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## 1964 Developments in the Application of Section Seven of the Clayton Act to Horizontal Acquisitions

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tional devices of acceleration, excision, separable trusts] will be abandoned under the amended rule, to the extent it may be applicable."<sup>106</sup> In view of the fact that the courts will still be confronted with trusts which are governed by the law in effect in 1958, prior to any amendments, it will be some time before these devices will be abandoned—if ever they are. There is no reason to suppose that the courts will be eager to construct an entirely new framework within which these trusts will be viewed. One case has already voiced this opinion;<sup>107</sup> it is to be expected that others will follow.

## 1964 DEVELOPMENTS IN THE APPLICATION OF SECTION SEVEN OF THE CLAYTON ACT TO HORIZONTAL ACQUISITIONS

### I. INTRODUCTION

Section 7 of the Clayton Act,<sup>1</sup> now fifty years old, was intended by Congress to supplement Section 1 of the Sherman Act<sup>2</sup> by suppressing the trend toward concentration of corporate power in many industries.<sup>3</sup> The section, however, fell short of its intended purpose because it had application only to corporate acquisitions by stock purchase.<sup>4</sup> Moreover, the effectiveness of the section was limited by a rather narrow construction in the courts.<sup>5</sup> Thus, the primary antimerger weapon of the Justice Department again became the Sherman Act. However, *United States v. Columbia Steel Co.*,<sup>6</sup> decided in 1948, was understood

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106. N.Y. Leg. Doc. No. 65(G), p. 44 (1960).

107. *Matter of Pendleton*, 41 Misc. 2d 831, 246 N.Y.S.2d 531 (Surr. Ct. 1964).

1. 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

2. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

3. S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950). Judge Learned Hand described the philosophy behind section 7 as follows: "Throughout the history of . . . [the antitrust statutes] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

4. The relevant part of the original § 7 is as follows: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914).

5. See *Pennsylvania R.R. v. ICC*, 66 F.2d 37 (3d Cir. 1933), aff'd per curiam by an equally divided court, 291 U.S. 651 (1934); *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 656 (3d Cir. 1931); *United States v. Republic Steel Corp.*, 11 F. Supp. 117 (N.D. Ohio 1935); cf., *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

6. 334 U.S. 495 (1948).

to substantially limit the utility of that weapon.<sup>7</sup> It was against this background that the Celler-Kefauver Amendment<sup>8</sup> to section 7 was enacted in 1950. As amended, the heart of the section read as follows:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, 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.<sup>9</sup>

During the eleven years following, court decisions provided relatively little insight as to how far section 7 would reach. *United States v. E. I. du Pont de Nemours & Co. (Du Pont-General Motors)*,<sup>10</sup> holding that the effect of an acquisition was to be determined at the time of the trial rather than at the time of the acquisition, had been handed down in 1957, but that decision was based on section 7 as it was prior to amendment. There were only two decisions<sup>11</sup> by the Supreme Court based upon the amended section, and neither of them required a thorough analysis of the statute.<sup>12</sup>

It was in the 1962 decision of *Brown Shoe Co. v. United States*<sup>13</sup> that the Supreme Court first provided a thorough analysis of section 7. This case made it clear that there is no specific test which has universal applicability in merger cases. Each acquisition must be realistically viewed in its own particular setting.<sup>14</sup>

Following *Brown Shoe*, several district court judges applied their understanding of that case to horizontal acquisition cases before them and in each case found for the defendant.<sup>15</sup> Four of these cases were appealed and, during its 1964 spring session, the Supreme Court reversed all of them. It is to these decisions, and their implications in view of *Brown Shoe*, that this comment is

7. Att'y. Gen. Nat'l Comm. Antitrust Rep. 117 (1955).

8. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

9. *Ibid.*

10. 353 U.S. 586 (1957).

11. *Jerrold Electronics Corp. v. United States*, 365 U.S. 567 (1961), affirming per curiam 187 F. Supp. 545 (E.D. Pa. 1960); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

12. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 311 n.18 (1962).

13. 370 U.S. 294 (1962).

14. *Id.* at 320-22.

15. *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), rev'd, 378 U.S. 441 (1964); *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963), rev'd, 378 U.S. 158 (1964); *United States v. Lever Bros.*, 216 F. Supp. 837 (S.D.N.Y. 1963); *United States v. Bliss & Laughlin, Inc.*, 1963 Trade Cas. 77906 (S.D. Cal. 1963); *United States v. Aluminum Co. of America*, 214 F. Supp. 501 (N.D.N.Y. 1963), rev'd, 377 U.S. 271 (1964); *United States v. El Paso Natural Gas Co.*, 1962 Trade Cas. 77289 (D. Utah 1962), rev'd, 376 U.S. 651 (1964). Of the six, the Government chose not to appeal *United States v. Lever Bros.*, supra, and *United States v. Bliss & Laughlin, Inc.*, supra.

addressed. Although the usual procedure for a section 7 case is to determine first the relevant market, and then to ascertain the probable effect of the acquisition in question upon that market,<sup>16</sup> these problems will be treated here in inverse order for ease of presentation.

## II. EFFECT OF THE ACQUISITION

### A. Existing Competition

The general test for determining the section 7 legality of any given acquisition is whether or not it "may be substantially to lessen competition or to tend to create a monopoly." Although the broad purpose of the section is quite clear, Congress provided no particular tests or practical guidelines against which an acquisition could be measured.<sup>17</sup> The House Committee Report states that the tests of the present section 7 "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act."<sup>18</sup> This statement apparently had reference to section 2,<sup>19</sup> which uses the same language in reference to price discrimination, and section 3,<sup>20</sup> which relates to exclusive dealing contracts and tying arrangements.<sup>21</sup>

Failing to find congressional assistance for the application of the concept of section 7 to a practical situation, one must turn to the courts for clarification. *Brown Shoe* has been regarded as having established the guide lines for section 7 cases. It has been understood to reject *per se* rules,<sup>22</sup> *i.e.*, rules by which certain mergers would be conclusively presumed to have the requisite adverse effect on competition. The Court said that each merger must be "functionally viewed, in the context of its particular industry."<sup>23</sup> This necessitated an examination of the market "structure, history and probable future."<sup>24</sup> Although market shares were to be the "primary index of market power,"<sup>25</sup> particularly when considering a horizontal merger,<sup>26</sup> other factors, such as the degree of

16. *United States v. Brown Shoe Co.*, 370 U.S. 294, 324, 335 (1962).

17. *Id.* at 320-21.

18. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

19. 38 Stat. 730 (1914), as amended 15 U.S.C. § 13 (Supp. V, 1964).

20. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

21. The Supreme Court has understood the statement to refer at least to § 3. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962), which indicates, however, that the Court understood the statement to pertain primarily to the purpose of the merger. Thus, if it appeared that the merger was intended to foreclose competition, the actual market foreclosure need not be as great to show a violation of § 7 as would be required in the absence of such intent.

22. Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 *Record of N.Y.C.B.A.* 411, 433 (1962); Rahl, *Current Antitrust Developments in the Merger Field*, 8 *Antitrust Bull.* 493, 505-10 (1963).

23. 370 U.S. at 321-22.

24. *Id.* at 322 n.38.

