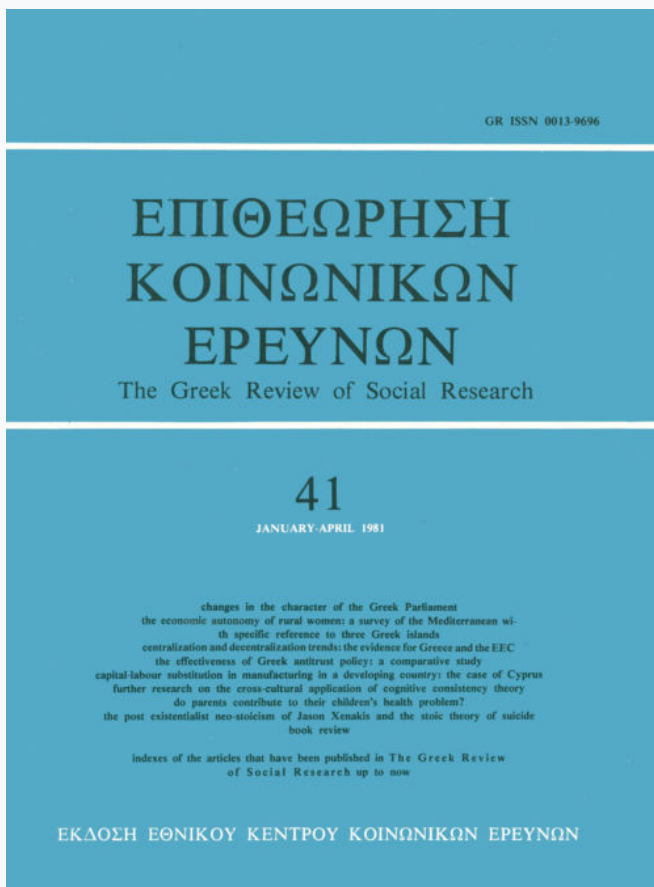


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### The effectiveness of Greek antitrust policy: A comparative study

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# the effectiveness of Greek antitrust policy

*A comparative study*

by

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## SUMMARY

The present paper explores the probable effectiveness of the Greek antimonopoly legislation in achieving its stated objective of improving the competitive forces in the Greek economy.

It does so by providing a brief discussion of the relevant economic theory underlying antitrust policies, as well as an examination of the legal rules, methods and machinery required for the proper enforcement of such policies.

After an outline of the key substantive points of the new Greek legislation there follows a summary discussion of the development and workings of similar policies in the US, UK and EEC and a brief critique of such policies.

The paper ends with an evaluation of the prospects of the Greek legislation to be an effective tool for the promotion of competition in Greece, by reference to both the preceding discussion and factors specific to the Greek economy, and concludes that the new policy is unlikely to herald the rise of more competition in Greece. Greek businessmen need not lose their sleep on account of that policy.

## introduction

Monopoly and oligopoly situations are prevalent in the Greek economy, and economic power is distributed very unevenly, particularly in the secondary sector. According to the 1973 Industrial Census, 93.5% of industrial establishments (small industry) accounted for 21.7% of horse power (used as proxy for capital), while a mere 0.5% of such establishments (100 employees and over) accounted for 59.3% of total horse power of the manufacturing sector. A similar picture is also emerging from the following table giving the five-firm concentration ratios<sup>1</sup> in terms of employment in Greek manufacturing in 1973. Although employment data do not represent the best yardstick of concentration, as they tend to understate it in capital intensive industries and

TABLE 1. *Five-firm Concentration Ratios in Terms of Employment*

ISIC Code	Concentration Ratio (%)	ISIC Code	Concentration Ratio (%)
20	3.92	30	18.29
21	32.11	31	36.02
22	45.86	32	54.85
23	13.79	33	23.52
24	4.70	34	85.31
25	11.51	35	11.86
26	5.45	36	6.87
27	56.78	37	24.17
28	11.38	38	26.06
29	5.97	39	9.74

Sources: Industrial Census 1973, ICAP *Financial Directory of Greek Companies and Federation of Greek Industries Bulletin* (various issues).

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1. Defined as employment accounted for by the largest five firms in the industry divided by total employment of the industry.

overstate it in labour intensive ones, they are used here for lack of any other suitable size variable. This table provides support for the proposition that market concentration in Greek manufacturing varies significantly, with some industries exhibiting significant market power.<sup>2</sup>

Also the Greek economy has been bedeviled over the years by restrictive practices of one sort or another which have seriously contributed to its inefficiency. This then would point to the need for some kind of policy for checking monopolistic and restrictive practices or for dealing with the problem of economic power. However, with the exception of some inadequate provisions, such policy was lacking until Law 703/1977 on the control of monopolies and oligopolies and protection of free competition was enacted by Parliament.<sup>3</sup>

It must be emphasised that while monopolistic and oligopolistic situations were present in the Greek economy earlier its development had not yet reached the point to warrant an antitrust policy.<sup>4</sup> The main priority of economic policy, particularly after 1953, was the changing of the underdeveloped character of the Greek economy through industrialisation. Consequently, it was understandable in the circumstances for the authorities not only to allow a free hand to domestic and foreign industrialists and capitalists, but also to actively promote attempts at industrialisation through a series of inducements at the expense of other considerations, were they of a monopolistic/oligopolistic nature, environmental nature or any other. It is only recently that Greeks are waking up to the realisation that the uncontrolled industrialisation of the 1960's and 1970's had also certain undesirable side effects. Of course this is not to imply that had an antitrust policy been previously enforceable the organisational structure and distribution of economic power in the Greek economy would have been different. The promotion and achievement of a competitive economy depends not upon legislation per se, but upon the effectiveness of enforcement. The experience and performance of other countries demonstrates that in itself, antitrust legislation is comparatively powerless in contributing decisively towards this target. The aim of this paper is to consider the new Greek antitrust policy and evaluate its prospects towards achieving its stated objectives of enhancing competition in the Greek economy.

The *raison d'être* of antitrust policy is to be found in the failure of the free enterprise system, in certain forms of industrial organisation, to provide an efficient regulatory mechanism of the economy and the need to

improve the working of the market. It follows then that an essential element of antitrust policy is agreement on its objectives. It is the role of economic theory to provide such objectives but, sadly, there seems to be little evidence of a consensus among economists on the issue. Indeed, there is disagreement on the desirability of even having an antitrust policy at all. However, given an economy with a large and strong sector of decentralised decision-making, most people would agree that there needs to be a means of checking excesses of the system. «Like the Lord, competition may well work in mysterious ways so that prices and changes alone are an inadequate guide to the operation of the 'unseen hand'».<sup>5</sup> The objectives and rules of antitrust policy are controversial, and an attempted resolution of the controversy is outside the brief of this paper. Nevertheless, proper evaluation of the likely effectiveness of the new Greek policy demands analysis of economic and legal factors, as well as examination of the workings of similar legislation elsewhere.

The economic theory underlying antitrust is treated in Section II which also attempts to set up certain objectives by following the structure-conduct-performance approach. Section III deals with legal rules and procedures characterising such policies. An outline of the main provisions of the Greek legislation is given in Section IV which is followed, in Section V, by a brief discussion of the American, British and European Community experience of antitrust legislation. Finally, an evaluation of the Greek legislation is attempted in Section VI.

### **the economic framework**

Antitrust legislation is usually cast in terms of promoting or protecting competition. Not unnaturally a precise definition of the kind of competition which it seeks to preserve or achieve is usually omitted, and it is left to economic theory to provide us with such a definition. The problem, however, has proved to be a thorny one. The major difficulty is that only perfect competition (defined in text-book terms) can produce those results beneficial to society, in terms of the optimum allocation of resources, which are usually associated with «competition». This concept of competition, however, is unrealistic for the purposes of antitrust legislation. It is difficult to imagine a piece of legislation which aims, among other things, to drastically change the structural organisation of various markets. Such change might generate far more awkward and difficult problems than those it set out to solve.<sup>6</sup>

Assuming, for the moment, that such a change could be beneficially effected, the perfect competitive

5. J.M. Lishan, «The Cellophane Case and the Cross-elasticity of Demand», *Antitrust Bulletin*, Vol. 4, 1959, p. 598.

6. It must be remembered, though, that the first antitrust legislation (Sherman Act, 1890) was largely influenced by considerations of perfect competition.

