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# Antitrust Constrains on Acquisitions by Aliens in the United States

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## Introduction

In November 1977, *Forbes* described the pace of foreign investment in American manufacturing as a "discreet amble."[1] By April 1979, *Forbes* reported that the pace of such foreign investment now resembled "the fury of an Olympic 100-meter dash."[2] According to one study, during the first quarter of 1979 there were sixty-three acquisitions of American companies by aliens as compared to thirty-seven similar acquisitions during the first quarter of 1978.[3] Another study indicated that in 1978 foreign direct investment in the United States increased fifty percent over 1977 in number of completed transactions and seventy percent in reported values.[4]

The reasons for this much publicized "dash" by foreigners to invest in the United States include: the decline in the value of the dollar; the relative political and economic stability of the American market; the fact that American labor and tax costs are now competitive with those of most industrialized countries; and the attractiveness of the large size of many American markets.[5]

There have been several reactions to this increasing tide of foreign investment, including Congressionally mandated studies[6] and legislation by both

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[1]*Foreign Investment in the U.S.—It Grows . . . But Slowly,* FORBES, Nov. 15, 1977, at 158.

[2]*Foreign Investors in the U.S.—The Pace Quickens,* FORBES, Apr. 2, 1979, at 73.

[3]*Merger Notices Rose 14% in First Period, W.T. Grimm Says,* Wall St. J., Apr. 11, 1979, at 15, col. 1

[4]U.S. Dept. of Commerce Press Release No. ITA 79-107 (June 13, 1979)

[5]*See, e.g.,* D. LAMONT, FOREIGN STATE ENTERPRISES: A THREAT TO AMERICAN BUSINESS 151-63 (1979); K. CROWE, AMERICA FOR SALE (1978); *Mergers and Acquisitions* which contains quarterly reports on "Foreign Investment in the U.S."; *Corporate Takeovers Are Here to Stay,* FORTUNE, May 8, 1978, at 91; *A Continuing Wave of British Takeovers,* BUS. WEEK, Dec. 19, 1977, at 27; WEAK DOLLAR, STOCKS SPUR FOREIGNERS TO SEEK ACQUISITIONS IN THE U.S., Wall St. J., Aug. 21, 1979 at 1, col. 6.

[6]*See, e.g.,* Foreign Investment Study Act, Pub. L. No. 93-479, 88 Stat. 1450 (1974). Pursuant to this legislation the Department of Commerce produced in 1976, a nine volume study. *See,*

the federal[7] and state governments.[8] In this issue Mr. Hendrickson's article has treated *The Agricultural Foreign Investment Disclosure Act of 1978*. This article will now examine the constraints imposed by United States antitrust laws on acquisitions by aliens in the United States; first by reviewing applicable legal standards; second by reviewing the various modes of enforcement of the relevant federal antitrust laws, and finally by summarizing three leading relevant cases.

## I. Legal Standards

United States antitrust laws seek to prevent conduct that weakens or destroys competition. For that reason they also seek to prevent giant aggregations of economic power from being built unfairly since the use of such power stifles the opportunities for competition and may result in undemocratic concentrations of political power.

Only *unreasonable* restraints of competition are illegal under the antitrust laws, but some restraints have come to be classified as *per se* unreasonable. Once such a restraint is proven to exist, no further inquiry will be made into the reasonableness or economic justification of the restraint. Justice Black explained the reasons for the *per se* exception to the general "rule of reason" standard in the following often-quoted statement:

> However, there are certain 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. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[9]

Practices which have been classified as unreasonable *per se* include: price fixing,[10] division of markets,[11] group boycotts,[12] and tying arrangements.[13]

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U.S. DEPT. OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES. (1976).

[7]*See, e.g.*, Agricultural Foreign Investment Disclosure Act of 1978, 92 Stat 1266 (effective Oct. 14, 1978).

[8]*See generally* DISTRICT OF COLUMBIA BAR, FOREIGN INVESTMENT IN THE UNITED STATES: LEGAL ISSUES AND TECHNIQUES (2d ed. 1980).

[9]Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-92 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, (pt. 1), 74 YALE L.J. 775 (1965), (pt.) 2, 75 YALE L.J. 373 (1966).

[10]*See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[11]*See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

[12]*See, e.g.*, Fashion Guild v. FTC, 312 U.S. 457 (1941).

[13]*See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947).

A. *Statutes*

Several different federal antitrust statutes apply to acquisitions by aliens in the United States.[14] However, under each of these statutes, the test is one of reasonableness in the circumstances and not *per se* unreasonableness.

Acquisitions are most likely to be challenged under Section 7 of the Clayton Act which prohibits the direct or indirect acquisition by one corporation of all or any part of the stock or assets of another corporation "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[15] It is not necessary for the Government or a private plaintiff to prove that an acquisition substantially lessens competition or creates a monopoly. It is sufficient to establish that there is a reasonable probability that the acquisition will produce one of those effects in the future.[16]

Under Section 7 both the acquiring and acquired entities must be "corporations" which are "engaged in commerce."[17] Although the Clayton Act does not define the word "corporation," it probably applies to foreign entities that have the principal attributes of corporations such as limited liability and continuity of existence.[18] However, if one of the parties to the transaction is either an individual or a partnership Section 7 would not apply.[19]

To be "engaged in commerce" the corporations must be "directly engaged in the production, distribution, or acquisition of goods or services" in commerce among the states of the United States or between the United States and a foreign country.[20] Moreover, Section 7 requires that the potential anticompetitive effects of the acquisition be "in any section of the [United States]."[21] Thus, if the only anticompetitive effects of the acquisition are outside the United States, Section 7 does not apply.

Section 7 expressly provides that it does not apply to acquisitions of stock solely for investment if such stock is not used "by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."[22]

[14]For summaries of state antitrust statutes, *see* 4 TRADE REG. REP. (CCH) ¶ 30,000; ABA ANTITRUST SECTION, STATE ANTITRUST LAWS (1974).

[15]Clayton Act § 7, 15 U.S.C. § 18 (1976).

[16]*See, e.g.*, United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[17]15 U.S.C. § 18 (1976).

[18]2 B. FOX & E. FOX, CORPORATE ACQUISITIONS AND MERGERS, § 33.03[4] (1968) [hereinafter cited as Fox & Fox].

[19]The Justice Department supports legislation to extend Section 7 to acquisitions involving all types of business entities. *Hearings on S. 390 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 96th Cong. 1st Sess. (Feb. 19, 1979) (testimony of Assistant Attorney General John H. Shenefield).

