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Comparative overview of the anti-monopoly regulation in USA, EU and Macedonia

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1. INTRODUCTION

Policy makers are interested in regulating the position of monopolistic enterprises because the conduct of such enterprises could have appreciable impact on the market. Besides having bad economical consequences, a concentration of economical power could also create political influence and affect all aspects of society. Corporations with monopolistic position on the market can behave independently from other competitors, create unequal conditions and discriminate against other customers . The legal system responds to social forces, which try to protect themselves from economical and political domination.[1] The legal structure also has its reverse effect on the society. It influences thought and behavior and it regulates the relationship between participants. In these cases participants are subjects on the market, i.e. enterprises.

Antimonopoly legislation affects corporations with large market shares and with large profits .Theirs marketing policies, business planning and practices which they use to survive on the market depend on the law in each particular country. Consequently, law is an important part of political-legal environment that affects business. Aims that are supposed to be achieved by such legislation are : protection of small business, of consumers and of society. Antimonopoly statutes are tailored to fit the specific goals to be achieved, such as efficiency, employment and the preservation of a single market[2] .

Some other countries have more stringent rules then the U.S. and EC. In India, for example, corporations producing food need special permission to lance trade mark that is duplicating already existing products.[3] In Filippines somebody who produces an expensive kind of food , must also make a cheaper version of it.

Former socialistic countries have passed legislation that regulates monopolistic position and exclusionary conduct[4]. This kind of regulation is necessary , because the competition is an

[1]For example : In US. Public demand for regulation of monopoly was so loud especially in 1870 , legal response was Sherman act passed in 1890.
[2]To avoid creation of barriers to entry which could isolate local markets and create different conditions for business.
[3]For example Coca-Cola and it's Indian producer
[4]For example Hungary: Act lxxxvi of 1990 on the prohibitions of unfair market practices ,Hungarian rules of law in force 1991.

important element in market economy. Some authors argue against such legislation because according to their opinion it punishes the winners. It affects business incentive,vigor and initiative. They defend big business, because it can invest more in research and development and offer better advantages for planning.[5] R.A. Posner thinks that there is no need for monopoly regulation and argues that the market can control big business instead with smaller costs.[6] Even A. Smith realized that monopoly elements are consisted in laisser faire[7], but he believed that government should not interfere because regulation could do more harm than good.

There are also other objections pointed against passing antimonopoly law from pragmatic point of view. Usually marketing personnel are against such statutes because the statute limits their possibilities, e.g. they must change their mind about introduction of new products on the market . They also point out that people in administrative agencies lack practical sense for business. They wonder what is the main purpose to be achieved, when enforcement costs are bigger then advantages gained with the enacted law. Considering all arguments against regulation of monopolies , the fact is that all Western Countries with market type of economy , have regulations controlling monopolization of the market , which enable fair competition .

2. AIMS AND METHODS OF THE STUDY

[5] GALBRAITH is one of the authors who is against any kind of control over monopoly.
[6] Posner R. Antitrust law ,1976
[7] laissez fair

Former socialistic countries in the past did not recognize the importance of competition and the free market. In theory, a free market allows everyone to choose what to produce , to whom to sell, and what prices to charge.[8] It is interesting first to analyze how the U.S. and the EC through their antimonopoly statutes balanced the situation on their markets.This paper will consider their legal solutions , as well as the enforcement agencies and procedures that enable application of the relevant statutes.In addition, differences and similarities between those two legal solutions will also be examined.

Futher on, I will analyze the market situation in Macedonian , and the laws that exist to suppress monopoly conduct. I will try to answer the questions : Whether Macedonia needs such a law, whether the present law is a good law, and possible improvements in the regulatory framework in Macedonia.

In addition to the comparative method ,the normative method will also be used with purpose not to find what the law is but what is the standard[9] for monopolistic enterprise on the market which is under constant change. Also, I will employ textual and historical methods of analysis to the statutes and articles , together with graphical method, in order to simplify certain points.

In connection with my analyses of the current situation in Macedonia, I will use micro and statistical analyses. I must mention the difficulty that exists in assessment of relevant statistical data. I was not able to find information for the biggest firms on the Macedonian market., because there are no periodicals dealing with this. It is hard especially now after we became an independent country. There are no informations identifying the biggest companies in trade , their annual sales, number of employed persons, or their profits. Firms would not give me this data

[8]Although truly unregulated market never existed but "...interplay and continuing interaction between the regulation the market by external forces including government and the discipline and the regulation of the market itself..." , The government and the economy, G. Stigler ;23 page

[9]Zelenkov B, Ekonomska politicka na Yu, 1989

because they regard them as confidential. I present here the only data that I could find concerning this matter.

This study will be concerned only with a single firm monopolization and the term monopoly will only refer to a single firm monopolization on the relevant area and not to contracts, mergers or concerted practices , where two or more firms are involved.

3. THE ORIGIN OF THE TERM "MONOPOLY" AND ITS DEFINITION

The origin of the term "monopoly" comes from two old Greeks words: Mono which means one and Polist that means seller.[10] As a theoretical model it refers to a market structure with only one supplier many buyers and no competition.

In the MIT Dictionary of Modern Economics [11] it is defined as a market with only one seller of homogenous product , without available substitutes for it on the market , and lots of customers.

Monopoly may alternativly be defined as ownership of the source or a commodity and domination in its distribution.[12] Another definition , found in the Encyclopedia of Economics, [13] treats monopoly as a theoretical market structure, in which there is only one supplier who controls quantity produced and offered for sale and its price. Under this definition, market entry must be closed for other competitors.

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[10] Samuelson & Nordhaus:, Economics,1985
[11] Pearce D. , 1992
[12] Rosenberg J. ,Dictionary of business and management, 1978
[13] Greenwald D.,1982

I must underline differences that exist in understanding of term "monopoly" in eastern and western countries. From the Marxist perspective "monopoly" also embraces all contracts and kinds of conspiracy among monopolistic enterprises.[14] For Marxizians even one period from the development of the society is called "monopoly Capitalism".

On the other hand in U.S. the term "antimonopoly legislation" is an expression which covers[15] U.S. statute, case law and administrative proc

ess relating to monopoly and competition that originated from late 19 th century.

In this study the term "monopoly" refers to a single firm which has power over the market for special kind of product that enables it to control prices , quantity or sale conditions. It does not refer to contracts between big corporations or concerted practices, but only to one firm which tries to obtain unfair advantages by using its dominant position on the market. So, this term is not exclusively connected with pure monopolistic situation on the market. It refers to any enterprise having superior position with substantial market power and which makes an unfair use of it.

4.THEORETICAL FRAMEWORK

[14]Ruskov T., Politicka ekonomija,1982
[15]GoyderD.G.; EC competition law,1993

The first theory of monopolistic competition was introduced in 1933 by E.H. Chemberlen [16]and Robinson[17]This theory introduces a market with a large number of firms producing similar but not identical products. The product differentiation and absence of freedom of entry enables enterprises to earn a monopoly profit. They can behave as superior companies because their products are similar but not interchangeable from customers' point of view.

Economic theory of monopoly is the basis for antimonopoly regulation in the U.S. It is mostly supported by Chicago law school and R. Posner. In his book Antitrust Law, he defines a monopolist as "a seller who can charge higher prices by limiting his output". The monopolist will stop raising its price at the point at which any other increase would reduce its revenue more then reduction in total cost, which would result from the smaller quantity produced. This could only be possible in monopolistic market structure with no other producers , without new entrants, and with inelastic demand curve.

Monopolies produce social costs and losses. Buyers are forced to use substitutes which are more costly to produce. If they had been cheaper customers would have used them earlier. Consumer demand thus is satisfied , but at higher cost. Thus resources are not being allocated in the most efficient way.

While in the U.S, the theorists are mostly concerned with the fact that deadweight produced by monopoly will not be captured by anyone , the EC scientists are more concerned with isolation of the member states markets. In the background of the EC legislation the theory is that dominant undertakings controlling 45% or more of the local markets would be counter-productive for the economical integration of the European Union .In a monopolist market, there is a single supplier who is able to charge higher prices, by controlling its output. Consumers have no other choice , but to buy from the monopolist. Monopolist profits will induce a company to use unlawful devices to maintain its dominant position, which will create obstacles among

[16]The theory of monopolistic competition ,1933
[17]The economics of imperfect competition

member states markets. This is contrary to the goals of the EC Treaty , which prohibits "abuse" of the dominant position. This explanation is the basis for article 86 of Treaty of Rome.

U.S. and EC in their prevention of monopolistic behavior on the market have two different directions. While the U.S.theory is mostly based on economical analysis , the EC is more concerned with creation of a single market without any impediment from its subjects. It is less based on the cost and benefit analysis and the deadweight produced by the dominant company.

According to the marxistic theory, monopolization of the market was considered to be the beginning of the end of the capitalistic society, because it enables accumulation of wealth and political power in the hands of a few and poverty for the rest of the people. Lenin[18] wrote that the phenomenon of market concentration makes the monopoly the most fundamental characteristic of capitalism. His opinion is expressed within the following sentence:
" Monopoly with its high prices and without technical development gives birth to rotting...".
Yet, I must mention that socialistic countries in their economical theory recognized that monopoly has had bad consequences for the whole society, especially because its position enables the monopolists to earn extra profit. This is contrary to the marxists idea for equal distribution of the wealth among people. The only basis for distribution should be hard work and skills. But in practice it was a lawful device for economic planing . It was accepted as part of the system and was established by law. The socialists tried to fix the production according to people's needs. This was not done very successfully, as one factory was usually producing one product and there was no competition . These factories were de facto monopolies on the market. The situation resulted in lack of products on the market and permanent economical crises. There is a difference between theory and practice, so it looks as Lenin is misrepresented. Or perhaps, the interpretation of his opinion over this matter is correct, but not quite implemented in practice.

[18]Imperialismot kako najvisok stadium na capitalismot

5. NATURAL AND STATE MONOPOLIES

Sometimes there is benefit of having a single firm organize the production. This depends on economy of scale, when only one firm can survive on the market.[19] Monopoly which existence is justified because of the economical reasons is called natural monopoly. These so called natural monopolies are the most efficient way to organize the production because of huge capital requirements for plant and equipment. They are mostly found in public utilities sectors. Anyway, there are problems caused by natural monopolies. For example imposition of excessive prices or restriction of the output. Natural monopolies can increase their costs through overpaying for supply or through paying excessive wages.[20] Because of absence of constraints from competition, natural monopolies are usually controlled by some kind of commission or governmental body. In U.S., the standard policy for such industries is to establish regulatory commissions , to control prices and quality of services.

In Europe, however, monopoly position for such enterprises is ussualy granted by statute. In the case where such position is granted by state this kind of monopolies are called state monopolies. Because of its possible effect on the single market, the Treaty on European Union has provisions governing state monopolies : articles 37 & 90.[21]

In Macedonia the relevant statute governing state monopolies is Company Act from 1988 year and its amendment from 1990. The 1988 Company Act regulates public utilities such as transport, electricity and communications.[22]These articles were changed by an amendment from

Commented [BP1]: Page: 12

[19]Samuelson; Nordhous, Economics,1985

[20]For e.g ,in U.S. in electric power industry there was a network of local monopolies in private hands but under governament regulation. Reason for considering these monopolisare character of services and inelasticy of demand curve. As a kind of experiment, competition was provide by Tennesse Valley Authority. The.effect of this was a lowering of the rates to be payed. (8 Readings inm Economics , P.A. Samuelson , 1970 - W. Adams)

[21] more in the part for E.C

[22] Macedonian Company act,1988,20-24

1990[23] By this Act state monoplies are defined as particular kind of enterprises created from the state for the purpose of satisfying public demand in public interest areas. The 1990 amandment of this Act allows, for the first time, natural and civil persons to own or invest money in state monopolies. Conditions for their operation are laid down by local governments. Republic administrative body, on the other hand, controls every price raise.

I share the general opinion that it is not always useful to suppress the monopoly. There are special cases when there is no better way to organize the production than to allow a monopolization of that particular market. All countries have special legal regime to regulate state monopolies. Therefore, they recognized that sometimes the existence of monopoly is justified by economical reasons.

6. METHODS THAT CAN BE USED TO REGULATE MONOPOLISTIC POSITION ON THE MARKET

The fear of monopolistic exploitation induces governments to use different methods of control. For example; they often use excessive taxes to reduce monopoly profit. This is a good method to reduce their extra earnings, but not sufficiently effective to increase supply.

Another method used to capture monopoly profit is price control. This is the usual method used to determine the prices in former socialistic countries. In U.S. this method was also introduced in 1970 by president Nixon, but it resulted in shortages of gasoline, toilet paper etc. This shows that it was not a very effective method.

In Europe, governmental ownership is the most commonly used method to control monopoly. It is more efficient than the previous ones , and it has been used for quite a long time.

[23]Macedonian Company act;articals 24a-24b

It has been modified , but never replaced. It is used during the history to control public utilities such as : telephone, electricity, railroads.etc...

Other forms of enforcing public policy are:

1) Regulatory commissions such as those originally created to cope with natural monopolies. This method constitutes governmental control without ownership. Besides control of the prices, the governament controls output, entry to and exit from the market. Regulatory commissions are created to control public utilities and financial markets. Sometimes industries even welcome control , because it means immunity from prosecution by the antitrust division.

2) Antitrust legislation.

Statutes and Regulations help to preserve competition and induce selfregulation of the market without direct governmental involvement.

The main focus of the remainder of this paper will be on antitrust legislation. Throughout my study, I will be dealing only with the method, antitrust legislation as one of the methods which are used to control monopolies.

7. REGULATION OF MONOPOLY IN THE UNITED STATES

7.1.Origins and rationale

Origins and rationale for legislation regulating monopolistic behavior are to be found in the history and development of American society and its market economy. As trade opportunities grew , the market became more and more dominated by large corporations. During 1880 , concentration was going on in major areas of industry, which were mainly controlled through the device of trust. Big business managers realized that it was much better for them to contact and to create some kinds of unions, to work together instead of competing. Some corporations were also able to drive other competitors out of the market and then they grew stronger and bigger. Accumulation of the capital enabled creation of big companies which were able to control the market. Corporations were also aware that they would be better off , if they agreed between them on the selling terms , the price and quantity produced.

Besides economical reasons for suppression of monopolies, the public was also afraid that accumulation of economic power could affect political life and individual freedom..
"If concentrated power is tolerated, giant pressure groups will ultimately gain control and democracy will be suppressed by some form of authoritantism."

Small businessmen wanted to protect their competitive position and they demanded protective legislation. Another function that antitrust law was originally supposed to perform was to protect the unity of American country and their single market. However this function is no longer of much practical importance, since the unity of the market is well established. A campaign with the parole "Distrust in trust, trust in competition"[24] resulted in the passage in 1890 of the federal Sherman Act.

Sherman Act prohibits any conduct which attempts to create monopoly, conspiracy to monopolize and actual monopolization This act also provides for judicial review and proscribes organs that are in charge to facilitate proceedings (section 4) . Subjects of this law and the meaning of the word person are also specified in section 8 .The main goals to be achieved with this statute were to preserve freedom of enterprise and to force corporations to internalize their costs of production.
After the Sherman Act, a number of other acts were enacted to regulate various aspects of competition:

[24]Speech of one of the senators in campaigne which was going on in 1877, SMALL BUSINESS IN AMERICAN LIFE, N.Y. Columbia University Press, 1980

1. Clayton Act (1914): prohibits discriminatory pricing , tying arraignments, exclusive dealing. Agriculture, labor and horticultural organizations are exempted from its application. It amends Sherman act and is more specific. It provides penalties for monopolization.
2. Robinson-Patman Act (1936): outlaws discriminatory pricing.
3. Miller-Tidings act (1937): exempts vertical price fixing from federal antitrust law in states which have fair-trade laws.
4. Anti-merger Act (1950): amends the Clayton Act and broadens the prohibition against mergers which would restrain trade.
5. Federal Trade Commission Act (1914) : establishes federal commission and prohibits unfair and deceptive practices injurious to competition. It is important for enforcement of relevant statutes in monopoly cases.
6. Revenue act (1916).
7. Webb-Pomerene Export Trade act (1918).
8. State fair trade laws (1931).

All of the foregoing form the body of U.S. antitrust law. Some of these laws contain antimonopoly provisions. All of them were passed by congress, which makes them federal laws, regulating different markets' behaviors.

Besides the enumerated Acts, the States have statutes of their own. The congress allows state's laws to differ from one another. This does not create a problem, since, for all practical purposes, competition regulation is of federal concern. From the prospective of monopoly regulation it is interesting to mention that more from half of the states prohibits predatory pricing , primarily to protect the margin of profits of small businesses. The reason for this is small business' bigger importance in smaller (local) areas.[25] Most of the states usually outlaw price

[25]Senator Benton, 1950,"...small business represents the leadership and initiative which have helped this country survive the winters of depression and war...small business was THE CORE OF COMMUNITY LIFE..."

discrimination , price fixing, division of the market and other devices that might restrain trade. This is why antitrust Acts are often called restrain of trade laws.

7.2. Enforcement of antimonopoly legislation

There is a dual enforcement of federal antitrust law in the Member states courts and also in the Federal Courts. Organs in charge for administering antimonopoly statutes are the Federal Trade Commission, the Division of Justice Department and the State Attorney General.