25. *Ibid.*

26. See Rahl, *supra* note 22, at 512. A horizontal merger has been described as a merger between competitors. *Att'y Gen. Nat'l Comm. Antitrust Rep.* 123 n.26 (1955). The United

concentration in the industry, recent tendencies toward domination of the industry, the accessibility of buyers and sellers to each other within the relevant market, and the ease with which a newcomer could enter the market, were regarded as important.<sup>27</sup> The Government's contention that a horizontal merger which resulted in the "elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition"<sup>28</sup> was explicitly rejected.<sup>29</sup>

Recent decisions under section 7 have caused some authorities to call into doubt the empirical approach taught by *Brown Shoe*.<sup>30</sup> It has been suggested that the Court has laid down a *per se* rule,<sup>31</sup> and some of the factors which *Brown Shoe* set forth as having considerable bearing on market power are not even considered. Furthermore, the Court has now given some recognition to the Government's previous argument that a violation occurs whenever the merger withdraws a substantial factor from the competitive situation.<sup>32</sup>

The decisions which are said to have modified *Brown Shoe* began with *United States v. Philadelphia Nat'l Bank*,<sup>33</sup> albeit that decision was in no sense inconsistent with *Brown Shoe*. In the *Philadelphia Bank* case it was held that a proposed merger between the second and third largest banks, out of a total of forty-two, in the Philadelphia area would violate section 7. The resulting bank would have become the largest in the area with 36 per cent of the total bank assets. Not only was the banking industry highly concentrated, but, also, there had been a noticeable trend to even greater concentration.

Mr. Justice Brennan, speaking for the majority, pointed out that it was desirable, when otherwise practical, to dispense with the elaborate proof advocated in *Brown Shoe*. The Court felt that it would not be practical to require such proof in the case before them, however, because, it said, any merger which produces a firm controlling an undue percentage of the market and results in a significant increase in the concentration of firms in that market is so inherently likely to substantially lessen competition that it must be enjoined in the absence of clear evidence to the contrary.<sup>34</sup> Obviously, the Court could

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*States v. Continental Can Co.*, 378 U.S. 441 (1964) and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) decisions, discussed at pp. 281, 289 & p. 381 *infra*, suggest that it would be more accurate to define a horizontal merger as a merger between two corporations which deal at the same market level, e.g., manufacturing, wholesaling or retailing, in products which actually compete for the same consumer demand or which have the potential for so competing.

27. 370 U.S. at 322.

28. Brief for Appellee, p. 131, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

29. Handler, *supra* note 22, at 433.

30. See, e.g., Handler, *Seventeenth Annual Review of Antitrust Developments-1964*, 19 Record of N.Y.C.B.A. 379, 386-88 (1964).

31. See *United States v. Continental Can Co.*, 378 U.S. 441, 476 (1964) (Harlan, J., dissenting).

32. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

33. 374 U.S. 321 (1963).

34. *Id.* at 363.

not specify a minimum percentage figure which would invariably be regarded as undue, but it did state that 30 per cent was surely too much.<sup>35</sup>

Thus, the Court was merely saying that *Philadelphia Bank* was the exception rather than the rule. The case does not suggest a *per se* rule, but it does teach that a *prima facie* case is established by a showing of two factors: an undue proportion of the relevant market and a significant increase in the concentration of competitors.

Although there were some adverse commentaries on *Philadelphia Bank*,<sup>36</sup> most writers agreed that the case was sound insofar as it dealt with the effect of the merger.<sup>37</sup> Then came *United States v. Aluminum Co. of America (Alcoa)*.<sup>38</sup>

In 1958 Alcoa produced 27.8 per cent and Rome Cable Corporation, the acquired competitor, produced 1.3 per cent of the total aluminum conductor output in the country. Rome had been an aggressive competitor and a pioneer in the field of insulated aluminum conductor, a field in which Alcoa had been relatively unsuccessful and one which it allegedly had neither time nor facilities to explore. The industry was regarded as being already oligopolistic and was showing a trend toward further concentration. The major existing competitors had come into being by virtue of government action<sup>39</sup> rather than by voluntary entry into the market. On these facts the Court found that the acquisition would be likely to substantially lessen competition in the United States market for aluminum electrical conductor.<sup>40</sup>

It is rather interesting to note that the Court made only incidental reference to *Brown Shoe*<sup>41</sup> and seized upon language in *Philadelphia Bank*.<sup>42</sup> Although it followed its previous admonition to regard market share as the primary index of market power,<sup>43</sup> it seems that this was done in a very superficial man-

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35. Id. at 364.

36. See, e.g., Note, 77 Harv. L. Rev. 156, 159-61 (1963); 68 Dick. L. Rev. 187, 192 (1964); 18 Rutgers L. Rev. 668, 677 (1964). But see 62 Mich. L. Rev. 990 (1964).

37. The primary source of controversy was over the holding that bank mergers are subject to § 7. The section specifies that no corporation which is subject to the jurisdiction of the Federal Trade Commission shall acquire assets of another corporation where the specified effect is a probable result of the merger. Banks are not subject to the jurisdiction of the FTC. See H.R. Rep. No. 1416, 86th Cong., 2d Sess. 9 (1960); S. Rep. No. 196, 86th Cong., 1st Sess. 1, 2, 5 (1959); Wemple & Cutler, *The Federal Bank Merger Law and the Antitrust Laws*, 16 Bus. Law. 994 (1961); 68 Dick. L. Rev. 187, 189 (1964); 75 Harv. L. Rev. 756, 758 (1962).

38. 377 U.S. 271 (1964).

39. Id. at 279.

40. Id. at 277.

41. *Brown Shoe* was cited for the propriety of establishing submarkets within the framework of the general market, id. at 275, and to emphasize that § 7 was concerned with probabilities rather than mere possibilities. Id. at 280.

42. Id. at 279. The passage states: "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 365 n.42 (1963).

43. *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962).

ner. The 27.8 per cent of the market attributed to Alcoa was a 1958 figure. The district court had placed considerable emphasis upon the fact that Alcoa's share had steadily dropped from 42.8 per cent in 1954 to 23.5 per cent in 1961.<sup>44</sup> These figures clearly show that Alcoa's market power was not accurately represented by the 1958 percentage figure and that a tendency toward domination, an important factor according to *Brown Shoe*, was wholly absent. Furthermore, the Court's adoption of the 1958 figure instead of the 1961 figure suggests a departure from its holding in the *Du Pont-General Motors*<sup>45</sup> decision that effect would be determined at the time of suit and not at the time of acquisition. Apparently, however, the Court had no intention of modifying the *Du Pont-General Motors* holding as evidenced by a reference to it in a decision<sup>46</sup> which was to follow *Alcoa*.

Another factor which *Brown Shoe* regarded as significant was the ease with which newcomers could enter the market. The Court in *Alcoa* touched upon this point in saying that it had been only through federal intervention that new competitors had come into being, not from the usual competitive forces.<sup>47</sup> The Court apparently was referring to the production of aluminum ingot instead of the production of aluminum electrical conductor.<sup>48</sup> The district court had thoroughly treated this aspect of the case and had found that, while the number of manufacturers of bare aluminum conductor had remained at 12 since 1950, the number of producers of insulated aluminum conductor had increased from 4 to 29 in the decade preceding suit.<sup>49</sup>

The tendency of the industry to greater concentration was perhaps not as real as the Court thought. The Court's support for this finding is found in a footnote which explains that, other than Alcoa's acquisition of Rome, there had been four acquisitions since 1957.<sup>50</sup> Significantly, two of the four occurred *after* the Government had commenced suit against Alcoa and one of them took place after the district court decision. It becomes rather evident that Alcoa was being judged upon events which occurred subsequent to the bringing of the suit.<sup>51</sup>

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44. *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 507 (N.D.N.Y. 1963).

