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NOTES

THE DEFINITION OF COMPETITORS UNDER SECTION 8 OF THE CLAYTON ACT: THE EMERGENCE OF SUPPLY SIDE COMPETITION ANALYSIS

In 1914 Congress enacted the Clayton Act[1] to prohibit practices facilitating or encouraging the elimination of competition.[2] Section 8 of the Clayton Act

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1. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1976)). Section 2 of the Clayton Act prohibits a seller of goods from discriminating in price between two or more buyers of the same product. 15 U.S.C. § 13(a) (1976). Section 3 of the Clayton Act prohibits a seller of goods from requiring a buyer to refrain from dealing with the seller's competitors. *Id.* § 14. Section 7 of the Clayton Act restricts corporate mergers that might tend to restrain trade. *Id.* § 18 (Supp. IV 1980). Section 8 of the Clayton Act restricts the use of interlocking directorates by banks and competing industrial corporations. *Id.* § 19 (1976); *see infra* notes 3-9 and accompanying text (discussion of § 8 of the Clayton Act).

2. *See* S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914), *reprinted in* 2 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES, 1744 (1978) (Clayton Act's drafters intended to halt development of trusts and other restraints of trade in incipient stage by supplementing Sherman Antitrust Act); 51 CONG. REC. 13848 (1914), *reprinted in* 2 KINTNER, *supra*, at 1800 (statement of Sen. Culberson) (Congress should enact legislation to prohibit practices beyond scope of Sherman Act but threatening to competition); *see also* 15 U.S.C. §§ 1-7 (1976) (text of Sherman Act). Congress enacted the Sherman Act in 1890 to prevent the increasing concentration of American business into powerful trusts. *See* 21 CONG. REC. 2457 (1890), *reprinted in* 1 KINTNER, *supra*, at 117 (statement of Sen. Sherman). Section 1 of the Sherman Act prevents the concentration of business by prohibiting contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (1976). Section 2 of the Sherman Act prevents the concentration of business by forbidding monopolization and attempts to monopolize. *Id.* § 2. Although Congress designed the Sherman Act to eliminate the most outrageous competitive abuses, the Sherman Act failed to restrain several questionable trade practices tending to encourage or facilitate the elimination of competition. *See* S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914), *reprinted in* 2 KINTNER, *supra*, at 1744 (Sherman Act does not arrest creation of trusts in incipient stage). Furthermore, in 1911, the Supreme Court substantially weakened the Sherman Act by limiting the Sherman Act's application to unreasonable restraints of trade. *See* Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911) (§ 1 of the Sherman Act subject to rule of reason analysis since every contract results in some restraint of trade); *see also* Borg-Warner Corp., 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,667 (F.T.C. June 23, 1983) (Congress enacted Clayton Act partly in response to Supreme Court's adoption of rule of reason approach to Sherman Act); Mattson, *Tying Arrangements-An Update*, 1982 B.Y.U. L. REV. 857, 858 (1982) (Congress enacted Clayton Act in part to fill gaps opened in Sherman Act by *Standard Oil* decision). By 1914 many observers in Congress concluded that the language of the Sherman Act was too narrow to combat effectively the trust problem. *See* H.R. REP. No. 627, Pt. 1, 63d Cong., 2d Sess. 19 (1914), *reprinted in* 2 KINTNER, *supra*, at 1099 (trend toward concentration continued after enactment of Sherman Act). The Clayton Act extended the coverage of the antitrust laws to four problems not addressed by the Sherman Act. *See* 15 U.S.C. § 13(a) (1976) (price discrimination); *id.* § 14 (tying arrangements); *id.* § 18 (Supp. IV 1980) (mergers tending to restrain trade); *id.* § 19 (1976) (interlocking directorates); *see also* S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914), *reprinted in* 2 KINTNER, *supra*, at 1744 (Sherman Act should be supplemented in at least four areas).

restricts the use of interlocking directorates by competing corporations because directoral interlocks between competitors may tend to facilitate anticompetitive practices.[3] An interlock occurs whenever two corporate boards have one or more common directors.[4] Although directoral interlocks are commonplace[5] and generally do not threaten competition,[6] a director sitting on the boards of two competing corporations may substantially reduce competition between the two corporations by coordinating the two corporations' policies.[7] Section

3. *See* H.R. REP. No. 627, Pt. 1, 63d Cong., 2d Sess. 19-20 (1914), *reprinted in* 2 KINTNER, *supra* note 2, at 1099 (interlocking directorates between competing corporations only maintain uniform policies among interlocked competing corporations). In reporting on § 8 of the Clayton Act, the House Committee on the Judiciary not only objected to the tendency of interlocks to facilitate collusion between competing firms, but also objected to the tendency of interlocks to create conflicts of interest for directors serving on more than one board and on the tendency of interlocks to discourage the development of new leadership. *Id.*; *see* STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT 7 (Comm. Print 1965) (interlocks objectionable because interlocks raise threats of collusion, create conflicts of interest, and diminish opportunities for young leaders) [hereinafter cited as COMM. ON THE JUDICIARY].

4. *See* 5 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 1300-01, at 359-64 (1978) (general discussion of interlocks); COMM. ON THE JUDICIARY, *supra* note 3, at 10 (same). Generally, interlocks fit into one of two categories, direct or indirect. *See* 5 P. AREEDA & D. TURNER, *supra* ¶ 1300, at 359 (interlocks may be direct or indirect). A direct interlock between two corporations occurs when a single individual serves on the boards of each of two corporations. *Id.* An indirect interlock may occur in several ways. *See* COMM. ON THE JUDICIARY, *supra* note 3, at 10. For example, corporation A and corporation B may be indirectly linked if both corporation A and corporation B share a common director with corporation C. *Id.* Similarly, corporations A and B may be indirectly linked if a close friend, relative, or associate of a director of corporation A serves on the board of directors of corporation B. *See* 5 P. AREEDA & D. TURNER, *supra* ¶ 1300, at 359 (discussion of various kinds of indirect interlocks). Although directoral interlocks may be either direct or indirect, § 8 of the Clayton Act regulates only direct interlocks. *See* 15 U.S.C. § 19 (1976) (no individual may serve simultaneously on boards of two or more competing corporations); *see also* 5 P. AREEDA & D. TURNER, *supra*, ¶ 1301(c), at 363 (§ 8 directed only at direct interlocks); Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX. L. REV. 819, 823 (1968) (§ 8 does not prohibit indirect interlocks).

5. *See* STAFF OF ACCOUNTING & MANAGEMENT SUBCOMM. OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 2D SESS., INTERLOCKING DIRECTORATES AMONG THE MAJOR U.S. CORPORATIONS 27 (Comm. Print 1978) [hereinafter cited as ACCOUNTING & MANAGEMENT SUBCOMM.]. A study of 130 major American corporations by the Accounting and Management Subcommittee indicated that in 1976 the United States' 13 largest corporations had a total of 240 direct interlocks with the boards of other corporations. *Id.*

6. *See* FEDERAL TRADE COMMISSION, REPORT ON INTERLOCKING DIRECTORATES, H.R. DOC. No. 652, 81st Cong., 2d Sess. 19 (1951) (not all directoral interlocks threaten competition) [hereinafter cited as FEDERAL TRADE COMMISSION]. An individual could serve on the boards of several corporations engaged in completely unrelated businesses without endangering the competitive process. *Cf. infra* note 7 (discussion of danger inhering in interlocks between competing corporations).

