3 III ACart of 1995, the procedures set forth in the ACart regarding the assessment of restraints of competition shall take precedence over the procedures set forth in the Act on Price Surveillance, except in the event of a decision to the contrary taken by common consent by the Competition Commission and the Price Surveillance Authority. For a presentation of the dividing lines between the ACart and the Federal Act on Price Surveillance, see M.DIETRICH/A.BÜRGI, "Abgrenzung der Zuständigkeiten von Wettbewerbskommission und Preisüberwacher, in: sic! Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 3|2005, pp. 179 - 188.

[1135] SR 172.056.51. Public procurement bodies might refer to private standards in relation to public procurement contracts and indirectly render such standards mandatory by law. Such standards cannot be considered private voluntary standards any more and will thus not be dealt with hereunder.

[1136] SR 943.02.

[1137] SR 946.51. These last two acts will not be presented in detail as they are mostly irrelevant for our discussion (see, however, for a quick analysis of their pertinence in the standardisation context). Nevertheless, they share the same objective as the ACart, i.e. the reinforcement of competition (Commentary FATBT, FF 1995 II 516). Further, both aim at ensuring that public bodies do not interfere, as a matter of principle, with competitive conditions in the market.

[1138] Article 60 ACart provides for such powers. In addition, Article 53a III ACart empowers the Federal Council to enact ordinances regarding the fees to be levied by competition authorities in competition proceedings. The Federal Council as issued an Ordinance on Charges in connection with the ACart (SR 251.2).

[1139] Article 6 ACart empowers the Commission to adopt notices on the "conditions under which agreements restricting competition are as a general rule, deemed to be justified on grounds of economic efficiency".

[1140] SR 251.4.

[1141] SR 251.5.

[1142] In German, officially, "Merkblatt zur Vorgehensweise bei Hausdurchsuchungen" or in French, "Notice sur le déroulement des perquisitions". On dawn raids, see in particular, CH.LANG, "Untersuchungsmassnahmen der Wettbewerbskommission im Spannungsverhältnis zwischen Wahrheitsfindung und Verteidigungsrechten eines Angeschuldigten", in: *Jusletter*, 27. September 2004.

[1143] All relevant pieces of legislation can be found on the Commission's website: www.weko.ch

Furthermore, the Swiss Federal Constitution ("Cst") contains various provisions, which have been and are still applied in competition matters[1144]. The following provisions have played an important role in the interpretation of Swiss competition rules:

- Article 27 Cst guarantees the right to economic freedom, which protects both individuals and legal entities in their right to conduct economic activities. The right to economic freedom can be invoked not only against hindrances set by the state (vertical relationship) but also against restrictions brought by private parties (horizontal relationship)[1145].

- Article 96 Cst, with the title "Competition Policy", provides that:

> *The Confederation shall legislate to fight against economically or socially damaging effects of cartels and other restrictions of competition.*
>
> *It shall take measures […] to prevent abuses in price fixing by undertakings and organizations of private and public law enjoying a dominant position on the market […].*[1146/1147]

[1144] For a summary of the constitutional basis of the ACart, see R.RHINOW/G.BIAGGINI, "Verfassungsrechtliche Aspekte der Kartellgesetzrevision", in: R.ZÄCH/P.ZWEIFEL, *Grundfragen der schweizerischen Kartellrechtsreform*, Schulthess, p. 98, 1995, and F.HOFFET, "Kommentar zum Artikel 1 KG", in: E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz*, Schulthess, 1996.

[1145] Article 27 Cst corresponds to the former Article 31bis of the 1874 Swiss Constitution. Article 31bis of 1874 Cst guaranteed economic freedom only negatively. Indeed, Article 31bis 1874 Cst, merely forbade governmental hindrances to economic freedom. Although Article 31bis Cst had a horizontal, albeit limited, effect, as it ensured that private market actors would not render the vertical guarantee completely meaningless by depriving competitors of the possibility of entering a market, the majority of Swiss commentators were of the opinion that Article 31bis Cst did not protect economic freedom "positively", in that it did not impose a competitive market organisation. BGE 116 Ia 240, J.P.MÜLLER, *Die Grundrechte der schweizerischem Bundesverfassung*, 2nd Ed., Stämpfli, 1991. The newly introduced Articles 94 and 96 of the 1999 Federal Constitution makes now clear that derogations from competitive principles are to be construed restrictively and that the Confederation is granted the power to legislate in the field of competition, and thus to protect competition positively as well.

[1146] For the sake of completeness, it must be mentioned that, since the 2003 revision of the ACart, the Article of the Swiss Constitution which deals with consumer protection (Article 97 Cst) is also cited as one of the constitutional basis of the ACart. Nevertheless, as Article 97 is rarely invoked for the interpretation of competition rules, no further presentation of this Article is necessary.

One might argue that the protection of competition inherently guarantees the protection of consumers, as competition rules are usually understood as seeking, at least in the long term, to maximise social welfare (R. POSNER, *Antitrust Law*, 2nd Ed., Chicago University Press, 1996, p. 5, D.HILDEBRAND, *The Role of Economic Analysis in the EC Competition Rules*, Springer, 2002, and F. SOUTY, *Le droit et la politique de la concurrence dans l'Union européenne*, LGDJ, 2003). Note, however, that under Swiss law the maximisation of social welfare is not an express objective of the ACart, which, however, does not exclude it either. The Commentary describes the theoretical model on which the ACart is based ("efficient competition") in the following terms:

> *la concurrence est un processus dynamique aux multiples facettes, et la politique de la concurrence a (essentiellement) pour mission de garantir que les fonctions statiques et dynamiques de la concurrence soient suffisamment assurées, c'est-à-dire pas trop fortement entravées par des restrictions privées de la concurrence (ou par des dysfonctionnements dus aux réglementations étatiques). En d'autres termes, la concurrence doit inciter, voire forcer, les entreprises à optimiser l'utilisation des ressources, à adapter produits et production aux conditions externes et à innover au niveau des produits et des procédés de production. Il y a donc concurrence efficace lorsque, sur un marché donné, ces fonctions fondamentales de la concurrence ne sont pas faussées. Il n'incombe dès lors pas à une politique de la concurrence*

The first provision has been used since the end of the nineteenth century[1148] to develop a case law on boycott of business partners. Under Article 27 Cst, the issue whether consumer welfare is affected is not central. The focus lies on individual protection, which means that competition is only indirectly protected and the object of the protection is more the right of individuals to enter into an economic activity, rather than the maintenance of competition as a (policy) institution.

The second provision protects competition as an institution. Anticompetitive agreements between undertakings and abuses of dominant positions are to be prohibited, because they entail "economically or socially damaging effects", rather than because they hinder a specific competitor in his economic activities. The focus lies more on the social impact of anticompetitive behaviour.

Articles 96 Cst has been introduced by the Swiss Federal Constitution of 1999. The fact that competition laws were for a long time merely based on a provision the main focus of which was the protection of individuals as competitors (Article 27 Cst) rather than on a provision which protected competition as an institution, has certainly played a major role in the development of competition rules in Switzerland, as will be briefly discussed in the next subsection[1149].

5.1.2. Short historical presentation of Swiss federal rules on competition

The 1995 ACart was not the first Swiss act on competition matters[1150]. Even before the adoption of the first Act on Cartels and Similar Organisations in 1962 ("1962 ACart"),

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> *procédant d'une compréhension dynamique de la concurrence d'éliminer toutes les prétendues "imperfections" des mécanismes du marché.* Commentary, p. 514.

Thus, even if this text lays great emphasis on the protection of market mechanisms (resources optimisation and innovation in productive procedures), such a model does not seem to be at odds neither with a goal of social welfare maximisation nor with the protection of consumers. Furthermore, one might wonder whether the right to economic freedom might not be, at least indirectly, protected in a satisfactory manner through the protection of competition. A boycott has often a negative effect on social welfare (i.e. on competition) as consumers are deprived of a supplier without being compensated in another way. See as well, F.HOFFET, "ad Article 1", in: E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz.*

[1147] Article 94 III and IV Cst further provide that:

> *within the limits of their powers, [the Swiss Confederation and the Cantons] shall strive to create favorable conditions for the private sector of the economy.*
>
> *Derogations from the principle of economic freedom, in particular measures against competition, shall be allowed only if foreseen by the Federal Constitution or based on cantonal monopolies.*

[1148] BGE 22 I 175 (1896) *Boycott du boulanger Vögtlin*. Decisions of the Federal Supreme Court, the Swiss highest court, are published in an official reporter, called "Amtliche Sammlung der Entscheide des Schweizerichen Bundesgerichts", traditionally designated with the acronym BGE ("Bundesgerichtsentscheide") in German or ATF ("Arrêts du Tribunal federal") in French.

[1149] Article 27 Cst might still play a particuliar role in the interpretation of the ACart. See, for example, the discussion on the introduction of the "relative Marktmacht" concept (fn 1165).

[1150] For a more comprehensive review, see B.SCHMIDHAUSER, "Introduction", in: E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz*,

constitutional and civil laws had already gradually developed a body of principles applicable to the relationships between competitors. The case law from which these rules emanated was mainly based on the private protection of personality and the constitutional right to economic freedom. The focus of this body of rules was the protection of competitors against boycotts (i.e. concerted refusals to deal).

The 1962 ACart had only a limited success. It embodied most of the previous case law but kept, as principal aim and focus, the protection of individual personality[1151]. Nevertheless, it introduced limited administrative proceedings for the surveillance of cartels by creating the Cartels Commission[1152]. Moreover, the 1962 ACart already recognised the illegality of restriction to competition. Its practical importance was, however, limited, as cartels as such were not illegal[1153]. They even played a substantial role in the Swiss economy. Indeed, cartels were so well accepted that the 1962 ACart contained a provision whereby cartel members might request to be freed from their membership in the cartel by a judge[1154], as cartel decisions were enforceable in court. The decisions of a cartel were only illegal in limited circumstances[1155]:

> *Les mesures prises par un cartel, telles que l'interdiction d'acheter et de livrer des marchandises, la mise à l'index d'employeurs, les discriminations en matière de prix ou de conditions d'achat, ainsi que la sousenchère dirigée contre un concurrent déterminé, sont illicites, sous réserve des exceptions prévues à l'article 5, lorsqu'elles visent à écarter des tiers de la concurrence ou à les entraver notablement dans l'exercice de celle-ci.*
>
> *Les entraves à la concurrence sont licites lorsqu'elles sont justifiées par des intérêts légitimes prépondérants, sont compatibles avec l'intérêt général et ne restreignent pas la libre concurrence de manière excessive par rapport au but visé ou du fait de leur nature et de la façon dont elles sont appliquées.*[1156]

Schulthess, 1997, and P.TERCIER, "Introduction générale", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003.

[1151] The Commentary accompanying the 1962 ACart, for example, provided (FF 1961 II p. 549, p. 561):

> *Le projet influera beaucoup moins sur les rapports internes du cartel que sur ses relations avec les non-membres, notamment parce que la grande diversité des engagements résultant d'un cartel ne permet pas d'établir des critères propres à déterminer de façon certaine les engagements licites. On peut admettre, cependant, que le caractère illicite du boycottage dirigé contre les outsiders permet déjà de lutter contre des accords excessifs.*

The 1962 ACart aimed at ensuring access to the market ("possible competition" principle) and fell short of protecting efficient competition.

[1152] The Cartels Commission had very limited powers as it was only authorised to issue non-binding recommendations.

[1153] Commentary, BBl 1961 II, 553, 562.

[1154] Article 11 and 12 1962 ACart.

[1155] Article 4-5 1962 ACart.

[1156] Among such "interêts légitimes" (legitimate interest) were measures which aimed at (5 II 1962 ACart):

> *b. établir, pour une branche ou une profession, des exigences professionnelles ou techniques raisonnables;*
> *c. assurer, dans une branche ou une profession, une structure souhaitable dans l'intérêt général;*
> *d. assurer l'application de dispositions sur les marchés étrangers à caractère de cartel.*

Moreover, for them to be illegal, agreements between undertakings needed to be in writing (Article 10 1962 ACart). Hence, the limited protection offered to competitors, the broad justifications for cartels, the procedural difficulty of proving a written boycott and the restricted powers of the Cartels Commission all contributed to heavily limit the 1962 ACart's impact on anticompetitive practices.

In 1985, the 1962 Act was replaced by the Federal Act on Cartels and Similar Organisations of 20 December 1985 ("1985 ACart"). Already in 1971, the President of the Cartels Commission, Leo Schurmann, had deposited an official motion before the Parliament in order to provide its commission with more powers. Parliamentary debates were, however, laborious and, as a result of many political compromises, the 1985 ACart did not contain all improvements that were originally foreseen. Notably, the powers of the Cartels Commission were not substantially reinforced and no merger control was instituted. Some improvements were, however, introduced. In particular, the member of the Federal Council responsible for the Federal Department for Public Economy ("DFEP") was granted the power to open an administrative procedure against firms whose behaviour was considered anticompetitive by the Cartels Commission and the power to order all necessary measures against such undertakings (Article 37 1985 ACart). Moreover, the 1985 ACart operated a change in the approach towards anticompetitive behaviour as it aimed not only at protecting the access to a market ("possible competition" principle), but "efficient competition" as well. This was reflected in Article 29 I 1985 ACart, which pertinently provided:

> *La Commission des cartels recherche [...] si un cartel ou une organisation analogue a des effets nuisibles d'ordre économique ou social.*

Unfortunately, the limited powers granted to the Cartels Commission and the so-called "méthode du bilan/Saldomethode"[1157] (which required the Cartels Commission to weigh anticompetitive aspects of cartels with their positive social aspects, Article 29 II 1985 ACart[1158]), did not allow such a change in legal approach to fully bear its fruits[1159]. Still, some decisions of the DFEP had a certain impact on anticompetitive practices. A decision of 25 January 1988, for example, ordered the dissolution of a cartel in the insurance industry.

[1157] Article 29 II and III 1985 ACart pertinently read:

> *Les effets peuvent être qualifiés de nuisibles du point de vue économique et social avant tout lorsque la concurrence efficace sur le marché de certains biens ou services est empêchée ou entravée notablement, à moins que ces effets ou d'autres conséquences nuisibles puissent se justifier par des motifs prépondérants qui relèvent de l'intérêt général.*
>
> *Dans son appréciation des effets, la commission tient compte en particulier des intérêts des consommateurs.*

[1158] See H.SIEBER, "Über die Kriterien der volkswirtschaftlichen Schädlichkeit von Kartellwirkungen", in: *Wirtschaft und Recht,* p. 48 and ff., 1973.

[1159] Its impact was more informal. At the end of some sector specific inquiries (media, health and energy sectors), the Cartels Commission took upon itself to issue not only recommendations to the undertakings but also suggestions on measures to be taken by public authorities. Although not binding, such suggestions were often taken seriously by administrative bodies (see P.TERCIER, "Introduction générale", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 25.

However, private parties were also not able to take full advantage of the legal changes partly because the Federal Supreme Court imposed on them an extensive burden of proof[1160].

In the wake of the rejection of the European Economic Area on 6 December 1992, it was decided that the Swiss economy needed to be internally revitalised[1161]. One of the instruments for attaining such an objective was the adaptation of Swiss competition rules to European standards. Even though the reform brought important material changes, procedurally, the Commission was still considered a "paper tiger" as it was only allowed to take decisions but was not entrusted with the power of imposing direct sanctions. Probably the most important change was the emphasis on the defence of competition as an institution and not, as in the past, on the protection of individuals[1162]. Article 1 ACart reads:

> *The purpose of the present Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a market economy based on liberal principles.*

The ACart also introduced merger control rules and reinforced criminal and administrative sanctions. In 2003, the ACart was once more revised and the Commission was, at last, provided with more substantial prosecution powers. In particular, the Commission was granted the power of imposing direct fines[1163]. The Commission was also granted the power of conducting dawn raids and seize evidence[1164]. At the same time, the 2003 revision authorises the Commission to put in place a leniency programme, whereby companies, which take part in the disclosure and removal of competition restraints ("whistle-blowers") might benefit from a reduction or an exemption from fines. The scope of the concept of dominant position has also been modified and apparently extended[1165].

[1160] BGE 112 II 268.

[1161] It might be argued that, partly through the negotiations with the EC on the EEA, Swiss decision-makers realised how much their *laissez-faire* approach towards agreements between undertakings was not in-line with the approach followed by other commercial partners. Naturally, the low growth rate of the GNP also commanded a more proactive approach.

[1162] The protection of individuals remains, however, one of the objectives of the ACart. In the 2003 revision of the ACart, an express reference to the right to economic freedom (Article 27 I Cst) has been introduced.

[1163] Previously, fines could only be imposed on companies after its anticompetitive behaviour had been declared illegal. Note that fines can be imposed for anticompetitive behaviour, which took place after April 1, 2005, as a 1-year transitional period was put in place on entry into force of the 2003 revision. During the transitional period, undertakings had the option to notify their anticompetitive practices to the Competition Commission without being fined.

[1164] In practice such raids are conducted by the Secretariat of the Commission with the authorisation of one of the presidents of the Commission. See in particular, CH.G.LANG, "Untersuchungsmassnahmen der Wettbewerbskommission im Spannungsverhältnis zwischen Wahrheitsfindung und Verteidigungsrechten eines Angeschuldigten", in: *Jusletter*, 27. September 2004.

[1165] The modification of the definition apparently introduced an approach similar to the "Relative Marktmacht" concept used under Article 20 II of the German competition law (Gesetz gegen Wettbewerbsbeschränkungen, BGBl I 1998, 2521) into Swiss law. See R.ZÄCH/R.HEIZMANN, "Markt und Marktmacht", in: T.GEISER/P.KRAUSKOPF/P.MÜNCH (EDS.), *Schweizerisches und europäisches Wettbewerbsrech*t, Helbing & Lichtenhahn, 2005 and *CoopForte* Decision, RPW 2004/4.

5.2. Scope of Swiss competition rules

The ACart has a broad scope of application[1166]:

> *Toutes les activités des entreprises pouvant entraîner une restriction de la concurrence tombent dans le champ d'application - qui est donc étendu - de la loi.*

Thus, the ACart applies to (1) undertakings, (2) which restrict competition, (3) in Switzerland. Furthermore, Article 3 ACart expressly provides that certain other provisions of law, which do not allow competition in a market for certain goods or services, take precedence over the provisions of the ACart (4).

5.2.1. Undertakings (personal scope)

The undertakings to which the ACart applies are defined in Articles 2 I and 2 Ibis ACart:

> *The present Act applies to private or public undertakings […].*
>
> *The term 'undertakings' means all customers and suppliers of goods or services in the commercial process regardless of their legal or organisational form.*

Undertakings are therefore all market actors which offer or consume market products (goods or services). Market actors may be individuals or legal entities, or even entities without legal personality as long as they are public entities and dispose of a certain degree of independence[1167]. Indeed, by introducing Article 2 Ibis ACart, the legislator intended to override a decision of the Federal Supreme Court, whereby the ACart could only be applied against public undertakings which enjoy a legal personality[1168]. Based on the above, the following caveats must be borne in mind:

- the members of a group of undertakings are not considered to be independent undertakings[1169];
- single workers and trade unions are not considered to be independent undertakings[1170]; and
- consumers protection organisations usually do not offer or supply goods in the commercial process[1171].

[1166] Commentary, p. 534.

[1167] Contra: P.-A.KILLIAS, "ad Article 2", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 112, is of the opinion that legal personality is a condition for the application of the ACart. His opinion predates, however, the decision of the Federal Supreme Court BGE 127 II 32, cited hereunder, and the reform of 2003, which introduced Article 2 Ibis ACart. Therefore, it might be considered as surpassed.

[1168] AB StR 2003, 324 and ff. (Jenny), BGE 127 II 32 *Schweizerische Meteorologische Anstalt*.

[1169] W.R.SCHLUEP, "Kommentar ad Artikel 2 KG" in: L.SCHÜRMANN/W.R.SCHLUEP, *Kartellgesetz und Preisüberwachungsgesetz*, Schulthess, 1988, p. 169 and ff.

[1170] Commentary, p. 534. This is criticized by W.MÖSCHEL, "Tarifautonomie – ein überholtes Ordnungsmodel?", in: W.ZOHLNHÖFNER (ED.), *Die Tarifautonomie auf dem Prüfstand*, 1996.

[1171] Commentary, p. 534.

5.2.2. "Which restrict competition" (material scope)

The scope of the ACart does, however, not encompass all undertakings. According to Article 2 I ACart, the ACart only applies to undertakings which engage in specific activities:

> *The present Act applies to […] undertakings that are a party to cartels or to other agreements restricting competition, have market power or take part in concentrations of undertakings.*

The Commentary clarifies that (p. 535):

> *Le champ d'application englobe* ***toutes les formes de restrictions privées de la concurrence****. La loi s'applique aux entreprises qui sont parties à des cartels (accords horizontaux) ou à d'autres accords en matière de concurrence. […] Enfin, la loi s'applique aussi aux entreprises puissantes sur le marché comme à celles qui participent à des concentrations d'entreprises […]. Le champ d'application du projet englobe ainsi l'ensemble des comportements économiques pouvant avoir un effet sur la concurrence.* [Emphasis added]

The scope of the terms "private restrictions of competition" is defined by the ACart. The ACart provides that Swiss competition authorities intervene in order to sanction anticompetitive agreements between undertakings[1172/1173] and abuses of a dominant position[1174] and review mergers between undertakings which reach a certain threshold[1175]. These concepts (with the exception of merger control, which is hardly relevant in the context of standards) will be presented in more detail later[1176].

[1172] Article 4 I and 5 ACart.

[1173] According to the majority of commentators, non-compete clauses can violate the ACart, although the Federal Supreme Court ruled against such a point of view in BGE 124 III 495, 499 under the auspices of the 1985 ACart. R.ZÄCH, *Schweizerisches Kartellrecht*, p. 115 and ff, § 248 and ff.

[1174] Article 4 II and 7 ACart.

[1175] Article 4 III and 9 ACart and Merger Ordinance.

[1176] Note, however, the slight differences in wordings between the provisions which define the scope of the ACart (Article 2 ACart) and the activities that it forbids (Article 7 ACart): Article 2 I has as its subject undertakings which have "market power", whereas Article 7 prohibits unlawful practices of undertakings having a "dominant position". The ACart might thus encompass certain undertakings, even if such undertakings engage in activities, which are not forbidden by it. See W.R.SCHLUEP, "Kommentar ad Artikel 2 KG", in: L.SCHÜRMANN/W.R.SCHLUEP, *Kartellgesetz und Preisüberwachungsgesetz*, Schulthess, 1988, p. 151 and ff., R.ZÄCH, *Schweizerisches Kartellrecht,* p. 113, § 243, and., p. 112, § 240 and ff, and J.BORER, *Kartellgesetz*, Orell Füssli, 2005, p. 82, § 17 who distinguish between the scope ("Geltung") and the applicability ("Anwendung") of a law. Borer provides that:

> *Die Gesetzgebungslehre verlangt streng genommen eine Unterscheidung zwischen dem Geltungs- und Anwendungsbereich eines Gesetzes. Demnach ist zwischen dem Geltungsbereich, welcher die mit der Formalität ausgewiesene Existenz (Bestand) eines Gesetzes begründet, und dem Anwendungsbereich, mit welchem das Feld umschrieben wird, auf dem der Rechtsanwender tätig sein soll, zu unterscheiden.*

Thus, basically, the "Geltungsbereich" determines the scope of validity of the law, materially, geographically and temporally. The "Anwendungsbereich" determines its applicability (i.e. the object of the enforcer's control). For J.BORER, *Kartellgesetz*, p. 80, § 16, and P.-A.KILLIAS, "ad Article 2", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 120, such a distinction is relevant in order to define the powers of competition authorities, which can conduct inquiries in a specific market, without having to prove that a specific undertaking has a dominant position in this market, the mere

5.2.3. In Switzerland (geographic scope)

Article 2 II ACart provides that:

> *The present law applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country.*

There is not much discussion about the fact that the ACart's scope (*Geltungsbereich*) is coextensive with the Swiss territory. The ACart is, however, applicable (*Anwendungsbereich*) to "restrictive practices whose effects are felt in Switzerland"[1177]. This is a clear reference to the effects principle. The Commentary specifies that (p. 536-537):

> [La définition du champ d'application géographique de la loi] *s'appuie sur le principe des effets, généralement reconnu sur le plan international. et adopté en Suisse. Conformément à la jurisprudence du Tribunal fédéral, le droit suisse des cartels est applicable lorsqu'une restriction de la concurrence produit ses effets sur le marché suisse. Ce principe a été posé par la décision de la Cour Permanente de Justice Internationale dans l'affaire Lotus, décision selon laquelle le droit d'un Etat est applicable à des faits qui se sont produits à l'étranger, 'lorsque leurs effets se font sentir sur son territoire'. Dans le domaine du droit de la concurrence, cette situation est donnée lorsqu'une restriction de la concurrence produit de graves effets sur le marché national.*

The Commentary seems to see little trouble in the application of the **effects principle**. Some commentators have, however, expressed doubts about such a clear-cut analysis and have proposed limitations to the application of the effects theory in order to avoid running afoul of PIL principles. Bär[1178] is of the opinion that the effects should be "immediate" in order for Swiss law to be applicable. Without such a limitation, an excessive application of Swiss law might not be avoided and Switzerland might apply its legislation too extensively under the perspective of PIL.

Bär defines the immediateness of the effects as follows (p. 92):

> *Elementar wichtig für die Praktikabilität der Abgrenzung unter Kartellordnungen ist aber stets die **unmittelbare** Marktauswirkung […]. Ausser Betracht müssen bleiben a) Weiterwirkungen auf weitere Absatzmärkte und b) Rückwirkungen:*

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presence of market power being sufficient, although the requirement to provide information (Article 40 ACart) is not limited by the scope of the ACart, see as well B.SCHMIDHAUSER, "ad Article 2", in: E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz*, p. 13, § 30. This distinction is also adopted by international commentators, see, for example, B.STERN, "Quelques observations sur les règles internationales relatives à l' application extraterritoriale du droit", in: *AFDI*, 1986, p. 7, in particular p. 11, and R.ATWOOD, "Blocking statutes and sovereign compulsion: recent developments and the proposed Restatement", in: B.HAWK (ED.): *Antitrust and trade policies in the United States and the European Community*, Annual Proceeding of the Fordham Corporate Law Institute, Matthew Bender, 1986, Chapter 16, p. 327 and ff.

[1177] See the distinction in the previous footnote.

[1178] R.BÄR, "Das Auswirkungsprinzip im schweizerischen und europäischen Wettbewerbsrecht", in: R.VON BÜREN/TH.COTTIER, *Die neue schweizerische Wettbewerbsordnung im internationalen Umfeld*, Stämpfli, 1997, p. 87 and ff. The same opinion seems to be followed by J.BORER, *Kartellgesetz*, p. 84, § 21.

Z.B. eine Diskriminierung wird angeknüpft an den Markt, in bezug auf dessen potentielle Kundschaft sich die Diskriminierte benachteiligt sieht; nicht etwa noch an Märkte, auf denen sich seine reduzierte Leistungsfähigkeit oder die reduzierte (preisliche oder technische) Leistungsfähigkeit der betroffenen potentiellen Kundschaft erster Stufe als Verarbeiter und Weiterverkäufer ebenfalls chancenmindernd auswirken kann (=Weiterwirkung). Ebensowenig ist relevant der Sitz des Diskriminierten, wo sich die Vermögensschädigung auswirkt (= Rückwirkung).

He also rejects the relevance of quantitative criteria (p. 92-93):

Die Botschaft S.69 scheint beiläufig doch noch eine Diskrepanz anzudeuten: Unter Berufung auf Frank Vischer [IPRG-Kommentar, 1993, Art. 139 N11] wird die Unmittelbarkeit nämlich auch als eine gewisse ***Intensität*** *der Auswirkung verstanden. Dies scheint anzuklingen an Tendenzen im Ausland bei quantitativ wesentlicher („substantial") Auswirkung die Anknüpfung and die Marktauswirkung* ***überhaupt*** *zuzulassen. Dies wäre jedenfalls unzutreffend auf Art. 137 IPRG, wo die Marktauswirkung allein die berufene Rechtsordnung (lex causae) bezeichnet, worauf letztere materiellrechtlich bestimmt, ob erst quantitative Anforderungen zwischen erlaubt und unerlaubt scheiden.*

So ist aber auch für Art.2 Abs.2 KG richtig: Das schweizerische KG wird relevant auf Grund der Auswirkung allein. Nicht die Grenznorm, sondern die einzelne materielle Norm bestimmt allfällige quantitative Mindestanforderungen, z.B. in Art.5 Abs.1 KG der Passus „erheblich beeinträchtigen". Vischer, im Kontext gelesen, meint m.E. nichts anders: Die „Intensität" ergibt sich für ihn aus der Beschränkung auf die erste Kausalitätsstufe, mithin aus der Beschränkung auf die unmittelbare Marktauswirkung. Der Autor wollte nur gegen Weiterwirkung und Rückwirkung argumentieren.[1179]

[1179] The opinion is also shared by P.-A.KILLIAS, "ad Article 2", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, § 68, p. 119. Other authors require that the effects be perceived ("Spürbarkeit"), see B.SCHMIDHAUSER, "ad Article 2", in: E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz*, § 40, p. 13, R.ZÄCH, *Wettbewerbsrecht der Europäischen Union*, 1994, p. 433, R.ZÄCH, *Schweizerisches Kartellrecht*, p. 126, § 268, J.BORER, *Kartellgesetz,* p. 84, § 21. Borer, for example, provides that:

Die gleichen Überlegungen führen dazu, neben der Unmittelbarkeit der Auswirkung ihre Wesentlichkeit zu verlangen. Dieses Erfordernis ist nicht unproblematisch. Es handelt sich nämlich nicht um eine Erheblichkeitsprüfung im Sinne der materiellrechtlichen Kriterien des Kartellgesetzes, sondern um die Frage, ob die Auswirkungen auf dem inländischen Markt überhaupt spürbar, d.h. tatsächlich wahrnehmbar, sind. Damit soll verhindert werden, dass von den materiellen Tatbestandmerkmalen her eigentlich erfasste, bloss mögliche Wirkungen durch Wettbewerbsabreden zum Anlass für die Einleitung eines nationalen Kartellverfahrens genommen werden, auch wenn im Inland keine Wirkungen tatsächlich spürbar sind.

The Federal Supreme Court has confirmed the effects theory in its *Mérial* decision[1180]. The Federal Supreme Court seems to have been inspired by the EC *Gencor* decision[1181], where the CFI took the view that the fulfilment of the thresholds set by the merger regulation were sufficient to ground EC jurisdiction. However, before referring to the thresholds and arguing that such thresholds were selective enough to encompass only situations where the effects on the Swiss market were substantial enough to ground Swiss jurisdiction, the Supreme Federal Court elaborated its understanding of the effects doctrine in particularly broad terms (c.3):

> *Avec l'art. 2 al. 2 LCart, le principe des effets ("Auswirkungsprinzip"), largement reconnu sur le plan international, est […] maintenant inscrit dans la loi. Il ne s'agit cependant que des effets sur le marché suisse prévisibles d'emblée, afin de réserver à l'autorité compétente la possibilité de procéder ensuite à un examen plus approfondi (JÜRG BORER, Schnittstellen der schweizerischen mit der europäischen Wettbewerbsordnung, in "Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Professor Roger Zäch zum 60. Geburtstag", Zurich 1999, p. 221; ULRICH IMMENGA, Zur extraterritorialen Anwendung der europäischen Fusionskontrolle, ebenda, p. 349 ss). L'art. 2 al. 2 LCart est donc une règle de conflit qui fixe les conditions d'application de la loi suisse sur les cartels et* ***oblige*** *la Commission de la concurrence à exercer un contrôle préventif, en examinant l'influence de la concentration sur le marché suisse déjà au stade de la notification de l'opération en cause selon l'art. 9 al. 1 LCart (JÜRG BORER, Kommentar zum schweizerischen Kartellgesetz, Zurich 1998, n. 20 à 23 ad art. 2, p. 104 à 109).*
>
> *Conscient des difficultés qui pouvaient survenir lorsqu'aucune des entreprises concernées ne relevait de la juridiction suisse et que tout leur patrimoine se trouvait à l'étranger, le Conseil fédéral avait certes introduit une règle de conflit spéciale qui visait à limiter l'application du principe des effets. L'art. 9 al. 4 du projet de loi prévoyait ainsi qu'une concentration d'entreprises n'était pas soumise au régime de l'autorisation lorsque toutes les entreprises participantes avaient leur siège à l'étranger et n'étaient pas affiliées à une entreprise en Suisse, ni ne disposaient d'un établissement en Suisse actif sur les mêmes marchés ou sur les marchés voisins (FF 1995 I 575/576). La Commission du Conseil national a cependant décidé de supprimer cette disposition, jugeant préférable de ne pas se priver de toute possibilité d'intervention. Le Parlement a ensuite approuvé sans discussion cette modification […]. Il s'ensuit que* ***l'obligation d'annoncer les opérations de concentration selon le droit suisse peut déjà résulter des effets potentiels que lesdites opérations sont susceptibles de produire sur le marché suisse****, même si les entreprises concernées ne sont pas physiquement présentes en Suisse […].* [Emphasis added]

The broad wording used by the Federal Supreme Court might be troublesome, especially if it is understood as defining the effects doctrine in areas where no thresholds are given, i.e. in non-merger cases. Indeed, such a wording seems to entail that mere potential effects are enough to justify Swiss jurisdiction. It is at best arguable whether PIL, (especially, the PCIJ's *Lotus* decision, see Chapter 3) would support the view that potential effects suffice to justify

[1180] BGE 127 III 219.
[1181] T-102/96, [1999] ECR II-753.

an extraterritorial application of national laws. Therefore, it might be the case that the terms "potential effects" used in *Mérial* should be interpreted in light of the *Gencor* case law, where the CFI established that in order to comply with PIL, an extraterritorial application of law must be based on "immediate, substantial and foreseeable effects". Moreover, note that under US law, competition authorities might reject their jurisdiction out of comity principles. In the *Mérial* case law, the Swiss Federal Court seems to imply that the Commission does not enjoy such freedom, as it is "obliged" to proceed to a preventive merger control. It is a matter of interpretation whether the Swiss Federal Court really intended to render administrative intervention compulsory or whether the Commission still enjoys a certain degree of discretion in this area.