45. 353 U.S. 586 (1957).

46. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 153, 168 (1964). The Court said that since the effect of an acquisition is measured at the time of trial, it would be sufficient for purposes of § 7 if the acquired corporation were engaged in commerce at the time of trial.

47. 377 U.S. at 279.

48. *Id.* at 277-78.

49. 214 F. Supp. at 513.

50. 377 U.S. at 279 n.6.

51. There is no indication in either the district court's opinion or the Supreme Court's opinion that Alcoa knew of any negotiations that led to the mergers which occurred after suit was brought.

It is interesting to note that the Court has recently agreed to review a holding that post-acquisition evidence may be considered in judging the merger's effect. *FTC v. Consolidated Foods Corp.*, 33 U.S.L. Week 1071 (U.S. Nov. 17, 1964).

One of the mergers which had been consummated prior to the Alcoa-Rome merger was Olin Mathieson's acquisition of Southern Electric Corporation, which had been the largest independent manufacturer in the market. Olin Mathieson, however, manufactured *no* aluminum conductor.<sup>52</sup> The Court was careful to point out that Olin Mathieson owned one-half of Ormet, Inc., which is one of the major producers of aluminum ingot and presumably of aluminum conductor as well.<sup>53</sup>

This, of course, reduces to some degree the independence of competitors—an essential condition to meaningful competition.<sup>54</sup> It would appear, however, that competitors which are commonly owned are relatively limited in the extent to which they may legally cooperate.<sup>55</sup> The remaining acquisition which preceded that by Alcoa was Kaiser Aluminum's acquisition of a manufacturing plant from U. S. Rubber. The market share held by U. S. Rubber was only 0.8 per cent.<sup>56</sup>

Although there appears to have been less support than the majority opinion would indicate for the market power attributed to Alcoa and for the finding that there had been a trend toward further concentration, the case seems to indicate that section 7 is violated whenever the leader in a concentrated and concentrating industry acquires an aggressive competitor.

The Court did not say whether the 29.1 per cent of the 1958 market that Alcoa and Rome had was an undue proportion, but the *Philadelphia Bank*<sup>57</sup> case suggests that it was. The major factual difference between *Alcoa* and *Philadelphia Bank* lies in the degree of concentration resulting from each of the mergers.<sup>58</sup> Furthermore, the *prima facie* rule of *Philadelphia Bank* seemed to be giving way to a *per se* rule in view of the Court's failure to take into account the mitigating circumstances surrounding Alcoa's acquisition of Rome.<sup>59</sup>

52. 214 F. Supp. at 513.

53. Neither the district court opinion nor the Supreme Court opinion says that Ormet, Inc. is a producer of aluminum conductor.

54. Att'y. Gen. Nat'l Comm. Antitrust Rep. 327 (1955).

55. See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949), aff'd, 341 U.S. 593 (1951).

56. *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 513 (N.D.N.Y. 1963). The two acquisitions which took place after trial was commenced were Reynolds Metals Company's acquisition of John A. Roeblings' Sons Co., which had never had more than 0.1 per cent of the market, and Aluminum, Limited's acquisition of Central Cable Corporation, a large independent producer. Central Cable's share of the market was not given.

57. 374 U.S. at 364.

58. The two largest banks controlled 44% of the business, absent the proposed merger. If the merger had been allowed, the two largest banks would have controlled 59%, an increase of more than 33%. 374 U.S. at 365. In contrast, Alcoa plus Kaiser, the second largest producer, controlled 50% of the market prior to the acquisition of Rome. 377 U.S. at 278. Since Rome had only 1.3% of the market, the 50% figure would be only slightly increased.

59. Alcoa's share of the market had been on a steady decline. 214 F. Supp. at 507, 513. Its return on invested capital had declined from 9.3% in 1950 to 3.7% in 1961. *Id.* at 512. Alcoa was seeking know-how so it could compete more effectively. *Ibid.*



Although *Alcoa* may have suggested a *per se* rule, the most recent decision, *United States v. Continental Can Co.*,<sup>60</sup> seems to dispel that idea. Contrary to one commentator<sup>61</sup> on *Continental Can*, the decision necessarily avoids a *per se* rule.<sup>62</sup> A divestiture suit was brought against Continental Can, a supplier of metal containers, for its acquisition of Hazel-Atlas Company, a supplier of glass containers. The relevant market was the combined glass and metal container industries and all the end uses for which they compete. During the year prior to the merger, Continental Can was the second largest supplier with 21.9 per cent of the market, and Hazel-Atlas was sixth with 3.1 per cent. The metal and glass container industry was highly concentrated, the top three suppliers holding 60 per cent of the market. It was primarily upon this evidence that the Court reversed the district court's grant of a motion for dismissal and remanded the case for further consideration. Mr. Justice Goldberg, concurring, pointed out that the holding of the Court was merely that the Government had established a *prima facie* case which the defendant would have an opportunity to rebut.<sup>63</sup> Mr. Justice Harlan, dissenting, said that the establishment of a presumption was, *in effect*, no different than the creation of a *per se* rule.<sup>64</sup>

When considered together, *Philadelphia Bank*, *Alcoa* and *Continental Can* would appear to form a pattern. They suggest that a *prima facie* case is established when it is shown that one of the leaders in a highly concentrated industry has acquired an active, thriving competitor to produce a firm having a market share with a magnitude of 25 to 30 per cent.

### B. Potential Competition

There were opinions from some quarters that a very real factor in many areas of competition is the awareness of competitors that others are interested in the possibility of entering their market.<sup>65</sup> This awareness of a potential competitor would have a tendency to keep the actual competitors honest. It was, therefore, felt that the Court should give consideration to the effect that such a competitor has in the market. At present, there are two decisions by the Court which rely entirely upon the effect of eliminating a potential competitor. The cases promise to open rather substantial questions in future section 7 cases.

In *United States v. El Paso Natural Gas Co.*,<sup>66</sup> a merger between El Paso and Pacific Northwest Pipeline Corporation, which had been approved by the

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60. 378 U.S. 441 (1964).

61. BNA Antitrust & Trade Reg. Rep., No. 157, B-3 (July 14, 1964).

62. See notes 63 & 64 *infra* and accompanying text.

63. *Id.* at 466 (Goldberg, J., concurring).

64. *Id.* at 476 (Harlan, J., dissenting).

65. Wilcox, Competition and Monopoly in American Industry, TNEC Monograph No. 21, at 7-8 (1940); 11 U.S.L.A.L. Rev. 393, 401-07 (1964).

66. 376 U.S. 651 (1964). The district court wrote no opinion. It dismissed the complaint after trial and adopted verbatim the findings of fact and conclusions of law submitted by counsel for El Paso.

