ANTICOMPETITIVE PRACTICES IN ANTITRUST LAW

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Abstract

The federal antitrust framework is formed – excepting The Sherman Act (1890) – of The Clayton Act (1914), The Federal Trade Commission Act (1914) and The Hard-Scott-Rodino Act (1976). These Antitrust Laws codify what have become known as „per se" and „rule of reason" violations of the Sherman Act.

According to the Supreme Court´s jurisprudence, a practice is an exclusionary conduct only if it is appreciated as an „unreasonable" restrain, but the Court hasn't explicitly defined this concept. However „reasonableness" inquiry focuses on how a challenge business practice affects competition. There exist two tests for demonstrate the anticompetitive characteristic of a practice: per se test and rule of reason test. Each test helps to identify a „per se" violation or a „rule of reason" violation. The first test is applied to the violations of Section I of the Sherman Act and the second to the rest of them.

Jurisprudence identifies as „per se" violations: price fixing, agreements among competitors to divide markets or allocate costumers, certain tying agreements and group boycotts. Under the application of „per se" test, a violation is treated as being so clearly anticompetitive as to be conclusively "unreasonable" and the plaintiff only has to demonstrate that the practice occurred.

By contrast, „rule of reason" test was developed to analyze all the competitive and anticompetitive effects of the challenged conduct before the determination of „unreasonableness". The "rule of reason" violations are prohibited under the Section II of the Sherman Act.

The extensive background and experience in the U.S. Antitrust Law demonstrated that the classification of a practice as „per se" or „rule of reason" violation wasn't always easy to do. A few horizontal restrains were said to be subject to an intermediate mode of analysis called the „quick-look" which appeared in the XX century.

Keywords: *antitrust framework, Sherman Act, Clayton Act, FTC Act, Celler-Kefauver Act, Hard-Scott-Rodino Act, exclusionary conduct, „per se" violation, „per se" test, „rule of reason" violation, „rule of reason" test, anticompetitive effects, horizontal restrains, „quick-look" analysis.*

Abbreviations: FTC Act – Federal Trade Commission Act

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I. Exclusionary conducts under the U.S. antitrust laws

Preliminary approach

U.S. is the first country in the world to recognize the importance of normal competitive environment, and the U.S. legal system protected the positive effects of competition even before the first law on fair competition was enacted. This is due to the fact that the benefits of competitive environment could be easily identified in the U.S., where small businesses and small farms represented the engine of business activity. In this context, with the view to prevent the development of practices that could result in the prevention, restriction or distortion of competition, the law hold that any behavior was illegal if it could be rated as "*unreasonable*" on the market, and the judges had to determine in each case this particular circumstance[1)].

In 1623, the English Parliament enacted the *Statute of Monopolies*, the first piece of legislation in the world prohibiting development of anticompetitive practices leading to the creation of monopolies and providing victims the opportunity to recover by the institution of a civil action for damages - firstly - treble damages in consequence of violation of this rule and - secondly - double costs[2)].

Following the American Civil War, once the industrialization process occurred and big companies emerged, a concern came to the fore in the US for the so-called "*trust*" (market concentration operations) that allowed large companies to gain control over key industries. Senator John Sherman took as an example the English model and argued that it was necessary to promulgate in U.S. a law prohibiting development of any antitrust practice because[3)]. This situation led to the enactment of the first U.S. antitrust law, called the *Sherman Act*. The text drew upon the *Statute of Monopolies*, and under this form, monopoly in combination with other antitrust practices was declared unlawful. It also granted victims the opportunity to request treble damages, but in contrast with the old British model, they were not granted the right to claim double costs.

Relating to antitrust practices, it's worth mentioning that the *Sherman Act* prohibits development of antitrust practices, though it fails to mention the relevant ones. Therefore, the main animadversion upon this law was that its vocabulary was too ambiguous.

The Sherman law provisions stand for the arteries of legal framework of antitrust law[4)] In U.S., doctrine also showed that this law equaled the starting point in establishing modern competition law worldwide[5)]. The text was created in 1890 as a broad "*charter of fundamental economic rights*". The objective was to promote creation of a fair competitive environment and to remove transactions that could break the much needed balance of an effective competitive market.

The Law is based on the idea that free interaction of competitive forces result in: an efficient assignment of business appeals, lower prices, better quality of products and services offered on the market while creating a favourable environment for preservation of democratic political and social institutions[6]. This approach of the subject matters answers the generally accepted concept according

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1) Sklar, M. J., *The Corporate Reconstruction of American Capitalism, 1980-1916 – The market, The Law and Politics*; University of Cambridge, Cambridge, 2004, p. 86 and the following

2) Baker, D.I., *Revisiting History-What have we learned about private antitrust enforcement that we recommend to others?*, in Loyola Consumer Law Review, EE.UU., 2004, p. 379; article available online on http://luc.edu/law/academics/special/center/antitrust/pdfs/baker.pdf.

3) *„if we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life"* in Anderson, M.C., *Self-regulation and league rules under the Sherman Act*, Capital University Law Review, Florida, 2001; p. 127, article available online on http://culsnet.law.capital.edu/LawReview/BackIssues/30-1/Anderson14.pdf.

4) In this text I shall use the American term "*antitrust*" instead of the common term used in Europe, "business *competition*" - firstly, to reveal the singularity of the American system and, secondly, because in legal literature this term is used in order to make a clear distinction between the American legal system and other competition law systems.

5) Álvarez Zenteno, R., *Una visión de nuestro Derecho de la competencia*, in Revista del Abogado Nº 6, Colegio de Abogados, Chile, 1996, p. 24.

6) For further details, see also case *Northern Pacific Railroad Co vs. United States 356 U.S. 1 (1958).*

to which "*it doesn't matter if you win or lose, it's how you play the game*" and it completely rejects the idea supported by Vince Lombardi that "*winning is not the most important thing, it's the only thing*".

Although the Sherman Act was in U.S. the most important piece of legislation on competition, its vocabulary was vague and poor. Terms such as "*restrain of trade*", "*combination*" or "*monopolize*" whose definitions did not appear in the legal text, created many practical problems, because the courts - that enjoy in the United States absolute freedom to interpret the law - have interpreted the legal text as they thought proper. Consequently, a wide range of court decisions with settlements "for all tastes" was ruled - that far from clarifying the meaning of these terms - aggravated the situation further, because the jurisprudence lines created offered casuistry solutions that very often proved to be contradictory. This situation has led to divergent interpretations of legal text that allowed antitrust law to turn into one of the most politicized laws in the U.S.[7)].

In 1914 *Clayton Act* was enacted, the law collecting jurisprudence creation published in the late nineteenth century and early twentieth century to close gaps in the *Sherman Act.* Thus, the Clayton Act lists various anticompetitive practices, such as: discriminatory prices (Section I), exclusive distribution agreements (Section II), acceptance agreements of additional services (Section III), purchase of shares of companies in competition with the acquiring company (Section VII).

Thus, the new law prohibits - on the one hand - all antitrust practices which include a default increase in the price of products and services paid by consumers and - on the other hand - all practices carried out by economic agents that, given the current conditions, can be regarded as anticompetitive. Clayton Act was created as a law with an economic and industrial objective[8)].

With this law, another step forward was treaded in creating modern antitrust Law, but the vocabulary used has been criticized for referring to competition without explaining what it was and because, compared to the *Sherman Act*, it was far too rich[9)]. Consequently, courts have had to invent criteria so as to ease implementation of the rule.

Finally, the *Clayton Act* stands for a civil provision as it identifies clearly legitimate people to institute civil action, against which persons this action can be exercised and what may be claimed - in the American case, treble damages, litigation costs and attorney's fees.

In 1914, as well, the *Federal Trade Commission Act* was enacted, with the aim of prohibiting the so-called "*unfair or deceptive practices*" and "*unfair methods of competition*". Courts' duty is to interpret these precepts. Normally, it was considered unfair any practice or method fulfilling one of the following conditions: it is contrary to federal antitrust policy[10)], it is considered immoral or oppressive[11)] or causes substantial damage to the consumer[12)].

The legislator did not arbitrarily choose to use precepts that extensive. Its intention was to use *FTC Act* as a complementary tool that, along with the *Sherman Act* and the *Clayton Act*, effectively fight against antitrust practices, especially against those affecting the consumer directly. To that effect, courts noticed that the precepts used in *FTC Act* make it possible to judge as antitrust

7) Neumann, M., *Competition Policy. History, Theory and Practice*; Edward Elgar Publishing, Inc, Massachusetts, 2003, p. 34.