[20]United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 283 (1975). *See generally* 1 Fox & Fox, *supra* note 18, at § 7.04[2] [b].

[21]15 U.S.C. § 18 (1976).

[22]15 U.S.C. § 18 (1976); *see, e.g.*, Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973).

Acquisitions may also be prohibited by Sections 1 or 2 of the Sherman Act as unreasonable restraints of trade or as illegal attempts to monopolize a particular market[23] and by Section 5 of the Federal Trade Commission Act (FTC Act) as unfair methods of competition.[24] In addition, if any directors of the acquiring corporation serve as directors of companies that compete with the acquired corporation, the acquisition may result in a violation of the interlocking directorship provisions of Section 8 of the Clayton Act.[25]

The jurisdictional reach of the Sherman and FTC Acts is considerably broader than that of the Clayton Act. Unlike the Clayton Act, which is limited to corporations engaged in United States commerce,[26] the Sherman and FTC Acts have been held to apply to all activities that Congress has the power to regulate under the Commerce Clause of the United States Constitution.[27] Such activities include "every species of commercial intercourse between the United States and foreign nations."[28] Thus, the Sherman and FTC Acts have been deemed to apply to activities that "affect" United States commerce as well as to activities that are "in" United States commerce. Consequently, those statutes apply to communication or transportation between the United States and foreign countries as well as to United States exports and imports.[29]

Nevertheless, because the Sherman Act requires proof of an actual restraint, as opposed to the Clayton Act's requirement of proof of a potential lessening of competition, the Sherman Act has not been deemed to be an effective weapon against anticompetitive acquisitions. Moreover, although Section 5 of the FTC Act has a broader jurisdictional reach than the Clayton Act, it cannot be enforced by private parties or by the Justice Department. The FTC could take action against acquisitions involving foreign entities in situations where the Clayton Act would not apply, but it has rarely done so. When the FTC does bring a merger case it usually alleges a violation of both the Clayton and FTC Acts.

The jurisdictional reach of these statutes should not be confused with a court's jurisdiction over a particular entity that may be a defendant in a particular case. The former aspect of jurisdiction is known as "legislative" jurisdiction and the latter aspect is known as "personal" jurisdiction.

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[23]15 U.S.C. §§ 1, 2 (1976); *see, e.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

[24]15 U.S.C. § 45 (1976); *see, e.g.*, Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

[25]15 U.S.C. § 19 (1976).

[26]The Justice Department supports legislation to reverse United States v. American Building Maintenance Ind., 422 U.S. 271 (1975), by making Section 7 applicable to acquisitions involving entities whose activities affect United States interstate or foreign commerce. Testimony of John H. Shenefield, *supra* note 19.

[27]U.S. CONST. art. 1, § 8, cl. 3; Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976).

[28]Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824).

[29]*See, e.g.*, Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). *See* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, ch. 2 (2d ed. 1973); Kintner & Griffin, *Jurisdiction over Foreign Commerce under the Sherman Antitrust Act*, 18 B. C. INDUS. & COM. L. REV. 199 (1977).

Personal jurisdiction is limited by the Due Process clause of the United States Constitution. American courts are permitted to assert jurisdiction over non-American defendants only when those defendants have minimum contacts with the forum of such a nature and quality that the maintenance of the suit does not offend "traditional [American] notions of fair play and substantial justice."[30] This fairness test requires a court to weigh the competing interests of the parties: the defendant's interest in not being compelled to defend a suit in a foreign court; the plaintiff's interest in vindicating his claim in the court of his choice; and the public's interest in the issue.[31] Justice Frankfurter, noting that the crucial issues are questions of fact turning upon the unique circumstances of each case, stated that "a corporation can be 'found' anywhere, whenever the needs of the law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place."[32]

Often in cases involving non-American corporations personal jurisdication is obtained by "lifting the veil" of separate incorporation between the foreign parent and its American subsidiary corporation. The official position of the United States Government is that:

> When a subsidiary acts on behalf of a foreign parent, and there is such an identity of interest between the two or such control by one over the other that the one is in reality the alter ego of the other, or its mere agent, instrumentality, or adjunct, then the parent comes within the U.S. jurisdiction.[33]

The following facts are usually deemed relevant to the conclusion that veil-lifting is appropriate in order to establish "presence": the amount of ownership by the parent of the subsidiary; the existence of common officers or directors; the intermingling of the affairs of the two entities instead of the meticulous maintenance of separate accounts, tax returns, and so forth; the undercapitalization of the subsidiary; a representation by either entity that blurs the separation of the two units; bad faith, fraud, or illegality; and the degree of supervision of the day-to-day affairs of the subsidiary by the

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[30] Hanson v. Denckla, 357 U.S. 235, 249-50, (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) *quoting from* Milliken v. Meyer, 311 U.S. 457, 463 (1940); *see* Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts,* 25 U. CHI. L. REV. 569 (1958); Note, *Quasi in Rem Jurisdiction Over Foreigners,* 12 CORNELL INT'L L.J. 67 (1979).

[31] In addition to satisfying the constitutional requirement of fairness, the court must assert its personal jurisdiction and notify the defendant corporations of the suit by valid service of process pursuant to relevant statutes and court rules. Service must be made in a manner reasonably calculated to notify the defendant of the proceeding and to afford it a reasonable opportunity to appear and be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[32] United States v. Scophony Corp. of America, 333 U.S. 795, 819 (1948) (Frankfurter, J. concurring).

[33] 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 6 at 118-19 (1968). The U.S. Supreme Court has held that a stipulation by a subsidiary that it is the same entity as its parent is insufficient to give a court personal jurisdiction over the alien parent in the absence of service on the parent and an appearance by the parent. Zenith Corp. v. Hazeltine, 395 U.S. 100 (1969).

parent. No single factor is decisive and factors are often cumulated to support the decision.[34] Essentially, the test is a determination of whether the two separate legal entities in fact function as a single business entity.

