there appears to be no discernable differences between this standard and that established by the Clayton Act;

3) sections 1 and 2 of the Sherman Act have been applied to mergers, but to a lesser extent than the Clayton or FTC Acts. Section 1 refers, inter alia, to combinations "in restraint of trade or commerce among the several States or with foreign nations". Section 2 refers, inter alia, to persons who monopolize or combine to monopolize "any part of the trade or commerce among the several States or with foreign nations".

In 1992, the DOJ and the FTC jointly issued horizontal merger enforcement guidelines for the first time.[47] The unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. The DOJ has tended not to view vertical mergers with concern and its approach appears somewhat more lenient than U.S. jurisprudence.

Although U.S. case law has been predominantly concerned with the protection of domestic competition or consumers, there have been instances of protection of U.S. export and investment opportunities. In *United States vs. Western Electric Co.* (1986), the Bell-Operating Company was permitted to participate in a joint venture abroad because of the benefits to trade and balance of payments. In *United States vs. Ivaco* (1989), however, the district court rejected in principle an argument that an otherwise unlawful joint venture could be justified because it enhanced U.S. competitiveness abroad.

Sections 1 and 2 of the Sherman Act have been used to condemn mergers when they form part of a broader monopolization scheme or conspiracy to restrain trade. In this case, the merger must have a direct, substantial and reasonably foreseeable effect on U.S. commerce or on the trade of a person engaged in U.S. export trade. The latter provision, especially, by creating a specific "export trade" product market (which may or may not be appropriate in any given case) appears to open the door for suits aimed not at protecting competition but at protecting competitors.[48]

[47] Non-horizontal mergers are still covered by the DOJ's 1984 Merger Guidelines.

[48] In *Heatransfer Corp. vs. Volkswagenwerk A.G.* (1978), a U.S. manufacturer of auto air conditioners claimed that Volkswagen's acquisition of a competing U.S. manufacturer foreclosed the plaintiff from the market for air conditioners to be used in Volkswagens. The plaintiff's case dealt principally with the U.S. market, but the district court held that the alleged loss of export sales was covered under s. 7 of the Clayton Act as well as the Sherman Act. A jury verdict for the plaintiff, which included the export market, was sustained.