2. For a discussion of concentration in the Greek Chemical Industry see: G. Petrochilos, «Foreign Capital in the Greek Chemical Industry» in M. Nikolinas (Ed.), *Multinationals in Greece* (in Greek), Nea Synora Publications, Athens, 1982, forthcoming.

3. Nomos 703, *Ephimeris tis Kiverniseos*, No 278, Tefchos I, Athinaí 26.9.1977 (Law 703, *The Government Gazette*, No. 278, Part I, Athens 26.9.1977).

4. G.A. Petrochilos, «Greek Antitrust Policy: An Analysis», *The Antitrust Bulletin*, Vol. XXIV, No.3, 1979, pp. 595-619.

model might still be inadequate for the purposes of guiding antitrust policy. Under «perfect» conditions the tendency is for resources to be efficiently allocated, for prices to reflect the true opportunity cost of resources used, and, in the long run, for only the internally efficient firms to remain in operation, each producing at the lowest average cost (under the given technological conditions) and to full capacity. However, what happens to those industries in which the output necessary for a firm to achieve its lowest cost is so large, in relation to national sales, that only a few producers can remain effectively in the industry? In such cases perfect competition might not be the best solution for society or for the industry in question. In such a situation one is forced to choose between a large number of competing firms, each unable to reach the necessary economies of scale for drastic cost reduction and for consequent price reduction, or a few large firms, each able to achieve the full economies of scale but opposed to price competition.<sup>7</sup> In other words, the choice is between an industry conducive to maximising allocative efficiency and one which best serves the interests of technical efficiency. It is obvious that something has gone sour with the theory. The static framework of the perfectly competitive model and its preoccupation with price rivalry makes it unsuitable as a basis for an antitrust policy. It fails to take account of some crucial factors which affect not only the organisation of the particular firm but the overall economy.<sup>8</sup> If this is the case, what kind of competition is acceptable as a guide to the formulation of antitrust policy?

A number of people have suggested that antitrust legislation should seek to foster and to maintain what J. Clark has termed «workable competition».<sup>9</sup> The theory of workable competition is concerned with factors which stimulate economic rivalry. It tries to judge forms of industrial organisation and company policies by reference to the extent to which they promote or hamper this rivalry. The main prerequisite of workable competition is that there is an adequate number of choices of action open both to consumers and producers. However, this concept of competition is far from precise as it leaves vague what is meant by «adequate». Critics of the workable competition concept are opposed to its use on the grounds that this vagueness makes the concept unsuitable as a basis on which to build an antitrust policy. According to these critics the concept fails to outline how

much competition must exist before an industry can be called «workably» competitive. In other words, how much monopoly must be shown to exist before antitrust action is justified?<sup>10</sup> Since workable competition fails to answer these questions, it is held that it cannot provide appropriate objectives for an antitrust policy.

The structure-conduct-performance approach, however, provides a firmer basis for such a policy and is capable of producing some partial solutions to the problem. By recognising that there is a functional relation between structure, or rather the various elements of market structure, and performance through the conduct of firms (i.e., through their pricing, investment and product policies), it is possible to set up certain non-controversial objectives for an antitrust policy. These objectives can then be used as a means of appraising market performance by establishing the extent to which actual performance in specific markets deviates from potential performance.<sup>11</sup>

Basic elements of market structure likely to influence the conduct of firms are product differentiation, seller concentration and barriers to entry of new firms. The precise way in which these elements (structure) interact and help form a firm's behaviour pattern (which in turn influences the firm's performance) may not be quite known. Indeed, the problem is an empirical one and much more research is required in this area so that one could have «...fairly conclusive tests of the theoretically predicted associations of the seller concentration of industries to their price-cost margins or profit rates (measuring allocative efficiency); of their conditions of entry to the same and related aspects of performance; and of the degree of differentiation of their products to the size of their selling costs and possibly to other dimensions of performance».<sup>12</sup>

Although the exact form of this functional relation is not given, economic analysis and empirical work on the subject provide useful information with which the economist can attempt the formulation of specific objectives of antitrust policy. One may begin by stressing that the aim of legislation should be to foster a competitive system characterised by efficiency and progressiveness. This may sound like broad platitude but it does have the merit of highlighting some of the issues involved. By concentrating on these two aspects one can evaluate the workings of different market structures and can use public policy to strengthen or correct certain deficiencies. In the words of J.S. Bain, «the market performance of industries is the ultimate test of how well they fulfill their social function of enhancing material welfare, and the aim of regulatory

7. It must, however, be pointed out that the empirical evidence suggests that technical economies of scale, which are the most important ones, can be reached at relatively low or medium levels of output.

8. S. Peterson, «Anti-Trust and the Classical Model», *American Economic Review*, Vol. 47, 1957, pp. 60-78, reprinted in M. Gilbert (Edit.), *The Modern Business Enterprise*, Penguin, 1972, pp. 54-75.

9. J. Clark, «Towards a Concept of Workable Competition», *American Economic Review*, Vol. 30, 1940. See also G.C. Allen, *Monopoly and Restrictive Practices*, Unwin, 1968, pp. 23-33 and A. Hunter (Edit.), *Monopoly and Competition*, Penguin, 1969, pp. 71-91.

10. W. Adams, «The 'Rule of Reason': Workable Competition or Workable Monopoly?», *The Yale Law Journal*, Vol. 63, No 3, 1953, pp. 348-370, reprinted in S.E. Berki (Edit.), *Antitrust Policy-Economics and the Law*, Heath, 1966, which also contains a selection of interesting articles on the subject.

11. See J.S. Bain, *Industrial Organisation*, Second Edition, J. Wiley and Sons, 1968, p. 498 and R. Caves, *American Industry: Structure-Conduct-Performance*, Third Edition, Prentice-Hall, 1972, p. 94.

12. J.S. Bain, *op. cit.*, p. 432.

policy should be to improve performance in those industries where it is 'unworkable'.<sup>13</sup>

Firms in different market structures are expected to perform differently with regard to these criteria. For example, in a market where there are low degrees of concentration and of product differentiation and barriers to entry, firms have no pricing policies of their own. Prices are dictated by the market and are expected to be competitive. Misallocation of resources may tend to be minimised within such a market and efficiency, in the classical sense, may tend to be attained.

One is tempted at this point to embrace such markets as «the ideal», towards which one should strive in order to achieve overall allocative efficiency and raise welfare. This, however, may not be enough. Considerations of second best point to the fact that overall welfare may not be increased if other markets are not also «competitive». Further, in a market such as this, the incentive for research and for innovation in new products and methods of production is likely to be missing. Technical progress may be slow in coming. The introduction of these dynamic elements thus distorts the original picture and prepares the way for taking another look at imperfectly competitive structures.

Schumpeter has shown that a degree of monopoly is necessary if an economy is to be progressive.<sup>14</sup> Firms must be protected lest they lack the motivation to research new technology, research which can, if successful, significantly reduce costs. There is, however, no unambiguous empirical evidence that size is associated positively with progressiveness. On the contrary, smaller firms tend to obtain more patents, in proportion to total sales, than do larger firms. Moreover, during the current century, the individual has been the source of many important inventions.<sup>15</sup>

In this context, one needs to examine the movement towards the establishment of a more concentrated industrial structure through mergers and takeovers. Whether mergers are or are not in the public interest requires the analysis of a set of diverse factors; reliable data on which to base such analysis may, in many cases, be unavailable to the management of the merging firms, let alone be at the disposal of any agency charged with antitrust. This dearth of reliable data hinders objective appraisal of the merits of particular cases. The degree of confidence with which one can pronounce upon the desirability of mergers is therefore rather limited. How can economic theory help?