It must be stressed that the ACart's disciplines are applicable not only to inbound trade, but also to **outbound trade**. Zäch[1182], Weber[1183] and Killias[1184] recognise that the ACart is also applicable to export cartels. Killias argues that:

> *Les cartels d'exportation ne sont soustraits au champ d'application territorial de la loi sur les cartels que si a) l'activité en Suisse d'une entreprise, susceptible de satisfaire la demande étrangère, n'est pas entravée par le cartel et b) si les conditions de l'offre, déterminées par le cartel n'affectent pas la demande en Suisse.*[1185]

In practice, the application of the effects principle may raise problematic issues, especially when foreign firms do not have any assets in Switzerland. As Zäch explains[1186]:

> *Die Durchsetzung des schweizerischen Kartellrechts gegenüber Unternehmen mit Sitz im Ausland ist dann nicht problematisch, wenn diese in der Schweiz Tochtergesellschaften oder Niederlassungen haben. Ist dies nicht der Fall, dürften Unternehmen, die an Wettbewerbsbeschränkungen mit Auswirkungen in der Schweiz beteiligt sind, geschäftliche Beziehungen zu schweizerischen Unternehmen unterhalten, aus denen Forderungen entstehen, die allenfalls gemäss Art. 271 ff. SchKG mit Arrest belegt werden können.*

According to Zäch, even in case of anticompetitive practices of Swiss undertakings which have their direct effects outside Switzerland, the ACart is applicable provided that they have an indirect impact in Switzerland[1187]:

> *Das Kartellgesetz gilt auch für Exportkartelle schweizerischer Unternehmen, da der Wortlaut des Gesetzes bloss verlangt, dass ein Sachverhalt ‚sich in der Schweiz auswirkt'. Exportkartelle können insofern Auswirkungen auf dem schweizerischen Markt haben, als sie schweizerische Unternehmen durch die auf ausländischen Märkten vereinnahmten*

[1182] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 126-127, § 269.
[1183] R.H.WEBER, „Kartellrecht - Einleitung", in: R.VON BÜREN/L.DAVID, *Schweizerisches Immaterialgüter- und Wettbewerbsrecht*, Band V/2: Kartellrecht, Helbing & Lichtenhahn, Basel, 2000, p. 42,
[1184] P.-A.KILLIAS, "ad Article 2", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, § 77-85, p. 120-121.
[1185] It has not been determined under Swiss law, whether the effects doctrine would apply in the absence of exports, see *F. Hoffman-La Roche, Ltd. V. Empagran S.A.* 542 U.S. 155, 124 S.Ct. 2359 (2004).
[1186] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 130, § 274.
[1187] R.ZÄCH, *Schweizerisches Kartellrecht,* p. 126-127, § 269.

Kartellrenten in die Lage versetzen, ineffiziente Strukturen aufrechtzuerhalten. [1188]

Furthermore, Switzerland has concluded various **international trade agreements**, which may have an impact on the scope of the ACart. In this respect, Articles 58 and 59 ACart provide a mechanism in order to guarantee that restraints of competition incompatible with international agreements are dealt with efficiently[1189].

Already in 1972, Switzerland signed a bilateral free trade agreement with the EC[1190]. Article 23 I of this agreement provides that:

Sont incompatibles avec le bon fonctionnement de l'accord, dans la mesure où ils sont susceptibles d'affecter les échanges entre la Communauté et la Suisse:

tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées entre entreprises qui ont pour objet ou effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence en ce qui concerne la production et les échanges de marchandises;

ii) l'exploitation abusive par une ou plusieurs entreprises d'une position dominante sur l'ensemble des territoires des Parties contractantes ou dans une partie substantielle de celui-ci;

iii) toute aide publique qui fausse ou menace de fausser la concurrence en favorisant certaines entreprises ou certaines productions.

[1188] The effects principle was already applicable under previous Swiss competition acts, see W.R.SCHLUEP, "Kommentar zum Artikel 2 KG", in: L.SCHÜRMANN/W.R.SCHLUEP, *Kartellgesetz und Preisüberwachungsgesetz*, Schulthess, 1988, p. 184.

[1189] Article 58 and 59 ACart provide that:

Article 58

1. If a party to an international agreement asserts that a restraint of competition is incompatible with such agreement, the Department may instruct the Secretariat to conduct a preliminary investigation.

2. On a proposal from the Secretariat, the Department shall decide what further action to take, if any, after first hearing the interested parties.

Article 59

1. If, in implementation of an international agreement, it is found that a restraint of competition is incompatible with such agreement the Department may, with the consent of the Federal Department of Foreign Affairs, propose an amicable settlement to the parties concerned with a view to removing the incompatibility.

2. If an amicable settlement cannot be reached in time and one party to the agreement threatens to take measures against Switzerland the Department may, with the consent of the Federal Department of Foreign Affairs, order the necessary measures to remove the restraint of competition.

[1190] Agreement between the European Economic Community and the Swiss Confederation, OJ [1972] L 300, of 31 December 1972, as modified later, SR 0.632.401.

In 1960, Switzerland signed the European Free Trade Association Agreement ("EFTA")[1191], Article 18 of which provides that:

> *Member States recognise that the following practices are incompatible with this Convention in so far as they frustrate the benefits arising from this Convention:*
>
> *a) agreements between enterprises, decisions by associations of enterprises and concerted practices between enterprises which have as their object or result the prevention, restriction or distortion of competition;*
>
> *b) abuse by one or more undertakings of a dominant position in the territories of the Member States as a whole or in a substantial part thereof.*

However, these provisions have not yet played a decisive role in practice. One of the reasons may be that these international agreements are not directly applicable[1192]. Hence, private parties cannot invoke the agreement directly, but must require that the "Comité mixte" discusses the issue (diplomatic protection). Given the increasing conflicts arising out of the differing treatment by the national competition authorities, such provisions might become more relevant as a coordination mechanism[1193].

The Treaty between the European Community and the Swiss Confederation of 21 June 1999[1194] foresees competition rules which are applicable in the civil aviation sector and are very similar to Article 81 and 82 ECT[1195]. The Treaty provides that EC competition authorities are competent for the review of agreements between undertakings, abuses of dominant position and mergers both in Switzerland and in the EC, although Swiss authorities are still competent for reviewing anticompetitive behaviour which has only an effect on trade between Switzerland and third party states[1196]. Article 42a ACart specifically provides that:

> *The Competition Commission is the Swiss authority responsible for co-operation with the organs of the European Community according to Article 11 of the Treaty between the European Community and the Swiss Confederation of 21 June 1999 regarding air traffic.*
>
> *If an enterprise opposes a review in a proceeding under Article 11 of the Treaty, an investigative measure under Article 42 may be undertaken at the request of the European Commission.*

[1191] SR 0.632.3.

[1192] See, the *OMO* case law, BGE 105 II 49, and generally, PH.METZGER, "ad art 58-59 ACart", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 1049 and ff.

[1193] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 550, § 1155, contra: O.JACQUOT-GUILLARMOD, "L'applicabilité directe des traités internationaux en Suisse", in : *ASDI*, vol. anniversaire 1989 XLV, Schulthess, and TH.COTTIER, "Das Abkommen über handelsrelevante Aspekte der Rechte an geistigem Eigentum (TRIPS)", in: D.THÜRLER/S.KUX (ED.), *GATT 94 und die Welthandelsorganisation*, Zürich, 1996.

[1194] SR 0.748.127.192.68.

[1195] See, in particular, Articles 8, 9, 10 of the Treaty between the European Community and the Swiss Confederation of 21 June 1999.

[1196] Article 11 of the Treaty between the European Community and the Swiss Confederation of 21 June 1999.

In **private litigation** matters, Article 137 of the Swiss Act on Private International Law has to be taken into account:

> *Claims based on restraint of competition shall be subject to the law of the state of the market in which the damaged party is directly affected by the restraint.*
>
> *Where claims based on restraint of competition are subject to foreign law, the Swiss court may not award indemnities going beyond those which would be awarded for inadmissible restraint of competition under Swiss law.*

The Commentary provides that there are no conflicts between Article 137 of the Swiss Act on Private International Law and Article 2 ACart (p. 537):

> *Face à des prétentions de droit privé, la délimitation du champ d'application géographique en fonction du principe des effets est déjà donnée par le loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP). Aux termes de son article 137, les prétentions fondées sur une entrave à la concurrence sont régies par le droit de l'Etat sur le marché duquel l'entrave produit directement ses effets sur le lésé). Face aux prétentions d'origine privée qui découlent d'une entrave à la concurrence, les règles de conflit du droit international privé sont donc en parfaite harmonie avec celles du projet, même si celles-ci sont aussi applicables aux dispositions de droit public. La mention du principe des effets à l'article 2, 2e alinéa, pour les prétentions de nature privée n'entraîne pas de conflit de normes.*

5.2.4. Relations with other provisions of law (Article 3 ACart)

5.2.4.1. In general

Article 3 I ACart provides:

> *To the extent that provisions of law do not allow competition in a market for certain goods or services, such provisions take precedence over the provisions of this Act, including in particular:*
>
> *a) provisions which establish an official market or price system;*
>
> *b) provisions which entrust certain undertakings with the performance of public interest tasks, granting them special rights.*

The legislator did not intend to subject certain economic activities to a competition regime. The ACart takes this reality into account and defines the limits to its application accordingly[1197]. The Commentary provides (p. 539):

[1197] M.AMSTUTZ, "Vom Kartellrecht der öffentlichen Unternehmen: Vorstudien zur Anwendbarkeit des Kartellgesetzes auf die staatliche Wirtschaftstätigkeit", in: A.KELLERHALS (ED.), *Aktuelle Fragen zum Wirtschaftsrecht, Zur Emeritierung von W.R. Schluep*, Schulthess, 1995, and M.AMSTUTZ, *Neues Kartellrecht und staatliche Wettbewerbsbeschränkungen – Thesen zur Deregulierungsfunktion des Kartellrechts*, AJP, special

> *Le projet reconnaît qu'un régime étatique de marché ou de prix peut exclure la concurrence dans un secteur donné. L'agriculture en est un très bon exemple. Il n'est pas dans l'intention du législateur, en édictant des prescriptions en matière de concurrence, de remettre en question de tels régimes étatiques. Ceux-ci continueront d'exister sous la nouvelle loi**, si leur mise en oeuvre visait effectivement à exclure du principe de la concurrence le secteur en question**. La loi est néanmoins applicable à un tel régime dans un secteur économique donné **lorsqu'il permet un comportement concurrentiel** et peut donc voir appliqués les critères du droit de la concurrence (le cas échéant, compte tenu de la réserve additionnelle de l'art. 3, 1er al., let. b).* [Emphasis added]

Thus, the ACart does not apply to provisions[1198], which aim at excluding a specific sector of the economy from competitive principles or grant special rights to an undertaking[1199]. However, this exemption only applies when the undertaking does not have the discretion of engaging in any kind of competitive behaviour[1200]. This approach has been confirmed by the Federal Supreme Court in its *EEF* decision[1201]:

> *En adoptant [l'art. 3 I LCart], le législateur fédéral a reconnu que des prescriptions légales peuvent, pour des motifs politiques, exclure la concurrence dans un secteur donné […].*
>
> *La loi mentionne en particulier deux sortes de réserves, à savoir les prescriptions qui établissent un régime de marché ou de prix de caractère étatique (Article 3 al. 1 let. a LCart) et celles qui chargent certaines entreprises de l'exécution de tâches publiques en leur accordant des droits spéciaux (let. b).*
>
> *Les prescriptions qui établissent un régime de marché ou de prix de caractère étatique au sens de la lettre a sont celles qui excluent presque*

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issue 1996/1997: Das neue Kartellgesetz, has argued that the ACart was intended as a deregulatory instrument. The case law has not yet confirmed such point of view. Contra: B.CARRON, "ad Article 3 I", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 124.

[1198] Such provisions might be federal or cantonal. They must, however, have been taken within the framework of competences attributed by the Cst to each one of these legislative levels.

[1199] According to B.SCHMIDHAUSER, in: E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz*, ad Article 3, this is in particular the case for water, gas, electricity and waste disposal suppliers and public hospitals. R.ZÄCH, *Schweizerisches Kartellrecht*, p. 136-137, § 288, explains the main difference between the two *litterae* of Article 3 I ACart:

> *Die Preise, die vom Staat für ein solches Unternehmen festgelegt werden, bilden keine staatliche Preisordnung im Sinne von Art. 3 Abs. 1 [ACart]. Denn diese gelten nur für das betreffende Unternehmen, nicht aber für eventuelle Konkurrenten. Die Preise würden nur dann eine staatliche Preisordnung bilden, wenn das Unternehmen mit einem rechtlichen Monopol ausgestattet wäre. Die Tatsache, dass das Unternehmen mit Leistungsauftrag über ein faktisches Monopol verfügt, reicht dazu nicht aus [FN citing BGE 129 II 497, c.5.4.5, quoted here under].*

[1200] Note the similarities with the US (Chapter 3) and EC (Chapter 4) approach in this area.

[1201] See, for example, BGE 129 II 497, *Entreprises Electriques Fribourgeoises (EEF)/Watt Suisse AG, Fédération des Coopératives Migros/Commission de la concurrence/Commission de recours pour les questions de concurrence*, also published in RPW 2003/4, p. 925 and ff, p. 939, c.3.3.1.

totalement la concurrence dans un secteur donné; tel est le cas notamment des règles en matière agricole […], mais aussi dans le secteur de l'énergie […].

La lettre b mentionne d'autres prescriptions qui prévoient une exception aux règles de la concurrence. Il doit s'agir de prescriptions légales qui confèrent à l'entreprise une position concurrentielle particulière […]. Par droits spéciaux, on entend notamment des monopoles d'Etat et régales […]

La concurrence peut aussi être entravée de manière ponctuelle; cela n'implique pas que le domaine concerné soit totalement soustrait à l'application de la loi sur les cartels. Ainsi, dans la mesure où les entreprises concernées agissent en dehors du domaine exclu de la concurrence, elles doivent se comporter conformément aux principes de la concurrence […]. Il faut donc distinguer entre le domaine d'activité étatique à caractère d'entreprise, soumis au droit de la concurrence, et le domaine relevant de la puissance publique, soustrait au droit de la concurrence (cf. ATF 127 II 32 consid. 3f;[...]).

La volonté du législateur était, en révisant la loi sur les cartels en 1995, de renforcer les critères d'appréciation notamment en ce qui concerne les entreprises publiques par rapport à l'ancien droit et de ne laisser place que de manière plus restrictive à la réserve de l'article 3 alinéa 1 LCart […]. Il est par ailleurs conforme aux fondements constitutionnels de l'économie (art. 94 al. 4 et 96 al. 1 Cst.) d'admettre de manière plutôt restrictive une exclusion de la concurrence; celle-ci n'est admissible que sur la base d'une législation claire ordonnant ou autorisant un comportement anticoncurrentiel […]. Le simple fait d'attribuer une tâche à l'Etat ou à une entreprise étatique ne signifie encore pas que le domaine en cause soit exclu de la concurrence […]. Il est important de déterminer si les prescriptions spéciales accordent un espace de liberté aux entreprises concernées ou si elles veulent leur prescrire d'agir par voie de décision et de manière non concurrentielle (ATF 127 II 32 consid. 3c-e […]).

Nevertheless, it is sometimes difficult to apply this rule to specific pieces of legislation, as the legislator has not always expressed its intent of excluding an economic field from competition principles in absolutely clear terms. In the *EEF* decision the Federal Supreme Court clarified that[1202]:

[s]elon les travaux préparatoires et une partie de la doctrine, l'article 3 alinéa 1 LCart n'entre en ligne de compte que lorsque l'intention du législateur était d'exclure effectivement un secteur donné de la concurrence […]. Selon les règles générales d'interprétation, qui sont aussi valables dans le droit de la concurrence, il ne faut pas comprendre par là que la volonté expresse du législateur historique d'exclure un domaine de la concurrence doit être absolument établie. On ne saurait l'exiger, ne serait-ce que parce qu'il existe des prescriptions qui ont été adoptées à une époque où le droit des cartels ne s'appliquait pas aux activités étatiques, si bien que

[1202] *EEF* decision, cited above, at c.3.3.4., RPW, p. 941.

le législateur ne pouvait soustraire délibérément un domaine à la concurrence. Il est donc suffisant - mais nécessaire - que le secteur concerné ne soit pas soumis au droit de la concurrence selon une interprétation ordinaire de la réglementation spéciale en cause […]. Cela peut aussi résulter implicitement du fait que la loi contient des règles qui ne sont pas compatibles avec la concurrence.

5.2.4.2. In relation with intellectual property rights

Article 3 II ACart provides that the ACart is not applicable to effects on competition that result exclusively from intellectual property law. However, import restrictions based on IPR are to be assessed under the ACart. This means in particular that IPR cannot be used in order to prevent parallel imports if doing so would result in a violation of competition rules.

This solution is in line with the civil jurisprudence of Swiss courts in IP law. Indeed, the Civil Chambers of the Federal Supreme Court have confirmed that trade marks and copyrights exhaust internationally[1203]. This means that such IPR cannot be invoked in order to prevent imports in Switzerland after the product has been sold for the first time to a consumer.

In the field of patent rights, the Federal Supreme Court indicated in its *Kodak* decision[1204] that, although patent rights exhaust nationally, they might not be used in order to prevent, in an anticompetitive manner (i.e. through an abuse of a dominant position or through an illegal agreement between undertakings), parallel imports of already abroad-marketed products which are similar to the ones marketed in Switzerland[1205/1206].

5.3. Substantial concepts

5.3.1. Introduction

The ACart has been modelled after the rules of the ECT[1207]. Thus, EC law plays an important role in the interpretation of Swiss competition concepts. Swiss competition authorities remain,

[1203] See, *Philips* decision, BGE 86 II 270, *Chanel/EPA* decision, BGE 122 III 469, which confirms international exhaustion for the new trademark act of 1993 and the *Nintendo* decision, BGE 124 III 321, which stands for the proposition that copyrights also exhaust internationally. See, as well, S. VENTURI, "Propriété intellectuelle et révision de la loi sur les cartels : les importations parallèles sous la loupe", in : W.A.STOFFEL/R.ZÄCH (EDS.*), Die Kartellgesetzrevision 2003 – Neuerungen und Folgen*, Schulthess, p. 215.
[1204] BGE 126 III 129.
[1205] Note that the legal approach towards parallel imports of medicinal products is regulated specifically. Article 14 II of the Federal Law on Medicinal Products and Medical Devices foresees that medicinal products imported through parallel imports have to be granted a (simplified) authorisation by the Swiss therapeutic products authority, Swissmedic. Said authority is, however, not allowed to grant such an authorisation as long as the authorized medicinal product of the first applicant (original preparation) is protected by a patent (Article 14 III).
[1206] The influence of Article 3 II ACart in cases similar to the US *Dell* or *Rambus* (see Chapter 3) or the EC *Magill* and *IMS Health* (see Chapter 4) case law has not been clarified in the case law.
[1207] M.BALDI, "Zur Konzeption des Entwurfs für ein neues Kartellgesetz", in: R.ZÄCH/P.ZWEIFEL, *Grundfragen der schweizerischen Kartellrechtsreform*, 1995, p. 253 and ff and Commentary, p. 532.

however, independent and have at times taken a stance which differs from the EC approach[1208].

It has been suggested that the objective of the ACart is to ensure that competition as an efficient market mechanism within the Swiss economy be safeguarded, whereas the purpose of EC competition law is also to guarantee the integration of the EC internal market, and that EC rules may thus only be applied *mutatis mutandis*[1209]. This seems, however, too abstract to be convincing. Indeed, on the one hand, the integration of the EC market is only one of the goals pursued by EC competition law and the protection of competitive market conditions is at least as important an objective as market integration. Certainly, the influence of the market integration objective was important in a founding decision like *Consten Gründig*[1210]. The internal market is now, however, for all practical purposes a solid reality and EC law is more and more founded on an economic approach of competition rather than on teleological principles. It seems thus unlikely that the European Court of Justice would come up with solutions which would be at odds with sound economic principles only for the purpose of integrating the EC market. On the other hand, the goal of the integration of the market does not often seem to be incompatible with the protection of competition. On the contrary, the integration of the Swiss market in the international economy is a goal that the ACart pursues as well[1211]. The argument that Swiss competition approaches should be different from the EC approach merely on the ground that EC law has, as its aim, the integration of its internal market does not bring a sound justification. Of course, Swiss competition authorities remain nevertheless free to diverge from EC solutions on other grounds[1212].

5.3.2. Article 5 I ACart

Article 5 I ACart reads:

> *Agreements that significantly restrict competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the elimination of effective competition are unlawful.*

Consequently, under the ACart the following three types of agreements between undertakings are distinguished, in particular as regards their lawfulness:

- Agreements which do not significantly restrict competition are lawful;
- agreements which significantly restrict competition are in principle unlawful, unless they can be justified on grounds of economic efficiency; and

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[1208] See, for example, *Feldschlösschen Getränke Holding/Coca Cola AG/Coca Cola Beverages AG*, RPW 2005/1, p. 114, Weko.

[1209] F.HOFFET, The Revised Swiss Act on Cartels, in: Zeitschrift für Wettbewerbsrecht (ZWeR), 1/2005, p. 63 and ff.

[1210] *Consten & Grundig v. Commission* (C-56 & 58/64) [1966] ECR 299.

[1211] Commentary, p. 563 and ff.

[1212] The grounds put forward in the Commentary, (the reduced size of the Swiss economy (See, Y.FLÜCKIGER, "La politique de la concurrence d'un petit état sous l'angle économique", in W.A.STOFFEL/R.ZÄCH (EDS.*), Die Kartellgesetzrevision 2003 – Neuerungen und Folgen*, Schulthess, p. 309) and the fact that constitutionally the Cst does not forbid cartels as such, but only their negative effects) are debatable from a policy perspective. Indeed, it is unlikely that the constitutional hindrance alone (if it exists at all) would compel policy solutions, which substantially differ from the solutions adopted by other jurisdictions.

- agreements which eliminate effective competition are illegal (and cannot be justified on grounds of economic efficiency)[1213].

It is therefore necessary to clarify the following concepts: 1° agreement, 2° significant restriction of competition, 3° grounds of economic efficiency and 4° elimination of effective competition.

5.3.2.1. Agreements and concerted practices

According to Article 4 I ACart:

> *The term "agreements restricting competition" means binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of the market, the purpose or effect of which is to restrain competition.*

The term "agreement" includes contracts as defined under the Swiss Code of obligations[1214] as well as non-binding agreements of competitors (gentlemen's agreement). It is sufficient that an agreement has, as its purpose or effect, the restriction of competition in order to fall under Article 5 Acart. Swiss law is thus very similar to EC law on this score[1215]. In particular, Swiss case law also distinguishes forbidden concerted practices from authorised parallel conduct[1216] and price leadership. It must further be underlined that recommendations of a trade association are usually considered as concerted practices, at least, as long as they are followed by the addressees[1217].

5.3.2.2. Significant restriction of competition

The significance[1218] of a restriction of competition is central for the assessment of agreements between undertakings even though it is difficult to define precisely[1219]. This concept is not

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[1213] However, according to Article 8/31 ACart, unlawful agreements and abuses of a dominant position can be referred to the Federal Council if they are necessary for the safeguard of compelling public interests. It must also be pointed out that in the *Buchpreisbindung* decision, RPW 2002/4, Federal Supreme Court (also published under BGE 129 II 18), the Federal Supreme Court stated that the presumption of elimination of competition of Article 5 III ACart might be rebutted.

[1214] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 176, § 365.

[1215] Indeed, the definition used under EC law to describe concerted practices can be replicated under Swiss competition law, R.ZÄCH, *Schweizerisches Kartellrecht*, p. 177, § 367 and J.BORER, *Kartellgesetz*, p. 110, § 14. It is reminded that the ECJ explained in the *Dyestuffs*1215 case, *Imperial Chemicals Institute Ltd v. Commission*, 48/69, [1972] ECR 619, that the terms "concerted practices" were brought into Article 81 ECT in order to prohibit (§ 64):

> *a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.*

[1216] *Buchpreisbindung* decision, RPW 2002/4, Federal Supreme Court (also published under BGE 129 II 18). Autonomous parallelism is, as under EC law, not considered to constitute an agreement, *Benzinmarkt Schweiz (Zeitraum 1993 – 2000),* RPW 2002/1, p. 77, Weko.

[1217] Commentary, p. 544 and J.BORER, *Kartellgesetz*, p. 109, § 12, and *Tarification des honoraires des médecins genevois en matière de soins privés* case, RPW 2003/2, ComCo, p. 352 and ff,.

[1218] In German, "Erheblichkeit". In French, "qui affecte de manière notable la concurrence".

founded on a clear-cut concept of economic theory, it is rather a product of a legalistic approach to competition rules[1220]. As a result, the scope of the words "that significantly restricts competition" is to be inferred from the practice of the competition authorities[1221] and from the commentators writings. In his handbook on Swiss competition rules, Zäch, one of the two vice-presidents of the Commission, argues that the concept of significance is to be interpreted generally according to the Notice Regarding the Competition Law Treatment of Vertical Agreements[1222] ("Vertical Notice"). The Vertical Notice provides a list of agreements which are regarded as hardcore restrictions and therefore have to be considered as "significantly restricting competition" without regard to the market power of the undertakings being a party to such agreements (Article 3 of the Vertical Notice[1223]). Other agreements are

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[1219] For a more in-depth analysis, see A.RAASS, "Eine Frage der Erheblichkeit. Zur Interpretation eines Schlüsselbegriffs im Kartellgesetz", in: *Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht sic!*, 12/2004, p. 911 and ff, who argues that market shares and hardcore clauses (in particular, the ones used under Article 5 III and 5 IV ACart) should be used as a basis for defining significance.

[1220] The definition of significance under Swiss law can arguably be compared to the definition of apprecaibilty of a restriction to competition under EC law, see Subsection 4.2.2.1.2. "De minimis" or "appreciable effects on competition" doctrine.

[1221] In its *Buchpreisbindung* decision, (*Börsenverein des Deutschen Buchhandels e.V. und Schweizerischer Buchhändler- und Verleger-Verband gegen Wettbewerbskommission und Rekurskommission für Wettbewerbsfragen*, RPW 2002/4, p. 731, BGE 129 II 18, Federal Supreme Court) the Federal Supreme Court has explained that a restriction is significant (c. 5.2.1):

> *wenn sie eine gewisse Intensität aufwies und vom Betroffenen als solche empfunden wurde, weil sie seine Handlungsfreiheit unmittelbar oder mittelbar beeinflusste, ihn insbesondere zwang, auszuweichen oder Gegenmassnahmen zu ergreifen, um den Folgen der Diskriminierung zu entgehen. Das Element der Spürbarkeit ist auch nach dem geltenden Recht massgebend [...]. Da dieses nebst der Persönlichkeit der einzelnen Wettbewerbsteilnehmer (Individualschutz) aber auch den Wettbewerb als solchen schützen will (Institutionsschutz), ist die Erheblichkeit nicht mehr allein aus der Optik der einzelnen Unternehmen, sondern in Bezug auf das Funktionieren des wirksamen Wettbewerbs schlechthin zu beurteilen [...]. Dabei sind qualitative wie quantitative Merkmale relevant [...]. Eine erhebliche Wettbewerbsbeeinträchtigung ist (zumindest) dann zu bejahen, wenn die Abrede einen auf dem entsprechenden Markt relevanten Wettbewerbsparameter betrifft, wobei die Beteiligten einen erheblichen Marktanteil halten.*

[1222] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 187, § 389:

> *Die Regeln der Bekanntmachung finden sinnvollerweise nicht nur für vertikale, sondern grundsätzlich auch für horizontale Abreden analoge Anwendung. Denn was im vertikalen Kontext erheblich ist, gilt umso mehr im horizontalen.*

See as well the *Buchpreisbindung* case, *Börsenverein des Deutschen Buchhandels e.V. und Schweizerischer Buchhändler- und Verleger-Verband gegen Wettbewerbskommission und Rekurskommission für Wettbewerbsfragen,* RPW 2002/4, p. 731, BGE 129 II 18, Federal Supreme Court, c. 5.2.1.

[1223] Article 3 of the Notice reads:

> *In principle the Competition Commission regards vertical agreements to be material restrictions of competition within the meaning of Art. 5 (1) ACart when they have as their subject matter the following:*
> *a) Direct or indirect fixing of prices or minimum sale prices for distribution of the relevant goods or services by the dealer;*
> *b) Direct or indirect restrictions on the geographic area or the customer group for distribution by the dealer;*
> *c) Restrictions on sales to end users insofar as these restrictions are imposed on dealers within a selective distribution system;*
> *d) Restrictions on cross supply between authorised dealers within a selective distribution system, also when dealers at different levels of the market are involved;*

considered, as a rule, as non-material restrictions of competition provided the market share of all the undertakings involved does not exceed a threshold of 10% on any of the relevant markets (Article 4 of the Vertical Notice). Hence, it must be stressed that the Vertical Notice is unhelpful for assessing the validity of agreements, which (a) are not comprised in the list of its Article 3 and (b) the parties to which have a market share that exceeds 10%. In such cases, the definition of what is a significant restriction of competition remains unclear and little inference can be drawn from the straight-jacket approach followed by the Commission in the Vertical Notice. The Notice on Small and Medium Undertakings provides further guidance on this score. Concerning agreements between "micro"[1224] undertakings (i.e. undertakings with less than 10 employee and a turn-over which does not exceed CHF 2 Mio), the SMU Notice provides that it is generally presumed that they do not significantly restrict competition (Article 4 and 5 of the SMU Notice). It remains, however, forbidden to these undertakings to become parties to hardcore restrictions such as price fixing, restriction of output or allocation of geographic markets. Concerning other undertakings, the SMU Notice provides a *de minimis* rule: provided the combined market shares of the undertakings taking part in an agreement does not exceed 10% (if the agreement is of an horizontal nature) or 15% (if the agreement is of a vertical nature) respectively, the agreements are, in principle, presumed to have only "a restricted market impact" (Article 3 of the SMU Notice), unless they contain hardcore restrictions.

5.3.2.3. Grounds of economic efficiency

According to Article 5 I ACart, an agreement which has been deemed to significantly restrict competition may still be justified on grounds of economic efficiency. Such grounds are defined in Articles 5 II and 6 ACart. Article 5 II reads:

> *An agreement is deemed to be justified on grounds of economic efficiency:*
>
> *when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and*
>
> *when such agreement will not in any way whatsoever allow the undertakings concerned to eliminate effective competition.*

In order to be justified on economic grounds, an agreement must therefore:

(a) entail one of the positive economic benefits listed in Article 5 II a) ACart[1225];
(b) be necessary for the attainment of such a benefit; and
(c) not eliminate competition.[1226]

> *e) Restrictions that prevent the supplier from supplying components or spare parts to anyone (end user, repairers etc.) other than the dealer that is party to the agreement;*
> *f) Non-compete clauses that are agreed to for a duration of more than five years or for more than one year after termination of the vertical agreement.*

[1224] In French "microentreprises" and in German, "Kleinstunternehmen".
[1225] The Federal Supreme Court clarified that such a list of benefits is exhaustive. *Buchpreisbindung* decision, RPW 2002/4, 565, § 38, Federal Supreme Court, also published under BGE 129 II 18, c. 10.3.

Article 6 ACart provides that the conditions under which agreements restricting competition may be exempted may be determined by way of ordinances or communications[1227]. In particular, Article 6 provides the following non-exhaustive list of agreements, which might benefit from such an exemption:

> *a) co-operation agreements relating to research and development;*
> *b) specialisation and rationalisation agreements, including agreements concerning the use of schemes for calculating costs;*
> *c) agreements granting exclusive rights to deal in certain goods or services;*
> *d) agreements granting exclusive licences for intellectual property rights;*
> *e) agreements with the purpose of improving the competitiveness of small and medium-sized undertakings, in so far as they have only a limited effect on the market.*[1228]

According to Swiss commentators, standardization agreements could be encompassed by the concept of rationalisation agreements[1229]. Neither the Federal Council or the Commission have promulgated an ordinance or a notice on standardization so far.

[1226] These conditions are discussed in further detail in relation with standardisation issues under Section 5.4. Swiss approach towards standards.

[1227] As mentioned above, ordinances are established by the Federal Council whereas communications are established by the Commission. The main difference lies in the fact that ordinances bind competition authorities, whereas communications are not binding. J.-M.REYMOND, ad Article 6 ACart, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, is of the opinion that judicial authorities (cantonal or federal) can review the constitutionality of ordinances, whereas the Commission and the Appeals Commission in Competition matters cannot. Note, however, that up to now the Federal Council has not issued any ordinance on the bases of Article 6 ACart.

[1228] Article 6 II ACart also provides that:

> *Such ordinances and communications may also recognise particular forms of co-operation specific to certain branches of the economy as being deemed to be justified, in particular agreements concerning the effective implementation of legal provisions for the protection of customers or creditors in the field of financial services.*

Although it might not be excluded that such agreements make use of standards, the original *ratio legis* for such a provision was the self-regulation enforced for certain branches of the economy such as banks and insurances. The Commentary (p. 559-560) provides:

> *Alors que les formes de coopération énumérées au 1er alinéa de l'article 6P sont communes à toutes les branches de l'économie, le 2e alinéa reconnaît une compétence supplémentaire à la Commission, qui peut également édicter des dispositions d'exécution pour des formes de coopération spécifiques à une branche. Les expériences faites par la Commission des cartels montrent que de telles dispositions sont surtout nécessaires dans le domaine des services financiers, soit le domaine des banques et des assurances, mentionné dans le projet. En matière d'assurances, l'attention devra se porter d'abord sur les différents objets réglés aussi au niveau de l'UE dans des règlements sur les exemptions par catégorie. La formulation restrictive du projet "accords concernant la transposition rationnelle de prescriptions de droit public pour la protection des clients ou des investisseurs" révèle dans quel sens doit aller cette forme de coopération, qui sera en général admise. Cette norme a été spécialement conçue pour les branches soumises à la surveillance de l'Etat. La Commission de la concurrence, si elle le désire, pourra chercher à collaborer avec l'autorité de surveillance compétente avant d'édicter des dispositions d'exécution.*

[1229] J.-M.REYMOND, "ad Article 6 Acart", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 323, § 69 and ff. and F.HOFFET, *ad Article 6*, in:

5.3.2.4. Elimination of effective competition

The concept of elimination of competition appears not less than four times in Article 5 ACart. However, *prima facie*, there seems to be no special reason not to give it a homogeneous interpretation, although it is used each time in a different context.