7. *See* H.R. REP. No. 627, Pt. 1, 63d Cong., 2d Sess. 19-20 (1914), *reprinted in* 2 KINTNER, *supra* note 2, at 1099 (maintenance of uniform policies is principal result of directoral interlocks); ACCOUNTING & MANAGEMENT SUBCOMM., *supra* note 5, at 6 (concentration through interlocks can lead to uniform policy determination throughout industry). Although the most common objection to directoral interlocks between competitors is that interlocks between competitors facilitate collusion, tending to result in uniform policies throughout the industry, commentators have noted

8 prevents the use of directoral interlocks between competing corporations by prohibiting an individual from serving on the boards of two or more competing corporations if an agreement eliminating competition between the competing corporations would violate the federal antitrust laws.[8] Since section 8 prohibits interlocks only between competing corporations, a crucial issue arising under section 8 is what standard the courts should apply to determine whether two corporations compete.[9] Only a few cases,however, have examined the issue of whether two corporations with interlocking directorates compete[10]

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several other objections to directoral interlocks between competitors. *See* 5 P. AREEDA & D. TURNER, *supra* note 4, ¶ 1300, at 359. Professors Areeda and Turner note that interlocks between competing corporations may lead to fiduciary conflicts in which a director of two competing corporations is tempted to undermine the interests of one of the corporations to further the interests of the second corporation. *Id.* Professors Areeda and Turner also note that directoral interlocks between competing corporations may facilitate agreements between competing corporations to form illicit joint ventures or to raise barriers to new entry into the industry. *Id.*

8. *See* 15 U.S.C. § 19 (1976). Paragraph four of § 8 of the Clayton Act, sometimes called the competing corporations paragraph, prohibits an individual from serving simultaneously on the boards of two corporations other than banks, trust companies, and common carriers if one of the two corporations has a combined worth exceeding $1,000,000 and if the two corporations compete "so that" an agreement eliminating competition between the corporations would violate the federal antitrust laws. *Id.* Congress established the $1,000,000 size requirement in § 8 because Congress did not deem interlocks between small industrial corporations a threat to competition. *See* H.R. REP. No. 627, Pt. 1, 63d Cong., 2d Sess. 19 (1914), *reprinted in* 2 KINTNER, *supra* note 2, at 1099 (discussion of § 8 size requirement). Several courts have considered the meaning of the "so that" clause of § 8. *See* United States v. Sears Roebuck & Co., 111 F. Supp. 614, 617 (S.D.N.Y. 1953) (Congress included "so that" language in § 8 to avoid unconstitutionally regulating intrastate commerce); TRW, Inc., 93 F.T.C. 325, 379-80 (1979) ("so that" clause of § 8 does not define the term "competitors"), *aff'd in part, rev'd in part*, 647 F.2d 942 (9th Cir. 1981).

9. *See* 15 U.S.C. § 19 (1976) (individual may not serve on boards of directors of several competing corporations); Travers, *supra* note 4, at 823 (section 8 does not prohibit vertical interlocks or interlocks between potentially competitive corporations). Courts have upheld directoral interlocks between noncompeting corporations. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 982 (D. Md. 1981) (interlock allowed under § 8 since interlocked bakery corporations did not compete); Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co., 1966 TRADE CAS. (CCH) ¶ 71,678, at 82,064-65 (S.D.N.Y. 1966) (interlock between entertainment industry corporations not prohibited under § 8 because corporations not horizontally related).

10. *See* TRW, Inc. v. FTC, 647 F.2d 942, 945-46 (9th Cir. 1981) (interlock between manufacturers of credit authorization and electronic funds transfer systems); American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 980 (D. Md. 1981) (interlock between bakery companies); Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co., 1966 TRADE CAS. (CCH) ¶ 71,678, at 82,065 (S.D.N.Y. 1966) (interlock between entertainment firms); Borg-Warner Corp., 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,654, 22,659 (F.T.C. June 23, 1983) (interlock between firms producing automobile parts). Of the four cases addressing the question of whether two interlocked corporations competed with one another, only three have sought to apply any workable test or standard of competition. *See TRW*, 647 F.2d at 946-47; *American Bakeries*, 515 F. Supp. at 980-82; *Borg-Warner*, 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,659-63.

In *Paramount*, Paramount Pictures, a producer of television programs and motion pictures, filed suit in the United States District Court for the Southern District of New York to remove two hostile directors, Herbert Siegel and Ernest Martin, from the Paramount board. 1966 TRADE CAS. (CCH) ¶ 71,678, at 82,059-60. Siegel and Martin had accepted the Paramount directorships in exchange for an agreement to divest themselves of a large block of Paramount stock. *Id.* Paramount charged that Siegel's and Martin's memberships on the Paramount board violated § 8 and the courts resolving these few cases have applied different standards to determine whether the interlocked corporations did compete.[11]

The definition of competitors is crucial in section 8 enforcement because the statute bars interlocks only between competing corporations.[12] In deciding whether corporations with interlocking boards compete, courts have sometimes applied the tests established under the merger provisions of section 7 of the Clayton Act to define competitive markets.[13] Under the merger rules of sec-

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of the Clayton Act because both Siegel and Martin served on the boards of corporations competing with Paramount. *Id.* Siegel served as chairman of Baldwin-Montrose Chemical Company, whose subsidiary, General Artists Corporation (GAC), represented producers of television programs as a sales agent and Martin served as a director of Feuer & Martin Productions, Inc. (FMP), a corporation producing stage plays. *Id.* at 82,061-62. The *Paramount* court rejected Paramount's plea for injunctive relief, holding that neither GAC, nor FMP competed with Paramount. *Id.* at 82,065. Although the *Paramount* court concluded that GAC and FMP were not competitors of Paramount's, the court did not establish any clear criteria for determining whether two corporations compete. *See id.* Instead, the court simply stated as a conclusion of law that neither GAC, nor FMP, were related horizontally to Paramount. *Id.*

In *United States v. Crocker Nat'l Corp.*, the United States District Court for the Northern District of California stated in dictum that competition under § 8 should be determined by common sales in the same product and geographic market. 422 F. Supp. 686, 703-04 (N.D. Cal. 1976), *rev'd on other grounds*, 656 F.2d 428 (9th Cir. 1981), *rev'd sub nom.* BankAmerica Corp. v. United States, ___U.S.____, 103 S. Ct. 2266 (1983). The *Crocker* court, however, did not consider the issue of how courts should define the relevant product and geographic markets because the *Crocker* defendants stipulated to the existence of competition. *Id.* at 704.

11. *See infra* notes 43-89 and accompanying text (discussion of cases considering definition of competition under Clayton Act § 8).

12. *See supra* note 9 (§ 8 of Clayton Act outlaws interlocks between industrial and commercial corporations only when corporations compete). The coverage of § 8 of the Clayton Act is very narrow, outlawing interlocks only between competing corporations and, under certain circumstances, between banks. 15 U.S.C. § 19 (1976). Section 5(a)(1) of the Federal Trade Commission Act, however, may provide an alternative basis for attacking directoral interlocks that § 8 of the Clayton Act does not prohibit. *See* 15 U.S.C. § 45(a)(1) (1976) (unfair methods of competition are illegal). The FTC, on several occasions, has held that directoral interlocks violating § 8 of the Clayton Act also violated § 5(a)(1) of the Federal Trade Commission Act. *See* Borg-Warner Corp., 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,654, 22,668 (F.T.C. June 23, 1983) (violation of § 8 is in itself violation of § 5); TRW, Inc., 93 F.T.C. 325, 386 n.22 (1979) (defendants' violation of § 8 constituted violation of § 5), *aff'd in part, rev'd in part*, 647 F.2d 942 (9th Cir. 1981). The Ninth Circuit and the FTC, however, expressly have declined comment on the issue of whether § 5 may prohibit interlocks not prohibited by § 8. *See* TRW, Inc. v. FTC, 647 F.2d 942, 945 n.1 (9th Cir. 1981) (no need to consider whether § 5 affords broader coverage because defendants violated § 8); Borg-Warner Corp., 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,668-69 (issue of whether § 5 coverage extends to interlocks not prohibited under § 8 not reached); *TRW*, 93 F.T.C. at 386 n.22 (no need to consider whether § 5 coverage broader than § 8 because § 8 violated). *But see* Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, if so, What kind?*, 45 ANTITRUST L.J. 341, 349 (1976) (§ 5 may prohibit interlocks not prohibited by § 8).

13. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (competition under § 8 determined by cross-elasticity of demand test and reasonable interchangeability of use test); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (boundaries of relevant product market for § 7 analysis determined by cross-elasticity of demand test and reasonable interchangeability of use test); 15 U.S.C. § 18 (Supp. IV 1980) (Clayton Act § 7). Section 7 of the Clayton Act prohibits certain acquisitions of corporate stock and assets

tion 7, courts generally have determined whether two corporations compete by applying a cross-elasticity of demand test or a reasonable interchangeability of use tests.[14] Cross-elasticity of demand is an economic measure of the sensitivity of consumer demand for one product to fluctuations in the price of a second product.[15] Two products have cross-elastic demand whenever demand for one product rises as the price of a second product rises, and falls as the price of a second product falls.[16] For example, when two products, widgets and gidgets, compete closely, consumer demand for either product can be

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by both individuals and corporations. 15 U.S.C. § 18 (Supp. IV 1980). Paragraph one of § 7 prohibits persons engaged in commerce from acquiring all or part of the stock, share capital, or assets of another person engaged in commerce if the effect of the acquisition may be substantially to lessen competition or to create a monopoly in any line of commerce. *Id.* Paragraph two of § 7 prohibits persons not engaged in commerce from acquiring the stock, share capital, or assets of a person engaged in commerce if the effect of the acquisition may be substantially to lessen competition or to create a monopoly in any line of commerce. *Id.* In considering the validity of a merger challenged under § 7, a court must first define the market in which competition may be lessened. *See* United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 593 (1957) (market definition is necessary predicate to finding violation of § 7). In defining the relevant market for § 7 analysis, the courts generally have applied two threshold tests, cross-elasticity of demand and reasonable interchangeability of use. *See Brown Shoe*, 370 U.S. at 325 (cross-elasticity of demand and reasonable interchangeability of use are proper standards for defining market under § 7). The *Brown Shoe* Court, however, recognized that other factors also may be helpful in determining the boundaries of the relevant market. *Id.; see infra* notes 29-37 and accompanying text (discussion of relevant submarkets).

14. *See supra* note 13 (cross-elasticity of demand test and reasonable interchangeability of use test are threshold tests in § 7 analysis).

15. *See* TRW, Inc. v. FTC, 647 F.2d 942, 947 n.7 (9th Cir. 1981) (cross-elasticity of demand defined); *see also* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 400 (1956). In *DuPont*, a landmark case on market definition, the Justice Department charged that DuPont had violated § 2 of the Sherman Antitrust Act by monopolizing the cellophane market. *Id.* at 378. Although DuPont produced 75% of all cellophane sold in the United States, DuPont contended that the relevant market in which to measure DuPont's power was the flexible wrapping materials market. *Id.* at 379-80. DuPont's cellophane sales totalled less than 20% of the flexible wrapping materials market. *Id.* The *DuPont* Court accepted DuPont's proposed market definition because the Court found a high cross-elasticity of demand between the various flexible wrapping materials. *Id.* at 400. The *DuPont* Court cited evidence in the record indicating that increase in the price of cellophane caused many of DuPont's customers to begin using glassine, waxed paper, and other flexible wrapping materials in place of cellophane. *Id.* Likewise, the Court noted that as cellophane prices fell, customers who had been using glassine and waxed paper began to use cellophane instead. *Id.*

Commentators have criticized the *DuPont* decision because the Court failed to apply properly the cross-elasticity of demand test. *See* Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 308-09 (1956). Professor Turner argues that the *DuPont* Court improperly measured cross-elasticity of demand at prevailing prices. *Id.* Turner states that the correct approach would require the Court to consider as competing products only products that would be substitutes at or near competitive price levels. *Id.; see also* R. POSNER, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE 128 (1976) (even poor substitutes become attractive if price of principal product rises high enough). Professor Turner notes, however, that cross-elasticity of demand may be a sound economic measure of competition when properly applied to discover substitutes at competitive price levels. Turner, *supra*, at 309.

16. *See* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 400 (1956) (glassine demand rose and fell in response to cellophane price changes).

satisfied by the other product.[17] Either a sharp rise in the price of widgets or a sharp decline in the price of gidgets may cause consumers to substitute gidgets for widgets.[18] A high cross-elasticity of demand between two products, therefore, suggests competition between those products.[19] Conversely, a low or negative cross-elasticity of demand suggests the absence of competition.[20]

Since cross-elasticity of demand is difficult to measure in practice, courts often apply the reasonable interchangeability of use test as a proxy for demand cross-elasticity.[21] When consumers can use two products interchangeably, the consumers' demand for either product generally will be affected by fluctuations in the price of the second product.[22] Products that are reasonably interchangeable, therefore, will generally have cross-elastic demand.[23] Unlike the cross-elasticity of demand test's focus on consumer perceptions, the reasonable interchangeability of use standard focuses on the physical and functional characteristics of the products.[24] Under the reasonable interchangeability of use test, a court examines whether two products perform essentially the same tasks and whether the two products are physically alike.[25] Either physical or functional similarity between two products may suggest competition between the two products.[26]

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17. *See id.*

18. *See id.*

19. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (high cross-elasticity of demand would prove competition).

20. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 54 (1977) (unrelated or non-competing products would reflect zero or negative cross-elasticity of demand).

21. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (reasonable interchangeability of use is alternative inquiry to cross-elasticity for finding competition under § 8); *See also* R. POSNER, *supra* note 15, at 125-26. Judge Posner notes that, although cross-elasticity of demand is the best indication of competition, courts often must resort to more general market definition standards because cross-elasticity of demand is difficult to measure with confidence. *Id.; see also* L. SULLIVAN, *supra* note 20, at 58 (in some cases evidence of cross-elasticity of demand may be too costly to acquire).

22. *See* L. SULLIVAN, *supra* note 20, at 58 (interchangeability of use is indirect indicator of market definition).

23. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (interchangeability of use test and cross-elasticity of demand test pose same question from different angles); *see also* 16B J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 13.03[2], at 13-38 (1983) (although aim of cross-elasticity of demand test and reasonable interchangeability of use test is same, tests have different focuses).

24. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (cross-elasticity of demand test focuses on consumer perception while interchangeability of use test focuses on product capabilities); *see also* 16B J. VON KALINOWSKI, *supra* note 23, § 13.03[2], at 13-39 (cross-elasticity of demand test and interchangeability of use test focus on different factors).

25. *See* American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (two elements of reasonable interchangeability of use are similarity of use and physical similarity); *see also* 16B J. VON KALINOWSKI, *supra* note 23, § 13.03[2], at 13-39 to 13-40 (similarity of use and physical similarity are elements of reasonable interchangeability).

26. *See* American Bakeries v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (showing of either physical similarity or similarity of use will satisfy § 8 competition requirement).

In *Brown Shoe Co. v. United States*,[27] the Supreme Court established cross-elasticity of demand and reasonable interchangeability of use as the proper tests of competition under section 7 of the Clayton Act.[28] The *Brown Shoe* Court, however, noted that a broadly defined product market may contain relevant submarkets within which competition is especially intense.[29] The *Brown Shoe* Court listed seven "practical indicia" that tend to indicate whether two products occupy different submarkets within an overall product market.[30] The seven "practical indicia" listed in *Brown Shoe* include whether the industry and the public perceive distinct submarkets within the broadly defined product market,[31] whether one of the two products enjoys peculiar characteristics and uses,[32] whether the two producers use distinct production

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27. 370 U.S. 294 (1962). In *Brown Shoe*, the Justice Department charged that the merger of Brown Shoe Company, the nation's third largest seller of shoes, with the G. R. Kinney Company, the industry's eighth largest seller, violated § 7 of the Clayton Act by substantially lessening competition in the manufacture and sale of men's, women's, and children's shoes. *Id.* at 296-97. Brown Shoe contended that the Government incorrectly characterized the relevant lines of commerce as men's shoes, women's shoes, and children's shoes. *Id.* at 298. Brown Shoe argued that the relevant markets for analyzing the merger's anticompetitive effects should have been more narrowly drawn to account for price/quality and age/sex distinctions. *Id.* at 326-27. For example, Brown Shoe contended that little boys' shoes did not compete with little girls' shoes and that infants' shoes did not compete with either little boys' shoes or little girls' shoes. *Id.* at 327. Similarly, Brown Shoe argued that discount shoes did not compete with either high priced shoes or medium priced shoes. *Id* at 326. Brown Shoe urged that if the relevant lines of commerce had been defined more narrowly, the evidence would have shown no danger of a lessening of competition in any line of commerce. *Id.* at 298. The district court accepted the Government's proposed market definition and further held that the merger between Brown Shoe and Kinney had lessened competition substantially in the manufacture and sale of men's shoes, women's shoes, and children's shoes. United States v. Brown Shoe Co., 179 F. Supp. 721, 741 (E.D. Mo. 1959). On appeal, the Supreme Court upheld the district court's findings with respect to both market definition and lessening of competition. 370 U.S. at 340, 346.

