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## Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law

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# Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law

John Temple Lang

## **Abstract**

This article starts by looking at Article 86 of the ECC Treaty governing antitrust violations and the significance of “dominant position” in applying the Rule. The author then explains how in light of *United Brands v. Commission*, a Court of Justice of the European Communities Court, evidence of dominance may be classified in four categories. Next, the author explains the different types of abuses under Article 86. Finally, the author draws four conclusions. First, the contrast drawn by various authors between the EEC law, which prohibits abuse of a dominant position, and U.S. law, which forbids “monopolisation”, is exaggerated and inaccurate. Second, all the U.S. case law on monopolising and attempts to monopolise under section 2 of the Sherman Act is relevant to EEC law. Third, the valuable economic analyses of U.S. antitrust cases and policies is directly relevant and valuable in considering Community antitrust policy and experience, and this should encourage more comparative and economic analysis of European Community antitrust law. Fourth, if “monopolising” by a dominant enterprise is prohibited by Article 86, complaints against such behavior will be encouraged.

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## SOME ASPECTS OF ABUSE OF DOMINANT POSITIONS IN EUROPEAN COMMUNITY ANTITRUST LAW

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### I. A DOMINANT POSITION

The relevant provision of the EEC Treaty governing antitrust violations<sup>1</sup> (Treaty) can be found in Article 86.<sup>2</sup> Under Article 86,

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Advocate General Mayras said in 1972 that "it would be rash to make a systematic reapproachment between American law and Community law." *ICI v. Commission*, [1972] C. J. Comm. E. Rec. 619, 670, [1971 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161. A United States lawyer has written that "American legal precedents are too loosely cited in EEC cases." Jones, *American Anti-trust and EEC Competition Law in Comparative Perspective*, 1974 L.Q. REV. 191. Nevertheless, it has been thought useful in this article to cite a few United States cases and authors to illustrate some of the similarities and differences between the two systems of law.

1. Treaty establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 14 [hereinafter cited as EEC Treaty].

2. Article 86 reads as follows:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

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

(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage;

or

(d) the subjecting of the conclusion of a contract to the acceptance, by a

major significance is given to the concept of a "dominant position."<sup>3</sup>

A dominant position is "a position of economic strength enjoyed by the enterprise which enables it to prevent *effective* competition being maintained on the relevant market by giving it the power to behave *to an appreciable extent* independently of its competitors, customers and ultimately of its consumers."<sup>4</sup>

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party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

EEC Treaty, *supra* note 1.

3. "Whether or not a position is dominant depends in each case upon the delimitation of the 'relevant market,' for an enterprise cannot have a 'dominant position' in general, but always only in respect of certain products or services." C. OBERDORFER, A. GLEISS & M. HIRSCH, *COMMON MARKET CARTEL LAW* ¶ 206 at 73, (CCH 1963). This article does not discuss the relevant market under Article 86.

The leading cases on the relevant market are: *Continental Can v. Commission*, [1973] C.J. Comm. E. Rec. 215, at paras. 28-37, [1971-1973 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 8171; and *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at paras. 10-57, [1977-1978 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 8429. *See also* *United States v. E.I. duPont de Nemours*, 351 U.S. 377, 395 (1956). On the aspects of Article 86 covered by this paper, *see generally* J. VAN DAMME, *REGULATING THE BEHAVIOUR OF MONOPOLIES AND DOMINANT UNDERTAKINGS IN COMMUNITY LAW* (1977), especially the papers by Schröter on relevant market and dominant position. This volume was, however, published before the *United Brands* judgment of the Court. *See also* C. BELLAMY & G. CHILD, *COMMON MARKET LAW OF COMPETITION*, 160-72, 184-85 (2d ed. 1978) [hereinafter cited as C. BELLAMY & G. CHILD].

4. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 65, [1977-1978 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 8429 (emphasis added). For earlier definitions of a "dominant position," see the Commission's Memorandum on "Le problème de la Concentration dans le Marché Commun (1966)," [1976-1978 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 9800, where it is said "[a] dominant position exists on a market when one or more enterprises have the power to adopt an independent strategy influencing the decisions of other market participants so that workable and sufficiently effective competition cannot appear and maintain itself on the market." *Id.* The Commission's Memorandum also stated that market domination cannot be defined solely in terms of the market share of an enterprise or of other quantitative elements of a particular market structure. It is primarily a matter of economic potency, or the ability to exert on the operation of the market an influence that is substantial and also in principle foreseeable for the dominant enterprise. This economic ability of a dominant enterprise influences the market behaviour and the economic decisions of other enterprises, irrespective of whether it is used in a specific sense. If an enterprise is able, at its pleasure, to oust a competing enterprise from the market, it might already occupy a dominant position and exert a controlling influence upon the practises of other enterprises even if its own share of the market is still relatively small. *Id.*

In *Re United Brands*, the Commission stated:

Undertakings are in a dominant position when they have the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers. Such is the case where an undertaking's market share, either in itself or when combined with its know-

how, access to raw materials, capital or other major advantage such as trademark ownership, enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive all other market participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes, even if there are differences in the extent to which it dominates individual submarkets.

19 O.J. EUR. COMM. (No. L95) 11 (1976), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

In *Re Continental Can*, the Commission stated:

Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners, but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour, even if there are differences in intensity in their influence on the different partial markets.

. . . Continental Can's important shares in the market, its production programme covering all the part markets and some substitution products, its supply of machines for manufacturing and using its products, its technical lead and its economic and financial power based on a very large size, ensure for that undertaking possibilities of independent action which give it a very strong position on the German market in light containers for meat and fish preserves as well as in metal covers.

15 J.O. COMM. EUR. (No. L7) 25 (1972), [1970-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9481.

See also the opinion of the Advocate General in *Deutsche Grammophon v. Metro*, [1971] C.J. Comm. E. Rec. 487, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106.

According to these criteria, the position of producers and distributors of similar products must be taken into account and it must be asked whether the undertaking which is alleged to occupy a dominant position has the necessary power to impede effective competition in a considerable part of the relevant market. Thus . . . it must be considered whether it is possible for an undertaking, by virtue of its share of the market (including the shares of other undertakings belonging to the same group), its know-how, its raw materials, its capital and its exclusive rights, to determine prices for a substantial part of the common market (such as the territory of a Member State), or to control production and distribution, and whether an undertaking has scope for independent action and can act to a large extent without regard to competitors or suppliers . . . it will be possible to hold that a dominant position exists on the basis of such exclusive contracts in rare cases only, for example, if the performers in question are unusually successful and numerous exclusive contracts exist.

*Id.* at 511.

*Cf.* *United States v. Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (ability to exclude competition is a sign of monopoly power).

Briefly then, a dominant position is economic power, due to lack of competition, of which the holder can take advantage to impede effective competition. An enterprise may have a dominant position, even if effective competition has not been eliminated.<sup>5</sup>

To determine whether a dominant position exists, all facts tending to prove or disprove the market power of the enterprise must be taken into account. The effect of a series of findings may be cumulative, especially if only one enterprise on the market enjoys all of the competitive advantages considered. No single fact is necessarily decisive.<sup>6</sup>

*United Brands v. Commission*<sup>7</sup> is the leading case on the subject of dominance. United Brands, a New York corporation, is, at present, the largest group on the world banana market and accounted for 35% of world exports in 1974.<sup>8</sup> On December 17, 1975, the Commission of the European Communities (Commission) handed down a decision<sup>9</sup> which declared that United Brands had infringed Article 86 of the EEC Treaty (a) by requiring its distributor/ripeners "to refrain from selling its bananas while still green";<sup>10</sup> (b) by charging its distributor/ripeners in the various Member States "dissimilar prices for equivalent transactions";<sup>11</sup> (c) "by imposing unfair prices" for the sale of its bananas on its cus-

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5. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 113, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. In *Suiker Unie et al. v. Commission*, [1975] C.J. Comm. E. Rec. 1663, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334 [hereinafter cited as the *Sugar Cartel* cases], the Court said dominance is the power to impede the maintenance of effective competition. *Id.* at paras. 381-82. It will be seen that in Community Law as in United States antitrust law, "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco v. United States*, 328 U.S. 781, 811 (1946). In fact, it is characteristic of dominant firms that they tolerate competitors as long as they do not compete too successfully or vigorously, but react strongly against a competitor which is noticeably successful. This is relevant to anticompetitive and reprisal abuses. See notes 70-71 *infra* and accompanying text.

6. This is clear from the judgment in *United Brands v. Commission* [1978] C.J. Comm. E. Rec. 207, at paras. 63-129, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

7. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

8. *Id.* at para. 97, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

9. *Re United Brands*, 19 O.J. EUR. COMM. (No. L95) 11 (1976), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

10. *Id.* after para. 131, [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

11. *Id.*, [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

tomers;<sup>12</sup> and (d) by refusing to supply a major distributor/riper on the ground that it had taken part in an advertising campaign for bananas of a competing brand.<sup>13</sup> The Commission imposed a fine of one million units of account and ordered United Brands to bring the infringements to an end without delay.<sup>14</sup> United Brands appealed the decision to the Court of Justice of the European Communities (Court). The Court affirmed in part the decision of the Commission except that it annulled finding (c) above, of the Commission and reduced the fine to 850,000 units of account.<sup>15</sup> In light of the Court's decision in *United Brands*, evidence of dominance may be classified in four categories.

#### A. *The Features of the Allegedly Dominant Enterprise*

Characteristics of the enterprise itself may indicate that it has market power sufficient to amount to dominance. In *United Brands* the Court took into account the following characteristics of the United Brands group:<sup>16</sup>

1. United Brands was vertically integrated from its banana plantations through to the point of sale to the consumers.<sup>17</sup>

2. It had ample sources of supply for its needs from its own plantations and through links with growers producing the variety of bananas required by United Brands.<sup>18</sup>

3. It had a broad geographical spread of plantations giving it protection against the effects of hurricanes and disease.<sup>19</sup>

4. It was relatively self-sufficient in transport.<sup>20</sup>

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12. *Id.*, [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

13. *Id.*, [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

14. *Id.*, [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

15. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 309, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

16. *Id.* at paras. 58-129, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

17. *Id.* at paras. 70-71, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. Through close supervision of ripening and of both its own retailers and those of its customers, United Brands is vertically integrated from its sales to whole ripener/distributors through to the point of sales. *Id.*

18. *Id.* at paras. 72-74, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

19. *Id.* at paras. 75-76, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

20. *Id.* at paras. 78-81, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. Thus allowing it to have more frequent deliveries in Europe than any of its competitors.

5. It had a greater scope of research than its competitors.<sup>21</sup>
6. It had so stabilized the quality of its product that it ensured regular customers and consolidated its economic strength.<sup>22</sup>
7. Its limited number of customers simplified its supply policy and provided economies of scale.<sup>23</sup>
8. Its policy of delivering less than the quantities ordered maintained its position of strength.<sup>24</sup>

The Court accepted the Commission's argument that, although no one of these features alone would have been enough to show dominance, the fact that United Brands was the only enterprise in the market to have all these advantages showed that it was dominant.<sup>25</sup> How far features of these kind would give a competitive advantage will, of course, depend on the particular character of each case. The characteristics of competitive advantages will differ from industry to industry.<sup>26</sup> Also, the changing market conditions within a particular industry will alter the importance of certain features.<sup>27</sup>

#### B. *Market Shares and Effectiveness of Competition*

As to market shares in *United Brands*, the Court held that a corporation with 40-45% of the relevant market<sup>28</sup> was not thereby

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21. *Id.* at paras. 82-84, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. This has been proven by results: ". . . in this respect [its competitors] are at a disadvantage compared to [United Brands]." *Id.* at para. 84.

22. *Id.* at paras. 85-94, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. General quality control of a homogeneous product makes the advertising of the brand name effective and indeed makes it the "premier" brand name on the relevant market. *Id.* at para. 87. "The distributor cannot afford not to offer it to the consumer." *Id.* at para. 93. Through its policy of labelling in the tropics it had revolutionized the banana trade.

23. *Id.* at para. 95, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

24. *Id.* at para. 96, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

25. *Id.* at para. 66, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

26. Bananas are a relatively simple product and the effect of each feature was fairly clear without elaboration. In a more complex industry, of course, the effect of each feature could be considerably more difficult to ascertain.

27. For example, if production fluctuated, owning one's own ships might be a costly handicap when production was low, especially if the ships were specialized or for any reason could not easily be used for other purposes. If demand fluctuated, it might be advantageous to be able to ensure maximum deliveries at times of high prices.