Federal Power Commission,<sup>67</sup> was held to be likely to substantially lessen competition in the production, transportation and sale of natural gas in California. El Paso, the sole out-of-state supplier to the California market, supplied more than 50 per cent of all gas consumed in California in 1956. Northwest had the only other major pipeline west of the Rockies and, although Northwest had never supplied gas to the booming California market, it had on one occasion tried to acquire a supply contract from a dissatisfied consumer of El Paso. El Paso had responded by giving a firm gas supply commitment to that consumer at a handsome price concession. The Court regarded this fact as sufficient to show that Northwest was a "substantial factor in the California market"<sup>68</sup> and that the elimination of this factor transgressed section 7. The Court apparently felt that a primary consideration in El Paso's acquisition of Northwest was its intention to prevent new competition.<sup>69</sup> Findings that Northwest "could not have obtained a contract from the California distributors, could not have received the gas supplies or financing for a pipeline project to California, or could not have put together a project acceptable to the regulatory agencies"<sup>70</sup> were considered irrelevant. The Court said that "unsuccessful bidders are no less competitors than the successful one."<sup>71</sup>

There is a noticeable absence of economic data in the *El Paso* case. A treatment of the degree of competition between El Paso and intrastate suppliers is wholly absent. The case suggests a rule of *per se* illegality for any merger by which a dominant supplier eliminates a potential competitor, who has had a demonstrable effect upon competition, for the purpose of preventing the independent entry of the potential competitor into the market. Little, if any, disagreement can arise over the *El Paso* decision, particularly in view of the unanimity of the Court as to the merits of the case.<sup>72</sup> It is the sequel to *El Paso, United States v. Penn-Olin Chem. Co.*,<sup>73</sup> which has far-reaching implications in view of existing economic establishments.<sup>74</sup>

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67. Following the approval for the merger, the State of California brought suit against the FPC to have the Commission's order set aside. The Supreme Court granted the requested relief saying that the Commission should not have acted until the merger's validity under the Clayton Act had been determined. *California v. FPC*, 369 U.S. 482 (1962).

68. 376 U.S. at 658.

69. See the Court's reference to El Paso in *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964).

70. 376 U.S. at 657-58.

71. *Id.* at 661.

72. Mr. Justice Harlan dissented, although he made it clear that the decision was correctly decided on the merits. He expressed the Court's disappointment in the trial court's failure to write an opinion and suggested that Congress eliminate the dual regulation of public utilities. *Id.* at 663. Finally, he objected to the Court's ordering divestiture rather than remanding the case for appropriate relief in the district court as had been the procedure in the past. *Id.* at 664. See generally Comment, 32 *Fordham L. Rev.* 135 (1963).

73. 378 U.S. 158 (1964).

74. The Penn-Olin decision struck down a joint venture. For an appreciation of the

Penn-Olin was a joint venture corporation formed by Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation to produce and market sodium chlorate in the southeastern part of the United States. Each of the parent corporations, for a number of years, had considered entering the market individually but had not done so because market and cost analyses did not forecast the rate of return desired. The market for sodium chlorate was burgeoning, and both Olin and Pennsalt were financially capable of entering it independently. Both corporations possessed the technological know-how for producing the chemical. Pennsalt had been the major supplier to the western market for a number of years. Although it was found that Pennsalt had not been an *effective* competitor in the southeast,<sup>75</sup> it had supplied some of that market through a sales agency with Olin who had a good working relationship with the paper industry, the primary consumer of sodium chlorate. Olin had never been a producer of sodium chlorate.

The competition in the southeast was highly concentrated, the two leading manufacturers having over 90 per cent of the market. Penn-Olin was the first major competitor to enter this market in a decade and was followed by Pittsburgh Plate Glass, who also promised to be a significant competitor.

The district court found it "impossible to conclude that as a matter of reasonable probability *both* Pennsalt and Olin would have built plants in the southeast if Penn-Olin had not been created."<sup>76</sup> Because it was felt that Penn-Olin would be at least as effective in competition as would either Pennsalt or Olin, the district court concluded that competition was not likely to be substantially lessened by the formation of Penn-Olin. It was accordingly held that the joint venture was not in violation of section 7.

A direct appeal<sup>77</sup> was taken to the Supreme Court where a divided court<sup>78</sup> remanded the case for further consideration. Mr. Justice Clark, speaking for the majority, instructed the district court to determine the probability that *either* Pennsalt or Olin would have built a plant while the other would have remained a significant potential competitor.

The court said that the combination of certain factors present in this case "certainly reaches the *prima facie* stage."<sup>79</sup> The factors mentioned were: (1) the rapidly expanding industry; (2) the high proportion of the national market that existed in the southeast; (3) each of the parent corporations was one of

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significance which joint ventures have in our economy, see Dixon, *Joint Ventures: What Is Their Impact on Competition?*, 7 *Antitrust Bull.* 397 (1962).

75. Pennsalt had been losing \$80,000 per year on the sales to the southeastern market. *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110, 121 (1963).

76. *Id.* at 130.

77. A direct appeal is authorized by 62 Stat. 989 (1948), 15 U.S.C. § 29 (1953).

78. Mr. Justice White dissented but wrote no opinion. Mr. Justice Black concurred with Mr. Justice Douglas' dissent to the decision to remand the case. They would have simply reversed the lower court. Mr. Justice Harlan would have affirmed the decision of the district court but did not elaborate upon his reasons.

79. 378 U.S. at 175.

the few corporations that had the inclination, resources, know-how and good will<sup>80</sup> to enter the market; (4) Olin owned a valuable patent;<sup>81</sup> (5) each of the parent corporations was a consumer of sodium chlorate;<sup>82</sup> (6) a long, sustained interest by each corporation to individually enter the market;<sup>83</sup> and (7) a reasonable profit was available.<sup>84</sup>

Mr. Justice Douglas, with whom Mr. Justice Black joined, voiced his dissent to the remand order. He felt that there was a persuasive analogy between this case and the allocation-of-market cases.<sup>85</sup> The combination would have the effect of limiting and restricting each of the potential competitors from entering the market and competing. Those cases are easily distinguished from *Penn-Olin*. The allocation-of-market cases generally involved a conspiracy among competitors who, taken as a whole, had sufficient market power to insulate a particular product from the ordinary influence of supply and demand. In view of the relative strength of the two leading manufacturers in the southeast, it is absurd to suggest that Penn-Olin had or was likely to have that effect, it having had less than 10 per cent of the market when formed. The share possessed at the time of trial was not indicated.<sup>86</sup>

Secondly, Mr. Justice Douglas seems to have overlooked the matter of intent.

80. *Ibid.* Good will was said to arise from the gratuitous licenses under the patent owned by Olin. Unfortunately the extent to which the good will assisted Olin in selling to the paper industry can not be determined from the decisions. The figures given in the opinion of the district court are obviously inaccurate. For example, it is said that Olin sold a total of only 3,203 tons but sold 3,420 tons to the paper industry. 217 F. Supp. at 121-22. It was known that 84.1% of all sodium chlorate sold in the southeast went to paper manufacturers. *Id.* at 120 n.8. If Olin had greatly exceeded this figure, it would have been evidence that the alleged good will was actual.