8) See in this respect the standpoint of Judge Breyer in *Entrevista a Stephen Breyer, Juez de la Corte Suprema de EE.UU.*, document available online at http//:www.cepchile.cl/dms/archivo_1529_866/rev80_breyer.pdf: "*Entonces, teníamos jueces que necesitaban criterios, una ley con un objetivo económico y casos en que la Corte parecía haber perdido el rumbo: en una palabra, la oportunidad ideal para que Turner, Areeda y muchos otros que tenían formación en economía trataran de crear estándares a partir de los elementos básicos de la teoría económica, la realidad de la industria y los precedentes judiciales. Los quince tomos de Areeda y Turner cumplieron esa tarea y el derecho actualmente refleja más o menos lo que ellos escribieron en sus tratados. Uno podría decir, ¡Dios mío, qué sistema es éste! A mí me parece que suena exactamente como un sistema de derecho continental…*".

9) *Clayton Act, 15 U. S. C. 12 (1914).*

10) Emerson R.W., *Business Law,* 5th ed., Barron´s Educational Series, Inc., New York, 2009, p. 526.

11) *Case FTC v. Sperry&Hutchinson Trading Stamp Co.; 405 U.S. 233 (1972).*

12) *Case E.I. DuPont de Nemours&Co. v. FTC*; 927 F.2d 128, 136 (1984).

practice any illegal practice that can not be labeled as such following enforcement of *Sherman or Clayton* laws, because the legal text uses very general terms whose interpretation can be extended to a wide variety of conducts[13)].

Also, it's worth mentioning two other antitrust regulations: *Robinson Patman Act* (1936) and *Celler-Kefauver Act* (1950). These rules were especially created in order to protect small businesses of large companies that, due to an appreciable business volume and financial capacities, obtained from providers more advantageous economic conditions, which gave them the opportunity to provide the same products as competitors, but at a much lower price. In this context, small businesses could not keep up on the relevant market, because they lacked the same purchasing power. This situation led to the enactment of the two aforementioned laws, aimed to support preservation of a fair and effective competitive environment [14)].

Celler-Kefauver Act amplifies the scope of Section VII of *Sherman Act*, relating to the business concentrations known in the U.S. as "*joint-venture*"[15], while *Robinson Patman Act* prohibits all providers to carry out any act of discrimination that could lead, directly or indirectly, to altering market competition or creating a monopoly.

Regarding the *Robinson-Patman Act*, it should be mentioned that the courts have interpreted the text in a particular way. It figured out that prohibited antitrust practices may affect competition between competitors ranging at different levels of the economic chain. Case law identified in a progressive way all these levels, as described below.

The first level is that of suppliers'. At this level, the injured party shows that it has suffered damages because the other competing supplier offered the same products at a lower price, which has caused loss of a large number of customers. The second level is that of buyers'. At this level, the injured buyer argues that because its competitor bought the same products at a lower price, it could market the same products at a much lower price. Consequently, a deviation of sales occurs in this case. At the third level there is a bearing upon the competition legal relationship between clients of economic agents of the second level, etc. One of the most common examples in practice is that of price differences[16)].

Hart-Scott-Rodino law is also relevant, as along with the enactment of this law another progress in terms of antitrust law is thereby recorded. The law requires that any business concentration to be notified when standards legally set are violated. For efficient operation of this mechanism of business competition protection, the main internal control bodies were granted the power to investigate, prohibit and/or amend the conditions under which it is claimed achievement of notified concentration.[17)]. Authors Lizana and Pavic highlighted that, "*in 1976, when Hart-Scott-Rodino law came into force, this rule has been described as the most important progress recorded in terms of antitrust since the approval of the Clayton law*". By regulating the process of notification of an business concentration transaction ("*premerger notification*") the system used *a posteriori* for these antitrust conducts underwent substantial amendments[18)]. Earlier, it was not compulsory to bring the concentration transaction to the notice of any antitrust control body. Unless

[13)] ABA Section of Antitrust Law; *FTC practice and procedure manual*, ABA, Illinois, 2007, p. 12.

[14)] Díez Estella, F., Los objetivos del Derecho antitrust, in Gaceta jurídica de la UE y de la Competencia Nº 224, Fundación Ico, Lebrija, 2003, p. 40-41.

[15)] If *Section VII of Clayton Act* prohibits horizontal antitrust agreements exclusively, with the approval of the Celler Kefauver law there are also prohibited along with these ones vertical and conglomerate antitrust agreements (the latter taking place between economic agents that do not operate their business on the same dominant market). For further details, see, Hobst, A.; *Celler-Kefauver Act*, en *Encyclopedia of White-Collar & Corporate Crime*, Sage Publications, Ltd., EE.UU., 2005, p. 147 and the following.

[16)] Section of Antitrust Law; *Proving Antitrust Damages – Legal and Economic Issues*, 2nd Ed., ABA, Illinois, 2010, p. 275 and the following.

[17)] Miller, E.L., *Mergers and acquisitions: a step-by-step legal and practical guide*, Willey & Sons., Inc, Boston, 2008, p. 131.

[18)] Lizana, C., Pavic, L, *Control Preventivo de Fusiones y Adquisiciones frente a la Legislación Antimonopolios*, in *Revista de Derecho*, Vol. 29 – No. 3, Chile, 1990, p. 507 and the following.

this operation inflicted damage upon an individual or a corporation, the injured party was not entitled to institute legal proceedings and, in this case, federal courts analyzed the *pro*- or *anti*-competitive character of the concentration transaction. An *ex-post* control of the transaction was thus carried out. Alongside the enforcement of the *Hart-Scott-Rodino* law, the U.S. judicial system introduces an important novelty - *ex-ante* control of a concentration transaction in breach of legal standards.

The legal framework summarised above is not exhaustive, but illustrative. It should be pointed out that the federal antitrust policy outlines around four rules of substantive law: *Sherman Act (1890), Clayton Act (1914), Federal Trade Commission Act (1914)* and *Hard-Scott-Rodino Act (1976).* Besides these laws also apply the so-called "*specific statutory exceptions*", known as non-mandatory rules under which the federal government authorizes voluntary restriction of competitive competition in certain business sectors. There are also relevant regulations of general interest of the *Department of Justice Antitrust Division* (DOJ) - one of the federal control bodies in the competition area - known as *guidelines*[19)] (equivalent term in the competition field in Romania for *legal documents* emanating from an administrative authority, which can take different forms - *normative legal acts (regulations, instructions or orders*) or *individual legal acts* (*decisions, orders or opinions*). We should not forget the legal rules emanating from each and any federal state, either. Consequently, it's worth pointing out that the U.S. consists of fifty different states, each with its own legal rules. Normally, these are a reproduction of federal laws.

A simple analysis of U.S. Antitrust Law evolution takes out that two guardianship systems were used in judicial practice in order to determine a conduct's *pro*- or *anti*- trust character. The first, called "*per se*", prohibits in absolute terms implementation of specific conducts considered to have antitrust character and the second, known as "*rule of reason*", implies determining a conduct's *pro*- or *anti*- trust character after analyzing current circumstances for each particular case.

Hereinafter, I will try to highlight when and how the two aforementioned systems emerged, "*per se*" prohibited conducts, what conducts are subject to the "*rule of reason*" system and which are the most recent case law changes that took place in the U.S. in the antitrust field.

II. Analysis of antitrust practices

Rom the literal point of view, the first section of the Sherman Act[20)] prohibits any practice meant to restrict free competition ("*every contract in restraint of trade*"), but the Supreme Court

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19) "*Many people considered that legal acts emanating from federal control agencies in the antitrust area are one of the most interesting aspects to be reviewed in U.S. law, as it clearly reflects progressive evolution of legal framework in time. The main advantage of the fact that these internal control bodies were assigned the power to pass regulations relating to antitrust law was to offer the existing legal framework the opportunity to quickly adapt to new business circumstances*". Over the years, federal control bodies have specialized in the field. Thus, the ruling of general administrative decisions applicable to all business concentrations changed into the ruling of specific decisions, such as decisions applicable to horizontal mergers exclusively. For example, "*Herfindahl-Hirschman Index*" (*HHI*) indicates how to calculate the concentration level of market activity and under what terms a transaction is most likely to be prohibited instead of being accepted by DOJ. For further details, see Lizana C., Pavic L, *op. cit.*; p. 519.