The FTC was established in 1914 by Federal Trade Commission Act. The Act enables the Commission to act as enforcement agency and to take actions against pricing violations under Sherman act[26]. This Commission is also responsible for administering Webb-Pomerene Act, Consumers Credit Protection Act[27], Clayton Act and for series of other Acts that regulate labeling of certain products. It is consisted of 5 commissioners appointed by the president. The FTC is very important administrative organ that acts as an investigator agency , prosecutor and judge. The Commission also helps industry better to understand relevant laws through issuance of Trade Practice Rules and through organizing Conferences. The Federal Trade Commission issues industry guides that deal with activities within its jurisdiction. The Commission also makes an extensive use of the Consent decrees which specifies which steps should be taken by the defendant to stop the alleged violation. The FTC's powers are to file complaints , to issue cease and desest orders and to impose penalties up to 5,000$. Appeals from the Commission's decisions are available in Federal Courts.

Other administrative organ is Antitrust division of the Justice Department in charge for civil and especially for criminal proceedings under Sherman Antitrust Act. Its powers are mostly to punish and not to prevent like FTC. DOJ can issue guidlines, can provide a business -review

[26]Authorised by Section 5 of the FTC Act
[27]When such an enforcement is not administered by particular agency

procedure and can give prior clearance. Antitrust division has authority to impose "three D's" - divestiture, divorcement and dissolution. Because of its extensive powers defendants would rather sign a consent decree or apply a plea of nolo contendere to the Court.

The third administrative organ is State Attorney General which is empowered by Sherman Act, section 4 , by Clayton Act , section 15 and by Antitrust Improvement Act to institute proceedings against violators of antimonopoly law , under direction of Attorney General. According to Clayton Act , section 4C , any Attorney General of a State can commence a civil action for money relief on the behalf on natural persons residing in the very State. On the other hand , this right has been extended by Hart-Scott- Rodono Antitrust Improvement Act from 1976 which empowered the state A.G., to bring a treble damages action on behalf of its citizens, parens patriae treble damage action. State Attorney General also , may induce the FTC to initiate antimonopoly proceedings.

Besides public action, individuals also have the right to commence an antimonopoly procedure under the Clayton Act , section 4. Threefold damages are good incentive for private parties to bring antitrust claims in District Courts. Private plaintiffs are also empowered to sue for injunctive relief , under Clayton Act , section 16. The judicial test for permissible plaintiff is the *Direct Injury Test*.[28] Under this test only direct purchasers can claim damages in antimonopoly competition cases . Persons who suffered direct injury from the monopolistic behavior can claim the entire sum , even in cases where overcharge was passed down the distribution chain. [29]

The second test, for the permissible private plaintiff was laid down by the Court in the Conference of Studio Unions v. Loews[30]case. It is known as the *Target Area Test* and its starting

[28]Loeb v. Eastmen Kodak Co. 183 F. 704, 709 (3rd Cir. 1910)

[29]Indirect purchasers are not entitled to seek private relief except if they show that the entire overcharge was passed onto him. This exception was formulated in the Illinois Brick Co. v. Illinois case and it is known as a Brick rule. This rule says that undercut buyer can seek relief only if there was a pre-contract, both as to mark up and quantity and if the middleman was involved as the part of the antitrust conspiracy. But , in such a case the only available remedy is injunction. This exception is not available in cases of a single firm monopolization.

[30] 193 f. 2d (9th Cir 1951).

point is who should be protected. The favored plaintiffs are the customers and the competitors , who usually suffer the biggest damage because of the monopolistic behavior on the market.

Sherman Act section 4 and Clayton Act , section 11 (c) and 4 (h) vested the jurisdiction of antimonopoly cases to District Federal Courts. The verdict of these appellate courts can be reviewed by the Supreme Court , who can order rehearing , deny the petition of certiory or affirm the District Court judgment.

Administrative agencies are passing their decisions according to administrative procedure. The Federal Trade Commission issues and files complaint , stating its charges to the person in violation of the Act and to Attorney General.[31] After hearing and investigating the facts , in the case where the FTC finds that the corporation is in violation of Antitrust law , the Commission makes a report and issues an order to cease and desist a wrongful doing. Then the defendant has a right to file a petition in the Court of Appeals of the United States. Antitrust division is exclusively in charge to act as enforcement agency for criminal penalties. The defendant can be put in prison only in the criminal proceeding.

Damages can be awarded in the legal civil procedure. In antitrust damage cases, parties have the right their case to be heard by the jury . Jurors act as fact finders of the liability and amount of damage awarded. In the cases of private injunction , there is no right the case to be heared by a jury. Therefore, the fact finder's role is performed by the District Judge.

7.3. Remedies

There are various public remedies. For example: FTC can issue cease and desist orders . Criminal penalties such as imprisonment up to three years and fines are sometimes suitable punishment for monopoly offenses. In a single firm monopolization case , there can also be changes in firm's structure-division to smaller firms. Antitrust division is the one which has the

[31]Clayton Act , section 11.

power to impose divorcement or mandatory orders for dissolution. The courts , on the request of the administrative enforcement agencies can issue temporary injunction or cease and desist orders. The last three are equitable remedies. In addition to these , private plaintiffs can obtain damages. They are entitled by the Clayton Act to get treble sum of damage suffered. Substantial Judicial latitude is given to plaintiffs in calculating and proving damages. In cases of monopolization the principle basis for calculation is the difference between the actual paid prices and the price that they would have to pay in a competitive market. The District Court excepted that:

> " The amount of damages should not equal the entire difference between the monopoly price and competition price , but rather the price increase caused by the anti competitive conduct that originated or augmented the monopolist's control over the market."[32].

Today , most judges and antitrust analists working on antimonopoly cases, consider these remedies to be too harsh. They have concluded that threefold damages , are very high and they do not just compensate the plaintiff , but that they also have the overdetterance effect. Judges have a second thought to order mandatory dissolution of the corporation in violation of Sherman Act , section 2 , because they do not want to interfere with firm's business. Now , there is a tendency toward lowering the antimonopoly remedies.

7.4.Analysis of Sherman act , section 2

> "Every person who shall monopolize or attempt to monopolize , or combine or conspire with any other person to monopolize any part of the trade or commerce among the several states or with foreign nationals shall be deemed guilty of felony."

In this section three different offenses are proscribed. First, it is the case of actual monopolization. This violation arises when corporation with large market share, over 90 %, uses

[32]Berkey Photo, Inc v. Eastmen Kodak Co.,603 F (2d Cir 1979) cert. denied, 444U.S. 1093 , 100 S.Ct.1061, 1981;297

its power to create barriers to entry. It condemns a-single firm monopolization of the market. The general intent to use that power is presumed on the persons conduct.

This act also covers preliminary steps. An attempt to monopolize should be understood as a separate offense in a case where the evidence shows smaller amounts of market power. This section catches both cases , where there is an already existing monopoly and where a corporation with a smaller market share uses its power to drive the competitors out from the market. In the second case , Court's standards are much stricter . A plaintiff needs to show a specific intent and the conduct requirement is much stricter. The third offense is a joint abuse by two or more enterprises in order to monopolize the market. This is the federal law and can be applied only when there is a "direct effect on interstate trade", but it also refers to manufacturing, too. The last part provides fines and imprisonment for the violators of this section.

The origin of this prohibition is in the common law doctrine which says :

> "A private trader can freely exercise his own independent discretion , in respect of the party with whom he deals , but only in absence of any purpose of creating or maintaining monopoly."[33].

Monopoly position is not itself condemned , but rather the conduct that enables maintenance of monopoly position.[34] Corporations can have market power over 90 % of the market and still not be convicted under Sherman Act , section 2. On the contrary, even with smaller market power , they could be accused for monopolization if they practice unfair conducts. They are such acts that give a person the power to control prices or to exclude his competitors.

Sherman Act , section 2 has been accused of being too vague and unclear. For example it does not define the meaning of trade[35], when a firm has a monopoly position on the market, nor whether that is sufficient to be condemned.Most of these answers to these questions can be found

[33]Kamp H. H. , ECONOMICS AND FEDERAL ANTITRUST LAW ; 1985

[34]This paper will not analyze attempts to monopolize,but instead concentrate on conduct of firms which alrady have a monopoly position on the market.

[35]In the past it was unclear whether commerce also means trade.

in judicial interpretations of the statute , according to special circumstances of the case. There is no rule of *per se* illegality in this kind of case.

Analysis of monopolycases rests usually on the economic concept of market power.

7.5.Market power

Market power is a term that is used interchangeably with monopoly power. It is defined as the ability to raise the price by restriction of the output. It is power that enables dominant firms to control prices or to exclude competitors from the market. The main issue is whether the company has the power to charge more than the competitive price and hether it can do that for a longer period than necessary.

D. F. Turner [36] wrote that when a firm can persistently behave over a substantial period of time in a manner which differs from the behavior that the competitive market would impose on a competitive firm facing similar costs and demand conditions , that is evidence of monopoly power. For Areeda and Turner "a substantial period of time" means at least the last five years. This shows that in U.S., it is not enough for a corporation to have a monopoly power, but also to have it for a long period of time.

Monopoly power is a function of the following different values:

1. *Market share*, provides evidence of market power.

Only corporations with a large market share can raise their price without substantial loss of sales and customers. The reason for this is that their competitors are small , with small market shares and limited possibilities for production , so , there is no other choice for the buyers on the market

[36]A POLICY OF ANTITRUST LAW

but to buy product from the dominant firm.. In U.S. law usually more than 70% market share is enough to show monopoly position.[37] .

2. *Elasticity of demand* determines the monopolist's degree of market power.

It is a powerful conceptual tool that shows sensitivity of the quantity of a certain product as a result of change in price. The more elastic the demand curve, the less power the dominant firm has to charge excessive prices. If the demand curve is inelastic the monopolist can charge higher prices without loosing too many sales.

3. Elasticity of supply shows the same phenomenon from the competitor's side.

If a firm restricts its output , other competitors on the market might be able to satisfy market demand if they have excess capacity or if they could easily switch to production of the deflated product. Elasticity of supply thus shows the ability of the other competitors on the market to increase their output and satisfy market demand.[38]

7.6. Formulas for quantifying monopoly power.

Various authors have developed formulas for quantifying monopoly power as a tool for the courts to determine whether a particular firm has monopoly power.

Posner has proposed this formula : EDF=EDM/S + ES(1-S), where EDF is elasticity ; EDM is elasticity of demand , ES is elasticity of supply from other firms in the market and S is the market share of the firm.

To quantify market power, Turner and Areeda have suggested a combination of three elements. If one company for 5 or more years has 50% or more of sales annually , it has Monopolypower.

Pm = e

[37] The theory of workable competition which is very popular among economists in the western countries says that , although one firm might have a 1oo% market share there is still interbrand competition, between producers of different goods , which could put constraints on the competitors' attempts to monopolize.

[38] Sometimes on the market there is an umbrella effect. If a Monopolist holding 90% of the market is charging an excessive prices, its competitor , who holds the other 10% may also follow suit and charge tha same.

$$\frac{\quad}{Pc} \quad \frac{\quad}{e-1}$$

The following formula[39] expresses the ratio of the monopoly to the competitive price as a function of the elasticity of demand , where Pm is monopoly price and Pc is competitive price.

7.7.Judicial analyses

In order to find a violation of the Sherman Act , section 2 judges interprate and apply corresponding sections of the relevant statutes. They always interprate the law , in such way that it can be able to answer the challanges of the new time and responde to the needs of the modern life.There are three approaches in the U.S. judiciary for the interpretation of monopoly as a unlawful device.

a. Prior interpretation which was made by Judge Hand in ALCOA case :

".One who has acquired an overwhelming share of the market , monopolizes when he does business."[40] Judge's Hand used strict approach, which was overruled by the Griffith case.[41]. Now a monopolist can be punished only if it is engaged in exclusionary practices .

b. An enterprise has monopolized in violation of Sherman act , section 2 if it has acquired or maintained market power with the purpose to exclude others and this conduct has resulted in an unreasonable restraint of trade.[42]

c. Mr. Justice Douglas[43] concluded that an enterprise has monopolized in violation of section 2 if it has the power to exclude other competitors and has exercised it. This approach is now used to interprate the monopoly. It shows that changes in judicial interpretation of the law over time are consistent with changes of fundamental ideology. For example, now the focus has moved from protection of competition toward protection of customers.

[39]KAMP , ECONOMICS AND FEDERAL ANTITRUST LAW , 1985
[40]U.S.v.United Shoe Machinery Corp. , 347 U.S. 521
[41] U.S. v. Griffith ,334 U.S. 100
[42]U.S. v Columbia Steel Co.,334 U.S. ,495 , 525 (-)
[43]U.S. v. Griffith ,334 U.S. 100 (-)

The courts in their analysis employ the *rule of reason,* which was originally formulated by the Supreme Court as a mean to distinguish permissible from impermissible exclusionary practices.[44] They consider particular circumstances for each case and apply two step test. First , the courts determine the relevant market and the firm's market share. After finding that the alleged violator has a monopolistic position on the market, then the courts consider the firm's conduct. The test of monopoly is structural, based on the percentage share of the market. Consequently, the determination of the market share is a very important issue. To define the market share, the courts must first set boundaries of the relevant market.

1. *Determination of the relevant market.*

Elements of the market definition are:

a. Product market

b. Geographic market

c. Production dimension

a. In order to set market boundaries, the court first identifies the product that is alleged to be monopolized, the relevant geographic market and the percentage of output in it. To define the market the courts must first identify groups of purchasers , sellers and the smallest possible market. In determining product market the courts usually use the test of *cross elasticity of demand.* That is they see how the slight increase of the price induces customers to switch and buy a similar but cheaper product. The courts also use the test of *interchangeability* They compare two relatively similar products and examine their physical differences and their use , to see whether they are considered as substitutes in the view of buyers when sold at the same price. Two products can also be interchangeable in the eyes of the Court , in the cases when they can be produced by the same production facility, although customers do not considere them as substitutes. Sometimes through application of the tests of interchangeability and of

[44] KAMP , ECONOMICS AND FEDERAL ANTITRUST LAW , 1985

crosselacticity of demand the Forum of Justice, finds the existence of submarkets , as the Court in the Brown Shoe case[45] said :

> "In the product market well-defined submarkets may exist. ...such a submarket may be determined ... as a separate economic entity , according to their particular characteristics and uses, distinct prices , sensitivity to prices."

Submarkets do not have a big importance in a single monopolization case

b. Second issue to be determined is the geographic market. It is an area in which the defendant sells the product and where the buyers look for their supply. It is the place where the sellers compete for distribution and to which the customers may turn to an alternative kind of a product. It could be worldwide , nationwide or local trade where particular product is sold. Indications for a single market are close price relationships and sales patterns. Barriers for entry on the particular market are the transportation costs and customer's preferences. Transportation costs increase the price of the product and make it less competitive. On the other hand , buyers usually choose to buy a product that is near the area where they live , instead of making travel expenses and buying an article on sale miles away from their homes. Customer's preferences are very important , because clientele usually buy the same product for which they are convinced to be better than another similar article. They are not easily going to switch and buy a new product. Thus, new entrant must invest a lot of money in advertisements , which increase costs.

c. Production dimension is an important element for determination of market share. If the firm which is charged with monopolization of certain market , is the sole or pre-dominant producer on it , that indicates that the corporation has big market share. On the contrary when there are many producers who can use and accommodate their production facilities to produce the commodity in question that is an evidence for lower market share.

2. *Monopoly conduct.*

[45] Brown Shoe v. U.S. ,370 U.S. 294 (-)

The second element of the test applied by the courts, is the behavior of the monopoly on the relevant market - *the conduct factor.* The monopolistic position on the relevant market is not condemned by itself, but by the firm's abusive conduct. A firm with a vast monopoly power falls under Sherman Act, section 2 only if it tries to use the power to create barriers to entry. According to the theory of profit maximizing behavior, all firms will try to achieve and preserve superior position on the market which will enable them to earn more. For example : monopolistic corporations can maximize their profits by charging higher prices. There are also many other practices that are prohibited, but not enumerated in the statute. It is the job of the courts and enforcement agencies to identify and suppress such unlawful conducts. Examples for exclusionary practices are; espionage or sabotage, mergers, price discrimination, predatory pricing, tying arrangements and refusal to deal. Courts look at the firm's intent , in order to evaluate purpose and effects of certain conduct.[46] In actual monopolization cases, the general intent is inferred from the conduct. The test is a dangerous probability of success. If the courts can not find such probability , they do not look further. The specific intent needs to be proved only in attempts to monopolize cases.

> "To fall within section 2, the monopolist must have both the power to monopolize and the intent to monopolize. To read this passages to demand any specific intent of it, is a nonsense"

In this quote from the ALCOA[47] case, Judge Hand clearly stated that he did not take into consideration the specific intent , while evaluating the firm's conduct.

3. *Examples of prohibited exclusionary practices :.*

a. **Predatory pricing** is conduct of a dominant firm trying to drive its competitors from the market by charging prices lower than its costs of production. This offense is caught by the

[46]For ex:I If a firm drops prices , knowing that this would drow his competitor out of the market , if it initiates litigation without any cause or if it fails to predisclouse product innovation

[47]U.S. v. Aluminium Co. of America , 2 cir , 148 F. 2d 416 (1945).

Sherman Act , section 2, which prohibits monopolization and attempts to monopolize. Protection of the competitors is not the sole argument predatory pricing to be condemned under this Act. Another reason for its prohibition is to protect the consumers. If a superior corporation is successful in driving its competitors out of the market, it can become a single seller , thus able to charge higher price to its buyers. In such case customers will also be worse off.

Few pre-conditions must be met , in order this conduct to be successful. For example: a market should be suitable for monopolization , the competitors must be weak; and the benefit from the monopoly profit in future must be bigger than sustained loss. The corporation can incure its losses , by achieving a monopolistic position on the market which will enable it to charge higher price for its product. It seems likely that the monopoly profit will attract new entrants, thus a firm planing to engage in predatory pricing must take into consideration an excessive capacity of already existing competitors on the market and possible barriers to entry. If there is any possibility left for the competitors to produce additional units , the corporation will not be in the position to charge monopolistic prices and thus able to incure its losses.