B. *Standards for Acquisitions Involving Aliens*

Some foreign businessmen have charged that the United States antitrust laws have been used discriminatorily against acquisitions of United States firms by aliens.[35] However, American antitrust enforcement officials have consistently taken the position that they do not "discriminate against or in favor of business entities on the basis of their citizenship in any antitrust situation. In U.S. antitrust enforcement, it is a firm's role in or effect on U.S. commerce that is of concern."[36]

In fact, the Assistant Attorney General in charge of the Justice Department's Antitrust Division has stated that "foreign purchasers of U.S. business are likely as not to be procompetitive, to be invigorating, to be avenues by which new technologies come into this country, and new sources of capital introduced."[37]

The United States courts have also rejected contentions that they should enjoin or prohibit acquisitions by aliens merely because the acquirers are foreign. The courts have taken the position that in the absence of Congressional guidance to the contrary, foreign investment will be tested under the same standards as domestic investment.[38]

However, the Justice Department's *Antitrust Guide for International Operations* contains the following statement which appears to indicate an increasing flexibility when dealing with international transactions:

> The rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not normally found in the domestic market. Either circumstance could justify a fuller factual inquiry. We emphasize, however, that the normal per se rules will be applied fully to basic horizontal restraints designed to affect United States market prices or conditions or to divide the United States market from other markets.[39]

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[34] *See generally* Note, *Personal Jurisdiction Over Alien Corporate Parents and Affiliates in Antitrust Actions: A Plea for Perspicuity,* 5 SYR. J. INT'L L. & COM. 149 (1977); W. CARY, CASES AND MATERIALS ON CORPORATIONS 109-49 (4th ed. 1970); 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 25 (M. Wolf, perm. ed. 1974).

[35] *See, e.g., "Unwelcome Mat?" Invest-in-U.S. Craze Loses Some Allure for Foreign Firms,* Wall St. J., June 14, 1974, at 1, col. 6.

[36] ANTITRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 18 (1977) [hereinafter cited as ANTITRUST GUIDE], *reprinted in* 799 ANTITRUST & TRADE REG. REP (BNA) at E-1 (Feb. 1, 1977). The *International Guide* was published in January 1977 and slightly revised in March 1977. It may be purchased from the United States Government Printing Office (stock No. 027-000-00495-4).

[37] 875 ANTITRUST & TRADE REG. REP. (BNA) at AA-7 (Aug. 3, 1978).

[38] *See, e.g.,* Copperweld Corp. v. Imetal, 403 F. Supp. 579, 608 (W.D. Pa. 1975) (*See* text at note 97 *infra* for a description of this case); Texasgulf Inc. v. Canadian Dev. Corp., 366 F. Supp. 374, 419 (S.D. Tex. 1973).

[39] ANTITRUST GUIDE, *supra* note 36, at 2-3. In a 1977 speech, Attorney General Griffin B. Bell

An example of the type of contention that may be raised under such an "international rule of reason" analysis is the following contention made by the British Government in its *Amicus Curiae* Brief to the United States Court of Appeals for the Second Circuit in the *BOC* case,[40] which involved an FTC challenge to the acquisition of an American firm by a British company:

> All firms, whether domestic or foreign, face a series of obstacles to entering a new market. However, a foreign firm seeking to enter a market in another country faces numerous additional commercial, cultural, and legal barriers which do not confront firms expanding inside a single nation.
>
> * * * *
>
> Although, generally, these barriers are not individually insurmountable, their cumulative effect is to increase the difficulty of entry by a foreign firm. In some situations these barriers may make de novo entry or significant expansion of a small toehold acquisition impossible or impractical. In all events, the [FTC] must consider the effect of the barriers to foreign entry in particular cases. Failure to undertake such an analysis is, the British Government submits, reversible error.
>
> The British Government does not contend that the legal standards are, or should be, different for acquisitions by foreign companies. However, it is submitted that the factors relevant to a proper analysis of whether Section 7 of the Clayton Act has been violated vary as between acquisitions by domestic firms and those by foreign firms for the reasons mentioned above. This contention may be analogized to the legal analysis necessary in tort cases to determine whether the "reasonable man" standard of conduct has been met. The legal standard is the same in each case, i.e., whether the actor's conduct was that of a reasonable man. However, the factors which must be considered in order to answer properly this legal question vary with the particular circumstances of each case.[41]

In a speech discussing the British Government's amicus brief, Douglas Rosenthal, the Chief of the Foreign Commerce Section of the Antitrust Division, noted that "foreign firms may be entitled to special considerations when acquiring U.S. enterprises depending upon the nature and extent of the barriers to their entry. But these barriers need not necessarily be great ones and, if not, the foreign firms may be *more* vulnerable to antitrust challenge."[42]

As an example of a situation in which a foreign firm's exposure might be greater than an American firm's, Mr. Rosenthal pointed to the Justice Department's complaint against Alcan Aluminium Limited of Canada and its American subsidiary.[43] The subsidiary had agreed to acquire an aluminum smelter and rolling mill in Alabama owned by Revere Copper & Brass, Incorporated. The Justice Department sought to enjoin the acquisition because it would have eliminated competition between Alcan and Revere in the supply

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noted that a "current major concern is that the realities of foreign competition should be considered in the enforcement of the antitrust laws." Address by Griffin B. Bell, The University Club 10 (Dec. 14, 1977).

[40]BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977)

[41]Brief for *Amicus Curiae* at 19-20 (June 30, 1976). *See* text at note 98, *infra*, for a description of the *BOC* case.

[42]Rosenthal, *International Antitrust Aspects of Mergers*, 1978 N.Y. State Bar Assoc. Antitrust Law Symposium 15, 19 (Jan. 18, 1978).

[43]United States v. Alcan Aluminium Ltd., 4 Trade Reg. Rep. (CCH) ¶ 45,077 (S.D.N.Y. 1977).

and sale of primary aluminum and in the production and sale of aluminum rolling mill products and aluminum sheet. Alcan's American subsidiary ranked fourth and Revere's facility ranked tenth in shipments of both rolling mill products and aluminum sheet. According to Mr. Rosenthal,

> One of the considerations that led to the filing of this suit, as stated in the complaint, is the very substantial potential that Alcan has for having an impact in the United States market through sales of refined Canadian aluminum. Right across the border in fact, it has greater direct access to many important northeast and north central United States markets from Canadian sources than do many American producers. Alcan, the government believes, has an approximately 8% share of the U.S. primary aluminum market. It further believes that this share could be significantly increased by the importation of substantial Canadian production into U.S. markets.[44]

Although no court has ruled on the issue, it seems clear that the difficulties and advantages of acquisitions by aliens in the United States will become increasingly important factors under the "international rule of reason."

C. *The Relevant Market*

The legality of a particular acquisition is determined by reference to the relevant product market ("line of commerce") and the relevant geographic market ("section of the country"). The identification of these relevant markets is often a major point of controversy.

1. RELEVANT PRODUCT MARKET

The following definition of a relevant product market is contained in the Justice Department's *Merger Guidelines:*

> The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality, and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality, and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality, and use from the standpoint of that group of purchasers for whom the two products are interchangeable.[45]

According to the United States Supreme Court the "outer boundaries" of the relevant product market "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. . . ."[46] However, within such markets there may be submarkets which alone may constitute the relevant product market in a particu-

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[44]Rosenthal, *supra* note 42.