20) The Sherman Act preserves the old case law doctrine and, therefore, prohibits "unreasonable" practices affecting free competition: *§ 1 Sherman Act, 15 U.S.C. § 1*, "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court*". It is important to note that any person developing a practice prohibited under this section is guilty of a conduct classified as *felony*. This term is used in the U.S. to define a crime involving a much higher social risk than the so-called "*misdemeanor*". In conclusion, development of a similar practice is judged as "*crime*". In the U.S., any illegal conduct punished by imprisonment not exceeding one year is classified as offense, and any behavior punished by imprisonment exceeding one year is classified as crime. A very

construes the text in the sense that it should apply so as to prohibit only those practices deemed "*unreasonable*", failing to define what should be understood by "*unreasonable practice*". With the view to fill this gap, legal literature interpreted the concept as referring to any practice substantially affecting free competition. This standpoint was accepted by the Supreme Court, which created two rules designed to assess the degree of danger to free competition through the development of any antitrust practice prohibited under the Sherman Act. These methods are: "*per se rule*" and "*rule of reason*"[21)].

Section II of the Sherman Act condemns any person who monopolized or attempted to monopolize any part of the trade or commerce, thus affecting free competition between different federal states or between these and foreign ones[22)]. Sanctions applied to persons violating provisions of section hereby are the same as those applied in Section I. Section II deals with two issues. Firstly, with monopolization, which in spite of literal writing of text that seems to sanction the mere

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similar system was applied over time in European countries, as well, among which France, Italy, Spain, Belgium or Romania.

Case law highlighted how shaded the criterion of implementing this section is, in case of practices worthy of double sanctions: by fine and imprisonment. This is, for example, the case of concerted practices which carry forth a much greater threat to society when compared with unilateral actions. In terms of concerted practices, the Supreme Court set forth that these shall always be punished twice because there is no doubt that they entail more serious social danger.

Section I of the Sherman Act applies to antitrust practices, such as: agreements obstructing free price fixing (this includes both horizontal price fixing agreements, and vertical, such as agreements that lead directly or indirectly to resale price fixing), the conclusion of contracts subject to acceptance by parties of supplementary obligations which, by their nature or according to commercial usage, are not related to the subject matter of such contracts, boycotts, division of sales market on territorial criterion, sales and purchase volume or other criteria, etc. These practices were deemed prohibited "*per se*" practices. It should be noted that, as shall be set out elsewhere in the article, this criterion underwent various amendments, worthy to be acknowledged.

In order to make a brief history of the emergence and evolution of antitrust practices condemned as illegal under Section I of the Sherman Act, the following should be specified. Foremost, the first antitrust practices which were found in the U.S. in the eighteenth century in danger of being sanctioned were the so-called *trust* (currently known as *cartel cases*). This situation constrained economic agents to invent other types of antitrust practices. Consequently, a new type of antitrust practice occurred in New Jersey, which was called "*merger*". This figure came up with the incorporation of a big company following conclusion of a merger agreement by various companies carrying out their business on the same relevant market. Since the federal Government failed to prevent implementation of this new practice, it opened the door to a whole series of mergers created throughout the nineteenth century. In 1903, the Supreme Court responded and dissolved the Northern Securities Company, which was to be formed through the merger of two railroad companies. The final ruling passed in this case, *Northern Securities Co. v. United States, 193 U.S. 197 (1904)* marked a new stage in the implementation of antitrust law, because it finally ended the attitude of "*laissez-faire*" adopted by the federal Government until that date.

Subsequent regulations approved in terms of antitrust law do not amend the general criteria set forth under the Sherman Act, they just fill the existing gaps by listing various emerging practices that are deemed antitrust by applying the rule "*per se*" or the "*rule of reason*", as shall be pointed out below.

For this purpose, see: Neumann, M., *Competition Policy. History, Theory and Practice*, Edward Elgar Publishing, Inc, Massachusetts, 2003; Anderson, M.C.; *Self-regulation and league rules under the Sherman Act*, in *Capital University Law Review*, Florida, 2001; document available online on http://culsnet.law.capital.edu/LawReview/BackIssues/30-1/Anderson14.pdf.; Foer, A.A. y Lande, R.H., *The Evolution of United States Antitrust Law: The past, present and future*; American Antitrust Institute, EE.UU, 1999, article available online on http://www.antitrustinstitute.org/files/64.pdf.; Álvarez Zenteno, R., *Una visión de nuestro Derecho de la competencia*; in *Revista del Abogado* Nº 6; Colegio de Abogados, Chile, 1996; Rubin, J.E.; *General Overview of United States Antitrust Law*; ed. por Library of Congress - Congressional Research Service, EE.UU., 2001; article available online on http://www.competitionlaw.cn/upload/temp_05062801031227.pdf. or Entrevista a Stephen Breyer, Juez del T.S., available online on http://www.cepchile.cl/dms/archivo_1529_866/rev80_breyer.pdf.

21) Harley J.E., *The rule of reason*; American Bar Association, Illinois, 1999, p. 1 and the following.

22) *„Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court". § 2 Sherman Act, 15 U.S.C. § 2.*

existence of monopoly, actually refers to the development - by the company holding this exclusive privilege - of practices aimed at maintaining and reforming its position. Secondly, the text sanctions all practices developed by way of taking monopoly power.

Whether a practice is considered as "*per se*" or "*rule of reason*" antitrust, case law has established that for each particular case there should be examined: *whether the person accused actually committed the antitrust crime* (in this case it is sufficient that the aggrieved party presents the court an agreement or any other irrefutable evidence that tends to exclude the possibility that the parties concerned have acted independently on the affected market), *if the conduct developed affects free competition between the different federal states or between these ones and other foreign states* (for it must be proved that the antitrust practice affects free competition under the aforementioned conditions. Excluded are: a) antitrust practices affecting free competition in a single federal state - because in this case domestic law of the relevant state is applicable, and not federal law and b) antitrust practices which, although affecting international relevant market, do not affect - directly or indirectly - any economic sector in the U.S.) and whether the conduct or practice developed can be regarded as irrational (in the latter case there were always applied the two previously mentioned rules -, "*per se rule*" and "*rule of reason*").

Generally, legal literature writes down the application of the rule "*per se*" as a decision in favor of the aggrieved party, while application of the "*rule of reason*" was accounted as a decision in favor of the defendant. [23)], on the grounds put forward hereinafter.

In 1897, Judge Taft of the Sixth District of the Court of Appeals wrote an article exhibiting his standpoint on the *Sherman Act.* He asserted that construing legal text equals for a judge to having set "*sail on the sea of doubt*". Taft argued that it was deemed necessary to establish an interpretive model to provide an effective solution and allow passing a court decision grounded on little more than the opinions of a judge. One year later, in case *US vs. Addyston Pipe and Steel Company*[24)], Taft offered a solution for analyzing cases of monopoly which, although on a first impulse seemed abusive, no one hesitated to consider it effective. This solution was later called the "*per se*" rule.

[23)] Beschle, D.L.; *What, Never? Well, Hardly Ever: Strict Antitrust Scrutiny as an Alternative to Among Competitors*, Antitrust L.J.,,1989, p. 433 and the following.

[24)] In case *Addyston Pipe and Steel Company,* six companies manufacturing cast-iron pipes have joined their efforts in a cartel, consequently dividing the sales market of the product on territorial criteria and fixing the selling price of products merchandised in the U.S. Thus, whenever the parties involved in the cartel were participating in an open tender to award a public contract, the six companies submitted offers so that the company in whose territory the work had to be carried out would always win the auction, under the terms set out in the cartel; thence, the public administration instituted legal proceedings. The first sentence was appealed. The Court of Appeal judged the corporate conduct as antitrust practice whose implementation could be tolerated only if it was ancillary and not primarily, as in this particular case. Moreover, even if ancillary, development of this practice was absolutely necessary in order to protect a legitimate interest or to avoid the occurrence of other more serious effects than the ones expected to occur following development of antitrust practice under review. Thirdly, the Court argued that in this case there was no doubt referring to the objective of the companies involved in the development of antitrust practice, which was none other than to restrain free competition on the affected market. Also, there was filed an appeal against this decision, though failing to attack the standpoint of the Court of Appeal. The appeal was grounded on the fact that, in accordance with the Commerce Clause in the U.S. Constitution, review by the federal courts of any type of private contract was not allowed , but only of those affecting trade between different Member States of the U.S. federation. Judge Peckham of the Supreme Court passed a new ruling, arguing that the substantiation of the recurring party lacks any base, since the cartel also fixed the selling prices of products offered in different Member States. These prices were assessed as unreasonable, as it was shown that charging 17-18 U.S. dollars per ton of iron granted companies reasonable gainings, which is why it was unreasonable to charge 24-25 U.S. dollars per ton of iron. In addition, the court decision highlights the fact that there are situations in which simple private agreements can cause an economic impact that, in a direct manner, may affect trade between different Member States of the federation, and these agreements are therefore unacceptable. Moreover, the cartel executed could not be considered a simple private agreement concluded in accordance with the Commerce Clause set out in the Constitution, because this clause - that guarantees freedom of will of contracting parties - does not touch absolute freedom, but the freedom to do only what is allowed under the law (*The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation*). In conclusion, this article can not be applied to any antitrust practice. *Case 175 U.S. 211 (1899).*