In neoclassical economics monopoly is condemned, *per se*, on the familiar grounds of misallocation of resources.<sup>16</sup> It would appear that if the objective of antitrust policy was to maximise social welfare, proposed mergers should be disallowed in that the merger, once

accomplished, would contribute to increased divergence between price and marginal cost and so augment the dead-weight welfare loss. By increasing monopoly power, a merger might help bring about higher prices and consequent allocative inefficiency. At the same time, though, a merger might facilitate reduced costs through economies of large scale production. (There is, of course, no guarantee that these reduced costs would be passed on to the consumers in the form of lower prices.) Since social welfare, the maximisation of which is sought, is given by the sum of consumer surplus and producer surplus,<sup>17</sup> it is perfectly possible for the benefits of mergers in the form of cost reductions (accruing to producers) to outweigh the costs of increased prices and for mergers to be beneficial to public interest.<sup>18</sup> In a case where, through an increase of market power, a merger leads to both allocative inefficiency and economies, it is proposed that a trade-off test be conducted to decide whether the merger should be allowed. According to O.E. Williamson,<sup>19</sup> mergers passing this test should, subject to certain qualifications, be permitted to proceed.

However, both the neoclassical theory and the Williamson argument fail to take account of the fact that, apart from worsening allocative efficiency, through the increase in price-cost margins, the increased monopoly power likely to be entailed by a merger affects what Leibenstein has termed «X-efficiency».<sup>20</sup> Since the forces of competition are diminished by a merger there is less incentive for the firm to pursue policies of cost minimisation. It is likely, therefore, that X-inefficiency increases as a result of increased monopoly power. It has, in fact, been estimated that the welfare loss due to X-inefficiency is likely to be much larger than the

*American Economic Review*, Vol. 44, May 1954, pp. 77-78 and D. Schwartzman, «The Burden of Monopoly», *Journal of Political Economy*, Vol. 68, December 1960, pp. 627-630, F.M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally, 1970, p. 408, K. Cowling and D.C. Mueller, «The Social Costs of Monopoly Power», *The Economic Journal*, Vol. 88, 1978, pp. 727-748.

17. The social welfare function to be maximised is given by the difference between total social benefit and total social cost, i.e.,  $W = TSB - TSC = TR + CS - TC = CS + (TR - TC) = CS + PS$ , where CS is consumer surplus and PS stands for producer surplus. See O.E. Williamson, «Peak-Load Pricing and Optimal Capital under Indivisibility Constraints», *American Economic Review*, Vol. 56, September 1966, pp. 810-27, reprinted in R. Turvey (Edit.), *Public Enterprise*, Penguin, 1968, and also in O.E. Williamson «Economies as Anti-Trust Defense», *American Economic Review*, Vol. 58, May 1968, pp. 18-36, reprinted in C.K. Rowley (Edit.), *Readings in Industrial Economics*, Vol. 2, Macmillan, 1972, pp. 136-49.

18. This, of course, leaves the question of distribution unanswered. It is assumed that, to deal with the problem of distribution of income, the authorities have at their disposal means other than the antitrust policy. Benefits accruing to both consumers and producers are thus treated alike. See M.A. Crew and C.K. Rowley, «Anti-Trust Policy: Economics versus Management Science», *Moorgate and Wall Street*, Autumn 1970, pp. 19-34, reprinted in C.K. Rowley (Edit.), *op. cit.*, pp. 136-49.

19. O.E. Williamson (1968), *op. cit.*

20. H. Leibenstein, «Allocative Efficiency v 'X-Efficiency'», *American Economic Review*, Vol. 56, June 1966, pp. 392-415. See

13. *Ibid.*, p. 431.

14. J.A. Schumpeter, *Capitalism, Socialism and Democracy*, Fifth Edition, Unwin, 1966.

15. J. Jewkes, D. Sawers, R. Stillerman, *The Sources of Invention*, Macmillan, Revised Edition, 1969.

16. See A. Harberger, «Monopoly and Resource Allocation»,

welfare loss due to misallocation of resources.<sup>21</sup> Further evidence of X-inefficiency in oligopolistic markets is provided by the managerial and behavioural theories of the firm, where «management slack» and «organisational slack» are recognised as important factors in shaping business objectives. This, of course, serves to illustrate that the issues in question are of an empirical nature and that the knowledge required for the purposes of formulating public policy should be obtained by empirical evidence, since knowledge on a priori grounds is often uncertain. The part of economic theory best suited for an analysis of this kind is that dealing with industrial organisation. In that it provides a better understanding of the workings of the various markets, this analysis enables economists to evaluate the contributions made by different firms operating in different market structures. It therefore offers a firmer basis for an antitrust policy. For these reasons the part of economic theory pertaining to industrial organisation should underlie any antitrust legislation.

#### legal rules, methods and machinery

If antitrust legislation is to be successful appropriate legal rules need to be formulated and the machinery for the implementation of such legislation needs to be set up.<sup>22</sup> Generally speaking the choice is between a set of rules characterised either by flexibility or by rigidity. Fixed rules, often denounced because of their rigidity, nonetheless provide firms with sufficient assurance as to where they stand vis-à-vis the law. The predictability of fixed rules ensures that businessmen know whether their actions and decisions are «legal» or «illegal». In this respect fixed rules tend to minimise uncertainty, and there is thus obvious reason for recommending them. On the other hand, rigid rules do impose a straightjacket on business. Accordingly one looks to the alternative. The adoption of general principles guiding antitrust legislation, with the advantage of greater flexibility (in that each case can be examined on its merits), would result in an element of uncertainty and also in unavoidable delays in antitrust litigation. Flexible rules, therefore, suffer in two respects—they increase uncertainty for firms and tend to render the antitrust legislation ineffective. In the American antitrust literature fixed and flexible rules have come to be known as the «per se» versus «the rule of reason» doctrines respectively. The former refer to company agreements, decisions or actions which are in themselves illegal while the latter exercise «reasonableness» as the means to establish whether or

not illegal conduct exists. The «rule of reason» criterion considers, for example, that the loss in competition may be outweighed by other advantages. However, the role of these legal rules is to facilitate judicial enquiries and to help in the interpretation of the law in particular cases. This means that discussion of the main lines of thought regarding legislation for the promotion of competition must precede the examination of such legal rules. By and large, antitrust legislation has sought to promote and to protect competition by any of the following methods, either singly or in combination:

- 1) by the outright prohibition of certain agreements, decisions or actions by two or more firms; for example, the fixing of prices, the sharing of markets etc.
- 2) by allowing such agreements, decisions or actions but by retaining the right to refer such agreements to an appropriate body which would be vested with the authority to discontinue such practices, on the grounds that they are «socially unacceptable».
- 3) by requiring prior registration of such agreements, decisions or actions and the notification by interested firms of such agreements. An appropriate body would then be called upon to recommend whether or not the said agreements should be put on the register.

It must be emphasised that these methods deal with the problems of restrictive practices only. They leave the problem of monopoly to be tackled in a different manner, if at all. The same legal rules mentioned above seem, however, to apply to both, that is to the treatment of problems of monopoly power as well as those of restrictive practice. The first and third methods constitute a more appropriate preventive approach to antitrust while the second is more applicable if a curative approach is favoured or is necessary.

The first method proves «illegality» simply by showing that certain agreements have indeed taken place. Conviction depends, however, upon the rules or legal doctrines which the courts are using for the interpretation of the law. This method is obviously rigid and, within the framework of a «free enterprise» system, can be considered a significant constraint of the freedom of businessmen.

Under the second method firms are, in principle, free to enter into certain agreements. They do, however, face the possibility of having such agreements investigated by competent bodies which can declare them either lawful and retainable or unlawful and unenforceable. Particular agreements or decisions harmful to society can thus be perpetuated until such time as the rather slow investigative machinery catches up with the culprits. In the interim, however, markets may have been exploited and monopoly profits made. The judicial decisions cannot hope to remedy fully the damage done in this interim period because such decisions tend to be made tardily and acted upon only half-heartedly. Therefore a feeling of injustice may persist.

The third method relies on prior notification of such

also W.S. Comanor and H. Leibenstein, «Allocative Efficiency, X-Efficiency and the Measurement of Welfare Losses», *Economica*, new series, Vol. 36, August 1969, pp. 304-9.

21. See H. Leibenstein, *op. cit.*, W.S. Comanor & H. Leibenstein, *op. cit.* and F.M. Scherer, *op. cit.*, p. 408. Scherer calculates that for the American economy total losses due to market power could be anywhere between 3% and 12.5% of GNP (for 1966).

22. S.E. Berki (Edit.), *op. cit.*, pp. viii-ix.

agreements to a competent authority which must rule on whether or not the agreements are within the law. Those agreements which pass the test of acceptability are then placed on a special register and are allowed to be implemented. This method may go some way towards meeting criticisms levelled at the other two.