. To see whether the corporation was engaged in predatory pricing, the courts use a test based on the calculations of short run marginal costs. When a monopolist sells below its marginal cost , this evidences predatory pricing. Besides marginal costs, another test has been proposed by Turner and Areeda , i.e. the concept of average variable costs (AVC). The authors gave list of variable costs that courts should look at.[48]. The courts look to see if the prices are lower than variable costs, and if there is such a case , then it is an evidence of predatory pricing. The judges however face many difficulties in applying AVC test, especially: in identification and calculation of variable costs .They have also concluded , that it is not a suitable test for particular kinds of industries and it failes to take into account all relevant variables.

Because of the failure of the former test, Joskow and Klevoric proposed a similar one based on the AVC costs with these presumptions :

[48]This test was developed in 1975

1. A price below AVC is predatory
2. If the price is somewhere between AVC and average total costs they are presumed to be predatory
3. If there is a price increase after a price reduction[49], it provides a further evidence of predatory pricing.

This practice is further prohibited by Clayton Act , section 2 [50] . The corporation must choose only one price for selling its commodity, because this Act prohibits differentiation of the prices in different markets. Thus, the firm can not charge in the market with monopolistic structure a higher price with a purpose to recoupe its losses from the market elsewhere. The Recoupment theory explains such conduct of the firm as follows; it is selling under costs in the market with more lively competition with purpose to increase the monopoly power , and is charging higher prices in market where it alredy has monopolistic position . This theory is the basis for Clayton Act , section 2.

b. **Tying arrangements.** This conduct is on the detriment of competitors and customers as well.. By tying the product that is produced by a firm which is a monopolist on the market, it can force its customers to buy its other product that they don't need or can buy for better price somewhere else. Tie ins put the parties at unequal position and the monopolist is the one who dictates the terms. Buyers who refuse to go along with the tying arrangement might be punished with refusal to be supplied. By using tie-ins, dominant corporation can obtain higher profits , without being concerned with competition of tied product.

Such conduct can also be a method for facilitating price discrimination. For example : if the customers buy both products they will pay a lower price, if they buy only a tying product, than they will have to pay more for the same commodity.So, the buyers will be charged according to whether they are going to buy only the tying product or the tied product as well.

[49]Kamp, Economics and federal antitrust law ,1985
[50] amended by Robinson Patman Act (1936)

Tie ins are disagreeable with competitive market stucture because they create barriers to entry for new producers. New entrants will have to produce both products , because they will not be able to win market share in only one of the markets, especialy when particular products are closely connected and must be used together.

A monopolist on the market may try to extend its monopoly into a second market by using this mean. For example , the Court in Hanry v.Dick Co"[51]. said:

> "It has been very earnestly said that a condition restricting the buyer to use it only in connection with ink made by patentee is one of the character which gives to a patentee the power to extend his monopoly so as to cause it to embrace any subject , not within the patent."

This quote shows that tie-ins are used as sophisticated tools by monopolistic enterprises to gain control in the second product market and to engross its monopoly power.

c. **Refusal to deal.** The essence of this offense is that a monopolist can freely deal with whomever it chooses, but may not exercise this freedom if such conduct will result in maintenance of monopoly. Unilateral refusal to deal which is likely to result with maintenance of monopoly for longer time than necessary is actionable under Sherman act , section 2. Antimonopoly legislation secures [52] the monopolist's big obligation to behave fair on the market place.

Some refusals to deal by other competitors that are not questionable under antitrust legislation, may be prohibited (by it) for corporation with a huge market share. The reason is that a monopolist has a higher duty for fair dealing with his customers . He might be the sole producer of a product needed by buyers to continue their business. By refusing to supply , the monopolist might drive the customers out of the market, which will lessen the competition. A

[51]Henry v. Dick Co. S.C. of U.S., 1912 224 U.S. 1, 32, S. Ct. 364,56 L. Ed. 645
[52]Clayton Act ,1914 specifies exclusionary practices.

monopolistic supplier can also threaten its distributors with refusal to deal if they do business with other company. Apparently, this conduct is on the detriment of the customers

This practice also create barriers to entry, in the case where the monopolist refuses to supply new entrants on the market.

The courts look at the intent of the monopolistic enterprise in order to draw a distinction between lawful and harmful refusal to deal. The plaintiff must show that the corporation accused for unilateral refusal to deal intentionally employed such practice, not for other reason but to prolong the duration of its monopoly or to secure the obedience of its trading partners. Otherwise it will just be the right of dominant partners to choose with whom to deal business in accordance with fair trade rules on the market.

7.8. Case studies

In the **United States v Aluminum Co. of America**"[53]the Court of Appeals based its decision on the relationship between supply and demand elasticity , market power and market share. Once this case was decided, such analysis has become a regular tool used by Courts for reaching judgments in monopoly cases.

ALCOA was a corporation engaged in production and sale of "ingot" aluminum. It secured its monopoly in manufacturing its product through holding two patents. In this case , Judge Hand took a broad approach to the interpretation of monopoly. He interpreted the motives of the Congress from historical perspective, looking at the time when the Sherman Act was passed. He considered not only bad economic consequences of monopolization of the market, but its social and moral impact on society as well. Judge Hand stated in his opinion that a monopolistic position on the market was enough the corporation to be condemned for violation of Sherman Act , section 2, although it did not employ prohibited practices:

[53]U.S. v. Aluminium Company of America, 148 F.2d 416, Court of Appeals, (1945)

"If power was acquired or maintained throughout improper means, the fact that monopoly was not used to extract from the consumers more than a fair profit is not a valid defense"[54]

Judge Hand thought that a company with monopoly power could start abusing such position at any time. This would have bad consequences for market structure with many small competitors, which was preferred[55] by Congress. This broad approach to interpretation of monopoly has now been overruled by the decision in the Griffith case[56].

In order to find the existence of the monopoly power, the Court of Appeals , first defined the relevant market. It examined demand and supply elasticity . According to the information about demand and supply, the Court concluded that ALCOA was pretty sure that the actual need for the ingot on the market would be partly satisfied by its production and this consideration played a great role in determining the quantity to produce. As far as elasticity of demand was concerned, the Court of Appeals found that Aluminium Co. was the sole producer of "ingot" aluminum on the U.S. market. The Court did not regard competitors from abroad primarily because they had to bear high transportation costs and tariffs, although it did recognize that the foreign competition had some impact on ALCOA's pricing policy. According to these analysis the Court estimeted that ALCOA owned 90% of the market share on the market for "ingot" aluminum, which indicated strong monopoly position. In accordance with judge Hand's broad interpretation of monopoly, this evidence was enough for him to condemn the Aluminium Co. for monopolization in violation of Sherman Act , section 2. Now, it is not enough for the plaintiff only to prove to the courts that the corporation has monopolistic position on the market, but he also must show that the defendant used his market power in an unlawful way to obtain material advantages in trade, for its own benefit.

[54]U.S. v. Aluminium Company of America, 148 F.2d 416, Court of Appeals, (1945)
[55]Judge Hand opinion
[56] U.S. v. Griffith ,334 U.S. 100

The case **Berkey Photo, Inc v. Eastman Kodak Co.**[57] confirms the operative rule of law for monopoly which expresses that an offense prohibited by Sherman Act section 2 has two elements : first; the possession of monopoly power and second this power to be used in such a way to enable acquisition or maintenance of monopoly.

Kodak is manufacturing cameras , films and film papers. It has developed a special film which could only be used complementary with its camera. It started to advertise its improved film. This campaign was successful and increased sale both in cameras and camera films. However, at the same time Berkey's market share in cameras went down. Apperently , it accused Kodak for monopolization of the camera market, film market and paper market, that is prohibited under Sherman Act , section 2.

The Court of Appeals applied two step test to estimate if Kodak had made such offense. First, it examined the situation on the markets to see if the corporation had monopoly power which would have enable itself to control the relevant market place. After considering the figures that had shown the revenue and annual sales of cameras (90%), of photograph films (88%) and of CP & P[58] (95%) of all market sales , the Court of Appeals concluded that Kodak had a substantial monopoly power and that it was a dominant firm in the particular markets. Refering to Griffith dictum[59], the Court of Appeals, underlined that the mere existence of monopoly power was not enough for a corporation to be convicted under Sherman Act ,section 2. It went further on and examined the conduct of the firm , which was the second element of the monopoly test. The main issue was whether the defendant had violated antimonopoly legislation, by tieing the sales of its new film with its camera. In other words, whether Kodak had used its monopoly power in one market to gain a competitive advantage and to monopolize another market. The Kodak defense was that it was normal for a firm competing in several fields to seek

[57] 603 F 263 (2 nd Cir.) cert. den., 444 U.S. 1903, 100 S. Ct . 1061 (1980)
[58]Kodak's Color Print and Processing Labaratories
[59]U.S. v. Griffith ,334 U.S. 100

for the competitive advantages in efficient production and greater ability to develop complimentary product But the jury found that this tie in arraignment violated Sherman Act , section 2.

Berkey also accused the defendant of failing to predisclose information about the innovation on time. In had been a past practice of Kodak always to predisclouse its improvements in order the industry to meet consumer's demand for complementary product for its innovation. The Court rejected this claim stating that it was not an exercise of monopoly power. It would have been a violation only if Kodak had refused to sell the film to Berkey, but the plaintiff only contended that Kodak's past offense had created a duty for Kodak to predisclouse information to other competitors. The Court found out that Berkey had failed to show that, because of Kodak's conduct it suffered actual harm. It clearly underlined public policy that supported the process of research , development and innovations.

In the monopolization cases, first it is important for the courts to determine the relevant market. Definition of market has two components: product and geographic markets. In the **U.S. v. Du Pont de Nemours and Co**[60]. case , the Supreme Court worked out the concept of cross elasticity of demand as a test for defining the product market.

Du Pont is a large corporation that produces more than 75 % of the cellophane in the U.S. The complaint alleged monopolization of interstate commerce in cellophane.
The Court had to determine the relevant market to see whether Du Pont had monopoly power that would enable it to control prices or exclude competitors. The relevant issue was the product market . If the product market was the only market for cellophane, Du Pont would have had a large market share to evidence the monopoly power. If , however , the relevant product market was the one for wrapping materials then , as defendant alleged, its market share would constitute

[60]U.S.v. E. U. Du Pont De Nemours and Co. , 351 U.S. 377 (1956).

less then 20% of all flexible packaging materials. The Court used the test for *interchangeabillity* between cellophane and other packaging materials.

> "Court will not need to consider other substitutes than those which are substantially fungible with the monopolized product and sell at substantially same price."[61]

Interchangeability depends on how customers in their needs think of the products and if the products satisfy the same needs. The Court emphasized the importance of physical characteristics and use of commodities in question..

Another test employed in this case for determining product market was "c*ross elasticity of the price*":

> " If slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrapping materials to switch to cellophane ...it would be an indication for high elasticity of demand."

The Supreme Court's conclusion was that commodities with their specific characteristics need different wrapping materials, but the need for flexible wrappings was central and unchanged. So , the Court determined that the relevant product market had been the one for flexible wrappings and that Du Pont had not possessed the monopoly power to set its prices independently

Dissenting opinion objected that the majority judges put too little weight on evidence of the great profits that Du Pont was earning. By their opinion if Du Pont's market share was not sufficient to enable it to behave independently from its competitors, then it would not have charged excessive prices and thus enable it to earn extra monopoly profit. Dissenting judges also concluded that the trial judge had wrongly concluded that If Du Pont raised its prices, then the market would have penalized it with smaller profits. The profit numbers, on the contrary, showed that Du Pont could set its prices independently from its competitors.

[61]U.S.v. E. U. Du Pont De Nemours and Co., 351 U.S. 377 (1956)

It is interesting to compare this case with the ALCOA case. Aluminum Co. was convicted of its large market share . Normal profit earnings were not the proper defense in the eyes of the court. In Du Pont is case, on the contrary, although there was evidence of high earnings, it was not found guilty of monopolization in violation of Sherman Act , section 2 , because of its low market share. In case of monopolization , therefore, the U.S. courts consider all market features and conducts through analysis of the market place. Mere existence of high profit is not an outcome determinative or even a prime indicator of monopolization, because of the two step test, which the courts apply first to estimate the market share and second to analyze the conduct.

Telex Corporation v. International Business Machines Corp.[62] provides further guide to how the courts determine the relevant product market and monopoly power of the corporation in question.

International Business Machines Corp. was charged for monopolization of manufacturing , distribution and sale of pheriperial plugs. In this case Du Pont was used as a precedent. The District Court of Appeals reversed the trial verdict and concluded that the Du Pont standard was not applied correctly. The trial court reasoned that although there were some practical interchangeable possibilities , the product market was restricted because of Telex' commitment to supply only peripheral plugs compatible with IBM system. However, the District Court , recognized *reasonable interchangeability* as a standard for determining product market. The Court considered the elasticity of demand and found that the need for such peripheral plug was low. The Court of Appeals also examined the production facilities of other competitors and found that other manufacturers could adapt their plants with minimal costs to make them compatible with IBM system.. This indicated high degree of substitutability of production. According to these facts , the Court determined the product market to be wider then the one for peripheral plugs. On such defined product market IBM's share was not big enough to evidence

[62] 367 F. Supp. 258, aff'd in part ,rev'd in part 510 F . 2nd . 894 ( ).

monopoly position. In absence of monopoly power that would enable the corporation to control the market, apperently the Court of Appeals reject the charge that IBM violated Sherman Act, section 2.

U.S. v. Grinell [63] is another example of how the Supreme Court applies tests to determine the relevant product and geographic market.

Grinell is corporation that manufactured plumbing supplies and fire sprinkler system. It owned 76% of the stock of ADT, 89 % of the stock of AFA and 100 % of the stock of Holmes. This fact was the reason Grinell to be seen as a single company and to be charged for monopolization in manufacturing plumbing supplies , under Sherman Act ,section 2 , instead under Sherman Act , section 1.

To determine whether the corporation had monopoly power the Court first determined the relevant market. The Court applied a different test from the one used in Du Pont case. The Court found that:

> " There were substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangability test of Du Pont."

The Court applied the standard of *single use*. According to it, the Supreme Court did not see why not to combine in the single market number of different products, if that combination reflects *commercial realities.* The Court concluded that customers were not really concerned with the price of the product but with safety of their business. Consequently,the Court concluded that there was a single product market for the entire accredited central station service business.

The second step was to analyze the relevant geographic market, to find out whether it was local or national. The Court considered the *price relations* (actual sales pattern) and *costs of transport,* too. The Supreme Court also realized that buyer's preferences had a great role to play

[63] 384 U.S. 563 (1966).

because they were barriers to sell in the particular market. Considering the nature of the product , the national schedule of the price rates , and the terms for sale, the Court decided that the whole U.S. was the geographic market.[64]

This case is important because it contains the presently accepted definition for monopolization, i.e. that mere acquisition of monopoly power is not enough for one corporation to be convicted under Sherman act , section 2 , but the conviction requires the willful acquisition and maintenance of that power. The Supreme Court recognized that there were some exceptions if the acquisition was due to either the power or growth as a consequence of a superior product, business acumen or historic accident.

After the Court had considered all the relevant issues from this case and found that Grinell violated Sherman Act, section 2 , it ordered divestiture as most proper remedy. The reason for it was the structure of the corporation.

Besides Du Pont and Grinell which are examples of how the courts estimate relevant market and dominance on it, the **U.S. v United Shoe Machinery**[65] case is an example of how the courts estimate that there was an abusive exploitation on the market.

United Shoe Machinery was charged with monopolization of interstate commerce,monopolization and attempts to monopolize the distribution in shoe supplies. It was sued for violation of Sherman Act , section 2.

Estimating the supply, demand and other competitors on the market , the Court found that the firm owned 75% market share of all shoe machinery supplies. It concluded that it evidenced monopoly strength big enough to control the market. United Shoe Machinery's market dominance was neither attributable to research and development, natural advantages, corporation's economic scale nor to inevitable economic laws. The mere fact that the corporation

[64]Although price varied to meet local conditions.
[65]347 U.S. 521, (1954).

had the monopolistic position was not enough it to be condemned for violation of Sherman Act, section 2. The further step for Court was to see whether the defendant abused its monopoly strength to preserve and achieve the superior position on the relevant market.

First, the judges examined the defendant's leasing policy and beneficial system of replacement and repair to see if they had imposed limitations on the competitors. Judge Wyzanski reasoned that such policy had enabled United Shoe Machinery to create barriers to entry for potential competitors. He defined barriers to entry as:

"Something that makes it difficult for a potential competitors to enter the field."

Secondly, the Court examined the rates of return. It concluded that this corporation had facilitated discrimination by fixing different rates of return. On the markets with vigorous competition, United Shoe fixed smaller rates, whereas in other market places where competition was of lesser significance, it fixed rates of return were higher.

Although the United Shoe Machinery had not charged excessive prices , the Court concluded that the defendant had deliberately chosen leasing policy and lower prices with purpose to suppress the competition on the market for shoe machinery ,which would enable it to live a "quite life". In order to break up United Shoe's monopoly power, the Court ordered the corporation to offer the machines for sale , in addition to offering them for lease.