After a short period of time, the Supreme Court confirmed this interpretative model and optimized it in that it identified the existence of certain practices that, due to their pernicious effect on free competition, could be considered without the slightest doubt as antitrust practices. Therefore, the Supreme Court judged that, as far as these conducts were concerned, it was not necessary to perform a close-up so as to determine their antitrust character, more than that, these practices could be directly judged by the court as antitrust practices, without examining the effects entailed by them on the relevant market of the affected product or service. Consequently, from that point on, it was well understood that horizontal restrictive agreements (such as those incidental in price fixing directly or indirectly or in dividing markets on grounds of territorial criteria or in allocating customers, sales and acquisitions volume etc.) should have been considered prohibited "*per se*" antitrust practices. As regards vertical restrictive agreements, there were considered as prohibited "*per se*" all practices substantially affecting free competition, while all the other form the scope of the "*rule of reason*".[25]. Thus, it was established that "*per se*" rule is applicable to vertical restrictive agreements that, directly or indirectly, cause price increases ("*price vertical restrains*") whenever: a) it is argued that the defendant enjoys market power needed in order to affect free competition by way of practice developed and whenever b) the existence of a coercive element is proven[26]. There should be also noted that there are excluded from the enforcement of the rule "*per se*" all other denominated vertical practices, "*non-price vertical restrains*" subject to the "*rule of reason*".[27].

The rule "*per se*" is the most severe model of analysis that a federal court may apply in order to check if the practice carried out by an individual or a corporation has an antitrust character and, in European law, this model is equivalent to a presumption - *juris et de jure* - according to which a practice is always deemed as antitrust. Therefore, case law indicated as taxative cases where "*per se*" rule is applicable, while in crowded situations a legal debate shall be held with the view to establish the rule applicable to the case *sub judice*. Once a federal court rules that "*per se*" rule is applicable, the only valid defense is to prove that the defendant is not the person having carried out the antitrust practice. In conclusion, the court will not take into account any other argument such as the fact that prices paid by the consumers are reasonable, that the parties do not enjoy enough power on the market so that the practice developed affects free competition or that this conduct is beneficial to consumers. Excluded from this form are all the other arguments that the companies carrying out the antitrust practice could bring to defend themselves. Thus, a ruling is passed reducing costs to a maximum.

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[25] Aspen Law Center; *Health Care Antitrust*; Aspen Publication, Maryland, 1998, p. 11 and the following

[26] See court decision *FTC v. Indiana Fed´s of Dentists, 476 U.S. 447, 458 (1986)* - boycott; ruling *Northwest Wholesale Stationers, 472 U.S. 295-298* – boycott; ruling *Jefferson Parish Hosp. Dist. Nº2 v. Hyde, 466 U.S. 2, 15-18 (1984)* - the conclusion of agreements subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such agreements; court decision *PSI Repair Serv. V. Honeywell Inc., 104 F. 3rd 811-815 (1995)* where federal courts concluded that between the known "*per se*" and "*rule of reason*" there is no clearly determined border. Therefore, it is not difficult to ascertain that the two systems merge and, consequently, certain conditions are required to be met for an antitrust practice to be considered prohibited "*per se*". Only if these conditions are met a Court can be persuaded that a conduct deserves to be sanctioned without analyzing in detail its *pro-* and *anti-* trust effects. For further details, see Jacobson, J.M. in *Antitrust Law Developments*, 6th ed.; Vol. I; ABA Book Publishing, Illinois, 2007, p. 48 and the following, where it is argued, in the first place, that "*per se rule*" and "*rule of reason*" are not two systems that exclude each other and, secondly, that it is not mandatory for an antitrust practice to fall automatically into one of the two categories. There can be crowded situations where, in case of a practice generally prohibited as "*per se*" antitrust, there can be provided sufficient arguments to demonstrate that it would be more appropriate to consider otherwise. The text of this article sets forth some cases that can serve as an example.

[27] See court decision *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36(1977).*

The second court decision important in the field of antitrust law was passed in 1911, in the case *Standard Oil Co. of New Jersey vs. United States*[28], when the "*rule of reason*" was created. It should be noted that, as previously mentioned, this rule can only apply to restrictive ancillary practices, because all the other antitrust practices are directly judged as prohibited "*per se*" antitrust practices.[29].

In relation to the effects entailed by an antitrust practice, it's worth mentioning that, in comparison with practices deemed "*per se*" antitrust, in case of conducts subject to the "*rule of reason*" the defendant is given the opportunity to defend itself by turning evidence hence it results that there prevail pro- competitive effects of the conduct[30].

One of the most important aspects referred to the court in case of practices whose antitrust character is established by applying the "*rule of reason*" is the existence of an abuse of dominant position on the product's relevant market. To that effect, it proves necessary to carry out a study of the relevant market structure and on the concentration of buying power in the affected area. For example, as a general rule, federal courts tend to presume that when the person charged with having committed an antitrust practice enjoys no dominant position on the relevant market, its intention by the time of reducing production or lowering products' prices can not be that of altering free competition.

Normally, when the "*rule of reason*" is applied, the plaintiff is in the position to having to prove that the antitrust practice is generating essential antitrust effects. Once the plaintiff has proven their existence, the defendant must bring in front of the court any evidence attesting that the same practice generated even more important pro- competitive effects. Thereafter, the court shall ask the

[28] *Standard Oil Co. of New Jersey vs. United States 221 U.S. 1(1911).* Over a period of decades, the Standard Oil company of New Jersey had bought up virtually all of the oil refining companies in the U.S. Initially, it was assumed that the growth of this company was driven, primarily, by superior refining technology and consistency in the kerosene products and, secondarily, that they reinvested their profits in the acquisition of everything needed to transform it in the company with the largest oil refining capacity in the Cleveland area. By 1870, Standard Oil was producing about 10% of the United States output of refined oil. This quickly increased to 20% through the shakeout of the competitors in the Cleveland area. Its ability to continually lower its production costs and, thereby, the cost to the consumer when purchasing the product, enabled the company to secure preferential rates in the region, which compelled the competition to face bankruptcy or sell out their products. The Court argued that the practices carried out by Standard Oil Company were unreasonable and unacceptable, wherefore these were falling within the category of practices prohibited under the Sherman Act. The arguments of the court decision were innovative. The Court concluded that the terms "*restrain of trade*", "*attempts to monopolize*" etc. originated in common law where, at first, any contract restraining trade was forbidden. This doctrine was subsequently amended by case law when it was concluded that not any contracts, even if they display the same features, may be deemed illegal if the liberty of contract of a person was thereby restrained; consequently, under such terms, a contract can be considered valid if it is shown that the restriction introduced is partial and reasonable. The court decision supplemented Judge Taft's reasoning by introducing a new model applicable called "*rule of reason*". The novelty introduced was that, despite the fact that during the previous period, monopoly was considered illegal because it restrained liberty of contract to other people who did not participate in its creation, there may be cases in which a monopoly could be accepted whenever it was concluded that its benefits exceed its fallouts. To that effect, it had to be carried out a study on the characteristics of the business activity under review, on the particularities of the case, on the case history of restrictive challenged practice, on the reasons that led to the development of this conduct and on the effects of the antitrust practice on the product's relevant market. This study led the Court to the conclusion that - in this case - the aforementioned conditions were not met because the negative effects of antitrust practice were prevailing. Consequently, the Court ordered the dissolution of the company into many smaller competitors on the same relevant market.