It would appear that the first method is that most likely to give rise to conflict between the rule of reason and the *per se* rule. The rigidity of approach of this first method contrasts with the flexibility inherent in the other two. Legislation which reflects a «pragmatic» approach to the problems of monopoly and of restrictive practices thus tends to be based upon either the second or third methods, or upon a combination of the two. Some of the points raised above, with regard to legal rules, also apply to these methods.

It has been suggested that if the first method is used the existence of any prohibited action proves guilt. In regard to methods two and three, however, the distinction between a firm's lawful or unlawful behaviour is based upon consideration of all the relevant factors. Each case, in other words, is examined solely on its own merits. To facilitate examination along these lines it is useful to compare the results of each case against some kind of abstract criterion, viz that which purports to promote the public interest. However, «public interest» is by no means easy to define. Indeed, even legislation explicitly stated to be for the purpose of protecting the public interest contains no such definition. The most that one can expect is perhaps to obtain a list of various guidelines which, in the opinion of the legislators, can be considered conducive to protecting the public interest. What these specific guidelines are and how they are arrived at, is obviously the product of a thorough weighing up of economic, social, political and other factors. In this respect, political will to arrive at and to enforce an effective policy is an important factor, not only in shaping such guidelines but in making antitrust policy successful. This point will be treated in more detail later on.

The last element in an antitrust legislation is the establishment of an appropriate mechanism, that is, of various procedures and of competent bodies, the latter being empowered to implement and to enforce the legislation. For example, the tasks of initiating searches and of bringing to light legislative violations, of instituting proceedings for ascertaining and remedying such violations, of preparing and presenting the case against culprits in a court, and of ensuring that the recommendations of the court are enforced, must be covered and established by the antitrust legislation. So too must the very bodies which are to be responsible for such tasks. The law must also vest such bodies with powers to discharge their duties unhindered.

It does not follow, however, that the mere existence of antitrust legislation will ensure the promotion and protection of competitive forces in an economy. Such assurance essentially depends upon the way in which legislation is applied. As is the case in the entire field of public policy, applicability may be circumscribed by a number of factors. Prominent amongst these factors

are the political will (i.e., the degree of political commitment to its aims) and the compatibility/incompatibility between the aims of the legislation and those of general public policy, notably economic policy. It is unlikely that the promotion and protection of competition will feature highly in the list of priorities of any government. Usually, whenever there are economic difficulties, the first victim is competition. These considerations, as well as the «pragmatic» approach to antitrust, may well lead to the emasculation of an antitrust policy.

### **the legislation**

The objectives of the Greek antitrust legislation were made clear in an explanatory statement which accompanied the draft law to the Parliament. This statement referred to the need of averting the creation of monopolistic or oligopolistic situations, which could hamper the normal functioning of markets, as well as the need to bring Greek legislation into line with that of the European Economic Community, in anticipation of full Greek membership. Further, in an interview with the Athens daily *Kathimerini* on 27/5/78, the Minister of Trade saw in the legislation a means to achieve economic and social progress without inflation and social upheavals. The last section of this study considers the first objective in detail. It should, however, be stated that the second objective of the legislation is fully met as L. 703/1977 not only follows closely the relevant Community legislation, but its Articles 1 and 2 (which are the essence of the whole legislation) are almost exact translations of Articles 85 and 86 of the Treaty of Rome.<sup>23</sup>

The main provisions of the Greek antitrust legislation are as follows:

Article 1 prohibits all agreements between and restrictive practices by firms or associations of firms where such agreements or practices may affect competition, particularly in the areas of: the fixing of selling prices or of buying prices; control of production, distribution, technological development or investment; sharing of markets or of sources of supply; applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a disadvantage. Finally the prohibition extends to the concluding of contracts which make parties subject to additional obligations unconnected with the subject of such contracts. Article I exempts from this prohibition such agreements or restrictive practices (or parts of them) which the Commission for the Protection of Competition<sup>24</sup> considers that they satisfy all the

23. It should be pointed out that Articles 85 and 86 of the Treaty of Rome refer to interstate trade while present Greek legislation applies only within Greece. When Greece becomes a full member of the EEC, Community legislation will, automatically, be applicable in Greece itself. Furthermore, in cases of conflict, it will supersede national legislation.

24. A body specially set up by Law 703/1977 to implement the legislation. See below.



following conditions, viz agreements or practices which:

- (a) contribute to the improvement of production or distribution of goods or to the promotion of technological or economic progress and which allow consumers a fair share of the resulting benefit,
- (b) do not impose on firms restrictions beyond those necessary for the attainment of the above objectives,
- (c) do not afford to such firms the possibility of eliminating competition in large parts of the relevant market.

Article 2 prohibits a firm from abusing its position of dominance throughout the national market or part of it. Such abuse may consist of:

- (a) direct or indirect compulsion to fix buying or selling prices, or other unfair trading conditions,
- (b) limiting production, consumption or technological development to the detriment of the consumers,
- (c) applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a disadvantage, and,
- (d) making the conclusion of contracts subject to the acceptance by other parties of additional obligations unconnected with the subject of such contracts.

Article 3 states the general principle of the legislation. Accordingly, it prohibits all agreements, decisions and concerted practices, covered by Art. 1 and abuse of dominant position covered by Art. 2 without any prior decision of a competent authority being necessary.

Article 4 allows mergers and takeovers, and states explicitly that these do not constitute infringement of Article 1.

Article 5 extends the legislation to nationalised industries or public utilities as well as to agricultural and transportation enterprises but it also provides for the exemption of such enterprises. Exemption depends upon the recommendation of the Commission for the Protection of Competition and upon the joint decision of the Ministers of Coordination and Trade and Agriculture, Transport or Merchant Marine (Which ministers are called upon to make this decision, apart from those of Coordination and Trade, depends upon the kind of enterprise under consideration). The reason given for this exemption is that such enterprises may be of significant importance to the national economy.

Finally, Article 6 extends the provisions of Article 5 to exporting firms. It exempts agreements, decisions or restrictive practices aimed exclusively at the promotion or the strengthening of export activity, so long as actions do not infringe international obligations.

Implementation of the law is in the hands of two new bodies within the Ministry of Trade. These bodies, which were specially established by the legislation, are called the Office for the Protection of Competition and

the Commission for the Protection of Competition.<sup>25</sup> The Office is established within the Civil Service and for its manning it can call not only upon civil servants but also upon the services of other qualified staff outside of the Civil Service (Article 7). Amongst its wide ranging tasks are those of:

- (a) keeping the Register of Restrictive Practices,
- (b) searching for violations of the law and generally gathering information,
- (c) preparing and presenting cases to the Commission,
- (d) implementing the decisions of the Commission and those of the courts,
- (e) performing the tasks of the Secretariat for the Commission,
- (f) referring to the courts any violations of the legislation, etc.

In performing its duties the Office can demand any information relevant to the present legislation. This authority extends to all firms and trusts, and to natural or legal persons of private or public law. If the information is not forthcoming, or if it is misleading or deficient, those representing the bodies from which it is sought are liable. In the case of private enterprises, this liability is in the form of fines of up to 500,000 drachmas. Civil servants or representatives of «legal persons of public law» are liable to disciplinary action. These penalties are apart from, and additional to, any penal sanctions and are decided by the Commission (Article 25). The staff of the Office are vested with the powers of tax inspectors, and they can check books and other documents and demand receipt of copies of such documents. They are also empowered to search offices and other premises, search the houses of firms' representatives (provided they act constitutionally) and receive sworn or unsworn statements. Those obstructing the actions of Office staff are liable to fines ranging from 100,000 to 1m. drachmas, the extent to be decided by the Commission (Art. 26). Article 27, on the other hand, obliges the staff of the Office to keep confidential any information which does not pertain to their specific investigation. As far as relevant confidential information is concerned, staff have to notify its finding to the Office in their statements. In turn, such information can constitute part of the submission to the Commission or to the courts, by which process the information naturally loses its confidentiality. Staff found guilty of disclosing confidential information can be fined up to 200,000 drachmas and are also liable to disciplinary action as well as to any penal sanctions.