U.S. v. American Can Company[66] is another example of how the Court estimates the monopoly conduct on the market. This company was charged with violations of Sherman Act, sections 1 and 2. It was the largest corporation on the market, which by persuading, inducing or coercing forced other competitors to sell out. It then bought up their plants for different values, but always more than they were worth. To create barriers to entry for other potential competitors , American Can made a deal with the largest manufacturer of caning machinery that obliged the supplier to produce such equipment exclusively for the defendant for six years. To restrict the

[66]20 256 U.S. 706, 1921.

supply American Can shut up all the plants that it bought. By lowering the output this company was able to control the price, although it denied any intent to do so. Because of the defendant's conduct, the prices went up and induced new entries on the market. To keep the rate high, American Can bought cans from its new rivals, but the money resources ran out. The corporation's defense was first, that it had made many improvements in making and selling cans, and second that the prices had been excessive only for short time. The Court refused these arguments. In the decision of the case judge Rose expresed his opinion that the mere size of the corporation was not a crime , but then added that:

> "The law wishes that industrial and trading corporations shall operate under the checks and balances imposed by free and unrestrained competition" .

Judge Rose interpreted the declared policy of the Congress and concluded that the defendant's behavior had been against the public wealth. The reason for that was the impact of the firm's conduct on the market that destroyed the competition. Furthermore judge Rose stated that monopolistic abuse of the market had been a public danger and contrary to the legislator who had wanted to preserve competition on the market. From his reasoning it is clear that a superior firm can not be condemned for its monopolistic power, unless it uses such a power to drive other competitors from the market , opposite to the antitrust goal.

Considering what remedy to impose on American Can the Court criticized the dissolution because it was not fast enough for purpose of antimonopoly legislation. In their opinion such remedy was pointed against the company's size, instead of against the conduct. Since the time this case was decided, dissolution was not considered as a proper solution for suppression of monopoly and rarely was imposed on other corporations, charged for the same violation.

In **Greyhound Computer Corp. Inc. v. IBM Corp.**[67]**, Transamerica Computer Co. Inc. v.IBM** [68] **and California Computer Products Inc v. IBM**[69], standard pricing practices of IBM were the target of the Court's inquiry.

In Greyhound, the plaintiff claimed that by using technical discounts unrelated to costs or demand conditions, IBM had monopolized the market for general purpose computers.The Court's decision was that IBM 's conduct excluded other competitors from this market.

In Transamerica where IBM was charged with predatory pricing, the Court held that price reduction was reasonable, because it was justified by design changes and above - average costs.

The most important decision on this issue, pricing practices, was in California Computer Products Inc v. IBM. The Court concluded that IBM only responded to price changes forced by its competitors and that a corporation with a monopoly position on the market can defend its lawfully achieved superior position on the market by the device of technical improvements. With tis decision the Court created an exception and an excuse for superior enterprises. Clearly the Court was trying not to cause any adverse effects to a corporation's vigor for innovations and to escape the trap that antimonopoly law could create for big firms which invest their money in research and development.

UTAH PIE Co. v Continental Baking Co provides a good illustration of the monopoly conduct known as predatory pricing.

Utah Pie had the largest share of the market for frozen pies in the Salt Lake City. It had the lowest prices, because of its natural advantage i.e. (location). New entrants started increasing their market shares by lowering their prices. Utah Pie challenged various practices of its competitors i.e., Continental, Carnation and Pets Co. Each of them alredy had a large market share on some other geographic market.

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[67] 559f . 2d 488 ( ).
[68] 481 F. Supp , 965, 698 F. 2nd 1377 ( ).
[69] 613 F. 2nd 727 ( ).

Utah Pie's first complaint was against Pet Milk Company. It accused this company for industrial espionage and predatory pricing. Evidences showed that because of its pricing policy Pet Milk had sustained losses, although it was not proved that it had recouped them on another market. It was clearly indicated that this corporation had charged higher price in the markets where it had had a significant market share. Two other defendants Continental and Carnation Co. also reduced their charges for the product and at the same time they were selling the same pies for higher prices in other places. They maintained a below price structure and worked with losses.

On the Utah Pie application, the Supreme Court reversed the decision of the Court of Appeals that stated that the impact from the respondent's acts on the market , was insignificant. Basis for their judgment was the fact that Utah Pie constantly increased its sales and still earned profit. The Supreme Court interpreted Sherman Act , section 2 , as not prohibiting common price competition. Such price reductions should be prohibited only if they were injurious to the competition.[70]. The Court analyzed the evidence introduced on the trial and concluded that the respondents deliberately reduced their prices, in order to overtake the relevant market and to increase their market power. In addition the Court also found predatory intent in the actions of these three companies. Therefore the Court concluded that their behavior was unlawful and bed for competition. Pricing policy of other companies, forced Utah Pie to reduce its prices which made it a less effective competition force. Clearly with their pricing policy Utah Pie's competitors lost much money, but they gained a market share. At the same time, Utah Pie lost its customers. Other competitors recouped their money from other markets, but Utah Pie was only operating on Salt Lake City market, so it was unable to do the same. The Court said that it could not support competitors when they were trying to increase their market shares by using unlawful means.

[70]Utah Pie Co v. Continental Baking Co.,386 U.S. 685 (1967).

This judgement of the Supreme Court, perheps also expresses public policy that is protectiv for small business which is highly important in local areas.

In **MCI Communications Corp. v. AT & T Co.** [71] the Court stated an exception to the rule that a company can freely exercise its will in deciding with whom to do the business.

AT & T was a corporation with monopolistic position on the market for long distance communication. It was accused for refusal to deal with MCI. This refusal caused a great loss of business to its customer

To see whether the AT & T really violated the law by refusing to deal or merely exercise the freedom to choose its customers, the Court developed the "essential facilities" theory. The essence of it is that the corporation in possession of such facilities must allow other competitors to use them if they need such facilities for their process of production.

The Court identified four elements, necessary to establish liability of the monopolist:

1) A Monopolist must control essential facilities.
2) The Monopolist must be able to offer these facilities for use.
3) It can not reasonably be expected from the competitors to duplicate such essential facilities.
4) The competitor must have been refused when seeking to use these facilities.

The Court considered the four requirements and found that AT & T's conduct satisfied them. Therefore, it found that the defendant had been guilty under Sherman Act, section 2. In its decision the Court concluded that the proper remedy for this case was an ordere for AT & T to do business with the MCI Communication Corp.

7.9. Conclusion

[71] 708 F .2nd 1081 ( ).

After compliting the examination of this section, it is obvious that U.S. had regulated monopolistic position on the market since 1890 when Sherman Act was passed. It does not prohibit the dominant position, but the behavior of the monopoly which might result with acquisition or maintenance of monopoly. In order to enforce this Act, an effective system of enforcement is developed. Parties with role to play in enforcement are administrative agencies and private plaintiffs who can seek damages or injunction in District Courts. Remedies that can be imposed are with purpose to prevent and punish.

Besides the U.S., the most important features of the antimonopoly law will be further analized in the parts for EC and Macedonia. Characteristics of antimonopoly regulative such as relevant laws, enforcement agencies, standing, judicial review and sanctions will be further examined in the following sections of this study. I will make a comparison between them, deal with their similarities and differences and possible improvements of such regulation in Macedonia.

8. REGULATION OF MONOPOLY IN THE EUROPEAN COMMUNITY

8.1. Origin of EC competition rules

After the second world war, the European nations accepted the idea for European Cooperation. They signed an international Treaty and developed several institutions such as, Organization for European Economic Cooperation and Council of Europe. Yet the real origin of the competition rules is the Treaty of Paris (1951), establishing European Coal and Steel Community. The provisions of this Treaty still govern matters concerning coal and steel, so they are exempt from the Treaty of Rome. The relevant articles are article 4, which prohibits discrimination in price and delivering terms that interfere with the freedom of the suppliers in doing business and article 5, which is concerned with preservation of normal conditions of competition. Even more important are articles 65 and 66 which embody main principles of the enforcement. As far as this study is concerned article 66 (7) is the most significant, because for the first time the notion of abuse of dominant position is laid down. Actually it deals with de jure and de facto monopoly.

The success of the Treaty of Paris in coordinating of coal and steel industry led to further economical integration of Europe and resulted with exeptance of the Treaty of Rome (1957), which established European Economic Community. This Treaty came into force in 1958. It creates mutual obligations and it is more than a mere agreement. Thus, a special legal system based on principles of proportionality, subsidiarity and primacy of competition rules[72] was created to enable enforcement of the Treaty. Main goals to be achieved with this Treaty are preservation of a single market, economical and political integration, equity and fairness, protection of small and medium sized undertakings and increased efficiency. They are underlined in article 2 of the Treaty of Rome which states that :

> "The Community shall have as its task by establishing the common market and progressively approximating the economic policies of member states , to promote throughout the Community a harmonious development of economic activities , a continuous and balanced expansion , an increase in stability , an accelerated raising of the standard of the living and closer relations between the states belonging to it."

The Rome Treaty establishing EEC contained special provisions designed to assure system of effective and fair competition: articles 85 and 86. Now, Treaty of Rome, as amended by

[72] The principal of proportionality assures that means corespond with aims to be achieved. Subsidierity enables some actions to be undertaken by the Community itself if member states are not able to achieve the result on their own. Primacy of competition rules means that Treaty competition rules have primacy over domestic (protective) legislative.

Maastricht Treaty of European Union contains rules on competition in part three, title one, chapter one, articles 85 to 94. Article 85 & 86 are not amended.

8.2. Relevant laws governing competition cases

Besides article 86 which is the most important for monopoly cases and which is analyzed in the further sections of this study, Treaty of Rome contains other articles governing competition matters. For example; article 3 provides measures and activities for achievement of EC goals. Article 3 (f) assures that:

> "The institutions of the system are ensuring that the competition in the common market is not distorted."

Article 85 applies to agreements, concerted practices and decisions between two or more undertakings, in cases where these actions affect European single market and distort competition in.

Futhermore, the European Community passed many other regulatives relevant for competition cases. One of them is Regulation 17/62 enacted in 1962. It contains the procedural basis for implementation and enforcement of competition rules. The basis for this Regulation is the article 87 (1)[73] of the Rome Treaty, but the Regulation is modeled on German Legislation. Powers of the Commission to investigate and make inquiries are vested in article 9 (2) and specifically enumerated in article 14 of this Regulation:

a) to examine the books and other business records;

b) to take copies of or extracts from the books and business records;

c) to ask for oral explanation on the spot; and

[73]Article 8Ar7 (1) provides that Council acting unanimously on the proposal from the Commission: "shall adopt any appropriate regulations or directives to give the effect to the principles set out in the articles 85 & 86".

d) to enter any premises, land and means of transport of the undertaking.
Article 20 of the Regulation lays down the principle of confidentiality, so it assures that the information obtained in this way can only be used for investigation purposes.
Regulation 2988/74 contains limitation periods in the proceedings and enforcement of the decision.Commission Regulation 99/63 EEC of 25 July 1963 is concerned with the hearings of the undertakings under investigation. This regulation protects rights of the subjects of competition law and enables lawful procedure.Other examples for secondary legislation are: Council Regulation 19/65, Commission Regulation 417/85 and the Memorandum of the Commission for Concentration of Enterprises. Regulations 26/62 and 49/62 modify the competition rules for agriculture, and Regulations 141/62 & 1017/68 deal with transport by land and inland waterway.

In order to provide more informations for undertakeings, the European Commission issued "A practical guide on how to deal with Investigations by the European Commission"[74], which makes clear powers of the Commission and how it obtains the information.

8.3.Organs, proceedings and sanctions

Regulation 17/62, more precisely, article 15 (2a) states that the administrative organ in charge for enforcement of EC Competition Law is the Commission. Actually, DG IV which is the competition department of the Commission. It manages day to day work under supervision of the Commissioners. This department consists of directories A, B, C, D and E. Directorate A coordinates individual cases, state monopolies and public enterprises. Directorates B, C and D are in charge of abuse of dominant position, and Directorate E of state aid. There is an Advisory

[74]1989, pp. 1-3,17-19.

Committee on Restrictive Practices and Monopolies as well, which is composed of one official appointed by each member state.[75]

Commission can initiate action ex officio or can act on the request of interested parties, but that depends on the organ's discretion which cases will be primary analyzed. The Commission conducts investigation and collects all relevant data. There are two types of inspections, compulsary and voluntary. The Commission issues statement of objections and informs the undertaking . Afterward, the relevant company can request a hearing, which is not public and enables every person to be orally heard. Before rendering the decision, Commission must consult the Advisory Committee on Restrictive Practices and Monopolies. After the decision is passed, undertakings can make an application to the Court of Justice. Persons that are entitled to make an application are member states, natural and legal persons who have a legitimate interest. The basis for Judicial control is provided in article 172 of the Treaty of Rome and further specified in article 17 of the Regulation 17/62. Because the Court of Justice has been overloaded with work, a Court of First Instance has been established in Luxembourg. Most of competition cases, since 1989 were brought there.[76]. Article 177 of the Treaty of Rome elaborates the "Preliminary References" procedure. According to it, the EC courts can give their opinion, even in cases where lawsuit is filed in the member state's courts if they ask for such help.

As far as remedies are concerned, those that can be imposed by the Commission are penalties, fines, daily penalties and order to cease and desist. The imposed fines can go up to one million ECU's or 10% of the turnover for the previous year. But, in most cases the fines are usually arbitrary. Daily penalties may be imposed to compel adherence to the order to cease and desist. If the undertakings make an appeal, penalty payment will be suspended, but interest will

[75]Regulation 17 article 4.

[76]Marc Daurmont, a franch cancelor for the Court of First Instance said:
" It is in the interest of all countries to respect the Court's decisions, next time it might rule in your favour and you will expect other the side to be obedient. Vecer, 22,10,1994 :18.

be charged.[77] As far as private parties are concerned they can ask for damages only in the member states courts and according to their national law. The scope of the available interim relief varies from country to country and depends on the conditions in the particular state. Consequently there is a dichotomy in enforcement of the article 86. When cases are heard in the member state's courts the member states can declare the conduct illegal and can issue a prohibitory or mandatory injunction plus award restitution of the money.

8.4. Relations between EC and member states

Member states, as well as European Community have their own competition laws. That is why, the relations between them become an important issue to this study. In addition, there are two different directions of competition policy in the EC and its member states. While member states are more concerned with protection of freedom of competition, the EC is more concerned with guarding freedom of movement and ensuring equal conditions and opportunities for selling goods without any discrimination with purpose to preserve a single market.

There are three dimensions of the relations between EC and member states. First is coordination between Commission while conducting investigation and national authorities. The second dimension of this question concerns enforcement of Community law by national courts, and the third concerns the parallel application of Community and national laws. Regulation 17 article 11 is relevant for the first dimension. It provides for cooperation between the Commission and the member states. Article 20 says that national authorities shall be informed by the Commission. This also means that they shall have all the copies of the relevant documents, but the problem of confidentiality arises. The second dimension of this question concerns enforcement of the Community law by national courts which is provided in article 88 of the Treaty of Rome:

[77] Goyder E.C. Competition law ,1983.

"Until the entry into force of the provisions adopted in pursuance of article 87 the authorities in member states shall rule ...on abuse of dominant position in the common market in the accordance with their law of their country and with the provisions of article 86."

So, legal system of the EC has dual enforcement by its own organs and by the organs of its member states.

Relevant to this question is the Commission's Draft Notice on the Application of Articles 85 and 86 by National Courts, which underlines the need for cooperation. Collaboration is needed to achieve "strict, effective and consistent application of the Community law.[78]". But it is not said how to facilitate such cooperation.

Besides absence of means to facilities collaboration between EC and member states courts, another problem of uniform application of the Community law arises, the role of national courts in obtaining damages by private parties. The reason for such problem is the difference that exists between competition laws of the member states. This is underlined in the third dimension of this issue. Basically if behavior is prohibited by both, then parallel proceedings can be initiated by both jurisdictions. But if the conduct which is lawful in the member state is prohibited under article 86, then it should be prohibited in that state as well[79]. Similarly, conduct which does not violate article 86 but which does violate member state legislation is also forbidden. The principle of parallel application was laid down in Wilhelm v. BundesKartelamt.[80] Parallel application is possible if it does not prejudice uniform application of Community law.

8.5. State monopoly and special grant of rights

[78]Commission's Draft Notice on the Application of Articles 85 and 86 ( ).
[79]principle of supremacy of the Community law.
[80]case 14/68 (1969) E.C.R. 1 : (1969) CMLR 100.

Competition rules deal both with private and with state actions that might isolate national markets. Two provisions of the Treaty of Rome are important for this issue, articles 37 and 90. Both of them forbid enacting new measures that might affect the development of trade. The functioning of member state's monopolistic enterprises should not prevent progress of the single market.

First important article is article 37 of the Treaty of Rome whish provides that:

> "Member states should progressively adjust any state monopoly of a commercial character,...there will be no discrimination regarding the conditions under which goods are procured."[81]

This article applies to anybody through the member states which "directly or indirectly supervises, determines or appreciably influences imports or exports between the member states." The Court of Justice has stated that:

> "Member states should not enact measures enabling private undertakings to escape from the constraints imposed by the competitive scheme of the Treaty. Any national measure which had the effect of facilitating the abuse of the dominant position capable of effecting trade between the member states would be incompatible with articles 30-34."[82]

Second is article 90 which concerns undertakings having special grant of rights from the state, such as monopolies entrusted with operation of services of general economic interest or with revenue producing character. Such "undertakings shall be subjects to the rules contained in this treaty, in particular to rules of the competition". Through the application of articles 90-92 of the Treaty of Rome, the Commission is trying to protect the single market from distortion that can be caused by the state participation in regulation of commerce or trade. Yet, these Treaty provisions should not prevent fulfillment of the tasks of such monopolies, either.

[81]Article 37 ,Treaty of Rome.
[82]INNO v. ATAB 13/77,1977 ECR 2115 ,1978 1CMLR 283.