28. *See* 370 U.S. at 325 (product market's outer boundaries determined by cross-elasticity of demand or by reasonable interchangeability of use).

29. *See id.* (submarkets may in and of themselves constitute relevant markets for antitrust purposes).

30. *Id.*

31. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][b], at 18-63 to 18-66. An industry or public perception that two products do not compete may be evidence that the two products occupy distinct submarkets. *See* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][b], at 18-63. An industry perception that two products do not compete may keep producers from marketing the first product to consumers of the second product.*See* Reynolds Metals Co. v. FTC, 309 F.2d 223, 225, 229 (D.C. Cir. 1962) (florist foil a distinct submarket because manufacturers of other foils did not produce decorative florist foil and producers of other decorative foils did not sell to florists). Likewise, a public perception that two products are distinct may prevent consumers from accepting viable substitutes. *See* Grumman Corp. v. LTV Corp., 1981-2 TRADE CAS. (CCH) ¶ 64,330, at 74,512 (E.D.N.Y.) (United States Navy's unwillingness to buy carrier based aircraft from inexperienced manufacturers made experienced manufacturers' carrier based aircraft distinct submarket), *aff'd*, 1981-2 TRADE CAS. (CCH) ¶ 64,364, at 74,683 (2d Cir. 1981).

32. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][c], at 18-66 to 18-70. Within a broad product market, some products may possess unique characteristics making these unique products part of a distinct submarket as well as part of a broader market. *See* United

methods,[33] whether the two producers use distinct distribution channels,[34] whether the two producers serve different customers,[35] whether the two products sell at different prices,[36] and whether the two producers respond to changes in each others pricing policies.[37] Although the *Brown Shoe* Court ultimately considered a number of factors, the Court's opinion clearly established cross-elasticity of demand and reasonable interchangeability of use as the threshold competition inquiries in defining the relevant market under section 7.[38] Under section 8 of the Clayton Act, however, the standard for determining whether two corporations compete is not so clear.[39]

States v. American Technical Indus., Inc., 1974-1 TRADE CAS. (CCH) ¶ 74,873, at 95,873 (M.D. Pa. 1974) (although real and artificial Christmas trees perform same function and belong to same product market, artificial trees constitute revelvant submarket offering additional advantages of fire resistance and long life).

33. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][f], at 18-80 to 18-81. Uniqueness of production facilities required for manufacturing a given product may indicate that the product is in a distinct submarket. *See* United States v. Kimberly-Clark Corp., 264 F. Supp. 439, 454 (N.D. Cal. 1967) (sanitary paper products constituted relevant submarket within broader paper products market because production of sanitary paper products required special machinery). In *Kimberly-Clark*, the court narrowed the relevant market because the defendants proved that the facilities used in producing sanitary paper products were dissimilar to the facilities used in the broader paper products market. *Id.* A somewhat analogous proposition is that firms with similar production facilities may belong to the same market notwithstanding that the products produced by the firms are dissimilar. *See* 370 U.S. at 325 n.42 (cross-elasticity of supply may indicate that products belong to a single market); *see also infra* notes 94-96, 109-15 and accompanying text (discussion of supply cross-elasticity's role in market definition).

34. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][g], at 18-81 to 18-82. The existence of specialized vendors for a product may be evidence that the product belongs to a distinct submarket. *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 740 (D. Md. 1976) (professional chainsaws constituted relevant submarket because occasional users rarely purchased saws from logging equipment distributors and professional loggers rarely purchased saws from hardware or department stores).

35. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][d], at 18-70 to 18-72. Products with distinct classes of customers may be in distinct submarkets. *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 739 (D. Md. 1976) (lightweight, inexpensive chainsaws constituted distinct submarket because occasional users used only these saws, while professional loggers used only more expensive, high powered saws).

36. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][e], at 18-73 to 18-79. Market price differences between two otherwise reasonably interchangeable products may be evidence that the two products occupy separate submarkets. *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 739 (D. Md. 1976) (chainsaws priced under $200 constituted relevant submarket because occasional users generally purchased only inexpensive saws).

37. 370 U.S. at 325; *see* 16B J. VON KALINOWSKI, *supra* note 23, § 18.02[2][e], at 18-73 to 18-81. Proof that the price of a product is unresponsive to fluctuations in the prices of alleged substitutes may be evidence that the product occupies a distinct submarket within the broader product market. *See* United States v. American Technical Indus., Inc., 1974-1 TRADE CAS. (CCH) ¶ 74,873 at 95,873 (M.D. Pa. 1974) (artificial christmas trees constitute distinct submarket because manufactures of artificial trees set prices without regard to prevailing natural tree prices).

38. *See* 370 U.S. at 325 (outer boundaries of product market determined by cross-elasticity of demand or reasonable interchangeability of use).

39. *See infra* notes 43-89 and accompanying text (discussion of cases considering definition of competition under Clayton Act § 8).

Litigation under section 8 of the Clayton Act is infrequent[40] and, in most reported cases brought under the statute, defendants have stipulated competition.[41] Few courts, therefore, have confronted the issue of whether two corporations with interlocking directorates were competitors.[42] The first case to address whether two corporations with interlocking directorates were competitors was *American Bakeries Co. v. Gourmet Bakers, Inc.*[43] In *American Bakeries*, a manufacturer and wholesaler of baked goods, American Bakeries, filed suit in the United States District Court for the District of Maryland to enjoin Gourmet Bakers from electing Peter Grimm, a director of Gourmet, to American's board of directors.[44] Gourmet, a warehouser and distributor of bakery ingredients, was engaged in a proxy contest to win control of American and sought to elect Grimm to the American board as part of a takeover plan.[45] American contended that section 8 of the Clayton Act prohibited Grimm's simultaneous service on the Gourmet and American boards of directors because Gourmet and American competed in sales of baked goods to grocery stores and to fast food restaurant chains.[46]

The *American Bakeries* court examined whether Gourmet and American were competitors by applying the reasonable interchangeability of use test established in *Brown Shoe* to define markets under section 7 of the Clayton Act.[47] The court examined the two corporations' sales to grocery stores and noted that the raw ingredients Gourmet sold to grocery stores were not interchangeable with the fresh baked goods American sold to grocery stores.[48] Fur-

40. *See* J. Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 ANTITRUST L.J. 317, 317 n.1 (1976). From 1914 to 1950, government and private plaintiffs filed seven § 8 complaints challenging thirteen interlocks. *Id.* Of these complaints, the plaintiffs voluntarily dismissed five upon the resignations of the suspect directors, one complaint resulted in a consent order, and only one complaint went to litigation. *Id.* From 1950 to 1976 plaintiffs filed thirty-four complaints challenging forty-five interlocks. *Id.* Of the latter complaints, plaintiffs voluntarily dismissed seven suits upon the directors' resignations, and eleven complaints went to litigation. *Id.; see* Protectoseal Co. v. Barancik, 484 F.2d 585, 586-87 (7th Cir. 1973) (Seventh Circuit never considered § 8 case until 1973).

41. *See, e.g.*, BankAmerica Corp. v. United States, ___U.S.___, 103 S. Ct. 2266, 2268 (1983) (competition between interlocked banks and insurance companies stipulated); Protectoseal Co. v. Barancik, 484 F.2d 585, 587 (7th Cir. 1973) (defendant admitted $1,500,000 competitive overlap in faucets, fittings, and tanks for flammable liquids); United States v. Sears Roebuck & Co., 111 F. Supp. 614, 615 (S.D.N.Y. 1953) (defendants admitted competition in seven product categories in ninety-seven communities); *see also* TRW, Inc. v. FTC, 647 F.2d 942, 946 (9th Cir. 1981) (competition stipulated in prior cases).

42. *See supra* note 10 (discussion of cases considering competition issue).

43. 515 F. Supp. 977 (D. Md. 1981).

44. *Id.* at 977-79.

45. *Id.* at 979.

46. *Id.* at 980-81. The *American Bakeries* court found that both American and Gourmet sold bakery products to Pathmark supermarkets and to fast food restaurants in the New York metropolitan area. *Id.* at 980.