28. The "relevant market" is the market for bananas in five of the nine European Community Member States.

automatically proved to be dominant: among other things, the strength and number of its competitors, and their market shares, were also relevant.<sup>29</sup> United Brands had a market share several times greater than that of its next largest competitor (who had 9%–16%), and in each national market it sold about twice as much as the next supplier there. United Brands' market share included sales which it made in Latin America to a major European importer-distributor which cooperated with United Brands and never competed with it in price or otherwise.

In *Hoffmann-La Roche*,<sup>30</sup> the Court said that though the significance of even a large market share would vary with the circumstances of the market, very large market shares may prove dominance unless there are exceptional circumstances.<sup>31</sup> Again, the relative sizes of the dominant firm's market share and those of its next largest competitors were stressed. For vitamin A it had 47% and its two main competitors 27% and 18%, for vitamin C it had 63-66% and its competitors 14% and 6%, and for vitamin E it had 50-64% and its competitors 16% and 6%; the Court said these figures proved dominance in each case.<sup>32</sup> The first of these three instances is interesting because the dominant firm's market share was little larger than that of United Brands' while those of its competitors were much larger than those of the competitors of United Brands.

The economic strength of United Brands, the Court stated, had enabled it to adopt a flexible overall strategy against new competitors establishing themselves on the whole of the relevant market.<sup>33</sup> The financial and practical barriers to entry on the market made effective competition impossible.<sup>34</sup> Active competition

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29. "A trader can be in a dominant position on the market for a product only if he has succeeded in winning a large part of this market. . . . This percentage does not . . . permit the conclusion that UBC automatically controls the market. [The question of dominance] must be determined having regard to the strength and number of the competitors."

United Brands v. Commission, [1978] C.J. Comm. E. Rec. 207, at paras. 107, 109-10, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

30. *Hoffmann-LaRoche v. Commission*, [1979] C.J. Comm. E. Rec. 461, 3 COMM. MKT. L.R. 211.

31. *Id.* at para. 93, 3 COMM. MKT. L.R. 211.

32. *Id.* at paras. 106-08, 3 COMM. MKT. L.R. 211.

33. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 121, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

34. The Court referred to the need for large capital investment, diverse sources of supply, efficient transport because of the product's perishability, economies of scale not available to new market entrants, and the costs and risks of market entry

against United Brands tended to be limited in space and time and relatively ineffective.<sup>35</sup> The Court also stressed that customers continued to buy more bananas from United Brands although its prices were higher.<sup>36</sup>

### C. Performance

United Brands argued that it had made losses during the relevant period and, since dominance is in essence the power to fix prices, making losses is inconsistent with the existence of a dominant position. The Court rejected this argument, saying that large profits may be made in competitive conditions, and low profits or even losses are compatible with dominance.<sup>37</sup>

High prices may be combined with modest profits, for example, if the enterprise is using profits from one source to subsidise sales of another product or in another market, or if it is inefficient, as monopolists may be, or if very heavy investment costs are being incurred. Profits are *not* a conclusive test of dominance.

Clearly, the fact that an enterprise has not charged high prices is not proof that it is not dominant. It might have used its economic power in some other way, or it might not have used it at all. But prices which clearly could not have been charged, or profits which could not have been made, in conditions of competition would of course be evidence of dominance, at least in a well established market.

### D. Behaviour

The Court in *United Brands* stated that in determining whether a dominant position exists "it may be advisable to take account if need be of the facts put forward as acts amounting to

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(setting up adequate commercial network and large scale advertising). *Id.* at para. 122, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

35. Competitors which launched sales campaigns failed to reduce United Brands' market share or substantially increase their own. United Brands nullified their efforts by reducing its prices to meet competition or by bringing indirect pressure on distributors. *Id.* at paras. 114-20, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

36. The Court stated that this was "a particular feature of the dominant position and its verification is determinative in this case." *Id.* at para. 128, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429 (emphasis added).

37. *Id.* at para. 126, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

abuses without necessarily having to acknowledge that they are abuses.”<sup>38</sup> In other words, behaviour can be evidence of dominance.

The Commission had argued that normally only an enterprise with considerable market power could successfully prohibit its customers from reselling its goods horizontally when they had a financial reason for doing so, or charge substantially different prices in the same place and circumstances, or cut off supplies because a customer had given a competitor publicity, all of which United Brands had done. The Commission had not, however, relied strongly on behavioural evidence of dominance either in its decision or in its written pleadings to the Court. This seems to be the reason why the Court gave little attention to it; the quotation above makes it clear that in appropriate cases the Court would accept such evidence.

A dominant position exists when the dominant enterprise is able to use its economic power to obtain benefits or to practise behaviour which it could not obtain or practise in conditions of reasonably effective competition, *i.e.*, that dominant power is power of which unfair advantage can be taken, or power which is great enough to be “abused.” This principle is one basis for behavioural evidence of dominance in Community law, if one is needed.<sup>39</sup> This principle also implies a link between the concept of dominance and

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38. *Id.* at para. 68, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. “[The] best and simplest evidence . . . that defendants have a requisite degree of power over market price, or over competitors’ entry, is its actual use.” Report of the Attorney General’s National Committee to Study the Antitrust Laws 48 (1955); Judge Taft, in *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899) said, “The most cogent evidence that they have this power is the fact . . . that they exercise it.” 85 F. at 292. Judge Wyzanski, in *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff’d*, 384 U.S. 563 (1966) stated, “*Hardly any indicium of monopoly power is more persuasive than the continued capacity of the asserted monopolistic combination to sustain offerings at a loss either in particular areas or in particular services or products.*” 236 F. Supp. at 254 (emphasis in original). Successfully imposing a “tie-in” in a number of cases is proof of economic power over the tying product. See *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495 (1969); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). See also Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375 (1974).

39. “It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.” *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 249, [1977-1978 Transfer Binder] COMM. MKT. REP.

the concept of abuse. For example, large financial resources would be an important aspect of dominance if the abuse charged was unfairly low pricing.

Behavioural evidence of dominance may become important in the future in appropriate cases, as well as the features of the allegedly dominant firm and the extent of competition.

#### E. *General Comment on the Concept of Dominant Position*

The Court's definition of a dominant position in *United Brands*, quoted above, implies two criteria:

1. The power to prevent "effective" competition being maintained (even if that power has not been exercised and so effective competition has not been ended), *i.e.*, power to exclude or seriously weaken competitors, or to prevent new competitors from entering the market, by raising barriers to entry.

2. The power to behave "to an appreciable extent" independently of its competitors, customers and consumers.

The words in quotes imply differences in degree and not necessarily differences in kind. The Court seems to regard these two criteria as two aspects of the same threshold. A third criterion—power to control prices—was referred to by the Commission in its *Continental Can* decision,<sup>40</sup> from part of which the Court's second criterion seems to have come.<sup>41</sup> This criterion can be considered as one aspect of the power to behave independently of others. These three criteria are all tests of the same threshold, though in any given case it may be easier or more convincing to use one rather than the others.<sup>42</sup>

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(CCH) ¶ 8429 (quoting EEC Commission Memorandum on Concentration, (1966)). The Court's comment was made in discussing excessive prices, but appears to apply equally to many other kinds of abuses.

40. *Re Continental Can*, 15 O.J. COMM. EUR. (No. L7) 25 at paras. 100-02 (1972), [1970-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9481.

41. In United States antitrust law monopolization involves "power to control prices or exclude competition." *United States v. E. I. du Pont de Nemours*, 351 U.S. 377, 391 (1956). The tests used by the Court in *United Brands* were already well established in Community law. Compare Schröter, *Le concept de position dominante*, in J. VAN DAMME, *supra* note 3, and the authorities collected therein, with Article 66(7) European Coal and Steel Community Treaty, 261 U.N.T.S. 140 (1957), which speaks of enterprises holding "a dominant position shielding them from effective competition;" and Article 85(3) EEC Treaty, *supra* note 1, which allows restrictive agreements to be approved only if *inter alia* they do not "afford . . . [the participating corporations] the possibility of eliminating competition in respect of a substantial part of the products in question."

42. "Preventing effective competition" suggests power to indulge successfully

Power to control prices does not mean power to set prices at *any* level: if it did, dominance would be possible only in respect of necessities for which the demand was totally inelastic. Power to set prices at *any* level, regardless of consumer reaction, is not normally a feature of economic power, even power which would be universally regarded as constituting dominance. In the *United Brands* case the Court held that the ability continuously to charge higher prices than competitors without loss of market share was "a particular feature," *i.e.*, a proof, of dominance, although it was clear that United Brands could not have set its prices at any level it liked. "Power to control prices" is therefore not a test which implies a threshold higher than the two tests explicitly mentioned by the Court in the *United Brands* case.

It is not power to eliminate competition which is the test of dominance, it is the power to interfere with or eliminate ("to impede the maintenance of") effective competition. This power might exist even if the dominant firm was not able to eliminate all competition. For dominance it is sufficient that one firm is able to prevent competition continuing on an effective basis: that it is able, as it were, to draw the teeth of its competitors, even if it has not in fact done so.

The Court's view that the failure of competitors' sales campaigns is evidence of dominance is important and perceptive. It is the ability to contain competition, not the ability to ignore it, which is characteristic of dominance. Dominant firms can overcome competition, but very few of them can disregard it. The power to plan and choose a controlled response to competitors' efforts, sufficient to ensure no significant long term loss of market share, is typical of dominant firms. As market leader a dominant firm is often able to adopt a strategy advantageous to itself and disadvantageous for the rest of the industry, without using overtly exclusionary practises, which will maintain its market in spite of some competition. Such a strategy may be adopted on the dominant firm's own initiative or in response to competitors' actions. Since dominance does not mean absence of competition, or even absence

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in exclusionary practises; "power to behave independently" suggests self-sufficiency and ability to implement a freely chosen strategy, to be a market leader in matters other than price (as *United Brands* undoubtedly had been), and to lead consumer preferences rather than being led by them; Commission's Decision in *Re United Brands*, 19 O.J. EUR. COMM. (No. L95) 11, at para. 76, (1976), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800.

of effective competition, clearly it does not mean freedom to disregard competition. It follows that dominance can exist even if the dominant firm is compelled to react to its competitors' activities.

There are several possible approaches to the concept of "effective" competition, based on *United Brands*. First, "effective" competition for the purposes of Article 86 is defined as competition which is effective enough to prevent the market leader or leaders from taking advantage of or abusing their respective economic powers.<sup>43</sup> While attempts to clarify such language tend to amount to circular arguments, this formula prompts a test: what would happen in this market if the allegedly dominant enterprise tried to charge a high price or to practise behaviour which it clearly could not charge or practise if competition was vigorous? If it would succeed, then this would imply dominance: if it would lose business and be compelled to alter its policy, the implication would be one of non-dominance. It will often be difficult to say what would happen if the market leader tried something it has never in fact done. But it may be possible to point to some actual practise of the corporation in question and argue that the practise could not have been successful if competition had been effective, *i.e.*, a behavioural test.

Second, "effective" competition exists when no one firm dominates the market to such an extent that it can unilaterally adopt strategies sufficient to enable it substantially to contain or overcome all sales campaigns and other competitive attacks of its competitors. (A firm is dominant when it can determine the basis on which the industry is to develop, so that it can decide on what ground it will compete in the future.)

Third, when one firm does not lose its market share even when its prices are consistently higher than those of its competitors, competition is not "effective." A fourth approach, less explicit but equally important, is if one firm enjoys many more competitive advantages or features contributing to economic strength than any other actual or potential competitor, so that it is substantially in a different class, it is able to adopt policies in its own long term interests and competition will not be effective. This is not, of course, to suggest that dominance is the freedom to overcome any imaginable competition, or to charge any imaginable price, or to adopt any

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43. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at paras. 111-29, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

conceivable policy, with impunity. Nor is it necessary for dominance that the market leader should be the only firm which makes innovations in products or marketing.

It appears that these tests of dominance are based on power, and that this power has to be considered in the light of all the circumstances of the market. No simple tests of dominance are likely to evolve, and different tests will give appropriate and convincing answers in different circumstances. But it is submitted that the Court has adopted a logical and coherent theory of dominance. Because the Court has used the words "effective competition" and power to behave "to an appreciable extent" independently, this theory is a practical one.

However, although the tests used are similar, dominance in Community law is not the same as "monopoly" in United States antitrust law.