Secondary legislation relevant to this issue is directive 80/723 that enables public authorities to exercise directly or indirectly a dominant influence over undertakings in which they have ownership interest. Third directive under 90(3) adopted in 1988 deals with the competition in the telecommunications market, which forced member states to open up their telecommunication terminal service markets. The same pressure was put on the postal services and employment agencies.

Judical analysis of the cases show that there can be some exceptions to the rule to break up state monopolies. In Italy v. Commission, an example of this principle is introduced.[83] If a particular company is a state monopoly this could create an absolute barrier to entry and isolate national market. Thus, article 37 might substantially affect the activities of the government and force it to take back the legal rights alredy given to state monopoly.

State monopolies can use as a valid defence the fact that they could not function properly if article 90 is going to be applied. But in the Fedtab case [84], the Court clearly held that undertakings can not use it as a defense when the competition was reduced by member state's legislation and esspecialy if such legislation gave enough space for maneuvering. The Court also underlined that permissive national legislation of prices or industry, if it was merely an encouragement, could not provide immunity from the Commission's prosecution.

This examination shows that one of the means to achieve and to preserve a common market is to regulate the state and other rights granted monopolies, that otherwise can be disagreeable with the unity of the single market.

8.6. Analysis of article 86

[83]Korah, EEC competition law and practice.
[84]209, ECR 3125:, 3 CMLR 134 (1980).

Article 86 of the Treaty of Rome is aimed at unilateral conduct of a single firm and lays down the concept of the abuse by an undertaking in a dominant position. It does not refer specially to monopoly, but it is based on a wider concept. Actually, it is concerned with the conduct of a firm with substantial market share, that can behave independently and can control market place. On the 1.1. 1958, this article came into force together with the Treaty of Rome, but it has a direct effect[85] since 13.3. 1962, when Regulation 17/62 was passed. The article provides:

> "Any abuse by one or more undertakings of a dominant position within the common or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states ."

Such abuse may particularly consist in:

a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b) Limiting production, markets or technical development to the prejudice of the consumers;

c) Applying dissimilar conditions to equivalent transaction with other trading parties, thereby placing them at a competitive disadvantage;

d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract [86].

This article has four elements :

1) Dominant position on the common market or a substantial part of it.

2) Abuse of the dominant position.

3) By one or more undertakings.

4) If it may effect trade between the member states.

[85] i.e. citizens of member states can directly rely on article 86 in their national courts.
[86]Treaty of Rome, article 86.

The first step is to define a dominant position. Usually it is defined as the position on the European market that enables the firm to act independently from other competitors. The Court of Justice estimates the company strength by its market share. The relevant market could be the whole EC market or a significant part of it. Substantial part may be, for example, two or more states or even an area from one member state. Even the capital city of one member state can be an important part of the common market.

The second element to be analyzed under article 86 concerns abuse of superior position. This article prohibits the conduct of the company and not merely its size and strength. This element is placed in the second part of article 86, and contains a non exhaustive list of examples of prohibited practices and enumerates abusive behaviors.

Article 86(a) outlaws unfair purchase or selling prices and imposition of other unfair market terms which discriminate customers. In some cases even if the company has a small market power, it can be accused and punished for exclusionary conduct. More characteristic features of such conducts will be examined in detail in section 8.8.a. below.

Article 86(b) explicitly states that it is concerned with protection of consumers, not of competition. Only a firm that is dominant on the market could raise its prices by restricting the output and in the absence of effective competition on the market. Examples of this kind of abuse are fixing of the quantity, loyalty rebates, etc.

Analysis of article 86(c) must focus on three elements:

1) The transaction has to be equivalent (i.e.,customers must be located at the same place on the distribution chain);

2) Dissimilar conditions in terms of prices; and

3) The other party must be placed at a competitive advantage.

Examples of this conduct are discrimination on the basis of nationality, loyalty rebates (as distinguished from the quantity rebates), etc.

Finally, article 86(d) refers to tying arrangements. The Court usually looks at the nature, durability, composition, construction and use of tied products. This form of abuse will be examined in section 8.8.d. below.

Further examples of abuse are threats to other competitors on the market with purpose to strengthen the dominant position, refusal to deal, mergers as a method for obtaining monopoly etc.

The third element to be analized under article 86 is abuse by one or more undertakings, but my focus in this paper is solely on abuse of the market performed by only one competitor with monopolistic position.

The final part of article 86 defines its jurisdictional reach. It clarifies when the EC rules should be applied and when rules of the member states are applicable. This element states that the proceedings can be initiated by the EC organs only if the abuse"effects trade between member states". The test is whether the conduct in question can harm the common market or only internal market of the member state. This fourth element also enables article 86 to have extraterritorial reach. Foreign companies that operate in the common market can be caught by this article if their behavior affects trade between the member states. Also if the dominant company is a subsidiary controlled by a parent company which does not operate directly on the EC market, the parent company can be prosecuted , under direct effects doctrine developed by the Court, which permits Commission to claim jurisdiction against the parent company, even if it does not have any physical involvement in the abusive conduct.

8.7.Judical analysis

Some economic concepts are relevant for the analysis under article 86 such as monopoly power that enables market dominance. In theory, monopoly power is defined as a market power of a dominant enterprise that 100% controls the market. In practice, lower market share is needed to evidence monopoly power. Another economic concept, relevant for this issue is entry barrier imposed by a monopoly, in order to preclude potential competitors to enter the market. The notion of interbrand competition has also become very important, lately. The essence is that there is not only competition between intrabrand competitors, but also there is competition between companies dealing in different types of products. Even this interbrand competition influates pricing and marketing policy of the undertakings.

The test which is usually used by the Court to determine the dominant position on the market has two steps:

1) First the Court must determine whether the undertaking is dominant on the relevant market; and

2) Second, it must determine whether that dominant position has been abused.

In order to examine whether the alleged company really has the monopoly power, the Court must begin with defining the relevant market. It encompasses product market[87],geographic market, and (in some cases) a time dimension.

The first step is to define the product market. The requirement is that the product or groups of products are sufficiently homogenous, so they could easily be distinguished from other products. In particular, the Court must examine the substitutes from both the supply and the demand side. On the demand side the Commission has traditionally looked at the products' use, quality and price. It uses the test of *interchangeability*[88]. This is usually measured by physical attributes, particular use, the needs of special classes of buyers and barriers to entry. Another aspect of the market is the *cross elasticity of demand*[89]. A high cross elasticity is an indicator of interchangeability. The Commission in its determination of the product market has used the German competition law as a model. The test to estimate relevant product market is an arbitrary one, and according to Korah[90], the Commission usually examines what firm is being accused,

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87 Utah Pie Co. v. Continental Backing Co., 386 U.S. 685,(   ).

88 Cases 6 and 7/73 1 CMLR 309 (1974).

89 Cases 6 and 7/73 1 CMLR 309 (1974).

90 Korah V. EEC Competition law and practice, 1986.

which products are involved in the complaint, who buys them, and what else could be used by those customers with minimal adaption of their business.

Second, the Court must determine in which geographic area a firm has a dominant position. Only abuse that occurs on the common market can be prosecuted by the Commission. The relevant geographic market is the one on which the firm is active. Another definition of geographic market says that it is an area in which the product is sold and conditions of marketing are sufficient homogenous. Geographic market can also be defined as a place where the conditions of competition are objectively the same and where there are no important barriers to entry like transportation costs.

The third element of the Court's determination of the relevant market concerns the period of time during which the company held the allegedly dominant position and whether it has been dominant longer than necessary.

After defining the relevant market, the Court next looks at the market share. A large market share shows dominance *per se*. Not only clear huge market shares, such as 70% or 80% but even 45% market share is enough to show dominance if other competitors are much smaller. The UBC case[91] provides an example. If the market included all food, the company's market share would be infinitesimal, if all fruit it would be de minimis, if only soft fruit small but significant, but if banana is the relevant market, then UBC`s market share would be substantial.[92] However, the Court recognized that market share is not the most significant evidence of the dominance, since it can be obtained even in an environment of lively competition. In Hoffman La Roche v. Commission, the Court stated that market share was not the most important indicator of the existence of a dominant position. It recognized that " its importance varies from market to market according to the structure of these markets especially as far as production, supply and demand are concerned."[93]

[91]27/76.
[92]The product that is produced is banana, U.B.C. v Commission 27/76.
[93] Hoffman La Roche v. Commission 85/76, (1979) ECR 461.

Thus, other evidence is still needed such as entry barriers, potential competitors and the position of the other companies. In Hoffman La-Roche, the Court said:

> "Dominant position does not preclude some competition , but enables the undertakings which profits by it, if not to determine at least to have an appreciable effect on the conditions under which the competition will develop and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."

The courts thus investigate several aspects of the market and the company's position on it to determine which is the relevant market and whether the undertaking has a superior position on it.

After having established that an undertaking is dominant on the relevant market, the Court next moves to consider the question of abuse. The mere possession of market power is not *per se illegal*, but there must be an active effort by the company to use the monopoly power in order to strengthen or extend the durability of its position on the market. It must be an active abuse with anticompetitive effects in order to constitute a violation of article 86. Here are some examples of the exclusionary practices:

a) **Excessive price.** An undertaking having dominant position is able to charge higher prices to its customers. The test used by the Court is whether: " the price is excessive in relation to the economic value of the service provided."[94] This is a kind of price discrimination that enables a dominant undertaking to extract more than a fair profit. It is very hard to determine when the prices are excessive. In addition the General Motor's test, the Commission occasionally uses the alternative *deduced logic* test[95]. The essence of this test is that the Commission relies on the deduction made upon comparative estimation of the reasonable prices in relation to prices charged before by that undertaking and prices charged by other producers of the same product. But the Commission faces many hardships when it undertakes full scale analysis of prices and tries to gather all necessary information. Sometimes these prices are justified because of the need

[94]General Motors Continental 26/75 (1975) ECR 1367,1378, 1379.
[95]Green N. , Hartly T. C. , Usher J. A. , SINGLE EUROPEAN MARKET ; 1991.

to recoup research and development costs, because of the need to make provisions for future research with respect to a product having a short life cycle, and because of high initial marketing and distribution costs.[96]

It should also be mentioned that excessive prices do not automatically suppress the competition but, on the contrary, attract new entrants to the market with the lure of big profit.

b) **Abusive discounts**. It is an act of deduction, granted by dominant undertaking on the market to its customers proportional to the total bill. A superior company can give discounts in order to make its buyers loyal. The company may disclose how much it will reduce its prices or can just grant discount without saying how much it will be. When discounts are transparent the buyers may plan to buy from other competitors, but if there is a mystery about the discount, then they will be reluctant to buy from other producers[97], because perhaps such conduct will decrease their possibility to buy the product for less money. Obviously, it is a method used by a superior company to overtake the buyers from its competitors. They might operate to tie the distributor to the main supplier and to create barriers to entry for potential rivals. Abusive discounts can also distort competition at the buyer's level, if there is a discrimination among buyers in granting such discount. So, wholesalers that will buy the same product for less money can afterwards charge lesser price and be more competitive than the other wholesaler who is not using that discount. Discounts can only be justified if they are value discounts that enable cost saving in transport and administration of the goods.

c) **Refusal to supply** is another example of exclusionary practice. This practice is not *illegal per se*. In general, dominant undertaking can freely exercise its freedom to decide whom to make business with. But if refusal to supply is impediment for the customers to continue its business which will result with distortion in the system of competition, then such practice will violate article 86. The general rule is that a dominant firm cannot refuse to supply its

[96]MMC report on supply of Credit car franchising service,1982.
Report on Chlordiazepoxide and Diazepam 1973 HC 197 .
[97]Green N. , Hartly T. C. , Usher J. A. , SINGLE EUROPEAN MARKET ; 1991.

longstanding customer if the customer does not have an alternative source of supply. The reason such practice to be forbidden is that it limits the market, lessens competition and has an impact on the consumers. Example of such conduct is found in Commercial Solvents Corporation v. Commission of EC.[98]

d) **Tying arrangements** are explicitely forbidden by article 86(d). Tying enables the company to extend its first monopoly in the market for the "tying" product into a second market for the "tied" product. This practice makes the supply of one product condition to conclude the contract for buying other commodity. Such exclusionary conduct is bad for competitive market structure, because it lessens competition through foreclosing sale's opportunities and distorts choice of the consumers. Apparently, tying arrangements can be used as a method to drive other competitors out of the market.

The Court usually looks at product's construction and durability to estimate if such arrangement was unlawful. The applicable test is the one of the *usage of the product*. This means that such arrangement is justified only if the tying product can not operate without the tied one. Other justification of this practice is to be found in Re Hilti AG v. Commission[99], where a unique product was protected by copyright and patent and could only be supplied by the dominant firm. Yet, in the arrangement there was nothing to forbid, that the second product that was needed and unprotected article to be obtained from other suppliers. Therefore, it did not preclude possibilities of other rivals and consumers to buy and sale. If the Court finds that the obligation from the tying arrangement is only supplementary and that there is no real connection between tied and tying product, then this practice will be unlawful and will fall within article 86.

e) **Predatory pricing** is the converse of excessive pricing. The essence is that an undertaking with financial strength, sets its prices at low level in certain markets for limited period of time. It reduces its prices, not only because of the low costs, but also with purpose to

[98]Cases 6 and 7/73 1 CMLR 309 (1974).
[99]Re HILTI AG (1985) 3 CMLR 619.

draw other competitors out from the market. The Commission is aware that predatory pricing has a bad consequence on the EC market. In its study on predatory pricing[100] the Commission explicitely stated that in the case when such conduct is practiced, there is no room for normal competition. The entrant drops prices that will attract other company's customers and thus force those other competitors to charge lower prices and eventually either to absorb the loss or exit the market. This conduct is not only bad for the competitive structure of the market, but for ultimate users as well. Although in the short run they will benefit from this "price war", they will lose in the long run. The reason is that when undertaking obtains monopoly position, it will be able to charge an excessive price to its buyers. The Commission in its report identified the multinational companies as the most common aggressors, because they are able to cover their losses somewhere else. It also found that predatory pricing reduced the present value of the entrant's future profit below its fixed entry costs, so it should not be able to survive for a long time. That is why the company usually charges higher price in the market with no other competitors and lower price in the market with more lively competition.

To estimate whether such low prices are lawful, the Court usually uses the concept of marginal or average variable costs. The existence of a predatory intent is also important for the judicial review of such cases. Example of predatory pricing is provided in AKZO case [101].

All these kinds of conducts could not only lessen competition but could also isolate national markets. Prevention of such effect is the most important goal of the EC competition law. Some of the conducts are exploitative, such as imposing unfair prices and limiting the production. They occur where a dominant position has been used to injure those with whom the company has trading relations, even if they do not affect other competitors on the market. Others are coercive, for example discrimination among the customers that results in unfair treatment for some buyers. The reason for such conducts is not to extract more profit from the buyers, but to

[100] 16th Report on Competition policy,1986.
[101] case C-62 /86 ,1991 ECR , july 3 1991.

obtain some other advantages, such as loyalty from the most important customer. Both kinds of conduct are forbidden under article 86 of the Treaty of Rome. The previous discussion examined the tests used by the Court in determining antimonopoly cases. In the following section it will be presented how the Court analyzes and applies those tests in particular cases.

8.9. Case studies

This section includes the summary of the most important cases decided by the EC courts[102]. It is focused on how the courts interpreted and implemented article 86 of the Treaty of Rome. In order to solve the monopoly case the Court first determines relevant product and geographic market.

An example of how the Court of Justice determined the product market is in the case **United Brands Company and United Brands Continental B.V. v. Commission of the European Community.**[103] The Court estimated the relevant product market by using the concept of the *interchangeability*. The particular characteristics of bananas were considered and the degrees of substitutability with other fruits especially peak periods, price movements, etc. The Court measured the responsiveness of the sales of other kinds of fruit to price changes of bananas. It also examined another feature of product market, e.g. *supply elasticity,* a concept connected with examination of the product facilities and the position of other producers of the product. The Court looked at the combination of several factors such as structure of other competitors and the existence of barriers to entry to demarcate boundaries of the product market.

The relevant test to estimate product market, used by the Court in **Hoffman La Roche & Co. v. Commission**[104] ,was the same as in the UBC case, the *sufficient degree of*

[102]The Court of Justice and the Court of First Instance.
[103]United Brands Co. & United Brands Continental B.V. v. EC Commission case 27/76, Court of Justice of EC (`1978) E.C.R. 207 .
[104]85/76 ,1979 ECR 461.

interchangeability between all the products. The Court examined whether all the considered products together are forming the same market in respect of their *particular use*. Then it looked at the *supply substitutes* and found an existence of a highly developed Hoffman La Roche's sales network, an absence of significant competition indicated, and no relevant substitutes on the market for the products in question. In its analysis of supply elasticity the Court especially focused on large capital requirements and a need for long term programming capacities and concluded that they constituted barriers to entry for potential competitors. According to those analyses the Court defined the product market.

In **Institutio Chemocoterapico Italiano Spa and Commercial Solvents Corporation v. Commission** [105] the Court looked at the *supply elasticity* to estimate the relevant product market and found that **CSC**[106] was the biggest undertaking which produced aminobutanol. With its decision, the Court put limits on the doctrine of the s*upply substitution* that was used in previous cases. It examined the supply substitutability and held that, when the substitute was produced by bigger expense and risk, it could not be considered as a valid alternative.

In the **Michelin** [107]case likewise in the previous cases**,** the Court looked at *supply substitutability* i. e. at differences in the plant and equipment needed for production of different kinds of car tyres . By using this test, the Court reached the conclusion that there were significant differences in the production of tyres for heavy vehicles from the tyres for cars, and defined the relevant product market as the one of busses, trucks and other heavy vehicles. Further investigations showed that customers had a high preference for Michelin tyres, which acted as a kind of barrier for other producers to enter the market. This fact made the elasticity of supply lower.