[29] Case *Addyston Pipe and Steel Co. v. United States, 85 F. 271 (6th Cir.* 1898) was the starting point in creating the new antitrust practices analysis model, called "*rule of reason*", whose implementation method was strengthened in the previously mentioned case Standard Oil.

[30] See court decision *Chicago Board of Trade v. United States, 246 u.s. 231 (1918)*, where the federal court concluded that a conduct is deemed reasonable should it promote competition. Using the "*rule of reason*" it is reasonable to accept a conduct which, although restraining competition offers - on the relevant market - other benefits that exceed the negative effects brought about by means of carrying out the restrictive practice. For this purpose, see comments in Hylton, K. N., in *Antitrust Law Economic Theory & Common Law Evolution*; Cambridge University Press, Cambridge, 2003, p. 104 and the following.

plaintiff to prove that in order to get the same pro- competitive effects it was neither necessary, nor reasonably to carry out the antitrust practice under review. As it appears, by using the "*rule of reason*" it is not attempted to verify "*the conduct's reasonableness*" but, rather, the intention is to establish whether the restrictive practice tends to restrain or destroy market competition, without there being any pro- competitive effect appropriate for the industry and the competitive situation [31)].

It would be worth mentioning that the "*rule of reason*" always applies to practices deemed antitrust, according to *Section II under the Sherman Act* (relative to monopolization and attempted monopolization). Consequently, Courts have asserted that it is essential to prove not only that the defendant enjoys a dominant position in the relevant market, but also that this position has been misused. In the case *U.S. vs. Grinnell Corp. [384 U.S. 563, (1966)* there were embodied integrated elements of the monopolization conduct, which follow: a) the possession of monopoly power of the defendant in the relevant market and b) the willful acquisition / maintenance of that power - in other words, when neither the maintenance, nor the acquisition of the existing power is due to business acumen of the defendant, such as placing on the market of a product of superior quality as compared to existing ones, increase in the company's efficiency, or just simply the existence of favorable foreign circumstances. As it also appears in the case of "monopolistic" practices, the presumption of existence of the conduct's antitrust character can be challenged should it be evidenced that the disappearance of competitors in the relevant market is a consequence of either special merits listed above. In other words, if the defendant fails to prove, by any evidence admitted in American law, the existence of this acumen, the practice carried out shall be deemed as antitrust practice and shall be sanctioned as per the law in force.

It's worth mentioning that, while there are similarities between the abuse of dominant American and European power, there are also many differences. In order to get the correct idea of this, we should not forget that on the two continents there have been adopted divergent views on how market competition should be defended and, therefore, two legal frameworks have been created that do nothing but respond to different historical experiences, although, as it shall appear in the next part of the article, the new perspectives on antitrust law seem to tend to slightly approximate the two systems. As far as these antitrust practices are concerned, the differences between the two systems are a consequence of the criteria applied in establishing anti- competitive conducts. For example, the American model does not specifically condemn neither concerted fixing, either directly or indirectly, of sale or purchase prices, nor application of unequal conditions to equivalent transactions, but focuses on forbidding any abuse that tends to exclude business competitors. This approach allows the prohibition as antitrust practices of conducts previously mentioned and of any other conduct such as, for example: negative action to contract with an economic agent when there is no other cause than to exclude the aforesaid from the market [*case Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)]* or practice of excessive or downfall prices, with the view to set aside competition *[caso Brooke Group Limited v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993)]*.

Of the two court decisions listed above, special importance is played by Aspen decision on account that - in this decision - the federal court construed that a conduct tending to rule out competitors in the field should be conceived as the conduct that not only aspires to harm economic agents' opportunities to compete in the market, but also strives to affect competition in a way that is neither reasonable, nor necessary [32)].

For the attempted monopolization of the market to be sanctioned, the Supreme Court judged, in the case *Swift & Co. v. U.S.*, that three conditions must be met: that the defendant carries out an

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[31)] Anderson, M.C., *Self-regulation and league rules under the Sherman Act*, Capital University Law Review, Florida, 2001, p. 130, text available online on http://culsnet.law.capital.edu /LawReview/BackIssues/30-1/Anderson14.pdf.

[32)] Popofsky, M.S., *Defining exclusionary conduct: Section 2, the rule of reason, and the unifying principle underlying antitrust rules*; in Antitrust Law Journal - Vol. 73, Chicago, 2006, p. 439.

antitrust conduct, there is the intent to monopolize and a dangerous probability to hold a dominant market power[33]. This court ruling marked a new beginning for antitrust law with reference to monopolistic practices, because it allowed for these crimes *ex-ante* application of antitrust rules, given that the competent federal bodies can take action in all these cases in a preventive manner. To that effect, it is sufficient to know the offender's intention to carry out an antitrust conduct without expecting that any of the practice's negative effects is brought forth. [34)].

This form of classification of antitrust practices in "*per se*" or "*rule of reason*" prohibited practices was considered antitrust methodology and applied in the U.S. for more than a century without undergoing, from the procedural point of view, important changes. However, by the half of the twentieth century, known in legal literature as the "*rule of reason*" century, there have been recorded changes worthy of being mentioned. First, the direct scope of "*per se*" rule was substantially restrained, since courts have introduced a new technique known as "*quick-look*". It emerged in the 80s, its origin being unknown. Notwithstanding the fact that, at first, not all courts have expressly recognized use of this technique, they never gave up making use of it[35)]. It should be noted that there is currently no official definition of the technique. In fact, knowledge of it didn't prove imperative, as legal literature explained in depth what it dealt with. Judge Thomas argued that "*quick-look*" was a method to make a superficial examination of a given situation, so as to determine whether the challenged practice is clearly anticompetitive and, consequently, can be considered worthy of being subject to the rule "*per se*" or, on the contrary, the examination performed reveals that it would be more appropriate to apply the "*rule of reason*" to the case *sub judice.* Teachers Gavil, Kovacic and Baker discoursed upon "*not an immediate condemnation of a conduct, but a brief analysis performed by way of sentencing it*". Similarly, Professor Piraino argued that this technique was a method allowing the performance of a brief analysis of antitrust conduct, not much different from the analysis carried out by the time the rule "*per se*" was applied. Some other authors concluded that this technique is very similar to the "*rule of reason*" because the reasoning employed allows for pro- and anti- trust effects of a practice, effects which are not taken into account when applying the rule "*per se*". On that account, this technique was called "*quick-look rule of reason*", "*the flexible rule of reason*" or "*the truncated rule of reason*"[36)].

The Supreme Court makes use of this technique as an intermediate model of analysis and reasons its employment by the fact that, over many decades of time in which federal courts have applied antitrust laws, it had been clearly enough established that there is no limit precisely determined between the two methods used - "*per se*" and "*rule of reason*" - wherefore it is imperative to perform, before applying the rule "*per se*", a brief analysis of the relevant market and of the antitrust practice impact on the relevant market before applying the rule "*per se*", because application of this rule involves automatic incrimination of a conduct. Thus, along with this technique is initiated a control mechanism that was previously nonexistent. [37)].

[33)] *Caso Swift & Co. vs. U.S., 196 U.S. 375 (1905).*

[34)] Londoño A.F.; *Anotaciones sobre el Derecho antimonopolístico en los Estados Unidos de Norteamérica,* ed. CEDEC, Bogotá, D.C., 1992, p. 12.

[35)] For further details, see court decisions passed in the following cases: *Board of Regents of University of Oklahoma v. NCAA, case 468 U.S. 85 (1984); Northwest Wholesale Stationers, Inc., Petitioner v. Pacific Stationery and Printing Co., case 472 U.S. 284, 298 (1985); Catalano v. Target Sales, caso 446 U.S. 623 (1980), o Arizona v. Maricopa County Med. Soc'y, case 457 U.S. 332 (1982).*

[36)] Brunet, E.; *Antitrust Summary Judgment and The Quick Look Approach*; Lewis & Clark Law School, Portland, 2009, p. 9 y ss; available online on
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358610&rec=1&srcabs=1446845.