Zäch describes the concept as follows:

> *Wirksamer Wettbewerb wird durch Abrede beseitigt, wenn sie dazu führt, dass die Marktgegenseite nicht mehr aus unterschiedlichen Angeboten auswählen kann bzw. ein Ausweichen von einem Wettbewerber auf einen anderen – wegen der Einheitlichkeit des Angebots – sinnlos ist. Zur Entscheidung der Frage, ob wirksamer Wettbewerb beseitigt ist, wird – wie die bisherige Praxis zu Art. 5 Abs. 3 KG zeigt – im konkreten Fall insbesondere geprüft, ob Innen- oder Aussenwettbewerb vorliegt. Dabei wird allenfalls auch geprüft, ob potenzieller Wettbewerb besteht und/oder ob von der Marktgegenseite disziplinierende Wirkung ausgeht.*
>
> *[...] Zur Beseitigung wirksamen Wettbewerbs genügt es danach meist, dass die* ***Handlungsfreiheit der Wettbewerber*** *im Hinblick auf einen oder wenige* ***wichtige Wettbewerbsparameter durch Abrede ausgeschaltet*** *wird. [...]*[1230] [Emphasis added]

Borer seems to argue for a more limited application of the concept of elimination of competition[1231]:

> *Der wirksame Wettbewerb ist beseitigt, wenn die autonome Festlegung* ***sämtlicher*** *relevanter Wettbewerbsparameter ausgeschlossen ist. Sind mehrere Wettbewerbsparameter relevant und sind nicht alle von der Abrede betroffen, kann folglich ein Restwettbewerb bestehen und die Beseitigung wirksamen Wettbewerbs ist zu verneinen.* [Emphasis added]

The question whether all or only some important competition parameters need to be negatively restricted by the agreement seems not to be crucial[1232]. Rather, the fact that "effective competition" may take place seems to be more relevant. Indeed, it would seem that under both approaches it should be determined whether market actors, which may or may not be a party to the agreement, are still in a position, through their "Restwettbewerb", to have a sufficiently disciplining influence on the parties to the agreement in order to ensure that these are not free to behave independently from other market actors.

E.HOMBURGER/B.SCHMIDHAUSER/F.HOFFET/P.DUCREY, *Kommentar zum schweizerischen Kartellgesetz*, p. 16, § 28. Note that EC legislation does not refer to rationalisation agreements anymore, standardisation agreements being now referred to in a specific chapter of the Horizontal Guidelines as presented under Chapter 4.

[1230] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 210-211, § 434 and 435.

[1231] J.BORER, *Kartellgesetz*, p. 149, § 29.

[1232] It has to be kept in mind that Article 81 (3) ECT speaks of agreements which *substantially* eliminate competition. Although Swiss law is inspired by EC law (Commentary p. 528-531), it is difficult to base an argument on this textual difference. Indeed, arguments might go both ways. If one takes the view that Swiss law should be interpreted in conformity with EC law, the approach favored by Borer might be preferable. If one takes the view that the Swiss avoidance of the term "substantially" is not random, it might be argued that Zäch's approach is to be preferred.

The main consequence of the distinction between agreements which "eliminate competition" and those which merely restrict it "significantly" is that the former cannot be justified on economic grounds[1233]. It must, however, be pointed out that agreements that eliminate competition are unlikely to comply with the requirement of "indispensability" (or "necessity" in Swiss parlance[1234]) which a justification on economic grounds has to respect. The distinction between agreements which eliminate and those which significantly restrict competition should therefore not lead to substantially different results in practice under this point of view.

5.3.3. Article 5 III and IV ACart

Article 5 III and IV provide two rebuttable presumptions. When an agreement complies with these requirements, it is presumptively considered to eliminate competition. Article 5 III ACart defines which agreements between (actual or potential) competitors are presumed to lead to an elimination of competition. Agreements between competitors are usually referred to as horizontal agreements. Article 5 IV ACart spells out the scope of the presumption concerning vertical agreements, that is agreements between undertakings which are at different market levels[1235].

Pursuant to Article 5 III ACart, agreements which (a) directly or indirectly fix prices, (b) restrict the quantities of goods or services to be produced, bought or supplied, or (c) allocate markets geographically or according to trading partners are presumptively deemed to eliminate effective competition. Article 5 IV ACart mandates the same presumption for vertical agreements regarding fixed or minimum prices as well as agreements which allocate territories in so far as sales by other distributors into these territories are not permitted.

As indicated, the presumptions of Article 5 III and IV ACart are rebuttable. These presumptions might in particular be rebutted by proving that there is sufficient internal and external competition[1236]. Internal competition takes place between firms which are part to the agreement (or in case of vertical agreements, to a similar agreement). External competition originates in the behaviour of undertakings, which are not part to the agreement, but sell similar or substitutable products. The exact level of (internal or external) competition necessary to rebut the presumption has not been entirely clarified[1237/1238]. In any case, as

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[1233] Note that as the Federal Supreme Court mentioned in the *Buchpreisbindung* decision, RPW 2002/4, Federal Supreme Court (also published under BGE 129 II 18), the presumption of elimination of competition of Article 5 III ACart might be rebutted by economic motives. This does not mean, however, that the elimination of competition might be justified on economic grounds. In such cases, the only justification left is a "compelling public interest" according to Article 31 ACart. Such interest are examined by the Federal Council.

[1234] For a discussion of the Swiss "necessity" priniciple, see hereunder, Subsection 5.4.2.2. Significant restriction of competition.

[1235] Note that the practice of the Commission has been rather focused on issues of distribution agreement (i.e. "vertikale Preisbindungen zweiter Hand" and certain "vertikale Marktaufteilung"). It is an untested hypothesis whether Article 5 IV ACart applies generally to all agreements to which non-competitors are parties, although this is the way EC authorities apply the concept of vertical agreements.

[1236] *Buchpreisbindung*, BGE 129 II 18, 35, c. 8.1.

[1237] As the Federal Supreme Court summarily mentioned in the *Buchpreisbindung* case, BGE 129 II 18, 35, c. 8.2.1.: "erforderlich sei der Nachweis, dass trotz der fraglichen Abrede der Preiswettbewerb in hinreichendem Masse spiele". According to J.BORER, *Kartellgesetz*, p. 150, § 29:

> *Bei der Überprüfung der Wirksamkeit des Wettbewerbs ist [...] jeweils zu fragen, ob die in einem Markt tätigen Unternehmen (auch in Zukunft) gezwungen oder doch angespornt werden, den Ressourceneinsatz zu optimieren, die Produkte und Produktionskapazitäten an die*

confirmed by the Federal Supreme Court, the presumptions cannot be rebutted if the agreements lead to market foreclosure[1239].

5.3.4. Article 7 ACart

Article 7 I ACart reads:

> *Practices of undertakings having a dominant position are deemed unlawful when such undertakings abuse their market position and prevent in this way other enterprises from entering or competing in the market or put trading partners at a disadvantage.*

Thus, Article 7 I basically contains three requirements:

1° The undertaking must be in a dominant position;
2° the undertaking must abuse their market position; and
3° such an abuse must have a negative impact on trading partners, (i.e. it shall the "prevent other enterprises from entering or competing in the market or put trading partners at a disadvantage").

5.3.4.1. Dominant position

5.3.4.1.1. Relevant market

Except in extreme cases, the concept of dominance usually entails an in-depth analysis of the market conditions in which the allegedly dominant firm is active as well as of its behaviour. Such analysis helps determining the degree of independence enjoyed by a particular undertaking. The concept of relevant market is crucial[1240], as the interactions with actors in this market (actual competition) are central to determine the degree of independence enjoyed

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> *äusseren Bedingungen anzupassen sowie neue Produkte und Produktionsverfahren zu entwickeln.*

In the context of vertical agreements, J.BORER, *Kartellgesetz*, p. 154, § 31 mentions:

> *Die Vermutung ist nicht erst wiederlegt, wenn nachgewiesen wird, dass uneingeschränkter Wettbewerb herrscht, sondern bereits, wenn dargetan ist, dass trotz der die Vermutung begründenden Abrede noch ein gewisser – wenn auch allenfalls erheblich beeinträchtiger – Rest- oder Teilwettbewerb besteht..*

[1238] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 229-230, § 477, argues that potential competition is not sufficient to rebut the presumption.
[1239] BGE 129 II 18, 43, c. 9.5.5.
[1240] *Produktebündel Talk & Surf* case, RPW 2004/2, Secretariat, p. 362, § 23:

> *Um festzustellen, ob sich Swisscom tatsächlich in wesentlichem Umfang von anderen Marktteilnehmern unabhängig verhalten kann, ist vorab der relevante Markt abzugrenzen.*

E.CLERC, "ad Article 4 II", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 180, § 54 and ff.

by an undertaking[1241]. In order to establish whether an undertaking is independent, competition authorities generally assess whether the trading partners (suppliers or customers) of the undertaking are in a position to sell or buy their products from or to another market actor (competitor) ("*Ausweichmöglichkeiten*")[1242]. Therefore, in a first step, it is necessary to define the market in which the undertaking is active. Such a definition is usually brought by the setting of three boundaries:

a) The product market;
b) the geographic market; and
c) the temporal market[1243].

a) Product market

The product market encompasses all products that can be considered substitutable to those produced by the allegedly dominant undertaking. This is confirmed by Article 11 III of the Merger Ordinance, which is often cited as being applicable by analogy (litt. a)[1244]:

> *The product and geographic markets […] shall be determined as follows:*
> *a. the product market includes all goods or services that are* ***considered by potential trading counterparts as substitutes*** *in view of their characteristics and foreseeable purposes of use.* [Emphasis added]

The terms **"**trading counterparts" encompass both suppliers and demanders of a substitutable product[1245]. Although demand-side substitutability is often examined in practice, supply side substitutability is also crucial in defining the relevant product market[1246]. Even in the absence of actual demand substitutability, a high degree of supply substitutability[1247] can impede a firm to act independently in a market as it knows that competitors have an incentive to enter its market by switching their production, as soon as the incumbent undertaking raises its prices above the competitive level.

[1241] Potential competition (i.e. the interactions and actors who intend to enter such market) being the other central factor for the determination of dominance.
[1242] See Article 11 III of the Merger Ordinance as quoted hereunder
[1243] Like under Chapter 4, this condition will not be presented in details as it is hardly relevant in the field of standardisation.
[1244] E.CLERC, ad Article 4 II, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 183, § 60.
[1245] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 272-273, § 566 and ff.
[1246] As E.CLERC, ad Article 4 II, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 186, § 64, mentions :

> *En plus de la substituabilité au niveau de la demande, la substituabilité au niveau de l'offre […] peut être utilisée comme critère supplémentaire de définition du marché en cause, pour autant qu'elle produise des effets de disciplines équivalents à ceux de la substitution du côté de la demande en terme d'****immédiateté*** *et d'****efficacité.***

[1247] The main difference between supply substitutability and potential competition is the speed and costs at which a competitor is able to enter the market. If entry is "immediate", the undertaking is taken into account for the determination of supply substitutability. If not, the firm might be considered a potential competitor.

In order to assess the level of the product market competition authorities apply various tests, the most important of which are the cross-price elasticity test and the SSNIP[1248] test, which are also used by the EC[1249].

b) Geographic market

The Commission determines the relevant geographic market by reference to Article 11 II litt. b Merger Ordinance, which pertinently sets forth that "the geographic market includes the territory in which the potential **trading counterparts** offers or demands the goods and services covered by the product market"[1250]. In addition, the SSNIP is used to determine the geographic market.

5.3.4.1.2. Dominance

Once the relevant market in which the undertaking is active has been determined, competition authorities still need to assess whether the undertaking is dominant in the respective market. Dominance is qualified market power[1251], which allows an undertaking to behave independently from other market participants. Although all undertakings active on a specific market influence, at least theoretically, the interplay of supply and demand, which establishes the equilibrium price, not all undertakings are to be deemed dominant, as defined in Article 4 II ACart:

> *The term 'undertakings having a dominant position in the market' means one or more undertakings being able, as regards supply or demand, to behave in an essentially independent manner with regard to the other market participants (competitors, suppliers or customers).*

The wording of this article seems to suggest that the focus lies, like under EC law, on the behaviour of the undertaking[1252]. Some have argued that such behaviour might be appreciated in relation to criteria such as the ability of the undertaking to determine the principal competitive parameters (price, output or quality, etc.), the technological advance, the know-

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[1248] Small but significant non-transitory increase in price. As presented under Chapter 4, Subsection 4.3.4.2.1. Relevant market, litt. a) Product market.

[1249] It seems that potential competition, like under EC law (Commission Notice on the definition of the relevant market, [1997] OJ C372/5, § 24), is not used to determine the relevant product market, but is used in connection with the determination of dominance. R.ZÄCH, *Schweizerisches Kartellrecht*, p. 273-274, § 568 and ff. and E.CLERC, ad Article 4 II, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 182, § 59.

[1250] Quoting M.WAELBROECK/A.FRIGNANI, "Concurrence", in : *Commentaire J. Megret, Le droit de la CE*, tome 4, 2nd ed., Bruylant, 1997, p. 542 and ff., CLERC, op. cit., p. 191, § 74, mentions that:

> *Selon Waelbroeck, le critère de l'homogénéité n'exclut pas toute différence dans les conditions de concurrence à l'intérieur du marché géographique défini ; il se réfère uniquement aux différences qui constitueraient des barrières aux échanges, susceptibles d'entraver l'accès à certaines parties de ce marché par les firmes opérant dans d'autres parties du marché en cause.*

[1251] RPW 2004/2, p. 457, § 30.

[1252] The 1985 ACart put forward a triple-headed test. Structure of the market, behaviour and market effect, E. CLERC, ad Article 4 II, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 204, § 101.

how or IPR, the product variety or the advertising of the undertaking and of competitors[1253]. In reality, structural criteria (market shares including their variation of the undertaking and of competitors, the market structure of suppliers or customers and potential competition) still play a primary role in the determination of dominance[1254/1255].

Although **market shares**[1256] still play a central role under the new ACart[1257], they do not alone suffice for a finding of dominance. In particular, high entry barriers can lead to a finding of dominance even when market shares are relatively low, whereas low entry barriers might lead to the rejection of dominance. An undertaking which alone holds a market share of less than 20% is usually not deemed dominant[1258]. Although there are no market share thresholds above which dominance is imperatively to be found, the following market shares thresholds might be regarded as an indicative rule: Between 20 and 40% market share, the undertaking is likely not to be considered dominant, although in case of high entry barriers or other factors which influence the independence of the undertaking, dominance might be found. Undertakings with a market of share of more than 50% are likely to be found dominant. Of course, the economic and regulatory circumstances of a case might lead to other results.

The **structure of the market**, i.e. the relative market shares of competitors, are also an important factor to be taken into account. Competitors with an equal market share are more likely to compete effectively with the undertaking at stake than competitors with a substantially lower market share[1259]. In the *SBB-Gruppenreiseverkehr* case[1260], the Secretariat indicated that:

> *Die Heterogenität des Marktes erklärt, weshalb die Schätzungen betreffend das Marktvolumen derart unterschiedlich sind. Immerhin scheint festzustehen, dass die SBB und die im ASTAG organisierten Carunternehmer insgesamt über vergleichbare Marktanteile verfügen. Dabei ist den Aussagen beider Seiten zu entnehmen, dass sie sich zumindest bei der Preisgestaltung aneinander orientieren. Unabhängiges Verhalten und damit eine marktbeherrschende Stellung der SBB auf dem Markt für Gruppenreisen im Sinne von Art. 4 Abs. 2 KG liegt demnach nicht vor.*

The **countervailing power** of trading partners ("*Marktgegenseite*") may also play an important role for the determination of dominance. When demand for a product is atomistic, an undertaking is more likely to be able to impose its prices as each individual customer has

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[1253] E.CLERC, "ad Article 4 II", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 204, § 101. See as well, F.SOUTY, "Entre 'concurrence praticable' et contestabilité: les barriers à l'accès au marché dans les theories américaines de la politique de la concurrence", in: *Revue de la concurrence et de la consummation*, n°80, juillet-août 1994.

[1254] E.CLERC, "ad Article 4 II", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 205, § 105.

[1255] The Commission generally determines whether dominance exists in three steps: actual competition, potential competition and the position of trading counterparts.

[1256] Market shares are usually based on the turnover of undertakings, although sales volumes might also be taken into account, in particular for basic products.

[1257] *Markt für Postsendungen ohne Adresse* decision, RPW 1997, p. 301, § 28-32.

[1258] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 286, § 585 and J.BORER, *Kartellgesetz*, p. 114, § 20.

[1259] This is particularly true in markets where economies of scale are high.

[1260] RPW 1998, p. 13 § 15.

generally only a limited market power[1261]. On the contrary, when customers are aggregated, they increase their bargaining power and might be in a better position to keep prices down[1262].

Market shares alone do not provide a definitive view on the degree of independence enjoyed by an undertaking. The presence of **barriers to entry** can substantially influence the ability of an undertaking to behave independently. Indeed, barriers to entry determine the ability of (actual or potential) competitors to undercut the anticompetitive behaviour of an undertaking. If such entry barriers are not such as to impede a competitor to enter the market, it is likely that the above-equilibrium profits made by the incumbent attract potential competitors.

Barriers to entry have been classified by WAELBROECK/FRIGNANI [1263] into three categories: regulatory barriers, market-specific barriers and behavioural barriers. Regulatory barriers have been considered as barriers to entry under Swiss law and include, for example, important requirements for the attribution of a trade licence[1264]. Other typical regulatory barriers include technical regulations, legal packing requirements, price regulation or import quotas. Market-specific barriers are related to advantages enjoyed by incumbents in a market. In the EU, examples of such barriers include economies of scale, product differentiation (through branding, superior technology or specific characteristics of the products) and sunk costs[1265/1266]. In Switzerland, the fact that an undertaking enjoys a superior business reputation and a long experience of customers needs[1267], or the necessary scale of operations for a

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[1261] *Plakatierung in der Stadt Luzern* case RPW 2003/1, p. 75, 84, § 49.

[1262] Under the 1962 ACart, the law authorised so-called "Abwehrkartelle", which were cartels established by trading partners of an undertaking with substantial market power (likely to be in a dominant position) in order to protect themselves against unfair prices imposed by such an undertaking. It is unclear whether such cartels could be tolerated under the current ACart.

[1263] M.WAELBROECK/A.FRIGNANI, "Concurrence", in : *Commentaire J. Megret, Le droit de la CE*, tome 4, 2nd ed., Bruylant, 1997, p. 542. See as well the discussion on barriers to entry in Chapter 3, Subsection 3.3.1.1.2. Barriers to entryand Chapter 4, Subsection 4.3.4.2.2. Dominance.

[1264] *Beschaffung, Verteilung und Lagerung von Stiersamen zur künstlichen Besamung von Rindern* case, RPW 1999/1, p. 75 and ff, § 61 and 36-40, Weko.

[1265] *Bahnhofkioske* case, RPW 1999, 403, 419, § 74, Weko.

[1266] See as well, concerning transaction (switching) costs, R.ZÄCH, *Schweizerisches Kartellrecht*, p. 289, § 588 and the *CoopForte* case, RPW 2005/1, Weko, p. 146 and ff, § 135-137.

[1267] In the *Intensiv SA, Grancia* case, RPW 2001/1, 95, 102, § 39, Weko, the Commission stated:

> *Die Wahrscheinlichkeit eines Marktzutrittes im Markt für die Herstellung von rotierenden Instrumenten ist nur schon aufgrund der technischen Besonderheiten der hergestellten Produkte (siehe oben unter sachlich relevanter Markt) kaum zu erwarten (vgl. Rz. 31). Die Herstellung von Rotationsinstrumenten erfordert eine extrem hohe Genauigkeit.*
> *Zudem spielen die Erfahrung und der Ruf der herstellenden Unternehmen eine sehr grosse Rolle. In diesem Zusammenhang gilt es zu berücksichtigen, dass Intensiv die Universitäten für die dort stattfindende Ausbildung mit ihren Produkten beliefert. Nach eigener Aussage ist die starke Präsenz von Intensiv an den Universitäten "das Resultat langjähriger gezielter Analysen der Vorstellungen und Anforderungen der wissenschaftlichen Abteilungen und ihrer Leiter und Assistenten" (Akte V 4). Den Aussagen der Zahnärztegesellschaft entsprechend ist es unzweifelhaft, dass "das Gewöhnen an bestimmte Instrumente im Laufe der Ausbildung und bei der Weiterbildung an Universitätszentren durchaus die Wirkung [hat], dass man mit diesen Instrumenten besser vertraut ist" und ein späterer Kaufentscheid zu Gunsten dieser Produkte ausfällt. Deshalb beziehen heute noch die meisten Zahnärzte ihre rotierenden Instrumente aus dem Angebot der Firma Intensiv. Ein Marktzutritt eines neuen Wettbewerbers ist demnach auch aus diesen Gründen in mittelbarer Zukunft nicht sehr wahrscheinlich.*

In other words, Intensiv has been able to impose its product as a *de facto* market standard. The Commission considered the fact that customers were used to Intensiv's products as an entry barrier, and thus, an indication of dominance. The Commission did not analyse whether the fact of supplying universities with its products might

successful entry into a market[1268] have, for example, been considered as a (market-specific) barrier to entry. Behavioural barriers to entry are practices from which a competitor has to conclude that the incumbent will render his entry more difficult[1269]. Such strategies might involve the over-purchase of advertising assets by an incumbent. This might ensure market shares to the incumbent without obliging him to enter into a price war[1270]. Concerning the definition of barriers to entry applied by Swiss competition authorities, it must be pointed out that they tend to consider that all cost born by a new entrant are to be considered barriers to entry even if such a cost has (had) to be born by the incumbent as well[1271]. This seems to support the conclusion that Swiss competition authorities tend to apply a Bainian test to the determination of barriers to entry[1272].

5.3.4.2. Abuse of dominance

The mere presence of a dominant position is not illegal, as it is one of the corollaries of competition to allow better firms to gain market share[1273]. As a result, in order to violate Article 7 ACart, a dominant firm must abuse its dominant position. Defining the concept of abuse, Article 7 I Cart postulates that such a dominant undertaking must:

(a) neither prevent other enterprises from entering or competing in the market; nor
(b) put trading partners at a disadvantage.

The former involves the exclusion of competitors (horizontal effect), whereas the latter consists in the exploitation of the dominant position to the advantage of the dominant firm (vertical effect)[1274]. Additionally, the case law admits that practices which comply with one of these two alternatives are nevertheless legal provided they are justified by so-called "legitimate business reasons"[1275]. The ACart thus follows an approach very similar to EC competition law.

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be an anticompetitive (exclusionary) practice. This decision is of particular interest, as it shows that voluntary standards, although not mandated by law, might have an important anticompetitive effect on competition.

[1268] *Veterinärmedizinische Tests/Migros* case, RPW 2003/4, p. 753, 767, § 70, Weko.

[1269] *Siemens/Elktrowatt* case RPW 1997, p. 540, and *Bahnhofkioske* case, RPW 1999, 403, 419, § 75, Weko.

[1270] D.FUNDENBERG/J.TIROLE, "The fat-cat effect, the puppy-dog ploy, and the lean and hungry look", in: *American Economic* Review 74: 361, 1983.

[1271] R.ZÄCH, "Verhaltensweisen marktbeherrschender Unternehmen", in: R.VON BÜREN/L.DAVID, *Schweizerisches Immaterialgüter- und Wettbewerbsrecht*, Band V/2: Kartellrecht, Helbing & Lichtenhahn, Basel, 2000, p. 174, and E.CLERC, "ad Article 4 II", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 217, § 131.

[1272] Concerning collective dominance, the case law of Swiss competition authorities is not very extended. Most commentators refer, however, abundantly to the practice of the ECJ. Chapter 4 presents such a practice in more details. For a Swiss example, see the C*redit card* case, RPW 2003/1, 106, and RPW 2005/4, Reko.

[1273] Commentary, p. 564 and ff.

[1274] The Commentary reads (p. 564-565):

> *Aux termes de la clause générale de l'article 7, 1er alinéa, P, les pratiques d'entrave et d'exploitation d'une entreprise dominant le marché sont illicites lorsque l'entreprise abuse de sa position dominante. Dans le premier cas, on peut également dire que la stratégie envers le concurrent doit être "indue", soit lorsque, par exemple, la volonté d'exclure un concurrent est manifeste. Dans le second, il y a abus (selon nombre de législations étrangères) lorsque les conditions commerciales diffèrent notablement de celles qui seraient appliquées selon toute probabilité avec une concurrence efficace.*

[1275] *Recymet SA* case, RPW 1997/2, p. 490, *Intesiv SA, Grancia* case, RPW 2001/1, 95, 105, § 53 and ff., Weko, and R.ZÄCH, *Schweizerisches Kartellrecht*, p. 305-306, § 627 and ff.

Borer[1276] describes exclusionary and exploitative practices as follows:

> *Mit der Generalklausel werden alle denkbaren Verhaltensweisen marktbeherrschender Unternehmen erfasst. Es wird darin nicht zwischen Behinderungs- und Ausbeutungspraktiken unterschieden. Behinderungsmissbräuche sind gegen missliebige Konkurrenz gerichtet. Durch preisliches, aber auch nichtpreisliches strategisches Verhalten kann das marktbeherrschende Unternehmen erreichen, die missliebige Konkurrenz aus dem Markt zu verdrängen oder gegen sie entsprechende Markteintritts-, Marktaustritts- oder Mobilitätsbarrieren zu errichten. Als Ausbeutungsmissbräuche kommen insbesondere Preisdifferenzierungen, Koppelungspraktiken sowie die Erzwingung unangemessener Preise und Geschäftsbedingungen in Betracht. Mit diesen Praktiken kann das marktbeherrschende Unternehmen unter missbräuchlicher Ausnützung seiner Stellung die ihm ausgelieferte Marktgegenseite zu seinen Gunsten ausbeuten.*[1277]

While the case law of Swiss competition authorities has not yet fully clarified the concept of abuse[1278], Article 7 II ACart provides a list of practices, which are to be considered abusive:

> *The following in particular may constitute unlawful practices:*
>
> *a) the refusal to deal (e.g. refusal to supply or buy goods);*
> *b) the discrimination between trading partners with regard to prices or other conditions of trade;*
> *c) the imposition of unfair prices or other unfair conditions of trade;*
> *d) the under-cutting of prices or other conditions directed against a specific competitor;*
> *e) the restrictions on production, outlets or technical development;*
> *f) the conclusion of contracts only on condition that partners agree to supply additional goods or services.*

Unlike Article 5 III and IV ACart, these examples do not entail a presumption of illegality. On the contrary, even in presence of such practices, it must still be examined whether an abuse in the sense of Article 7 I ACart has taken place[1279].

[1276] J.BORER, *Kartellgesetz*, p. 193, § 8.

[1277] See as well, M.RUFNER, "Unzulässige Verhaltensweisen marktmächtiger Unternehmen", in: *AJP/PJA*, special issue, 1996/1997: *La nouvelle loi sur les cartels*, p. 834 and ff.

[1278] J.BORER, *Kartellgesetz*, p. 194, § 9, citing the *Unique (Flughafen Zurich AG), Sprenger Autobahnhof AG, Alternative Parking AG* case, RPW 2004/3, Reko, p. 859, and *Veterinärmedizinische Tests/Migros* case, RPW 2003/4, p. 753, Weko.

[1279] Commentary, p. 565 :

> *Les pratiques mentionnées à titre d'exemple ne constituent pas des présomptions. Chaque cas doit donc être analysé en profondeur afin de déterminer s'il répond aux critères généraux de l'abus formulés au 1er alinéa de l'article 7.*

See as well, *Entreprises Electriques Fribourgeoises (EEF) contre Watt Suisse AG, Fédération des Coopératives Migros et Commission de la concurrence*, RPW 2003/4, Federal Supreme Court, p. 925, also published under BGE 129 II 497, 538, c. 6.5.3.

Of particular relevance for the discussion on standardization are litt. a and e of Article 7 II ACart, which are further examined below.

5.3.4.2.1. Refusal to deal (litt. a)

a) Generally

The refusal to deal with certain trading partners might be seen as a classical example of exclusionary practice. Yet, Article 7 II litt. a ACart does not introduce an obligation for undertakings to enter into a business relationship with any market actor. Dominant firms remain free to choose their business partners. However, under specific circumstances, their refusal to deal with certain partners is considered illegal. The Commentary explains (p. 565):

> *On entend par là tant la rupture et la restriction de relations commerciales avec des clients actuels que le refus d'en nouer avec des clients potentiels. S'il est vrai qu'une entreprise a la faculté, sous l'angle de la concurrence, de choisir ses partenaires commerciaux, et qu'une position dominante n'entraîne pas une obligation générale de contracter, le constat du refus de relations commerciales n'en est pas moins d'une grande importance pour la politique de la concurrence car, dans bien des cas, il permet indirectement de mieux empêcher d'autres pratiques abusives. L'expérience montre en effet que les entreprises de petite taille n'osent en général pas se défendre contre un partenaire qui domine le marché, de crainte de le voir rompre toute relation commerciale par mesure de représailles.*
>
> *Les effets d'un refus de relations commerciales dépendent en premier lieu du rôle de l'entreprise dominante sur le marché considéré. En l'absence de toute possibilité de choix, le partenaire pénalisé peut être dans l'impossibilité d'exercer sa liberté de concurrence.*
>
> *[…]*
>
> *La rupture de relations commerciales est objectivement justifiée quand, par exemple, les prestations économiques du client deviennent objectivement insuffisantes ou lorsque le client modifie sa politique d'achat et de livraison au point que l'entreprise dominante ne peut plus y souscrire pour des motifs d'ordre économique. Les limitations de livraison sont justifiées par exemple en cas de pénurie, pour autant qu'elles s'appliquent uniformément à tous les acheteurs.*

The Swiss definition of refusal to deal is thus very similar to the EC approach[1280]. Like under EC law, the refusal to keep a commercial relationship is examined more stringently than the refusal to enter into a new commercial relationship[1281].

[1280] See Chapter 4 and E.CLERC, "ad Article 7", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 395-396, § 111, who expressly states that Article 7 II litt. a ACart is the equivalent of the EC *Commercial Solvents* and *United Brands* cases.

[1281] M.RUFNER, "Unzulässige Verhaltensweisen marktmächtiger Unternehmen", in: *AJP/PJA*, special issue, 1996/1997: *La nouvelle loi sur les cartels*, p. 834 and ff., R.ZÄCH, *Schweizerisches Kartellrecht*, p. 319 and 321, § 658 and 663, R.ZÄCH, "Verhaltensweisen marktbeherrschender Unternehmen", in: R.VON BÜREN/L.DAVID,

According to Clerc[1282], the obligation to deal is subject to four conditions:

> *La rupture arbitraire par une entreprise dominante des relations commerciales qu'elle entretenait avec un concurrent actuel, comme le refus arbitraire de relations commerciales avec un concurrent potentiel, sont abusives à **quatre** conditions. a) Il faut tout d'abord qu'il n'existe **aucun substitut réel ou potentiel** au produit ou service fourni par l'entreprise dominante. b) En deuxième lieu, le produit ou service en cause doit être **indispensable** à l'activité économique du concurrent. c) Le refus de relations commerciales doit ensuite être de nature à **éliminer toute concurrence** de la part de l'entreprise requérante. (d) Enfin, le refus doit être arbitraire, c'est-à-dire ne reposer sur **aucune justification objective**.*[1283]

Such four (EC law-inspired[1284]) requirements have not been formally recognised *in toto* by Swiss competition authorities, although some of these conditions have been discussed in their case law[1285]. The Secretariat seems to refer only to two conditions. In the *Talk & Surf* case[1286], it explained that:

> *Rechtsprechung und Lehre verlangen für die Qualifikation einer Verhaltensweise als Verweigerung von Geschäftsbeziehungen als Missbrauch im Sinne von Artikel 7 KG zwei Anforderungen (vgl. z.B. Watt/Migros-EEF, RWP 2001/2, S. 284 f.). In einem ersten Schritt wird verlangt, dass durch die Verweigerung von Geschäftsbeziehungen andere Unternehmen in Aufnahme oder Ausübung des Wettbewerbs behindert werden oder die Marktgegenseite benachteiligt wird. In einem zweiten Schritt ist zu fragen, ob sich die Weigerung aus sachlichen Gründen rechtfertigen lässt. Die Begründung der Wettbewerbskommission im erwähnten Fall Watt/Migros-EEF wurde vom Bundesgericht als*

Schweizerisches Immaterialgüter- und Wettbewerbsrecht, Band V/2: Kartellrecht, Helbing & Lichtenhahn, Basel, 2000, p. 174, 201, and E.CLERC, "ad Article 7", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 399, § 125, which states that:

> *Si les mêmes conditions sont appliquées pour apprécier les effets d'une rupture/restriction ou d'un refus de relations commerciales, elles sont toutefois interprétées de manière **plus stricte** dans le cas de **rupture** de relations commerciales existantes que dans ceux de refus d'entretenir de telles relations. En effet, alors que les effets d'un refus sont évalués de manière prospective, ceux d'une rupture sont basées sur une comparaison de la concurrence passée et prösente sur le marché. De plus, des relations commerciales créent au cours du temps une situation de dépendance du partenaire commercial concurrent envers l'entreprise dominante (Zäch, SIWR KG, p. 201).*

[1282] E.CLERC, "ad Article 7", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 399, § 124.
[1283] Such four conditions are directly inspired by EC law and have not been formally used by other commentators when analysing the refusal to deal case law (for example, Borer, Ruffner, or Zäch).
[1284] The EC approach on this question is presented under Chapter 4. The question whether the refusal to deal cases and the essential facilities cases are part of the same body of case law is open to debate.
[1285] For example, condition a): *Swisscom – Angebot von Mietleitungen* case, RPW 1999/3, p. 375, § 58-63; condition, c): *SWICA* case, RPW 1999/3, p. 463, § 11-15; condition, d): *Spitallisten bei Halbprivatversicherungen mit eingeschränkter Spitalwahlfreiheit*, RPW 1999/2, p. 220, § 99.
[1286] *Produktebündel Talk & Surf* case, RPW 2004/2, Secretariat, p. 357, 373-374, § 74.