Also established by the legislation was the Commission for the Protection of Competition. This important body consists of seven members, one of whom is the Director of the Office. Its broad tasks include the issuing of orders, e.g. for a firm to refrain from the kind of restrictive practices covered by Art. 1 and 2. Its orders are mandatory but are also challengeable in the

25. Hereafter referred to as the Office and the Commission.



courts. The Commission is also responsible for advising individual Ministers on particular questions, such advice being of a consultative nature.

If a violation of Articles 1 and 2 is established, the Commission can ask the offending firm or firms to stop the violation(s) and can force enterprises to refrain from repeating such violations. In cases where enterprises persist with the violation it can also threaten to impose fines. Lastly, the Commission can impose fines of up to 10% of the gross earnings of the enterprise(s) in question, these earnings being related to the year in which the violation took place or of the previous year (Art. 9). The decisions of the Commission can be challenged in the administrative courts of justice by those against whom the decisions were made, or by those who first reported the violation to the Office, or by the Minister of Trade, or by the General Counsel of State (Epitropos Epikratias). Similarly, appeals against the decision of the courts of justice can be made to the Athens Administrative Court of Appeal, and, as a final resort, application can be made to the Council of State<sup>26</sup> for revocation of a previous court's decision (Articles 15 & 16).

The Commission is obliged to inform the district attorney's office of any decision regarding violations of Articles 1 & 2 within ten days of such decision being reached. Those participating in agreements and decisions and/or committing acts prohibited by Articles 1 & 2, can be sentenced to at least three months in jail and be fined between 100,000 and 200,000 drachmas, penalties which can be doubled if an offence is repeated. The same penalties face those who: (a) hinder the searches of the staff of the Office (b) refuse to provide information (c) furnish the authorities with information which they know is misleading or hide the truth and (d) either refuse to give statements or provide statements which contain false information or hide the truth (Art. 28 & 29). Notification of restrictive practices by firms or trusts to the Office absolves the representatives of such firms from the above penal sanctions. These persons, however, are liable to sanctions if their firm, within 15 days of being served notice by the Commission, does not stop the violation(s) and refrain from further committing it (Article 30).

The legislation applies to all practices likely to limit domestic competition irrespective of whether the relevant agreements, decisions or restrictive practices originate in or outside Greece or whether the offending firms have a Greek parent company. Similar considerations also apply to the abuse of dominant position (Article 32).

#### **the foreign experience**

Evaluation of antitrust legislation involves analysis of the way in which such policies have thus far worked, particularly in the United States, Britain and the

26. The country's highest Administrative Court.

European Economic Community. The American experience is of special interest not only because of the long history of antitrust legislation in that country but because of the approach adopted, which is almost unique. For these reasons, therefore, analysis of the American experience is of use to this paper, notwithstanding the differences between the American and Greek economies.

The first American antitrust legislation, the Sherman Act of 1890, had its origins in radical opposition to the excesses of the free enterprise system. It was a reaction to the growth of trusts and of restrictive practices of businesses. The Act contained two types of prohibition: one proscribed various restrictive trade practices (contracts, combinations, conspiracies) while the other made it illegal for a person to «monopolise» or «attempt to monopolise». Further legislation was enacted in 1914, with the Federal Trade Commission Act, in 1915, with the Clayton Act, in 1936, with the Robinson-Patman Amendment to the Clayton Act, in 1938, with the Wheeler-Lee Amendment to the Federal Trade Commission Act and, finally, in 1950, with the Anti-merger Amendment of the Clayton Act (Section 7).

One would expect that such a huge armoury of antitrust legislation should have precluded monopoly and monopolistic practice. That has not been the case. It was mainly in the area of anti-competitive conduct that the attention of the authorities was directed. The early vigorous application of the Sherman Act resulted in the formulation of the fixed rules discussed above, with two stringent standards which made illegal restrictive practices of trade and mergers between previously competing firms. Price fixing, in particular, was declared illegal, per se, a declaration reaffirmed on a number of occasions and under which, in 1961, seven executives were given prison sentences.

American antitrust legislation is almost unique in that it places such importance on competition that it (i.e., competition) becomes not the means towards certain ends but desirable for its own sake. Yet the Sherman Act has been powerless to deal with concentration of economic power, no significant case seeking to reduce of limit existing levels of concentration having been filed for at least 20 years prior to 1972.<sup>27</sup> On the monopoly front, Blair summarises the history of the Sherman Act as follows: «Broadly speaking, enforcement of the Sherman Act's proscription of monopoly began with a little more than a decade of quiet neglect, followed by vigorous application up to 1911, only to be followed by nearly a half century of quiet judicial interment, then by a little-noted rebirth in the late 1940's and early 1950's, and finally a second interment—this time at the hands of the enforcing agency.»<sup>28</sup> This may, to an extent, be due to the original

27. S.E. Boyle, *Industrial Organization-An Empirical Approach*, Holt, Rinehart and Winston, 1972, p. 159.

28. J.M. Blair, *Economic Concentration-Structure, Behavior and Public Policy*, Harcourt Brace Jovanovich, 1972, p. 558.

per se rule having been changed in 1911 and the «rule of reason» doctrine having been introduced into judicial thinking. This, according to a number of critics, led to the emasculation of the antitrust policy.

Before 1945 the attitude both of the Antitrust agencies and of the courts was that the mere size of a firm did not constitute an offence and that a firm had to exert monopoly power, through restrictive conduct, before it could be prosecuted. However, in 1945, in the Alcoa case, there was a change in judicial thinking, which condemned monopoly per se and put an end to the «good-trust v. bad-trust» criterion, which had dominated judicial decisions for the previous quarter of a century.

On the merger front there had virtually been a free run up to 1950, with all types of merger activity continuing almost unchecked. This way due to the fact that (a) Section 7 of the Clayton Act prohibited only the acquisition of a competing firm's stock not its assets, and (b) a decision of the Supreme Court in 1926 made prosecution under the Clayton Act almost impossible. However, following the amendment of this Act in 1950, the American Antitrust agencies (The Federal Trade Commission and the Antitrust Division of the Department of Justice) have pursued a different policy, have filed many merger complaints and have managed almost to eliminate horizontal mergers (During 1926-30 horizontal mergers accounted for 64.3% of the total merger activity; between 1951 and 1968, during which time such activity accelerated from 235 manufacturing and mining acquisitions to 2407, horizontal mergers declined from 35% to 8% of the total). «In summary, it appears that it is only in the area of horizontal merger activity, and even there only since 1950, that the government has made any progress in halting or slowing the pace of increasing concentration».<sup>29</sup> The pace, however, of the conglomerate mergers continued unabated, reaching 82% of the total in the period 1966-68 and persuading even businessmen of the need for stronger legislation.<sup>30</sup> The operation, however, of the amended Section 7 of the Clayton Act, with its restrictive effect on merger activity, drew the wrath of the defenders of mergers. They argued that mergers, far from impeding competition, may be actually enhancing it (provided monopoly and oligopoly are attained through efficiency and are characterised by freedom of entry), and asked for the repeal of Section 7 of the Clayton Act.<sup>31, 32</sup>

The failure of American antitrust legislation to preserve and to strengthen competition may be due to the fact that in spite of the professed devotion to such ideals, few people in Congress, the courts and in business seem prepared to see antitrust policy becom-

ing an effective means of checking economic power. Businessmen seek to avoid competition and instead try to build up monopolistic defences against the uncertainties and insecurities associated with competitive markets. The ability, for example, to make price decisions independently of market forces of demand and supply is one of the characteristics of oligopoly attractive to businessmen. In this, they may be prepared to evade or to violate the law, particularly where the «rewards» of such actions are large. In these attempts they have, inadvertently (?), been helped by a confusion between Congress and the courts as regards the objectives of antitrust. Other factors contributing to this situation have been the shortage of funds and of personnel in the antitrust agencies. This shortage has naturally hindered the agencies' ability to deal effectively with laborious and time consuming cases. Even where companies have been found guilty of breaches of antitrust the penalty is often small and consequently cannot have a strong deterrent effect upon other companies contemplating similar actions. As a result the overall effect of American antitrust policy in shaping the industrial organisation of the American economy has, at best, been minimal.