81. 378 U.S. at 175. The valuable patent had been made available to paper manufacturers under royalty-free licenses. *Id.* at 162. The record does not disclose that manufacturers were legally bound to purchase sodium chlorate from Olin. The value of the patent, therefore, seemed to exist only in the form of good will.

82. *Id.* at 175. The opinions disclose neither the amount of sodium chlorate consumed by either parent corporation nor whether the consumption occurs in the relevant geographic market. Olin produces sodium chlorite from the chlorate at its Niagara Falls plant and had previously bought approximately 1300 tons per year from Hooker Chemical Co. for this purpose. The trial court noted, however, that the evidence did not show that Olin would now buy from Penn-Olin, and transportation expenses prevented the court from saying that it was probable that Olin would do so.

83. *Ibid.* Each time that the question had been raised, it had been decided that the expected return would not justify the venture. In the absence of some significant change in market conditions this fact speaks loudly for the conclusion that the parent corporations would not individually enter the market.

84. *Ibid.* The court should not say what is a reasonable profit. Whether or not an investment is worthwhile seems to be a matter which is best left with the investor.

85. See, e.g., *United States v. National Lead Co.*, 332 U.S. 319 (1947); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

86. It seems clear that Penn-Olin had less than 28% of the market, however, since that was its share of the production capacity in the southeast. 378 U.S. at 165.

An agreement to allocate markets necessarily speaks of an intention to affect prices and provide non-ancillary restraints upon the free play of competitive forces.<sup>87</sup> On the other hand, mergers and joint ventures provide means by which corporations can more efficiently use their facilities and capabilities and can, therefore, be explained without reference to an anticompetitive intent. Moreover, it is not possible to reconcile the view of Mr. Justice Douglas with the district court's finding that at least one of the parent corporations would not have entered the market had Penn-Olin not been formed.<sup>88</sup>

One significant aspect of *Penn-Olin* is its answer to the previous controversy as to whether joint ventures are within the purview of section 7.<sup>89</sup> The district court had found it unnecessary to decide this point, being of the opinion that, whether or not joint ventures were covered by section 7, the Government had failed to prove that the necessary anticompetitive effect would be a probable result of the venture.<sup>90</sup> When the issue was raised on appeal, the appellees argued that section 7 had no application unless the acquired corporation was engaged in commerce at the time of its acquisition, and that Penn-Olin, being a newly-formed corporation, did not satisfy this condition. The Court dismissed this argument for several reasons, the most important of which seemed to be that to hold otherwise would frustrate the purpose of section 7.<sup>91</sup> The Court indicated that, because the probable economic effects of an acquisition are to be determined in view of the economic factors existing at the time of trial rather than at the time of the acquisition,<sup>92</sup> it would be sufficient for the purposes of section 7 that the acquired corporation be engaged in commerce at the time of trial.<sup>93</sup>

A far more significant development of *Penn-Olin* is the construction which the case implicitly, but necessarily, places upon the words "may be substantially to lessen competition."<sup>94</sup> The Court envisaged four possible competitive situations: (1) that existing prior to the joint venture (two actual competitors and two potential competitors); (2) that which would exist if either Pennsalt or Olin had entered the market and the other had remained as

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87. *United States v. Addyston Pipe & Steel Co.*, 35 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

88. 217 F. Supp. at 130.

89. See generally Dixon, *Joint Ventures: What Is Their Impact on Competition?*, 7 *Antitrust Bull.* 397 (1962); 11 *U.C.L.A.L. Rev.* 393 (1964).

90. 217 F. Supp. at 115.

91. 378 U.S. at 168. Other reasons given by the Court were: (1) the wording of the section and its legislative history; (2) Penn-Olin was organized for the purpose of engaging in commerce; and (3) the effect of the acquisition would be to lessen the likelihood of competition between the parent corporations. *Ibid.* The latter reason would seem to be irrelevant unless the Court was trying to say that the parent corporations were in essence acquiring interests in each other. This argument had been made in the district court by the Government. 217 F. Supp. at 114.

92. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957).

93. 378 U.S. at 168.

94. Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1956). (Emphasis added.)

a potential competitor (three actual competitors and one potential competitor); (3) that in which both Pennsalt and Olin were actual competitors (four actual competitors and no potential competitors); and (4) that in which Penn-Olin participated (three actual competitors and no potential competitors). The Court reluctantly accepted the district court's finding that the third possible situation would probably never exist.<sup>95</sup> Furthermore, the Court admitted that the formation of Penn-Olin had demonstrably *increased* competition.<sup>96</sup> It apparently felt, however, that a greater increase in competition would result under the second possible situation and remanded the case to determine whether such a situation would probably develop in the absence of Penn-Olin. Thus, the Court was not concerned with a "before and after" assessment of the competitive situation, but rather it was concerned with comparing two possible alternatives to the previously existing situation. In effect, *Penn-Olin* says that section 7 prohibits not merely acquisitions which lessen competition, but also those which do not *maximize* competition.

*El Paso* was cited as authority for *Penn-Olin*. It is true that these cases are similar in that the Court recognized that one who had never supplied the market in question could, nevertheless, be a substantial factor in that market. Beyond this the similarity ceases. First, in *Penn-Olin* there was no evidence that the potentiality of either parent's entry into the market was a competitive factor, whereas, in *El Paso* the defendant's effect upon the market had been demonstrated.<sup>97</sup> Secondly, in *El Paso* the challenged merger clearly produced a competitive situation which was worse than had existed before the merger, whereas the creation of Penn-Olin resulted in demonstrably improved competition.<sup>98</sup> In short, *El Paso* does not say, as *Penn-Olin* does, that an acquisition must lead to the best possible of the probable competitive situations.

It may appear that the doctrine of *Penn-Olin* applies only to joint ventures. While it is true that the rationale of that case, insofar as it differs from *El Paso*, can have no application to horizontal mergers,<sup>99</sup> it does introduce a substantial problem into the area of vertical mergers. Any supplier who seeks to acquire one of his customers does so for one of two reasons: he seeks a captive outlet for his product, or he is attracted by the potential profits in the market in which his customer deals. If the former, the acquisition may be properly attacked under section 7 for intentionally foreclosing a market from a com-

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95. 378 U.S. at 175.

96. *Id.* at 174.

97. See text accompanying note 68 *supra*.

98. 378 U.S. at 174.

99. In the usual horizontal merger situation, the merging corporations are already competing. Thus, no problem of potential competition arises. *El Paso* is an exception to the general situation because the merging corporations had not been supplying the same market. However, the situation presented by *El Paso* does not involve a problem of maximization. It requires only a comparison of the instance in which there is one actual competitor and one potential competitor, on the one hand, and the instance in which there is one actual competitor and no potential competitor on the other.

petitor.<sup>100</sup> If the latter, the supplier must be regarded as a potential competitor in his customer's market. Applying the doctrine of *Penn-Olin*, it becomes necessary to determine the probability that the supplier would have entered his customer's market by internal expansion if he could not have acquired the customer corporation. If it is probable that he would have done so and would have been a substantial competitive factor, the acquisition must fail because competition would have been greater had he entered the market by growth from within.<sup>101</sup> *Penn-Olin* goes still further. Even if the supplier's independent entry into its customer's market were not probable, it would be necessary to determine whether he "might have remained at the edge of the market, continually threatening to enter."<sup>102</sup> A finding that the supplier would have remained as a "substantial factor"<sup>103</sup> in the customer's market would lead to a transgression of section 7, whether or not its alleged effect as a potential competitor had been demonstrated in the realities of the market place.