[37)] With the view to clearly seize what this technique is dealing with, I deem proper to carry forth the reasoning of the Court of Appeals in the case *Board of Regents of University of Oklahoma v. NCAA, 469 U.S. 85, 104 (1984).* NCAA is an association serving as the sports activities governing body for universities in the United States. In 1981, it adopted a plan which limited the total amount of televised football games, the number of football games that any one TV channel may televise (ABC and CBS), under the agreement signed with NCAA, fixing the price for television rights. CFA, association organized to promote the interests of major NCAA sports colleges and at the same time member of

In conclusion, the "*quick-look*" technique is employed in cases where there are suspicions that direct application of "*per se*" rule is not appropriate, though it doesn't imply that the case should be reviewed in great depth so as to establish a conduct's antitrust character. Nowadays, this technique is part of the antitrust methodology employed in the U.S., analyzing economic effects of an antitrust practice with the view to be ruled by the court whether conduct, by its social risk, is worthy of being sanctioned by applying the rule "*per se*" or, what it makes no difference, when there is doubt that the effects of conduct may substantially affect market competition, it reveals imperative to apply the "*rule of reason*" so as to decide upon the antitrust character of the challenged conduct.[38]. During recent years, prohibited "*per se*" practices were considered worthy of a "*quick condemnation*", except in cases where the defendant evidences the existence of a plausible and sufficiently reasoned fact so as to raise reasonable doubt ("*hotly litigated*") [39]. That is to say, existence of damage is presumed and the defendant undertakes to prove that there are enough pro- competitive effects so as not to declare a practice prohibited under the form "*per se*". Should the arguments of the defendant be accepted, the "*rule of reason*" is normally applied, while the defendant is allowed to prove that the practice carried out is not anticompetitive.

NCAA, expressed disagreement with regard to this new policy, accordingly concluding other contracts with ABC and CBS that would have allowed a more liberal number of football games to be broadcast and rebroadcast. Consequently, the NCAA ruled disciplinary action against the association. CFA lodged a complaint with the competent federal court, arguing that this sanction was unjustified and the conduct manifested by the NCAA in breach of the Sherman Act, particularly Section I. The Court of First Instance concluded that the NCAA has made an abuse of power, sanctioned under Section I of the Sherman Act.

The Court of Appeals debated the case in depth and found that free competition had been restrained in three ways. Price fixing for particular telecasts, exclusive rights for football games broadcast were granted in favor of two television channels and the threat of sanctions against CFA agency was tantamount to a boycott of all other potential competitors operating in the same relevant market, since, except for ABC and CBS, no other channel was entitled to rebroadcast football games. *Prima facie*, this conduct was judged as a horizontal price fixing and output limitation agreement, but the arguments offered by the NCAA made the court question whether or not to apply directly "*per se*" rule and whether, consequently, it may be inappropriate not to apply the "*rule of reason*". NCAA argued that the sole objective pursued by taking such measures was to protect university sport, wherefore no economic reason boosted the conclusion of the new agreement.

It should be noted that this court decision marks a significant change in case law since - as already mentioned - all antitrust practices sanctioned under *Section I of the Sherman Act* are "*per se*" prohibited practices, where defendants are not given the right to defend on the strength of arguments. The change allows to prove by any evidence that the defendant did not commit the crime it is charged with. The Court judged in this case that the absence of such financial gains is a sufficient argument that may raise reasonable doubt, wherefore there shall be performed a brief examination of the conduct carried out and of the relevant affected market. Primarily, the Court argues that, if one takes into account that not all television channels have been granted the opportunity to televise football games, the practice carried out can be invested with essential character, wherefore the "*rule of reason*" can not be applied. However, the NCAA argued that any person may enjoy live attendance of a football game and this approach grants the practice carried out ancillary character, because the product "is available at all". By the measure taken it is pursued only to remove the adverse effects of broadcasting football games, since statistics carried out from the moment university games started to be televised show that the number of people going on stadium to see a game has been considerably diminished. Thus, football games gradually come to be played on a nearly empty stadium. In conclusion, NCAA holds imperative the adoption of a similar measure, because only in this way interest in university football may be preserved and it might be expected that it shall turn once again into the attractive sport of yore. In addition, sports colleges will be able to recover economic losses resulting from limiting the number of televised football games, because a rapid growth in the number of spectators is foreseen, wherefore more entrance tickets will be sold at the stadium. The Court of Appeal judged that these arguments, entirely hypothetical, are no guarantee, consequently, it would be unacceptable to apply to this practice a model different from the "*per se*" rule. Even if it doesn't get down in this case to the application of the "*rule of reason*" and antitrust practice is reproved by applying the rule "*per se*", the fact that the court accepted and analyzed the arguments offered by the defendant is a novelty, given that the practice carried out is one of the unlawful conducts that has always been directly punished so far.

[38] For more details, see Section of Antitrust Law in *Antitrust and Associations Handbook*, ABA, Illinois; 2009, p. 43 and the following.

[39] See opinion formulated by Section of Antitrust Law in *Handbook on the Aspects of Standards Setting*, ABA, Illinois, 2004, p. 40 and the following.

III. Supreme Court case law in the field of antitrust practices

U.S. courts have made great efforts to create rules to properly operate in Antitrust Law, as "*per se*" rule for antitrust practices condemned by applying *Section I of the Sherman Act* and the "*rule of reason*" for the practices condemned under *Section II of the Sherman Act*. A methodology which, as previously mentioned, has not undergone major changes until the end of the twentieth century when the "*quick-look*" technique emerged, that courts started to continuously apply in relation to prohibited "*per se*" antitrust practices.

From this point gathers way the fact that courts reject direct application of the rule "*per se*". What is the cause? What happened? One reason was the private enforcement system of antitrust law. But for the United States, in no other place in the world the injured party may claim and obtain treble damages caused as a result of developing an antitrust practice. Should applicable procedural laws in the field of antitrust law, which are extremely permissive, be added up to this particular argument - as to these issues, I shall comment hereinafter on some aspects that are worth being taken into account - it is no question about a more tempting offer to determine someone to lodge a complaint in some other state than the U.S. With the view of monitoring this phenomenon, federal courts started to elaborate and apply in relation to antitrust cases procedural and material criteria, much more stringent than the ones applied until the end of the twentieth century.

New articles published in the field would find, one way or the other, a single explanation to this phenomenon: federal courts are much more alarmed by a "*false positive*" than by a "*false negative*". In other words, these articles conclude that if the application of more stringent criteria entails defendants being claimed to offer sufficient evidence so as to establish with a much higher degree of certainty the unlawful nature of a conduct - condition not always easily to be met by all potential plaintiffs - courts prefer to abandon condemnation of an illegal conduct as antitrust practice on account of lack of sufficient evidence ("*false negative*") than to rule a conduct as antitrust without reviewing in great depth each and any aspect that can be allowed for (which could lead to a "*false positive*"), and this because once a conduct is judged antitrust, the aggrieved parties are entitled to receive treble damages, litigation costs and fees of legal representatives[40)].

Since it is extremely difficult to put in a few pages the approach method employed over time by federal courts with regard to the issue of ruling a conduct as antitrust practice, I settled upon tackling the presentation of recent case law amendments directly affecting private application of antitrust law.

To start with, it is important to put forward the reasoning of the Supreme Court in the case *Twombly*[41)], reasoning directly affecting application of *Section I under the Sherman Act*. William Twombly and other consumers brought a class-action lawsuit against Bell Atlantic company and a number of other large telephone companies. Twombly alleged that these companies failed to comply with the provisions set forth under Section I of the Sherman Act since they agreed not to compete with each other any longer, wherefore they signed an agreement dividing the sales market on territorial criteria and prevented the emergence of new companies in the relevant market. The Court of First Instance[42)] judged that the plaintiff's arguments were insufficient so as to admit the complaint lodged, in as far as these were purely and simply circumstantial. The main argument of the court decision was that the existence of an antitrust practice being suspected alone is insufficient to lodge a complaint, as several companies manifested parallel conduct concurrently. Thus, the court asked for "extra" evidence tending to exclude the possibility that the same conduct to be

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[40)] For this purpose, see the articles of Rosch, J.T.: *Has the pendulum swung too far? Some reflections on U.S. and EC jurisprudence*; Washington, D.C., 2007, *The State of Antitrust in 2008*, Charleston, 2008; *Striking a Balance? Some Reflections on Private Enforcement in Europe and the United States*; New York, 2008.

[41)] *Bell Atlantic Corp. V. William Twombly et.al.; 127 Ct. 1955 (2007).*

[42)] *Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174, 179 (2003).*

adopted independently by various companies, *i.e.* without any agreement having been concluded by and between the aforesaid.