The British experience of monopoly and restrictive practice has varied over time. Before the enactment of special antitrust legislation these aspects were treated under the common law. In certain cases contracts tending to create monopoly by eliminating competition, restricting output and regulating prices and wages, have been declared to be an illegal restraint of trade and thus void. But the courts have been reluctant to declare contracts void on account of reasons of public policy and few agreements were therefore upset on this ground.<sup>33</sup>

The British antimonopoly legislation was the product of a social, legal and political environment different to the American.<sup>34</sup> It followed in the wake of the full-employment policy of the government, envisaged in the White Paper of 1944, being almost a by-product of that policy.<sup>35</sup> The first antitrust legislation in Britain was enacted in 1948 with the Monopolies and Restrictive Practices Act. The Act established the Monopolies and Restrictive Practices Commission which was empowered to examine: (a) if a monopoly did exist and (b) if the monopoly worked against the «public interest». Monopoly was held to exist if a firm had one third or more of a particular market, though it was not the existence but the abuse of monopoly power that was contrary to public interest. The Commission would act on cases referred to it by the Minister of the (then) Board of Trade.<sup>36</sup> After

29. S.E. Boyle, *op. cit.*, p. 161.

30. J.M. Blair, *op. cit.*, pp. 597-8.

31. W.H. Peterson, «The Case against Antimerger Policy», *Business Horizons*, Vol. 4, No 4, 1961, pp. 111-20.

32. This is based on the familiar argument of attaching more importance to the size distribution of firms than the fewness of sellers, when discussing concentration in a particular industry. See G. Petrochilos (1982, *op. cit.*).

33. Stevens and Borrie, *Mercantile Law*, Sixteenth Edition, Butterworths, 1973, p. 517.

34. E.V. Rostow, «The Development of Law on Monopoly and Competition», *Modern Law Review*, Vol. 23, No 5, Sept. 1960. Reprinted in A. Hunter, *op. cit.*, pp. 161-82.

35. G.C. Allen, *op. cit.*, pp. 61-69.

36. Nowadays the Department of Prices and Consumer Protection.

investigation, the Commission would report its findings to the Minister, who would then decide on appropriate action.

The Act did not define «public interest» but it gave the Commission certain guidelines according to which the public interest would best be served. Within these guidelines came any firm with monopoly power which ensured; the most efficient production and distribution for home and overseas markets; the reflection of such efficiency in quality, volume and prices; the encouragement of new enterprise; the optimum allocation of the country's resources; significant technological advance; the expansion of existing markets and the development of new ones. This guidance, however, proved of little use to the members of the Commission, who were left to use their common sense in dealing with these problems.<sup>37</sup>

The policy introduced a pragmatic approach to tackling the problems of monopoly and restrictive practice but it suffered from the lack of clear objectives and criteria, pragmatism being insufficient to ensure the policy's effectiveness. To meet criticisms of the way in which the legislation worked, the Monopolies and Restrictive Practices Commission Act was passed in 1953. This Act increased the size of the Commission and, in order to expedite matters, allowed it to subdivide and to process several enquiries simultaneously.

Following a general report by the Commission on the incidence and possible harmful effects of widespread restrictive practices in the UK industry, the Restrictive Trade Practices Act was passed in 1956. The Act separated the control of restrictive practices from that of monopoly and established both a Registrar of Restrictive Trading Agreements and a Restrictive Practices Court to deal with the former. It also set up a new Monopolies Commission (abolishing at the same time the old one) to deal with the latter. The Act, however, reduced the size of the Commission and prevented it from subdividing for the purposes of pursuing simultaneous investigations. It also prohibited the collective enforcement of resale price maintenance, whereas the 1964 Resale Prices Maintenance Act prohibited the enforcement of minimum resale prices by individual manufacturers, except under certain conditions.

Dissatisfaction with the monopolies legislation continued, however. Existing monopolies could be dealt with by the legislation but there was no preventive means of dealing with takeovers and mergers which threatened to create new monopolies or to strengthen existing ones. Moreover, the legislation applied only to suppliers and processors of goods, thus excluding the service industries (banking, insurance, etc.). The small size of the Commission was also an obstacle in that it slowed down the pace of investigations. As a result, the Monopolies and Mergers Act was passed in 1965. It envisaged that proposed and actual mergers (with

certain qualifications) could be referred to the Monopolies Commission for investigation of possible harmful effects on public interest. This particularly applied where mergers involved assets in excess of £5m. The Act increased the size of the Commission and empowered them to subdivide. It also brought the service industries within the ambit of the law. In 1968 the Restrictive Practices Act amended the 1956 Restrictive Trade Practices Act in three minor ways.

Nevertheless, the vagueness both of the legislative objectives and criteria was such that uncertainty persisted. The reference of mergers to the Commission was characterised by an element of arbitrariness and inconsistency<sup>38</sup> which was due, in some measure, to the pragmatic way in which merger policy was operated. Equally responsible for this inconsistency, however, was the overall economic policy of the Government which in 1966, through the Industrial Reorganisation Corporation, sought «to promote rationalisation schemes which would yield substantial benefits to the national economy». This involved the Government in the promotion of some fifty mergers; it even involved the acceptance of one merger which the Commission had previously declared to be against the public interest.<sup>39</sup>

To correct the above deficiencies, the Fair Trading Act was promulgated in 1973. The Act introduced new administrative machinery for the implementation of the legislation as well as two important points of substance. It repealed the 1948 and 1965 Acts and amended others. It set up the Office of Fair Trading and the Consumer Protection Advisory Committee and appointed a Director General of the Office of Fair Trading. The Director General, among other functions, took over the duties of the Registrar of the Restrictive Trading Agreements; he was also empowered to initiate references to a reconstituted Monopolies and Mergers Commission. The Secretary of State, however, can overrule the Director General while the minister also retains his right of reference. He alone can refer nationalised industries (which are now within the ambit of the law), this being considered a near-political decision.

Apart from these essentially administrative changes the Act is significant in other ways. For example, the extent of market share necessary to constitute a monopoly has been reduced from one third to one quarter. The guidance as to what constitutes public interest has also been altered and for the first time it now emphasises the maintenance and promotion of effective competition. This is the clearest indication yet that competition is recognised as desirable and in the public interest. However, this did not change the basic favourable attitude of government towards mergers. For example, of a total of 353 acquisitions in 1976

38. See C.K. Rowley, «Monopoly in Britain: Private Vice but Public Virtue?», *Moorgate and Wall Street*, Autumn 1968, pp. 37-68 and C.K. Rowley «Mergers and Public Policy in Great Britain», *The Journal of Law and Economics*, Vol. II, April 1968, pp. 75-130.

39. The acquisition of Associated Fisheries by the Ross Group.

37. G.C. Allen, *op. cit.*, p. 66.

there were only four references. Although the merger boom of 1972-73 seems to have subsided this development is by no means the result of a more vigorous anti-merger campaign on behalf of the authorities. On the contrary, on a number of occasions government has allowed takeover bids despite monopoly considerations, justifying its allowance on the grounds of higher levels of efficiency, through economies of scale or the maintenance of jobs, as for example, was claimed in the non-referral case of Tate & Lyle's takeover bid for Månbre & Garton. Even after thirty years of experience government policy on antitrust appears to be influenced by pragmatism and by political expediency. Currently the whole competition policy in Britain is again under review, with Whitehall particularly questioning the efficiency of mergers and examining restrictive practices with a view to strengthening the law in this area. The possible creation of new administrative machinery to eliminate overlaps and to combine the functions of the Office of Fair Trading, the Monopolies and Mergers Commission, the Restrictive Practices Court, and the Price Commission is also being considered.<sup>40</sup> Whether the outcome of this review will herald a new philosophy on competition policy in Britain remains to be seen.

The European Economic Community's antitrust policy is based essentially upon Articles 85 and 86 of the Treaty of Rome. Articles 87 to 94 of the Treaty regulate aspects of antitrust machinery and cover the problems of dumping and of aid granted by member states where such aid is compatible with the Community's objectives. Articles 65 and 66 of the European Coal & Steel Community (ECSC), which are similar to Articles 85 & 86 of the Rome Treaty, complete the legislation as far as competition in the coal and steel industries is concerned. For all practical purposes, however, the Community's antitrust policy is enshrined in Articles 85 & 86. As was pointed out during the analysis of the Greek legislation, Art. 85 prohibits restrictive practices, declaring them incompatible with Common Market objectives. (Certain agreements and decisions which contribute to efficiency, distribution etc. and which do not impose undue restrictions or eliminate competition are, however, exempted.) Art. 86, on the other hand, deals with abuse of a firm's dominant position within the Common Market and prohibits abuse as incompatible with the Market's objectives. However, Articles 85 & 86 should be considered as instruments by which to establish and attain the Community's objectives rather than as legislation designed to curb market activity.<sup>41</sup> In particular, Article 86 is more of a declaration of principle than a code of precise rules.