UBC and Suiker Unie's decisions promote the Court's criterion for the geographic market. In the first case, the Court defined the relevant market as: " an area where the objective

[105]Cases 6 and 7/73 1 CMLR 309 (1974).
[106]In the rest of analisis of this case the company will be mentioned as SCS.
[107]OJ 1981 L 353/33-67.

conditions of competition applying to the conduct in question must be the same for all traders ." It looked at *custom duties, transportation costs and price target* to identify the specific territory. The Court concluded that lack of transport facilities or high transportation costs in relation to value of the product promoted isolation of national market. Besides this, the Court looked at the U.K., France and Italy's *preferential system* for the African countries and found that such system was relevant for its analysis because it created different conditions for competition, so the Court excluded markets of those three countries from the definition of the relevant geographic market.

In the second case, the Court examined the *transport and storage facilities* of all available producers of sugar. According to the facts that sugar from other competitors was only available in distant areas, that the buyers did not have good storage facilities, and that they needed the regular deliveries, the Court defined the relevant geographic market very narrowly. Considering the selling area of the Suiker Unie as an indication of the size of the market , the Court found southern Germany to be the relevant market , because this company concentrated there the most of its sales.

After determining the relevant product and geographic market , the Court turns to the question of dominant position. For example, in the **UBC's** judgment the dominance is defined as:

> "The position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to have an appreciable extent independently of its competitors, customers and ultimately its consumers."

The Court used the company's market share of the already defined market , to estimate the dominance of the alleged company . It underlined the importance of the market share saying that: " A trader can only be in the dominant position on the market for a product if he has succeeded in wining a large part of this market."[108] The fact that UBC had only 40% of the relevant market shows that the Court recognized that the market share was not the sole indicator of the

[108](1979) .E.C.R. p.282.

dominance. Beside the market shares of the other participants, the Court also took into consideration UBC's structure, the privileged access to supply and according to that, the Court found that UBC had effectively occupied the market. The decision of this case is important for companies with smaller market share but only when other competitors are insignificant.

In **AKZO Chemie BV v. Commission**[109] the Court also suggested that the market share was not a sufficient condition for dominance. It found that AKZO's market share on the Community market was 46%-50%, while its competitor ECS held only 1% of the market. According to those analyses the Court stated that "AKZO may not have an overwhelmingly large market share in quantitative terms, but it does have the economic power to exercise a significant impact on the market including the ability both to determine price levels and to eliminate a smaller competitor."

In the **Michelin** case the Court ranged Michelin's market share between 57 % and 65%, but when its market share was compered to the market shares of its competitors, the Court concluded that even 57% were a sufficient evidence of a dominant position.

Opposite to the previous cases, **Hoffman La Roche**[110] was found to be the largest manufacturer on the common market with following market shares: A : 47%, B2 : 86%, B3 : 64%, B4 : 95% , C : 68%, E : 70% and H : 95%. Other competitors were also considered but they were described as insignificant. According to the Court " a situation where an undertaking holds a large market share, while its competitors have appreciably smaller shares, can be seen as an indication of a dominant position." The Court's opinion further clarified that a substantial market share as evidence of the existence of the dominant position was not a constant factor and its importance varied from market to market. Not only that the Court used market share of the alleged dominant company as relevant test, but it also examined market shares of other

[109]case C-62 /86 , (1991) ECR.
[110](1979) E.C.R. p.521.

participants, financial resources, access to distributors etc., to estimate the dominance on the relevant market.

After establishing that dominance on the relevant market, the Court examines whether the alleged violator abused such dominant position. The concept of the abuse was laid down in **Hoffman La Roche's** judgment:

> "The concept of the abuse is an objective concept which relates to the behavior of an undertaking in the dominant position which influences the structure of the market where as a result of the very presence of the undertaking in question, the degree of competition is weakened".

The essence of such a concept consists of attaining advantages which could not be otherwise obtained under the conditions of effective competition. In the **Michelin** case [111], article 86 was interpreted as a law that covers practices of dominant undertakings, which were likely to affect the structure of the market. The Court in its analysis focused on the methods used by the undertaking in question, which hindered the maintenance or development of the level of competition and resulted with weakening of the rivalry. Examples of such practices were examined by the Court in **AKZO, British Leyland, Suiker Unie, UBC , Hoffman La Roche, Michelin and CSC** cases.

AKZO[112] was a multinational Dutch corporation producing organic peroxides. ECS was a small firm from U.K. producing the same product. ECS, with its aggressive active selling policy took over some of AKZO's customers, first in the U.K and then in Germany. AKZO's officials then threatened the ECS that they would start selling below the actual costs if ECS did not stop taking over its customers . ECS ignored this threat. As a response, AKZO adopted a tactic of pricing below the costs in order to drive ECS out of business. The Court applied the *average variable costs* test to see if the AKZO's conduct amounted to an abuse. It considered prices

[111]NV Nederlandshe Banden - Industrie Michelin v. Commission, Case 322/81, 1983 ECR 3461.
[112]case C-62 /86 ,1991 ECR , july 3 1991.

below average variable costs to be an unlawful price competition. Although AKZO 's conduct did not have a larger impact on ECS's profits, the Court concluded that companies which may be as efficient as the dominant undertaking but with lower *financial capacity* are incapable of resisting this kind of competition. In addition, the Court put most weight on AKZO's intent to eliminate its competitor:

> "A dominant undertaking has indeed no interest to practice such prices other than to eliminate competitors in order to increase its prices by benefiting from its monopoly position, since each sale entails a loss."

Apparently, most important for the Court's judgment was clear predatory intent and protection of smaller company which was consistent with Treaty objectives. This decision of the European Court of Justice was criticized, because it did not provide good criteria for estimating real costs and it was not clear by how much the sales were below the costs. The possible reason for such Court's decision is the promotion of the EC competition policy for a unified single market with lots of competitors and equality of opportunities. Besides predatory pricing, AKZO was also engaged in price discrimination, for charging lower prices only to ECS's customers and changing its prices 60% higher to its own loyal buyers. It imposed its prices not according to its own costs, but with a purpose to attract ECS's customers.

British Leyland[113] was fined by the Commission for discriminatory pricing. This company was granted by the U.K. the exclusive right to determine which cars that it imported confirmed with U.K. national standards and the right to issue confirmatory certificates. British Leyland arbitrarily used this right and charged different fees according to the kind of the car, i.e. left or right hand drive. This measure infringed the principle of free movement of goods, hindered competition by creating barriers to entry, and isolated U.K.market. On the appeal, the European Court of Justice[114] found that the charged fees of 150 or 100 pounds were

[113]OJ 1984, L 207 / 11.
[114]Cas 226 / 84, 1986 ECR 3263.

disproportionate to the economic value of a simple administrative check, since B.L.'s price for right-hand drive vehicles was only 25 pounds. For the substantially same service, British Leyland thus charged different prices. This conduct provides an example of discriminatory pricing based on nationality. Since the only country in Europe in which cars drive on the right side is U.K., then it is the only market for right-hand drive cars. In this case, the effect of the B.L. 's conduct was to promote cars exclusively made for the U.K. market and to impose unfair and arbitrary terms on other car manufacturers. This was a way of protecting the U.K. market by giving advantages to right-hand drive cars.

UBC case provides an additional example of abusive pricing practice which can create barriers to free movements of goods and isolate national markets. UBC was alleged to violate article 86, because of its price discrimination practice. It imposed a "selling price which differed according to the member state where its customers were established". Actually, UBC did not charge according to supply and demand, but according to the conditions of competition. When there was a significant competition on the market, its prices were lower, otherwise it imposed higher prices. The Court examined the conditions and costs of transportation, the weather, Government measures etc., and found that such policy of charging different prices was not justified. Afterwards, it considered the second claim for imposing unfair prices for sale for different groups of countries. It was alleged that UBC imposed an unfair and excessive price in relation to the economic value of the product supplied. The relevant issues were whether the difference between the costs actually incurred and the prices actually charged was excessive and whether the imposed price was either unfair in itself or when compared to the competing product. The Court undertook the analysis of cost margin and looked at the profit figures, that showed that UBC had been working with a loss in the market with lower prices and that it had not earned profits for five years. According to those facts the Court concluded that the Commission did not ascertain adequate legal proof that UBC directly imposed unfair prices.

Suiker Unie UA v. Commission[115] revealed an abusive rebate as kind of price discrimination. The Court of Justice found that Suiker Unie abused its dominant position in the production of sugar by forming a system of rebates granted in respect of exclusive supplies. With such system of rebates Suiker Unie wanted to maintain dominance and somehow to tie its customers. The cause for Suiker Unie to practice the conduct was that the producers of sugar outside the territory in which the applicant enjoyed dominant position charged much lower prices. Consequently, the Suiker Unie calculated a system of reduction in order to neutralize benefits from import and for the customers to be more expensive to buy foreign sugar. Suiker Unie further argued that this was a normal price reduction, but the Court concluded that it was a loyalty rebate and thus a form of price discrimination. The Court explained that Suiker Unie reduced its prices for the largest buyers in order to keep them loyal, while at the same time charged excessive prices to its smaller customers. The company was found guilty of an infringement of article 86(c) i.e., applying dissimilar conditions for similar transactions, and of article 86(d) i.e., with its conduct, Unie UA restricted the opportunities to compete for producers from other member states.

A further example of loyalty rebates as a kind of discriminatory pricing is provided in the case **Hoffman La Roche**[116]. This company was the world's largest manufacturer and seller of bulk vitamins. It was accused of infringement of article 86 of the Treaty of Rome because of the rebates which were offered to its customers as an incentive to buy all or most of their requirements exclusively or in preference from Hoffman La Roche. The European Court of Justice concluded that rebates were abusive because they tied distributors and " are designed to deprive the purchaser of the possible choice of supply source". It did not accept Hoffmans La Roche's normal pricing as a valid defense, because it was employed with a purpose to enable its long and quiet life on the relevant market. The Court's reasoning was that it was important for an

[115] 111, 1975,ECR 1663.
[116] 85/76 , 1979 ECR 461.

undertaking with a huge market share to make sure not to charge prices which are too high, because this would make it less competitive. Therefore, Hoffman's conduct amounted to an abuse because such fidelity rebates lead to discrimination prohibited under article 86(c)[117]. This kind of price reduction, imposed unfair terms on the customers, thus limited their choice and interfered with competition, which affected trade between member states. Dominant company must not only refrain from imposing loyalty rebates, but it must also assure that all discounts granted to the buyers are not anticompetitive. The difference is that rebate is granted when repayment is made at the end of the period over which the amount is calculated and a discount is a deduction made when charging a customer, often proportional to the total bill[118]. However, sometimes they are not justified because of their anticompetitive effect, that is, to make more difficult for smaller firms to compete.

An example of abusive discount is provided in **Michelin**[119] case. Michelin was found guilty of infringing article 86 (a) [120], because the discount system based on the achievement of sales target resulted with tying dealers to Micheling who was a dominant supplier. This abuse constituted in giving target bonuses to the dealers. Nevertheless, they were not informed of the actual level of reduction which varied from case to case. Consequently, the dealers were tied into the Michelin's system by uncertainty. Their right freely to deal with other competitors was suppressed.

The Court said that these discounts could be justified only if there was a clear relationship between the level of reduction and benefit obtained by supplier. Michelin could grant such discounts only if there was a probable cost saving in planing production or otherwise if it would encourage efficiency. But, it did not concern the Michelin case. The lack of transparency of the

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[117] Treaty of Rome , article 86 (c) " Applying dissimilar conditions to equiualent transactions with other trading parties , thereby placing them at a compatitive disadvantage. " .

[118]Korah V. E.E.C. COMPETITION LAW AND PRACTICE ; 1986 p 153.

[119]OJ 1981, L 353 / 33 - 67.

[120]Treaty of Rome , article 86 (a) "Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."

discount system and the existence of a whole network of Michelin representatives as its dealers produced anticompetitive effects . Actually, it hindered competition and made it more difficult for other producers to expand their market shares.

Refusal to deal practiced by the dominant undertaking is an example of coercive practice, that is not listed in article 86 (a-d). **UBC** was the biggest producer of bananas in the world with its own chain of distributors. It was charged with the refusal to supply. Its standing customer Olsen wanted UBC to give him a preferential treatment. In return, he would undertake an obligation not to sell or support any other banana producer. When UBC refused to grant the preferences, Olsen started to promote other brands of banana at the expense of UBC's Chiqity brand. In response to Olsen's marketing policy, UBC refused to deal with it. UBC explained that, such refusal was only a defense from the attack of the largest competitor who had been promoted, by Olsen's marketing policy. But the Court did not accept such explanation as contrary to the principle of proportionality which is the main principle of the EC legal system. It explained that "a counter attack is possible, but it threat must be proportionate, so while the Court estimates the facts, it must also take into account the economic strength of the undertakings confronting each other." According to the Court, the means did not correspond to the ends. It also developed the doctrine that "a company cannot stop supplying a long standing customer who remains a regular commercial practice if the order placed by that customer is in no way out of the ordinary." According to the Court's judgment, Olsen was only using usual selling practices. Therefore, the Court found that UBC'c refusal to supply was contrary to the fair trade practice and to the goals of the Treaty of Rome.

Another example of refusal to deal is in the case **Institutio Chemocoterapico Italiano Spa and Commercial Solvents Corporation v. Commission** [121]. CSC was a corporation having a dominant position on the market of aminobutanol. It acquired 51% of the Italian company Institutio Chemocoterapico and supplied it with the product in question. Institutio

[121]Cases 6 and 7/73 1 CMLR 309 (1974).

Chemocoterapico resold the raw materials to another Italian company Zoja. CSC got permission from the Italian government to manufacture the same products as Zoja, so they became competitors. In the meantime, CSC raised its price and therefore Zoja found an alternative source of supply and canceled a large order from CSC. However, CSC supplied Zoja's alternative source as well and it prohibited reselling of aminobutanol. Consequently, Zoja was forced to ask Institutio, which was controlled by CSC, for its supply, but CSC refused to do that despite the long term business relationship.

The European Court of Justice developed a doctrine which stated that:

> " An undertaking in dominant position ... able to control the supply to manufacturers of derivations cannot just, because it decided so, start acting in such a way as to eliminate their competitors."

The Court looked at the possibilities for alternative product supply in order to see if Zoja could provide an alternative source. According to the facts, such derivations were not available, except with big expense and risk. So, the Court concluded that in that case such source could not be seen as a substitute. Furthermore, the Court looked at the possible process of manufacturing which would not involve aminobutanol. But it found that such process had not been improved yet, so it could not be used in the industry for a reasonable period of time. The Court did not take into consideration whether Zoja had an urgent need for aminobutionol or whether it still had large quantities on hand, since it considered these facts irrelevant to the case. The Court's decision was that CSC was a dominant supplier with a full control over the resource and that there was no other possibility for Zoja but to provide the supply from CSC. In conclusion, CSC's conduct was injurious to competition, so the Court considered as proper remedies a fine and an order CSC to deal with Zoja.

8.10. Conclusion

The legal analyses introduced in this section show that article 86 is mostly concerned with the maintenance of conditions of free competition. The principle of free competition is mostly significant for achievement and preservation of a single market[122]. To accomplish such goal, EC created an effective competition system, including the system of protection from monopolistic enterprises. Besides the substantial law[123], EC developed procedural rules[124] and an administrative agency in charge for enforcement of antimonopoly law. A judicial review is available in the European Court of Justice and in the Court of First Instance. The Courts apply a two step test to see if there was the abuse of dominant position. First , they look at the dominance on the relevant market which is defined as holding a market share bigger then 45% and second, they look at the firm's conduct. The courts are mostly concerned with conducts creating barriers to entry or injuries to competition. But there is a change towards antimonopoly policy . Because of the high rate of present unemployment, EC is now more concerned with efficiency. There is a developing trend towards stringent conditions for application of article 86 and for lowering the fines imposed in monopoly cases, because usually the most efficient firms on the market are cought by antimonopoly law. Moreover, because of the vigorous rivalry coming from American and Japanes firms, some joint ventures which were prohibited in the past, are now allowed, if they help them to be more competitive worldwide. At the end, I should mention the importance of these rules for their subjects, enterprises. These articles should not be ignored by firms while drafting a contract or planning production and marketing policy, because they might be punished with fines up to 10% of their turnover for the previous year or they might even have their contract declared void [125].Case law supports these statements.

The following chapter is based on the legal analysis of the U.S. and EC antimonopoly systems made in the earlier parts and on an actual comparison between them. More precisely, it

[122] There is still no absolutly unified European market, for eg: labor mobility is limited and there are language barriers.
[123]Article 86 , Treaty of Rome.
[124]Regulation 17/62.
[125]Korah E. E. C. competition law and practice.

is concerned with their similarities and differences, which are more fully discussed in the succeeding section.

9.COMPARISON BETWEEN U.S AND EC ANTIMONOPOLY REGULATION

This comparison is made according to the examination of the antimonopoly systems of the U.S. and EC presented in the previous sections. The conclusion is that both jurisdictions are concerned with regulation of monopolistic position on the market. They, both prohibit monopolistic behavior on the market. Their public policy toward monopoly is similar and they use the same method, i.e. antimonopoly legislation to control this phenomenon.

Further similarities are that their courts apply the tests of *interchangeability and crosselacticity of demand* in order to ascertain the product market. As for estimation of the geographic market, the principle measure is the transportation cost. Although in both legal systems market share is an indication of dominance, they do not condemn sheer size of the enterprise, but rather target the exclusionary conduct. Mutual example of such conducts are predatory pricing, refusal to deal, and excessive pricing.