> *überzeugend befunden und vollständig gestützt (BGE 129 II 479 [recte 497], E. 6.5.3).*

The approach of the Secretariat is thus much broader than the approach described by Clerc. Indeed, the Secretariat's approach seems to be missing the first three conditions of Clerc's test.

b) Essential facilities

The Commentary explained that:

> *Le refus de relations commerciales peut également porter préjudice à un partenaire potentiel. Toutefois, cette pratique n'est illicite que s'il y a obligation de contracter. Une telle obligation est par exemple donnée de jure ou de facto lorsqu'une entreprise jouit d'un monopole de droit public ou lorsqu'elle seule dispose d'équipements ou d'installations indispensables à la production de certains biens ou services.*

Zäch[1287], defines the essential facilities doctrine as follows:

> *Von besonderem Interesse für ein marktbeherrschendes Unternehmen ist die Verweigerung von Geschäftsbeziehungen, wenn es als Einziges über Einrichtungen oder Information verfügt, die zur Erbringung bestimmter Dienstleistungen oder zur Herstellung bestimmter Produkte unerlässlich sind (sogenannte wesentliche Einrichtungen bzw. 'essential facilities'). Denn durch die Verweigerung des Zugangs zu einer 'essential facility' kann das marktbeherrschende Unternehmen potenzielle Wettbewerber von der Aufnahme und Ausübung des Wettbewerbs fernhalten.*

As the only condition for the recognition of an essential facility seems to be that the facility is indispensable, this definition is obviously (at least potentially) very broad. In the *EEF* case[1288], the Federal Supreme Court clarified however that:

> *Suivant l'exemple de la théorie dite 'Essential facility' élaborée aux Etats-Unis (BISCHOF, op. cit., p. 131 ss; SCHINDLER, op. cit., p. 3 ss) et discutée aussi dans l'Union européenne (SCHINDLER, op. cit., p. 35 ss), la doctrine suisse qualifie un comportement d'abusif lorsqu'une entreprise en position dominante dispose seule des équipements ou des installations indispensables à la fourniture d'une prestation et qu'elle refuse, sans raison objective, de les mettre à disposition aussi de ses concurrents.* ***Encore faut-il que les concurrents n'aient aucune solution de remplacement, si bien que le refus incriminé est de nature à exclure toute concurrence*** *(FF 1995 I 565 s.; BISCHOF, op. cit., p. 129 ss; BORER, op. cit., n. 12 ad art. 7 LCart; CLERC, op. cit., n. 124 ss ad art. 7 LCart; DALLAFIOR, op. cit., n. 105 ss ad art. 7 LCart; HÜBSCHER/RIEDER, op. cit., p. 440 ss;*

[1287] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 322-323, § 667.
[1288] *Entreprises Electriques Fribourgeoises (EEF) contre Watt Suisse AG, Fédération des Coopératives Migros et Commission de la concurrence*, RPW 2003/4, Federal Supreme Court, p. 925, also published under BGE 129 II 497.

SCHINDLER, op. cit., p. 192 s., 195; RUFFNER, op. cit., p. 841; ZÄCH, 1998, op. cit., p. 139). D'après la doctrine, cette théorie s'applique en particulier aux réseaux électriques, qui se trouvent en situation de monopole de fait; il est en effet pratiquement impossible de construire un réseau parallèle et concurrent notamment pour des raisons financières, si bien que les concurrents sont obligés d'utiliser les réseaux existants. Car sinon aucune concurrence ne serait possible (BISCHOF, op. cit., p. 141 s., 155 s., 165 s.; BORER, op. cit., n. 12 ad art. 7 LCart; VON BÜREN/MARBACH, op. cit., p. 280 s.; SCHINDLER, op. cit., p. 77, 88, 91 ss, 122; VOGEL, op. cit., p. 194; ZÄCH, 1999, op. cit., p. 223; le même, 2000, op. cit., p. 204 s.; le même, Netzstrukturen, op. cit., p. 951). [Emphasis added]

Thus, the Federal Supreme Court required first, that the essential facility be indispensable and second, that the refusal to deal eliminate competition. The Federal Supreme Court confirmed these two requirements when it approved the decisions taken by the lower instances (Commission[1289] and Appeals Commission[1290]):

La motivation des autorités inférieures, qui est conforme à l'avis de la doctrine, est convaincante. La recourante veut manifestement empêcher Watt d'accéder au marché en question. Watt ne peut pas livrer de courant électrique sans utiliser le réseau de la recourante parce que - ce qui n'est du reste pas contesté par celle-ci - pour des raisons juridiques et économiques, ***il n'est pratiquement pas possible pour Watt de construire elle-même un réseau de transport parallèle****. La recourante utilise sa position de fait dominante, qu'elle tire de son réseau de transport, pour ne pas devoir s'ouvrir à la concurrence. Son comportement est donc directement dirigé*

[1289] The Commission's decision, RPW 2001/2, p. 285, § 175 was more broadly drafted:

Selon le chiffre 25 de la décision du 7 février 2000 dans le cas BKW FMB SA, il faut partir d'un comportement illicite au sens de l'article 7 LCart lorsqu'une entreprise en position dominante refuse, sans raisons justificatives objectives, de donner accès, contre une rémunération adéquate, à ses réseaux ou à d'autres infrastructures à une autre entreprise, dès lors que, sans cet accès, celle-ci ne serait pas en mesure, pour des motifs de fait ou de droit, d'exercer une activité sur le marché situé en aval et que ce marché n'est pas exposé à une concurrence efficace (DPC 2000/1, p. 33). La question de savoir dans quelle mesure, dans ce type de cas, l'absence d'une concurrence efficace doit être examinée, peut en l'espèce rester ouverte. Comme il a été démontré plus haut, dans le présent cas, le marché situé en aval n'est pas caractérisé par une concurrence efficace.

[1290] The Appeals Commission decision is also broadly drafted, RPW 2002/4, p. 672, 696, c. 7.2:

En l'espèce, le refus opposé par les recourantes à Watt n'est pas contesté, ces dernières faisant valoir que ce refus était justifié. Mettant Watt dans l'incapacité de se positionner sur le marché aval, ce refus constitue un cas d'entrave et est à ce titre en principe illicite au sens de l'article 7 alinéa 1 LCart (commentaire romand, Clerc, Article 7, ch. 71) sans qu'il soit nécessaire de faire appel à l'alinéa 2, lettre a, de cette disposition que la Commission de la concurrence n'a pas appliqué. On notera cependant que les conditions d'application en paraissent, prima vista, réunies (commentaire romand, Clerc, Article 7, ch. 124 ss.). Ici aussi, le refus d'entretenir des relations commerciales imposé par une entreprise ayant une position dominante sur le marché est illicite lorsqu'il ne peut pas être justifié objectivement (ZÄCH, Verhaltensweisen, p. 199).

It is thus not entirely beyond doubt whether the indispensability and exclusion of competition have to be fulfilled as well. It seems, however, likely that the Federal Supreme Court intended them to play a significant role.

> *contre une possible instauration de la concurrence et* ***exclut****, dans le résultat,* ***toute concurrence*** *entre les fournisseurs d'énergie. Ce comportement doit donc être qualifié d'abusif, dans la mesure où il ne peut pas être justifié par des motifs objectifs.* [Emphasis added]

The Federal Supreme Court then examined whether the refusal might be based on legitimate reasons, among which it counted business reasons, the desire to seek a better quality/price relationship for the consumers or the lack of capacity. It concluded that such reasons did not exist in the case at hand and thus considered the refusal to deal illegal[1291].

In an interesting *obiter dictum*, the Federal Supreme Court seemed to consider that there was no tension between the right to ownership and the necessity of granting access to ones facilities (p. 540-541):

> *S'agissant de l'utilisation du réseau, le manque de capacité disponible du réseau constitue également une motivation objective (cf. art. 5 al. 3 LME; BISCHOF, op. cit., p. 157; SCHINDLER, op. cit., p. 115 ss). Car l'obligation d'acheminer l'électricité d'un tiers aussi en cas de capacités insuffisantes ou inexistantes du réseau porterait atteinte au propriétaire du réseau qui serait empêché de l'utiliser pour desservir sa propre clientèle; cela comporterait une restriction de la propriété, qui nécessiterait une base légale supplémentaire (FUCHS, op. cit., p. 59; cf. aussi JAGMETTI, op. cit., n. 34 ad art. 24quater aCst.). Mais la recourante n'a pas invoqué un manque de capacité de son réseau ou d'autres problèmes techniques pour ne pas ouvrir son réseau à des tiers.*

The question arises whether the owner of the essential facility was not limited in its right of ownership in a manner, which would have necessitated an extended legal basis even in the absence of a limitation in capacity. Clearly, the owner is not free to determine the use of its facility, despite being compensated for the third party's use.

[1291] Furthermore, the Commercial Court of the Canton of Aargau seems to have explicitly recognised the essential facilities doctrine: *Handelsgericht des Kantons Aargau: Allgemeines Bestattungsinstitut*, RPW 2003/2, p. 425, 473:

> *Als marktbeherrschendes Unternehmen muss das Kantonsspital Aarau vielmehr alle Geschäftspartner gleich behandeln (ROGER ZÄCH, Schweizerisches Kartellrecht, Bern 1999, N 372). Aus der Sicht der Konkurrenten bildet die Art und der Inhalt der Information der Angehörigen eines im Kantonsspital Aarau Verstorbenen eine essential facility, deren Zugang gewährleistet sein muss und deren Verweigerung eine Verweigerung von Geschäftsbeziehungen im Sinne von Artikel 7 Absatz 2 Buchstabe a KG darstellt (vgl. dazu ZÄCH, a.a.O., N 375). Auch hier kommt als erschwerender Umstand hinzu, dass das Kantonsspital Aarau bei seiner Tätigkeit an den verfassungsmässigen Gleichheitssatz und den Grundsatz der Gleichbehandlung der Gewerbegenossen gebunden ist. Eine von ihm praktizierte Diskriminierung von Marktteilnehmern ist deshalb umso problematischer.*

See as well, *BKW FMB Energie AG*, RPW 2000/1, p. 29, *Fussball-Club Aarau 1902, FC Aarau AG, David Sesa/Swiss Football League*, RPW 2004/4, Handelsgericht des Kantons Aargau, p. 1203 and K.SCHINDLER, *Wettbewerb in Netzen als Problem der kartellrechtlichen Missbrauchsaufsicht: Die 'Essential-Facility'-Doktrin im amerikanischen, europäischen und schweizerischen Kartellrecht*, Dissertation, Stämpfli, 1998.

5.3.4.2.2. Technical limitation (litt. e)

The Commentary clarifies litt. e as follows[1292]:

> *La limitation doit être 'artificielle' pour être abusive. L'entreprise dominante peut prendre elle-même des mesures limitatives ou obliger d'autres entreprises à adopter de telles mesures. Une limitation est artificielle lorsqu'elle ne résulte pas de l'évolution du marché mais du fait qu'une entreprise dominante cherche à faire monter les prix ou à les maintenir à un niveau élevé. La limitation peut porter sur les produits, les quantités, les régions de vente ou les acheteurs.*
>
> *Une limitation abusive de ses* **propres** *débouchés par une entreprise dominante peut notamment consister à ne pas vendre des composants d'un appareil qu'elle produit afin d'empêcher d'autres constructeurs d'accéder au marché en vendant des pièces compatibles avec ses composants, et ce, afin de perpétuer ou de renforcer sa position dominante. Une limitation de son développement technique par l'entreprise dominante ne peut être démontrée que dans de rares cas. Le contrôle des abus ne saurait servir à faire du développement technique une obligation pour les entreprises dominantes.*
>
> *Les limitations abusives, par des entreprises dominantes, du développement technique* **d'autres entreprises**, *notamment par le biais de droits immatériels, sont relativement fréquentes. Ainsi, l'obtention ou le simple maintien de brevets comptent au nombre des abus quand l'entreprise dominante en fait de purs moyens de blocage du progrès technique d'autres entreprises (brevets de blocage). Sont aussi abusifs les contrats visant à constituer des paquets de brevets ou les accords de licence croisés, lorsqu'ils ont pour seule fin d'ériger des barrières à l'accès au marché ou d'entraver l'action des concurrents. Une entrave abusive à l'innovation peut n'avoir aucun lien direct avec un droit de propriété intellectuelle: c'est notamment le cas du refus d'un fabricant de biens très spécialisés de fournir des données techniques afin d'empêcher d'autres entreprises de mettre au point des produits destinés à compléter ces biens.*

In the *Teleclub I*[1293] case, the leading cable analogue TV operator (Cablecom) refused to give access to its cable facilities (in particular the so-called "head-ends") to a competitor (Teleclub), which wanted to introduce digital TV in the German-speaking part of Switzerland. Cablecom intended to enter the digital TV market on its own. Teleclub saw in Cablecom's refusal an abuse of its dominant position. The Commission was requested to grant interim relief to Teleclub. It ruled that Teleclub was unjustifiably limited in its technological development (§ 35-36):

> *Mit der Einführung der D-Box durch Teleclub würde das deutschsprachige digitale Fernsehen in der Schweiz Einzug halten. Dies dürfte den Wettbewerb um die Einführung (neuer) schweizerischer Digital-Pakete, gegebenenfalls mit anderen technischen Normen und Standards,*

[1292] At p. 569-570.
[1293] *Teleclub AG vs. Cablecom Holding AG,* RPW 1999/2, Weko, p. 204.

beschleunigen. Mit anderen Worten könnte Wettbewerb zwischen verschiedenen digitalen Plattformen auf dem Cablecom- Netz entstehen. Dies würde nicht nur auf den betroffenen Hard- und Software-Märkten wettbewerblich begrüssenswerte Auswirkungen zeitigen, sondern in letzter Konsequenz auch unter den verschiedenen Programmanbietern.

Mit der Weigerung, dass Teleclub das Programm mittels D-Box codieren bzw. decodieren kann, behindert Cablecom diese technischen Entwicklungen, was Verzögerungen bei der Einführung des deutschsprachigen Digitalfernsehens zur Folge hätte. Zudem könnte Cablecom versucht sein, mittels geplanter Einführung der von ihr bevorzugten Plattform von Anfang an den Set-top-Standard zu monopolisieren, also keinen Wettbewerb um Standards aufkommen zu lassen. Damit ist mit ausreichender Wahrscheinlichkeit erstellt, dass ein Verstoss gegen Artikel 7 Abs. 2 Bst. e KG vorliegt.

The Commission also held that the refusal was not based on legitimate business reasons (§ 37-41)[1294/1295].

In the *Teleclub II* [1296]case, Teleclub requested again access to Cablecom's facilities (this time to the backbone and local networks) by means of interim measures. Cablecom had apparently refused to grant access to its networks unless Teleclub agreed to be included in Cablecom's digital TV offer, to use Cablecom's end-user decoders ("Set-Top-Box") and to transfer the administration of Teleclub's clients accounts to Cablecom. The Commission saw no economic justifications to the refusal to deal[1297] and so ordered Cablecom to broadcast Telecub's programmes without imposing the above-mentioned conditions. The Appeals Commission rejected Cablecom's appeal. However, the Federal Supreme Court took the view that Cablecom's might have legitimate business reasons to condition the distribution of Teleclub's programs to the use of Cablecom's Set-Top-Box. The Court seemed to argue that an undertaking in a dominant position might have an interest in imposing its own standard in order to reap network benefits. It also explained that Cablecom's intent might be to avoid that Teleclub's dominant position in the pay-per-view sector be extended to the whole of the digital TV industry (c.5.1.1.):

Die Beschwerdeführerin wendet ein, ihr Verhalten sei unter keinem dieser Gesichtspunkte unzulässig, da es sich auf sachliche Gründe ("legitimate business reasons") stütze. Das gesamte digitale Verbreitungs- und Zulassungssystem für digitales Pay-TV bestehe nicht nur aus dem

[1294] On appeal, RPW 1999/4, p. 618, the Appeals Commission annulled the interim measures as it was not sufficiently established that two digital TV distribution systems might be simultaneously sent through Cablecom's network.

[1295] As mentioned under Chapter 2, it is interesting to note that economic theory has described a process which might be near to the facts of the case. Through pre-announcements, an incumbent signals to the consumer that it will bring a new product (or a new technology) in the market and thus, induces consumers to stick with its technology. Pre-announcements are very problematic when such new products do not materialize (commentators speak of "vaporware"). See F.M.FISHER./J.J.MCGOWAN,/J.E.GREENWOOD, *Folded, Spindled, and Mutilated: Economic Analysis and U.S. v. IBM*, MIT Press, 1983, and J.FARRELL/G.SALONER, 'Installed Base and Compatibility: Innovations, Product Pre-announcements, and Predation', *American Economic Review*, 76, 940-955, 1986.

[1296] *Teleclub AG vs. Cablecom GmbH,* RPW 2002/4, Weko, p. 567, RPW 2003/2, Reko, p. 406, RPW 2003/4, Federal Supreme Court, p. 912.

[1297] The Commission also considered that Cablecom engaged in tying.

herkömmlichen Kabelnetz und einer Set-Top-Box. Die Entschlüsselungssoftware müsse mit dem Betriebssystem der Verschlüsselungsstelle kompatibel sein. Soweit sie die Verwendung der "Swiss-Fun"-Plattform beziehungsweise ihrer Set-Top-Box vorschreibe, gehe es ihr nicht darum, die Teleclub AG vom digitalen Pay-TV-Markt zu verdrängen, sondern die Attraktivität ihres Netzes auch für andere Anbieter und die Konsumenten sicherzustellen. Hiefür bedürfe es digitaler Standards und - damit verbunden - einer einheitlichen Plattform. In netzwerkabhängigen Industrien seien Standardisierungen unvermeidlich und im Interesse der Konsumenten unabdingbar; würden diese nicht durchgesetzt, gingen die Netzwerkeffekte verloren. Sie wünsche eine offene, möglichst vielseitige Verwendbarkeit ihres Netzes, was eine Infrastruktur voraussetze, welche es den Anbietern ermögliche, nicht nur auf der Ebene des Programminhalts, sondern auch auf jener der digitalen Zusatzdienste zueinander in Wettbewerb zu treten. Die Set-Top-Box der Beschwerdegegnerin entspreche diesen Standards nicht, da sie keine interaktiven Nutzungen - insbesondere Pay-per-View-Dienste - zulasse, womit andere Anbieter von Pay-TVProgrammen mit Zusatzdienstleistungen daran gehindert würden, den Kunden der Beschwerdegegnerin als heute marktbeherrschende Anbieterin von Pay-TV-Programmen im Pay-per-Channel-Bereich ein Angebot zu unterbreiten. Zudem sprächen technisch-ökonomische Überlegungen für die Verwendung einer einzigen Plattform. Der Einsatz zweier unterschiedlicher "Conditional Access"(CA)-Systeme über das "Common Interface" (CI) führe längerfristig zu technischen Schwierigkeiten, welche die Netzoperabilität und -integrität in Frage stellten und höhere operative Kosten nach sich zögen. Durch die regelmässigen "Updates" der Betriebssoftware entstünden immer weniger kompatible und damit anfälligere Netzstrukturen, weshalb weltweit denn auch auf keinem grösseren Kabelnetz zwei verschiedene digitale Plattformen dauerhaft zum Einsatz kämen.[1298]

[1298] Later the Court noted similarly (c. 5.2.2.):

[...] im Übrigen verkennt [die Rekurskommisson], dass für die Beschwerdeführerin an der angestrebten Offenheit der zum Einsatz kommenden Plattform ein zulässiges kommerzielles Interesse bestehen kann (vgl. BBl 1995 I S. 569): Wohl ist die Plattform der Beschwerdegegnerin durch das Bundesamt für Kommunikation insofern als offen und zulässig qualifiziert worden, als sie den Empfang allfälliger Pay-TV-Programme anderer Anbieter nicht ausschliesst, doch lässt sie eine interaktive Nutzung, an der die Beschwerdeführerin als Netzbetreiberin für eine möglichst breite Auslastung ihrer Infrastruktur ein eigenständiges Interesse haben kann, nicht zu. Im Rahmen einer provisorischen Beurteilung erscheint, was die Rekurskommission zu Unrecht nicht weiter geprüft hat, auch nicht zum Vornherein ausgeschlossen, dass eine marktbeherrschende Unternehmung ihre beanstandete Verhaltensweise damit rechtfertigt, dass sie eine in einem anderen Bereich, hier dem Pay-TV-Markt, marktbeherrschende Anbieterin daran hindern will, ihrerseits Marktzutrittsschranken zu errichten und wirksamen Wettbewerb dort zu verunmöglichen. Gewisse Anhaltspunkte deuten darauf hin, dass das Geschäftsmodell der Beschwerdegegnerin darauf ausgerichtet sein könnte, mit Hilfe ihrer Set-Top-Box ihre führende Marktstellung im Pay-TV-Bereich abzusichern: Sie bietet ihr Programm "Pay per Channel" an, wobei die Set-Top-Box im Preis inbegriffen ist und leihweise abgegeben wird, also zurückgegeben werden muss, wenn das Abonnement nicht weitergeführt wird, was zur Folge hat, dass die Set-Top-Box nicht genutzt werden kann, sollte der Konsument den Anbieter wechseln. Anderen Programmanbietern wird es mit dem Einsatz der "ADB"-Set-Top-Box erschwert, den Konsumenten und Abonnenten der Beschwerdeführerin "Pay per View"-Angebote zu unterbreiten, das heisst ihnen einzelne Filme

On the other hand, the lower instances stressed that (c.5.1.2):

> *Ob sich die eine oder die andere Plattform durchsetz[t, muss] der Markt entscheiden und [darf] nicht von der Beschwerdeführerin vorgegeben werden.*

The Federal Supreme Court refused, however, to consider that Cablecom's interest in imposing its own standard might not constitute a legitimate business reason. It stressed that, at the very least, the possibility that such was the case had not been sufficiently analysed by the lower instances[1299]. The Court explained that (c.5.2.1., 5.2.3.):

> *Die Wettbewerbskommission befürchtet, dass ohne die vorsorgliche Massnahme Cablecom von einem ungerechtfertigten "Infrastrukturvorteil" und einem "First Mover"-Effekt profitieren könnte, da ein Anbieter, der in der Aufbauphase des Marktes über einen Nachteil verfüge, kaum auf eine genügende Anzahl Kunden kommen werde. Da die von ihr getroffene Massnahme aber ihrerseits in die sich ausbildenden Strukturen eingreift und dabei geeignet ist, auf dem digitalen Pay-TV-Markt einen nur schwer reversiblen Zustand zugunsten der Beschwerdegegnerin zu schaffen, bedürfte es für die Anordnung der umstrittenen Massnahme gründlicher technischer Abklärungen, welche zurzeit noch fehlen und dem Untersuchungsverfahren vorbehalten bleiben müssen.*
>
> *[...]*
>
> *Bei dieser in tatsächlicher und rechtlicher Hinsicht unsicheren Ausgangslage erscheint es unverhältnismässig, die Beschwerdeführerin vorsorglich zu verpflichten, die Beschwerdegegnerin mit deren eigenen Plattform auf ihren Netzen zuzulassen[.]*

The Federal Supreme Court thus almost entirely stroke down the interim measures of the lower instances. It maintained, however, the Commission order whereby Cablecom was forbidden to condition the distribution of Teleclub's programs on the transfer of the administration of Teleclub's clients accounts[1300].

It would probably be a too broad reading of *Teleclub II* case law to construe it as accepting that an undertaking might abuse its dominant position each time that this could prevent

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> *- mit Blick auf die Abfolge der Verwertungsrechte - vor Ausstrahlung "per Channel" gegen Bezahlung anzubieten, müsste der Konsument hiefür doch - mit den für ihn damit verbundenen Kosten und dem entsprechenden Aufwand - allenfalls auf eine andere Set-Top-Box umsteigen.*

[1299] As the Court stated (c.5.2.):

> *Entgegen der Annahme der Vorinstanzen kann das Bestehen der geltend gemachten, legitimate business reasons', welche im Einzelfall jeweils aufgrund der konkreten Umstände genau zu prüfen sind (vgl. BBl 1995 I S. 569; MARKUS RUFFNER, Unzulässige Verhaltensweisen marktmächtiger Unternehmen, in: AJP 7/1996 S. 834 ff., dort S. 838 ff.), nicht mit der für den Erlass der angefochtenen vorsorglichen Massnahme erforderlichen Wahrscheinlichkeit ausgeschlossen werden.*

[1300] A procedure on this is score is pending.

another undertaking's potential abuse. This would seem tantamount to admit the application of the "unclean hands doctrine" which is not accepted in US private litigation cases[1301] or the application of the "egality in illegality" maxim which is not authorised under Swiss law.

The Federal Supreme Court did not seem to go that far though. It seemed simply not convinced that Cablecom had intended to abuse its dominant position; the Court accepted that it may be the case that Cablecom merely ensured that Teleclub would not exclude it from the Pay-TV market. Given that the lower instances had not examined this possibility in sufficient details as the interim relief case law requires, the Federal Supreme Court stroke the measures down.

The Federal Supreme Court was facing a tricky issue in this case: obviously, if Teleclub was not given access to Cablecom's digital TV distribution network, it would never have been in a position to abuse its dominant position in the Pay-per-view industry (at least in the digital TV market). But if the interim relief was maintained, it might have created a situation where Teleclub would have excluded Cablecom's competition in the Pay-per-view sector. The latter situation would have arguably been difficult to remedy as it would have necessitated the replacement of all Set-Top-Boxes[1302]. Ideally, Teleclub should have been obliged to use a Set-Top-Box which would allow future competition in the Pay-per-view industry. This is exactly what the Federal Supreme Court seemed to do when it refrained from forbidding Cablecom from conditionning the distribution of Teleclub's programs on the use of Cablecom's Set-Top-Box[1303].

The facts of this case are very specific and it might be dangerous to read in it too broad a holding. It might, however, be seen as a clash between two dominant undertakings, one in the content and one in the distribution sector. The Federal Supreme Court made clear that in such cases the standard of proof for obtaining interim relief must be taken extremely seriously. Indeed, the Court held that even the protection from potential anticompetitive behaviour by competitors might be considered as a legitimate business reason justifying a refusal to deal (at least in a interim relief setting). The Court also seemed to accept that a dominant undertaking might have an interest in imposing its standard and that it should be adequately proved that in enforcing it, the dominant undertaking pursued an anticompetitive objective.

[1301] See Chapter 4, Subsection 3.2.4. *"In pari delicto"* and "unclean hands" doctrines.

[1302] As the Court held (c.5.2.3):

> *Die Aufrecherhaltung der vorsorglichen Massnahme könnte für die Dauer des Verfahrens bewirken, dass in einem weiten Bereich des von der Beschwerdegegnerin beherrschten Pay-TV-Markts Konkurrenzangebote ohne Chancen blieben. Es wird mit der umstrittenen Massnahme ein technisch schwierig abschätzbarer Prozess vorweggenommen, der einer vertieften Abklärung in einem Untersuchungsverfahren bedarf und nicht vor einer solchen eingeleitet werden soll. Die der Beschwerdeführerin auferlegten Konsequenzen wären hinsichtlich der sich ausbildenden Marktstrukturen voraussichtlich schwer reversibel und überwiegen die gegenläufigen Interessen der Beschwerdegegnerin, die ihr Programm analog und unter - allenfalls vorläufigem - Einsatz der "SwissFun"-Plattform auch digital verbreiten kann. Für die Dauer des Verfahrens sind dieser die sich für sie hieraus ergebenden Nachteile - insbesondere der von ihr befürchtete "unselbstständige Auftritt als Gesellschaft" – zuzumuten […]*

[1303] Cablecom's Set-Top-Box was apparently considered to allow future competition in the pay-per-view sector.

5.4. Swiss approach towards standards

5.4.1. The legislation other than the ACart

It is obvious that there is no coordinated approach towards competition issues raised by standards. In fact, there is no Swiss equivalent to the section on standardization agreements of the EC Horizontal Guidelines or the body of case law existing under US law.

Few Swiss acts deal with private standardization issues. Beyond the ACart, one could expect two federal acts to deal with such issues: the Federal Act on the Internal Market ("FAIM") and the Federal Act on Technical Barriers to Trade ("FATBT"). The scope of these two acts is, however, generally limited to public standardization.

The FAIM is almost exclusively applicable to public bodies although it grants a certain number of rights to private parties (for example the right to market access (Article 2 I FAIM) or the right to reconnaissance of diplomas and certificates (Article 4 FAIM)). These rights might, however, only be invoked against public bodies (or private parties, to which public tasks have been delegated such as trade or professional associations which have received the power of regulating the activities of their members[1304]).

Like the FAIM, the FATBT imposes most of its obligations on public bodies, but it also grants certain rights[1305] to private parties (Article 1 II litt. c FATBT). Merkt-Matthey[1306] seems to imply that such rights can only be invoked against public bodies (vertical effects). Therefore, the FAIM and the FATBT are hardly relevant in the context of private standards[1307].

[1304] For a more in-depth presentation, P.TERCIER, "Introduction à la LMI", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 1237 and ff. and M.BIANCHI DELLA PORTA, E.CLERC and V.MARTENET, *commentaries to each article*, *eodem loco*, p. 1250 and ff.

[1305] Article 17 and 18 FATBT grants the possibility to the person who supplies, introduces or puts into service (producer, importer or distributor) to prove directly that a product complies with a compatibility requirement imposed by law, and that this person is even exempted of such a proof in case another market actor has already brought such a proof for the same product.

[1306] N.MERKT-MATTHEY, *ad Article 17 and 18 FATBT*, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 1509 and ff. At p. 1511, § 7 (and p. 1514, § 2), Merkt-Mathey only mentions as a condition for the rights of Article 17 and 18 FATBT to apply:

> *lorsque la* ***législation sectorielle*** *exige une preuve écrite de la conformité du produit"* [emphasis added]. *This seems to imply that, when such a conformity assessment is not mandated by law (private certification), the rights of the FATBT are not applicable.* [Emphasis added]

[1307] It should also be mentioned that the FATBT is completed by two ordinances (Ordonnance du 17 juin 1996 sur la notification des prescriptions et normes techniques ainsi que sur les tâches de l'Association suisse de normalisation (SR 946.511) and the Ordonnance du 17 juin 1996 sur le système suisse d'accréditation et la désignation de laboratoires d'essais et d'organismes d'évaluation de la conformité, d'enregistrement et d'homologation (SR 946.512). These ordinances have been promulgated in order to comply with WTO agreements (TBT and SPS Agreements) and two Mutual Recognition Agreements with Canada and the EC respectively. Like the FATBT, however, they only impose obligations in so far as a conformity assessment procedure is mandated by law.
Moreover, other provisions relevant in the field of certification are scattered among different legislative texts in relation with the regulation of construction products, drugs, chemical products, phytosanitary products, toys safety, etc.

The rules on private standardization are therefore to be found mainly in the ACart. As we have seen, the ACart has no detailed, specific provisions on standardization. The general concepts of such a law remain, however, applicable and there is at least some case law on this subject. This subsection purports to offer some remarks about the way standardization issues should be, in our view, interpreted by Swiss competition authorities.

5.4.2. Under Article 5 ACart

The general structure of Article 5 ACart has been presented under Subsection 5.3.1. Standardization agreements are likely to fall under Article 5 ACart on two grounds:

- as agreements which eliminate competition; or
- as agreements which significantly restrict competition.

5.4.2.1. Elimination of competition

It is undisputed that standardization agreements can have both pro-competitive and anticompetitive effects. The intensity of the restrictions to competition might, however, be such that the Swiss authorities consider that the agreement eliminates competition altogether. This might be the case when standardization agreements involve covenants not to compete or foresee restrictions of various competitive parameters (such as fixed prices, coordinated research and development or a control on output levels)[1308].

Moreover, as a general rule, standards to which competitors have no open and fair access are likely to impede competition by other producers (in particular, in cases where IPR prevent the use of a standardised technology)[1309]. In order, to determine whether such a denial of fair access is an elimination of competition in the legal meaning of these terms, it would, however, seem necessary to assess whether the standardised product is a market in itself. Should this not be the case, it might be argued that competition in the relevant market is still possible for producers of a competitive product even in the absence of a fair access to the standardised technology.

Furthermore, according to Zäch, standardization agreements may fall under the presumption of Article 5 III ACart as they might reduce output:

> *Wettbewerbsabreden dienen häufig auch dazu, Produkte mit – bemessen an den Bedürfnissen der Marktgegenseite – übertrieben hoher Qualität herzustellen (z.B. übertrieben hohe Haltbarkeit eines Produkts usw.). Ziel solcher überhöhter Qualitätsstandards ist eine Steigerung des Gewinns der*

[1308] Under the EC Guidelines (§ 165), agreements that use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors will almost always be caught by Article 81(1) ECT.

[1309] Note that in drawing up its own approach towards standards, the EC took great care to make sure that members of a SSO are allowed to continue to produce products according to another (lower or competing) standard[1309] (see the *VCR* case law, 78/156/EEC, Commission Decision of 20 December 1977 relating to a proceeding under Articles 85 of the EEC Treaty (IV/29.151 – Video cassette recorders), OJ L 047, 18/12/1978, p. 42-47, and the horizontal guidelines (§ 165) as presented under Chapter 4) giving them the ability of undercutting the cartel standard. In doing so, the EC impedes the standard-setters from protecting themselves against potential competition.

Unternehmen. Denn mit dem Wert eines Produkts steigt in der Regel auch die Gewinnmarge. Mit dem Ziel, den Unternehmensgewinn zu steigern, können allerdings auch Qualitätsstandards verabredet werden, die zu Produkten führen, die den Ansprüchen der Marktgegenseite nicht genügen. Zu erwähnen ist beispielsweise die mangelnde Beständigkeit von gewissen Textilfarbstoffen.

[...]

Standardisierungsvereinbarungen können zu Einschränkungen im Sinne von Art. 5 Abs. 3 litt. b KG führen, wenn beispielweise wegen hoch gesetzter Qualitätsstandards kostengünstige Produkte nicht mehr produziert werden.[1310]

It must, however, be stressed that, in order for such a scenario to arise, competition from outside the group of standard-setters must be sealed off[1311]. An outside producer would otherwise have a strong incentive to enter the market with a cheaper product. Consequently, at least in the long term, it seems unlikely that an above-equilibrium market standard might be imposed. However, in the presence of high barriers to entry, and/or high network externalities, as well as in cases where a standard is made compulsory by other private parties (for instance, insurances), the imposition of a high quality standard might be abusive as new entrants (and consumers) are "locked" into the standard. This is, however, a rather rare scenario and it is more likely to occur for compatibility standards than for pure quality standards, as quality standards can easily be undercut, whereas compatibility standards cannot be so easily circumvented. In reality, what seems problematic is not so much the standard itself, but rather the "sealing off of the market". The quality standard alone is only in extreme conditions anticompetitive.