In Community law a dominant position does not imply any criticism or blame on the firm which occupies it. Dominance can be acquired by entirely legitimate means. The mere existence of the power to exclude competition, without its exercise, is lawful under Community law. It is not necessary for the dominant defendant to prove that its dominance was "thrust upon" it or was attributable only to "superior skill, foresight and industry."<sup>44</sup> It is only the behaviour of a dominant firm which is controlled by Article 86. But, once dominant, a firm may not use unlawful methods to maintain, consolidate or strengthen its dominance. It is not absence of competition, but taking advantage of it or imposing further restrictions on competition which is unlawful.

#### F. *Dominant Positions in Narrow Markets*

A feature of Community antitrust law is the application of the concept of dominance in narrow markets. The first important case is *General Motors v. Commission*.<sup>45</sup>

The Belgian subsidiary of General Motors was the only corporation authorised by Belgian law to inspect imported GM cars and issue certificates confirming that they complied with Belgian legis-

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44. *United States v. American Tobacco*, 328 U.S. 781, 786 (1946); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

45. [1975] C.J. Comm. E. Rec. 1367, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320.

lation.<sup>46</sup> General Motors is clearly not dominant on the market for cars in Belgium. General Motors was found by the Commission to have abused its monopoly by charging excessive prices for the service of issuing the certificates.<sup>47</sup> The corporation argued that the activity of certifying was not a market in itself but was merely ancillary to the market in cars. The Court annulled the Commission's decision on another ground (the excessive price had been charged accidentally and GM had refunded the excess before the Commission's procedure had begun) but confirmed that the statutory monopoly of the power to issue certificates, combined with the freedom of the authorized corporation unilaterally to fix its price for the service, created a dominant position.<sup>48</sup> The Advocate General had stressed that the legal regime permitted intrabrand competition between the various models of GM cars certified by the Belgian corporation and gave it power to discourage imports and to discriminate in favour of cars assembled in Belgium.

Since *General Motors*, two other cases involving narrow markets have been decided by the Commission and appealed to the Court: *Hugin*<sup>49</sup> and *BP-ABC*.<sup>50</sup> The Commission found that Hugin, a Swedish company, and its wholly owned United Kingdom subsidiary occupied a dominant position on the market for spare parts for Hugin cash registers.<sup>51</sup> The importance of the case lies in this finding. The two Hugin companies had abused this dominant position by refusing to supply Hugin spare parts to Liptons, an English cash register maintenance company.

The finding that Hugin occupied a dominant position in the market for spare parts for Hugin cash registers was upheld by the Court<sup>52</sup> and in a long and detailed opinion by the Advocate General. On the facts, however, both the Court and the Advocate General rejected the finding that the refusal to supply had affected

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46. *Id.* at para. 1, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320.

47. *Re General Motors*, 18 O.J. EUR. COMM. (No. L29) 14, at para. 13 (1975), [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9705.

48. *General Motors v. Commission* [1975] C.J. Comm. E. Rec. 1367, at para. 10, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320.

49. *Re Hugin-Liptons*, 21 O.J. EUR. COMM. (No. L22), 23 (1978), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 10,007.

50. *Re BP-ABC*, 20 O.J. EUR. COMM. (No. L11) 7 (1977), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9944.

51. *Re Hugin-Liptons*, 21 O.J. EUR. COMM. (No. L22), 23, at para. 62 (1978), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 10,007.

52. *Hugin v. Commission* [1979] C.J. Comm. E. Rec. —, at para. 19, 3 COMM. MKT. L.R. 345.

trade between Member States, and the Court therefore annulled the Commission's decision.

Hugin did not have a dominant position on the market for cash registers. Hugin argued that the supply of spare parts and maintenance services was merely an aspect of the competition on the main market for cash registers. The Court said that because the behaviour criticised was the refusal to supply spare parts to independent maintenance companies, it was necessary to decide whether spare parts constituted a separate market.

Acknowledging the fact that users are unable to fit spare parts themselves, and spare parts cost little in comparison with the cost of maintenance and repair, the Court held that users are not purchasers directly on the market for spare parts. Users are, however, buyers on the market for maintenance and repair of cash registers, which is a market for services rather than for the sale of spare parts. This market for services is distinct from the market for cash registers.<sup>53</sup>

The Court accepted the Commission's argument that there was a market for spare parts at the level at which independent maintenance companies are buyers of spare parts for maintenance, repair, reconditioning and leasing out of cash registers. For all these activities a supply of spare parts is essential and there is a specific demand for Hugin spare parts, since they are not interchangeable with spare parts for cash registers of other makes. The market for Hugin spare parts was thus a separate market and was the "relevant market" in this case.<sup>54</sup>

As to whether Hugin had a dominant position on this market, Hugin had a monopoly in producing new Hugin spare parts. It was not economical for any other enterprise to produce new parts for Hugin cash registers. Hugin had argued that the practise of dismantling used cash registers to obtain spare parts was sufficient as an alternative source of supply, but the Court rejected this argument.

In the *BP* case, the Commission ruled that each refining company had a dominant position *vis-à-vis* its previous regular customers, and that BP had unlawfully discriminated against ABG, which had previously bought most of its petrol from BP.<sup>55</sup> The Court did

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53. *Id.* at para. 6, 3 COMM. MKT. L.R. 345.

54. *Id.* at paras. 7-8, 3 COMM. MKT. L.R. 345.

55. *Re BP-ABG*, 20 O.J. EUR. COMM. (No. L11) 7 at paras. 78, 101 (1977), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9944.

not decide whether BP had a dominant position in the narrow market formed only of its own customers. The Court annulled the *BP-ABG* decision without discussing or deciding the question of dominance, although it assumed *arguendo* that BP was dominant.<sup>56</sup> The Advocate General considered that BP was not dominant *vis-à-vis* its regular customers during a temporary period of shortage when other suppliers were not taking new customers. In his view, during the shortage BP would have to consider the reactions of its customers after the shortage was over. If the customers felt they had been treated badly during the shortage BP could not be dominant during the shortage. This does not say whether a temporary situation could involve dominance if, by action taken while it lasted, the allegedly dominant firm could prevent effective competition being maintained after the temporary situation was over. In the Commission's view, this was the very situation in the *BP* case. The Commission considered that BP's refusal to supply was likely to drive ABG out of the market or to force it to tie itself to one of the refining companies, thereby eliminating the only important independent petrol wholesaler in the Netherlands market. Even if that view of the facts is not accepted, it is suggested that if, during a purely temporary situation, a firm is in a position either to obtain monopoly profits or to effect competition in the long term, Article 86 should apply.<sup>57</sup>

## II. THE CONCEPT OF ABUSE UNDER ARTICLE 86

Article 86 does not define "abuse" but only gives a list of examples, corresponding to those in Article 85, of types of abuse.

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56. *BP v. Commission*, [1978] C.J. Comm. E. Rec. 1513, at para. 18, 3 COMM. MKT. L.R. 174.

57. The surprising thing about these cases is not so much the legal issues that they raise. If a distinct market for certifying services exists, and there is a monopoly on that market, it normally follows that the monopoly is capable of abuse. The surprising thing is that as a matter of antitrust enforcement policy the Commission has chosen to decide cases of so little apparent economic importance. However, it is worth adding that in the *General Motors* case the Commission saw itself as concerned with interference with parallel imports and so with division of the market, the first, worst, and best known violation in the theory of Community antitrust law (which aims to ensure the setting up of a unified common market and not merely to preserve competition). In the *BP* case, the Commission saw itself as protecting such competition as can be provided by independent distributors in highly oligopolistic industries and preventing the distributors from being eliminated or made dependent, in times of recession.

This list is not exhaustive.<sup>58</sup>

It is suggested that the law can now be summarised as follows. Behaviour of an enterprise (or more than one enterprise) occupying a dominant position may be an abuse for any one or more of the following reasons:

1. It takes advantage of its economic power so as to obtain benefits not obtainable in normal and reasonable effective competition, at the expense of the interests of customers or consumers or (in the case of one or more dominant buyers) of suppliers. These can be called "exploitative" abuses.

2. It significantly restricts intrabrand or interbrand competition, or alters the market in such a way that competition is likely to be significantly reduced, or increases or reinforces the firm's economic power. Normal legitimate competition (providing a better product or service or doing so at a lower price or on better terms) is lawful, however, even if it increases the market share or economic power of the dominant enterprise. These can be called "anticompetitive" abuses.

3. It damages or seriously interferes with the business of another enterprise. These can be called "reprisal" abuses.

These three types of infringement are not mutually exclusive. A dominant corporation could take advantage of the absence of effective competition to restrict competition further for its own benefit, thereby committing both an "exploitation" and an "anticompetitive" abuse. A reprisal can, but need not, be carried out in circumstances in which it substantially restricts competition.

Typically exploitative abuses can *only* be committed by dominant corporations, because they can be committed (or at least can be committed successfully) only in the absence of effective competition. On the other hand, anticompetitive abuses may consist of behaviour (*e.g.*, total requirements contracts) which can be engaged in by enterprises with relatively little market power, but which have serious effects on competition when engaged in by dominant firms. The latter type of behaviour, therefore, cannot constitute evidence of dominance. Exploitative abuses are prohibited even where they do not have any adverse effect on competition. There

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58. This is clear from the wording of Article 86 itself and from *Continental Can v. Commission*, [1973] C.J. Comm. E. Rec. 215, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171 and joined cases, *Commercial Solvents v. Commission*, [1974] C.J. Comm. E. Rec. 223, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209.

is no need, for example, to prove that as a result of an exploitative abuse the financial strength of a dominant enterprise would have been significantly increased and its dominance thereby strengthened.

#### A. *Exploitative Abuses*

The use of economic power by a dominant enterprise to obtain benefits which it could not have obtained if competition had been effective has generally been regarded as an abuse in EEC law, at least when the use is unfair or unreasonable.<sup>59</sup> It is precisely because monopolies tend to use their economic power in this way that their power must be controlled and exploitative abuses prohibited, even though dominant power itself is not unlawful in Community law.

The most obvious example of exploitative abuses is monopoly pricing. Article 86(a)<sup>60</sup> prohibits charging unfairly high selling prices. Except insofar as they cause the financial strength of the dominant enterprise to be increased and weaken the finances of buyers, for example, charging excessive prices has no anti-competitive effects, but it is unlawful just the same.

"Limiting production, markets or technical development to the prejudice of consumers," prohibited by Article 86(b),<sup>61</sup> deals with exploitative abuses insofar as it prevents a dominant enterprise from limiting its own production, markets or development, *e.g.*, to maintain prices or avoid making its existing products obsolete. Any other exploitative practise which resulted in direct gain to the dominant enterprise at the expense of customers or consumers would also be "unfair" and unlawful.

Exploitative abuses which do not involve monopolisation are not prohibited by United States antitrust law. Tie-ins are expressly prohibited by Article 86(d).<sup>62</sup> They are both exploitative (because a tie-in imposes on the buyer an obligation to buy something he may

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59. The definition of abuse in the Commission's Memorandum on Concentrations is discussed in: J. MEGRET, J. LOUIS, D. VIGNES & M. WAELBROECK, *LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉEN* 68-69 (1971) and the authors cited therein; Focsaneanu, *La notion d'abus dans le système de l'article 86 du Traité Instituant la CEE*, in J. VAN DAMME, *supra* note 3, at 364-77; J. TEMPLE LANG, *THE COMMON MARKET AND COMMON LAW* 426 (1966). For exploitation abuse by a monopoly buyer, see Eurofina, EEC Commission, Third Report on Competition Policy, para. 68 (1978).

60. See note 2 *supra*.

61. *Id.*

62. *Id.*

not want), and exclusionary (because it deprives competing suppliers of the goods tied of an opportunity to sell their products to the customers of the dominant firm).

Similarly, discrimination which is prohibited expressly by Article 86(c)<sup>63</sup> can produce both unlawful profit maximisation, taking advantage of market power for the benefit of the dominant firm, and anticompetitive effects insofar as it distorts competition between the customers of the dominant firm. *United Brands*, the leading case on discriminatory pricing in Community law, was argued on both grounds.

Other exploitative abuses include imposition of onerous and unreasonable terms in agreements. For example, in the *Eurofina* case<sup>64</sup> the Commission concluded that a monopoly buyer was violating Article 86 when the buyer insisted that it should have unlimited rights to all patents obtained by its suppliers as a result of contracts with it, and a right to license them to third parties without additional payment.<sup>65</sup>

In the *General Motors* case, the Court said that it might be abusive to impose "a price which is excessive in relation to the economic value of the service provided" and which discouraged parallel imports or led to unfair trade.<sup>66</sup> In that case, General Motors conceded that the price it had charged had been excessive, but the Court held that no abuse had been committed because the corporation, as soon as it discovered that the price was excessive, had refunded the excess.