As for the procedural issues, both the U.S. and the EC have administrative organs in charge for administering the antimonopoly law. Judicial review is also available on the appeal. In both legal systems, there is a dual enforcement on the level of the federation / community and on the level of the member states. The common remedy for monopolization cases is the fine, but also cease and desist orders are also available if such conduct can result with irreparable harm.

Yet, a distinction between the U.S. and the EC antimonopoly regulations can be made. There are several reasons for that. The U.S. is a federation which exists for a very long time and which is created in different ways than the EC. The EC was created in 1958 by an international treaty. The Treaty of Rome was signed by independent member states which have language and culture differences. The process of economic and political unification is a slow and painful one, and has still been going on. It creates an additional problem and influates the EC antimonopoly system. In addition, the U.S. Sherman Act was passed in 1890. It is an old statute that cannot quite meet the modern need. Therefore the antitrust courts and lawyers face difficulties with its application. The EC article 86 is from a more recent time. It is contained in the Treaty of Rome passed in 1958, so it was more possible for the legislature to design it according to the actual demand. Furthermore, the central elements of the EC antimonopoly system are protection of the trading partners, increasing of efficiency and European integration. The U.S. statute, on the contrary, was a response of the public that was afraid of concentration and big business. That is why Sherman Act, section 2 above all deals with big enterprises that can ruin competitive market structure. Obviosly, one can reach a conclusion that although the U.S and the EC have some elements in common, differences in history and organization of communities resulted in different regulatory approaches to this issue. The principal differences are stated below. First, there are basic differences in the wording of articles concerned. While Sherman Act, section 2 explicitly forbids monopolization, article 86 of the Treaty of Rome uses the expression "abuse of a dominant position". Thus, the EC applies a wider concept that does not require a proof of monopoly. Evenmore, article 86 contains a list of prohibited practices. The Sherman Act does not embody such enumeration.

Second, an important distinction is that indication of monopolistic position for the U.S. Court is 70 % market share or even more belonging to the alleged monopoly. On the other hand, for the European Court of Justice 45% market share is enough to conclude that there was a dominance on the market. So, the EC concept focuses more on the ability of a dominant undertaking to make independent decisions without considering other competitors.

The third difference is concerned with the regulation of exclusionary practices. For example U.S. law encourages low pricing so long as it does not result in monopoly. Contrary to it, the EC definition and application of this rule is stricter. As far as excessive prices are concerned to determine a fair rate of return, U.S. courts usually use marginal cost analysis. In the

EC, on the other hand, there is no general principle to determine excessive rate of return. Different approaches can also be noticed in refusal to deal. While U.S. law distinguishes between lawful also and unlawful refusal to deal, the EC rule applies whenever a dominant firm refuses to supply its longstanding customer.

Intent can be pointed out as a fourth distinction. While in the U.S. general intent is required for monopolization cases, it is not a relevant issue with the EC.

The fifth distinction that can be pointed out are remedies which can be imposed. Sherman Act, section 2 in its wording provides for fines and criminal penalties for violation of this law. In the EC, secondary legislation, i.e. Regulation 17 contains public sanctions. Accordingly, there are different kind of remedies that can be imposed. In the U.S., criminal imprisonment up to three years is possible in cases initiated by the Justice Department, but there is no similar punishment in the EC.

Further difference is concerned with private remedies, i.e. sanctions. Namely, both courts deal with the fact how the damage from private parties can be obtained. In the US they can be obtained in district courts. In the EC, however, they are only available in the member state's courts and according to national legislation. Obtainable damages differ from state to state. As it is already underlined, the reason for such distinction in remedies is again in the character and organization of the two communities.

From the previous discussion it is clear that U.S. and EC laws have similarities and differences in their antimonopoly regulations. After examining the U.S. and the EC antimonopoly systems and comparison between them, the following part of this study will focus on situation and legislation in Macedonia . After examination of all relevant issues in the next section I will try to decide which system is the most appropriate for Macedonia.

8. REGULATION OF MONOPOLIES IN MACEDONIA

10.1. General overview

The Former Jugoslavian Republic of Macedonia is a small country. It has 2.033.964 people living in a territory of 25.713 Km.[126] It used to be one of the six republics that made up the Socialistic Federal Republic of Yugoslavia. When this country started to disintegrate the Macedonian people were afraid to become involved in an armed conflict and decided that it would be much better to be independent than to take part in a war that was not their own. Now, this country is a member of the United Nations and has been recognized by the EC, the U.S., Russia etc. Athough Macedonia has succeeded in becoming part of the family of all countries in the world, there are still many problems that need to be solved. For example: the process of reform of the system and transition towards democracy and market economy is not an easy one. Reform in Macedonia is especially hindered by the ongoing war on the Balkan peninsula and the embargo imposed on our southern border of Greece.[127] Meanwhile, the embargo on our northern border has been partially lifted by the United Nations, but only after Macedonia had suffered considerable damages. All these economic hardships and pressures have repercussions on our production, economy and the number of unemployed persons. Although there are many new private firms, they are mainly involved with trade, not with production. It is hard to carry out product activities in the conditions of embargo and legal uncertainty. Closed borders and the

[126]Statistical yearbook of Macedonia ,1991.

[127]The effect of this embargo is to prevent Macedonians from traveling to Creece , from importing Greece products and from using Thessaloniki's port .

civil war in Bosnia make very hard for Macedonian firms to get the raw materials from abroad. In addition, most of the producers have lost the foreign markets and they do not have where to sell. As far as import is concerned, since 1994 it has been liberalized in the respect of tariffs and legal regime. However, the companies must pay the duty rate, the special tax and the tax duty which are special percentage from the value of the imported goods. The duty regime depends on the kind of imported goods. There is a special protective legislature for some types of industry which are important for Macedonia such are agriculture and chemical industry. Prohibitive measures employed by the government are specially estimated quotas of the product which are allowed to be imported or it imposes special taxis. But, there are also other kinds of quotas that are helpful for the firms and which allow row materials imports to be free from paying a duty. Yet, it is much cheaper to buy abroad and then resell in Macedonia, instead to produce. In addition, government with purpose to stimulate exports, made them free of duty.[128]

As far as monopoly is concerned, it is hard to speak about monopolistic firms in industry nowadays. Even the largest firms are not earning much money because of the already mentioned hardships in our economy. Such conclusion is illustrated in the statistical data presented below that show present situation for the most concentrated industries with only one producer in 1993[129]

Industry		Gross Income (in thousands of denars)	Gain (in thousands of denars)	No. of Workers
1.	Steel	2.400	45	112
2.	Ferro Alloy	186.400	6.130	3.468

[128]Sluzben vesnik na R. Makedonija, Zakon za Carina; 1984.
[129]Zavrsni smetki vo stopanstvoto na R. Makedonia , Zavod za platen promet na R. Makedonia,1993.

3.	Copper	79.400	2.491	841
4.	Zinc	155.000	11.852	2.203
5.	Other Colored metals	145.000	.	923
6.	Gypsum	7.600	389	350
7.	Cement	131.400	164.693	1.208
8.	Synthetics Theard	300	137	90
9.	Tyros For vehicles	3.300	1.101	30
10.	Cacao	77.400	26.549	657
11.	Plant oil	56.000	20.861	564
Total of most concentrated branches		9.439.00	234.245	12.851
The industry as a whole		7.758.800	1.019.082	180.457
Participation in % of the most concentranted brunches in the whole industry		0,08 %	0,04 %	0,14 %

These figures show that as far as production is concerned, only in few industrial branches there is a monopolistic structure of the market with the sole producer. In terms of gross income, profit and unemployment of the monopolist's share of the entire industry is insignificant. Profits are not attractive for other firms to enter the market, plus huge capital requirements which impose barrier to entry. Perhaps, these figures only show the depression in which our economy is now. Macedonian economy needs cash flows and new investments, but the problem is where to get them.

Considering the current economic situation in Macedonia, it must be considered whether Macedonia needs to regulate monopolies, and if so, how to do it. But first, the legal framework in Macedonia will be examined.

10.2. Prior legislation concerning monopoly

Macedonia used to be a part of the Socialistic Federate Republic of Yugoslavia. SFRY recognized the importance of market economy. It was the only "socialistic" country with some kind of free market. Thus, the federal constitution from 1964 gave some independence to enterprises. The relevant statutes governing this matter were:

1.Basic law for companies

2. Basic law for business dealings on the market ,1962

3. Basic law for trade of goods and services abroad, 1962

4. Resolution on the process of concluding the agreements between market subjects, for cooperation in international trade, 1964 as amended in 1970

5. Statute for trade of goods, 1966

6. Basic law for trade of goods, 1967. Article 5 of this law provides for doing business according to bona fides[130] and the principles of fair competition. Article 6 prohibits limitation of freedom of competition imposed by other subjects on the market.

7. Act for restrain of unfair competition and monopolistic agreements, 1974

The new constitution from 1974 laid down the contours of the changed economic system known as "self management". All enterprises were social property managed by their workers.

[130]good will.

They were independent subjects which were not owned by the state. Nevertheless, the government planed the country's economy, the production, types of products, prices etc. It could also impose temporary measures according to its plans. The government, even used to have representatives in the bodies for electing managers of the companies. Such situation was sustained until the enactment of the new Company Act in 1989, which allowed market subjects to act freely on the market.

This was the market environment in Yugoslavia, when the Act for restraint of unfair competition and monopolistic agreements (hereinafter the 1974 Act) was passed. It was an effort to preserve good behavior on the market. This federal law was created to protect a single Yugoslavian market. It was drafted according to western models . In Macedonia this law was never applied in an actual case.

Article 1 of the 1974 Act defined its scope. It prohibited activities whose purpose was creation and abuse of monopolistic position on the single Yugoslavian market and proscribed measures that should be taken for protection of the market from such activities. In addition, article 3a contains a general clause that prohibited "activities that enable material or other advantages based on unequal position in bargaining, using these activities in a manner which is against good will and business moral." On the other hand chapter IIIa, article 12a (1-5) contained a specific clause, which enumerated activities considered to be "activities for creation and abuse of monopolistic position." The wording of the article indicated that it had been a nonexhaustive list.

Limitation of output by refusing to deliver needed quantity, in order to increase prices was specially forbidden by Article 12a (1).

Article 12a (2) clearly prohibited using monopolistic position in a manner which was against good trade customs. It was forbidden for a firm that was the only producer or supplier in one territory to apply different terms for equal transactions.

Article 12a (3) was concerned with monopson. It prohibited a sole buyer on the market to use its position and to obtain unlawful advantages.

Article 12a (4) banned producers to sell their goods to ultimate users only in the seat of their organization in order to achieve a higher price and better position on the market. In such case, they limited the market, because ultimate users could obtain goods only from them. Consequently, the dominant company would maintain the monopolistic position on the market as a sole seller and thus, be able to charge higher prices.

From article 12a (5) we can see that this act was indirectly concerned with protection of the consumers, because it outlawed: " activities that prohibit the sale of goods or performance of services that are charged with lower prices than prices provided in directives." Directives were governmental acts that regulated prices. They usually kept them low and it was forbidden for companies to charge higher prices than those estimated by the government. But, this article was even more concerned with the obedience of the enterprises to the governmental directives.

The 1974 Act the same as article 86 and Sherman Act, section 2 prohibited the abuse of monopolistic position, not the market dominance itself. It is obvious that article 12a(1)-(2) prohibited conduct similar to one prohibited in western countries. Nevertheless, article 12a (4-5) showed the socialistic background of the country. It indicated that market had been strongly regulated by the governmental acts i.e., directives. Prices were not formed freely on the market, but were imposed by the government. The government also limited the freedom of companies i.e., which companies they would make business with and how.

As far as procedural issues were concerned the enforcement agency was very vaguely explained. There was no special competition administrative organ. Namely the Trade Inspection was in charge of supervising the administration of this statute. However, the main accent was put on the private enforcement as the most effective. Civil procedure could be commenced in the courts by persons who had suffered damages (article 14). Private persons could obtain an injunction to stop the unlawful conduct and damages. The damage procedure was the same as the procedure governing cases of tort. In addition, public sanctions were injunction (25a) and imposition of fines (article 24). The alleged violator could apply to the courts in respect of the decisions of the Trade Inspector.

The 1974 Act was a progressive one in its time and showed SFRY's determination to achieve a market economy. But it was not an effective one and has was never really enforced.

10.3. Present legislation

10.3.1. Substantive law

The present law aimed at regulating monopolistic activities is the Trade Act[131] enacted in 1990. It replaced the 1974 Act. The Trade Act was passed as a federal law, before the country fell apart. It reflected the democratic changes in the SFRY. In Macedonia, the 1990 Trade Act is still in use, since the new Macedonian legislation is in the drafting stage.

The 1990 Trade Act is not a special law regulating competition and monopoly, but rather contains a "Monopoly Clause" in chapter IV. In chapter IV article 21 defines the term "monopolistic activities". It states that the term "monopolistic activities" includes both monopolistic agreements and behavior. Thus, both conducts and agreements are condemned. Namely, in this act the term "monopoly" does not refer only to unilateral conduct by one monopolistic enterprise (like in the western countries), but it also embraces contracts and conspiracy between two or more firms having a dominant position on the market with the unlawful purpose to gain some kind of advantage. However, in this study I focused on the monopolistic behavior which does not require any contract or conspiracy. Only this aspect of the Trade Act is going to be further examined.

Article 21, (3) determines the term "monopolistic behavior" as "abuse of the dominant position on the market and attempts to monopolize and abuse of the monopolistic position."

[131]Trade act , August 10, 1990 no. 46 :1349-1351.

Thus, this act separates abuse of the dominant position from the abuse of the monopolistic position and defines them as two different offenses .

Articles 24 and 25 of the Trade Act are regulating the abuse of the dominant position. Article 24 defines dominant position as a position of a company which holds more than 40 % of the relevant market. Article 25 of the Trade Act in general condemns abuse of the dominant position and especially "refusal to sell or buy goods with a purpose to gain material advantage, which is contrary to good customs."

Article 26 is related to actual monopolization and attempts to monopolize. It contains a nonexhaustive list as article 86 of the Treaty of Rome does. For example, " to use this advantage in order to increase the expenses from import or trade and to gain material advantage". The ratio is that a monopoly may artificially increase its expenses in order to charge higher prices, especially when prices are determined by the governmental body. The monopolistic company can justify its higher prices by showing the list of its expenditure. The purpose of this article is to protect the consumers from overcharge.

After the analysis of 1990 Trade Act, my further study will compare it first with the article 86 of the Treaty of Rome and second with the Sherman Act, section 2. It is obvious that legislators used article 86 of the Treaty of Rome as a model to regulate dominant position on the market. This conclusion is first based on the fact that both Macedonian and the EC jurisdictions defined the dominance on the market in the same way. Only in the EC it is determined by the case law and in Macedonia is defined by the Trade Act. The second similarity is that both of them are regulating market position of firms which do not have very big market share. Third, Macedonia, as well as the EC does not prohibit dominance itself , but rather the conduct. The fourth parallelism is that the specific clause contained in article 25 of the Trade Act which expressly prohibits limiting the output in order to increase prices, is similar to the article 86 (b) of the Treaty of Rome which prohibits limiting the output on the prejudice of the consumers.

On the other hand, there is also a similarity in the wording between article 26 of the Trade Act, which prohibits monopolization and attempts to monopolize and Sherman Act section 2, which also forbids monopolization and attempts to monopolize.

Article 26 does not clearly state, but presumably it is concerned with a pure monopoly or with a company having at least an 80% market share. The assumption is based first on the fact that the Trade Act already contains articles (24 & 25) which concerns the firms with a smaller market share and second based on the expression that is used in article 26, i.e., monopoly which is usually related to a company having more than 80% market share. However, here the similarities end, because article 26 in its first part defines the term monopolization as a "firm's activity with a purpose to obtain material advantage, based on an unequal position and contra fair trade practice." Sherman Act, section 2 does not define the term monopolization or attempt to monopolize. Further difference between them is that in its second part, article 26(1-2) of the Trade Act examples of monopolization are enumerated. Sherman Act, section 2 does not give examples of prohibited practices.

As far as Trade Act itself is concerned, my opinion is that articles 24 to 26 of the Trade Act regulate the same matter and they are redundant. If the legislature wants to regulate not only monopolistic enterprises but also companies with a smaller market share, it only needs only to rely on the concept "abuse of the dominant position" and then give the examples of prohibited activities. Both articles regulate the same activity on the same way. For example, articles 25 prohibits conduct of a firm in a dominant position, which means that the firm is in a better position from the other business parties. Article 26 prohibits monopoly activities based on better market position. However, the article forbidding the abuse of the dominant position can also refer to a monopoly, because article 24 defines dominant position as a firm having more than a 40% market share. Further on, article 25 specifies that it is mostly concerned with limiting the output in order to increase the prices. This conduct can also be practiced by the monopoly which is even in a better position to employ such activity. The second part of article 26 is concerned with artificial increase of expenses. Such conduct can also be practiced by a firm with a smaller market share than 85 %. Therefore, these articles do not only seem to be redundant, but also confusing. There is no need for two articles. Article 25 covers monopoly conduct as well. Perhaps the legislature was only trying to make the statute clearer. According to my opinion, it would be much easier only to modificate article 25. First, it can contain the general clause prohibiting any activity of a dominant firm based on an unequal market position which is practiced with a purpose to obtain material advantage and the second specific part can contain the nonexhaustive list of examples of abuses.