5.4.2.2. Significant restriction of competition

In order to qualify as justified on economic grounds, an agreement which significantly restricts competition[1312] must:

(a) entail one of the positive economic benefits listed in Article 5 II litt. a ACart[1313];
(b) be necessary for the attainment of such a benefit; and
(c) not eliminate competition.

The discussion on the above requirements is extremely important in the field of standardization. In particular, these conditions help clarifying the following two points: First, to which extent a standardization process might qualify as an efficiency-enhancing measure (in particular, as a product- or process-enhancing tool under Article 5 II litt. a Acart) and

[1310] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 37 and 220, § 88 and 456:
[1311] Note as well that the cost of producing the products complying with the higher standard (and the reduced profit accruing from the reduced volume of sales) must be offset by the higher profit margin of the standardised products. This is not always necessarily so.
[1312] The criteria for a finding of significant restriction of competition have been discussed under Subsection 5.3.2.2. Significant restriction of competition.
[1313] The Federal Supreme Court that such a list of benefits is limitative. *Buchpreisbindung* decision, RPW 2002/4, 565, § 38, Federal Supreme Court, also published under BGE 129 II 18, c. 10.3.

second, how restrictive of competition a standard may be if it is to avoid being caught under Article 5 II litt. b ACart?

a) With respect to **economic benefits**, as outlined in Chapter 2, standardization might reduce production or distribution costs, in particular by simplifying production procedures and enhancing interoperability of products. Moreover, an heightened standard might improve the quality of a product and process standards might also help enhancing productive processes. Furthermore, standardization processes (and the licensing agreements, which accompany them) often promote exchanges of technical knowledge. This, in turn, leads to a larger diffusion of know how and might lead to a wider use of valuable IPR.

It will be a matter of (expert) evidence to quantify how important such benefits are. This corresponds to the treatment of standards under Article 81(3) ECT[1314] and Swiss competition law does not seem to contain any regulatory differences, which might warrant another conclusion on this point.

b) The second condition requiring that the restriction be **necessary** for the attainment of the benefits, is traditionally considered as a three-pronged necessity test[1315]:

1. the agreement must be able to bring the purported benefit;
2. the agreement must use the least restrictive means to achieve such a goal[1316]; and
3. the agreement must not restrict competition disproportionately.

The three-pronged necessity test corresponds to the traditional approach of the Federal Supreme Court when it applies the proportionality principle under Swiss law. One might, however, wonder whether the third prong of the test is adapted in a purely economic context. The third prong would entail the weighing of the pro-competitive with the anticompetitive effects of an agreement. As, at least in theory, economic effects can be valuated in monetary terms, such effects can be directly compared[1317]. Thus, given the direct comparability of such effects there might be little room for the third prong of the test. The mere fact that such an agreement fulfils the second prong of the test (i.e. the requirement that the agreement uses the least restrictive mean to reach the positive effects) should be enough. Indeed, if the positive effects of a measure exceed the negative ones, one does not understand why a judge should strike down the measure as "anticompetitive". The third prong seems thus, at best, redundant.

Moreover, there seems to be little basis in economic theory (and maybe in the law) to allow the judge to determine which economic goals are legitimate and which are not. The discussion should focus here merely on the evaluation of economic benefits. The fully-fledged proportionality test is adequate when two conflicting (hardly quantifiable and comparable) social values are considered, but it is argued that it is less adequate when assessing the legality of (more easily comparable) economic effects, as it is the case under the indispensability test of the Article 81 (3) ECT.

[1314] See, as well, the Horizontal Guidelines, as presented under Chapter 4.

[1315] *Buchpreisbindung* decision, RPW 2002/4, 565, § 38, Federal Supreme Court, also published under BGE 129 II 18, Commentary, p. 556, CH.MEIER-SCHATZ, "Unzulässige Wettbewerbsbeschränkungen", in: R.ZÄCH (ED.), *Das neue schweizerische Kartellgesetz*, Schulthess, 1996.

[1316] The second prong is often the most difficult condition to satisfy, as alternative, less-restrictive solutions are sometimes available to reach a positive effect. In standardisation matters, such a condition might arguably be used to constrain standardisation endeavours to remain as open as feasible and to allow outside firms to be granted access to the standardisation results (and in certain cases, to the standardisation process itself).

[1317] Mathematically, one might speak of ordinal values.

It should be pointed out that there might be situations where the group of persons who benefit from an agreement are not the same than the one who must bear their negative consequences. For this reason, under EC law, Article 81(3) ECT requires that a "fair share" of the benefits of an agreement flows to consumers. The third prong of the proportionality test might be interpreted in the light of this requirement.

c) Finally, the agreement must **avoid eliminating competition**. Standardization agreements inherently entail compliance with certain product (or process) characteristics, and the standardization organisation might try to impose that the members comply with the created standards in order to impose them in the market. This certainly reduces competition, and in some cases, might practically, eliminate competition from non standards-complying products, when the participating firms have a substantial market position and are in a position to impose their standard. However, in such cases, it must at least be made sure that firms that do not participate in the standard setting process are given access to the standard on fair, reasonable and non-discriminatory terms as it is the case under EC law[1318].

5.4.2.3. Which approach for standards under Article 5 ACart?

Obviously, both the "elimination of competition" and "the significant restriction of competition" approaches are practicable. As mentioned above, there might be particular cases where the "elimination of competition" approach is the way to follow, as the restriction to competition are particularly important. However, it is argued that an approach based on the "elimination of competition" requirement does not seem appropriate in most, milder standardization cases[1319]:

First and foremost, standardization agreements have both positive and negative effects on competition, except in extreme cases. The weighing of pro- and anticompetitive effects rather mandates the use of the balanced approach of the "significant restriction of competition" standard (including the question whether the restraint might be justified on economic efficiency grounds), since the "elimination of competition" approach is less flexible and does not allow to take into account economic efficiency grounds.

Second, most standardization agreements are unlikely to fully eliminate competition in practice, even when they relate to the competitive parameters set out in Article 5 III ACart. Indeed, absent an anticompetitive enforcement mechanism and provided that such agreements do not amount to a mere boycott of competitors, substantial competition might remain, even after the adoption of the standard. Thus, the high "elimination of competition" standard might be unfit to address anticompetitive effects of standards. It should also be stressed that the Supreme Federal Court has clearly stated that the presumption of Article 5 III and IV ACart might be rebutted[1320]. As the Federal Supreme Court summarily mentioned in the *Sammelrevers* case, it is necessary to prove that in spite of agreement at stake, there is still room for enough price competition[1321]. The level of price competition necessary for the

[1318] See, Chapter 4, Subsection 4.4.5. Fair access to necessary information and FRAND Terms for use of IPRs.
[1319] This discussion might be compared *mutatis mutandis* to the US discussion between the *per se* and rule of reason approach, see Chapter 3.
[1320] See the *Buchpreisbindung* case, BGE 129 II 18.
[1321] As the Federal Supreme Court stated (p. 35, c. 8.2.1):

rebuttal of the presumption of Article 5 III ACart has not been clarified. It seems, however, that, as standardization agreements do not generally tinker with central competitive parameters such a proof might be brought.

A "significant restriction of competition" test is, however, not without inconvenience. Indeed, agreements which fall under Article 5 III and 5 IV can be directly sanctioned under Article 49a ACart, whereas, conversely, agreements which do not fall under these provisions might not be directly fined[1322]. This would mean that most anticompetitive standardization agreements would not be subject to fines. This is not incompatible with the spirit with which Article 49a Acart was adopted. Indeed, during the parliamentary debate, many voices requested that direct fines should only be imposed against particularly clear-cut anticompetitive behaviour[1323]. As standardization agreements often entail both pro-competitive and anticompetitive effects, it is sometimes difficult to predict whether their negative effects outweigh the positive ones. It might thus be argued that standardization agreements, which comply with some minimal openness requirements, are rarely clear-cut anticompetitive offences and should thus not be fined given the spirit with which Article 49a ACart has been adopted[1324/1325].

> *[...] erforderlich sei der Nachweis, dass trotz der fraglichen Abrede der Preiswettbewerb in hinreichendem Masse spiele.*

[1322] The commentators are divided on the question whether agreements, which contain clauses falling under Article 5 III or 5 IV ACart and which are not considered as eliminating competition but merely as significantly restricting competition without being justified on economic grounds, might lead to a fine. On the one hand, R.ZÄCH, *Schweizerisches Kartellrecht*, p. 534 and 535, § 1120, and R.DÄHLER/P.KRAUSKOPF, in: W.A.STOFFEL/R.ZÄCH (EDS.*), Die Kartellgesetzrevision 2003 – Neuerungen und Folgen*, Schulthess, 2004 defend the view that fines might be imposed according to Article 49a ACart. On the other hand, R.JACOBS/J.BÜRGI, "Auswirkungen der Kartellgesetzrevision auf Verträge", in: *SJZ*, 2004, p. 149-157, and F.HOFFET/K.NEFF, "Ausgewählte Fragen zum revidierten Kartellgesetz und zur KG-Sanktionsverordnung", in: *Anwaltspraxis* 2004, p. 129-133, take the opposite view. The author tends to favor the second view as the wording of Article 5 III/IV and 49a ACart seems to support this interpretation (Article 5 III, 5 IV to which Article 49a refers speak of elimination of competition and does not refer to the "significant restriction of competition" wording) and the Commentary (p. 1929, cited hereunder) would become redundant. It would also appear that in order to impose a criminal fine, a clear legal base is necessary ("*Nulla poena sine lege*").
Clearly, this result – the fact that minor violations of competition rules cannot be fined - is not satisfactory from an enforcement perspective. Moreover it is not in line with the practice of the EC, according to which fines can be imposed on any competition law violation. This legal situation seems, however, an express policy decision of the Swiss legislator and should be, in our opinion, remedied at the legislative level and not by judge-made (or, in this case "enforcer-made") law.

[1323] 2002 Commentary, p. 1929, § 2.1.8:

> *Contrairement à la réglementation de l'UE [sur les sanctions], celle proposée en Suisse ne concerne pas toutes les restrictions illicites à la concurrence, notamment pas les accords verticaux, mais uniquement les cas les plus graves. Une entreprise peut clairement identifier la portée de telles restrictions à la concurrence avant d'y prendre part.*
>
> *En effet, les notions d'accords portant sur les prix, les quantités et la répartition géographique sont suffisamment explicites et n'appellent pas de clarification juridique. La jurisprudence a par ailleurs concrétisé ces notions au travers de plusieurs decisions.*

[1324] If the opinion of Zäch and Dähler/Krauskopf is followed, standardisation agreements which siginificantly restrict competition and are not justified on economic grounds but which do not eliminate competition might be fined under Article 49a ACart.

[1325] For a favorable treatment of standard setting issues, see the Standards Development Organization Advancement Act of 2004 (Chapter 3), which imposes a rule of reason approach in standardisation cases and shields SSO from treble damages.

5.4.3. The Swiss Notice regarding the Certification and Sponsoring of Sporting Goods

In 1997, the Commission has published a notice regarding the certification and sponsoring of sporting goods ("Sporting Goods Notice")[1326]. The Commission published the Sporting Goods Notice in order to prevent abuses in this area as certification of products was often linked with sponsorship agreements[1327]. The Sporting Goods Notice defines the general features that are generally considered as not anticompetitive, and can therefore be justified on efficiency grounds according to Article 5 II ACart[1328]. The Sporting Goods Notice is, however, not binding and the Commission reserves its right to rule on a case by case basis[1329]. Moreover, the fact that a specific feature is not dealt with under the Sporting Goods Notice, does not mean that such a feature is automatically void[1330].

"Homologation" is defined in a manner which is very similar to the WTO certification concept[1331]:

> *Par 'homologation', on entend l'autorisation d'utiliser, lors de manifestations sportives officielles, un article de sport qui a passé avec succès un contrôle de qualité conduit selon des critères préétablis. L'homologation contribue à la régularité des compétitions et peut également servir des aspects de sécurité. Elle donne aux consommateurs une garantie de qualité.*[1332]

The advantage for producers of sporting goods is to associate their products with a popular event and to brand their products as quality products. The risks of capture of such process by an undertaking which intends to have its products favoured by the sporting association is particularly obvious, as the homologated producers often conclude sponsoring contracts with the organisers of a sporting event. These sponsoring contracts are central for the organisers, as they usually cover up a substantial part of the costs. It can therefore not be excluded that some might be tempted to grant certification on more favourable terms to sporting goods producers who conclude sponsoring contracts. This is the reason why the Sporting Goods Notice stresses that, in order not to be considered anticompetitive, the certification process must be independent from any sponsoring agreement and must not be subject to requirements which have no relationship with the quality of the product[1333].

According to the Sporting Goods Notice, certification agreements are usually not anticompetitive:

[1326] For a general presentation of the interaction between Swiss competition rules and sport, see M.DIETRICH, "Sportregeln und Kartellrecht", in: causa sport 3/4/2004, pp. 249 – 261 and F.HOFFET, "Sport, competition law and arbitration from a Swiss perspective", in: *Arbitration of Sports-Related Disputes*, ASA Special Series No. 11, November 1998, pp. 33 – 43.
[1327] RPW 1998/1, p. 161, § B1.
[1328] RPW 1998/1, p. 161, § B1.
[1329] RPW 1998/1, p. 161, § B3.
[1330] RPW 1998/1, p. 161, § B4.
[1331] Certifcation issues and the TBT definition of this term is discussed in Chapter 1.
[1332] RPW 1998/1, p. 155, § B2.
[1333] RPW 1998/1, p. 151, § C4. Obviously, the certification process should not entail any violation of the ACart, which would alone be considered a violation. RPW 1998/1, p. 151, § C5.

si l'homologation est ouverte à tous les fournisseurs d'articles de sport aux mêmes conditions;

si la procédure d'homologation de chaque article de sport pour lequel une telle procédure est prévue est possible en tout temps. Le regroupement de plusieurs procédures en une seule est exceptionnellement possible si cette manière de procéder est moins coûteuse ou s'impose d'un point de vue organisationnel;

si les procédures d'homologation sont menées à intervalles réguliers, afin que les produits non encore homologués puissent être offerts comme tels sur le marché avant la saison sportive;

si l'homologation est liée à l'octroi d'un label (ou 'claim');

si les critères d'homologation sont fixés de manière objective en fonction des exigences qualitatives et techniques liées à l'usage de l'article de sport concerné;

pour autant qu'ils reconnaissent une homologation étrangère ou internationale si celle-ci respecte les règles établies par la présente communication;

pour autant que les personnes établissant les critères d'homologation, conduisant la procédure et décidant de l'homologation d'un produit soient neutres, de préférence des tiers, et pour autant que, hormis leur droit d'être entendu, les fournisseurs d'articles de sport ne soient pas impliqués dans ces différentes procédures;

pour autant que, dans le cas où la procédure d'homologation est déléguée à des tiers, le choix de ceux-ci s'effectue selon des critères dont l'objectivité est démontrable;

pour autant que les coûts effectifs de l'homologation soient reportés sur les fournisseurs concernés et que le calcul des coûts soit transparent.

On the other hand they are considered illegal :

s'ils octroient l'accès aux manifestations sportives officielles uniquement aux fournisseurs d'articles de sport de renommée internationale ou bénéficiant d'un réseau de distribution national.

All these conditions purport to ensure that the certification process be neutral (both formally and *de facto*) and that access to the process be guaranteed. The objective is to avoid capture by sporting goods producer and, thus, to avoid that certain producers are discriminated against.

The approach is, however, very formalistic ("straight-jacket" approach) as it does not involve any analysis of the market conditions. In particular, it might well be the case that the event in

question does not have a dominant position in a relevant market (sports events) and that the certification does not grant sufficient market to the sporting goods producer to allow it to have anticompetitive effects. The Sporting Goods Notice takes these facts for granted, or at least does not specify how such criteria should be taken into account. It is obvious that if, for example, the FIFA requests that footballs must be produced by only one specific producer for any official football game, this might have a substantial impact on the market for footballs. If the Neuchâtel Football Association decides that the cup matches of the association are to be played with Nike footballs but all other (championship) games might be played with any kind of football, this is unlikely to have a substantial impact on the market for footballs, even in Neuchâtel, as the cup matches might have a reduced impact on Neuchâtel consumers. The analysis of market effects remains therefore necessary. Another conclusion would bring with it a *per se* rule which seems particularly unwarranted in this area.

The Sporting Goods Notice concerns a very specific market. The question might, however, be raised whether its principles might be extended to other areas, where certification also occurs[1334]. Although the risks of capture are especially important in the field of sports certification due to the link with sponsoring agreements, it cannot be excluded that other certification bodies are captured as well. The emphasis put by the Sporting Goods Notice on non-discrimination seems to be replicable in other areas. Only the case law of competition authorities will tell whether this will be the case.

5.4.4. Under Article 7 ACart

In relation with standard-setting and SSO, Zäch mentions that[1335],:

> *Über eine ‚essential facility' verfügen kann auch, wer die für die Erbringung gewisser Dienstleistungen oder gewisser für die Berufsausübung erforderliche Qualifikationen erteilt. Beispielweise zu erwähnen sind die Eskamed AG, welche Anerkennungskriterien für Therapeuten/innen der Komplementärmedizin festlegt und bewerbende Therapeuten/innen registriert, die Swiss Football League oder die ISO (International Organization for Standardization), welche für die Unternehmenspraxis wichtige Zertifizierungen vornimmt. Die Verweigerung des Zugangs zu einer ‚essential facility', etwa zu einem Stromleitungsnetz ist – auch wenn solche Fälle in der Literatur gesondert behandelt werden – grundsätzlich ein Fall der Verweigerung von Geschäftsbeziehungen im Sinne von Art. 7 Abs. 2 litt. a [ACart] und kann somit missbräuchlich sein.*

Therefore, a dominant undertaking or group of collectively dominant standard-setting undertakings might be caught under the essential facility theory.

As we have seen, the scope of the essential facility doctrine has been defined broadly, at least by the lower instances[1336]. Such a broad understanding of the essential facility doctrine is not

[1334] Note that the two cases presented hereunder in the next subsection (*Vertrieb und Wartung von Frankiermaschinen* and *Eskamed*) cases are both posterior to the Sporting Goods Notice. Nevertheless, the Commission does not refer to the Sporting Goods Notice. It must, however, be stressed that both are abuse of dominance cases.

[1335] R.ZÄCH, *Schweizerisches Kartellrecht*, p. 322-323, § 667.

[1336] It is, however, our opinion that the Federal Supreme Court's judgement in *EEF* needs to be taken seriously, which means that the "indispensability" and "exclusion of competition" conditions have to be complied with.

without dangers. Indeed, investments in essential facilities might be at risk. In the context of standardization, the *ex ante* incentives to bear the costs of the standardization process might be much lower. Of course, this depends largely from what are to be considered reasonable terms. In the absence of case law in this respect, it is difficult to determine whether such incentives remain high enough[1337].

5.4.5. Certification

In its *Vertrieb und Wartung von Frankiermaschinen*[1338] decision, the Commission had to decide whether the former postal services state monopoly had acted anticompetitively when it established the standards for its stamping machines. The Commission stated[1339]:

> *Die Rahmenverträge definieren die technischen Voraussetzungen für die Homologation der Geräte und verpflichten die Hersteller zur Gewährleistung einer sicheren und raschen Wartung. Die Homologation erfolgt im Anschluss an ein entsprechendes Gesuch der Hersteller. Dabei ist unerheblich, ob es sich um ein eingesessenes Unternehmen oder um einen Newcomer handelt. Gemäss Aussage der Post könne 'selbstverständlich [...] jeder Hersteller eine Frankiermaschine zur Homologation anmelden' (Stellungnahme der Post vom 13. Juli 1998, II.12.). Dennoch sei die Anzahl Gesuche in den letzten Jahren angesichts eines gesättigten Marktes rückläufig. Immerhin wurde Ende 1994 ein Modell eines neuen Anbieters (Telefrank) homologiert; der Verkauf freilich ist noch nicht angelaufen.*
>
> *Die Post hat somit zwar massgeblichen Einfluss auf die Struktur des Angebots, diskriminiert mit ihrer Praxis indessen niemanden. Wer mit seinen Geräten* ***objektiv klar definierte Kriterien*** *erfüllt, kann diese anbieten. Auch neue Geräte eingesessener Unternehmen müssen von der Post nach identischen Kriterien zugelassen werden. Eine missbräuchliche Verhaltensweise i.S. von Art. 7 KG ist der Post in diesem Zusammenhang somit nicht zur Last zu legen.* [Emphasis added]

The Commission does not define what "*objektiv klar definierte Kriterien*" are, but it admits that as long as access to the certification process is warranted and that such objective criteria exist, there is no discrimination of business partners.

In the *Eskamed* case[1340], various insurers joined together to create an undertaking (Eskamed AG) entrusted with the registration and certification of alternative medicine procedures and of health personal active in alternative medicine ("therapist"). The participating insurers often agreed to reimburse an alternative medicine service only if the therapist was registered by a certification body, among which was Eskamed. However, the insurers were free to accept to reimburse a service even if the therapist was registered by Eskamed. The Commission

[1337] For a quick discussion of FRAND terms and additionally, on essential facilities in the context of IPR (another area where Swiss case law is missing), see Chapter 4. See, as well, for a discussion in the context of Article 13 of the Price Supervision Act, *Swisscom Directories AG betreffend Herstellung, Verwaltung und Herausgabe von regulierten Verzeichnisdaten gemäss Artikel 29 der Verordnung über Fernmeldedienste vom 31. Oktober 2001 (FDV; SR 784.101.1)*, RPW 2005/1, p. 54 and ff.
[1338] RPW 1998/4, Weko.
[1339] At § 14-15.
[1340] *Erfahrungsmedizinisches Register (EMR): Eskamed AG*, RPW 2004/2, p. 465, Weko.

established that only 35% of Eskamed approved procedures were reimbursed by participating insurers. The registration procedures of Eskamed were criticised by many therapists which were not granted registration and the Commission decided in 2002 to open an investigation against Eskamed.

According to the Commission, Eskamed's enjoyed a dominant position in the market for certification of alternative medicine procedures and therapists, as its two other competitors[1341] (NVS and ASCA) were not in a position to have a sufficient influence on Eskamed's policies[1342].

When it examines whether Eskamed's behaviour was abusive, the Commission did not seem to see any harm in the fact that Eskamed did not recognise its competitors' certification[1343]:

> *Die Eskamed AG hat es vermieden, mit anderen Unternehmen (wie etwa der NVS oder der ASCA) zusammenzuarbeiten und hat deren Zertifikate auch nicht anerkannt, da diese nicht den gleichen Qualitätskriterien entsprechen. Es obliegt jedoch nicht der Wettbewerbsbehörde zu entscheiden, ob die Zertifizierung/Registrierung durch das EMR derjenigen der NVS oder der ASCA qualitativ entspricht. Weiter bleibt auch festzuhalten, dass die Eskamed AG selbst in ihrer marktbeherrschenden Stellung nicht gehalten ist, mit ihren Konkurrenten zusammenzuarbeiten.*[1344]

The Commission sees therefore no obligation for a certification body to recognise the certification made by a competitor.

[1341] The entry of potential competitors was deemed unlikely, RPW 2004/2, p. 465, § 61.

[1342] Eskamed had more than 10'000 therapist registered, wheras NVS and ASCA had only approx. 3'200 and 2'600 respectively. Moreover, all Eskamed therapists were active in the additional insurance market (the only one in which insurers reimbursed alternative medicine services) whereas NVS and ASCA members include members which were not active in this market (i.e. their services were paid solely by patients). This further reinforced Eskamed's position. Eskamed also had an agreement with 38 insurers (regrouping approx. 66% of the insured persons) whereas NVS and ASCA only had such an arrangement with 10 (approx. 41% of the insured persons) and 7 (approx. 18% of the insured persons) insurers respectively. Eskamed also registered more therapeutical methods (143) than its competitors (121 and 91).
Note that the Commission is not gone in much depth in order to analyse these numbers. It merely made a flat statement (§ 57):

> *Die oben genannten Erläuterungen zeigen, dass sich die Eskamed AG betreffend der Registrierung von Therapeuten/innen unabhängig von der Konkurrenz auf dem Markt verhalten kann. Zudem machte die Eskamed AG die Therapeuten/innen sogar selbst darauf aufmerksam, dass sie eine "Quasi-Monopolstellung" innehabe.*

It should also be noted that the Commission did not produce any evidence proving that registration with Eskamed was made compulsory by insurers or that registration with NVS or ASCA would be insufficient (§ 67-71).

[1343] At § 69.

[1344] This might be compared with § 11 of the Sporting Goods Notice which provided that certification agreements were not anticompetitive:

> *pour autant qu'ils reconnaissent une homologation étrangère ou internationale si celle-ci respecte les règles établies par la présente communication.*

Under the Notice, a certification body might have to recognise the certification established by another body. Note, however, that in the Eskamed case, the other bodies were competitors and that these competitors did not establish "international certifications".

On the other hand, the Commission stressed that certification bodies in a dominant position were not allowed to discriminate between customers and were not allowed to impose unfair conditions to their customers. *In casu,* Eskamed refused access to its registration process to physiotherapists in order to comply with Swiss health law provisions. The Commission explained that the health insurance act did not impede physiotherapists to practice alternative medicine and that therefore, Eskamed's refusal to accept physiotherapists in its registry was illegal (Article 7 II litt. b ACart).

In addition, Eskamed limited the number of methods for which a therapist could be registered to three. The Commission saw in this an unlawful limitation of the therapists' freedom and thus condemned it as an imposition of unfair conditions to business partners (Article 7 II litt. c ACart)[1345].

5.5. Remedies

5.5.1. Civil remedies

Article 12 ACart provides that a plaintiff might request (a) the removal or cessation of the obstacle to competition[1346], (b) damages and reparations (in accordance with the Swiss Code of Obligations) (c) the remittance of illicitly earned profits[1347].

Interim relief might also be granted. Article 17 ACart states that, in order to protect justified claims arising from a restraint of competition, the courts may order provisional remedies at a party's request, by analogical application of the remedies provided by the Swiss civil code in protection of individual personality rights (Articles 28c to 28f and ff of the Swiss civil code).

5.5.2. Illegality

Agreements which violate Article 5 ACart are void. The majority of commentators takes the view that in case of unlawful agreements between undertakings (Article 5 ACart) the illegality is immediate and, thus, the nullity of the agreement produces *ex tunc* effects[1348].

[1345] Note that the Commission has recently opened an investigation concerning a possible abuse of dominant position by Documed, an undertaking with a substantial market position in the field of information related to public health sector, FF 2005 4135.

[1346] If the injunction is granted, the judge might order that (a) contracts are null in whole or in part and/or (b) the person at the origin of the obstacle to competition must conclude contracts on market terms with the plaintiff (Article 13 ACart).

[1347] For a detailed description of such remedies, see CH.G.LANG, *Die kartellzivilrechtlichen Ansprüche und ihre Durchsetzung nach dem Schweizerischen Kartellrecht*, Berne, 2000 and J.-M.REYMOND, "remarques liminaires aux Articles 12-17 LCart" and commentaries to each single Article, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003.

[1348] For a summary, see J.-M.REYMOND, "remarques liminaires aux articles 12 –17 LCart", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 580. and ff, and R.ZÄCH, *Schweizerisches Kartellrecht*, p. 115 and ff, § 248 and ff. In its decision published under BGE 129 III 209, the Federal Supreme Court has established that the question whether the nullity of a contract produces its effects *ex tunc* (rather than *ex nunc*) must be addressed taking into account the objective of the law which is violated. The Federal Supreme Court has, however, not yet stated its understanding of such a holding in the context of the ACart.

According to Reymond and Zäch[1349], contracts concluded with third parties by a party to an illegal agreement (for instance, a price-fixing cartel) and a party, which is not party to an illegal agreement on the other hand ("*Folgeverträge*"), are generally not illegal, unless they are themselves to be considered as illegal agreements under Article 5 ACart. In the *Reine Gase und Mischgase* decision[1350], the Commission was confronted with gas supply agreements with a term of five and ten years. A supplier, who was a member of a cartel discovered by the Commission, concluded an agreement with a customer. The Commission refused to consider the supply agreements as illegal, but, as such agreements perpetuated an illegal agreement, the Commission ordered that new contracts to be concluded on market terms[1351].

In relation with agreements concluded by undertakings which enjoy a dominant position both commentators foresee a pragmatic solution. In some cases, nullity might be the appropriate consequence (for example, in cases where the dominant undertaking has imposed an exclusivity agreement to a distributor). In other cases, nullity might be too far-reaching, as the non-dominant contractor might have interests in the contract that need be taken into account. It would then be sufficient and proportionate to order that the contracts are to be adapted to market terms[1352].

5.5.3. "Administrative sanctions" and criminal sanctions

The ACart makes a distinction between "administrative sanctions" (Articles 49a - 53 ACart) and "criminal sanctions" (Articles 54 – 57 ACart). In practice, even administrative sanctions (Article 49a ACart) are likely to be considered criminal sanctions within the meaning of the European Court of Human Rights[1353]. Whereas "administrative sanctions" are more directed at undertakings, "criminal sanctions" are directed at individuals.

The most important administrative sanctions are provided for by the newly introduced Article 49a I ACart[1354] which reads:

> *An undertaking that participates in an unlawful agreement in terms of Article 5 paragraphs 3 & 4 or that behaves unlawfully in terms of Article 7 will be required to pay a sanction of an amount equal to up to 10 per cent of its turnover in Switzerland in the previous three business years. […]*[1355]

[1349] Both cited above.
[1350] RPW 1999/1, p. 72 and ff. and RPW 1999/4.
[1351] See as well, the *Sammelrevers für Musiknoten* decision, RPW 1997/3.
[1352] See, J.BORER, *Kartellgesetz*, p. 258, § 8.
[1353] Y.HANGARTNER, „Aspekte des Verwaltungsverfahrenrechts nach dem revidierten Kartellgesetz von 2003", in : W.A.STOFFEL/R.ZÄCH (EDS.*), Die Kartellgesetzrevision 2003 – Neuerungen und Folgen*, Schulthess, p. 269 and ff, and A.WASER, *Grundrechte der Beteiligten im europäischen und schweizerischen Wettbewerbsverfahren*, Schulthess, 2002, p. 81 and 115ff.
[1354] Other sanctions include fines for contravention of amicable settlements and administrative decisions (Article 50 ACart), for non-compliance with rules related to a concentration of enterprises (Article 51 ACart) and for failure to provide information or produce documents (Article 52 ACart).
[1355] It is unclear whether agreements which do not eliminate competition but which significantly restrict competition and are not justified on grounds of economic efficiency can be subject to sanctions under Article 49a ACart. Although the wording of Article 49a seems to clearly limit the possibility of imposing fines only to cases encompassed by Articles 5 III and 5 IV (which are presumptions of the elimination of competition), such a result would be contrary to EC law. Several members of the Commission and the Secretariat have expressed the view

Article 49a ACart has been introduced with the 2003 revision. Previously, competition authorities were only in a position to impose fines provided that an undertaking did not comply with a binding commitment imposed on the undertaking by a competition authority and which has come into force. As of the April 1, 2005[1356], Swiss competition authorities are in a position to impose direct fines even in the absence of a preceding formal decision.

The application of the fines is described in further details in the Ordinance on Sanctions[1357]. According to the third sentence of Article 49a I ACart, the amount of the fine is dependent on the duration, the severity of the unlawful behaviour and the *a priori* profit thereby achieved by the undertakings[1358]. Article 49a II ACart provides a leniency program, whereby an undertaking which takes part in the disclosure and the removal of a restraint of competition may benefit from a full or partial waiver of fines.

According to Article 49a III litt. A ACart, undertakings have the ability of submitting an envisaged agreement in order to have it cleared by the Commission[1359]. The provision sets out that the fine that would normally be imposable under Article 49a I ACart is waived if:

> *the undertaking notifies the restriction of competition before it takes effect. If the undertaking informed of the opening of [an administrative procedure] within five months of notification and if it then continues with the restriction of competition, the charge is not waived.*

Criminal provisions (Article 54-57 ACart) foresee a fine of up to 100 000 Swiss francs for a person who intentionally violates an amicable settlement or a legally enforceable decision of the competition authorities, as well as a fine of up to 20 000 Swiss francs for anyone who intentionally fails to comply with a decision of the competition authorities concerning the obligation to provide information.

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that direct sanctions according to Article 49a ACart might be taken against parties to an agreement, which significantly restricts competition. See Subsection 5.4.2.3. hereabove, and R.ZÄCH, *Schweizerisches Kartellrecht*, p. 534 and 535, § 1120, and R.DÄHLER/P.KRAUSKOPF, in: W.A.STOFFEL/R.ZÄCH (EDS.*), Die Kartellgesetzrevision 2003 – Neuerungen und Folgen*, Schulthess, 2004.

[1356] Article 49a ACart entered into force on 1 April 2004. Undertakings were granted a one-year period during which they had the ability of notifying or terminating all existing anticompetitive practices without risking a sanction (final provision to the amendment of 20 June 2003).

[1357] Ordinance regarding the Sanctions for Unlawful Restrictions of Competition of 12 March 2004.

[1358] See as well, Ordinance on Sanctions, in particular, Article 3 to 6 and R.DÄHLER/P.KRAUSKOPF, „Die Sanktionsbemessung und die Bonusregelung", in: W.A.STOFFEL/R.ZÄCH (EDS.*), Die Kartellgesetzrevision 2003 – Neuerungen und Folgen*, Schulthess, 2004.