The Court's statement that the impact of a potential competitor "is not 'susceptible of a ready and precise answer'"<sup>104</sup> appears to be somewhat of an understatement. In the absence of concrete evidence that its potentiality as a competitor has had a significant impact, such a determination more closely approaches speculation. It would appear that any joint venture or vertical merger will exist only at the mercies of the Justice Department and the Court so long as *Penn-Olin* remains law.

### III. MARKET DETERMINATION

The determination of the relevant product market or "line of commerce" is "a necessary predicate" to a finding of a violation of section 7,<sup>105</sup> since anticompetitive effects can be measured only within a market framework.<sup>106</sup> The Court has long discounted the argument that only physically identical products with similar prices can be included in the same market.<sup>107</sup> Rather, the test was laid down to include those products having "reasonable interchangeability for the purposes for which . . . [the products] are produced—price, use and qualities considered."<sup>108</sup> Nevertheless, under this concept, the market was not, prior to

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100. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962).

101. The *El Paso* decision would also seem to support this conclusion if the effect of the supplier's threat to enter the market has been demonstrated. See note 58 *supra* and accompanying text.

102. 378 U.S. at 173.

103. *United States v. El Paso Gas Co.*, 376 U.S. 651, 653 (1964).

104. 378 U.S. at 174.

105. *United States v. Brown Shoe Co.*, 370 U.S. 294, 324 & n.1 (1962) (citing *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)).

106. See *Handler & Robinson, A Decade of Administration of the Celler-Kefauver Anti-merger Act*, 61 *Colum. L. Rev.* 629, 643 (1961).

107. *Id.* at 644.

108. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

*Continental Can*,<sup>109</sup> enlarged to encompass certain *interindustry* competition,<sup>110</sup> because it was felt that the products in such a case would not meet the test of interchangeability. This limiting approach in defining "relevant product market" was relied on by the district court in that case. However, as will be seen, it has been considerably modified by the Supreme Court.<sup>111</sup>

The issue of market determination was presented to the Supreme Court in a suit under section 7 attacking Du Pont's stock interest in General Motors.<sup>112</sup> The question was raised whether the doctrine of "reasonable interchangeability," as set down in *United States v. E. I. du Pont de Nemours & Co. (Cellophane)*,<sup>113</sup> decided under the Sherman Act, applied to Clayton Act cases.<sup>114</sup> The contention was that the market in a section 7 proceeding was limited to the products sold by the merging companies and that there was no justification for the inclusion of other competitive products, however close their substitutability.<sup>115</sup> This view had been unsuccessful in the past,<sup>116</sup> but, with a relaxing of the requirement of "interchangeability," it seems to have been adopted by the Court in *Continental Can*, where the relevant products were considered to be only glass and metal containers, the principal products of the merging companies. The Court refused to consider the inclusion of plastic containers as part of the relevant product market adopted for the purposes of this situation.<sup>117</sup> Whether inclusion of plastic will be allowed upon the remand to the district court is not clear.<sup>118</sup>

109. 378 U.S. 441 (1964), reversing 217 F. Supp. 761 (S.D.N.Y. 1963).

110. 351 U.S. at 393. Illustrations of interindustry competition referred to by Mr. Justice Reed in *Cellophane* include copper and aluminum; coal and oil; cotton, wool and synthetic fibres; trucks, automobiles, buses and airplanes; iron, copper and plastic pipe; glass, concrete, brick and asbestos building and insulation materials; and even glass, cans and plastic bottles.

111. See 217 F. Supp. at 780-83.

112. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

113. 351 U.S. 377 (1956).

114. *International Boxing Club, Inc. v. United States*, 358 U.S. 242 (1959) (by implication); *Reynolds Metals Co.*, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations, 1959-1960) ¶ 28533, at 37256, petition to reopen denied, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations, 1959-1960) ¶ 28666, appeal docketed, No. 15646, D.C. Cir., May 10, 1960. See also *United States v. Columbia Pictures Corp.*, Trade Reg. Rep. (1960 Trade Cas.) ¶ 69766 (S.D.N.Y. July 1, 1960).

115. See, e.g., *Brillo Mfg. Co.*, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations, 1956-1957) ¶ 26003, rev'd, 54 F.T.C. 1905 (1958).

116. *Handler & Robinson supra* note 106, at 645.

117. 378 U.S. at 457.

118. From the evidence offered in the district court, the annual sales of plastic container industry could be calculated at about \$36,000,000 as compared to the metal container industry's \$1,380,000,000. Thus, plastic sales were less than 3% by dollar volume. 378 U.S. at 459; 217 F. Supp. at 776. Therefore, even if the Court had found that plastic containers should have been included in the relevant market, the merging companies would not have been substantially different.



In *Brown Shoe*, the Supreme Court introduced the concept of a "submarket,"<sup>119</sup> which had been suggested in an earlier case.<sup>120</sup> Men's, women's and children's shoes were held to be relevant lines of commerce.<sup>121</sup> Thus, to the problem of market determination were added new questions: When is it proper to consider a broad general market in terms of submarkets, and how is the submarket to be determined? The Court suggested examination of several practical indicia: industry and public recognition of the submarket as a separate economic entity; the product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors.<sup>122</sup> This list, which did not purport to be exhaustive, reduced the "peculiar characteristics and uses" test for market determination to one of several relevant factors, no one of which must be satisfied or considered more important than any other.<sup>123</sup>

In *Continental Can* and *Alcoa*, the Court used submarkets to decide the relevant market question. Its methods of arriving at these submarkets and their validity in deciding the competitive effects question in each case will now be discussed.

#### A. *Continental Can*

In *Continental Can*,<sup>124</sup> the Government proposed ten relevant product markets in which the merger would have substantial anticompetitive effects. These were determined chiefly through a consideration of the end uses for which glass and metal compete.<sup>125</sup> The district court found that only three of the suggested relevant product markets—metal containers, glass containers, and metal and glass beer containers—were actual relevant product markets, and that it was not proved that there would be a substantial lessening of competition in any of them.<sup>126</sup>

The district court acknowledged the substantial interindustry competition between glass and metal containers, yet concluded that a relevant product market could not cross industry lines.<sup>127</sup> The court relied on *Cellophane*, decided under the Sherman Act, in holding that the relevant market for antitrust purposes by no means includes all substitutes.

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119. 370 U.S. at 325.

120. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 595 (1957).

121. *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962).

122. *Id.* at 325.

123. Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 *Record of N.Y.C.B.A.* 411, 435 (1962).

124. 217 F. Supp. 761 (S.D.N.Y. 1963).

125. The lines of commerce proposed by the government were (1) containers for the canning industry, (2) containers for the beer industry, (3) containers for the soft drink industry, (4) containers for the toiletries and cosmetics industry, (5) containers for the medicine and health industry, (6) containers for the household and chemical industry, (7) the can industry, (8) the glass container industry, (9) metal closures, and (10) the packaging industry. 217 F. Supp. at 778 n.34.

126. *Id.* at 806.