[45]1 TRADE REG. REP. (CCH) ¶ 4510, at 6882-83 (May 30, 1968) [hereinafter cited as MERGER GUIDELINES].

[46]Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

lar case. The Court mentioned seven factors to consider in identifying submarkets:

1. industry or public recognition of the submarket as a separate economic entity;
2. the product's peculiar characteristics and uses;
3. unique production facilities;
4. distinct customers;
5. distinct prices;
6. sensitivity to price changes; and
7. specialized vendors.[47]

2. RELEVANT GEOGRAPHIC MARKET

According to the Justice Department's *Merger Guidelines*

> The total sales of a product or service in any commercially significant section of the country (even as small as a single community), or aggregate of such sections, will ordinarily constitute a geographic market if firms engaged in selling the product make significant sales of the product to purchasers in the section or sections. The market need not be enlarged beyond any section meeting the foregoing test unless it clearly appears that there is no economic barrier (e.g., significant transportation costs, lack of distribution facilities, customer inconvenience, or established consumer preference for existing products) that hinders the sale from outside the section to purchasers within the section; nor need the market be contracted to exclude some portion of the product sales made inside any section meeting the foregoing test unless it clearly appears that the portion of sales in question is made to a group of purchasers separated by a substantial economic barrier from the purchasers to whom the rest of the sales are made.[48]

The relevant geographic market is often the entire United States. However, factors such as advantages of service and convenience, common economic and competitive factors within the area, and trade recognition of the area as a separate geographic market have been used to narrow the definition of the relevant geographic market.[49]

D. *Classification of Acquisitions*

For purposes of analysis, acquisitions are classified as "horizontal," "vertical," or "conglomerate." A "horizontal" acquisition is one where the acquiring and acquired companies are direct competitors in both the same relevant product and geographic markets.[50] A "vertical" acquisition is one where the acquired and acquiring companies are in a supplier-customer relationship. This classification is often subdivided into "backward vertical integration," that is, the acquisition of a supplier,[51] and "forward vertical inte-

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[47] *Id.*

[48] MERGER GUIDELINES, *supra* note 45, at 6883.

[49] *See, e.g.*, United States v. Conn. Nat'l Bank, 418 U.S. 656 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[50] *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

[51] *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562 (1972).

gration," that is, the acquisition of a customer.[52] "Conglomerate" acquisitions are those where the two firms are not related from the horizontal or vertical viewpoint. There are three subcategories of conglomerate acquisitions: a "pure conglomerate" acquisition, in other words, the acquisition of a totally unrelated firm;[53] a "market-extension" acquisition, where both companies manufacture or distribute the same products but do so in different geographic areas;[54] and a "product-extension" acquisition, where the products of both companies are functionally related to each other.[55]

### E. *Possible Anti-Competitive Effects of Acquisitions*

#### 1. Elimination of Actual Competition

If the result of the acquisition is loss of a substantial competitor, especially in a concentrated market, it will almost always be illegal.[56]

#### 2. Elimination of Potential Competition

An acquisition may lessen potential competition in two ways. If a large company in a concentrated market is acquired by a company outside that market which is perceived by those in the market as a potential entrant, the competitive pressure created by the potential entrant "waiting in the wings" of the market is removed. So long as the potential competitor is waiting in the wings those in the market will keep prices and profit margins lower than they would if there were no threat of the outsider entering the market. When the outsider acquires a large firm in the market, it no longer poses a threat, the "wings" effect on prices disappears, and competition is thereby lessened. This theory is known as the "perceived potential entrant" theory.[57]

A second theory involving potential competition is the "actual potential entrant" theory. Though this theory has been advocated by the FTC it has not been accepted by the United States Supreme Court, which has twice refused to rule on its validity.[58] According to the FTC's theory, an acquisition which has no effect on existing competition may violate Section 7 of the Clayton Act if such an acquisition eliminates the probability of future increased competition in the market, which, but for the acquisition, would have resulted from a later *de novo* or toehold entry by the acquiring company.[59]

[52]*See, e.g.*, Miss. River Corp. v. FTC, 454 F.2d 1083 (8th Cir. 1972).

[53]*See, e.g.*, United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970).

[54]*See, e.g.*, United States v. El Paso Gas Co., 376 U.S. 651 (1964).

[55]*See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

[56]United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

[57]*See, e.g.*, United States v. Marine Bancorp., Inc., 418 U.S. 602, 625 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33 (1973).

[58]*See* cases cited note 57 *supra*. *See also*, FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977).

[59]*See, e.g.*, *In re* British Oxygen Co., [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,063 (1975).

In the *BOC* case[60] where the United States Court of Appeals for the Second Circuit rejected this theory, the court noted that two questions must be answered before the "actual potential entrant" theory can be applied:

> First, would the firm in question enter *de novo* or by toehold acquisition if not permitted to enter by acquiring a large company? Second, would the *de novo* or toehold entry of the firm have procompetitive effects on the market in question. . . .
> While it is not clear — and we need not decide — whether the probable entry of the acquiring firm must be "imminent" in an actual potential entrant situation, it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with "near" defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.[61]

3. RECIPROCITY

Acquisitions may create the opportunity for reciprocal dealing, in other words, "I'll buy from you, if you'll buy from me."[62]

4. SUBSTITUTION OF A LARGER COMPETITOR (DEEP POCKETS)

When a large firm acquires an already significant company in a highly concentrated industry, the effect is to entrench the acquired firm or create an oligopolistic condition.[63] However, a large company may lawfully acquire a "toehold" size firm[64] or a "failing company"[65] and thereby promote competition.

5. FORECLOSURE

In a vertical acquisition a competitor of the acquired firm may be foreclosed from part of the market that he relied on to function as a competitor. For example, *A* and *B* may compete as suppliers to or purchasers from *C*. However, if *C* acquires *A*, *B* may be foreclosed from selling to or purchasing from *C*.[66]

F. *Trends in Analyzing Acquisitions*

Generally, horizontal acquisitions involving two significant competitors in an industry with a trend toward concentration are illegal.[67] In the *Philadelphia National Bank* case[68] the Supreme Court announced the following test of illegality:

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[60]BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2nd Cir. 1977).

[61]*Id.* at 29.