[1359] When the Commission receives a notified agreement, it has basically the following three alternatives: 1° It objects to the agreement and opens a preliminary investigation or an investigation (in which case, the decision following the procedding will usually be published); 2° It does not object to the notified agreement and sends a so called "lettre de non-opposition" which has the effect of avoiding that a fine might be imposed if an investigation is nevertheless opened at a later stage (Article 49a III litt. a ACart and Articles 15-19 of the Ordinance on sanctions, mentionned hereunder). The "lettre de non-opposition" is unmotivated and is not a decision in the Swiss administrative law meaning of the term (i.e. it does not modify the rights and obligations of the parties). Thus, the Commission might open a preliminary investigation or an investigation even though it has issued a "letter de non-opposition". Such letters are almost never published. 3° It does not object to the agreement within five months of their notification. In such cases, the undertakings which are parties to the agreement cannot be fined although the Commission remains free to open a preliminary investigation or an investigation.

5.6. Procedural rules and Swiss competition law authorities

5.6.1. Procedures

Swiss competition procedures are divided into civil and administrative proceedings, which each entail their own particularities. This subsection purports to briefly present their principal characteristics.

5.6.1.1. Civil proceedings

Civil proceedings are described in Articles 12 to 17 ACart.

5.6.1.1.1. Locus standi

Article 12 ACart provides that a person adversely affected in its ability to enter or compete in a market by an *unlawful* restraint of competition or, who, on account of a *lawful* restraint of competition, is more seriously impeded in his ability to compete than is warranted by the implementation of such restraint may request relief from a civil judge[1360].

The person affected might be an individual or a legal entity[1361], must take part in competition[1362/1363/1364]and must have been affected in her competitive possibilities[1365].

The defendant is the person (an individual or a legal entity[1366]), who restrains competition by impeding the plaintiff from entering into or competing in a market. Such a restriction might take the form of an unlawful agreement (Article 5 ACart) or an abuse of a dominant position

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[1360] On the questions dealt with in this subsection, see, in particular, CH.G.LANG, *Die kartellzivilrechtlichen Ansprüche und ihre Durchsetzung nach dem Schweizerischen Kartellrecht*, Berne, 2000 and J.-M.REYMOND, "remarques liminaires aux art. 12 – 17 LCart" and commentaries to each single article, in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003.

[1361] Public bodies are generally granted *locus standi* when their claims arise out of an economic activity and are not linked with their administrative or monopoly powers.

[1362] The affected person does not need to be in competition with the violator in the market where the violator's restriction sorts its effects, *Arzneimittel* decision, RPW 1997/1 and RPW 1997/2.

[1363] Consumer protection organisations are generally not granted *locus standi* independently as they are not competing with the violator. They are, however, able to file an administrative complaint with the Commission. Although, under the 1962 ACart, the Supreme Federal Court admitted that trade association could be granted locus standi (BGE 103 II 294) and that such a right was legalized in the 1985 ACart (Article 8 II ACart), trade associations are not granted *locus standi* independently under the 1995 ACart. They are, however, granted *locus standi* when they are personally affected by the restriction to competition or have personally taken part in the anticompetitive behaviour, even when they only issued recommendations (at least when such recommendations are being followed). *Cliniques privées* decision, RPW 1997/1, p. 72. See J.-M.REYMOND, "remarques liminaires aux articles 12 –17 LCart", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 599, § 11 and § 14.

[1364] The question whether the plaintiff can be part herself in the anticompetitive practice for which it requests a remedy is controversial. See CH.G.LANG, *Die kartellzivilrechtlichen Ansprüche und ihre Durchsetzung nach dem Schweizerischen Kartellrecht*, Berne, 2000.

[1365] Both actual and potential competitors are usually granted *locus standi*. The mere threat of a restriction of competition is usually considered a sufficient ground to be granted *locus standi*. *Cliniques privées* decision, RPW 1997/1, p. 72.

[1366] Public bodies might also be defendants as long as their behaviour is encompassed by the scope of the ACart.

(Article 7 ACart), in particular in case of a refusal to deal or a discrimination against the plaintiff (Article 12 II ACart).

5.6.1.1.2. Reference to administrative authorities

Article 15 ACart foresees that:

> *If the **lawfulness** of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an **opinion**.*
>
> *If a restraint of competition that is as such unlawful is presented as being necessary for the safeguard of compelling **public interests**, the matter shall be referred to the Federal Council for a **ruling**.* [Emphasis added]

Under Swiss competition law, the administrative and civil proceedings are independent[1367], civil judges being free to decide in a different manner than the Commission[1368]. However, as both proceedings apply the same substantial provisions, Article 15 ACart brings a mechanism, whereby a certain degree of coordination is favoured. Article 15 ACart aims at ensuring that administrative authorities have been granted the possibility of expressing themselves on a still undecided specific issue.

Article 15 I ACart obliges the judge to refer to the Commission, when the lawfulness of a restraint of competition is disputed. This does not mean that the civil judge has to refer the question of the lawfulness of a restriction each time that a party puts it into question, but rather when, taking into account the circumstances of the case and the relevant practice, the question of its lawfulness is unclear in the eyes of the judge[1369]. Moreover, the judge can only refer questions of law and not questions of facts to the Commission[1370].

Under Article 15 II ACart, the judge has to refer a case to the Federal Council, when an anticompetitive practice is "necessary for the safeguard of compelling public interests"[1371]. As examples of such interests, the 1985 ACart cited distributive, structural, regional, cultural and employment effects (Article 29 1985 ACart).

[1367] *Handelgericht des Kantons Aargau: Allgemeines Bestattungsinstitut*, RPW 2003/2, and J.BORER, *Kartellgesetz*, p. 283, § 11.

[1368] On the contrary, rulings of the Federal Council (Article 15 II ACart) are binding.

[1369] Failure by the judge to make the reference can be appealed with the definitive judgement. The obligation to refer the question of the lawfulness does not encompass interim relief proceedings (Article 17 ACart).

[1370] *Handelgericht des Kantons Aargau: Allgemeines Bestattungsinstitut*, RPW 2003/2 and "Grundsätze zu Gutachten nach Art. 15 Abs. 1 Kartellgesetz", RPW 1997, p. 593, and RPW 1998, p. 621.

[1371] The text of Article 15 II ACart speaks of "unlawful" restraints of competition. This does not mean that the opinion of the Commission on the lawfulness of the restraint (15 I ACart) must have previously been requested by the judge. See, J.-M.REYMOND, op. cit., ad Article 15 II, p. 681, § 117.

5.6.1.2. Administrative proceedings

5.6.1.2.1. Structure of the ACart's chapter on administrative proceedings

Chapter 4 of the ACart (Article 18 to 53a) is dedicated to administrative proceedings. The first section of the chapter is exclusively dedicated to the Commission and its Secretariat[1372]. Section 5 describes the duties of the Commission. Sections 2 and 3 deal with the two types of investigations introduced by the Commission, namely the investigations concerning restraints of competition and those concerning concentrations of undertakings[1373]. Section 4 deals with procedural aspects of the investigations and Sections 6 and 7 provide that administrative and criminal sanctions might be imposed against competition law violators, including the imposition of fees.

The competition authorities and their duties will be presented in the next subsection of this study. This subsection purports to present briefly the procedures introduced by the Commission and their principal characteristics.

5.6.1.2.2. Preliminary investigations

Proceedings of the Commission usually begin with a preliminary investigation by the Secretariat, which "may conduct preliminary investigations on its own initiative, at the request of undertakings concerned or on information received from third parties"[1374] (Article 26 ACart). The Commission and the Secretariat may order searches and seize exhibits, as long as a member of the presiding body of the Commission has given his consent (Article 42 ACart)[1375]. Such proceedings are informal, but parties are usually granted the right to bring arguments[1376]. At the end of a preliminary investigation, the Commission might decide to start a formal investigation.

5.6.1.2.3. Investigations

Concerning the opening of formal investigations, Article 27 ACart pertinently reads:

[1372] The title of this section refers to the Commission and the Secretariat as the "competition authorities". However, in this study, the terms "competition authorities" have been used as including all authorities which usually take part in competition proceedings, i.e. the Commission, the Secretariat, the Appeal commission for competition matters, the Federal Supreme Court, the Civil courts and the Federal Council.

[1373] The procedure of investigations concerning concentrations of undertakings will not be presented here as it is hardly relevant in the context of standardisation.

[1374] Note that third parties have no right to the opening of a preliminary investigation.

[1375] For a presentation of the Commission's powers during dawn raids, see the Notice on Dawn Raids. F.HOFFET/D.SECKLER, „Vom Anwaltsgeheimnis zum 'Legal Privilege' - Die Revision des Kartellgesetzes erfordert eine neue Sicht auf den Schutz der Anwaltskorrespondenz", in: *Schweizerische Juristen-Zeitung*, 101(2005) 14, p. 333 – 341, and A.RAEMY/P.SOMMER, "Rechtliche Fragen bei Hausdurchsuchungen im Rahmen des Schweizer Kartellrechts", in: *Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht sic!*, 10/2004, p. 758.

[1376] The question of the applicability of the procedural guarantees granted by the Federal Act on administrative procedure of 20 December 1968 (VwVG/PA) in preliminary investigations has been left open by the Federal Supreme Court, *Corner Banca / Telekurs Multipay AG* decision, RPW 2004/4, Bundesgericht. The Appeals Commission considers that such guarantees are not applicable, *Corner Banca / Telekurs Multipay AG* decision, RPW 2004/2, Reko. Moreover, Article 26 III ACart foresees that the preliminary investigation procedure does not imply the right to consult files.

> *If there are signs of an unlawful restraint of competition, the Secretariat shall open an investigation, with the consent of a member of the Commission's presiding body. It shall open an investigation in all events if asked to do so by the Commission or by the Department.*

The investigation is the procedure by which the Commission determines whether an unlawful restriction of competition has occurred. The opening of an investigation is published in the official publication instrument of the Confederation[1377] (Article 28 ACart), but is not subject to appeal. Article 30 II ACart provides that:

> *The participants in the investigation may furnish in writing their opinions on the Secretariat's proposal. The Commission may conduct hearings and instruct the Secretariat to take additional steps for the requirements of the investigation.*

At the end of an investigation, the Secretariat might call for an amicable settlement on how to remove the restraint. If such a settlement is accepted by the parties, the Secretariat transmits it in a written form to the Commission which decides on its approval. It must be underlined that the possibility of concluding an amicable settlement might be restricted if the behaviour at stake can be directly sanctioned within the meaning of Article 49a ACart[1378]. On proposal from the Secretariat, the Commission might also decide, if it deems the behaviour illegal, on the measures (sanctions or injunctive remedies) to be taken or, if it deems the behaviour legal, to terminate the investigation.

5.6.1.2.4. Appeals

The parties to a decision of the Commission can lodge an appeal with the Appeals Commission for Competition Matters against such a decision (Article 44 ACart). The Appeals Commission can review issues of law and of facts.

Decisions of the Appeals Commission can be again appealed with the Federal Supreme Court, which will only review issues of law[1379].

According to Article 31 ACart:

> *If the Commission has taken a decision acknowledging the unlawful nature of a restraint of competition, the interested parties may, within 30 days, submit to the Department an application for exceptional authorisation from the Federal Council on the grounds of compelling public interest.*

Such an application might also be lodged within 30 days of the entry into effect of a decision of the Appeals Commission for Competition Matters or a judgement of the Federal Supreme Court. Such an exceptional authorisation shall, however, be of limited (renewable) duration

[1377] Bundesblatt/Feuille Fédérale, abbreviated BBl or FF.

[1378] CH.TAGMANN/B.ZIRLICK, "Indirekte Auswirkungen der KG-Revision auf einzelne Rechtsinstitute", in Jusletter 17. Oktober 2005, argue that an amicable settlement is excluded for past behaviour, but might be reached concerning future behaviour.

[1379] See, for example, *Gesuch des Schweizer Verbands der Musikalienhändler und Verleger (SVMHV)*, RPW 1998/3, p. 478, and *Les Entreprises Electriques Fribourgeoises/La Fédération des Coopératives Migros/WATT Suisse SA*, RPW 2003/4, p. 966.

and may be subject to terms and conditions (Article 31 III ACart). What constitutes a "compelling public interest" has not been defined precisely, but is probably to be interpreted in relation with Article 8 ACart, which is the parallel provision for exceptional authorisation in a merger procedure[1380].

5.6.2. Swiss competition law authorities

Beyond civil courts[1381], at least four authorities are entrusted with competition law issues: 1° The Competition Commission (including its Secretariat), 2° the Appeals Commission for Competition Matters, 3° the Federal Supreme Court and 4°) the Federal Council[1382].

5.6.2.1. The Competition Commission

The Commission comprises between eleven and fifteen members, the majority of who shall be so called "independent experts"[1383] (Article 18 ACart)[1384]. The members of the Commission are designated by the Federal Council. No member is employed full-time by the Commission and a minority represent the interests of trade unions, trade associations or agricultural producers. The members of the Commission must disclose their conflict of interests in a register (Article 18 IIbis ACart, as modified by the 2003 revision). In presence of a conflict of interests, they must disqualify themselves, although according to Article 22 II ACart, such a conflict of interest does not exist, as a general rule, by the mere fact of representing an umbrella organisation.

Organically, the Commission is part of the Federal Department of Economic Affairs, although the department does not have the power to give instructions to the Commission. The Commission is headed by a presiding body composed of a president (at present, Prof. W.A. Stoffel, a professor of law at the University of Freiburg) and two Vice-Presidents (Prof. Y. Flückiger, a professor of economics at the University of Geneva and Prof. R. Zäch, a professor of law at the University of Zürich). The Commission is divided into three chambers, each headed by a member of the presiding body, and each empowered to take decisions[1385].

[1380] See, generally, I.CHABLOZ, *L'autorisation exceptionnelle en droit de la concurrence*, Etude de droit suisse et comparé, Univeristé de Fribourg, 2002, B.CARRON, "ad Article 31", in: P.TERCIER/CH. BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 805, and M.BIANCHI DELLA PORTA, ad Article 8, *eodem loco*, p. 467.

[1381] Article 14 ACart provides that each canton is required to designate a single cantonal authority in competition matters. Most cantons have designated their commercial or appeals courts.

[1382] The presentation of the last three institutions does not need to be detailed. The Federal Supreme Court is the highest judicial instance in Switzerland. The Court is divided in chambers which are specialized in broad areas of the law. The Federal Council is the executive body of the Swiss Confederation. The Federal Council is composed of seven members, which are each responsible for an area of government. The Appeals Commission for Competition matters is an independent administrative commission which is specialised in competition issues, see, for a more in-depth presentation, W.A.STOFFEL, "Die Beschwerde and die Rekurskommission für Wettbewerbsfragen, in: Schweizerische Zeitschrift für Wirtschftsrecht (SZW) ", Special issue, 1996. The Appeals Commission for Competition Matters will forseeably be replaced by the new Federal Administrative Court as of 1 January 2007.

[1383] Usually, law or economics scholars.

[1384] For a more detailed presentation, see A.BIZZOZERO, "ad Article 18", in: P.TERCIER/CH.BOVET (EDS.), *Droit de la concurrence*, Commentaire Romand, Helbing & Lichtenhahn, 2003, p. 731 and ff.

[1385] For the internal functioning of the Commission, see the Internal Regulation of the Competition Commission (SR 251.1). Note that fundamental legal question have to be referred to the Commission as a whole (Article 6 of the Regulation).

The chambers are each attributed a specific area of responsibility: product markets, services and infrastructure.

The Commission takes all decisions in competition matters that are not expressly reserved for another authority. Additionally, it submits recommendations (Article 45 ACart) and opinions to the political authorities (Article 46 ACart) and gives expert advice (Article 47 ACart). Moreover, according to Article 8 of the Federal Act on the Internal Market of 6 October 1995, the Commission is responsible for the supervision of the act and can address recommendations to the Confederation, the Cantons and the Communes in relation to existing or envisaged legislation which might contain restrictions to trade or competition. Furthermore, with the entry into force of the amendments to the Federal Act on the Internal Market, the Commission will receive the power to lodge an appeal against administrative decisions, which might violate the act (Article 9 IIbis of the project).

5.6.2.2. The Secretariat

The Secretariat of the Commission is headed by a director nominated by the Federal Council. The rest of its staff is appointed by the Commission, with the exception of the administrative personnel (up to salary class 17), who are appointed by the Director (Article 4 II litt. f and 13 I litt. b of the Internal Regulation of the Competition Commission). The Secretariat is led by an Executive Management Board composed of the director, a deputy director and two vice-directors and the head of the resources and logistics.

According to Article 23 I ACart:

> *The Secretariat shall prepare the Commission's business, conduct investigations and, with a member of the presiding body, take procedural decisions. It shall make proposals to the Commission and carry out its decisions. It shall deal directly with interested parties, third parties and the authorities.*

It is generally understood that the Secretariat is the investigative arm of the Commission. It also conducts most of the day-to-day work, as their staff is employed full-time, contrary to the members of the Commission. The Commission is empowered to give instructions to the Secretariat and decides upon the proposals submitted by the Secretariat.

Moreover, Article 23 II ACart provides that the Secretariat has to advise undertakings in competition matters. This is an especially important task now that direct sanctions can be imposed. Such an advice must be distinguished from the procedure of Article 49a III litt. a ACart[1386], as it does not grant exemption from fines.

5.7. Conclusions

It is an inescapable conclusion that Swiss competition law is much less developed in the standardization context than EC competition law, let alone US antitrust law. Swiss competition authorities have had almost no opportunity of analysing such a question.

[1386] See, Section 5.5.3. above.

Moreover, the size and the exportation-oriented nature of the Swiss economy have rendered the use of anticompetitive standards uninteresting[1387]. Indeed, Swiss industries are compelled to comply with foreign standards in order to sell their products abroad and have, as a result, little interest in developing different standards for the internal and the external market. Swiss standardisation activities are therefore limited and often take as a basis international standardization efforts. This does not, however, mean that compliance with international standards is ubiquitous and that there is no room for anticompetitive standards in Switzerland. However, it might be argued that, beyond the openness of the Swiss economy, the limited size of the Swiss market and the importance of fixed costs of a standardization process might have rendered a standardization strategy in seeking protection from international competition unattractive. Additionally, it might be the case that the relative inefficiency of antitrust enforcement might have rendered other less subtle anticompetitive instruments more attractive than anticompetitive standardization. Furthermore, it might also be argued that Swiss producers are often in a position to influence the drafting of technical regulations, which, given that they are legally mandatory, have usually an even more important anticompetitive impact on a market. In this context, it must be stressed that given that Switzerland is not a Member of the EC, it is not directly subject to the disciplining effect of the free movement of Goods or Services[1388]. The adoption of the Federal Act on the Internal Market and the Federal Act on Technical Barriers to Trade has shown that technical barriers to trade are still important even within Switzerland.

These might be some of the reasons why no official policy on the competition approach towards standards has been taken so far in Switzerland. The only provisions left are thus the general concepts of the ACart. Of course, these concepts do not apply in a self-explanatory manner to standardization issues. However, as these concepts are very similar in their wording and their application to EC concepts, it is legitimate to draw parallels with the EC approach. As we have seen, there seem to be no specificities of the ACart (and of its objectives), which positively hinder the application of the EC approach, and possibly even some elements of the US approach, in Switzerland.

[1387] This does not, however, mean that the number of standards is lower in Switzerland than in other comparable countries. According to the Perinorm database, developed by the British, French and German national standardisation agencies, containing approximately 650'000 world wide national standards, Switzerland has 14'691 standards with a very high proportion of standards shared at the international level (14'012). As quoted in: 2005 WTO Report on standardization, p. 61. The total number of standards is rather in the average of OECD countries (USA: 32'886 and Australia; 8'469). The rate of internationally shared standards is, however, among the highests (with Denmark: 19'644/19'085).
Another document seemingly declaring the generally not anticompetitve nature of Swiss standards is the yearly US Trade Representative National Trade Estimate Report on Foreign Trade Barriers. In 2005, the only standards related worries seemed to concern agricultural products (ntably for GMO-containg products).

[1388] It is reminded that the bilateral agreement with the EC and the WTO agreements are not directly applicable in all respects and their enforceability is therefore limited. Note that the unilateral application of the "Cassis de Dijon" prinicple by Switzerland has been recently discussed.

As a subset of governmental regulation, technical standards came under the purview of the GATT. Indeed, technical regulations are a subset of GATT Article III. However, the provisions of the GATT were not considered specific enough to target efficiently technical regulations. With the substantial reduction of tariff barriers brought about by the successive negotiations rounds, GATT's contracting parties started focusing their attention on non-tariffs barriers, among which technical barriers were seen as one of the most important categories. The Tokyo Round brought an Agreement on Technical Barriers to Trade, compliance with which was not a pre-requisite for GATT membership. Building on the success of the Tokyo Round agreement[1389], the Agreement establishing the WTO incorporated the Agreement on Technical Barriers to Trade ("TBT") into the WTO contract and rendered its adherence compulsory for all Members[1390].

If disciplines on technical regulations, as a subcategory of governmental regulation, were a traditional subject for GATT contracting parties, standards, as mainly the result of private behaviour, presented a peculiar challenge. Most GATT (and WTO) disciplines regulate the behaviour of Members themselves. Provisions on standards and on the procedures followed by private SSO and certification bodies were not only the product of Members behaviour, but rather of private parties' behaviour as well. The success of the Tokyo Round Agreement, however, showed that disciplines on private behaviour were needed and that the threat posed by private behaviour to international trade was sufficiently important to warrant regulation at the international level.

The TBT is not the only WTO Agreement which, at least potentially, deals with standardization issues. As mentioned, the GATT contains provisions which might be applicable to technical regulations, although it contains only limited provisions which might be helpful to fight against trade-restrictive aspects of private standardization. Article VI § 4 and 5 of the GATS specifically provide disciplines concerning standards. The WTO Agreement on Sanitary and Phytosanitary measures ("SPS") also contains provisions on standards, although they pertain almost exclusively to technical regulations.

These provisions contain different rules on standardization and their scope does not avoid a certain overlap. In particular, it might happen that a provision falls simultaneously under the scope of the GATT, the SPS and the TBT. The TBT and the SPS are certainly the most specific agreements as their purpose is to deal with a more restricted and specific set of issues. The GATT expressly recognises the specific nature of the latter agreements, in the general interpretative note to Annex 1A[1391] :

[1389] The Tokyo Round TBT Agreement was the code with the largest acceptance (42 contracting parties, including both developing and non-market economies).

[1390] In this chapter, "Members" will refer to WTO Members, unless otherwise explicitly provided.

[1391] See as well, *Argentina – Safeguard Measures on Imports of Footwear*, (WT/DS121/AB/R, § 81):

> *Thus, the GATT 1994 is not the GATT 1947. It is "legally distinct" from the GATT 1947. The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and, as such, are both "integral parts" of the same treaty, the WTO Agreement, that are "binding on all Members". Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards*

"In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

The case law has also established that the SPS take precedence over the TBT[1392] and that the TBT takes, in turn, precedence over the GATT[1393]. This means, for example, that when a

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are all provisions of one treaty, the WTO Agreement. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that "Article XIX of GATT and the Safeguards Agreement must a fortiori be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction." Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements.

[1392] Article 1.5 TBT:

The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

[1393] See, *EC – Trade Description of Sardines ("EC – Sardines")*, (WT/DS231) Panel, not reversed by the AB, § 7.14-7.16:

Peru requests that we examine its claim under Article 2.4 of the TBT Agreement first and then examine its claims in the order of Articles 2.2 and 2.1 of the TBT Agreement only if we were to determine that the EC Regulation is not inconsistent with Article 2.4. If we were to determine that the EC Regulation is not inconsistent with the provisions of the TBT Agreement invoked by Peru, it requests that we examine its claims in respect of Article III:4 of the GATT 1994.

In addressing the issue of the order of analysis, we have taken into account earlier considerations of this question. We recall the Appellate Body's statement in EC — Bananas III which stated that the Panel "should" have applied the Licensing Agreement first because this agreement deals "specifically, and in detail" with the administration of import licensing procedures. The Appellate Body noted that if the Panel had examined the measure under the Licensing Agreement first, there would have been no need to address the alleged inconsistency with Article X:3 of the GATT 1994.1393 The Appellate Body suggests that where two agreements apply simultaneously, a Panel should normally consider the more specific agreement before the more general agreement.

Arguably, the TBT Agreement deals "specifically, and in detail" with technical regulations. If the Appellate Body's statement in EC — Bananas III is a guide, it suggests that if the EC Regulation is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994. Moreover, Peru, as the complaining party, requested that we first examine its claim under Article 2.4 of the TBT Agreement followed by Article 2.2 if we find that the EC Regulation is consistent with Article 2.4. And similarly, only if we were to find that the EC Regulation is consistent with Article 2.2 does Peru ask us to consider its claim under Article 2.1. In the event that we were to find that the EC Regulation is consistent with the TBT Agreement, Peru requests that we examine its claim under Article III:4 of the GATT 1994. We note that the European Communities did not contest Peru's request regarding this sequencing analysis.

complainant alleges that a measure falls both under the TBT and the GATT, the WTO adjudicating bodies start by examining whether the measure at stake complies with the TBT. If it does, it will not review its compatibility with the GATT[1394].

6.1. The 1994 GATT and GATS

Together with the Agreement on trade-related aspects of intellectual property rights ("TRIPS"), the GATT and the GATS compose the three pillars of the agreement establishing the WTO. Certain of the provisions which might be invoked in standard-related disputes are Article III, XI and XX GATT and Article VI §§ 4 and 5 GATS.

Article III GATT defines the national treatment obligation ("NT"), which is one of the most important disciplines of the GATT. Together with Article I (the Most Favoured Nation clause, "MFN"), it has been interpreted as building the two faceted non-discrimination principle. Whereas the MFN clause forbids discrimination between foreign products, the NT forbids to discriminate against imported products once their import duties have been assessed.

Basically, the NT obligation provides that, once tariff duties have been exacted, Members are not allowed to apply internal taxes or regulations to imported products so as to afford protection to domestic products. In particular, any Member must grant to the products of any other Member a "treatment no less favourable" than that accorded to like domestic products in relation with taxes and regulations. Thus, as a sub-category of governmental regulation, technical regulations need, as a matter of principle, to comply with the NT requirement.

Article XI GATT requires that Members do not impose prohibitions or restrictions other than duties, taxes, or other charges on the imports of any other Member. As technical regulations might have the effect of excluding products from a market, they can fall under Article XI GATT. Article XX GATT provides a certain number of exceptions to the disciplines imposed by other provisions of the GATT. WTO Members are, *inter alia*, allowed to take measures necessary to protect human, animal or plant life, health or measures relating to the conservation of exhaustible natural resources. According to the chapeau of Article XX GATT, such measures must, however, not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction of international trade.

Article VI GATS aims at ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. In particular, such measures shall be:

Note that in *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* (WT/DS135/AB7R), the AB seemed already to indicate that when a regulation contained the characteristics of a technical regulation, it should be first analysed under the TBT (§ 80):

> *We observe that, although the TBT Agreement is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.*

[1394] It remains an open question whether the TBT (and the SPS) imposes more far-reaching disciplines than the GATT anyway.

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;
(b) not more burdensome than necessary to ensure the quality of the service;
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.[1395]

6.2. SPS

The SPS deals, as its title indicates, with sanitary or phytosanitary measures and in particular, disciplines their potential trade-restrictiveness. Such measures can be defined, as any measure applied to protect animal, human or plant life or health against risks arising from the spread of pests, diseases, disease-carrying organisms, additives, contaminants and toxins[1396].

The second sentence of paragraph 1, Annex A of the SPS adds that:

> *Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including,* inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.*

This is certainly a very broad definition and its boundaries do not seem to be entirely clear. In particular, it is questionable whether such provisions are limited to public regulations or might also extend to private standards. Unlike the TBT, the SPS does not differentiate between

[1395] As this study deals with product standards rather than service standards, a detailed analysis of the GATS provisions will not be brought.
[1396] More precisely, paragraph 1 of the Annex A of the SPS defines SPS measures as:

> *Any measure applied:*
>
> *(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;*
>
> *(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;*
>
> *(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or*
>
> *(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.*

technical regulations and standards. With regards to the obligation of Members to ensure compliance with the disciplines of the SPS, Article 13 SPS pertinently provides that:

> *Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by* ***other than central government bodies****. Members shall take such* ***reasonable measures*** *as may be available to them to ensure that* ***non-governmental entities*** *within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures, which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.* [Emphasis added]

This is not an issue deprived of interest, as private SPS measures are becoming an increasing concern in the context of free trade. Indeed, the SPS Committee has even dedicated a session to this issue in 2005[1397]. However, as Mavroidis, Berman and Howse point out, enforcement of SPS disciplines in the context of private standards is not given:

> *Discussions so far have not been fruitful, in part because the SPS Agreement does not include provisions that could adequately address this issue. WTO Members are required, by virtue of Article 13 SPS, to take* reasonable *measures, in order to ensure that, bodies other than governmental will observe the SPS Agreement. It is not however, associated with any meaningful* procedural *requirement to this effect. Consequently, assuming a standard has its origins in a body, which is considered to be a non-governmental body, there is little an affected party can do. FN*
>
> *[FN: One possible source of inspiration to interpret the term* reasonable *appearing in Article 13 SPS would be Article XXIV.12 GATT, which regulates the obligations of a central governmental* vis-à-vis *its sub-central entities. Case-law in that context suggests a rather cautious, non-intrusive attitude by panels. One would imagine, that at least the same attitude should be observed when dealing with issues coming under the purview of Article 13 SPS: if a panel does not wish to light-heartedly disturb the relationship between a central government and its sub-central entities, all the more so in the context of Article 13 SPS (where the relationship envisaged is not between two governmental entities one hierarchically higher than the other, but a relationship between a government and private behaviour).]*

It seems thus clear that the SPS agreement imposes obligations on Members, which go beyond their mere central government legislative powers, but mandates as well, positive

[1397] WTO Doc. G/SPS/36, review of the operation and implementation of the SPS Agreement, as quoted by P.C.MAVROIDIS/R.HOWSE/G.BERMANN, *The WTO : Texts, Cases and Materials*, West law Publishing, 2006, Ch. 9, p. 35.

efforts to ensure that non-central government entities abide by the rules set forth in the SPS. The wording of § 1 Annex A SPS and Article 13 SPS do not seem *prima facie* to restrict the scope of the SPS only to measures mandated by law. Indeed, one might wonder whether Article 13 SPS imposes a best endeavours obligation on Members to encourage a *mutatis mutandis* application of SPS disciplines by private SSO. This view is reinforced by the fact that the wording of Article 13 SPS is very similar to Article 4.1 TBT[1398], which is widely acknowledged as imposing such an obligation. On the other hand, given the fact that the SPS does not contain specific provisions on private standards and that the terms "reasonable measures" might not impose an extensive burden on Members[1399], it would seem rather risky to base a complaint on a Member's failure to implement SPS disciplines in relation to private standards. Manifest and clearly trade-restricting violations of the SPS disciplines might, however, have more chances of success[1400].

The importance of the SPS might not be limited to sanitary and phytosanitary measures. In fact, it is not excluded that the SPS might serve as a source of inspiration for other agreements, and in particular for the TBT. The SPS contains detailed requirements, for example, on risk assessment and the role of scientific evidence. Such subject-matter has been the subject of various procedures before the WTO Dispute Settlement Body[1401]. The TBT contains similar, but less detailed and less invoked provisions on such topics. In the absence of case law, it is rather difficult to predict which role the SPS case law might play in the context of the TBT.

6.3. TBT

Nomen est omen: the TBT deals with technical barriers to trade. Among technical barriers to trade, as mentioned in Chapter 1, the TBT distinguishes between "technical regulations" and "standards"[1402].

In relation to standards, the TBT contains in particular a Code of Good Practice for the Preparation, Adoption and Application of Standards ("CGP")[1403], which defines specific rules for private standardization. It should, however, be underlined that, not unlike what happens under the SPS, the CGP does not impose obligations directly on private parties, but rather on Members to take "reasonable measures" to ensure that the provisions of the CGP are respected by private parties.

[1398] See hereunder, the subsection on the TBT, Section 6.3.

[1399] This point is dealt with more in detail in the next subsection.

[1400] Another way of imposing disciplines to sanitary or phytosanitary standards would be to argue that the Code of Good Practice of the TBT applies to them, notwithstanding Article 1.5 TBT, which provides that the provisions of the TBT Agreement "do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures". On the one hand, it might be argued that if private standards are not encompassed by SPS, the TBT's Code of Good Practice is still applicable. On the other hand, it might be argued that as the Code of Good Practice is only an Annex of the TBT, Article 1.5 does not exclude the application of the Code of Good Practice in relation with sanitary or phytosanitary standards.

[1401] See for example *Australia – Measures Affecting Importation of Salmon* (WT/DS18) and *EC – Measures concerning meat and meat products (Hormones),* WT/DS48/AB/R.

[1402] It is reminded that the main difference between these two categories is that technical regulations are mandated by law, whereas compliance with standard is not imposed by law and that *de facto* standards fall outside the purview of the TBT as they are not "approved by recognised bodies".

[1403] The CGP is to be found at Annex 3 of the TBT.

6.3.1. Code of Good Practice

6.3.1.1. Scope of the Members obligation to promote compliance with the CGP

6.3.1.1.1. Article 4.1 TBT

The TBT and the CGP provide various obligations with which Members have to comply. But, as standards might be issued by non-central government entities, Article 4.1 TBT obligates the obligations of Members to ensure that non-central government authorities comply with such provisions. The first sentence of Article 4.1 TBT requires that the Members' central government standardising bodies accept and comply with the CGP. Moreover, Members must take (Article 4.1, 2nd sentence):

> *such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice.*

6.3.1.1.2. Interpretative issues

An important issue concerns the definition of "non-governmental body" in Article 4.1 TBT. This term is defined by § 8 of Annex 1 TBT, as a:

> *Body other than a central government body or a local government body,* ***including*** *a non-governmental body which has legal power to enforce a* ***technical regulation****.* [Emphasis added]

Paragraph 8 of Annex 1 TBT seems to introduce a certain tension with the fact that the CGP aims at regulating the preparation, adoption and application of standards. If the emphasis is laid on the criteria given by the definition of paragraph 8 of the Annex 1 TBT (i.e. "legal power to enforce a technical regulation"), the CGP might not encompass private SSO when they merely set up standards without having the "legal power of enforcing a technical regulation". This could hardly be the intention of the founding fathers. Paragraph 8 should probably be understood as providing an example of what might constitute a non-governmental body[1404]. It remains nevertheless an open question whether the "legal power to enforce a technical regulation" criterion should be used as a guidance for the definition of the non-governmental body concept[1405]. Moreover, one might wonder whether the activities of an entity to which a "legal power of enforcing a technical regulation" has been delegated would not be attributable to a Member anyway, and thus fall under the TBT provisions as an activity of a central or local government. In such a case, the second and third sentence of Article 4.1 would seem to be redundant, a situation which is forbidden by the Vienna Convention on the Law of Treaties[1406].