10.3.2. Procedural rules

Beside the relevant articles of the substantive law, the 1990 Trade Act also contains procedural rules. Article 27 of this Act for the first time creates a special enforcement administrative agency. The original name is the " Federal Commission for Protection from Monopolistic Behavior" (hereinafter the "commission"). The field of its activity is " to follow the conduct of firms in dominant position and to take protective measures against monopolistic behavior." In order to fulfill its task, article 29 of the Trade Act grants the investigation power to the Commission which is entitled to request all needed documents from the company under investigation. The second part of article 27 states that the Commission can only undertake the preventive measures against monopolistic abuse of the market. But, the article does not specify which measures. In cases where the Commission finds that abusive conduct already exists, it must inform the Federal Trade Inspectorat. This organ is in charge to act with undertaking proper measures such as injunction (article 38) against actual abuse. The Federal Trade Inspectorat was a federal administrative organ in charge with enforcement with the Federal Trade laws, taking care of the single Yugoslavian market. The Trade Act was enacted as a federal law. Consequently the enforcement bodies were federal, i.e., the Federal Trade Inspectorat and the Federal Commission. However, since Yugoslavia fell apart a short time after passing this law, such Commission was probably never established. Although the 1990 Trade Act is still in force in Macedonia, a similar administrative agency on the republic level has never been established. Therefore, the Trade Act's Commission remained on the paper as an idea for the future enforcement of the antimonopoly law.

The present administrative organ in Macedonia for the enforcement of the Trade Act and its Monopoly Clause is the Trade Inspectorat of the Republic. The Trade Inspection Act[132] empowers the Trade Inspectorat of the Republic to administer and supervise the law against monopolies. The last sentence of article 6 states that "the Trade Republic Inspectorat hinders the possibility for anybody to obtain advantage on the market by abusing the monopoly position." That is why, the Inspectorat can impose fine, which is provided by article 44 (3-4) for the abuse of dominant position , monopolization and attempts to monopolize. The Trade Inspectorat is also empowered to issue a temporary injunction until the courts reach the decision. The alleged violators can apply to the courts. In the administrative the procedure courts reexamine the Inspectorat's decision. Furthermore, only the courts in the criminal procedure can sentence the responsible person with the imprisonment. Such criminal penalty is provided by article 43, for infringement of article 26 (1)-(2). This is an interesting solution, similar to Sherman act, section 2 which provides for imprisonment up to 3 years. Article 43 provides for imprisonment up to 5 years[133] if a person uses its dominant position to increase the price of imports or to conclude the contract with higher price than prices charged in the market place in order to increase expenses and thus, to be able to charge higher prices. So, criminal penalties can be obtained only in those two cases concerning international trade, which are designed first to protect society's companies and second to protect domestic consumers from undue exploitation.

In addition, private action can be commenced by every person that suffered loss from monopolistic behavior. Such persons can obtain damages in the civil legal procedure.

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[132] Sluzben vesnik na SRM , ZAKON ZA PAZARISNA INSPEKCIJA .
(Trade Inspection Act) , NB. 40 , PAGE 1114 ; 1973.
[133]refers to U.S. Sherman Act , section 2.

"Monopoly Clause" from the Trade Act has never been used in Macedonia and there is no case law that would help the interpretation of these articles. Namely, the Trade Act is an inheritance from the Yugoslavian law and will be changed soon. It was made for another kind of a country, a federation that is already dead and for a different, socialistic system. Therefore, it is not suitable for Macedonia. This Act is still in force for practical reasons. Otherwise , without a law regulating the trade in the period of the transition, the market and the traders will be in a total confusion. Especially considering the fact that the new Macedonian Trade Act is still in a draft. The Macedonian legislature has not yet stated a clear position whether it intends to include the articles regulating market behavior or competition in the new trade law that is under consideration.

10.3.3. Other relevant laws

Another law where we can find relevant provisions regulating the monopolistic behavior on the market is the Obligation law [134]. The part which contains the principles in creation of obligations are the Fundamental Provisions of the Obligation law. They prohibit creation and abuse of monopolistic position. More precisely, article 14 forbids the use of superior position in order to achieve material advantage, which would put the other party in the inferior position. It is a kind of protection for the weaker party not to be forced to conclude tie in arrangements.

Moreover, the public policy in Macedonia is concerned with regulation of monopolistic behavior on the market. The legal basis for future statutory regulation is to be found in the Constitution of Macedonia, the chapter on Economical Relationships, article 55 which states that

> "The country assures equal legal protection for all subjects on the market. Macedonia undertakes measures against monopoly position and conduct on the market."

[134] Sluzben Vesnik na SFRJ ;nb.29 :1185, 1978.

From the first sentence it is obvious that its main goal is protection of competitors and trading partners. The second sentence provides for suppression of monopolistic behavior on the market because of its recognized bad consequences. Thus, it is reasonable to expect that in near future the Macedonian legislature will enact antimonopoly legislation.

This table shows relevant laws, enforcement agencies and sanctions for anti monopoly cases in the U.S., the E.C. and in Macedonia.

	U.S.	EC	Macedonia
Law	Sherman Antitrust Act section 2	Treaty of Rome article 86	Trade Act articles 21, 24-26
Governamental bodies	1.Justice department 2.Federal Trade commission 3.State attorney general	1.Commission of the European Community D.G. IV	1.Trade Inspestion
Sanstions	1.Fine 2.Imprisonment up to 3 yeras 3.Preliminary/ permanent injunction	1.Fine 2. / 3. /	1.Fine 2.Imprisonment up to 5 years 3.Preliminary injunction

	4.Cease & desists order	4.Final cease & desists order	4. /
	5.Damages	5.Damages in member state	5.Damages
	6. /	6. Periodic penalty	6. /
-	7. /	7.Nullity of condemnd practice	7. /
	8.Mandatory orders for dissolution	8. /	8. /

11. CONCLUSION

1. *Reasons for having an antimonopoly law*. An important component of the market economy is a competition. This rivalry between firms induces development, technical improvements and increase of quality. To survive on the market companies try to produce better products and to sell them for lower prices. It brings benefits for the competitors, consumers and society as a whole. However, some firms in order to maximize their profit use unfair devices. They try to restrain the trade, which damages competition. For example, a dominant firm on the market could restrict its output, increase prices and create barriers to entry for potential competitors. Such a firm could even employ illegal practices in order to drive its smaller rivals out of the market. The kind of behavior opposite to the basic law of supply and demand destroys the normal conditions of competition, and places companies in an unequal position . In cases when there is no equal opportunity, it is hard for non-dominant firms to survive on the market. All firms should have the same possibilities and then compete with their lower costs or superior products. To achieve " fairness" on the market place Macedonia needs an effective antimonopoly system, to control conduct of dominant firms.

Moreover, Macedonia needs such system in order to realize its commitment not only to the market economy, but to democracy as well. The reason is that beside the economic impact dominant, firms can also produce political consequences. For example, accumulated market power will enable companies with the biggest market share to achieve political power and they will be able to request a beneficial legislation. Suppression of bad political consequences is especially needed in this period of transition, because:

> "Enterprise which is not competitive cannot for a long time remain free, and a community which refuses to accept the discipline of competition inevitably exposes itself to the discipline of absolute authority.[135]"

Therefore, concentrated economy power can not be tolerated, because giant pressure groups can ultimately gain control of the government and our newborn democracy can be superseded by some form of authoritarianism.

Although the Macedonian economy and its firms are in very bad position now, that is not a sufficient excuse for the absence and ineffectivness of enforcement of competition law. Moreover, the protective legislature that will help legal certainty and will establish the basis for mutual trust of the trading partners is necessary for the transitional period. Although the most successful companies might appeal against legislative initiatives to control their behavior and their market power, antimonopoly legislature is a precondition for efficient and free market enterprises, promotion of economical growth and bigger discipline among trade subjects, not only for Macedonia, but worldwide.

2. *Macedonia should pass a new law against monopoly according to western models, but modified to our special circumstances.* It is clear that public policy requires Macedonia to regulate dominant companies on the market. At the begining, the policy goals must be determined, for example, building an effective market system, protection of small and medium sized firms, increase of competition through new entries on the market, encouragement of new investments through improvement of legal certainty, higher employment, economic growth, increased efficiency etc.

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[135] Norver. & Savitt ;Conceptual readings in the marketing economy , 1971.

Next, the market can not regulate itself by its "invisible hand". That is why, it is important to identify tools for achievement of this aim e.i. regulation of the tradeplace. The best legal instrument to be engaged in Macedonia is the legislative method for control of market behavior. The reason to employ such instrument is that it does not involve governmental interference. So, this legal instrument enables some kind of a balance between overcontrol and undercontrol of the market.

At the end, it will be necessary to measure the effects of the instrument used. Instead of having positive results, the law can be very strict and suppress trade. So, the relation between the law and market subjects must be clearly estimated in the present situation. It is of great importance new rules and procedures to be drafted in such a manner to function in accordance with development of our market and international trade, to enable harmonization with the western rules for competition and closer relationships with international trading partners.

3. *The system for protection of monopolies must satisfy certain basic criteria.*

First it should be efficient. The procedure should be fast and accurate. Violators should be found and fined as speedily as possible. Second, the system should be transparent. All subjects of this law should be clearly informed about its content and purpose. Firms must be able to rely on the legal framework. Third, a way must be found to reduce the time and expense of such burdensome cases. For example: The Rulings of the body in charge must be given within a short time to speed up the procedure. Fourth, antimonopoly system should be tailored in such a way as to enable effective protection of the competition on the market and of the society interest. Fifth, Macedonia needs a separate act dealing with monopolies, instead of the clause in the 1990 Trade Act. It should regulate monopolies in the trade and manufacture. This future Act should exempt labor and agriculture, which are very sensitive and specific issues to deal with. The new Act should contain articles dealing with both substantive and procedural issues.

4. *Substantive law.* A special article that will govern monopoly cases must be drafted in such a way as to the be relevant law not only for monopolistic enterprises, but as well for dominant companies with much lower share. I believe that abuse of the dominant position should be the

main concept. This concept is concerned with companies with smaller market share, and it catches their anticompetitive conduct. Another reason which supports use of the concept of the abuse of dominant position is that it is accepted by the EC countries. Association agreements with former socialistic "Visegrad" countries also contain article 86, which is important for harmonization of laws and better communication with the EC. Although there is no individual Association agreement yet Macedonia is one of the countries that sees its perspective in the European Community. Not only as future member[136], but also as trading partner. Our companies should become familiar with the idea, meaning and consequences of article 86. This can be better achieved by having similar domestic legislation.

Futher on, the article must contain an active prohibition dealing with firm's conduct. Therefor the size of the company is not going to be condemned by its virtue, but only the unlawful conduct of such dominant firm.

It should separate conduct from agreements and conspiracy and underline that it refers only to conducts of dominant firms. This is with a purpose to be more specific and to try not to confuse things. Beside such general clause which prohibits abuse of the dominant position, the article should contain some examples of most frequent practices. Therefore, the Act should provide a list of examples of prohibited practices e.g. limitation of output with purpose to increase price of those goods[137], unjustified refusal to supply when customer does not have another source of supply available, imposing unfair terms in trade in order to gain bigger profit and discrimination among customers which places them at competitive disadvantage. All these practices enable a dominant firm to discriminate among customers or to create barriers to entry with purpose to retain the control over the market and to suppress the competition.

[136]Which is very far , especialy considering unfriendly atitude of one of its members Greece.
[137]Similar to 12a (1) , Law for Suppresion of Unfair Competition and Monopolistic Agreements.

The antimonopoly Act should also contain a definition of the dominance according to the size of the market share held by a company. For example, a dominant firm is a firm having more than 50 % market share on the relevant market.

The Act should also provide for articles that will make easier for the courts and involved party to define the product and geographic market. For example, the relevant product market is the market for products which are interchangeable in the eyes of the customers regarding their use, or the relevant geographic market is the selling area which can be reached by customers without having transportation costs.

The new Act must be clear and precise because in Macedonia, court's decisions are not a source of law. Thus , the law must be detailed in order to provide guidelines not only for the courts , but also for the actors on the market. The new law is going to be essential for a clear and detailed interpretation which will help the firms to behave in accordance with the law. Further on, such law is needed, because each case is going to be examined in the light of specific circumstances.

5. *The new Macedonian antimonopoly law must provide for effective enforcement mechanisms.* Its purpose should be to enable interested parties to fulfill their tasks and to protect their legal rights. This Act should create a special administrative body to deal with competition matters. It should be an independent governmental body that will supervise the administering of this Act. In order to be effective, the antimonopoly authority must have the power to investigate, to request documents and to exercise all the powers necessary to enable this organ successfully to determine the relevant facts. It should be composed of persons who are professionals, equipped both with legal and business knowledge. Further on, such authority should be granted power to issue preliminary or temporary injunctions in cases where investigated conduct could impose irreparable harm to its competitor. If this body finds that there has been a violation it must have the power to fashion the remedy, such as imposing fines and to issue an order to stop the infringement. On the other hand, the operations of such body should be supervised by some higher authority i.e., a higher administrative organ. It could perhaps be the Trade Inspectorat of

the Republic which is controlling the work of all other local Inspectorats. The Republic Trade Inspectorat, is already empowered by the 1990 Trade Act to act in the case of monopolization and perhaps has some experience over this matter. The proceedings of the antimonopoly authority should be governed by the general rules of the administrative procedure. According to the administrative procedure , judicial review from the Supreme Court of Macedonia is provided for the applicants who claim that their right was infringed by the decision of the governmental body, so the new Act should give the same right in the monopolization cases.

Finally, it should also be allowed for private parties to start the procedure. They could either file a complaint with the antimonopoly authority or ask for damages in the appropriate courts according to civil procedure measures. Private plaintiffs must have the right to commence the procedure because such right is likely to lead to better detection of the monopoly cases. It is in my opinion that all persons who have suffered direct injury from the monopolistic behaviour on the market should have a standing.

6. *The system of remedies should be designed to compensate the victims and to prevent or deter unlawful practices.* According to the experience of the other countries, the Macedonian system of remedies should embrace fines, injunction and damages.

Administrative organ should be granted with power to impose fines in cases of infringement of relevant article. The function of the fine is to punish the violator. However, it can as well prevent and deter the unlawful practices. For example ; the companies will be afraid to employ prohibited practice if the fines are high. The basis for calculating the fine can be measured by the percentage of turnover of relevant company in the previous year[138]or by some percentage of material advantage gained through monopoly device.[139] In addition, to ensure integrity of the investigation procedure, the antimonopoly authority should have the power to impose fines in

[138]For example regulation 17 article 15 (2) : 10% of the turnover of the previous year.
[139]Para 48: Hungarian law against restarin of trade.

cases when companies intentionally or negligently give incorrect information or refuse to provide all documents.

The antimonopoly agency should be allowed to issue an injunction to stop the unlawful conduct. Private parties should be also allowed to ask for preliminary and temporary injunction but, only in cases where they can show that they are going to suffer irreparable harm, because of the alleged violator's conduct. The reason to be precautious in issuing preliminary injunction is that in such cases it is still not proved that the defendant really violated the law. Therefore, the courts must be careful, since the injunction might harm the alleged violator and suppress the competition.

In addition, to make the private enforcement more successful, injured parties should be entitled to a double sum [140]of damage suffered. This should work as an incentive for private parties to be more active in the enforcement of the act. The basis for computation of damages should be the difference paid between monopoly and competition price in the case of overcharge[141]. When competitors are damaged by the conduct of the dominant firm, they should be able to collect double the amount of damages calculated. This sanction does not have the sole purpose to compensate the victims , but also is designed to have a deterrent effect on dominant firms. Such offense is necessary to serve the second goal of the remedies.

I do not think that a penalty with clear criminal nature as an imprisonment is good remedy in case of Macedonia. The same deterrent effect can be achieved by levying fines and awarding damages. Perhaps this remedy should be available only in cases in which the defendant does not have enough money to pay the fine or damages .

[140]I think that the triple sum available under U.S. law is too high for Macedonia's economic conditions.

[141]In U.S. now is adopted test proposed by Turner and Areeda which says that" an injured person is not entitled to have damages based on the excess of the monopoly price but only to the price increment reasonably attributable to the actual behaviour. Areeda P. & Turner D. , ANTITRUST LAW; 1975

8. *The fact that it will be difficult to enforce such an antimonopoly law should not prevent Macedonia from enacting it, since the benefits will outweigh the burden.* The market economy does not yet work properly, since the process of reform is still ongoing. Therefore, it is clear that under present circumstances in Macedonia, it will be difficult to implement the antimonopoly legislation.

There are several reasons for that. First, there are not enough money or resources to enforce such a law properly. The consequence is that with the given tight budget restraints, it will be hard to create the antimonopoly authority. It will be hard to train the personnel and to enable them to work their job efficiently. Next difficulty is that our courts are not equipped to deal with this kind of issue, since there is no court practice in this field. Lastly, it is unlikely that such a law would enjoy support from traders and manufacturers, who would see it as another attack on their freedom to deal.

Yet, despite these difficulties, Macedonia should proceed to enact and enforce such antimonopoly legislation. As soon as Macedonia has a similar antimonopoly regulation, Macedonian businessmen and lawyers will be more familiar with the antimonopoly laws in the countries of their trading partners. Beside helping them not to infringe foreign antimonopoly legislation in international transactions this knowledge would perhaps help them to strengthen their bargaining position e.g., to avoid tying arrangements etc. Therefore, the benefits of having will outweigh the disadvantages in the long run, provided that the law is tailored to respond our special needs and is properly enforced. Competition as important segment of the market must be preserved. Antimonopoly legislation is the best method used from more developed countries that had market economy for centuries. The experience of the western countries shows that competition is necessary part of healthy market economy. Thus, in order for Macedonia to enter into trading relations on an equal footing with its European and other partners, it is necessary to learn to play by the same rules (adopted as necessary during our transition).

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