The annulment by the Court of the Commission's finding of excessive prices in *United Brands* is more important. The Court began by saying it was

advisable to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. In this case, charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is such an abuse.<sup>67</sup>

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63. *Id.*

64. *Eurofina*, EEC Commission, Third Report on Competition Policy (1978).

65. See note 59 *supra*.

66. *General Motors v. Commission*, [1975] C.J. Comm. E. Rec. 1367, at para. 12, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320.

67. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at paras. 249-50, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

The Commission had relied primarily on a relatively simple argument. United Brands had admitted that its Irish prices were profitable, and the prices found excessive were very much higher. The Commission had not proved the production costs involved, however, and United Brands later claimed that the Irish prices were unprofitable when certain unforeseen losses were taken into account. The Court said that one way of determining objectively whether prices were excessive would be by comparing selling price and production cost, to calculate the profit margin: "The question to be determined is whether the difference between the costs actually incurred and the price actually charged is excessive" and if this is so "to consider whether a price has been imposed which is either unfair in itself or when compared to competing products."<sup>68</sup> The Court held that the Commission had failed, as a matter of evidence, to prove its case, but approved the cost-plus method of calculating profit.

The Court thus apparently approved two methods of establishing that prices were unfairly high: the cost-plus method and comparison with prices charged in a similar but competitive market. The latter seems to include both prices charged by one dominant firm in a competitive market, and prices charged by other firms in comparable competitive markets (subject to the "umbrella" effect, and assuming that such markets exist). The Court, however, gave no guidance as to the level at which prices should be considered excessive.

It is suggested that to be an abuse the value received must be grossly disproportionate to the value given, and outside the limits of what is reasonable. Presumably, the more necessary the goods are to their buyers, the lower the level at which prices become unlawful. There is greater scope for exploitation of dominance over necessary goods than over unnecessary luxuries.<sup>69</sup> As the demand

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68. *Id.* at para. 252, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

69. The Court has commented on prices and price differences as possible abuses of a dominant position in *Parke, Davis v. Probel Reese*, [1968] C.J. Comm. E. Rec. 72, 73-74, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8054; *Deutsche Grammophon v. Metro*, [1971] C.J. Comm. E. Rec. 487, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106, where the Court said, "[t]he difference between the . . . price and the price of the product reimported from another Member State does not necessarily suffice to disclose . . . an abuse; it may however if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse." *Id.* at 495. The same language was used in *Sirena v. Eda*,

for necessary goods is relatively inflexible, it is important that excessive prices should not be charged for necessary products or services. The difficulties of deciding the maximum "fair" price for unnecessary or luxury goods are enormously greater than for essential goods.

The Court's basic test—use of dominant power to reap benefits unobtainable in sufficiently effective competition—is not limited to price abuses or to Article 86(a), or even to exploitative abuses. It suggests that any behaviour is an abuse if it obtains benefits for the dominant firm, or imposes burdens on customers or competitors, substantially greater than would be possible if competition were effective.

### B. Reprisal Abuses

There are statements in the *United Brands* decision to the effect that behaviour designed to damage the business of another corporation may be an abuse, apparently even if it neither directly benefits the dominant enterprise nor restricts competition.<sup>70</sup> The statements, however, were made in connection with a refusal to supply a distributor on the express grounds that it had participated

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[1971] C.J. Comm. E. Rec. 69, 84-85, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 28101. In *Deutsche Grammophon* the Advocate General said:

previous decisions (in the *Parke, Davis* and *Sirena* cases) . . . make it clear that . . . abuse cannot be conclusively deduced from established differences in prices, although they may be a factor determining the existence of a situation in which there is an abuse of a dominant position if they are particularly great and cannot be justified objectively . . . it is necessary to consider not only the manufacturer's selling prices but also the retail prices, and . . . the different burdens of value added tax . . . must be taken into account and that different costs may be due to the marketing structure and to the amount of the copyright royalties to be paid to the . . . German Performing Rights Society. . . . If . . . the differences in price are considerable and disproportionate, and constitute decisive evidence of an abuse of a dominant position within the market, according to previous case-law the use of industrial property rights for the purposes of partitioning the market and the maintenance of the price difference must be held to constitute an abuse and fall within the prohibition of Article 86 of the EEC Treaty . . . the fact that in the Member State in which it occupies a dominant position it applies prices which, without any objective justification, are considerably above the price level in other Member States must be regarded as important evidence of abuse.

*Id.* at 512, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106. See also *Re Peelers Co.*, 65 F.T.C. 799 (1964); C. BELLAMY & G. CHILD, *supra* note 3, at 198.

70. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at paras. 182-83, 191-94, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

in the sales campaign of a competitor of United Brands, so that the refusal to supply discouraged interbrand competition.

It is suggested that an action by a dominant enterprise which is designed to injure another firm and which goes further than is essential merely to safeguard the legitimate interests of the former is likely to be an abuse. This would be so if the action were intended to punish or penalise the smaller firm, *e.g.*, for promoting a product of a competitor of the dominant enterprise or for making a complaint to an antitrust authority against the dominant enterprise, or to warn the smaller firm not to compete too vigorously. As such reprisals undoubtedly occur, and in any case are feared, it is important to be clear that they are normally abuses of a kind for which the Commission should be particularly ready to fine.

Such reprisals would normally be anticompetitive in intent, or at least be intended to punish or penalise procompetitive behaviour. Whether such action would be an abuse if there were no anticompetitive element is an open question. Therefore, it is not clear if reprisal abuses should be regarded as distinct from anticompetitive abuses.

### C. *Anticompetitive Abuses*

At least some of the abuses listed in Article 86 have anticompetitive effects. Limiting production, markets or technical development of firms other than the dominant enterprise implies anticompetitive behaviour. Discrimination is prohibited expressly when it puts some firms at a competitive disadvantage. Tie-ins are an abuse not only against those forced to buy goods or services they do not want with the "tying" goods which they do want, but also against competing suppliers of the goods or services "tied."<sup>71</sup> More generally, since the examples in Articles 85 and 86 are written in almost the same words, it is clear that Article 86 covers anticompetitive behaviour similar to that prohibited by Article 85 when practised jointly.

In *Continental Can*, the Court held that it was an abuse for a company already in a dominant position to strengthen its position further and to reduce the scope for competition by acquiring a competitor.<sup>72</sup> This judgment determined definitely that Article 86

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71. See *Continental Can v. Commission* [1973] C.J. Comm. E. Rec. 215, at para. 26, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

72. *Id.*, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

applied to mergers; its implications for other types of anti-competitive abuse were less discussed. Thus, if both behaviour, which takes direct advantage of dominant power, and structural measures such as mergers, which lessen competition only indirectly, are abuses, it would be irrational if behaviour which had a direct effect on competition (*e.g.*, exclusionary behaviour) were not an abuse. In *Continental Can*, the Court rejected the argument that an abuse can be committed only if dominant power is used to commit it; acquisition of a competitor by a dominant enterprise is unlawful even if it could have carried out the same acquisition if it had not been dominant. Therefore, a *fortiori* behaviour restricting competition directly and involving use of dominant power must be unlawful.

Since Article 86 clearly prohibits some abuses because they restrict competition, it would be irrational and anomalous if it did not restrict all behaviour which has that effect. Once over the threshold of dominance, an enterprise should be prevented from taking advantage of its existing market power in any way to restrict competition further. There could be no sound economic reason for preventing a dominant firm from taking advantage of its power to benefit itself by exploitative abuses while allowing it to take advantage of its power to benefit itself more, and more permanently, by exclusionary practises. "If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed."<sup>73</sup> And there could be no sound economic basis for allowing an already dominant enterprise to use some techniques of restricting competition while prohibiting others. This is particularly true of methods of restricting competition which can be practised *only* by enterprises which already have considerable market power. Also, if Article 86 were confined to classical restraints of trade or to any given list of types of behaviour, dominant firms would be able to devise new exclusionary practises and practise them with impunity. It does not appear that the practises described in Article 86 are always likely to be seriously objectionable and that by contrast other practises should be prohibited only if, in the particular circumstances, substantial competitive impact (or some other objectionable effect) can be shown.<sup>74</sup>

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73. *United States v. Griffith*, 334 U.S. 100, 108 (1948).

74. This is not the view of Siragusa, *Application of Article 86: Tying Arrangements, Refusals to Deal, Discrimination and Other Cases of Abuse*, in J. VAN

If an enterprise in a dominant position, however, is the most efficient enterprise on the relevant market, its selling prices and other normal and legitimate competitive behaviour will tend to cause its market share to increase at the expense of its competitors. This is not a violation of Article 86, as long as its behaviour is indeed confined to legitimate competition. This was pointed out by the Commission in its written arguments in the *National Carbonising* case,<sup>75</sup> and is implied by the Court's decision in *Hoffmann-LaRoche*.<sup>76</sup> Also, anticompetitive behaviour which would otherwise constitute an abuse is probably lawful if under the circumstances it is essential in the long term for the continued survival of the dominant enterprise.

The general principle that all behaviour restricting competition is an abuse is consistent with the language of the Court in describing a dominant position. The Court has repeatedly described dominance as "power to impede the maintenance of effective competition."<sup>77</sup> This power could hardly constitute the essential test of dominance if its use to impede effective competition was not, or was not necessarily, an unlawful misuse of dominant power. Apart from these arguments, the conclusion that all anticompetitive behaviour by dominant firms is unlawful can be drawn from the judgements of the Court.

Thus, in *Continental Can* the Court said that Articles 85 and 86 were "based on" Article 3(f)<sup>78</sup> which obliges the Community to

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DAMME, *supra* note 3, at 398. Yet, *prima facie*, refusals to deal and acquisition of competitors by dominant firms are probably *more* likely to have a substantial effect on competition than the practises listed in Article 86.

75. Temple Lang, *L'affaire National Carbonising*, (1977) CAHIERS DE DROIT EUROPÉEN 506, 514; reply to parliamentary questions in *Re National Carbonising*, 21 O.J. EUR. COMM. (No. L35) 8 (1976); EEC Commission, Fifth Report on Competition, Policy 60-61 (1976).

76. *Hoffmann-LaRoche v. Commission*, [1979] C.J. Comm. E. Rec. 461, 3 COMM. MKT. L.R. 211.

77. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 65, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. *But see* *Metro v. Commission*, [1977] C.J. Comm. E. Rec. 1875, 1902, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8435; *EMI v. CBS*, [1976] C.J. Comm. E. Rec. 811, 849, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8350; *Sugar Cartel* cases, [1975] C.J. Comm. E. Rec. 1663, 1978, 1994, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334; *Sirena v. Eda*, [1971] C.J. Comm. E. Rec. 69, 83, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 28101; *Deutsche Grammophon v. Metro*, [1971] C.J. Comm. E. Rec. 487, 501, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106.

78. Article 3(f): "For the purposes set out in the preceding Article, the activi-

ensure that competition is not distorted or a fortiori eliminated.<sup>79</sup>

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ties of the Community shall include, under the conditions and with the timing provided for in this Treaty. . . the establishment of a system ensuring that competition shall not be distorted in the Common Market. . . ." EEC Treaty, *supra* note 1.

79. Continental Can v. Commission, [1973] C.J. Comm. E. Rec. 215, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171, reads in part:

[t]he question is whether the word "abuse" in Article 86 refers only to practises of undertakings which may directly affect the market and are detrimental to production or sales, to purchasers or consumers, or whether this word refers also to changes in the structure of an undertaking, which lead to competition being seriously disturbed in a substantial part of the Common Market. The distinction between measures which concern the structure of the undertaking and practises which affect the market cannot be decisive, for any structural measure may influence market conditions, if it increases the size and the economic power of the undertaking. In order to answer this question, one has to go back to the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty. These problems thus cannot be solved by comparing this Article with certain provisions of the ECSC Treaty. Article 86 is part of the chapter devoted to the common rules on the Community's policy in the field of competition. This policy is based on Article 3(f) of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted. The applicant's argument . . . ignores the fact that Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. . . . But if Article 3(f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated. . . . With a view to safeguarding the principles and attaining the objectives set out in Articles 2 and 3 of the Treaty, Article 85 to 90 have laid down general rules applicable to undertakings. . . . Articles 85 and 86 seek to achieve the same aim on different levels, *viz.* the maintenance of effective competition within the Common Market. The restraint of competition which is prohibited if it is the result of behaviour falling under Article 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned. . . . The endeavour of the authors of the Treaty to maintain in the market real or potential competition even in cases in which restraints on competition are permitted, was explicitly laid down in Article 85(3)(b) of the Treaty. . . . [T]he obligation to observe the basic objectives of the Treaty, in particular that of Article 3(f), results from the obligatory force of these objectives. In any case Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim. . . . Article 86 . . . states a certain number of abusive practises which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) of Article 86(2), the provision is not only aimed at practises which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(f) of the Treaty. Abuse may therefore occur

There must be no lacuna in the antitrust law of the Treaty, stated the Court. This means that the Treaty must prohibit at least all anticompetitive behaviour which makes use of dominant power and which could not be practised if competition were effective.