[1404] The use of the word "including" seems to militate in favour of this view.
[1405] The terms "including a non-governmental body which has legal power to enforce a technical regulation" might also help stressing that even non-governmental bodies which have certain characteristics of governmental bodies (i.e. the legal power of enforcing technical regulations) are subject to the disciplines of the CGP.
[1406] Alternatively, one might wonder whether the term "enforcement" should be interpreted (very) extensively.

The scope of the obligations imposed on Members by Article 4.1 TBT seems to leave many more questions open. Thus, the analysis will be divided in two parts: in this subsection, the questions which seem to be relevant in this context will be outlined and in the following subsection, a tentative interpretation will be proposed.

One set of questions relates to the meaning of "reasonable measure as may be available" to ensure compliance with the CGP. Should Members legally require compliance with the CGP? Towards which SSO, Members are required to take such reasonable measures? Is this an obligation limited only to SSO "of which they or one or more bodies within their territories are members" or does it extend to standardization bodies to which public authorities are not part? In other words, do the terms "of which they or one or more bodies within their territories are members" only qualify "regional standardization bodies" or do they also define "local government and non-governmental standardizing bodies within their territories"? What is a "body" in the first place? Does it encompass a standardization agreement between private firms, even in the absence of a separate legal entity?

As, according to their definition in the Annex 1 of the TBT, standards need to be approved by "a recognised body"[1407], one might argue that the personal scope of the obligations imposed on Members by the CGP should be linked with the interpretation of this concept under Annex 1. Does recognition need to be interpreted as participation of a public body in a SSO? If this is the case, which degree of participation is necessary? Is, for example, control of the decision procedures of the SSO necessary? When is conduct attributable to a public body?

Further, Article 4.1 TBT further provides (3rd sentence):

> *In addition, Members shall not take measures, which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice.*

Is this sentence not encompassed by the obligation to take reasonable measures to ensure that standardization bodies comply with the CGP? Or, should this sentence be understood as imposing on Members the obligation of avoiding to encourage or require that standardization bodies to which Members are not parties comply with the CGP?

Finally, Article 4.1 TBT provides that (4th sentence):

> *The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.*

This sentence makes clear that the acceptance of the CGP by the standardization bodies is not a condition for the obligation of the Members. It is probably up to the national laws to qualify the domestic legal consequences of acceptance of the CGP by standardization bodies. In particular, it is a matter of interpretation whether such acceptance will render direct applicability of the CGP towards the standardization body more likely[1408].

[1407] Unfortunately, as mentioned in Chapter 1, there is no precise definition of this concept under Annex 1 either.
[1408] The question whether international treaties are directly applicable is usually left to the interpretation of the Treaty participants. However, one might wonder whether Article 4.1 TBT might be interpreted as requiring from

6.3.1.1.3. A tentative interpretation of Article 4.1 TBT

a) First Sentence

The first sentence of Article 4.1 TBT[1409] should probably be construed as meaning that **public recommendations**[1410] established at the central government level should fully comply with the CGP. The title of Article 4.1 TBT refers explicitly to the setting of standards and the first sentence of Article 4.1 TBT refers to central government bodies, thus mandating compliance with the CGP when central government bodies establish public voluntary standards .

b) Second sentence

The second sentence of Article 4.1 TBT [1411] might stand for the proposition that the central government shall use its best efforts to make sure that standardising bodies (be it local or non governmental) within its territory comply with the CGP. The precise meaning of **"reasonable measures as may be available"** is open to debate. It seems, however, to indicate that the way in which the obligation will be implemented differs from the implementation of other disciplines. It is not obvious where the difference lies.

One way of interpreting the second sentence of Article 4.1 TBT is to define the measures to be taken as the rights Members have by way of the organisational bylaws of the SSO, as for example, the participation and voting rights of public officials. This interpretation would restrict the obligation of members to the associative rights they enjoy in the SSO as opposed to their legislative or executive powers. It remains open to question whether a Member shall refuse to participate or to fund a standardization body, which does not comply with the CGP.

Another way of interpreting the "reasonable measures" wording in the non-governmental context is to is argue that it stands for the proposition that Members shall not be held responsible for the acts of private parties if they have taken sufficient care in selecting "reasonable measures as may be available" for the enforcement of the CGP. Unlike cases in which states act in their own name and thus, bear a full responsibility for their agents' conduct (as long as their conduct is attributable to the state they represent), states would only be liable

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Member States that they grant direct applicability to the CGP. Moreover, the CGP's disciplines seem, *prima facie*, to be sufficiently clear and detailed to be granted direct application. In particular, the TBT case law on similar issues might be used as reference. On the other hand, the definition of the terms "non governmental body "contained in Paragraph 8 of Annex I TBT could certainly benefit from some clarifications.

[1409] The first sentence reads as follows:

> *Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice").*

[1410] As defined in Chapter 1, public recommendations are standards established by a Member, but compliance with which is not mandated by law (a.k.a. "public voluntary standards").

[1411] It is reminded that the second sentence reads as follows:

> *They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice.*

towards other Members if they did not take the "reasonable measures" for the enforcement of the CGP. If private parties create a damage notwithstanding the reasonable measures, the Member would not be held liable for their behaviour.

It has been suggested in the context of the SPS[1412] that guidance might be drawn from the interpretation of Article **XXIV.12 GATT**[1413], which deals with the duty of a Member to ensure that local government entities comply with GATT provisions. The wording of Article 13 SPS is very similar to the one of Article 4.1 TBT. However, reference to Article XXIV.12 GATT does not seem to necessarily lead to a "weak enforcement"[1414] of the CGP, at least, for two reasons. *First*, one might wonder if an *a fortiori* application of the Article XXIV.12 GATT case law is warranted. A central government might have difficulties in imposing regulations to local governments (for example, for constitutional reasons)[1415]. On the other hand, a government is much freer to impose regulation on non-governmental entities in its field of competence. The constitutional rationale would seem to fall. Thus, when a Member

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[1412] See, here above, Section 2, the quotation of P.C.MAVROIDIS/R.HOWSE/G.BERMANN, *The WTO : Texts, Cases and Materials*, West law Publishing, 2006:

> *One possible source of inspiration to interpret the term reasonable appearing in Article 13 SPS would be Article XXIV.12 GATT, which regulates the obligations of a central governmental vis-à-vis its sub-central entities. Case-law in that context suggests a rather cautious, non-intrusive attitude by Panels. One would imagine, that at least the same attitude should be observed when dealing with issues coming under the purview of Article 13 SPS: if a Panel does not wish to light-heartedly disturb the relationship between a central government and its sub-central entities, all the more so in the context of Article 13 SPS (where the relationship envisaged is not between two governmental entities one hierarchically higher than the other, but a relationship between a government and private behaviour).*

[1413] Article XXIV.12 GATT reads:

> *Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.*

[1414] See Section 6.2. SPShereabove.

[1415] In the GATT Panel *United States – Measures affecting Alcoholic and Malt Beverages*, (DS23/R - 39S/206), the GATT Panel noted in relation with Article XXIV.12 GATT (§ 5.79):

> *The Panel noted from the drafting history of Article XXIV.12 that this provision was designed to apply only to those measures by regional or local governments or authorities which the central government cannot control because they fall outside its jurisdiction under the constitutional distribution of powers. The Panel agreed with this interpretation in view of the general principle of international treaty law that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation. As indicated in an earlier Panel report [FN: Canada – Measures Affecting the Sale of Gold Coins], not yet adopted by the CONTRACTING PARTIES, the qualification in Article XXIV.12 of the obligation to implement the provisions of the General Agreement grants a special right to federal states without giving an offsetting privilege to unitary states, and has to be construed narrowly so as to avoid undue imbalances in rights and obligations between contracting parties with unitary and federal constitutions. The above-mentioned interpretation -- according to which Article XXIV.12 applies only to measures by regional or local authorities which the central government cannot control under the constitutional distribution of powers -- meets the constitutional difficulties which central governments may have in ensuring the observance of the provisions of the General Agreement by regional and local authorities, but minimizes the risk that such difficulties lead to imbalances in the rights and obligations of contracting parties.*

has the ability and the legitimacy for taking a measure against a non-governmental entity, a deferential stance might be less warranted. After all, it is a PIL principle that states might not invoke domestic legal provisions to avoid compliance with international law.

Second, the GATT case law does not seem to be as deferential as one might think[1416]. In all the cases considered under the GATT case law, not only a violation of the duty to take reasonable measures was found, but the burden of proving that such measures had been taken was also consistently borne by the defendant. It is thus necessary to take a closer look at the 1947 GATT case law on Article XXIV.12.

In the 1992 Panel on *"Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"*[1417], with respect to certain measures which had not been reviewed by the preceding 1988 Panel, the Panel :

> *[...] concluded that the measures taken by the Government of Canada in this respect were clearly not* ***all*** *the reasonable measures as might be available to it to ensure observance by the provincial liquor boards of the provisions of the General Agreement relating to private delivery, as provided in Article XXIV.12 and that therefore the Government of Canada had not yet complied, in this respect, with the provisions of that paragraph. The Panel was therefore of the view that, in these circumstances, the procedure suggested by the 1988 Panel should be followed also in this case, namely that the Government of Canada should be given* ***a reasonable period of time*** *to take measures to bring the practices of the provincial liquor boards relating to private delivery into line with the relevant provisions of the General Agreement. The Panel considered that, pending the elimination of such discrimination, the liquor boards should in no case levy charges for the delivery of imported beer higher than the costs actually incurred by them.* [Emphasis added]

Note that, under Article 21 of the WTO Dispute Settlement Understanding ("DSU"), a reasonable period of time is also left to a violator of a WTO discipline to comply with its obligations.

The insistence on a certain period of time for the implementation of the obligation is also reflected in the interpretative note ad Article III.1 GATT, which might be used as a source of inspiration[1418]. The interpretative note defines the meaning of Article XXIV.12 GATT in the context of Article III GATT. It pertinently reads:

> *The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its*

[1416] Of course, it might be difficult to establish a benchmark for deference.
[1417] DS17/R, adopted on 18 February 1992, 39S/27, § 5.38.
[1418] Such a reference to the interpretative note to Article III:1 was accepted by the unadopted GATT *Canada – Measures Affecting the Sale of Gold Coins* Panel, L/5863, dated 17 September 1985, § 69.

> *spirit**, if such repeal would result in a serious financial hardship** for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation **gradually over a transition period**, if abrupt action would create **serious administrative and financial difficulties**.* [Emphasis added]

The distinction between a violation of the spirit of a provision and a violation of its letter might be hard to define, and it grants adjudicating bodies a certain degree of flexibility.

A further distinction between "implementation" and "applicability" of an obligation was introduced by the unadopted GATT *Canada – Measures Affecting the Sale of Gold Coins* Panel[1419] (§ 63-64):

> *The Panel considered that, as an exception to a general principle of law favouring certain contracting parties, Article XXIV.12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties. Only an interpretation according to which Article XXIV.12 does not limit the applicability of the provisions of the General Agreement but **merely limits the obligations of federal States to secure their implementation** would achieve this aim.* [Emphasis added]

The distinction between applicability and implementation might not be self-explanatory, but it seems clear from the case law[1420] that a contracting party is entitled to take measures against another contracting party, which had not taken all reasonable measures. This is also reflected in subsequent WTO disciplines, as the violation of the obligation to take available reasonable measures might be enforced against a Member. The Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that (§ 14):

> *when the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.*

It might thus be the case that the distinction between applicability and implementation has to do more with the timing at which compliance has to occur, rather than with the principle or extent of compliance.

The GATT case law emphasised that the measures to be taken had to comply with a high standard. With respect to measures which had already been submitted to the 1988 Panel the

[1419] L/5863 (unadopted, dated 17 September 1985).
[1420] See *"Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"* quoted above.

1992 panel on *"Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"*[1421], stated (§ 5.37):

> *[…] the Panel proceeded to examine whether Canada had demonstrated that it had taken all reasonable measures available with respect to the different practices which the Panel had found to be contrary to the General Agreement. The Panel considered that, for this purpose, Canada would have to show that it had made a* ***serious, persistent and convincing effort*** *to secure compliance by the provincial liquor boards with the provisions of the General Agreement. […] After reviewing all the information and documentation before it, […] the Panel came to the conclusion that, in spite of that request made by the CONTRACTING PARTIES in 1988, Canada had not demonstrated that it had made serious, persistent and convincing efforts to secure elimination of restrictions on points of sale for beer. These discriminatory practices had not been dealt with in the agreement reached with the EEC subsequent to the adoption of the 1988 Panel report, nor had they been specifically addressed in the interprovincial agreement designed to achieve an integrated market for Canadian beer. The Panel therefore concluded that Canada had failed to comply with its obligations under Article XXIV.12 of the General Agreement with respect to availability of points of sale.* [Emphasis added]

It is thus clear that omission to act is no defence. On the contrary, under GATT case law, in order to show that it took "such reasonable measures as may be available", a Member has to bring proof of a "serious, persistent and convincing effort to secure compliance".

In *United States – Measures affecting Alcoholic and Malt Beverages*[1422], the Panel even went as far as to interpret US constitutional law and refused to grant a special implementation period to the United States[1423] (5.78, 5.80):

> *The Panel noted that the United States had not provided the Panel with any evidence in support of its invocation of this provision. In particular, it had presented no evidence in support of its claim that reasonable measures were not available to it to ensure the observance by the state authorities of the relevant provisions of the General Agreement.*
>
> *[…] according to the evidence submitted to this Panel, GATT law is part of federal law in the United States and as such is superior to*

[1421] DS17/R, adopted on 18 February 1992, 39S/27.
[1422] DS23/R - 39S/206.
[1423] The US had argued that (§ 3.132):

> *The United States presented its view that Article XXIV.12 applied as a matter of course in a dispute in which the defending Contracting Party was a federal state. Identification of particular measures which might be reasonably available to the Federal Government of the United States to ensure observance of the provisions of the General Agreement by state governments would depend on the scope and content of the Panel's findings,* ***as well as on the practice and the state involved.*** *However, the United States would need more time to implement Panel findings that necessitated a change in state practices than would a contracting party that did not have a federal structure.* [Emphasis added]

> *GATT-inconsistent state law. Based on the evidence submitted [FN: The Panel noted that this view is also shared by the legal authorities to which the parties referred in their submissions. E.g. Hudec, "The Legal Status of GATT in the Domestic Law of the United States" in Hilf, Jacobs, Petersmann (eds), the European Community and GATT (1986), page 221: "Article XXIV.12 obligates the United States to compel state adherence to [the General Agreement] ...".] the Panel concluded that the United States has not demonstrated to the Panel that the general obligation of contracting parties to withdraw measures inconsistent with the General Agreement cannot be observed in this case by the United States as a result of its federal constitutional structure and that the conditions for the application of Article XXIV.12 are met.*[1424]

Thus, the GATT case law might be deemed not to be very deferential. Beyond defences based on sound constitutional grounds and maybe on the definition of the reasonable time period necessary for implementation, it is not obvious in which respect the implementation of GATT disciplines by local government bodies under Article XXIV.12 GATT is more deferential than the implementation of other GATT disciplines by Members[1425]. This is so even though it might be the case that a pro-deference stance might have been more warranted under the GATT system, where Panels were adopted per consensus, than under the WTO system where Dispute Settlement Bodies' decision can only be rejected at the unanimity (Articles 16.4 and 17.14 DSU).

As a consequence, concerning Article 4.1 TBT, it might be argued that the standard of review of the obligation imposed on Members to "take such reasonable measure as may be available" in order to ensure that non-governmental bodies comply with the CGP shall not be particularly deferential.

c) Third sentence

The third sentence of Article 4.1 TBT[1426] might be seen as completing the second. Whereas the second sentence seems to embody a positive obligation on Members to take steps to ensure compliance with the CGP, the third sentence is likely to be interpreted as a stand-still provision. At the very least, Members are required not to take positive steps to undermine compliance with the CGP. Thus, Members shall not take any measure which could be incompatible with CGP or which might require or encourage non-compliance with the CGP.

One might wonder which influence such a sentence has on tribunals. Shall this mean that judges need to interpret the law in a CGP friendly manner? In the antitrust context, shall this

[1424] The United States did not oppose the adoption of the Panel report but deposited a formal reservation regarding these paragraphs, GATT Doc. C/M/257.
[1425] Under the WTO DSU, Article XXIV.12 might be used in the context of the definition of the reasonable time period left to the violating party (21 DSU).
[1426] It is reminded that the third sentence of Article 4.1 TBT reads as follows:

> *In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice.*

mean that a violation of the CGP is to be seen as a violation of the antitrust laws, or as circumstantial evidence (proxy) thereof?

d) The private addressees of the CGP

We have seen that Members are the primary addressees of the CGP. Members however, shall also make sure that the CGP is respected by local governmental[1427] and non-governmental bodies, which might be defined as secondary addressees, although formally only Members are the addressee of WTO obligations.

Paragraph 8 of Annex 1 TBT defines rather imprecisely what a non-governmental body should be. On the one hand, one might be tempted to interpret paragraph 8 restrictively, as its example (a body "which has legal power to enforce a technical regulation") seems to militate for a very restricted view of non-governmental bodies. In practice, few SSO are encompassed by this example. On the other hand, one might lay emphasis on the first part of paragraph 8, and understand non-governmental bodies as *any* standard-setting "body other than a central government body or a local government body". In the latter case, the definition becomes very broad.

Paragraph 2 of Annex 1 TBT, which provides the WTO definition for standards, is another provision defining the scope of the CGP. According to this provision, standards have to be adopted by a "recognised body". These terms are hardly more self-explanatory than the terms "non-governmental body". In the absence of WTO case law, there are no clarifications neither of what the recognition must amount to nor of who is competent for granting it. In relation to the second issue, one might wonder whether the recognition shall be granted by a government, by the WTO or by private parties. One way of interpreting recognition is in relation with paragraph 8 of Annex 1 TBT. In such a case, recognition would be defined as the granting of the "legal power to enforce a technical regulation". This might, however, lay to much emphasis on these terms and to little on the word "including" of paragraph 8. It must further be stressed that the terms "recognised body" probably encompass not only non-governmental bodies but governmental bodies as well. Public recommendations are voluntary standards adopted by governmental bodies. The definitions of recognised body and non-governmental body might however be related, in the sense that it would seem odd that a recognised body establishing standards under the TBT would not be considered as a non-governmental body under paragraph 8 of Annex 1 TBT, especially if the standards are clearly trade-restrictive.

Consequently, the definition of what a recognised body is has been left to judicial interpretation. Indeed, as we have seen standardization might take many forms and be set in different ways. If all national and sub-national SSO had to be defined precisely, negotiations would rather be long. Additionally, general criteria might be hard to agree upon as standardization procedures vary enormously from country to country. For example, the different standardization traditions between the US, which tend to trust uncoordinated private standardization, whereas European standardization traditions are generally publicly regulated[1428]. The range of secondary addressees of the CGP might thus be hard to define.

[1427] The obligations of local government bodies will not be addressed as they are hardly relevant for the private standard discussion.

[1428] For a brief presentation, see WTO SECRETARIAT, *World Trade Report 2005, Exploring the links between trade, standards and the WTO,* 2005, p. 75 and ff.

It might be argued that at least four ways of recognizing a standardization body exist:

1° Formal recognition by way of a governmental act (be it a recognition as a governmental body or as a SSO);

2° using standards of a private SSO for public purposes (for example, the adoption of the private standard for government procurement purposes or as a public recommendation);

3° officially participating in the decision process of such bodies; and

4° funding such bodies.

There should be little doubt that formal recognition of an SSO constitutes recognition within the meaning of the TBT, especially if explicit reference is made to the TBT or the CGP. For the other examples mentioned, the WTO case law has not given any guidance on which of these activities are to be understood as recognition.

However, it would seem straightforward to take the view that participation in a standardization body equates to recognition. Indeed, a Member would probably be hard-pressed to argue otherwise, especially if it controls the decision process of the SSO. The adoption of the SSO's standards for public purposes and the funding of such standardization body might also be seen as an example of recognition, as such behaviour would probably fall under sentence 3 of Article 4.1 TBT[1429].

Moreover, the terms "of which they or one or more bodies within their territories are members" appearing in the second sentence of Article 4.1. TBT should probably only qualify "regional standardising bodies" and should not refer to local government and non-governmental standardising bodies. Such terms might be seen as clarifying that Members only undertake to use their best efforts in relation with regional standardization bodies to which they are members and that they are not required to join or influence any other regional bodies. In relation with domestic local government and non-governmental bodies, Members can make use of their competences and powers to push the SSO, even the ones in which they have no membership, towards compliance with the CGP.

6.3.1.2. The CGP's disciplines

Preliminarily, it should be noted that compliance with CGP (and acceptation of its disciplines) means *ipso iure* compliance with the TBT. This follows from Article 4.2 TBT, which pertinently reads:

> *Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.*

[1429] In EC case law, the funding by the Irish government of a non-public body which conducted advertising campaigns in favor of domestic products was considered illegal, as a violation by the Member State of the rules on the free movement of goods. See the *Buy Irish* case law, C-249/81, [1983] ECR 4005.

Nevertheless, the exact consequence of this presumption on the interpretation of the CGP's disciplines remains unclear. Should it mean that the CGP's disciplines are materially identical to the TBT's disciplines or that Members' obligations towards standards do not go further than the less-stringent disciplines contained in the CGP even though CGP's disciplines are considered less stringent than those contained in the TBT? This is an important issue. Indeed, if the first alternative is chosen, the interpretation of the CGP's disciplines is likely to be very similar to the interpretation given to the TBT's disciplines. If the second alternative prevails, the CGP's disciplines might be interpreted in a different way than the TBT's disciplines.

Moreover, the CGP's disciplines are not specific to the CGP, but already appear in other WTO agreements. In the absence of relevant case law, it is an open question to which extent the TBT (and SPS) interpretation of such concepts as the National Treatment, Most Favoured Nation and Necessity principles is to be applied to standards or whether there are grounds to justify a different treatment. On the one hand, it might be said that the language of the CGP and the list of concepts it uses are very similar to those of the TBT[1430]. This should militate for a similar interpretation of the TBT and the CGP. On the other hand, the CGP imposes obligations to Members in relation with the standardization bodies' behaviour, whereas the TBT imposes obligations related to the Member's behaviour itself. Moreover, the CGP foresees best-endeavours clauses, whereas the TBT imposes binding disciplines. In the absence of case law, this question is likely to remain unclear. The following subsection will nevertheless briefly present the different best endeavours disciplines contained in the CGP.

6.3.1.2.1. Non-discrimination

Litt. d CGP reads:

> *In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.*

Under this provision, standards have to comply with the classical non-discrimination disciplines of the GATT (NT (Article III GATT[1431]) and most favoured nation (Article I GATT)). These disciplines are one of the cornerstones of the GATT and have been the subject of intense interpretation. Under the TBT, the disciplines are expressed by Article 2.1. TBT, which reads:

> *Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*

[1430] The drafting of Article 2.1 TBT and litt. d CGP (National Treatment and Most Favoured Nation) as well as Article 2.2 TBT and litt. e CGP (Necessity) and Article 2.4 TBT and litt. f CGP (requiring that international standards shall be used as a basis for standardisation) are very similar.

[1431] For a very brief presentation of Article III GATT, see here above, Section 8.1. For a summary on the taxation side of the non-discrimination principle, see H.HORN/P.C.MAVROIDIS, "Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination", in: *EJIL*, Vol. 15 No. 1, p. 39-69, 2004, and generally, P.C.MAVROIDIS, *The General Agreement on Tariffs and Trade: A Commentary*, Oxford University Press, 2005.

Except for the fact that Article 2.1 TBT is addressed to Members rather than standardising bodies and that it refers to technical regulations instead of standards, the discipline is drafted in identical words. The interpretation should therefore be substantially the same, unless contextual arguments warrant a different conclusion.

6.3.1.2.2. Necessity requirement

The necessity principle defines the link between the potentially trade-restrictive effects of a standard and the policy goals pursued by standard setters[1432]. It might be summarily described as requiring that first, the measure which promotes a given policy goal (for example, the protection of the environmental, health or life, etc.) be appropriate to reach this goal, and second, that the measure chosen is the least trade-restrictive among available measures. This principle appears, for example, in litt. e CGP, which pertinently provides:

> *The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.*

Under the TBT, the necessity requirement in relation to technical regulations is reflected by Article 2.2. TBT, which is drafted in terms very similar to litt. e CGP:

> *Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. […]*

In the context of standardization, SSO generally have two paths towards standardization. They can either base a standard on international standards or create a standard from scratch. The TBT and the CGP acknowledge such a choice and attribute it different legal consequences. In particular, as Article 2.5 TBT makes clear:

> *Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.*

Thus, whenever a Member adopts a technical regulation using an international standard as a basis for the promotion of a legitimate objective as defined under Article 2.2 TBT[1433], the necessity principle is considered to be respected. On the other hand, when it does not base its

[1432] For a mainstream interpretation of the WTO necessity concept, see WTO SECRETARIAT, *GATT/WTO Dispute Settlement Practice relating to GATT Article XX, paragraphs b), d) and g)*, WT/CTE/W/203. For a summary of the necessity concept in the TBT context, see J.NEUMANN/E.TÜRK, "Necessity Revisited: Proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines", in: *Journal of World Trade*, 37/1, , 2003, p. 199-233, G.MARCEAU/J.TRACHTMAN, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade", in: *Journal of World Trade*, 36/5, 2002, p. 811 and ff., and J.TRACHTMAN, *Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation*, paper presented at the OECD, World Bank Service Experts Meeting held in Paris, 4-5 March 2002, available at http://ssrn.com/abstract=298760.

[1433] A textual reading of Article 2.2 TBT would probably lead to the conclusion that, when a standardisation body promotes a legitimate objective which is not comprised in the list of Article 2.2 TBT and which is based on an international standard, the presumption of Article 2.5 TBT might not come into play.

technical regulation on an international standard, it should be proven that the departing technical regulation is not unnecessarily restrictive of trade. We examine both paths in turn.

a) International standards as a basis for standardization

Article 2.4 TBT[1434] provides:

> *Where technical regulations are required and **relevant international standards** exist or their completion is imminent, Members shall use them, or the relevant parts of them, **as a basis** for their technical regulations […].* [Emphasis added]

aa) International standards

Although standards are defined in § 2 of Annex 1 TBT, "international standards" are not defined in the TBT[1435/1436]. In *EC – Sardines*[1437], the WTO adjudicating bodies had, *inter alia*, to decide whether a standard of the Codex Alimentarius was to be understood as an international standard, as it was not entirely clear whether such standard had been adopted by consensus. The WTO Appellate Body ("AB") explained (§§ 221-225):

> *The European Communities does not contest that the Codex Commission is an international standardization body, and that it is a "recognized body" for purposes of the definition of a "standard" in Annex 1.2. The issue before us, rather, is one of* approval*. The definition of a "standard" refers to documents* approved *by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.*
>
> *[…]*
>
> *In our view, the text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to "documents". The term "document" is also used in the singular in the first sentence of the definition of a "standard". We believe that "document(s)" must be interpreted as having the same meaning in both the*

[1434] Litt. f CGP similarly provides that:

> *Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, […].*

[1435] The explanatory note of Annex 1 TBT mentions, however, that:

> *Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.*

This can hardly be held as self-explanatory definition. Note as well that, in contrast with the TBT, the SPS expressly mentions the standardisation bodies from which international standards originate (Annex A § 3 SPS).

[1436] As the AB seems to imply in *EC – Sardines*, the definition of Annex 1 § 2 is also relevant for the interpretation of the terms "international standards" (§ 220 and ff).

[1437] *EC – Trade Description of Sardines*, ("sardines", WT/DS231/AB//R).

definition and the Explanatory note. The European Communities agrees.[1438] *Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refer to standards* in general*, and not only to those adopted by entities* other than *international bodies, as the European Communities claims.*

Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word "also" in the last sentence suggests that the same subject is being addressed—namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.

The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the TBT Agreement*, which provides:*

The terms presented in the sixth edition of the ISO/IEC Guide 2:1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide …
For the purpose of this Agreement, **however***, the following definitions shall apply … (emphasis added)*

Thus, according to the chapeau, the terms defined in Annex 1 apply for the purposes of the TBT Agreement *only if their definitions* depart *from those in the ISO/IEC Guide 2:1991 (the "ISO/IEC Guide").*[1439] *This is underscored by the word "however". The definition of a "standard" in Annex 1 to the* TBT Agreement *departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required.*

[…] the definition of a "standard" in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the omission *of a consensus requirement in the definition of a "standard" in Annex 1.2 of the* TBT Agreement *was a deliberate choice on the part of the drafters of the* TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note.*

[1438]European Communities' response to questioning at the oral hearing. The United States agreed. (United States' response to questioning at the oral hearing)
[1439]ISO/IEC Guide (6th edition, 1991), submitted, as Exhibit EC-1 to the European Communities' appellant's submission.

bb) Relevant international standards

After accepting the view that the term "relevant" in Article 2.4. TBT meant "bearing upon or relating to the matter in hand; pertinent", the AB clarified that the fact that the scopes of international and national standards overlapped might lead to a finding of relevance (§§ 230-232):

> *the European Communities argues that, although the EC Regulation deals* only *with preserved sardines—understood to mean exclusively preserved* Sardina pilchardus*—Codex Stan 94* also covers *other preserved fish that are "sardine-type".*
>
> *We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved* Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved* Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved* Sardina pilchardus*.*
>
> *Second, we have already concluded that, although the EC Regulation expressly mentions only* Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved* Sardinops sagax*. Codex Stan 94 covers 20 fish species in addition to* Sardina pilchardus*. These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.*

cc) Basis for technical regulations

In *EC-Sardines*, the AB also clarified its understanding of Article 2.4. TBT's requirement that international standards should be used as a "**basis**" for technical regulations. After agreeing that "an international standard is used "as a basis for" a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation" (§ 243) and rejecting the view that a mere "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter" and that such a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard" (§ 246), the AB explained that (§§ 248-250):

> *We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said—at a minimum—that something cannot be considered a "basis" for something else if the two are* contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard* contradict *each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.*

> *Thus, we need only determine here whether there is a* contradiction *between Codex Stan 94 and the EC Regulation. If there is, we are justified in concluding our analysis with that determination, as the only appropriate conclusion from such a determination would be that the Codex Stan 94 has not been used "as a basis for" the EC Regulation.*
>
> *In making this determination, we note at the outset that Article 2.4 of the* TBT Agreement *provides that "Members shall use [relevant international standards],* or the relevant parts of them*, as a basis for their technical regulations". (emphasis added) In our view, the phrase "*relevant parts of them*" defines the appropriate focus of an analysis to determine whether a relevant international standard has been used "as a basis for" a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address* all *of those relevant parts; the regulating Member is not permitted to select only* some *of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.*

b) Deviation from international standards

aa) Conditions for deviation

Although international standards should be used, as a matter of principle, as a basis for standardization, Article 2.4 TBT sets forth the conditions under which deviation from international standards might take place:

> *Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an* ***ineffective*** *or* ***inappropriate*** *means for the fulfilment of the* ***legitimate objectives*** *pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.*[1440] [Emphasis added]

In *EC–Sardines,* the AB had the opportunity to present its views of what the terms "ineffective" and "inappropriate" meant (§ 285):

[1440] Litt. f CGP is very similarly drafted:

> *Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.*

Note, however that the CGP does not bring a list of the legitimate objectives that might be pursued. It would seem, however, that the list of Article 2.2 TBT might be inspirational given that, as the AB clarified in *EC – Sardines* (§ 286), the list of Article 2.2 TBT is not exhaustive.

> *[…] we noted earlier the Panel's view that the term "ineffective or inappropriate means" refers to two questions—the question of the* effectiveness *of the measure and the question of the* appropriateness *of the measure—and that these two questions, although closely related, are different in nature. The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting' ". The Panel also stated that:*
>
> *Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. … The question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed. (original emphasis)*
>
> *We agree with the Panel's interpretation.*

As confirmed by the AB in *EC –Sardines*[1441], the terms "legitimate objectives" have to be interpreted in relation with Article 2.2 TBT, which reads:

> *Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are,* inter alia: *national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. […]*

bb) Burden of proof

Procedurally, it remains to be clarified who shall bear the burden of proving whether the conditions of an exception are met[1442]. In *EC – Sardines*, this issue was hotly debated. The

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[1441] § 286:

> *As to the second question, we are of the view that the Panel was also correct in concluding that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which refers also to "legitimate objectives", and includes a description of what the nature of some such objectives can be. Two implications flow from the Panel's interpretation. First, the term "legitimate objectives" in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." Second, given the use of the term "inter alia" in Article 2.2, the objectives covered by the term "legitimate objectives" in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.*

AB finally held that the complaining party bears the burden of proving that the international standards at stake are appropriate and effective for the defendant to reach its objective. This conclusion seems in line with the SPS case law[1443/1444].

One might, however, wonder whether such a solution is fully justified[1445]. Indeed, it might be argued that proving that an international standard is effective/appropriate or that such a standard is ineffective/inappropriate and that therefore deviation from the international standard is acceptable, are the two sides of the same coin. In *EC- Sardines*, Peru had to prove that the international standard would have been effective/appropriate to reach the legitimate objective (consumer protection) set by the EC. Conversely, it would have been possible, as the Panel did, to let the EC prove that the international standard was ineffective/inappropriate. Peru found itself in the rather uncomfortable situation to prove that the international standard was a proper tool to attain the objective set by the EC. In doing so, Peru had to overcome an asymmetry of information problem not only towards the effectiveness of the international standard, but also towards the level of protection set by the EC and the reasons why the EC had considered the international standard as ineffective/inappropriate. This is made all the more perilous in the context of the TBT, where the role of risk assessment and scientific evidence seems not to be as straightforward as under the SPS. Clearly, the EC would probably have been in a better position to present its standing on this issue, as it must have had reasons to deviate from the international standard. One might wonder whether Article 2.4 TBT should not have been understood as setting the principle that international standards should be followed as a general rule and that deviations thereof should be justified by the party invoking an exception.