[62]*See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

[63]FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[64]*In re* Budd Co., 3 TRADE REG. REP. (CCH) ¶ 20,998 (1975). For various definitions of a "toehold" acquisition, *see* BOC Int'l Ltd. v. FTC, 557 F.2d 24, 26 n.3 (1977).

[65]International Shoe Co. v. FTC, 280 U.S. 291 (1930).

[66]*See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[67]*See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

[68]United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[69]

Thus, the legality of a horizontal acquisition is usually tested initially in terms of the amount of competition eliminated. If the combined market strength of the two companies is greater than five percent of the relevant market, the acquisition immediately becomes suspicious. As this combined market percentage increases, the risk of illegality becomes greater. Other significant factors include the acquisition history of the acquiring company, the trend toward oligopolistic concentration in the industry, the ease of entry into the industry, and the cumulative effects of prior acquisitions by the acquiring company. To the extent that these additional factors appear in aggravated form, a finding of illegality is likely even though only a small percentage of the total relevant market is controlled by the acquired company.

In reviewing horizontal acquisitions, the Government's concerns are:

(1) preventing elimination as an independent business entity of any company likely to have been a substantial competitive influence in the market;
(2) preventing any company or small group of companies from obtaining a position of dominance in the market;
(3) preventing significant increases in concentration in a market; and
(4) preserving significant possibilities for eventual deconcentration in a concentrated market.[70]

Vertical acquisitions are tested in much the same way. In a backward vertical integration, when a company is acquiring a supplier, the critical question is whether the acquisition will deprive the acquiring company's competitors of a source of supply necessary to their effective competition with the acquiring company. The percentage of the market for the items supplied controlled by the acquired company is especially significant in testing the legality of the acquisition. An even higher percentage can be defended, however, by proof that adequate quantities of the items supplied are readily available to the competitors of the acquiring company. In a forward vertical integration, when a company acquires a customer, usually illegality is found if competitors of the acquiring company have been deprived of a substantial customer necessary to the maintenance of their effective competition. Again, the percentage of the market represented by the customer's purchases is the major criterion of legality.[71]

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[69] *Id.* at 363.

[70] *See, e.g.*, United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975); United States v. Citizens & S. Nat'l. Bank, 422 U.S. 86 (1975); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[71] *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562 (1972); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

The types of competitive injury that may result from a vertical acquisition include foreclosing access to potential customers, foreclosing access to potential suppliers, and facilitating promotional product differentiation. Thus, the acquisition will be examined closely to determine whether it creates a substantial potential for a supply or price squeeze, for a loss of customers of the competitors of the acquired firms, or for impeding the entry of new sellers or the expansion of existing sellers. A significant adverse effect in either the supplying or purchasing firm's market will normally trigger a challenge of the acquisition.

Pure conglomerate acquisitions have been attacked only recently by the enforcement agencies. Therefore, the guidelines of illegality are only beginning to emerge. The significant factor is the economic or marketing strength of the acquiring company and the probable effect of that strength on the market in which the acquired company operated. For example, if a financial giant acquires a company in an industry composed of small competitors of roughly equal size, a court might infer that competition in the acquired company's market will be affected detrimentally because of that company's heightened economic strength as a result of having a "rich parent." Small competitors would fear to compete vigorously on such matters as price and promotion, and potential competitors would be "scared off." Post-acquisition economic data concerning the actual competitive effects of the acquisition are frequently used in conglomerate acquisition cases.[72]

The standards applied to market-extension acquisitions are similar to these applied to pure conglomerate acquisitions. The likely effect of the imposition of the acquiring company's economic strength on the competitive structure of the geographic market in which the acquired company did business will provide the test of legality. Potential competition, that is, the likelihood that one of the companies would enter the other's market on its own, is another factor. The trend toward concentration in the industry, however, is the factor of paramount importance. To date, market-extension acquisitions have been attacked mostly in those industries in which a wave of acquisitions has changed a traditional pattern of local competition into one of national oligopoly.[73]

Product-extension acquisitions are judged by tests of illegality similar to the tests used to judge pure conglomerate and market extension acquisitions. The economic strength of the acquiring company, the effects on competition in the market of the acquired company, and barriers to entry are all significant factors.[74]

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[72] *See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1962). United States v. DuPont & Co., 353 U.S. 586 (1957); United States v. Int'l Tel. & Tel. Corp., 324 F. Supp. 19 (D. Conn. 1970).

[73] *See, e.g.*, United States v. Marine Bancorp., Inc., 418 U.S. 602 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

[74] *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); Kennecot Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

## G. *Defenses*

### 1. Failing Company

If an acquisition would otherwise violate Section 7 of the Clayton Act, it may nevertheless be held valid if it can be shown that:

(1) the resources of the acquired company are "so depleted and the prospect of rehabilitation so remote that it faced the grave possibility of business failure";[75] and

(2) the acquiring company was the only available purchaser after the acquired firm made bona fide efforts to seek alternative purchasers.[76] As to this second requirement, in 1977 the then Assistant Attorney General in charge of the Justice Department's Antitrust Division stated:

> While there may be room for disagreement regarding the nature of the showing that must be made to carry the burden of the second prong of the failing company doctrine, all too often counsel simply ignore this requirement altogether, or assert that on the date of consummation, no other purchaser had an interest, offering as proof of the fact that no one sought to buy after the merger agreement in question was publicly announced. This simply does not satisfy the requirement of clear and convincing proof of a bona fide attempt to find a less anticompetitive purchaser.[77]

### 2. Depleted Resources

If the acquired company's resources are so depleted that its future is dim, its acquisition may not be anticompetitive, because the company has ceased to be a competitive factor in the market. Thus, in this special type of situation, even though the requirements of the failing company defense cannot be met, the acquisition may be deemed to be not anticompetitive.[78]

### 3. Countervailing Power

*In dicta* the Supreme Court has stated that in some cases an acquisition might be upheld if it enables two small companies "to compete more effectively with larger corporations dominating the relevant market."[79] However,

[75]International Shoe Co. v. FTC, 280 U.S. 291 (1930).

[76]Citizen Publishing Co. v. United States, 394 U.S. 131, 138 (1969); *see* United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 983 (5th Cir. 1977). For a recent analysis of this defense see testimony of Asst. Attorney General John H. Shenefield on the Failing Company Defense before the *Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Judiciary Comm.* 96th Cong., 1st Sess. (July 19, 1979).