In the light of this and of the similar reasoning in *Commercial Solvents*,<sup>80</sup> *United Brands* and *Hoffmann-LaRoche*, perhaps the strongest legal argument for the view that Article 86 outlaws all anticompetitive behaviour is Article 3(f) of the EEC Treaty. Once it is accepted that Article 3(f) can be used to define what practises are prohibited by Article 86, it necessarily follows that *all* behaviour (not merely mergers) which distorts or a fortiori restricts or eliminates competition is unlawful. (It also seems to follow that normal fair competition is authorised, even if it tends to allow a competitor to increase his market share towards monopoly.)

The Court in *Commercial Solvents*, basing itself on Article 3(f), held that a refusal by a monopoly to supply a customer with a raw material was contrary to Article 86 where it would have had the effect of putting that customer out of the market for products derived from the raw material in question.<sup>81</sup> It was clear that *Commercial Solvents* wished to facilitate its entry into the market for the derived product by eliminating a competitor. The question whether its refusal to supply would have been lawful if it had needed its total production of the raw material to produce the de-

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if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, *i.e.*, that only undertakings remain in the market whose behaviour depends on the dominant one. Such being the meaning and the scope of Article 86 of the EEC Treaty, the question of the link of causality raised by the applicants which in their opinion has to . . . exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above.

*Id.* at paras. 20-27.

In its Memorandum on Concentrations in 1966 the Commission said that any behaviour by a dominant firm was an abuse if it was contrary to the objectives of the Treaty (including presumably Article 3(f)) and that abuses could be committed against actual and potential competitors, suppliers, users and consumers. The Commission went on to say that pricing below cost would be an abuse if it was intended to eliminate a competitor or compel it to merge against its will or on unfavourable terms. *Italy v. Commission* [1966] C.J. Comm. E. Rec. 564, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8048.

80. *Commercial Solvents v. Commission*, [1974] C.J. Comm. E. Rec. 223, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209.

81. *Id.* at para. 25, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209.

rived product economically did not arise; no justification was pleaded.

This was a striking decision because Article 86 does not expressly prohibit refusals to supply or cessation of supplies. Clearly this was an anticompetitive abuse involving interference with inter-brand competition at the finished products level.

In the *Sugar Cartel* case,<sup>82</sup> the Court made several rulings which show that Article 86 prohibits anticompetitive abuses. The Court said that by compelling dealers to channel their exports to specific consignees or destinations and to impose these restrictions on their own customers, the dominant enterprise had restricted the outlets of the dealers and their customers. The Court held that so limiting the markets of *other* firms was a violation of Article 86(b).<sup>83</sup>

The Court also said that clauses prohibiting the handling of competing brands, if imposed on independent agents, are an abuse if the clauses consolidate the dominant position.<sup>84</sup> Even if the agents are not independent, such clauses are unlawful if competitors are thereby deprived of access to the only dealers who can market their products on an appropriate scale. The Court held that rebates given only to dealers who bought exclusively from one producer (SZV), involved both illegal discrimination (because two buyers buying the same quantity would be treated differently if one bought elsewhere as well) and limited the markets of competitors of SZV, and was also illegal because they would further consolidate SZV's dominant position.<sup>85</sup> The Court thus confirmed that Article 86(b) prohibits a dominant enterprise from limiting the markets of its customers and its competitors, and that Article 86 prohibits practises tending to strengthen an existing dominant position.

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82. [1975] C.J. Comm. E. Rec. 1663, at paras. 399, 482-83, 486, 523-27, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334.

83. *Sugar Cartel* case, [1975] C.J. Comm. E. Rec. 1663, at para. 5, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334.

84. *Id.* at para. 8, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334.

Even clauses prohibiting competition imposed by an undertaking occupying a dominant position on trade representatives may constitute an abuse, if foreign competitors find that there are no independent operators who can market the product in question on a sufficiently large scale, and are in practise forced to apply to the said undertaking's trade representatives if they wish to sell this product in the latter's sales territory, or if the said undertaking enlarges the scope of the prohibition of competition to such an extent that it no longer corresponds to the nature of the legal and economic relationship in question.

85. *Id.* at para. 7, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334.

In the *SABAM* case<sup>86</sup> the Court had to consider the principles relating to a national copyright monopoly which was said to be imposing "unfair trading conditions" contrary to Article 86(a) on authors assigning their rights to it. The Court said that a balance was needed between the maximum freedom for authors and the effective management of their copyright rights, in their own interests.<sup>87</sup> For the monopoly effectively to protect the authors' interests, their rights had to be assigned to it. Imposing on authors obligations which were not "absolutely necessary" to the aims of the monopoly and which therefore encroached unfairly on the authors' freedom to exercise their copyrights would be an abuse. The language of the Court makes it clear that this is an anticompetitive abuse, although the Court, of course, did not use that term to describe it.

In *United Brands* the Court held that there had been three abuses: a prohibition on resale by distributors of unripened bananas, a refusal to supply a distributor, and discriminatory prices. The Court ruled that a fourth abuse, excessive prices, had not been proved.<sup>88</sup>

The prohibition on resale of unripened bananas was, of course, a restraint on intrabrand competition. The Court held that it limited the markets of the dealers and was contrary to Article 86(b).<sup>89</sup> The Court also referred to the fact that the prohibition prevented the dealers from increasing their economic power *vis-à-vis* United

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86. *B.R.T. v. SABAM*, [1974] C.J. Comm. E. Rec. 313, at paras. 8-15, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8268. As the Court was acting under Article 177 of the EEC Treaty, it did not determine how the rules it laid down applied to the facts before the national court. *See also* *Sacchi v. Commission*, [1974] C.J. Comm. E. Rec. 409, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8267 (unfair or discriminatory charges or conditions imposed on advertisers by a television monopoly): Commission decision in *Re GEMA*, 14 J.O. COMM. EUR. (No. L134) 15 (1971), [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9438 (copyright society); *Van Ameyde v. V.C.I.*, [1977] C.J. Comm. E. Rec. 1091, Opinion of Advocate General at 1137, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8425.

87. *B.R.T. v. SABAM*, [1974] C.J. Comm. E. Rec. 313, at para. 8, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8268.

88. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 267, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. In *Deutsche Grammophon v. Metro*, the territorial protection when coupled with a dominant position may be an abuse. [1971] C.J. Comm. E. Rec. 487, at 512, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106. It seems likely that all behaviour by a dominant enterprise restricting exports from one Member State to another is likely to be contrary to Article 86 at least if it is combined with another abuse. C. BELLAMY & G. CHILD, *supra* note 3, at 194-195.

89. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at paras. 159-161, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

Brands, and enabled United Brands to practise discriminatory pricing.<sup>90</sup>

As to the refusal to supply a distributor, the Court said that cessation of supplies to a long standing customer is inconsistent with Articles 3(f) and 86 because it limits markets and involves discrimination.<sup>91</sup> Even a measure protecting the commercial interests of the dominant enterprise is unlawful "if its actual purpose is to strengthen this dominant position."<sup>92</sup> As the refusal to supply had been imposed because the dealer had promoted a competitor's brand, it was likely to deter interbrand competition and make United Brands' position of strength more effective.

In *Hoffmann-La Roche*<sup>93</sup> the Court held that an obligation or a promise by customers to buy all or a considerable proportion of their requirements exclusively from the dominant enterprise is an abuse, whether or not there is a corresponding obligation to give fidelity rebates. It is also an abuse if fidelity rebates are given under contract, even without any obligation on the part of the customer, or unilaterally without contract. They are incompatible with the aim of undistorted competition because they are not based on an economic service justifying them, but tend to take away or restrain customers' right of choice and to prevent other suppliers from having access to the market. Fidelity rebates discriminate between buyers who buy exclusively from the dominant seller and buyers who do not, even if they buy the same quantities. They also tend to reinforce the seller's dominant position through competition which is not based on service and is therefore distorted.

The Court gave what is in substance a definition of "abuse":

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in

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90. *Id.* at para. 160, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

91. *Id.*, at paras. 182-83 (Opinion of the Advocate General, at 335), [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

92. *Id.* at para. 189, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

93. *Hoffmann-LaRoche v. Commission*, [1979] C.J. COMM. E. REC. 461, 3 COMM. MKT. L.R. 211.

products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.<sup>94</sup>

The Court again stressed that in such a market "all additional restrictions on this competitive structure are likely to constitute an abuse of a dominant position."<sup>95</sup> After referring to Article 3(f), the Court repeated what it had said in *Commercial Solvents*: that Article 86 applies not only to practises likely to injure consumers directly but also to those which injure them indirectly by affecting the structure of effective competition.<sup>96</sup>

It will be seen that the Court has for the first time defined "abuse," and has done so in terms of anticompetitive abuses. (Only anticompetitive abuses were involved in the case: the Court certainly did not mean that exploitive behaviour is not an abuse.) All behaviour which affects the structure of a market and which restricts existing competition or prevents competition developing is an abuse, and a distinction is made between normal competitive practises with a legitimate economic justification and practises, the principal effects of which are anticompetitive.

This judgment confirms the consistency of the Court's approach to Article 86, and greatly strengthens the argument that Article 86 prohibits all exclusionary practises, whatever their nature, which restrict interbrand competition.

The *BP* case<sup>97</sup> concerned a refusal to supply during the petrol shortage in the Netherlands in 1973. Owing to the Arab boycott, the refining companies were refusing to supply new customers. It was uneconomic to import refined petrol in the Netherlands, due to maximum prices imposed by the Dutch Government. The Court pointed out that before the oil crisis BP had legitimately ended its supply contract with ABG and since then had been supplying refined petrol to ABG only as advances under a contract for refining crude oil to be provided by ABG. The Court concluded that at the crucial time ABG was only an "occasional" customer of BP for refined petrol and not a regular customer, and that BP therefore was not obliged to give ABG the same treatment as those who were

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94. *Id.* at para. 91, 3 COMM. MKT. L.R. 211.

95. *Id.* at paras. 91, 123, 3 COMM. MKT. L.R. 211.

96. *Id.* at para. 125, 3 COMM. MKT. L.R. 211.

97. *Re BP-ABG*, 20 O.J. EUR. COMM. (No. L.11) 7 (1977), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9944.

still its regular customers (which would have involved a smaller reduction in quantities supplied).<sup>98</sup> The Court said that, in the absence of special legislation, BP could not be obliged to treat ABG similarly to its other customers, without regard to the supply contracts it had entered into with them. The Court added that, through informal intervention, the Netherlands authorities had ensured that ABG obtained some supplies to keep it going during the shortage, thereby implying that BP might have had some duty to supply ABG if ABG had had no other source of supply.<sup>99</sup>

Although the judgment is not very easy to apply to other situations, the essence of it is that BP was entitled to differentiate in favour of its customers with long term contracts as opposed to a company in ABG's position, an entirely reasonable result. The Court dealt with the Commission's second argument, that BP had treated ABG worse than any other customers, even those without supply contracts, only by implying that any duty BP might have had toward ABG was ended by the fact that ABG's most vital needs were met from other sources. It could not have been suggested that BP's supply contracts had been intended to have exclusionary effects. The case, therefore, does not seem to have any implications for a situation in which a dominant firm adopts conduct with serious exclusionary effects which is not called for by its normal (*i.e.*, non-exclusionary) contractual obligations to third parties.

The *BP* case and the Court's ruling in *Sugar Cartel* on SZV's prohibition against handling competing brands both indicate, therefore, that normal commercial behaviour which is lawful if it has minimal effects on competition will be unlawful if the circumstances cause it to have serious effects on competition. In other words, the existence of the duty will depend on the degree and extent of the reasonably foreseeable effects on competition. This is an objective test.