The plaintiff appealed this decision, and the Court of Appeal [43] concluded that, under the case law line initiated in the case *Conley v. Gibson*[44], the complaint lodged is accepted if it states facts which make the existence of an antitrust conduct "conceivable", and it could only be dismissed in case it would be able to prove "no set of facts" in support of the claim. Consequently, applying the old criteria, the court concludes that it is sufficient to notify the legal authorities on the existence of a parallel conduct similar to the one pointed out in this case, so that the complaint lodged be accepted, even if this does not infer the existence of an antitrust practice. In other words, the plaintiff may not be challenged to produce that "*extra*" required by the Court of First Instance.

This court decision is also appealed by the defendant and the Supreme Court passes another ruling confirming the reasoning in the decision passed by the Court of First Instance. In brief, this Court is arguing that it's time to take a case law amendment on this issue by adopting a less permissive criterion. It is therefore necessary to claim that a complaint be based on particular facts sufficiently plausible so as to create an expectation under which it can be accepted the existence of a sign on the development of any antitrust practice. Therefore, the novelty introduced is obvious - there can no longer be accepted complaints based on mere hypothetical facts[45].

This reasoning brought about immediately the effect expected by the Supreme Court - there was recorded a decrease in the number of liability claims initiated after carrying out a prohibited antitrust practice under Section I of the Sherman Act. Secondly, it should be noted that all parties involved benefit from this criterion - both parties in the civil case and legal authorities - since judicial and business appeals are no longer fruitlessly wasted so as to analyze any conduct alleged as antitrust, considering that the plaintiff reviews the case much in depth before lodging a complaint[46].

Another important court decision which introduces a new case law amendment affecting application of *Section II of the Sherman Act* is decision passed in the case *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*.[47]. Weyerhaeuser company is one of the leading pulp and paper companies in the world, which was charged with violation of Section II of the Sherman Act. The company had bid up input costs, because it wanted that suppliers reserve it the right to be supplied with products necessary for the manufacturing of pulp and paper before any other competitor on the market. Consequently, competitors have been forced to pay higher prices to their suppliers, which led to an increase in output costs. However, Weyerhaeuser was the only one that did not alter the price of merchandised products.

In a particular verdict, the jury Court concluded that the civil case introduced may not be accepted, since the relevant market in this case was the wood market and Weyerhaeuser Company did not enjoy adequate market power so as to alter free competition, wherefore it would be

[43] *Twombly v. Bell Atlantic Corp., 425 F.3d 99, 114 (2005).*

[44] With the view to outline the idea that the amendment framed on these lines by the First Instance was innovative in antitrust law, a brief history of the topic avers requisite. First, it's worth mentioning court decision *Theatre Enterprises, INC. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954),* where the Supreme Court argued that "*proof of parallel business behavior between the economic conduct that is the subject of the civil action introduced and another antitrust conduct does not conclusively establish the existence of a new antitrust behavior, nor does such behavior itself constitute an antitrust offense*". This reasoning did not serve much federal courts that had to judge cases there being no telling whether a civil action had to be approved under the given circumstances, since nothing was being mentioned thereupon. The Supreme Court dissipated this doubt sometime later, under the court decision *Conley v. Gibson, 355 U.S. 41 (1957),* referred to above.

[45] Gist, R.; *Transactional Pleading: A Proportional Approach to Rule 8 in The Wake of Bell Atlantic Corp. v. Twombly*, in *Wisconsin Law Review*, Wisconsin, 2009, p. 1031 and the following.

[46] For further details, see Cherry, S.F., Pearson, G., *Why Twombly Does (and Should) Apply to All Private Antitrust Actions, Including Alleged Hard-Core Cartels: A Reply to William J. Blechman,* in *The Antitrust Source*, ABA, Chicago, 2007.

[47] *Case 127 S. Ct 1069 (2007).*

considered appropriate to judge that, lacking the existence of adequate power market, no antitrust conduct could have been developed. The plaintiff argued that, in this case, the relevant affected market was not the wood market, as judged by the jury Court, but the alder one (where the market power of the defendant company reached 65%), but not enough evidence has been brought so as to persuade the jury thereupon. It was only mentioned that alder has some features other trees have not, so that alder wood could not be replaced with other wood[48]. Even so, the jury identified in this case the existence of an antitrust abusive practice, carried out by offering some input sales prices much higher than the normal price of these products ("*predatory bidding*"), aiming to prevent other competitor companies to buy these products at a "fair" price. This conduct was judged identical to practicing predatory pricing, as it was concluded that the objective the aforesaid company set itself to achieve was to shakeout competition existing on the market.

The court decision was appealed by the defendant, and the appeal was based on the fact that antitrust case law doctrine in the case *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[49] highlighted the fact that one can not assess the existence of an antitrust practice if the selling price of a product is higher than production costs. The Court of Appeal noted that this particular case deals with an abusive practice similar to predatory pricing, though not identical to it, wherefore there can not be applied the same doctrine in the case *sub judice*.

The Supreme Court held that the aforesaid doctrine is applicable because there can be established the similarity existing between the challenged conduct and a predatory pricing scheme, but it underlined some issues worthy to be considered. First, the Court argued that, under the predatory pricing scheme, a company aims to obtain monopoly power on the product's market in which it carries out its business, because by way of this practice existing competition is eliminated and the emergence of new companies is thus avoided, as the said company finally gets to control prices of products on the relevant market in which it carries out its business. However, as far as the case under review is concerned, the conclusion of contract conditioning the supplier to sell to Weyerhaeuser Company all raw materials necessary to the latter in order to release on the market its products before fitting out other rival companies, enables the company to acquire monopoly power, forasmuch as this transaction enables the company to control input prices [50] and, consequently, to control production costs of competitors, since it diminishes their purchasing power. Secondly, so that the practice carried out by Weyerhaeuser to be considered antitrust, two conditions must be met: a) bidding up of raw materials should cause competitors cost of the relevant output to rise above the revenues generated in the sale of those outputs and b) there is a high probability that the defendant, through the exercise of monopoly power acquired, be able to recover the losses incurred in bidding up input prices.

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[48] It should be noted that in an antitrust case it is vital to determine the relevant market of a product. The plaintiff shall always preserve as the relevant market of a product a market of products as numerically narrowed down as possible, while the interest of the defendant is to prove the contrary. This principle is used in the European case, as well, whether domestic or EU regulations in the field of competition law are applicable or not. In order to give a practical example where a very similar argument to the one offered by the plaintiff in the case mentioned above was accepted, I wish to mention court decision *United Brands v. European Commission, Case 27/76,* where it was established that the relevant market affected by the challenged anticompetitive conduct was the relevant market of bananas, and not the fresh fruit market, because bananas have special characteristics that other fruits have not, and which proved to be sufficient in order to reach this conclusion. Let us imagine that the fresh fruit market would have been accepted as relevant market affected. Not only bananas are sold on this market, but all sorts of fruits such as: apples, pears, cherries, lemons, etc. The defendant is producer of bananas exclusively. Although United Brands company would be the only company producing bananas in the world, it would be almost impossible to argue that it benefits of sufficient power on the fresh fruit market so as to carry out anticompetitive practice. For this to be possible, the entire global population should be "inveterate" consumers of bananas and just occasionally should it consume other fruits, and we are all convinced that this is not the real case.

[49] *Case 509 U.S. 209 (1993).*

[50] It should be appreciated that in this case, the Weyerhaeuser company gets to control the price of products on a relevant market other than the relevant market in which it carries out its business.

This court decision was welcomed by some lawyers and criticized by some others. Those who have criticized it stated their arguments in the well-known "*The Consumer Welfare Effect Test*". This test is made up of stages. This is a reliable indicator in determining the antitrust nature of a conduct. First, we must determine whether reasonable grounds exist so as to believe that a given conduct creates, preserves or extends the defendant's monopoly or monopsony power, while competitors have their opportunity to operate on the same relevant market decreased. It is not difficult to be aware of the fact that the practice carried out by Weyerhaeuser company fulfills this condition and it can be acted toward the completion of the second stage. It is therefore necessary to consider whether the practice carried out fulfills one of the following three conditions: makes no profit to consumers, disproportionally affects the level of competitors' gains or is not needed by consumers. The given conduct easily fulfills two of the three conditions, therefore, along with the conclusion of this test, it can be argued that the challenged practice may be deemed antitrust under Section II of the Sherman Act [51)].