[77]Address by Donald I. Baker, Government Litigation Under Section 7: The Old Merger Guidelines and the New Antitrust Majority, 16-17, (Feb. 24, 1977). In a controversial June 1978 decision the Justice Department consented to the merger of LTV Corporation and Lykes Corporation on the basis that Lykes was a "failing company." Dept of Justice Press Release (June 21, 1978), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,381. *See* 869 Antitrust [ Trade Reg. Rep. (BNA) at A-21 (June 22, 1978). *See also,* Lancaster Colony Corp., 3 Trade Reg. Rep. (CCH) ¶ 21,538 (1979).

[78]United States v. General Dynamics, 415 U.S. 486, 506-08 (1974).

[79]Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).

it appears that this defense is inapplicable if the larger firm is in another market or if the relevant market is already concentrated.[80]

4. Economic Benefits

The possible economic or social benefits of an acquisition cannot be used as a defense to an anticompetitive merger.[81] However, special legislation permits the courts to weigh the "convenience and needs of the community" when evaluating bank mergers.[82]

5. Foreign Sovereign Compulsion

If the acquisition was the result of compulsion by a foreign sovereign, the victim of such compulsion may have a defense to a suit against him under United States antitrust laws. No sovereign compulsion cases have yet arisen in the context of an acquisition. However, the principles analyzed in the relevant cases could be applicable to acquisitions.[83]

## II. **Enforcement**

The United States Department of Justice may challenge acquisitions under Sections 1 or 2 of the Sherman Act as well as under Section 7 of the Clayton Act. The FTC may also challenge an acquisition under Section 7 of the Clayton Act. In addition, the Commission is the exclusive enforcer of Section 5 of the FTC Act.

It should be remembered that private parties may challenge acquisitions under the Sherman and Clayton Acts. These private parties may seek injunctive relief[84] and treble damages.[85]

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[80]United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370-71 (1963); Elco Corp. v. Microdot, Inc., 360 F. Supp. 741, 751 (D. Del. 1973).

[81]United States v. Philadelphia Nat'l Bank, 374 U.S. at 371.

[82]Bank Merger Act, 12 U.S.C. § 1828 (c) (1976); United States v. Marine Bancorp Inc., 418 U.S. 602 (1974).

[83]Interamerican Refining Corp. v. Texaco Maracaibo Inc., 307 F. Supp. 1291 (D. Del. 1970). *See also* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1324 (D. Conn. 1977). In the Justice Department's Antitrust Guide, *supra* note 36, the Department takes the position that the foreign sovereign compulsion defense: (1) does not apply to an act inside the United States; (2) does not apply unless the act is one of a "truly sovereign entity acting within the scope of its powers under the law of its nationality;" (3) does not apply to "commercial" acts of sovereigns; and (4) does not apply unless "the company is being reasonable in doing what it felt it had to do." For a criticism of this position *see* Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations,* 11 Cornell Int'l L. J. 215, 248-52 (1978).

[84]Clayton Act §16, 15 U.S.C. § 26 (1976).

[85]Clayton Act §4, 15 U.S.C. § 15 (1976). In order to recover treble damages for violating Section 7 of the Clayton Act the plaintiff must prove an "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

## A. *Department of Justice Merger Guidelines*

The Department of Justice has issued guidelines detailing the standards applied by the Department in determining whether to challenge an acquisition.[86] It is important to note that these statements are merely "guidelines" and are not binding on the Justice Department or on the courts. As one court has stated:

> The purpose of the Guidelines is "to insure that the business community, the legal profession and other interested persons are informed of the Department's policy of enforcing Section 7 of the Clayton Act." However, they are in no way binding on the Department in a particular case and the Department is entitled to evaluate each case on the basis of its own facts and the varied factors that must be taken into consideration. Indeed, the Department has available a business review procedure which, as the Guidelines point out, "makes available statements of the Department's present enforcement intentions with regard to particular proposed mergers or acquisitions."[87]

## B. *FTC Industry Guidelines*

The FTC has issued three formal statements of enforcement policy pertaining to particular industries. The present validity of some of these statements in this rapidly changing area of the law is questionable because of their age.[88]

## C. *Notification Requirements*

### 1. HART-SCOTT-RODINO ACT

In most cases there is no requirement that advance notification of intended acquisitions be given to the Department of Justice or to the FTC. However, in 1976 Congress added a new section to the Clayton Act requiring that parties to certain large acquisitions report their plans to the FTC and to the Antitrust Division and wait thirty to fifty days (with a shorter fifteen to twenty-five day period allowed for *cash* tender offers) while the antitrust agencies evaluate the data and, if they so desire, seek an injunction to stop consummation of the acquisition.[89]

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should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[86] *See* note 45 *supra.*

[87] United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969), *aff'd mem.*, 401 U.S. 986 (1971).

[88] Vertical mergers in the cement industry, 1 TRADE REG. REP. (CCH) ¶ 4520 (Released Jan. 17, 1967); Mergers in the food distribution industries, 1 TRADE REG. REP. (CCH) ¶ 4525 (Released Jan. 17, 1967); Mergers in the dairy industry, 1 TRADE REG. REP. (CCH) ¶ 4532 (Released July 3, 1973). The FTC has announced that firms covered by the dairy industry guidelines must file the special form relating to dairy operations in addition to the Hart-Scott-Rodino premerger notification form. 43 Fed. Reg. 28,046 (1978).

[89] The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (adding § 7A to the Clayton Act). For an analysis of this new statute, *see* Remarks of Malcolm R. Pfunder, Asst. Director, FTC Bureau of Competition, Premerger Notification After One Year (Aug. 14, 1979); Kintner, Griffin & Goldstein, *The Hart-Scott-Rodino Antitrust Improvements Act: An Analysis,* 46 GEO. WASH. L. REV. 1 (1977).

The amendment expressly provides that the enforcement agencies' failure to challenge an acquisition during the waiting period does not stop them from subsequently challenging the acquisition.[90]

This new provision does not change the substantive standards for determining the legality of an acquisition, nor does it alter the Government's burden of proof for obtaining a preliminary injunction delaying consummation of an acquisition. The section applies to any acquisition consummated after September 4, 1978.[91]

2. PRIOR JUDGMENTS OR CONSENT DECREES

A ban or restriction on future acquisitions is a common form of ancillary relief in antitrust cases. Therefore, it is essential that any judgments or consent decrees entered into by either party to the transaction be examined to determine whether the party is required to notify or to obtain the permission of a court, the FTC, or the Justice Department before consummation of an acquisition.[92] If there is such a provision, the terms of the judgment will dictate the procedure to be followed.

D. *Advance Clearance Procedures*

Both the Justice Department and the FTC have procedures for obtaining advance clearance for contemplated business activities.