127. *Id.* at 781.

In *Cellophane*, the Supreme Court stated that the relevant market under the Sherman Act could not include widespread interindustry competition, such as between brick and steel, or wood, cement and stone, since this interindustry competition is not the type intended to be protected by antitrust legislation.<sup>128</sup> Nevertheless, the Court ruled that Du Pont had not violated Section 2 of the Sherman Act by its control of almost 75 percent of United States cellophane production. It designated as the relevant product market "flexible packaging materials," including glassine, waxing paper, sulphite bags, aluminum foil, acetate, pliofilm, polyethylene, Saran and Cry-O-Rap, in which market Du Pont's share was approximately 20 percent.<sup>129</sup> Thus, the Court included within a single relevant line of commerce the interindustry competition between cellophane and functionally related alternates.

One of the problems of the district court in considering competition between glass containers and metal containers, which it found to be "substantial and vigorous,"<sup>130</sup> was whether it should follow the building materials analogy of the *Cellophane* dictum, or follow the holding of *Cellophane* and conclude that glass containers and metal containers are part of the packaging industry, a relevant market proposed by the Government. The district court considered the factors "reasonable interchangeability of use" and "cross-elasticity of demand" and concluded that the dictum in *Cellophane* should be followed.<sup>131</sup>

On direct appeal,<sup>132</sup> the Supreme Court held that "the District Court employed an unduly narrow construction of the 'competition' protected by section 7 and of 'reasonable interchangeability of use or the cross-elasticity of demand' in judging the facts of this case."<sup>133</sup> In arriving at the relevant product market, the Court allowed itself great latitude in considering factors influencing its decision when compared with the district court. For example, it found, in effect, that almost every glass container is a potential substitute for a metal container;<sup>134</sup> that the manufacturers were constantly attempting to make entries into end-uses for which the other material, be it glass or metal, was traditionally used; and that "substantial and vigorous interindustry competition"<sup>135</sup> and "com-

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128. 351 U.S. at 393.

129. *Id.* at 404-05.

130. "Metal can, glass container and plastic container manufacturers were each seeking to enlarge their sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random." 217 F. Supp. at 780-81.

131. *Id.* at 781.

132. 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958).

133. 378 U.S. at 452.

134. "In our view there is and has been a rather general confrontation between metal and glass containers and competition between them for the same end uses which is insistent, continuous, effective and quantitywise very substantial. . . . [E]ach is trying to expand its share of the market at the expense of the other . . . ." *Id.* at 453.

135. *Id.* at 448.

petitive relationships" do exist.<sup>136</sup> Although there may be some end-uses for which glass and metal containers do not and should not compete, the Court found it unnecessary that a complete interindustry overlap be shown in order to arrive at a single line of commerce to test the effect of the merger.<sup>137</sup> The Supreme Court was also aided in its finding of a relevant product market by doing something which the district court would not take upon itself. The Supreme Court adopted and considered a line of commerce which the Justice Department had not suggested. The Court justified its determination of this relevant line because it was coextensive with the two industries which were held to be lines of commerce in the district court,<sup>138</sup> and because it was composed largely, if not entirely, of particular end-use lines asserted by the government. It said: "We see nothing to preclude us from reaching the question of . . . [the relevant market's] *prima facie* existence. . . ."<sup>139</sup>

It might be said that the Court arrived at the existence of a "supermarket," the market of interindustry competition existing between glass containers and metal containers, by reversing the process of submarket determination used in *Brown Shoe*. However, the Court indicated that the relevant market may be considered as a submarket of another broad market defined in terms of uses, which would include plastic, paper, foil and other types of containers along with metal and glass containers.<sup>140</sup>

From this decision, certain conclusions regarding the relevant product market in section 7 cases can be drawn. The competition which the Court will consider meaningful may be between separate industries manufacturing products with similar end-uses. A strict interpretation is not given to the requirements of "interchangeability" and "cross-elasticity." Nor is it necessary that the product market in which the Court finds that competition will be substantially lessened be a product market which has been suggested by the Government.

It should be noted that Mr. Justice Goldberg, concurring, stated that he wished to clarify that, as he understands the decision, the Court did not purport to finally decide the relevant product market. The district court dismissed the complaint at the close of the Government's case and therefore, upon remand, the defendants, it would seem, should be allowed not only to rebut the *prima facie* inference that metal and glass containers may be considered together as a line of commerce, but also to prove that plastic or other containers in fact compete with metal and glass to such an extent that as a matter of "competitive reality" they must be considered as part of the determinative line of commerce.<sup>141</sup> The question not answered is why a concurring opinion is necessary to clarify this point. Does the Supreme Court, by neglecting to state that another

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136. *Id.* at 450.

137. *Id.* at 457.

138. The two industries were the metal can industry and the glass container industry.  
217 F. Supp. at 806.

139. 373 U.S. at 457.

140. *Id.* at 458.

141. *Id.* at 466 (Goldberg, J., concurring).

relevant product market may be proved on remand, wish to imply that it has made a final determination that the product market is the combined glass and metal container industry?

The validity of the Court's reasoning is not questioned, if, in fact, inter-industry competition of this type is to be protected by the Clayton Act. However, the procedure of finding an anticompetitive effect somewhere, and then circumscribing the relevant market around this, is questioned. Since this decision represents a departure from traditional theories, the message which the decision should transmit to corporate counsel is that almost all future mergers must be approached from the point of view that if there is interindustry competition and the merger affects a significant share of the new interindustry relevant market, the merger will be subject to attack.

### B. *Alcoa*

In *Alcoa*, the parties had agreed that the general product market was aluminum and copper conductor and that bare aluminum conductor alone was an appropriate submarket.<sup>142</sup> The Government, however, argued that aluminum conductor (insulated and bare) was a submarket. The district court found that insulated copper conductor was sufficiently competitive with its aluminum counterpart to deny submarket status to insulated aluminum conductor, and therefore, that bare and insulated aluminum conductor could not be a relevant line of commerce where one of the subcategories of that product would not qualify as a line of commerce.<sup>143</sup>

The Supreme Court did not disturb the district court's reasoning, but it concluded that the degree of competition between insulated copper and insulated aluminum was not sufficient to prevent the latter from being regarded as a submarket.<sup>144</sup> Having concluded that insulated aluminum was a relevant market, and noting that the parties had agreed that bare aluminum was a relevant market, the Court found no difficulty in designating aluminum conductor generally as a relevant market.<sup>145</sup>

A determination that insulated aluminum conductor was a relevant submarket was essential to the decision in this case. Several factors suggest that the criteria used to specify submarkets may be far less exacting than those used to determine the general product market. The Court stated that the competition between copper and aluminum was sufficient to justify grouping aluminum and copper conductor (bare or insulated) into a single market. It had been agreed that bare aluminum was sufficiently free from competition that it could be

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142. 214 F. Supp. 501, 509 (N.D.N.Y. 1963).

143. *Id.* at 510. The subcategory referred to was insulated aluminum conductor, which competed with insulated copper conductor.

144. 377 U.S. at 275. The Court looked to *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), and *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) for support of its conclusion.