The Court has not yet had to decide a case in which the exclusionary behaviour was said to be necessary and normal competitive practise in the interests of the dominant enterprise. The Commission, however, expressed a view on substantially this situation in the *National Carbonising* case,<sup>100</sup> although this case was withdrawn

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98. *BP v. Commission*, [1978] C.J. Comm. E. Rec. 1513, at paras. 32-33, 3 COMM. MKT. L.R. 174.

99. *Id.* at paras. 38-40, 3 COMM. MKT. L.R. 174.

100. *National Carbonising v. Commission*, [1975] C.J. Comm. E. Rec. 1193; EEC Commission Fifth Report on Competition Policy 60-61 (1976); EEC Commis-

before the Court decided the merits. National Carbonising bought coal for making domestic coke from the United Kingdom National Coal Board. The Coal Board, which also sold domestic coke, had a dominant position in Britain for both coal and coke. National Carbonising claimed that it was forced out of business because the margin between the price it had to pay for coal for making domestic coke and the market price for the coke, both of which were fixed by the Coal Board, was insufficient to allow an independent coke producer to survive. The Commission considered that there was no abuse, because coke producers also make industrial coke, the prices of which were different and on which profits could be made; the Commission concluded that the Coal Board's pricing policy on domestic coke alone could not put a coke producer out of the market.<sup>101</sup> Moreover, the Commission added *obiter*, the Coal Board could not be legally obliged to reduce its price for coal for domestic coke, because it was already selling it at a loss, and could not be obliged to increase its price for domestic coke, because to do so would damage the coal industry by causing coke consumers to change over to gas or electricity. It is clear that a dominant enterprise cannot have a duty to make a loss in order to provide a profit for a customer whose losses would otherwise exclude it from the market.<sup>102</sup> The Commission considered that what would otherwise have been an abuse was justified by the risk to the Coal Board's own business. On this view of the facts, the opinion amounts to saying that a dominant enterprise is not obliged to damage seriously its own business, and certainly is not obliged to risk its own existence in the long term, in order to keep a competitor alive. Even policies with significant exclusionary effects may be lawful if all other possible policies would seriously weaken the dominant firm *vis-à-vis* competitors not subject to the alleged exclusionary effects. Clearly, however, the interest of a dominant enterprise cannot normally outweigh substantial ill-effects on competition.

It is apparent that the entire case was based on the exclusion-

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sion, Seventh Report on Competition Policy 113-14 (1978); Temple Lang, *supra* note 75.

101. See *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975) on substitutability in production.

102. "The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business." *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

ary effect of the Coal Board's two prices in combination. No conventional restraint of trade or exclusionary practise was involved, nor was it argued that the price for coal was otherwise excessive or that the price for domestic coke was otherwise predatory.

Because Community law clearly does not object to the existence of monopoly or dominant power, it is compelled to seek a clear rule on behaviour by dominant firms. The search for such a rule will compel Community law to try to draw the line, on one hand between legitimate methods of competition which may derive some of their efficacy from the size and strength of the firm employing them, and on the other hand unlawful practises which may involve restricting significantly the scope for competitors or taking advantage of market power. The only case in which these issues have been raised, but not answered, was *National Carbonising*.

The better view seems to be that normal competitive behaviour which increases a dominant firm's market share but which neither exploits the relative absence of competition nor excludes competition (and which only increases the firm's power to exclude competition to the extent and in the manner that any increase in market share may necessarily have that effect) is lawful. Behaviour which increases market share primarily or exclusively by significantly excluding competitors and so restricting interbrand competition is not. Behaviour which tends to exclude competitors more than to sell the products of the dominant firm practising it, is unlawful. The test seems to be if the competition-restricting (*i.e.*, exclusionary effect for competitors) is greater or more important than the other effects on the customer or the dominant firm, and is significant, the practise is unlawful,<sup>103</sup> at least unless the dominant

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103. Similarly, a restrictive agreement cannot be approved under Article 85(3) if its restrictive effects outweigh the benefits to be obtained from it. On this basis, therefore, Community law also forbids "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor . . ." *Otter Tail Power Co. v. United States*, 410 U.S. 336 (1973), *reh. denied*, 411 U.S. 910 (1973); *United States v. Griffith*, 334 U.S. 100, 107 (1948).

"It is necessary to examine the economic context in which the conduct takes place to determine whether the restrictive effects outweigh the benefits. And typically the restrictive effects will vary directly with the market power of the firm involved." Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 314 (1956); "[M]arket power may be an essential ingredient in determining the propriety of some kinds of conduct which may have a business justification." Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1229 (1969).

firm could not reasonably have known of the exclusionary effects.<sup>104</sup> Neither the Commission nor the Court has hitherto spent much time discussing purpose or intent, and except for *General Motors*, the Court does not seem to have treated it as important. The entire *Continental Can* judgment implies that the test is what behaviour is objectively contrary to the Treaty. The better view is that intent is relevant when the dominant firm did not know and could not reasonably have known that its practise was anticompetitive or exploitative, and then corrected its error when it discovered it. If it knew or should have known of the anticompetitive effects of what it was doing, any intent which the law requires is sufficiently proved. However, fines may be imposed only when the violative behaviour was deliberate or negligent under Regulation 17/62.<sup>105</sup>

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For a lengthy but nevertheless incomplete list of practises which United States courts have held to be unlawful monopolising under Section 2 of the Sherman Act, see Cooper, *supra* note 38, at 445-50.

104. "[E]ven if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did." *United States v. Griffith*, 334 U.S. at 108 (1948). In *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), Judge Wyzanski said "it is a violation of [section] 2 [of the Sherman Act] for one having effective control of the market to use, or to plan to use, any exclusionary practice, even though it is not a technical restraint of trade." *Id.* at 342 (emphasis added). The words italicized may go further than the Community law but the rest of this statement probably states it accurately. But "a mixture of motives is not good enough under the rule in *Alcoa*: where 'honestly industrial' aims and exclusionary aims—or effects—go together, the latter [will] prevail legally." A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA*, 123 (2d ed. 1970). The rule as suggested in the text above does not go so far as this but corresponds to L. SULLIVAN, *HANDBOOK ON THE LAW OF ANTITRUST* 99 (1977): "a firm violates section 2 if it gains or holds monopoly power through conduct which is not a normal industrial response to market opportunities, but is primarily aimed at limiting the opportunities of competitors, so as to drive them out of the market," and cites *United States v. American Tobacco*, 221 U.S. 106 (1911). Sullivan concludes that "conduct which tends to erect barriers to the entry or expansion of other firms is exclusionary, and supplies the conduct element in the offense of monopolisation." L. SULLIVAN, *supra* at 101. See Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of the Dominant Position within the Common Market*, 53 NOTRE DAME L. REV. 768 (1978):

In *Continental Can* [t]he Court provided the Commission with the means to control anticompetitive conduct adopted by firms already enjoying a dominant position—not only horizontal mergers, but presumably any behaviour that might substantially reduce competition between existing suppliers or customers, or raise barriers to entry without conferring countervailing benefits on consumers.

*Id.* at 774-75.

105. Regulation 17/62, 13 J.O. EUR. COMM. (No. L13) 204 (1962), of which Article 15 reads as follows:

In Community law proof of some behaviour tending to exploit dominance or to restrict competition seems necessary for abuse; mere "intent and purpose"<sup>106</sup> to exclude competitors, without any

(1) The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one hundred to five thousand units of account where, wilfully or through negligence:

(a) they supply false or misleading information in an application submitted pursuant to Article 2 or in a notification made pursuant to Articles 4 and 5;

(b) they supply false information in reply to a request made pursuant to Article 11, paragraph 3 or 5, or to Article 12, or do not supply information within a time-limit fixed by a decision taken under Article 11, paragraph 5; or

(c) they submit in incomplete form, on the occasion of investigations carried out under Article 13 or Article 14, the books or other business documents required, or decline to submit to an investigation ordered by means of a decision taken pursuant to Article 14, paragraph 3.

(2) The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one thousand to one million units of account: this last figure may be increased to 10% of the turnover of the preceding business year of each of the enterprises having taken part in the infringement where these enterprises, wilfully or through negligence:

(a) have infringed the provisions of Article 85, paragraph 1, or of Article 86 of the Treaty, or

(b) have infringed a stipulation made under Article 8, paragraph 1. In determining the amount of the fine the duration of the infringement shall be considered in addition to its gravity.

(3) Article 10, paragraphs 3 to 6, shall apply.

(4) The decisions taken under paragraphs 1 and 2 shall have no penal character.

(5) The fines provided for in paragraph 2, sub-paragraph (a), may not be imposed for actions taking place:

(a) after the notification to the Commission and prior to its decision regarding the application of Article 85, paragraph 3, of the Treaty, in so far as these actions do not go beyond the limits of the activity described in the notification;

(b) prior to the notification of and within the framework of the agreements, decisions and concerted practices existing at the date of entry into force of the present Regulation, provided that this notification has been made within the time-limits laid down in Article 5, paragraph 1, and Article 7, paragraph 2.

(6) Paragraph 5 shall not apply once the Commission has informed the enterprises concerned that after a preliminary examination it considers that the conditions of Article 85, paragraph 1, of the Treaty have been fulfilled and that application of Article 85, paragraph 3, is not warranted.

C. OBERDORFER, A. GLEISS & M. HIRSCH, *COMMON MARKET CARTEL LAW* ¶ 443-44 at 148-50 (CCH 1963).

106. Justice Burton in *American Tobacco v. United States*, 328 U.S. 781, (1946) said:

A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under section 2 of the Sherman Act, for parties . . . to

act in furtherance of the intent, is not enough, although actual success in exclusion or exploitation is not necessary.

A principle along these lines would have several merits. First, it would prevent the outcome depending on evidence of subjective intent, which seems unsatisfactory in cases of single firm monopolising. Second, it should make it possible for an honest firm to tell in advance whether given behaviour is likely to be unlawful or not. Thirdly, it should not inhibit bona fide competitive behaviour provided that dominant enterprises do not try to go as close as they can to the extreme limits of the law. Fourth, it avoids (at least in relation to anticompetitive abuses) discussion of economic performance, which seems difficult ground for both advising and adjudicating lawyers, especially as economists have not so far agreed on objective practical tests of economic performance.

Community law, like United States law, will be obliged to deal with the problem of remedy where dominance has been maintained or strengthened by unlawful methods, even though it is the methods and not the dominance which are unlawful. Mere termination of the abuse, allowing the firm to retain power unlawfully acquired, may obviously be an insufficient remedy. Only to this extent does it seem that Community law is concerned with the *causes* of dominance.

#### D. *Discrimination*

It is convenient to discuss discrimination separately from other abuses.

1. Article 86(c) makes it an abuse for an enterprise in a dominant position to apply "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."<sup>107</sup> The last words suggest that the clause prohibits primarily interference with actual or potential competition between buyers, *i.e.*, second line competition.

But discrimination and differential pricing may also be unfair

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acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several States or with foreign nations, provided they also have such a power that they are able . . . to exclude actual or potential competition from the field and provided they have the intent and purpose to exercise that power. . . . [N]either proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization . . . *Id.* at 809-10.

*See also* United States v. Griffith, 334 U.S. 100, 107 (1948).

107. *See* note 2 *supra*.

under Article 86(a) or for other reasons under different legal rules.

2. An abuse occurs if "unfair" and excessive prices are charged to the customers differentiated against (an exploitative abuse). Charging such prices would not be unlawful primarily *because* of discrimination, but if the lower prices were charged in a competitive market the difference might be evidence that the higher prices were unfair, and might be unfair to the extent of the difference.

3. An abuse occurs if the lower prices are below or near cost and are exclusionary and so "unfair" under Article 86(a) (an anti-competitive abuse). Not all prices, even below cost, are exclusionary.<sup>108</sup> Even prices slightly above cost, but below any normally acceptable rate of return, at least if they are charged locally or temporarily, may have exclusionary effects. This is so especially if low prices are charged differentially to discourage potential entrants, or to punish and exclude actual entrants. Normally, potential entrants expect rather higher returns than those demanded by firms which have already invested capital in the market. In such circumstances the prices are not unlawful primarily because they are discriminatory, but evidence of differentiation may be important. Cost analysis and evidence of intent would normally be relevant.