47. *See supra* notes 13-28 and accompanying text (discussion of cross-elasticity of demand and reasonable interchangeability of use tests of competition).

48. 515 F. Supp. at 980-81. The *American Bakeries* court noted that the ultimate configuration of the bakery materials Gourmet sold to grocery stores was determined by the grocer's processing, while the retail form of the American products was fixed upon delivery. *Id.* at 981.

thermore, the *American Bakeries* court found that the products Gourmet and American sold to fast food restaurant chains were not interchangeable because American sold only fresh baked steak rolls to restaurant chains whereas Gourmet sold only frozen rolls to restaurant chains.[49] The court denied American's request for injunctive relief concluding that the absence of interchangeability between the uses of American's and Gourmet's products indicated that American and Gourmet were not competitors.[50]

Although the *American Bakeries* decision appeared to signal the courts' acceptance of the *Brown Shoe* cross-elasticity of demand and reasonable interchangeability of use standards as appropriate tests for defining competition under section 8 of the Clayton Act,[51] the Ninth Circuit's opinion in *TRW, Inc. v. FTC*[52] effectively challenged the applicability of the cross-elasticity of demand and interchangeability of use standards to section 8 cases.[53] In *TRW*, the Federal Trade Commission (FTC) staff charged TRW, Addressograph-Multigraph Corporation (A-M), and Horace Shepard with violating section 8 of the Clayton Act during a four and one-half year period in which Shepard served on the boards of both TRW and A-M.[54] Both TRW and A-M manufactured and sold point-of-sale credit authorization systems and electronic funds transfer machines.[55] The defendants, however, contended that TRW and A-M did not compete because customers could not use the TRW and A-M systems interchangeably.[56]

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49. *Id.* at 981-82. Although the *American Bakeries* court found that American Bakeries and Gourmet Bakers sold different products to restaurant chains, the court also held that of the two corporations, only American had the power to determine product prices and specifications. *Id.* at 982. The court noted that American negotiated independently with the restaurant chains to manufacture and supply steak rolls to the restaurants and that Gourmet merely received, stored, and shipped rolls that the restaurant chains bought from other baked goods manufactures. *Id.*

50. *Id.*

51. *See id.* at 980 (despite paucity of § 8 case law, clear guidelines indicate interchangeability of use should determine whether interlocked corporations compete).

52. 647 F.2d 942 (9th Cir. 1981).

53. *Id.* at 947; *see infra* notes 73-75 (cross-elasticity of demand test and reasonable interchangeability of use test are not always appropriate in Clayton Act § 8 cases).

54. 647 F.2d at 945. The terms of the Clayton Act provide for concurrent enforcement of § 8 by a variety of plaintiffs. *See* 15 U.S.C. §§ 21, 25-26 (1976). Section 11 of the Clayton Act grants the Federal Trade Commission authority to enforce § 8. *Id.* § 21. Section 15 of the Clayton Act authorizes actions by the United States Attorney General to prevent and restrain violations of § 8. *Id.* § 25. Section 16 of the Clayton Act authorizes private suits for injunctive relief under § 8. *Id.* § 26. The Clayton Act also grants limited § 8 enforcement authority to the Federal Reserve Board. *Id.* § 21. The Federal Reserve Board's authority, however, does not extend to the competing corporations paragraph of § 8 of the Clayton Act. *Id.* § 21.

55. 647 F.2d at 947-48.

56. *Id.* at 947. In the initial *TRW* decision, the administrative law judge noted significant distinctions between the TRW and the A-M systems. TRW, Inc., 93 F.T.C. 325, 335-59 (1979) (F.T.C. review incorporating initial decision of administrative law judge), *aff'd in part, rev'd in part*, 647 F.2d 942 (9th Cir. 1981). The administrative law judge found that the TRW system 4000 and the TRW system 5000, the principal TRW products at issue, best accommodated large department stores and banks with heavy transactional traffic originating from numerous terminals. *Id.* at 335. Conversely, the administrative law judge noted that the relevant A-M products were essentially "stand alone" units designed for smaller retail establishments. *Id.* at 338.

After the initial hearing in the *TRW* case, the administrative law judge ruled that rigid application of the cross-elasticity of demand and reasonable interchangeability of use tests to cases arising under section 8 of the Clayton Act would be inappropriate because the cross-elasticity of demand and reasonable interchangeability of use tests are designed to measure potential competitive harm.[57] The administrative law judge reasoned that since section 8 is a preventive statute designed to prevent interlocks before the interlocks work any competitive harm, the cross-elasticity of demand and reasonable interchangeability of use tests would be ill-suited to section 8 analysis because the cross-elasticity of demand test and the reasonable interchangeability of use test focus on competitive harm.[58] The administrative law judge held that in determining whether two corporations with interlocking directorates compete, courts should examine whether the relationship between the two firms is marked by "contest" or "rivalry."[59] Under the "contest" or "rivalry" standard, the administrative law judge found that TRW and A-M were competitors.[60] The FTC complaint counsel and Shepard appealed the administrative law judge's finding to the FTC.[61]

On appeal, the FTC upheld the administrative law judge's conclusion that the section 8 competition inquiry should not be limited to an examination of cross-elasticity of demand and reasonable interchangeability of use.[62] The FTC, however, found the administrative law judge's "rivalry" standard too vague and conclusory to assist the court in determining whether two interlocked corporations compete.[63] The FTC instead examined several general factors in determining whether TRW and A-M competed.[64] The Commission noted that TRW's and A-M's products performed essentially the same tasks,[65] that TRW and A-M had frequently approached the same clients,[66] and that TRW and

57. *Id.* at 355-56.

58. *Id.*

59. *Id.* at 355. In *TRW*, the administrative law judge held that TRW's and A-M's attempts to win over the same potential customers sufficiently evidenced the required "contest" or "rivalry" between the firms. *Id.* at 356. The administrative law judge then entered a cease and desist order against Shepard. *Id.* at 371-72. The administrative law judge, however, did not issue orders against A-M or TRW because A-M had entered into a consent order several months before the release of the TRW decision and because TRW had not been involved actively in either Shepard's appointment to or Shepard's service on the A-M board. *See id.* at 368 (TRW played no active role); 90 F.T.C. 144, 144 (1977) (A-M consent order).

60. 93 F.T.C. at 356.

61. *Id.* at 373.

62. *Id.* at 380.

63. *Id.* In *TRW*, the FTC noted that although the administrative law judge's "rivalry" standard was not inaccurate, the standard was not workable. *Id.*

64. *Id.* at 381-83.

65. *Id.* In *TRW*, the FTC noted that, although the TRW credit authorization systems were designed for large department stores and banks and the A-M systems were designed principally for small retail establishments, both products performed the same kind of credit authorization functions. *Id.* at 381.

66. *Id.; see id.* at 340-47 (initial *TRW* decision). In the initial *TRW* decision, the administrative law judge studied the circumstances surrounding twelve major purchases of electronic funds transfer machines. *Id.* at 340-47. Of the twelve buyers of electronic funds transfer systems, ten buyers considered both the TRW and the A-M systems. *Id.* Of the remaining purchasers, one purchaser looked at only the A-M system and one purchaser considered only the TRW machines. *Id.*

A-M had offered to modify existing products to suit customers' needs.[67] The FTC held this evidence sufficient to prove competition in a developing industry in which the traditional cross-elasticity of demand and reasonable interchangeability of use standards may yield unsatisfactory results because of a lack of product standardization.[68] The FTC then issued cease and desist orders against both TRW and Shepard.[69] TRW and Shepard petitioned the Ninth Circuit Court of Appeals for review of the FTC's decision.[70]

Upon review, the Ninth Circuit upheld the FTC's finding that TRW and A-M were competitors.[71] The *TRW* court noted that both the cross-elasticity of demand test and the reasonable interchangeability of use test may be useful in section 8 competition analysis.[72] For two reasons, however, the court held that the FTC's failure to apply either test to determine whether TRW and A-M were competitors was not error.[73] First, the *TRW* court reiterated the administrative law judge's argument that the cross-elasticity of demand and reasonable interchangeability of use tests measure potential competitive harm which is not a factor in section 8 competition analysis.[74] Second, the court stated that in developing industries the cross-elasticity of demand and reasonable interchangeability of use tests are difficult to apply and are likely to lead to inaccurate results because markets in developing industries are generally small, product variation often is only beginning, and customers' needs usually are not standardized.[75]

Although the Ninth Circuit acknowledged that TRW products and A-M products were sufficiently dissimilar that virtually no customer had a choice of a satisfactory product from each firm, the court held that TRW and A-M were competitors.[76] The Ninth Circuit premised this finding of competition

67. *Id.* at 382; *see id.* at 340-47. The administrative law judge's study of twelve major electronic funds transfer machine purchases indicated that on at least three occasions either TRW, or A-M, or both TRW and A-M, had offered to modify existing products to suit customers' needs. *Id.* at 340-47.