145. 377 U.S. at 276-77.

regarded as a separate line of commerce.<sup>146</sup> Necessarily then, the primary source of competition between copper and aluminum had to be in the insulated products. Although it was this competition which the Court regarded as sufficient to group copper and aluminum for the general market, the Court found it to be insufficient to prevent the designation of insulated aluminum as a separate market.<sup>147</sup>

In addition to saying that conductor generally and insulated aluminum conductor were relevant markets, the Court recognized that aluminum conductor and bare aluminum conductor were two additional appropriate markets. Assuming that the Court still regards a market as an area of effective competition, it is difficult to understand how all of these markets could be said to exist. It is implicit in a finding that where a given product or group of products constitutes a product market, no substantial competition exists between that market and another product. Thus, one cannot say without qualification that copper and aluminum together constitute a market, and at the same time say that aluminum itself is a product market. The qualification necessary to remove the simultaneous existence of the markets from the realm of the absurd is the designation of the "use market"<sup>148</sup> wherein the product is consumed.

The facts in *Alcoa* present an excellent illustration of what is meant by a "use market." In the conductor field there are two primary areas of use: transmission lines, which carry electricity from the power plants to substations, and distribution lines, which carry electricity from the substations to the consumers. From the fact that bare aluminum accounted for about 95 per cent of the overhead transmission lines installed in 1959,<sup>149</sup> it seems appropriate to say that insofar as overhead transmission lines are concerned, bare aluminum meets no substantial competition and may, therefore, be regarded as an appropriate product line. However, bare aluminum accounted for only 79 per cent of the 1959 installations of overhead distribution lines, bare copper accounting for 21 per cent.<sup>150</sup> It is clear that any product which accounts for over one-fifth of the sales in a given area is a substantial competitor in that area. Therefore, with respect to the overhead distribution line of use, bare aluminum is not an appropriate market. A determination of whether bare aluminum is properly a product market must depend upon its contemplated use.

It is submitted that this example illustrates a general rule: that it is not possible to define a product market without having reference to a particular "use market." If this general rule is accepted, it becomes relatively easy to

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146. 214 F. Supp. at 509.

147. 377 U.S. at 276.

148. The district court recognized this when it refused to find that service drop cable (aluminum and copper) was a line of commerce. The court stated: "If a product line is designated in terms of function, it must include all competitive substitutes accomplishing the same result." 214 F. Supp. at 511.

149. 377 U.S. at 274.

150. *Ibid.*

explain the simultaneous existence of the four markets recognized by the Court in *Alcoa*.<sup>151</sup>

Explaining how it is possible that an aluminum conductor market can coexist with a market comprising aluminum and copper conductor not only puts an end to one problem, but gives rise to another. That is, when combining in one line of commerce both bare and insulated aluminum conductors, the Court has disregarded a consideration of the degree of competition between them and compared each to its copper counterpart, and it is submitted that the Court fell into error in this regard.

The Court purported to justify in two ways its determination that bare and insulated aluminum conductor was a proper submarket. The first attempt was by reference to *Brown Shoe* and *Philadelphia Bank*. In the former it was held proper to break the general market, shoes, into various submarkets.<sup>152</sup> That holding has no bearing upon *Alcoa*. The basis in logic for separating men's shoes from women's shoes is that male consumers give no thought to purchasing a pair of women's shoes merely because the price of one is higher than the other. In contrast, a utility company has a choice between copper and aluminum conductor. If the price of one is too high, the buyer may take the other, and many consumers of conductor do just that.<sup>153</sup>

Neither does *Philadelphia Bank* lend support to *Alcoa*. That case held that commercial banking was a "line of commerce" despite the existence of some competition between banks and other institutions, such as loan associations, because banks enjoy "such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions."<sup>154</sup> In other words, the competition suffered by banks from other institutions was relatively insubstantial. However, the degree of interchangeability of aluminum and copper in the use market in which they compete is too high to support the submarkets created by the Court.

The second method by which the Supreme Court justifies its finding that aluminum conductor is a relevant market is by adding together the relevant market of insulated aluminum conductor and the relevant market of bare aluminum conductor. By reversing the reasoning by which submarkets are formed, the Court arrives at the existence of a "supermarket." However, as Mr. Justice Stewart notes in his dissent, "there is no basis in logic, or in the competitive realities of the conductor industry, for lumping together in one line of com-

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151. The four markets were bare aluminum conductor, aluminum and copper conductor, insulated aluminum conductor, and aluminum conductor (bare and insulated). *Id.* at 276-77.

152. 370 U.S. at 326.

153. In the field of overhead distribution lines, aluminum's share of the total annual installation has increased from 6.5% in 1950 to 77.2% in 1959, at the expense of copper. 377 U.S. at 275.

154. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963).

merce bare and insulated aluminum conductors.<sup>155</sup> Although bare conductor and insulated conductor are both used for distribution lines, the statistics presented show what percentage of its own market each has as compared to the copper counterpart of each.<sup>156</sup> There are no statistics to indicate the degree of competition between the two.

Since the Supreme Court, through the submarkets which it has delineated, has been able to find that the merger of Alcoa and Rome will substantially tend to lessen competition, the decision raises the serious question as to whether a major industrial company can make any acquisition, regardless of size, in its own line of business.

#### IV. CONCLUSION

The recent decisions relating to the application of section 7 to horizontal acquisitions represent a mixed blessing. With respect to the determination of the probable effect of an acquisition, it would seem that the empirical approach of *Brown Shoe* still represents the general rule. No *per se* rule has been established although *Philadelphia Bank*, *Alcoa*, and *Continental Can* suggest that a *prima facie* case is made out when it is shown that one of the leaders in a highly concentrated industry has acquired an active, thriving competitor to produce a firm having a market share of over 25 percent.

*El Paso* and *Penn-Olin* introduce the matter of potential competition. Consideration of this aspect of the overall competitive situation promises to introduce a great deal of uncertainty into the problem of determining the anti-competitive effect of any given acquisition in view of the difficult, if not impossible, task of estimating its effect. This difficulty presently exists with respect to joint ventures, and a logical extension of the rationale of *Penn-Olin* would seem to indicate that this difficulty will probably arise with respect to vertical mergers as well.

Any clarification that the recent cases have made with regard to the question of effect seems to be entirely offset by the manner in which the Court arrives at the relevant market. "Submarkets" and "supermarkets," which have been created, do not seem to necessarily represent areas of effective competition. Submarkets are defined by excluding products which are substitutable and within the same price range. Supermarkets are created by grouping together products which compete for some uses, even though the extent to which they compete in the overall situation is not known. It has been contended herein that submarkets and supermarkets are very real and should be considered provided that reference is had to the "use market," *i.e.*, that body of products which the consumer seriously considers for his particular use, and provided that the anticompetitive effect is determined in light of the extent to which that use market has been and probably would be served by the merging corporations.

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155. 377 U.S. at 286.

156. *Id.* at 274-75.

*Continental Can* teaches that *potential* interchangeability of products should be considered in determining the relevant market. This seems to be a legitimate consideration where, as in *Continental Can*, consumers have traditionally switched back and forth from one product to the other.

Cases which assist the practitioner in giving an opinion upon the probable effect of a merger are obviously of little value if the courts are able to "create" a market which does not conform to the realities of the market place. It is believed that the "urge to merge" will subside until the Court again returns to a realistic approach to the market problem.