As already mentioned, there are also lawyers that deemed reasonable the new criterion introduced by the Supreme Court, because it does not contradict the criterion employed in the case *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* but simply complements what was previously stated. Despite the fact that, after a simple reading, the old point of view seems to be changed, because the court decision lets us assume that the Supreme Court absolutely rejects application of the so-called "*The Consumer Welfare Effect Test*", not the same thing goes in terms of application of the system developed by Judge R. Posner, known as "*Equally Efficient Rival Test*". Posner argues that whenever one of the competitors on the same relevant market carries out a conduct similar to the aforementioned, one of the following three situations may occur. To start with, if one company is able to pay more for raw materials, the same may be done by other equally efficient competitor. In the next place, there can be the limit situation that an increase in production costs does not allow a competitor to obtain gains, but it neither incurs losses (in other words, economic inputs are equal to economic outputs). In these two situations, it may be asserted that the company carrying out the prohibited practice and the affected competitor are equally effective for they may run on the same relevant market. As per the third possibility, the consequence caused by increasing input price is that it forces the competitor to exit the market, since it doesn't afford to purchase raw materials at the new price. This is the only situation where, according to Posner and the Supreme Court, it may be sanctioned. The theory deemed adequate to this situation, since it is easily applicable to a real case, vitally diminishing the possibility that a "*false positive*" might occur[52)].

Finally, the case *Leegin*[53)] is equally extremely important, because the court decision establishes new criteria applicable for the case of concerted minimum resale price fixing. Compared with the previous decision, unanimously passed, this case deals with a decision adopted by absolute majority. Facts under review are simple. Leegin company stopped selling its products to PSKS Inc. company, since the latter resold the products below the price suggested by Leegin. PSKS filed suit alleging that Leegin entered into vertical agreements with its retailers to set minimum resale prices. The Supreme Court argued that the latest studies in the field of antitrust law show that not all vertical agreements cause only negative effects, but there are also agreements that cause positive effects, one of the more striking examples being the fact that these agreements converge to encourage competition between trademarks ("*inter-brand competition*"). Consequently, this conduct

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[51)] For further details, see Areeda, P.E. & Hovenkamp H.; *3 Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2ª ed., Aspen Law & Business, New York, 2002, 651a.

[52)] For further details, see opinion of Lambert, T.A. in his article entitled *Weyerhaeuser and the Search for Antitrust´s Holy Grail* in *Cato Supreme Court Review-2006/2007*; Law Legal Studies Research, 2007, Washington, D.C., p. 297 and the following, in which it argues that should case law accept this point of view, the maximum prudence defended by Voltaire, according to which "*the perfect is the enemy of the good* ", would be thereby adhered to.

[53)] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).*

should be removed from the scope of the rule "*per se*", in as far as there can not be stated with certainty that always, or in almost all cases, concerted minimum resale price fixing adversely affects free competition.

The decision is no news, but it embodies the efforts made by the Supreme Court during the last thirty years with the view to amend the system applicable to vertical restrictions[54)], effort opened in the case *GTE Sylvania*[55)]. This does not infer that concerted minimum resale price fixing of a product is considered a lawful "*per se*" agreement, nor the "*rule of reason*" is applicable to each and any similar vertical agreement. Literally, the Court emphasizes that this is one of the so-called "cases limit" where the "*quick-look*" technique should be applied in order to determine - after analyzing the affected relevant market and the market power owned by the defendant - whether "*per se*" rule or "*rule of reason*" are applicable to the case *sub judice.* The new criterion introduced by way of this court decision was taken up both by federal courts and by most of the various Member States, that started to implement all the necessary amendments to their antitrust regulations in order to apply the new criterion[56)].

IV. Conclusions[57)]

All facts mentioned above are consequence of the fact that the American experience gained in the field of antitrust law highlighted that, in many cases, the objective determining the plaintiff to institute legal proceedings is not identical to the one which it is attempted to be achieved through the application of antitrust regulations. Namely, this assertion would be equivalent in everyday language to the saying "*every coin has two faces*" - one is the one wishing to make itself known and the other is the one trying to hide itself, or better said, "to cover up", admissible case in the U.S. due to the existence of extremely permissive rules in this field, as I shall try to highlight hereinafter. Under a broad outline, it might be stated that competitors are given the opportunity to apply antitrust laws in their favor and attorneys are given the opportunity to settle almost all cases extrajudicially, gaining thus large financial amounts, which they receive under the form of fees, far from being hard-earned in terms of case defence.

For I want the reader to be able to imagine how this system works in practice, I shall seek hereinafter to define threats turning antitrust laws into an "*effective weapon for riding the gravy train*" .

Normally, in most cases of private antitrust laws enforcement - I particularly refer to actions for damages - the party instituting the proceedings seeks to take advantage of any gaps in the system so as to put the defendant "between the devil and the deep blue sea" [58)]. We must bear in mind that, in most of the cases, there is not only one plaintiff, in 99% of cases there are multiple plaintiffs for that it is very difficult that an antitrust practice affects only one individual or corporation, wherefore the defendant is bound to choose one of the two possibilities granted to him. He either decides to litigate, standing the risk of losing the case and paying financial amounts that may lead him to bankruptcy - very likely situation since, except for ancillary agreements, monopoly and attempted

[54)] The application of the old system used for almost a century is thus waived, that is since its approach in the case *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 (1911)* until the pronouncement of court decision in the case *Leegin*. Pursuant to the old system, concerted minimum resale price fixing was considered a prohibited "*per se*" antitrust practice, as it violated *Section I of the Sherman Act.*

[55)] *Continental T.V., INC. v. GTE Sylvania, INC., 433 U. S. 36 (1977).*

[56)] For further details, see Lindsay, M.A.; *State Resale Price Maintenance Laws After Leegin*; in T*he Antitrust Source*; ABA; Chicago; 2009; p. 2 and the following, text available online on http://www.dorsey.com/files/upload/lindsay_eupdate_antitrust_oct09.pdf.

[57)] Standpoints put forward below are absolutely personal.

[58)] For further details, see Rosch, T., *Striking a Balance? Some Reflections on Private Enforcement in Europe and the United States*; FTC, New York, 2008, p. 23 and the following.

monopoly cases, all other practices were condemned as “*per se*” antitrust[59)], before amendments outlined in article hereby are implemented, or attempts to settle the case extrajudicially. I would like to point out that, although one may say that, in terms of practices covered by the “*rule of reason*”, the defendant may have the chance that the conduct carried out is not judged as antitrust, as far as practices subject to the rule “*per se*” are concerned, it is common knowledge from the very outset that a condemnation ruling is to be passed. Judiciously, the second option shall be chosen ninety times out of a hundred. This is the prospect of popular actions (“*class-actions*”).

The second case is represented by individual actions (“*stand-alone actions*”) in which extremely permissive procedural rules with respect to the discovery of antitrust practice gives the plaintiff the opportunity to abuse, blackmail and even impose upon the defendant payment of excessive amounts. The only procedural impediment the plaintiff has to overcome is to have admitted his complaint lodged, point at which he is given the opportunity to claim at least expenses incurred in relation to ruling upon the alleged unlawful conduct, minding that there is the possibility to receive treble damages, litigation costs and attorney’s fees, should the Court rule as antitrust the practice carried out by the defendant. Additionally, an action for damages involves a trial that complex and exhausting, compelling thus the defendant to reach an extrajudicial agreement[60)].

Courts have pointed out all these threats and decided to introduce the “*quick-look*” technique as, under this form, it commits the plaintiff to review the case in depth before instituting an action for damages. Moreover, all these case law amendments illustrate courts’ concern to avoid that people that have not been actually affected by the development of antitrust practices enjoy the benefits provided under this private application system. Consequently, the enforcement of both procedural and substantive rules of law has been strengthened.

Legal American literature[61)] concluded that the new decisions greatly cater to current exigencies in the field of antitrust law, even though there have been lawyers unwilling to agree to them from the very beginning. Application of the new criteria endeavours: a) to avoid drain away of judicial appeals; b) not to reimburse large financial amounts to fake injured people and c) this to be accomplished without affecting real injured people’s opportunity to receive remedies deserved.

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[59)] I hereby restate the fact that, once a federal court rules that “*per se*” rule is applicable to the case *sub judice*, the only valid defense is to prove that the defendant is not the person having carried out the antitrust practice.

[60)] See case *Franchise Realty Interstate Corp. v. Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1083 (1976).*

[61)] Areeda, P.E., Hovenkamp, P., *Antitrust law – An Analysis of Antitrust Principles and Their Application*, Aspen, 2008, p. 154: “*Class actions…can consume massive judicial resources, result in enormous costs for all parties, and threaten gigantic recoveries. A class action can be the vehicle to strike suits designed to coerce a settlement*”.

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