4. An abuse occurs if the differentiation is contrary to a basic rule of fair and equal treatment of customers, *e.g.*, the rule against discrimination on the grounds of nationality. This is unlawful, even if the dominant enterprise does not benefit from the discrimination (*e.g.*, the case of a state-owned industry which discriminates in favour of its own nationals or in favour of certain trade channels or commercial operators) and even if the customers do not compete with one another.<sup>109</sup>

5. An abuse occurs if the differentiation is exclusionary in effect, *e.g.*, if a buyer is charged more or gets less if he also buys from another supplier, or if he does not buy a second product as well as the product for which the seller is dominant (a price reduction to induce a tie-in), or if a dominant buyer offers more favourable terms to a supplier if it sells to nobody else.<sup>110</sup> This is

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108. See Cooper, *supra* note 38, at 386.

109. Sacchi v. Commission, [1974] C.J. Comm. E. Rec. 409, at paras. 8, 14, 17, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8267 (the Telebiella Television case).

110. This seems clear from the Court's judgments in the *Sugar Cartel* case on SZV's rebates and in *Hoffmann-LaRoche*. See note 118 *infra*.

an abuse interfering with competitors of the dominant supplier (first line competition), and would be unlawful whether or not there was an effect on second line competition as well.

A dominant enterprise normally discriminates for its own benefit, not for the benefit of preferred customers. Price differentiation not based on cost differences, especially if supported by restrictions on resale by customers as in *United Brands*, is normally a profit maximising device.<sup>111</sup> In *United Brands* the Court upheld a finding of discriminatory pricing on the grounds that it interfered with free movement of goods, artificially separated national markets and distorted competition.<sup>112</sup> In the pleadings more emphasis had been

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111. See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955):

A single monopolist firm, or a group of firms exerting monopoly power in concert, would find it most profitable to divide up their customers and exact from each one the maximum that he could be made to pay. Such a scheme of discrimination would require that customers paying lower prices be prevented from reselling to those paying higher prices. The monopolist would need to control the product to point of final use, possibly by contract. If resale were practical, then competition among the customers would cause all the product to move through the lower-price buyers, discrimination thus tending to disappear.

Price discrimination may also take the form of predatory price cutting in selected areas or on selected products in order to eliminate competitors or to force them to follow a price or other policy. The essence of this conduct is its temporary nature; for it only exists in order that prices may eventually be raised once rivals are removed or coerced. Such predator price discrimination must, however, be carefully distinguished from vigorous competition where prices are not cut for such temporary purposes, but in order to permit more efficient firms to earn higher profits at low prices than at high prices, or for some other equally competitive reason.

*Id.* at 335.

The Commission's decision in *Re United Brands*, 19 O.J. EUR. COMM. (No. L95) 11 (1976), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9800, said: "For an undertaking in a dominant position, a policy of systematically setting prices at the highest possible level, resulting in wide price differences, cannot be objectively justified, particularly where that undertaking maintains market segregation." *Id.* at para. 97.

112. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429, reads:

Once it can be grasped that differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price levels according to the Member States, then it follows that those differences are factors which UBC only has to take into account to a limited extent since it sells a product which is always the same and at the same place to ripener/distributors who—alone—bear the risks of the consumers' market.

placed on the profits made by United Brands from its discriminatory pricing than on the distortion of second line competition, and it had been argued that the policies of United Brands put its customers at a disadvantage *vis-à-vis* United Brands by restricting their activities and weakening their bargaining power (a "vertical" competitive disadvantage, rather than a competitive disadvantage in second line competition).

In *United Brands* the Court stressed that United Brands sold only to wholesale distributor/ripeners and itself incurred none of the costs related to processing and distribution in Europe which brought about different retail prices in different countries. United Brands bore none of the risks associated with these costs, although it took them into account as precisely as it could estimate them, and it appropriated to itself each national retail price so calculated, less costs and wholesalers' and retailers' traditional profit margins. It charged all buyers in each country the same price, although their costs differed, and it refused to discuss or modify its weekly price, merely allowing buyers to reduce the quantities taken if they thought its price too high. The Court said that United Brands was legally free to take these costs and other local factors into consideration only "to a limited extent,"<sup>113</sup> presumably the extent to which a competitive seller at United Brands' level would be compelled to consider them because they would influence the price that buyers would be prepared to pay. According to the Court, United Brands was imposing weekly prices artificially calculated by reference to factors which it did not need to consider, and which it took into account only for its own advantage, *i.e.*, to obtain for itself every possible penny of profit likely to be available from the anticipated retail price for the next week although it was not itself selling retail or even to retailers. United Brands was clearly not compelled to charge the price it was charging at the level of the market at which it was charging it. It follows that the nearer to the retail level the

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The interplay of supply and demand should, owing to its nature, only be applied to each stage where it is really manifest.

The mechanisms of the market are adversely affected if the price is calculated by leaving out one stage of the market and taking into account the law of supply and demand as between the vendor and the ultimate consumer and not as between the vendor (UBC) and the purchaser (the ripener/distributors).

*Id.* at paras. 228-33.

113. *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, at para. 228, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

dominant enterprise sells, the greater the extent to which local factors may be taken into account in its final prices.

*United Brands* seems to be clear authority for the proposition that price differentiation by a dominant firm is normally unlawful if it is combined with restrictions on resale by the lower price buyers to the higher price buyers.<sup>114</sup>

Substantial price differentiation is facilitated if trade between purchasers is impossible, as in the case of most services, or impractical, as in the case of individually designed products and capital equipment. It is also likely to be unlawful, unless it can be justified, where transport costs make resale by purchasers uneconomical, and when goods are in short supply and there is no surplus available for resale by purchasers. In all these cases the imposition of different prices on different buyers, except insofar as based on different costs to the dominant enterprise, may involve taking unfair advantage of the absence of competition (including the absence of competition from low price buyers reselling to high price buyers).

*United Brands* is also clear authority for the proposition that differential prices are likely to be unlawful if the prices are imposed, manipulated or artificially calculated, and that they may be unlawful, even if neither the highest nor the lowest prices are "unfair."<sup>115</sup> This aspect of the case stresses the exploitative rather than the competition-distorting effect of the unlawful behavior.

Price differentiation is justified insofar as it is based on differences in costs paid or borne by the dominant enterprise. Insofar as the dominant enterprise incurs different production or distribution costs in different markets, they may be passed on to buyers in those markets. Genuine economies of scale in bulk deliveries may be passed on to buyers. More favourable prices may be given to buyers insofar as they agree to pay identifiable additional costs which the seller would otherwise have to bear.

Price reductions to break into a new market where the seller is not dominant are clearly lawful. Reductions to enter a new market in which the seller is nevertheless dominant could be unlawful,

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114. *Id.* at para. 232, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

115. The question of how far price differences may be justified is controversial and complex, because of the wide variety of circumstances which arise. The *United Brands* judgment is not very helpful in this respect because the situation in that case was relatively simple, as well as being somewhat unusual.

if they were exclusionary and thus "unfair" (Article 86(a)) or if buyers there were in competition with buyers elsewhere and second line competition were distorted. Local, individual or temporary price reductions by a dominant enterprise to exclude competition may be unlawful; there is no reason why a dominant enterprise should be free to compel some of its customers to subsidise its destruction or shackling of a competitor.

Even a dominant enterprise, however, probably is not obliged to charge the same price, plus local costs, throughout the Community. In some regions local supply, lower incomes or different consumer tastes may make it permanently impossible to charge as high prices as elsewhere, even though the enterprise may still be dominant in the regions in question for the product.

It is not always easy to decide if a dominant firm's low price in a given region is due to competition or to local tastes and spending habits; one useful test is what would happen if competitors' prices there were lowered further, or some other short term factor took effect.

Price discrimination in favour of an associated company, if it distorts competition between the associated company and other buyers of goods or services for which the seller has a dominant position, can constitute an abuse.<sup>116</sup> This would be so particularly if the seller was dominant in the market for both a raw material and the derived product, and was squeezing out independent producers of the derived product by depriving them of an adequate margin between the two prices.<sup>117</sup>

If the essence of the abuse is interference with second line competition, how great must be the competitive disadvantage imposed on buyers for the differentiation to be an abuse? In the *Sugar Cartel* case, a loyalty rebate of 0.3% was held sufficient to cause a competitive disadvantage as between large scale industrial buyers.<sup>118</sup> The price discrimination in *United Brands* was considerably greater, frequently amounting to between 10% and 30%. But

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116. So pleaded the Commission in *National Carbonising v. Commission*, [1975] C.J. Comm. E. Rec. 1195, 1198; EEC Commission, Fifth Report on Competition Policy 60-61 (1976). See Temple Lang, *supra* note 75, at 514.

117. This was the situation as seen by the plaintiff in *National Carbonising v. Commission*, [1975] C.J. Comm. E. Rec. 1193, 1195; EEC Commission, Fifth Report on Competition Policy 60-61 (1976).

118. *Sugar Cartel v. Commission*, [1975] C.J. Comm. E. Rec. 1663, at paras. 499-528, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334.

in each of these cases the goods sold were raw materials representing to the buyers in question a very high proportion of the costs of the finished product, and the discrimination was associated with anticompetitive measures or effects (on interbrand competition in *Sugar Cartel* and on intrabrand competition in *United Brands*).

In *United Brands* the Court accepted that distributor/ripeners of bananas in different Member States were actual or potential competitors, so that those paying higher prices were under a "competitive disadvantage" sufficient to make the express words of Article 86 applicable.

The difficulties of deciding how far and in what circumstances price differences may be justified in a Community are greater than they are in the United States.<sup>119</sup> In addition, it might be unlawful for a dominant enterprise to charge the same price throughout the Community if in fact its costs were substantially different in different places.

#### E. *Abuse by More Than One Undertaking of a Dominant Position*

Article 86 expressly prohibits any abuse by more than one undertaking of a dominant position.<sup>120</sup> This makes it clear that there may be a violation of the Treaty by several dominant enterprises in circumstances to which Article 85 does not apply, *i.e.*, where there is no collusive or concerted behaviour. Oligopoly is not, of course, itself unlawful, any more than dominance.

In any market in which a small number of large firms hold most or all of the market, the firms in question will be acutely aware of one another's behaviour. The market strategy of each must take account of the probable reactions of the others, thus they will tend to act similarly, especially if the other oligopolists' behaviour can be accurately foreseen. In particular, for example, each may limit its production so as to charge near-monopoly prices and maximise its profits.

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119. It must be remembered that the European Common Market is much less homogenous and much more divided by historical and cultural factors (as well as differences in national turnover, taxes, etc.) than the United States market. The problem of adapting price policies to diverse circumstances while keeping within the law is therefore felt to be greater in Europe than in the United States. In particular, it is complicated by different currencies having varying exchange rates within the Community market, and by the fact that several Community member states operate various kinds of price controls.

120. See note 2 *supra*.

Several authors have suggested that Article 86 applies to an abuse by a small number of enterprises in an oligopolistic market, even if no one of them has overall dominance, when all behave in a parallel manner even without any concerted practise between them.<sup>121</sup> For example, if all the members of an oligopoly charge excessive prices for their products, this can occur over a significant period of time only if there is no significant price competition between them (and no significant price competition from outside the oligopoly). Excessive prices and absence of price competition might coexist with competition between the members of the oligopoly in other respects (although if competition is vigorous enough it will usually manifest itself as price competition, in the absence of an agreement or concerted practise, if profit margins are large). Article 86 seems to be applicable both when there is no competition between oligopolists and when the only competition between them, for whatever reason, does not have the effect of eliminating the collective behaviour complained of. In other words, if all the oligopolists practise the behaviour which is said to be abusive, the fact that there may be competition between the oligopolists in other respects is irrelevant.

It will be seen from this analysis that the abuse cannot be totally separated from the question of the existence of the collective dominant position. Most abuses of dominant power occur because competition is not sufficient to prevent them. If there is competition between the members of an oligopoly, this may prevent the abuse of the members' power (if it is vigorous enough). If it does not and there is indeed abuse, it will be because the competition between the oligopolists is not effective or has not related to the practises which are said to be abuses, *i.e.*, because the oligopolists have all behaved in the way which is said to be an abuse. In practise, it seems likely that exploitative abuses against consumers will normally occur when there is relatively little competition between the oligopolists, but this would not necessarily be true of exclusionary abuses injuring primarily competitors.