The proposed regulation on the control of mergers will perhaps be of greater importance to certain coun-

tries within the Community, notably to Britain.<sup>42</sup> The European Commission is seeking powers to control mergers in all industries, powers which are along the lines at present in operation in the coal and steel industries. Proposals put forward by the Commission in July 1973, and passed by the European Parliament in February 1974, would require firms to notify the appropriate bodies of any merger or takeover which would result in a grouping with an annual turnover in excess of £400m. During a three month period after notification the merger or takeover will not be allowed to proceed without the approval of the Directorate General for Competition, the proposed new body. A further nine months is deemed necessary for full investigation of the merger, so that a year will elapse before the final decision is made. By the end of the year it is to be supposed that a number of the original conditions underlying the merger will have changed, and in many cases these changed circumstances will deter the interested parties from proceeding. It is also possible that interested parties will withdraw from mergers in frustration at the lengthy referral and approval procedure. However, all this is in the future. The time that has elapsed since the original proposals and the inability to reach final decisions on the subject suggest a lack of urgency on the part of the various bodies of the Community, and little political will among the member states. The way in which Community competition policy has operated in the past does, however, provide certain pointers as to its future direction.

The Community's antitrust policy in its first decade<sup>43</sup> was largely based upon the application of articles 85 of the Treaty of Rome and 65 of the ECSC Treaty. Attention was mainly focused on the ending of restrictive practice contrary to competition and also on the defining of areas and the fixing of limits of cooperation among enterprises.<sup>44</sup> The Council and the Commission also saw the competition policy as an instrument with which to fight against inflation in the Community. «The Commission's measures against restraints of competition liable to maintain prices artificially high are part of the policy which must be pursued both by the countries and at Community level to combat inflation.»<sup>45</sup> In this connection Art. 85 has been used in particular «...to terminate market-sharing, the fixing of prices and quotas, and other devices employed by firms to maintain market fragmentation».<sup>46</sup> On a number of occasions Art. 85 was used to put an end to restrictive practices and to impose fines on culprits. In addition it was employed as a means of granting negative clearances to agreements and deci-

42. *Third Report on Competition Policy*, The European Communities Commission, April 1974, points 22 to 38.

43. Articles 85 and 86 of the EEC Treaty were implemented in March 1962.

44. *First Report on Competition Policy*, The European Communities Commission, April 1972, p. 24.

45. *Second Report on Competition Policy*, The European Communities Commission, April 1973, p. 25.

46. *Ibid.*, p. 15.

40. *The Times*, 31-10-1977, 28-11-1977.

41. S.M. James, «The Concept of Abuse in EEC Competition Law. An American View», *The Law Quarterly Review*, Vol. 92, April 1976, pp. 242-57.

sions, the object or effect of which was not detrimental to competition. The Community thus proceeded warily in its attempt to develop rules and criteria for future use and at the same time to lay down decisions which could protect and promote competition throughout the Common Market. Nevertheless, between 1964 and 1970, the Commission handed down 34 decisions concerning Art. 85, whereas in 1971 nineteen decisions were handed down under Articles 85 & 86 and twenty decisions concerning Articles 65 and 66 of the ECSC Treaty.<sup>47</sup> Restrictions on competition and practices which jeopardise the unity of the Community are proceeded against with particular vigour.

To an extent the pursuance of this policy against restrictive practice may have been dictated by the total lack of any merger or monopoly policy. Existing policy does not ban monopolies or mergers. If anything, cross-frontier mergers have been encouraged in an attempt to expedite economic integration. However, Art. 86 seeks to regulate the conduct of enterprises which exercise a dominant position within their respective industries. Excepting a preliminary ruling by the Court of Justice in 1968, the Community really only began to apply Art. 86 in 1971. The criteria which need to be satisfied if an act is to be prohibited were largely established as a result of the first three cases brought in connection with violation of Art. 86. They are: (a) the undertaking charged with the act must occupy a dominant position in a particular product market and in a certain geographical area, (b) the act must be deemed to be an improper exploitation of that position, and, (c) there must be the possibility that trade between member-states will be affected.

During 1971 the Commission handed down two decisions in cases involving Art. 86 — GEMA and the Continental Can Co. The Commission found that both had abused their dominant positions in their respective markets. In the GEMA case abuse resulted from undue restriction being placed on the economic liberty of authors, composers and music publishers, action which amounted to exploitation of GEMA's monopoly position, particularly in the German market. In the Continental Can case, however, the company was found to have abused its dominant position as a result of merger activity having eliminated the remaining competitors from three subsectors of the packaging industry. This abuse was found to extend to a large area of the Community. The significance of this latter case lies in the fact that, although the Court of Justice annulled the Commission's decision to take action to dissolve the mergers (because the Commission failed to adequately define the market concerned), nevertheless, the court's ruling was hailed as a landmark for future cases. This was so because the «court confirmed the soundness of the interpretation of Art. 86 which the Commission had developed in its decision».<sup>48</sup> The interpretation was

that «the merger of an enterprise in a dominant position with a competing enterprise is an abuse within the meaning of Article 86, if it restricts the freedom of choice of consumers in such a manner as to be incompatible with the competitive system laid down in the Treaty».<sup>49</sup>

Enforcement of Art. 86 continued with the ZOJA case. ZOJA, which had a de facto monopoly for an intermediary product, decided to discontinue supplying that product to a firm which had hitherto used ZOJA's supplies for the manufacture of a final product. This decision was held to constitute abuse of dominant position. The importance of this decision rests on the fact «that it establishes for the first time the principle that a de facto monopolist's decision to discontinue supplies, so as to eliminate competition, constitutes an abuse of a dominant position within the meaning of Article 86».<sup>50</sup> The company was ordered to resume supplies and fined 200,000 units of account.

Similarly, Art. 86 was enforced against the United Brands Co. (UBC) and against Hoffman-La Roche, both of which were held to have abused their dominant positions. In the first case abuse consisted of discrimination in pricing without objective reasons, prohibition of distributors' reselling green bananas (thus fragmenting the market), the refusal to supply a main Dutch customer and other unfair practices. UBC was ordered to end its infringements and was fined 1m units of account. In the Hoffman-La Roche case, abuse was found to exist in the conclusion of exclusive or preferential contracts which tied the most important buyers of bulk vitamins to the company and thus prevented competition in supply. The company was fined and ordered to stop its abusive practice.

When it comes to evaluating the Community's competition policy it must be remembered that the legislation is still incomplete and that enforcement of the policy has been brief. Nevertheless, from its application so far certain conclusions can be drawn. In dealing with violations of Articles 85 & 86 the policy has been flexible, and both the Commission and the Court of Justice have accepted the «rule of reason» approach. In dealing with the ZOJA and Continental Can cases, however, it has been suggested that the Commission and the Court of Justice accepted instead the *per se* approach, thereby moving towards a more rigid policy.<sup>51</sup> In both cases, it is argued, the Court tried to preserve competition for its own sake without clearly explaining how decrease in competition indirectly harms consumers. Whether these two specific cases were decided by application of the *per se* or the rule of reason is debatable. Certainly the Court consistently followed the previously-established criteria regarding abuse of dominant position, and it is clear that in both cases the criteria were satisfied and that action was justified. More importantly, the problem seems to be one of underlying economic theory rather than of

47. *First Report on Competition Policy, op. cit.*

48. *Second Report on Competition Policy, op. cit.*, p. 27.

49. *First Report on Competition Policy, op. cit.*, p. 79.

50. *Second Report on Competition Policy, op. cit.*, p. 55.