1. DEPARTMENT OF JUSTICE BUSINESS REVIEW PROCEDURE

In response to a written request accompanied by all relevant data the Antitrust Division may

(1) state its present enforcement intentions with respect to the proposed business conduct,
(2) decline to pass on the request, or
(3) take such action as it considers appropriate.[93] The Department reserves the right to bring an action even after issuing a favorable business review letter.[94]

Thirty days after the Business Review Letter is issued, the letter requesting the Review, the information supplied to support it, and the Division's letter in response are indexed and placed in a file available to the public upon request. The party requesting a Business Review Letter may request nondis-

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[90]Clayton Act § 7A(i)(1).

[91]The implementing rules are at 16 C.F.R. §§ 801-803 (1979). Additional sources of information are the Statement of Basis and Purpose for the rules, 43 Fed. Reg. 33,450 (1978) and the FTC PREMERGER NOTIFICATION COMPLIANCE GUIDE. The latter publication is available from the FTC by writing to: Public Reference Branch, Room 130, FTC, Washington, D.C. 20580. *See also* 44 Fed. Reg. 47099-100 (Aug. 10, 1979) (Proposed change in rules *re* minimum dollar value exemptions).

[92]*See, e.g.*, United States v. ITT Continental Baking Co., 420 U.S. 223 (1975); United States v. Swift & Co., 1969 Trade Cas. ¶ 72,701 (N.D. Ill. 1969).

[93]The procedure may be found in 28 C.F.R. § 50.6 (1979).

[94]*See, e.g.*, United States v. Grinnell Corp., 30 F.R.D. 358, 363 (D.R.I. 1962).

closure of the information and such a request will be honored if certain criteria in the regulation justifying nondisclosure are met.[95]

2. FTC Advisory Opinions

The FTC has a procedure for obtaining nonbinding advisory opinions[96] which is generally similar to the above described procedure of the Justice Department. Requests for advice and supporting material will be placed in the public record unless a confidentiality request is filed and the FTC agrees to honor it.[97]

3. Limited Conclusiveness of Single-Agency Findings

It should be remembered that a clearance by one agency does not prevent the other agency from challenging the acquisition. For example, in 1970 Nestle received informal advice from the Justice Department that it would not challenge Nestle's purchase of a controlling interest in Libby, McNeil and Libby. Nevertheless, in November 1972 the FTC announced that it would conduct an investigation of the acquisition. More than two years later the FTC closed its investigation on the ground that the acquisition was a permissible "toehold" acquisition.[98] However, after Nestle acquired Stouffer Corporation the FTC did issue a complaint.[99]

It also should be remembered that enforcement agencies usually take a very conservative approach when they are requested to render an opinion that will be made public. Moreover, information supplied to the enforcement agencies during the course of an attempt to obtain advance clearance may be used later against the supplier of the information by the agencies if the agencies refuse to clear a transaction and that transaction is later consummated.

The FTC's explanatory comments relating to the implementing rules for the premerger notification amendment make it clear that the grant or pendency of a Business Review Letter or Advisory Opinion does not alter the obligations imposed by the premerger amendment.[100]

## III. Leading Relevant Cases

Set forth below, in chronological order, are brief descriptions of three important reported cases involving acquisitions by aliens of American companies. Cases involving similar acquisitions that were settled by consent de-

[95] Comegys, *Business Reviews by the Antitrust Division,* Conference Board Record, March, 1974, at 22.

[96] *See, e.g.,* Golden Grain Macaroni Co., [1970-1973 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 19,521, at 21,587 (1971) (suit filed after favorable advisory opinion issued).

[97] 16 C.F.R. §§ 1.1-1.4 (1979).

[98] *See* Wall St. J., June 14, 1974, at 1, col. 6.

[99] Nestle Alimentana, S.A. [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 20,808 (1975). Note that both Libby and Stouffer were involved in the production of frozen foods.

[100] 43 Fed. Reg. 33,505 (1978).

crees[101] and those involving acquisitions of American companies by the American subsidiaries of foreign firms may also be of interest.[102]

A. *Copperweld/Imetal*

Imetal, a large French holding company in the mining and mineral processing industries, made a cash tender offer for the stock of Copperweld, Incorporated, an American corporation.[103] Copperweld manufactures specialty metal products including alloy steel, tubing and bimetallic products. It sought an injunction preventing consummation of the acquisition on several grounds, including alleged violations of United States antitrust law.

Copperweld alleged that it was a customer of Imetal for certain raw materials and that its acquisition by Imetal would capture it as a customer and would foreclose its purchase of other supplies from other companies. The court rejected this contention because there was no evidence that Imetal intended to force Copperweld to purchase supplies from it or its affiliates. Moreover, because Copperweld's shares of the relevent supply markets were comparatively small, any foreclosure would be *de minimis*. The court also stated that there was insufficient evidence to support Copperweld's assertion that Imetal was a "most likely potential entrant" into the relevant market.

The court denied Copperweld's motion for a preliminary injunction.[104]

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[101]*See* United States v. Alcan Aluminium Ltd., 4 TRADE REG. REP. (CCH) ¶ 45,064 (D.N.J. 1964), 1965 Trade Cas. ¶ 71,366 (D.N.J. 1965) (refusal to grant temporary injunction); 1966 Trade Cas. ¶ 71,895 (D.N.J. 1966) (consent decree); 1968 Trade Cas. ¶ 72,631 (D.N.J. 1968) (modified consent decree); United States v. Standard Oil Co., 4 TRADE REG. REP. (CCH) ¶ 45,069 (N.D. Ohio 1969), 1970 Trade Cas. ¶ 72,988 (N.D. Ohio 1970) (consent decree); United States v. CIBA Corp., 4 TRADE REG. REP. (CCH) ¶ 45,070 (S.D.N.Y. 1970), 1970 Trade Cas. ¶¶ 73,269, at 73,319 (S.D.N.Y. 1970) (consent decrees); *In re* Imperial Chemical Indus., Ltd., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 19,914, 19,965, 20,444 (1972); Holderbank Financiere Glaris, S.A., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,000 (1972). [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,229 (1973) (consent decree); United States v. International Nickel Co. of Canada, 4 TRADE REG. REP. (CCH) ¶ 45,076 (E.D. Pa. 1976), 1978-1 Trade Cas. ¶ 61,869 (E.D. Pa. 1978) (consent decree); *In re* Nestle Alimentana S.A., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,808 (1975) (complaint) 3 TRADE REG. REP. (CCH) ¶ 21,560 (consent decree); United States v. British Columbia Forest Prods., Ltd., 4 TRADE REG. REP. (CCH) ¶ 45,078 (D. Minn. 1978) (complaint).