68. *Id.* at 382-83.

69. *Id.* at 389-91.

70. 647 F.2d at 944. Although the FTC rejected the administrative law judge's standard for determining whether TRW and A-M competed, the FTC upheld the administrative law judge's order against Shepard and issued a similar order against TRW. 93 F.T.C. at 386-89.

71. 647 F.2d at 948.

72. *Id.* at 947.

73. *Id.* The *TRW* court stated that the cross-elasticity of demand test and the interchangeability of use test may yield realistic results in some markets. *Id.* The court, however, concluded that the FTC did not err in rejecting the tests in TRW's case. *Id.*

74. *Id.; see supra* notes 57-58 and accompanying text (administrative law judge's discussion of appropriateness of applying cross-elasticity of demand test and reasonable interchangeability of use test to determine whether interlocked corporations compete).

75. 647 F.2d at 947 n.7. The *TRW* court's three objections to applying either the cross-elasticity of demand test or the reasonable interchangeability of use test in developing industries seem to focus on the nature of the market as a statistical sample. *See id.* For example, the court noted that in developing industries markets are generally small, making for a small and inherently less reliable statistical sample. *Id.*

76. *Id.* at 948. In holding that A-M and TRW were competitors, the *TRW* court cited different factors than the FTC had mentioned. *Id.* at 946-47; *see supra* notes 64-67 and accompanying text (discussion of factors relevant to FTC's decision).

upon several of the *Brown Shoe* Court's "practical indicia."[77] The court noted specifically the extent to which the industry and the public recognized the two corporations' products as competing or distinct, the similarity of the two corporations' production techniques, and the extent to which the two corporations served different types of customers.[78] The *TRW* court concluded that Shepard's simultaneous service on the TRW and A-M boards violated section 8, but the court reversed the FTC's issuance of cease and desist orders because the court noted that the violation was unlikely to recur.[79]

TRW may have created only a limited developing industries exception to a general rule that courts should measure competition under section 8 by either the cross-elasticity of demand test or the reasonable interchangeability of use test.[80] The FTC, however, has expressed a preference for a broader interpretation of *TRW*, under which the *Brown Shoe* "practical indicia" inquiry would become an alternative test of the competition between two interlocked corporations whether or not the corporations operate in a developing industry.[81] In *Borg-Warner Corp.*,[82] the FTC considered whether two manufacturers of automobile replacement parts were competitors.[83] The FTC staff had charged Borg-Warner Corporation, Robert Bosch Corporation (Bosch), Hans Merkle, and Hans Bacher with violating section 8 of the Clayton Act.[84] The FTC staff argued that Merkle's and Bacher's simultaneous service on the Borg-Warner and Bosch boards violated the Act because Borg-Warner and Bosch competed in the manufacture and sale of "fast-moving" import automobile replacement

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77. 647 F.2d at 947.

78. *Id.* The *TRW* court noted that potential buyers of point-of-sale credit authorization systems or of electronic funds transfer systems generally approached both TRW and A-M before ultimately purchasing any manufacturer's system. *Id.* at 948. The *TRW* court further found that both TRW and A-M represented to potential buyers that the systems each corporation produced could be modified to suit the customers' needs. *Id.* Finally, although the TRW and A-M systems were best suited to different kinds of customers, the *TRW* court noted that TRW and A-M generally marketed their systems to the same potential customers. *Id.*

79. *Id.* at 954.

80. *See* Note, *Interlocking Directorates and the Clayton Act: A New Standard of Competition?*, TRW, Inc. v. FTC, 19 HOUS. L. REV. 809, 817 (1982) (suggestion that *TRW* may create limited exception to cross-elasticity of demand and interchangeability of use rules for cases in which cross-elasticity and interchangeability are difficult to measure).

81. *See* Borg-Warner Corp., 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,654 (F.T.C. June 23, 1983). In *Borg-Warner*, the FTC initially stated that the *TRW* court found A-M and TRW to be competing because several of the seven *Brown Shoe* "indicia" had been met. *Id.* at 22,660. The *Borg-Warner* commission then proceeded to analyze *Borg-Warner* under the *Brown Shoe* "indicia." *Id.* at 22,660-63. The *Borg-Warner* commission, however, did not consider whether the import automobile replacement parts industry was a developing industry. *Id.; see infra* notes 94-98 and accompanying text (*TRW* may create supply side alternative to cross-elasticity of demand supply side alternative to cross-elasticity of demand and reasonable interchangeability of use tests).

82. 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,654 (F.T.C. June 23, 1983).

83. *Id.* at 22,659.

84. *Id.* at 22,665. In addition to charging Borg-Warner Corporation, Robert Bosch Corporation, Dr. Merkle, and Dr. Bacher with violating § 8, the FTC implicated Robert Bosch GmbH, the West German parent of Robert Bosch Corporation. *Id.*

parts.[85] Although the FTC held that the Borg-Warner and Bosch parts were clearly interchangeable, the FTC noted that a plaintiff could also satisfy the competition requirement of section 8 by showing that several of the *Brown Shoe* "indicia" indicated that the interlocked corporations were competitors.[86] The FTC reasoned that courts considering the validity of interlocks should not engage in any detailed analysis of cross-elasticity of demand or reasonable interchangeability of use because section 8 is a preventive statute unconcerned with the likelihood of actual competitive harm.[87] The *Borg-Warner* commission found that Merkle's and Bacher's simultaneous service on the Borg-Warner and Bosch boards violated section 8 and, accordingly, the FTC issued cease and desist orders against Borg-Warner, Bosch, and Merkle.[88] The FTC in *Borg-Warner*, therefore, effectively made the *Brown Shoe* "indicia" inquiry an alternative to the cross-elasticity of demand and reasonable interchangeability of use tests because the automobile replacement parts industry considered in *Borg-Warner*, unlike the industry considered in *TRW*, was an established industry.[89]

Prior to *TRW* and *Borg-Warner*, the FTC and the courts implicitly acknowledged the cross-elasticity of demand and reasonable interchangeability of use standards as determinative of competition under section 8.[90] *TRW* and *Borg-Warner*, however, suggest that the courts and the FTC are beginning to expand the section 8 competition analysis.[91] The cross-elasticity of demand test and the reasonable interchangeability of use test are similar because both tests are demand oriented, analyzing competition from the consumers' perspective.[92] Courts traditionally have concentrated on demand oriented analysis in defining relevant markets.[93] In finding that TRW and A-M were

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85. *Id.* Although Robert Bosch GmbH did not manufacture or sell auto parts in competition with Borg-Warner, the FTC charged that Robert Bosch GmbH exercised sufficient control over Robert Bosch Corporation to render the interlocks between Borg-Warner and Bosch GmbH illegal. *Id.*

86. *Id.*; *see supra* note 81 (discussion and application of *TRW* rule).

87. 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,662 (F.T.C. June 23, 1983); *see supra* note 58 and accompanying text (section 8 is preventive statute).

88. 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,655-56 (F.T.C. June 23, 1983).

89. *See id.* at 22,657 (Borg-Warner entered short-line import parts market in 1972 when Bosch was already active).

90. *See* Aluminum Co. of Am., 82 F.T.C. 1819, 1820 (1973) (interlock between aluminum company and copper company prohibited because copper and aluminum were interchangeable for certain purposes); Aluminum Co. of Am., 82 F.T.C. 1814, 1815 (1973) (interlock between aluminum company and steel company prohibited because steel and aluminum were interchangeable for certain purposes); American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981-82 (D. Md. 1981) (interlock between bakery companies permitted because companies' products not interchangeable). Although neither *Alcoa* case reached litigation, the complaints in both cases premised the FTC's allegation of competition upon the theory of reasonable interchangeability of use. *See* 82 F.T.C. at 1820 (copper and aluminum are interchangeable); 82 F.T.C. at 1815 (steel and aluminum are interchangeable).