51. S.M. James, *op. cit.*

legality. As if to confirm that there had been to shift in judicial thinking, the UBC case made clear that the investigation of the company's entire marketing policy was undertaken «not so as to attack its commercial dynamism and economic performance, since this is not the purpose of Art. 86, but because a dominant firm has an obligation not to indulge in business practices which are at variance with the goal of integrated markets and undistorted competition in the common market».<sup>52</sup>

It would, however, be erroneous to conclude that competition is supreme in the Community. This is far from the case. Competition may be enshrined in the Treaty of Rome and the courts may have declared unlawful certain restrictive practices and abuses of power, but in reality the picture is different. The procrastination, the four years spent in discussing the merger proposals, confirms the view that the Community sacrifices competition to regulation as a means of somehow limiting the impact of recession. As has been suggested, political will is an important factor in the application of any public policy. It appears that currently the political will of the member states is not in favour of competition, a fact reflected in the Community's agencies. In most member states there is a tendency away from competition and towards more regulation.

The new trend towards greater regulation is most evident in the European steel industry, the crisis within which «has prompted the Commission to move towards a quota and price cartel, extending thus the principle of regulation so far reserved for agriculture into the area of industry».<sup>53</sup> Since this looks like an infringement of Art. 65 of the ECSC Treaty, it would be rather too much to expect the Community to move towards more vigorous application of its competition policy in other directions.

#### evaluation

The Greek antimonopoly legislation is based on Western European models and in particular on the Community's competition policy. This makes an evaluation of the prospects of the Greek policy somewhat easier, since predictions can be made in the light of the Community's antitrust experience. Greek policy, in line with that of most European countries, tends to be rather pragmatic on antitrust. With regard to restrictive practices, the Greek legislation, by outright prohibition of certain agreements, decisions or actions, seems superficially to be based upon a *per se* approach. However, the exemptions of Article 1 necessarily introduce a criterion of «reasonableness» which is, to say the least, vague. The pragmatic view on monopoly power is such that abuse of monopoly

power, rather than its existence, is deemed to be against the public interest. In this respect the law avoids the difficult task of defining either public interest or dominant position, leaving it presumably to the Commission for the Protection of Competition and the courts to determine these points in specific cases.<sup>54</sup>

Of particular significance is the lack of regulation of mergers and takeovers in the Greek legislation. Mergers and takeovers are accordingly allowed to proceed without restriction, apparently because the Greek authorities consider an increase in the size of firms desirable. No doubt this consideration may be dictated by arguments that mergers, particularly horizontal ones, are necessary if one is to achieve economies of large scale and force a more efficient utilisation of assets, especially in economies where the pace of internal expansion is slow. It is, of course, recognised that Greek firms are mostly small and that increase in size should facilitate the more rapid adoption of modern technology, while also producing a more efficient utilisation of assets. However, to what extent do these benefits outweigh the disadvantages entailed by curtailment of competition through mergers? The experience of other countries suggests that these benefits may not be easily realised and that the social cost of monopolies may be considerable. Even assuming that this «rule of reason» approach can be adopted, the question remains empirical and unanswerable by a priori reasoning. An increase in monopoly power provides large enterprises with the conditions for abuse of their dominant position and in this respect constitutes a conflict between Articles 2 and 4 of the legislation. This conflict arises as a result of the interdependence between abuse of power and the power to abuse, and is confirmed by the American experience, on which Blair has commented that «...as the actual evidence in these cases illustrates, a dominant position in the real world is seldom achieved or even retained without abuse of power».<sup>55</sup>

Lack of appropriate data on industrial organisation in Greece is likely to impede the application of Articles 1 and 2 and the work of the Commission for the Protection of Competition. As stated, the issues are of an empirical nature and the structure-conduct-performance approach requires appropriate information if a proper evaluation of various market structures is to be made. Such information is, unfortunately, difficult to obtain in Greece. For example, there are no measurements of concentration available despite the fact that the Greek Statistical Service collects the nec-

54. This omission, however, is likely to prove a thorny problem in practice and seriously undermine the effectiveness of the antimonopoly legislation. The lack of clear criteria and specific guidance, particularly with regards to public interest, introduces necessarily a considerable element of uncertainty and confusion and there is a danger that ad hocery and possibly political expediency may dominate the Commission's discussions. Pragmatism may not be enough for the success of the new policy, as the British experience has shown.

55. J. Blair, *op cit.*, p. 568. The same argument was also used by the Court in the Alcoa case.

52. *Fifth Report on Competition Policy*, The European Communities Commission, April 1970, p. 59.

53. A.H. Herman, «Competition Bows out to Regulation in the EEC», *The Financial Times*, 11-5-1977. See also *The Times*, 20-12-1977.



essary data through the decennial industrial censuses and yearly surveys. Such knowledge, for example, through concentration ratios, is indispensable for an antitrust policy since it could provide a first indication of the extent of monopoly power in various industries. Admittedly, even this knowledge is only the beginning of the story. Further detail is required, for example of the size distribution of firms in various industries. So too is knowledge of potential competition and of barriers of entry, etc. Most of this information does not violate the confidentiality of the censuses and one can only speculate on the purposes served by its non-availability.

The cursory evaluation of antitrust policies in the United States, Britain and the EEC has shown that political expediency has played an important role in emasculating such policies. This, basically, is due to the conflict of objectives of economic policy. Antitrust priorities are likely to fare badly in relation to others superficially more pressing, a fact which further explains the emasculation. The erecting of monopolies and of monopolistic barriers is seen not only as an arguably natural defence for the firms concerned but also as defence of vital national or supranational interests. Protectionism at the micro level is soon accepted by the authorities at the macro level, and monopolies are not only tolerated but are occasionally actively encouraged, even when policies for promoting competition may coexist. The explanation of this is to be found in a contradiction contained within the free enterprise system. This is the tendency for greater centralisation and for concentration of capital which leads to increasingly bigger business units. These big units constitute the decisive vehicles of further capitalist reproduction and development. The survival and security of firms are better achieved and preserved behind monopolistic barriers, which naturally restrict the competitive forces. The competitive forces, however, are the essential principles, the firm foundations upon which the system of free enterprise is based. Destroy these and you destroy the system. One view is that «Big Business has failed to distinguish between free enterprise and private enterprise and apparently is unwilling to admit that the former is essential to the preservation of the latter».<sup>56</sup> It would appear, therefore, that big business does not believe in free enterprise. Competitors simply loathe competition. And it is not only the economic mechanism of accumulation of capital which leads to concentration of

economic power. Very often this process is actively encouraged by the authorities themselves. Under these circumstances the role of antitrust legislation in trying to regulate market activity, can at best be ambivalent. Antitrust legal rules are double-edged because although they are meant to maintain competition they also, by their nature, preserve the right of firms to grow, by which process they naturally reduce competition. «In a sense all antitrust legality leads to monopoly illegality.»<sup>57</sup>

It is not unreasonable to assume that the application of the Greek antitrust legislation might be dictated more by considerations of (justifiable?) political expediency than by anything else. If industrial giants like the US, UK and the EEC find it appropriate to use political expediency as a criterion in decision-making with respect to business policy, one can hardly blame Greece if she were to do the same. Indeed, the administrative bodies set up to implement the legislation (the Commission and the Office for the Protection of Competition) belong to the Civil Service, a fact which ensures that political expediency can be used almost at will.

The application of the Greek antimonopoly legislation is likely to be further circumscribed by the operation of other policies, such as for example Law 2687/1953 on Investment and the Protection of Foreign Capital, which offers foreign investors important privileges, thereby increasing their monopoly power. Further, it is possible for contradictions to arise in the operation of the two policies and, therefore, clashes to occur between different governmental departments empowered with their implementation.

The above considerations lead one to the conclusion that the first objective of the Greek antitrust policy, the harmonisation of the Greek legislation with that of the European Economic Community's, has already been achieved. The chances of achieving the second objective, the protection of free competition, are not good. The most that this legislation can achieve is to deal with certain restrictive practices, excesses in the area of price fixing, market sharing, etc. This kind of redress is unlikely to achieve, however, much by way of ensuring a healthier and freer competitive system in the Greek economy. The refusal to face up to the problem of monopoly, which after all is the heart of the matter, makes the present policy a rather ineffective weapon with which to protect competition. Greek businessmen need not lose any sleep over this legislation.

56. G.W. Stocking, «The Effectiveness of the Antitrust Laws», in E. Mansfield, *Monopoly Power and Economic Performance*, Revised Edition, Norton, 1968, p. 161.

57. R. Koundouros, *Multinational Enterprises and the Law Business*, Unfinished Ph. D. dissertation, Brunel University.



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