[102]*See e.g., In re* Rhinechem Corp., 3 TRADE REG. REP. (CCH) ¶ 21,535 (1978) (Rinechem is a wholly owned subsidiary of Bayer, A.G.) (proposed acquisition abandoned after complaint filed by the FTC); *In re* BIC Pen Corp., 3 TRADE REG. REP. (CCH) ¶¶ 21,267, 21,273 (FTC (1977) (BIC Corp. is a subsidiary of BIC, S.A.) (proposed acquisition abandoned after complaint filed by the FTC); Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964 (5th Cir. 1977) (acquisitions by Volkswagen's American subsidiary); United States v. Alcan Aluminium Ltd., 4 TRADE REG. REP. (CCH) ¶ 45,077 (S.D.N.Y. 1977) (Alcan Corp. is a wholly owned subsidiary of Alcan Ltd.) (proposed acquisition abandoned after complaint filed by Justice Department); United States v. Asiatic Petroleum Corp., 4 TRADE REG. REP. (CCH) ¶ 45,070 (D. Mass. 1970), 1971 Trade Cas. ¶ 73,689 (D. Mass. 1971) (consent decree) (Asiatic Petroleum is a subsidiary of Royal Dutch/Shell).

[103]Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975).

[104]For a similar case see Texasgulf Inc. v. Canadian Dev. Corp., 366 F. Supp. 374 (S.D. Tex. 1973).

B. *BOC/Airco*

In May 1977, the Court of Appeals for the Second Circuit[105] set aside a 1975 FTC decision[106] declaring the acquisition of Airco, Incorporated, an American company, by BOC International, Limited. (BOC), a British company, to be violative of Section 7 of the Clayton Act. The British Government filed a brief with the court as *amicus curiae* urging that the FTC's order be set aside. In addition, the Commission of the European Communities filed an *aide memoire* with the court opposing the FTC's decision.

BOC is the world's second largest producer of industrial gases. It had never produced or sold industrial gases in the United States. Airco was the third largest producer of industrial gases in the United States with about sixteen percent of the market. The top two producers in the United States had market shares of twenty-six percent and eighteen percent. In December 1973 BOC acquired, via a tender offer, a controlling interest (thirty-five percent) in Airco.

The FTC had based its decision on the "actual potential entrant" branch of the potential competition theory. According to the FTC, the acquisition of a large firm in an oligopolistic market may substantially lessen competition, if, but for the acquisition, the acquiring firm at some future time would probably have entered the market *de novo* or via a "toehold" acquisition.

The Court of Appeals noted that this "actual potential entrant" theory "lies on the frontiers of antitrust law."[107] However, the court did not reach the issue of the theory's basic validity because the record failed to establish a fundamental precondition to application of the theory. The FTC did not seek a review of this decision by the United States Supreme Court.

C. *SKF/Tyson*

AB-SKF, a Swedish corporation and the world's largest producer of bearings, acquired several foreign bearings companies which were alleged to be actual or potential suppliers of ball bearings in the United States. SKF Industries, Incorporated, the American subsidiary of the Swedish firm and the third ranking producer in the United States, acquired two major United States bearings manufacturers, Tyson and Nice. SKF also entered into an agreement with Federal-Mogul Corporation (F-M), the fourth ranking producer in the United States, under the terms of which SKF sold bearings to F-M which then sold to SKF's former customers.

The FTC issued a complaint alleging that the various acquisitions and agreements by AB-SKF and its American subsidiary constituted an unfair method of competition in violation of Section 5 of the FTC Act and would

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[105]BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977).
[106][1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,063 (1975).
[107]BOC Int'l Ltd. v. F.T.C., 557 F.2d at 25.

substantially lessen competition or tend to create a monopoly in the manufacture of ball bearings throughout the United States in violation of Section 7 of the Clayton Act.[108]

In May 1978, the administrative law judge issued an initial decision holding that SKF and Federal-Mogul had conspired to allocate ball bearing markets. He also held that two of the challenged acquisitions had been cleared by the FTC before their consummation and there was no evidence that the FTC's decisions had been erroneous. As to other foreign acquisitions by AB-SKF, the judge held that the FTC lacked legislative jurisdiction because there was no proof that those acquisitions had anticompetitive effects in the United States.

> There is no evidence that any of the companies acquired by AB-SKF were perceived as potential entrants into the United States by anyone, or that their prior existence (independent of AB-SKF) affected the American bearings market, or that their acquisition insulated or entrenched the competitive position of SKF or F-M in any United States bearing market in any way whatsoever. . . .[109]

On appeal the Commission affirmed the initial decision of the ALJ.[110] With respect to the staff's challenge of AB-SKF's foreign acquisitions on the ground that there were part of an overall scheme to insulate SKF from foreign competition, the Commission stated:

> [T]he theory of the complaint, while imaginative, might be more convincing had SKF, which allegedly was to be insulated from foreign competition, held a more dominant position in the U.S. market. The prospect of a foreign parent systematically acquiring foreign potential entrants in order to protect its subsidiary's monopoly profits in the U.S. market is rational only if that subsidiary has substantial domestic market power. . . .
>
> More importantly, no satisfactory competitive nexus has been shown by complaint counsel between the AB-SKF acquisitions and either the Tyson or Nice acquisitions. The record simply fails to reveal any linkage or special market factors connecting these widely scattered events from which a reasonable inference of anticompetitive purpose or effect could be drawn. Each of the acquisitions, when analyzed separately, exhibits few characteristics suggesting any significant competitive impact in the U.S. market.[111]

## Conclusion

A review of the leading cases involving acquisitions by aliens in the United States reveals that there is no discrimination in the enforcement of United States antitrust law against such acquisitions. Thus, the conclusion of the Commerce Department's 1976 study of foreign investment that "there is no evidence that the antitrust laws have had a restraining effect on foreign direct

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[108] SKF Industries, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,961 (1975).
[109] 3 TRADE REG. REP. (CCH) ¶ 21,508 (1978).
[110] 3 TRADE REG. REP. (CCH) ¶ 21,595 (1979).
[111] *Id.* at 21,726.

investment in the United States" [112] may be correct. However, it is also appropriate to note that there is no special consideration given to the problems inherent in international acquisitions. The flexibility of an "international rule of reason" offers hope that in the future all factors relevant to a realistic evaluation of these acquisitions will be considered, both by courts and by enforcement agencies.

[112] 1 U.S. DEPT. OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 144 (1976).