[1442] In *EC – Sardines*, the AB clarified that (§ 275):

> *This burden includes establishing that Codex Stan 94 [i.e. the international standard] has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.*

[1443] *EC – Measures concerning meat and meat products (Hormones),* WT/DS48/AB/R, § 104 and ff. The AB noted in *EC – Sardines* that (§ 274):

> *there are strong conceptual similarities between, on the one hand, Article 2.4 of the TBT Agreement and, on the other hand, Articles 3.1 and 3.3 of the SPS Agreement, and our reasoning in EC – Hormones is equally apposite for this case.*

As P.C.MAVROIDIS/R.HOWSE/G.BERMANN, *The WTO : Texts, Cases and Materials*, 2006, ch. 9, p. 23, notes :

> *[…] there is an important difference between the two agreements as to the relevance of international standards: in the SPS context, standards issued by the standard-setting institutions mentioned in the agreement are to be considered, for SPS purposes, as international standards. The body or organization who issues the standards matters in the SPS Agreement, whereas the opposite is true in the TBT Agreement. Unfortunately, this difference has been overlooked by the AB.*

[1444] Note, that in the EU, the party which wishes to impose a measure restrictive of trade in order to promote a legitimate objective bears the burden of proving that its measure is necessary (C-247/81, *Commission v. Germany*, [1984] ECR 1111, § 7 and C-155/96, *Kohll*, [1998] ECR I-1931, § 52.

[1445] See P.C.MAVROIDIS/R.HOWSE/G.BERMANN, *The WTO : Texts, Cases and Materials*, 2006, ch. 9, p. 24, who explains that the burden of proof was imposed on the uninformed party.

At any rate, the AB seems to have lowered the burden of proof imposed on complaining parties in two ways, although the first must be taken with a pinch of salt. *First*, the AB noted that complainants have access to information on the level of protection sought by the defendant (§ 277):

> *The TBT Agreement affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness. A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the TBT Agreement, which establishes a compulsory mechanism requiring the supplying of information by the regulating Member.*[1446]

It is here argued that the standard for the review of the quality of the information provided has to be high. It is obvious that a complainant, which does not receive satisfactory information under Article 2.5 TBT, will be hard-pressed to bring the proof that the international standard is effective/appropriate for the fulfilment of the legitimate objective. Moreover, the information supplied under the mechanism provided for by Article 2.5 TBT acquires a particular importance, as it seems to factually bind the defendant. A deviation from the reasons supplied under Article 2.5 TBT should probably entail a shifting of the burden of proof. In this context, the defendant might be tempted to provide an "optimally" imprecise information which allows him not to specify its objectives in a very detailed manner (in order to be in position to react when the dispute is deposited), but which is not so imprecise as to justify a shifting of the burden of proof. In order to avoid such an "optimisation", the standard of review needs to be high.

Second, it might be the case that the precise weight of the burden of proof has been reduced by the AB (§ 287):

> *With respect to the application of the second part of Article 2.4, we begin by recalling that Peru has the burden of establishing that Codex Stan 94 is an effective* and *appropriate means for the fulfilment of the "legitimate objectives" pursued by the European Communities through the EC Regulation. Those "legitimate objectives" are market transparency, consumer protection, and fair competition.* ***To satisfy this burden of proof,*** *Peru must****, at least, have established a*** **prima facie** ***case of this claim****. If Peru has succeeded in doing so, then a* ***presumption*** *will have been raised which the European Communities must have rebutted in order to succeed in its defence. If Peru has established a* prima facie *case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4. […]*[1447]. [Emphasis added]

[1446] Note that the CGP, compliance to which is mandated by Article 4.1 TBT for central government standardisation bodies, seems to impose similar transparency obligations (see, in particular, litt. j and l CGP).

[1447] What a "*prima facie* case" means is open to interpretation, but it seems obvious that it implies a lesser standard of persuasion than full-blown evidence. *Prima facie* evidence is customarily used in the context of summary proceedings and interim relief. Note, as well, that in this case, Peru did not submit any additional evidence to what it had originally submitted.

cc) Necessity

If a Member cannot base a technical regulation on an international standard, because, for example, the legitimate objective cannot be efficiently or appropriately pursued by the international standard (Article 2.4 TBT), it will have to prove that its technical regulation is necessary to pursue the given legitimate objective (Article 2.2 TBT). The case law on this score is limited under the TBT, but is more abundant under the SPS[1448].

As already mentioned above, the necessity requirement is a two-pronged test and requires first, that a measure which aims at promoting a specific social value be appropriate to reach this social value, and that second, the Member taking the measure used the less trade-restrictive among reasonably available (or less GATT-inconsistent) measures to reach the targeted level of protection of the promoted social value. Given the ambiguity of certain recent decisions of the WTO Dispute Settlement Body ("DSB") in this respect[1449], it has been hotly debated in the literature whether a third prong has been introduced[1450], whereby a measure shall not be disproportionately trade restrictive in relation with its purported social objective. Such a third prong is commonly referred to as "proportionality *stricto sensu"* and involves the weighing of the importance of the domestic social value with the trade-restrictiveness of the measure at stake. As mentioned, the necessity test appears in many provisions of the WTO Agreement and is sometimes drafted in different terms. Moreover, the context of a provision might command a different interpretation, although cross-interpretation cannot be excluded. It is not the purpose of this study to present a comparative analysis of all necessity provisions[1451]. We therefore focus on the necessity test as interpreted under the TBT.

A special feature of Article 2.2 TBT is that it adds to the classic requirement of not being "more trade-restrictive than necessary to fulfil a legitimate objective", the rather sibylline

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[1448] See *EC – Measures Concerning Meat and Meat Products ("Hormones"),* (WT/DS26), *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* (WT/DS135), and *Japan – measures Affecting the Importation of Apples* ("*Apples*"), (WT/DS245). The necessity test also appears in other provisions of the WTO Agreements. In particular, Article XX GATT contains such a test at litt. b) and d). The interpretation of the necessity test under Article XX GATT, has been the subject matter of different WTO procedures. See, for example, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R and *Korea – Beef*, WT/DS161, 169/AB/R. See as well, WTO SECRETARIAT, *World Trade Report 2005, Exploring the links between trade, standards and the WTO,* 2005, p. 135 and ff.

[1449] *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161,169), *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* (WT/DS135) and *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58).

[1450] For such an introduction, for example, WTO SECRETARIAT, *World Trade Report 2005, Exploring the links between trade, standards and the WTO,* 2005, p. 140, D.CASS, "The "Constitutionalization" of International Trade Law", in: *European Journal of International Law*, 12, p. 39-75, 2001, M.HILF, "Power Rules and Principles – Which orientation for WTO/GATT Law?", in: *Journal of International Economic Law*, 4, p. 111-130, 2001, G.MARCEAU/J.TRACHTMAN, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade", in: *Journal of World Trade*, 36/5, 2002, p. 811 and ff, C.TIETJE, "Die Völkerrechtliche Kooperationspflicht im Spannungsverhältnis Welthandel/Umweltschutz und ihre Bedeutung für die europäische Umweltblume", in: *Europarecht*, 35, 2000. *Contra*: A.APPLETON, GATT Article XX's Chapeau: A Disguised 'Necessary Test', in: *Review of European Community and International Environmental Law*, 6/131, p. 131-138, 1997, A.DESMEDT, "Proportionality in WTO Law", in: *Journal of International Economic Law*, 4, p. 441-480, 2001, P.C.MAVROIDIS, "Trade and Environment after the Shrimps-Turtles Litigation", in: *Journal of World Trade*, 1, p. 73-88, 2000

[1451] For an overview, see J.NEUMANN/E.TÜRK, "Necessity Revisited: Proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines", in: *Journal of World Trade*, 37/1, , 2003, p. 199-233.

words "taking account of the risks non-fulfilment would create". Commentators are divided on the question whether such a wording introduces a proportionality test[1452]. At any rate, it might be noted that the text of litt. e CGP does not contain the above-mentioned terms. In the absence of case law on both the link between CGP and TBT disciplines and the interpretation of the terms "taking account of the risks non-fulfilment would create", it is rather perilous to describe the necessity concept under litt. e CGP.

Concerning the criteria for assessing the necessity of a measure, the fourth sentence of Article 2.2 TBT provides that:

> *"In assessing [the risks non-fulfilment would create], relevant elements of consideration are,* inter alia: *available scientific and technical information, related processing technology or intended end-uses of products."*

Thus, the TBT does not require a particular methodology to be applied when assessing the risks non-fulfilment of a legitimate objective would entail[1453]. The elements listed in Article 2.2 TBT are only indicative[1454]. By contrast, the CGP is silent on the importance of scientific information and technical information[1455].

6.3.1.2.3. Other disciplines

The other disciplines of the CGP can be summarily described as follows[1456]:

Litt. g: Standardising bodies are required to "in an appropriate way, **play a full part**, within the limits of its resources, **in the preparation** by relevant international standardising bodies **of international standards** regarding subject matter for which it either has adopted, or expects to adopt, standards".

Litt. k: The national member of ISO/IEC shall **become members of ISONET** and other standardising bodies shall make every effort to associate themselves with the ISONET member.

Litt. h: Domestic and regional standardising bodies shall "make every effort to **avoid duplication of, or overlap** with, the work of other standardising bodies" at the national, regional or international level.

[1452] See, for example, M.HILF, "Power Rules and Principles – Which orientation for WTO/GATT Law?", in: *Journal of International Economic Law*, 4, p. 111-130, 2001. H.R.TRÜEB, *Umweltrecht in der WTO – Staatliche Regulierungen im Kontext des interantionalen Handelsrechts*, Schulthess, 2001, argues that the wording seems rather to introduce a relaxation of the necessity test, without going as far as introducing a proportionality test.

[1453] P.C.MAVROIDIS/R.HOWSE/G.BERMANN, *The WTO : Texts, Cases and Materials*, 2006, ch. 9, p. 26.

[1454] In the SPS context, the role of scientific evidence and risk assessment are defined in much more detail. See, for example, Article 2.2 and 5 SPS, *Australia – Measures Affecting Importation of Salmon* (WT/DS18), *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* (WT/DS135), and *Japan – measures Affecting the Importation of Apples* ("*Apples*"), (WT/DS245). The extent to which the SPS case law is applicable to TBT issues has not been judicially clarified.

[1455] Note that the imposition of risk assessment procedures on non-governmental SSO might entail substantial costs, which arguably might put private at risk. It is debatable whether the same level of evidence shall be imposed on public and private standards.

[1456] Similar provisions are provided for technical regulations under Articles 2.7 to 2.12 TBT.

Litt. i: Standardising bodies shall **specify standards "in terms of performance** rather than design or descriptive characteristics".

Litt. j: Standardising bodies shall **publish a work programme** containing, *inter alia*, the standards they are currently preparing and the standards which they have adopted in the preceding period and an indication, in accordance with any ISONET rules, of "the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis". Moreover, standardizing bodies shall **notify** the existence of the work programme to the ISO/IEC.

Litt. m: On request, the standardising body shall promptly **provide a copy of a draft standard** which it has submitted for comments.

Litt. l: Before adopting a standard, the standardising body shall **allow a period of at least 60 days for the submission of comments** on the draft standard by interested parties. This period might be shortened in case of urgency.

Litt. n: The standardising body shall **take into account, the comments received** and **include an explanation** why a deviation from relevant international standards is necessary.

Litt. o: Standardization bodies shall promptly **publish adopted standards**.

Litt. p: On request, the standardising body shall promptly **provide a copy of its most recent work programme or of a standard which it produced**.

Litt. q: The standardising body shall **afford sympathetic consideration to consultation** and shall make an **objective effort to solve any complaints**.

6.3.2. Principles of the TBT Committee on international standardization

In 2000, the Committee on Technical Barriers to Trade published its second review of the operation and implementation of the TBT[1457]. Among other issues, the TBT Committee agreed on a "decision on principles for the development of international standards, guides and recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement" ("2000 Decision") (Annex 4 of the review). At § 20 of the review, the Committee gives the *ratio legis* of this decision:

> *In order for international standards to make a maximum contribution to the achievement of the trade facilitating objectives of the Agreement, it was important that all Members had the opportunity to participate in the elaboration and adoption of international standards. Adverse trade effects might arise from standards emanating from international bodies as defined in the Agreement which had no procedures for soliciting input from a wide range of interests. Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent*

[1457] WTO Doc. G/TBT/9.

unnecessary obstacles to trade. In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives. In this regard, the Committee adopted a decision containing a set of principles it considered important for international standards development (Annex 4). These principles were seen as equally relevant to the preparation of international standards, guides and recommendations for conformity assessment procedures. The dissemination of such principles by Members and standardizing bodies in their territories would encourage the various international bodies to clarify and strengthen their rules and procedures on standards development, thus further contributing to the advancement of the objectives of the Agreement.

The 2000 Decision sets forth principles in relation to transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and addresses the concerns of developing countries for the preparation of mandatory technical regulations, conformity assessment procedures and voluntary standards at the international level.

6.3.3. Conformity assessment

Article 5 TBT provides detailed disciplines on conformity assessment procedures by central government bodies. In particular, Members must make sure that conformity assessment procedures are not discriminatory. In cases where a positive assurance of conformity with technical regulations or standards is required, Members must ensure that conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of foreign products under conditions no less favourable than those accorded to suppliers of domestic like products or of other foreign like products (Article 5.1.1 TBT). Moreover, conformity assessment procedures must not create unnecessary obstacles to trade. This means, that conformity assessment procedures have to respect the necessity principle and might "not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create" (Article 5.1.2 TBT). Moreover, Members are encouraged to take part in the work of international bodies in the filed of conformity assessment procedures (Article 5.5). Articles 5.2 and 5.6 TBT contain various clarifications of these disciplines and set, for example, various transparency and accessibility requirements. International conformity assessment shall be used as a basis for conformity assessment procedures, unless ineffective and inappropriate (Article 5.4 TBT which contains a list of reasons for which deviation might be justified).

Article 6.1 TBT sets forth that Members shall ensure, "whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures". Moreover, Article 6.3 TBT encourages Members to enter into negotiations for the conclusion of mutual recognition agreements ("MRA"). In relation with conformity

assessment procedures established by local government bodies, Article 7 TBT lays down similar albeit more limited obligations.

Concerning conformity assessment procedures established by non-governmental bodies, Article 8 TBT provides that Members have to take such "reasonable measures as may be available" to ensures that non-governmental bodies comply with Articles 5 and 6 TBT (except for the obligation to notify proposed conformity assessment procedures). In particular, Article 8.2 TBT states that "Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6".

6.3.4. Process standards

In contrast to product standards, process standards are not embodied in the product as such, but define its productions process. In *US – Shrimp*[1458], the US Endangered Species Act of 1973 (Section 609) required that all US shrimp trawl vessels be equipped with Turtle Excluder Devices (TED) or be restricted in their towing time in order to avoid to catch sea turtles when fishing shrimps in certain protected areas. The act further banned the importation of shrimps which were harvested with commercial fishing technologies which affected adversely sea turtles. At the same time, imports could be authorised if the State Department was satisfied that sea turtles were harvested in a way which limited the incidental catch rate of sea turtles to a rate similar to US vessels' catch rate.

Although the case was reviewed under Article XX GATT and not under the TBT, it might be interesting to note that the Panel and the AB condemned the US scheme as contrary to the chapeau of Article XX, which reads:

> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [protecting certain social values].*

The AB held that, although the goal of protecting sea turtles was legitimate (as the protection of an exhaustible resource under Article XX (g)), the fact that the US had failed to conduct serious negotiations with all trade partners with the objective of concluding international treaties for the protection and conservation of sea turtles, rendered the scheme an "arbitrary and unjustifiable discrimination" contrary to the chapeau of Article XX GATT[1459].

In an effort to bring its measure into compliance with GATT disciplines, the US entered into negotiations with various trade partners. Unfortunately, no agreement was concluded with Malaysia, which deposited a new complaint against the US for failure of implementing the first DSB's recommendation. As upheld by the AB[1460], the Panel stated that (5.63, 5.67, 5.76):

[1458] *US – Shrimp Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58.
[1459] WT/DS58/AB/R, § 156, 160, 172.
[1460] The AB (WT/DS58/ABRW) stated at § 123:

> *Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this*

"The Panel first recalls that the Appellate Body considered "the failure of the United States to engage the appellees*, as well as other Members exporting shrimp to the United States, in serious across-the-board negotiations* with the objective of concluding bilateral or multilateral agreements *for the protection and conservation of sea turtles,* before *enforcing the import prohibition against the shrimp exports of those other Members" bears heavily in any appraisal of justifiable or unjustifiable discrimination within the meaning of the chapeau of Article XX. From the terms used, it appears to us that the Appellate Body had in mind a negotiation, not the conclusion of an agreement. If the Appellate Body had considered that an agreement had to be concluded before any measure can be taken by the United States, it would not have used the terms "with the objective"; it would have simply stated that an agreement had to be concluded.*

[…]

We are consequently of the view that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection and conservation of sea turtles in order to comply with Article XX. However, we reach the conclusion that the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We also consider that those efforts cannot be a "one-off" exercise. There must be a continuous process, including once a unilateral measure has been adopted pending the conclusion of an agreement. Indeed, we consider the reference of the Appellate Body to a number of international agreements promoting a multilateral solution to the conservation concerns subject to Section 609 to be evidence that a multilateral, ideally non-trade restrictive, solution is generally to be preferred when dealing with those concerns, in particular if it is established that it constitutes "an alternative course of action reasonably open."

[…]

We understand the Appellate Body findings as meaning that the United States has an obligation to make serious good faith efforts to address the question of the protection and conservation of sea turtles at the

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measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be concluded by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.

international level. We are mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality. We note, however, that in the present case a number of guideposts are available. The fact that sea turtles are migratory species and that they are on the verge of extinction is unanimously acknowledged. Objectives in terms of protection and conservation of sea turtles are quite clear and largely uncontested. The means of reaching them have been identified by scientists, discussed in seminars and included in negotiation documents. The nature of sea turtles as migratory species is also important, in light of the preference expressed in a number of international conventions for a multilateral approach to the conservation of migratory species. The United States is a demandeur *in this field and given its scientific, diplomatic and financial means, it is reasonable to expect rather more than less from that Member in terms of serious good faith efforts. Indeed, the capacity of persuasion of the United States is illustrated by the successful negotiation of the Inter-American Convention.*

The AB also rejected Malaysia's view that the imposition of domestic standards might constitute a violation of Article XX GATT (§ 135-138):

Malaysia asserted that the United States "unilaterally" imposed its domestic standards on exporters. With respect to this argument, the Panel found:

It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries." We therefore conclude that if, in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed. (footnote omitted)*

Malaysia disagrees with the Panel that a measure can meet the requirements of the chapeau of Article XX if it is flexible enough, both in design and application, to permit certification of an exporting country with a sea turtle protection and conservation programme "comparable" to that of the United States. According to Malaysia, even if the measure at issue allows certification of countries having regulatory programs "comparable" to that of the United States, and even if the measure is applied in such a manner, it results in "arbitrary or unjustifiable discrimination" because it conditions access to the United States market on compliance with policies and standards "unilaterally" prescribed by the United States.[…]

We recall that, in United States – Shrimp, we stated:

> It appears to us … that *conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX*. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply. (emphasis added)

> *In our view, Malaysia overlooks the significance of this statement. Contrary to what Malaysia suggests, this statement is not "dicta". As we said before, it appears to us "that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX." This statement expresses a principle that was central to our ruling in United States – Shrimp.*

The AB seems to answer at least two issues. First, it states that a Member does not violate the chapeau of Article XX GATT by unilaterally imposing a standard similar to the one it imposes to domestic and other countries for the access to its market[1461]. It explains, however, that when imposing such a standard, a certain degree of flexibility must be guaranteed, namely in ensuring that a foreign standard, which is "comparable in effectiveness" be accepted[1462/1463]. Second, the AB does not seem to formally distinguish between product and process standards. The difference is, however, substantial as it seems to lie in the AB's insistence on the conclusion of international agreements. This is certainly no small burden on the regulatory freedom of Members, although Members are not obliged to conclude such agreements, but must rather engage in serious efforts to conclude them.

The relevance of the *US – Shrimp* case law in the TBT context is not entirely clear. For one, the TBT does not contain a chapeau. Moreover, the definition of standards expressly acknowledges that the definition of technical regulations and standards encompass process standards and there is no explicit and probably no implicit duty to negotiate an international agreement under the TBT. Thus, it remains to be seen whether the *US – Shrimp* case law might be transposed without adaptations to the TBT and *a fortiori* to the CGP context.

[1461] In doing so, the AB overruled the first Panel holding (WT/DS58/R).
[1462] See §§ 139 and ff.
[1463] See as well, 5.93 of the Panel report (WT/DS58/RW). This might be compared to the obligation of basing standards on performance requirement rather than on design standards (litt. i CGP).

6.4. Conclusion

One inescapable conclusion of a survey of the CGP's scope is that the boundaries of its application are not perfectly clear. On the one hand, it has been argued that the definition of circle of the CGP's secondary addresses might need substantial interpretation. On the other hand, the exact contours of the Members' duty to ensure that other entities (local governments and private SSO) comply with the CGP (i.e. the definition of what constitutes "reasonable measures") has not been established by the WTO case law, although it has been argued that GATT precedents do not militate for a very deferential approach. Furthermore, in the absence of case law on CGP specific issues, it is not obvious whether and to which extent the case law of other WTO agreements and the TBT itself might be used to interpret CGP's questions. This might lead to a situation where the effectiveness of the CGP very much depends on the goodwill of the Members rather than on threat of litigation, as legal uncertainties are still substantial.

Keeping this caveat in mind, the disciplines of the CGP and the other WTO agreements should have special relevance for antitrust enforcement in standardization issues. Although the unadopted Havana Charter already contained provisions on competition rules and in spite of an important discussion on the introduction of such rules after the establishment of the WTO, WTO law still does not contain specific competition provisions. Opinions vary on the opportunity, the feasibility and the form of such a possible framework. This should, however, not lead an observer to the conclusion that WTO law is fully deprived of relevance in antitrust matters.

Indeed, the disciplines imposed by the GATT and the TBT remain fully applicable to Members. In particular, discriminatory behaviour by governmental agencies is often forbidden under WTO law. Thus, antitrust authorities are, for example, forbidden to "afford protection to domestic production" (Article III:1 GATT and Article 2.1 TBT)[1464]. Antitrust authorities are, therefore, not in a position to discriminate against foreign producers. Moreover, a special added value of the TBT is that it imposes the burden on Members to make sure that private parties comply with most of the TBT disciplines, including the non-discrimination principle. This provides foreign producers with a certain degree of protection against anticompetitive behaviour of domestic standardization and conformity assessment organisations. Furthermore, the CGP contains detailed transparency and access provisions. These provisions provide a minimal procedural and substantial safety net for foreign competitors.

The principal disadvantage of the TBT in this regard is that unlike the plurilateral WTO Agreement on Government Procurement, it does not contain explicit language for a dispute settlement mechanism accessible to private parties. Private actors might thus be obliged to request protection from their constituencies. It will be up to national authorities to determine whether the CGP can be granted direct applicability. To the best of our knowledge, this has not been the case up to now.

[1464] See, for example, B.HOEKMAN/P.C.MAVOROIDIS, "Economic Development, Competition Policy And The World Trade Organization", in: *Journal Of World Trade*, 37, p. 1-27, 2003 and P.C.MAVOROIDIS/S.VAN SICLEN, "The Application of the GATT/WTO Dispute Resolution system to Competition Issues", in: *Journal of World Trade*, 31, p. 5-48, 1997.

Another loophole of the CGP protection is the fact that it probably does not encompass *de facto* standards and is limited to standards adopted by a "recognised body" although, as we have seen, such terms are not defined by the treaty.

In sum, the CGP might be considered a valid tool for combating anticompetitive effects of standard setting, but cannot be fully relied on.

Conclusion

Standards and competition law

Standards are rather unorthodox candidates for an antitrust review. Most competition law rules aim at avoiding cooperation between undertakings, whereas standards often require the collaboration of various undertakings. Competition laws have, however, recognised that cooperation does not necessarily lead to anticompetitive results, but that, on the contrary, it can lead to substantial efficiency gains. Thus, it has been admitted that collaboration between undertakings might sometimes enhance competition rather than damage it. For example, all three of the competition law systems analysed in this study provide that, under certain specific conditions (often a market share threshold), firms might collaborate in fields as research and development, joint purchase, distribution or commercialisation of products. In such cases, the antitrust analysis is often a variation of the following: competition authorities balance the positive efficiency effects that collaboration might bring with the negative effects that the absence of competition between the participants might entail. It must nevertheless be pointed out that the risks of such a balancing approach are high. Assessing the potential efficiency benefits of collaboration involves a look into the future and a hypothetical assessment of what competition between the participants to the joint venture might have brought[1465]. Although standards involve the same kind of analysis, the stakes are possibly even higher. Standards often involve the participation of a large share of market participants[1466] and, since they frequently take place in industries where network externalities are important, they frequently follow a winner-takes-all scenario. Moreover, given the likelihood of sunk costs related to the adoption of a standard and the inertia brought by network externalities, remedies in this field are generally not costless.

Foreclosure and refusal to deal

Paradoxically, courts are ill equipped to question the technical value of a standard, as judges can rarely appreciate whether another standard is technically (more) feasible or whether the business community might have agreed on another standard. As a result, judges have rather focused on the question whether the standard and, in particular, its enforcement methods

[1465] As these analyses are often case specific and time consuming, antitrust agencies have set down the conditions which must be met in order for such collaborations to be presumptively considered legal in general guidelines, see the US Competitors Collaborations Guidelines and the EC Horizontal Guidelines and Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements ([2000] OJ L304/7) and Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements ([2000] OJ L304/3) (Swiss competition authorities have not published similar guidelines).

[1466] The EC Commission recognises in its Horizontal Guidelines that (§ 168):

> *High market shares held by the parties in the market(s) affected will not necessarily be a concern for standardisation agreements. Their effectiveness is often proportional to the share of the industry involved in setting and/or applying the standard.*

might foreclose competition, adopting a very deferential stance towards the technical quality of the standard. Courts have thus striven to ensure that, as a matter of principle, the standards, its standardization process and technical information related to it remain available to competitors. Arguably, within the framework of an antitrust review, judges should focus on such issues and leave questions related to the technical quality of the standard to experts.

The focus on foreclosure might explain why the refusal to deal doctrine has played such a prominent role in standardization cases. However, the refusal to deal test has been rather stringently construed. Under US law, courts have been extremely reluctant to force a single undertaking to accept a certain business partner. Indeed, the unilateral refusal to deal doctrine is restricted to the conditions imposed by the *Aspen*[1467] case law, notably the undertaking refusing to deal must interrupt an existing business relationship in order for the doctrine to apply. Moreover, the holder of an IPR can be forced to share its technology only under extreme conditions (*Xerox* case law[1468]). On the other hand, the concerted refusal to deal doctrine has been much more liberally applied. Indeed, concerted refusals to deal were originally considered a *per se* violation of the Sherman Act. However, since the *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co*.[1469], the Supreme Court considers that refusal to deal cases might be reviewed under a rule of reason. Courts are therefore required to conduct a more detailed analysis of the market effects of a refusal to deal. As the case law suggests, in order for the concerted refusal to deal to be illegal, the undertakings must have foreclosed the access to the market to their competitors and the undertakings must not have presented legitimate business reason for doing so. The EC approach on refusals to deal is substantially similar to the US approach[1470], although, under EC competition law, an individual refusal to deal might be illegitimate even in the absence of an existing relationship between the two undertakings at stake[1471/1472]. In sum, although courts have not explicitly acknowledged it, they seem to balance the private interests of the undertaking to refuse to deal with the interests of the business partner and the community that such relationship is maintained. Unfortunately, courts do not seem to have come up with a clear-cut test yet on when the public interest trumps the private one. In the standardization context however, competition authorities in both competition law systems have clearly stated that, a standard shall not be more restrictive of competition than necessary for the prosecution of its goal[1473/1474].

In this regard, the WTO disciplines must be kept in mind, as they seem to bring their own benchmark for the definition of foreclosure of foreign competitors. Indeed, beyond non-discrimination and transparency requirements, the necessity principle reflected in the CGP

[1467] See Subsection 3.3.2.3.1. Unilateral refusal to deal (monopolization).
[1468] See Subsection 3.4.4.1. Unilateral refusal to deal and essential facility doctrines.
[1469] 472 U.S. 284, 105 S.Ct. 2613 (1985) (albeit not a standardisation case), Subsection 3.4.2.
[1470] See Subsections 4.3.3.2 and 4.3.4.3.2.
[1471] This is in particular the case when the competition authorities apply the essential facility doctrine, the contour of which have not been completely defined, see Subsection 4.3.4.3.2. Refusal to supply.
[1472] The same can be said for the Swiss approach towards refusals to deal.
[1473] See for example, under US law *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir.2003) and *National Association of Review Appraisers & Mortgage Underwriters v. Appraisal Foundation,* 64 F.3d 1130 (8th Cir.1995) and under EC law, paragraphs 171 to 173 of the Horizontal Guidelines which deal with the indispensability requirement of Article 81(3) ECT, in particular § 173, where the Commission provides that "[a]greements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality".
[1474] As it has been presented in Chapter 5, Swiss competition law does not contain specific guidelines on the approach to be followed in standardization cases. General antitrust concepts remain therefore applicable and US and EC case law might be used as a source of inspiration.

requests that SSO base their standards, as far as practicable, on international standards. Thus, if the CGP is to be complied with, competition authorities shall not only make sure that a standard does not foreclose competition, it must as well be based on the international standard "except where such international standards or relevant parts would be ineffective or inappropriate" (litt. f of the CGP)[1475].

To which extent the CGP is applicable to standardization issues has not been clarified by case law. According to the text of the TBT, Members must take "such reasonable measures as may be available to them to ensure that […] non-governmental standardizing bodies within their territories" comply with the CGP. One might wonder whether this provision does not oblige the Members' competition authorities to take the CGP disciplines into account when they litigate standardization cases. A further question would be whether private parties could be allowed to invoke the provisions of the CGP against an SSO (direct applicability).

Other issues

Although refusal to deal cases play an important role when competition authorities examine standardization issues, the analysis presented here above shows that issues linked with the standardization process are very heterogeneous. The reasons for such an heterogeneity are multiple: the types of standardization processes (unilateral or collaborative, public or private), the types of standards (quality or interoperability standards), the types of alleged anticompetitive behaviour (refusal to grant access to a label, technical information about the standard or the standardization process, monopsony power, abuse of an IPR, conduct conducive to cartelisation, etc.) can all render the outcome of an antitrust analysis substantially different. Beyond refusal to deal issues, a second category of case law concerns cases where the standardization process has been abused. These cases can, in turn, be divided into two groups: first, cases where undertakings manipulated the rules of an SSO in order to obtain an advantage in the market place and second, cases where the standardization process was a mere pretext or cover for cartelisation. In both cases, however, antitrust authorities have been quick to strike such behaviour as anticompetitive or as an unfair business practice. The issue seems more to be one of evidence[1476].

New benchmarks for the antitrust analysis?

A recent trend on both sides of the Atlantic is to impose new benchmarks for the antitrust analysis of standardization issues, such as "openness, balance of interest, due process, appeals process and consensus"[1477]. It might be remarked that such benchmarks are hardly self-

[1475] It is debatable whether the case law might be interpreted as ruling that a domestic standard not based on international standards unnecessarily forecloses (foreign) competition, as foreign competitors would have to incur adaptation costs. Courts failed to say so expressly. Moreover, it must be borne in mind that such barriers might maximise domestic social welfare and thus be justifiable from a trade perspective. At any rate, the CGP clearly requires that international standards be taken as a starting point.

[1476] However, it shall be stressed that the mere violation of an SSO's private rules are not *ipso iure* tantamount to an antitrust violation.

[1477] Standards Development Organization Advancement Act of 2004, 15 U.S.C. § 4301-05. The EC Horizontal Guidelines also require that the standardisation process be as open as possible and that the choice of the standard be "justifiable" (§ 174). Paragraph 163 of the Horizontal Guidelines states that standards adopted according to

explanatory and that it seems obvious that the case law will need to clarify their precise meaning. Even though it is to early to judge whether courts will give such concepts a bite of their own, they seem, *prima facie*, to impose disciplines which go beyond the requirements set by the competition case law. In any case, such terms seem to bring above all a clarification of the procedures which must be followed by the SSO. However, although procedural safeguards are practicable proxies for judging the quality of a standardization process, competition authorities should not loose sight of the fact that at the end of the analysis, a material violation of the antitrust laws must be found in order to condemn a given behaviour. The holding of the Supreme Court in *Northwest*[1478] made this clear:

> *If the challenged concerted activity of Northwest's members would amount to a* per se *violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a* per se *violation because the antitrust laws do not themselves impose on joint ventures a requirement of due process.*

It is therefore argued that the market effects of a certain behaviour are still the benchmark for judging anticompetitive practices in the standardization context. An emphasis on the market effects of a violation is not specific to the standardization sector and corresponds to an historical trend[1479]. Competition authorities increasingly recognise that the economic theory must be taken into account in the legal analysis of anticompetitive behaviour. Although standardization issues are often complex, their importance is so crucial that an in-depth analysis of their effects can bring substantial benefits and might help avoiding costly mistakes. The fact that economic theory might evolve over time and that the effects of standardization on trade and competition have not been extensively researched does not warrant a straight-jacket approach. Since its origins economic theory has been gradually assimilated into competition law and will help making competition laws evolve towards more efficient rules. As one of the most regarded Justices to the US Supreme Court famously put it, this evolution is part of the law itself:

> *It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even with the prejudices which judges share with their fellow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.*[1480]

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"non-discriminatory, open and transparent" procedures are presumed to fall outside the scope of Article 81(1) ECT.

[1478] *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* 472 U.S. 284, 105 S.Ct. 2613 (1985), at 293.

[1479] For a presentation of the increased importance of the rule of reason in the US case law, see for example, E.T.SULLIVAN/J.L.HARRISON, *Understanding Antitrust and its Economic Implications*, Legal Text Series, Matthew Bender and Co, 3rd Ed., New York, 1998. In the EC, the Commission has on many occasions stressed that its reforms aim at introducing an economically sounder approach.

[1480] O.W.HOLMES, The Common Law, Dover Publications, 1881.