91. *See infra* notes 94-98 and accompanying text (*TRW* and *Borg-Warner* may represent trend toward supply side competition analysis under § 8).

92. *See* 16B J. VON KALINOWSKI, *supra* note 23, § 13.03[2], at 13-38 (cross-elasticity of demand test and reasonable interchangeability of use test pose essentially the same question).

93. *See* Sterling Drug, Inc., 80 F.T.C. 477, 585 (1972) (demand side analysis historically has been favored in the courts over supply side analysis).

competitors, however, the *TRW* court emphasized that TRW and A-M used similar production techniques and that either firm could modify its products to perform interchangeably with other firm's products.[94] The *TRW* court, therefore, recognized that the list of firms competing in a given product market may include firms that are not presently producing the product or a close substitute, but that have the ability quickly and easily to begin producing the product.[95] The presence of peripheral competitors that could convert to the production of the relevant product within a short period of time may be an important factor in the competitive decisionmaking of present producers because any unreasonable attempt by the present producers to raise prices or limit output could cause the peripheral competitors to change over to the production of the relevant product.[96] Supply side analysis permits the courts to give proper weight to the peripheral competitors' impact upon the market.[97] Although demand oriented analysis continues to be a valuable market definition tool under both section 7 and section 8 of the Clayton Act, the *TRW* decision and the *Borg-Warner* decision may be part of a growing overall trend toward supply side competition analysis.[98]

In recent years several of the United States Circuit Courts have acknowledged the importance of supply side competition analysis in merger cases brought under section 7 of the Clayton Act.[99] For example, in *Equifax, Inc. v. FTC*,[100] the Ninth Circuit stated that production substitutability is a valid basis upon which to measure the competition between two products.[101] In *Equifax*, the FTC charged that Equifax, Inc., a nationwide producer of

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94. 647 F.2d at 946, 948.

95. *See id.* at 948 (although in almost every case customers' needs could be met only by TRW system or only by A-M system, TRW and A-M were competitors).

96. *See* Note, *The Role of Supply Substitutability in Defining the Relevant Product Market*, 65 VA. L. REV. 129, 131-34 (1979) (firms with capacity quickly and easily to enter market act as check on competitive abuses by firms in market). Although in theory every firm with the potential to enter a market plays a role in tempering the anticompetitive behavior of actual producers in the market, commentators and courts have recognized that only the most likely potential entrants are of real antitrust significance. *See* United States v. Marine Bancorporation, 418 U.S. 602, 624-25 (1974) (merger between present producer and perceived potential entrant would violate § 7 of Clayton Act only if potential entrant in fact tempered oligopolistic behavior of market participants); Carter, *Actual Potential Entry Under Section 7 of the Clayton Act*, 66 VA. L. REV. 1485, 1486-87 (1980) (discussion of *Marine Bancorporation* and the theory of potential competition).

97. *See* L. SULLIVAN, *supra* note 20, at 58 (market definition analysis should include consideration of both elasticity of supply and elasticity of demand); Note, *The Role of Supply Substitutability in Defining the Relevant Product Market*, 65 VA. L. REV. 129, 132-34 (1979) (in defining markets, courts should consider competitive impact of firms producing supply substitutes).

98. *See infra* notes 99-127 and accompanying text (discussion of trend toward supply side analysis under Clayton Act § 7).

99. *See* Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1330 (7th Cir. 1981) (cross-elasticity of supply is one factor courts should consider in defining relevant market); Equifax, Inc. v. FTC, 618 F.2d 63, 66 (9th Cir. 1980) (cross-elasticity of supply is valid basis for determining whether two products compete).

100. 618 F.2d 63 (9th Cir. 1980), *vacating*, Retail Credit Co., 92 F.T.C. 1 (1978).

101. *Id.* at 66; *see infra* notes 112-14 and accompanying text (discussion of Ninth Circuit's holding in *Equifax*).

character credit reports, violated section 7 of the Clayton Act by acquiring three regional credit bureaus producing consumer credit reports.[102] The FTC staff alleged that the acquisitions lessened competition in the local credit reporting markets of Tacoma, Washington, Portland, Oregon, Washington, D.C., and San Francisco, California.[103] Equifax contended that Equifax's reporting services did not compete with the consumer credit reporting services of the three regional credit bureaus Equifax had acquired.[104] Equifax argued that the production of character credit reports, such as mortgage reports, was distinct from the production of consumer credit reports because character credit reporting required extensive field research, while consumer credit reporting involved only the compilation of bill-paying records already on file with the reporting service.[105] The administrative law judge, however, rejected Equifax's contention, holding instead that Equifax's acquisitions violated section 7 of the Clayton Act because the acquisitions tended to restrain trade in the credit reporting markets of Tacoma, Portland, and Washington, D.C.[106]

On appeal[107] the FTC conceded that mortgage reports are substantially different from consumer credit reports both in substance and price.[108] The FTC, however, held that Equifax competed in the same credit reporting service market as the three credit bureaus Equifax had acquired because of the high production substitutability or cross-elasticity of supply between mortgage reports and consumer credit reports.[109] The FTC noted that the technologies used to produce mortgage reports and consumer credit reports were similar, that Equifax had produced consumer credit reports, and that the credit bureaus Equifax had acquired had produced mortgage reports.[110] The FTC concluded that Equifax's acquisition of the three credit bureaus unlawfully lessened com-

102. 618 F.2d at 64. Equifax produced mortgage reports and other character credit reports for clients desiring detailed information on the character and financial standing of prospective borrowers. *Id.* at 66. Equifax acquired three credit bureaus producing routine reports on the bill-paying habits of consumers applying for credit. *Id.*

103. 92 F.T.C. at 5-6. In *Equifax*, the FTC charged that Equifax's acquisitions of The Credit Bureau, Inc. (C.B. West Coast) and The Retail Credit Association of Portland, Oregon, Inc. (C.B. Portland) substantially lessened competition in the credit reporting market of Portland, Oregon. *Id.* The FTC further charged that Equifax's acquisition of C.B. West Coast lessened competition in the credit reporting markets of Tacoma, Washington and San Francisco, California. *Id.* Finally, the FTC alleged that Equifax's acquisition of The Credit Bureau, Inc. of Washington, D.C. substantially lessened competition in the local credit reporting market of Washington, D.C. *Id.*

104. 647 F.2d at 66-67.

105. *Id.*

106. 92 F.T.C. at 125-26. In *Equifax*, the administrative law judge found that Equifax was neither a substantial actual competitor nor a likely or perceived likely potential entrant in the local credit reporting market of San Francisco, California. *Id.* at 112-13. Accordingly, the administrative law judge found that Equifax's acquisition of The Credit Bureau, Inc. of Salem Oregon did not substantially lessen competition in the local credit reporting market of San Francisco. *Id.*

107. *Id.* at 131.

108. *Id.* at 136.

109. *Id.* at 136-37.

110. *Id.*

petition in the local credit reporting service markets of Portland, Tacoma, San Francisco, and Washington, D.C.[111]

On appeal to the Ninth Circuit, the court upheld the FTC's conclusion that supply cross-elasticity may be a valid basis for determining that two products compete in the same product market.[112] The *Equifax* court noted that most courts focus upon interchangeability of product use in defining product markets.[113] The court, however, further noted that as early as the *Brown Shoe* decision in 1962, the Supreme Court had acknowledged the validity of supply side competition analysis under section 7 of the Clayton Act.[114] Although the Ninth Circuit approved of the FTC's decision to apply the cross-elasticity of supply standard, the court disagreed with the FTC's conclusion that the production techniques used in preparing mortgage reports and consumer credit reports were interchangeable.[115] The court, therefore, concluded that the Equifax acquisitions did not violate section 7 of the Clayton Act.[116]

The courts have not been alone in emphasizing supply side considerations in section 7 market analysis.[117] In 1982, after the release of both *Equifax* and *TRW*, the United States Department of Justice released the Department's newly revised merger guidelines,[118] explaining the Justice Department's approach to enforcing the merger provisions of section 7 of the Clayton Act.[119] Under the new guidelines the Justice Department judges the propriety of horizontal mergers by a three step process.[120] First, the Justice Department calculates a provisional product market by grouping with the relevant product all substitutes to which consumers would turn within six months if the producers

111. *Id.* at 142-45, 147, 150, 156. In *Equifax*, the FTC found that the San Francisco Bay area credit reporting market was highly concentrated. *Id* at 143. The FTC noted that in concentrated markets even small increases in concentration may substantially lessen competition. *Id.* Accordingly, the FTC held that Equifax's acquisition of The Credit Bureau, Inc. of Salem, Oregon substantially lessened actual competition in the local credit reporting market of San Francisco, notwithstanding that Equifax controlled less than three percent of the San Francisco credit reporting market. *Id.* at 143-44.

112. 618 F.2d at 66.

113. *Id.* (quoting Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir. 1975)).

114. *Id.* The *Equifax* court referred to a footnote in *Brown Shoe* in which the Supreme Court stated that the cross-elasticity of production facilities may be relevant in defining market boundaries. *Id.; see* Brown Shoe Co. v. United States, 370 U.S. 294, 325 n.42 (1962). In *Equifax*, however, the court held that evidence of a high cross-elasticity of supply between two products may be sufficient to prove that the two products occupy a single market under § 7 of the Clayton Act. 618 F.2d at 66.

115. 618 F.2d at 66-67.

116. *Id.* at 67.

117. *See infra* notes 122, 126-27 (revised Justice Department merger guidelines place increased emphasis on supply side factors).

118. Merger Guidelines of the Department of Justice, 2 TRADE REG. REP. (CCH) ¶ 4500, at 6881 (June 14, 1982) [hereinafter cited as Guidelines].

119. *See id.* (Department of Justice Explanation and Summary); *see generally Symposium: The 1982 Merger Guidelines*, 71 CAL. L. REV. 280 (1983).

120. *See infra* notes 121-23 and accompanying text (discussion of three step analysis of horizontal mergers).

of the relevant product permanently raised the price of the relevant product by five percent.[121] Second, the Justice Department adds to the provisional market the production capacity of all producers not presently producing the relevant product, but likely to begin producing the relevant product or a close substitute within six months if the producers of the relevant product permanently raised the price of the relevant product by five percent.[122] Third, the Justice Department applies a mathematical formula to the resulting market to determine the probability that the questioned merger will have an anticompetitive effect.[123]

The Justice Department's new merger guidelines differ in many ways from the previous guidelines.[124] The new guidelines place a heavier emphasis upon economic analysis than did the previous guidelines.[125] For example, the Justice Department now includes within the relevant market firms not presently producing the relevant product, but capable of quickly and easily converting to the production of the relevant product.[126] The Justice Department, therefore, like the Ninth Circuit, has recently begun to recognize fully the present and actual competitive impact of firms with the short-run capability of entering a relevant market.[127]

Ever since the *Brown Shoe* Court noted that similarity of production techniques may be relevant in defining markets, supply side considerations have

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121. *See* Guidelines, *supra* note 118, ¶ 4502.10, at 6881-8. Under the revised merger guidelines, the Justice Department defines the relevant market by including with the relevant product all substitutes at prevailing relevant product prices. *Id.* Next, the Department adds to the relevant market all substitute products to which consumers might turn at any higher price level that the producers of the relevant product could profitably charge. *Id.* The Department determines these higher price level substitutes by hypothesizing a sequence of five percent price increases. *id.*

122. *See* Guidelines, *supra* note 118, ¶ 4502.20, at 6881-9. Under the revised merger guidelines, the Justice Department identifies participants in the relevant market as firms producing the relevant product or a substitute and firms that would begin producing the relevant product or a substitute at any higher price that the producers of the relevant product could profitably charge. *Id.* The Department also considers the competitive impact of used products that could be resold and of products consumed internally by producers. *Id.*

123. *See* Guidelines, *supra* note 118, ¶ 4503, at 6881-11 to 6881-13. After defining the relevant market and market participants under the revised merger guidelines, the Justice Department analyzes the effects of a proposed merger on market concentration by applying the Herfindahl-Hirschman Index of market concentration (HHI). *Id* at 6881-11. The HHI is a calculus weighting the respective market shares of the merging firms. *See* Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CAL. L. REV. 402 (1983) (discussion and analysis of HHI).

124. *See* Baker & Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311 (1983) (discussion of differences between 1982 merger guidelines and 1968 merger guidelines); *see also* Merger Guidelines of Department of Justice - 1968, 2 TRADE REG. REP. (CCH) ¶ 4510, at 6881-21 (1968) (1968 guidelines superseded by 1982 guidelines).

125. *See* Fox, *The 1982 Merger Guidelines: When Economists are Kings?* 71 CAL. L. REV. 281, 283 (1983) (1982 merger guidelines symbolize rise of economic analysis in antitrust law); Baker & Blumenthal, *supra* note 124, at 317 (new merger guidelines are plainly economic).

126. *See* Guidelines, *supra* note 118, ¶ 4502.20, at 6881-9 (producers of supply substitutes should be included among market participants); *see also supra* note 122 and accompanying text (discussion of role of supply substitutability under new merger guidelines).

127. *See supra* note 96 and accompanying text (discussion of competitive impact of fringe competitors).

played a minor role in section 7 competition analysis.[128] The Ninth Circuit's *Equifax* decision and the Justice Department's newly revised merger guidelines evidence an increased emphasis upon supply side analysis as a means of defining markets under section 7 of the Clayton Act.[129] *TRW* and, to a lesser extent, *Borg-Warner* appear to parallel this section 7 analytical trend in the context of section 8, enlarging the definition of competitors to include not only firms producing a demand substitute for the product in question, but also firms producing short-run production substitutes.[130] Substantial authority supports the proposition that section 8 does not prohibit interlocks between potential competitors.[131] The *TRW* court, however, correctly recognized that among the broad class of potential competitors, some firms have such an immediate capability of producing the relevant product that these firms are in fact actual competitors influencing even the most minute of the day to day decisions of the relevant product's producers.[132] The *TRW* court and the *Borg-Warner* commission effectively acknowledged that any standard of competition excluding supply substitutability as a consideration may fail ultimately to "recognize competition where, in fact, competition exists."[133]

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128. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 n.42 (1962). The *Brown Shoe* Court noted that cross-elasticity of production facilities may be significant in defining markets in which to assess vertical mergers under § 7 of the Clayton Act. *Id.* Furthermore, the *Brown Shoe* Court noted that uniqueness of production facilities may indicate that a firm operates in a distinct product market. *Id.* at 325.

129. *See supra* notes 112-27 and accompanying text (discussion of supply side analysis in *Equifax* and 1982 merger guidelines).

130. *See* TRW, Inc. v. F.T.C., 647 F.2d 942, 947 (9th Cir. 1981) (similarity of production techniques may suggest competition in developing industry); Borg-Warner Corp., 3 TRADE REG. REP. (CCH) ¶ 22,049, at 22,660-62 (F.T.C. June 23, 1983) (similarity of production techniques may suggest competition in established industry); *see also supra* notes 54-89 and accompanying text (discussion of *TRW* and *Borg-Warner*).

131. *See* Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co., 1966 TRADE CAS. (CCH) ¶ 71,678, at 82,065 (S.D.N.Y. 1966) (Clayton Act § 8 does not preclude interlocks between potential competitors); *see also* COMM. ON THE JUDICIARY, *supra* note 3, at 26 (Clayton Act § 8 does not address interlocks between potential competitors because conglomerate corporations were not significant market factor in 1914 when Clayton Act was passed); FEDERAL TRADE COMMISSION, *supra* note 6, at 10 (Clayton Act § 8 does not prohibit interlocks between potential competitors). *But see* TRW, Inc. v. FTC, 647 F.2d 942, 946 n.4 (9th Cir. 1981) (declining to address question whether § 8 prohibits interlocks between potential competitors).

132. *See supra* note 96 and accompanying text (discussion of competitive impact of fringe competitors).

133. TRW, Inc. v. FTC, 647 F.2d 942, 947 (9th Cir. 1981) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962)).