This conclusion, which is valid for both types of abuse, seems reasonable. If market power is being used in the same way by a number of enterprises, the fact that the users of it are not a mono-

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121. MEGRET, et al., *supra* note 59, at 73-74. See C. BELLAMY & G. CHILD, *supra* note 3, at 183; Schröter, *Le Concept de Position Dominante dans L'Application des Articles 66 paragraphs 7 du Traité CEE*, in J. VAN DAMME, *supra* note 3, at 44, 456. See also *Re Kellogg Co.*, 81 F.T.C. 1031 (1972).

lithic bloc in other respects does not make the market power any less real or any less liable to abuse.

If it is not necessary that there should be no competition between several enterprises in order for them to occupy a dominant position, what are the tests of a collective dominant position? Basically, the tests of market power are the same whether it is held by one or more enterprises. The power to behave independently of outsiders, to exclude competition, to determine prices or to control a significant proportion of total production or distribution, without being subject to the influence of competitors, purchasers or suppliers, may be exercised collectively. If dominant power is power which is great enough to be abused, then collective dominant power is power which may be abused collectively. It is useful to ask the question: if those whose market power is in question were all to act in a certain way, what could happen and who would stop them?

Clearly one member of an oligopoly may stop them, by acting differently from the others, *e.g.*, by failing to raise its prices when the others do, or by cutting its prices when all prices had been the same. If it does so, it may force its competitors to bring themselves into line with it. But if this occurs the oligopoly is not behaving, in the relevant respect, as an oligopoly. What has to be assessed is the market power of the members when, for any reason, they act similarly, *i.e.*, their aggregate market power *vis-à-vis* non-members.

Oligopolists may fear competition from one another more than from smaller companies. Therefore, they all have strong reasons for avoiding costly forms of competition among themselves, such as price cutting, of which they cannot limit the cost and of which outsiders can take advantage. If they sell undifferentiated consumer products, they typically compete by advertising. It is because members of an oligopoly selling products have similar interests that they tend to act similarly (without necessarily having a concerted practise that they will do so) and that they tend to compete only in strictly limited ways. Oligopolists often are more anxious to avoid excessive competition with one another than they are to increase their market share. They may even fear that if they do not join in a general price increase, their competitors may have more funds for advertising and that advertising thus financed will outweigh their price advantage.

Competition between the oligopolists may cause behaviour

excluding outsiders. If some members of an oligopoly practise exclusionary behaviour which restricts interbrand competition (total requirements contracts, tying clauses, fidelity rebates, etc.), the other members may feel compelled to do the same for fear of being deprived of too many of their customers. If all members of the oligopoly adopt these practises, the barriers to entry into the industry will be substantially increased; the market shares of the oligopolists will become more rigid and competition between the oligopolists may be reduced.

Clearly, if all the members of an oligopoly adopt the same practises (such as exclusive distributorship agreements), the effect on a potential entrant into the market will be similar to that of an equal number of exclusive distribution agreements entered into by a single enterprise with the same market share as all the oligopolists in the aggregate. The effect may not be identical, however; a distributor whose agreement had expired might consider himself unable to do business without the products of a single dominant enterprise, but might be more willing to do business with a new entrant if, in any case, he was able to stock the products of only one of several oligopolists at a time. Insofar as the effects of the oligopolists' practises on an outsider are concerned, therefore, the extent or the nature of competition between the oligopolists may be irrelevant if they all practise exclusionary behaviour which makes it impossible or difficult for him to enter the market. In other words, if all the oligopolists practise the exclusionary behaviour in question, the fact that there may be competition between the oligopolists in other respects is irrelevant. But, in some industries, it may be more important to maintain competition as far as possible between the oligopolists rather than seeking to protect the possibility of further entry, and exclusionary vertical practises might assist competition between the oligopolists.

On this analysis, even the smallest member of an oligopoly may be bound by the duties of dominant enterprises under Article 86, even though considered alone it is clearly not dominant. The smallest member of an oligopoly may plead that it is compelled to imitate the practises of the larger oligopolists, but if these are abuses, even a company with a small market share (if indeed it should be regarded as a member of an oligopoly at all) must not commit them. The gravity of its offense might well be less than that of the market leader, of course, and the Commission would hardly attack a small oligopolist without previously or simultane-

ously attacking all the larger ones. This would mean, for example, that even the smallest oligopolist may not indulge in exclusionary pricing to eliminate a smaller non-oligopolist competitor from the market.<sup>122</sup>

### III. PRACTICAL CONSEQUENCES AND COMMENTS

Several specific conclusions can be drawn. First, the contrast drawn by various authors between EEC law which prohibits abuse of a dominant position and United States law which forbids "monopolisation" is exaggerated and inaccurate. EEC law also prohibits monopolising by "dominant" enterprises. This seems to be a case of what biologists call convergent evolution.

Second, all the United States case law on monopolising and attempts to monopolise under section 2 of the Sherman Act is relevant to EEC law, as well as the case law under section 1 of the Sherman Act and under the Clayton Act. This does not mean that the United States case law will necessarily be followed by the Court of Justice or by the Commission, but merely that it becomes necessary to look at it.

Third, the valuable economic analyses of United States anti-trust cases and policies is directly relevant and valuable in considering Community antitrust policy and experience, and this should encourage more comparative and economic analysis of European Community antitrust law.

Fourth, if "monopolising" by a dominant enterprise is prohibited by Article 86, complaints against such behaviour will be encouraged.

In the longer term, problems will arise in deciding what remedies are appropriate when an enterprise is found to have substantially strengthened an already dominant position by practises prohibited by Article 86. It might be insufficient, in a serious case, merely to fine the enterprise and to order it to stop the practises in question, thus allowing it to continue to enjoy the market power it had unlawfully obtained; in a very serious case, divestiture might be appropriate. It is clear that if a dominant enterprise has carried out an illegal merger, divestiture will be ordered. But the appropriate remedy is more difficult where the violation has been a continuing practise and the improper increase in market power has

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122. Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974).

come about gradually. This problem already arises, of course, under those of the examples of abuses given in Article 86 which clearly restrict competition as well as or instead of constituting exploitative abuses. Fortunately, the Commission has a very wide power to order whatever remedy may be appropriate. The Court has held that the Commission's power to order the infringement brought to an end "must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld, as well as prohibiting the continuation of certain actions, practises or situations."<sup>123</sup> In that case (an unlawful refusal to supply) the Court went on to hold that the Commission had been correct in ordering deliveries of specified minimum quantities and ordering the corporation to make long term proposals to prevent repetition of the unlawful conduct.

The latter holding approves a useful device; in a decision ruling that an abuse has been committed, the Commission orders the firms to submit a plan for ensuring that it will not recur.<sup>124</sup> This, of course, may not avoid the necessity of ultimately imposing a remedy on the firm, by a second decision, if nothing equivalent to a consent decree on the remedy can be reached. But it offers the advantage that the remedy can be worked out by an administrative authority equipped to investigate the industry and to hold hearings (*e.g.*, of economists, competitors and consumers) subject, of course, to review by the Court of any decision ultimately imposing a remedy. This is probably more satisfactory than the United States practise of having the Court itself settle the remedy in a civil action. In particular, it is certainly much more convenient for the Commission to supervise the implementation of a complex remedy decision by a dominant firm than it would be for a court in the United States. Subject to this, United States experience with antitrust remedies will be useful in Europe in the future. For example, dives-

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123. *Commercial Solvents v. Commission*, [1974] C.J. Comm. E. Rec. 223, at 255, paras. 45-46, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209. See the opinion of the Advocate General in *United Brands v. Commission*, [1978] C.J. Comm. E. Rec. 207, 342, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429. In Article 85 cases, the Commission has often considered it necessary to forbid a variety of practises rather wider than that found to have been committed. This is obviously necessary to prevent companies later adopting similar but not identical practises, or practises with similar economic effects. The same type of formulation might be necessary in cases under Article 86 where the abuse condemned was capable of being practised in a variety of different ways.

titute and compulsory licensing of patents will certainly be considered as remedies in appropriate cases.

Since Article 86 prohibits *both* exploitation of a dominant position and behaviour which reduces competition, there are arguments which suggest that the Commission should try to direct its enforcement activities against anticompetitive behaviour rather than exploitation.<sup>125</sup> It is unlikely that the Commission, with its very limited manpower, could punish even a large proportion of the examples of illegal exploitation which may occur, especially since exploitation cases are likely to be even more complex and difficult than cases of anticompetitive abuses. Greater market power increases the scope for illegal exploitation and some, perhaps much, exploitation could probably be prevented by discouraging improper means of enlarging market power. Also, once improperly acquired, it is difficult to reduce market power or to recreate competition by administrative measures. Another consideration is that insofar as anticompetitive behaviour is directed against a particular victim company (as in the ECSC contested merger case, *Commercial Solvents*, *ABG-BP*, *United Brands-Olesen*, *Hugin* and *National Carbonising*, all cases of behaviour with specially serious effects on individual companies), the companies concerned should be able to protect themselves by civil actions in national courts for compensation or injunctions, although it is not yet completely clear how far the national laws of the nine Member States make this possible.<sup>126</sup>

In cases where behaviour specially prejudicing an individual company is clearly illegal, it might be appropriate for the Commission to claim and exercise power to grant interim measures of protection. The Commission clearly has these powers under the ECSC Treaty,<sup>127</sup> and if the Commission indeed has similar powers under the EEC Treaty, the dominant enterprises concerned might not

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124. *Re Continental Can*, 15 O.J. EUR. COMM. (No. L7) 25 (1972), [1970-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9581; *Re Commercial Solvents*, 15 O.J. EUR. COMM. (No. L299) 51 (1972), [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9543; *Re Hugin-Liptons*, 21 O.J. EUR. COMM. (No. L22) 23 (1978), [1976-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 10,007.

125. See Monopolkommission, Sondergutachten 1: Anwendung und Möglichkeiten der Missbrauchsaufsicht über Marktbeherrschende Unternehmen seit Inkrafttreten der Kartellgesetznovelle (1975).

126. See La répartition des conséquences dommageables d'une violation des articles 85 et 86 due Traité instituant la CEE (EEC Commission, Série concurrence, 1966); Temple Lang, *supra* note 75, at 474-82.

127. *National Carbonising v. Commission*, [1975] C.J. Comm. E. Rec. 1193; EEC Commission, Fifth Report on Competition Policy 60-61 (1976).

always think it worthwhile to try to insist on obtaining a definitive decision. (The disputes between Commercial Solvents and Zoja and between United Brands and Olesen, for example, were settled after the Commission's procedure had begun but before the cases were finally dealt with by the Court of Justice.) If this were so, the Commission might be able to give its attention primarily to cases brought, for example, to protect consumers or the public interest in continued competition. The Commission also has power to propose a directive harmonising the national law remedies of firms injured by violations of Community antitrust law, but has not yet done so.

There is another advantage in the Commission concentrating on "monopolising practices" rather than "exploitation" of market power. It is not an impossible task for an administrative body and a Court to determine whether or not a particular practise interferes with intrabrand or interbrand competition. It is often a very difficult task to determine whether a given level of prices is excessive and "unfair;" such questions involve considerations of ethics and of economic policy rather than readily justifiable issues, and this difficulty is not fully overcome by having cases determined initially by an administrative body and reviewed by the Court of Justice.

Notwithstanding, the Article 86 prohibition on unfair and excessive prices must not and will not be made a dead letter. In the United States the court will not determine the reasonableness of prices, but in the United States monopoly power, not merely its abuse, may be unlawful. In the EEC, monopoly power is clearly lawful, and therefore the need to prevent its exploitation is greater than in the United States. The Commission could not abandon its duty to enforce Article 86 against exploitative abuses, even if it wished to do so.

Any corporation which has complained to the Commission about an alleged violation of Community antitrust rules may sue the Commission if its complaint is not satisfied. This seems to be the result of *Metro-Grossmarkte v. Commission*,<sup>128</sup> which implies that the Commission has a legal duty to deal in some way with every complaint of an antitrust violation made to it, and is not free to choose to deal only with major cases, leaving the complainant to its

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128. [1977] C.J. Comm. E. Rec. 1875, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8435; Temple Lang, *The Position of Third Parties in EEC Competition Cases*, 3 EUR. L. REV. 177 (1978).

remedies in the national courts. This question is unresolved, not least because the extent and nature of the remedies available before national courts have been virtually unexplored.

Threats by a dominant enterprise to use industrial or commercial property rights to divide up the Common Market, in circumstances where this is clearly contrary to Articles 30 and 36 of the EEC Treaty, could also be a violation of Article 86. If this occurred, the enterprise involved might be liable to fines and to civil actions for compensation, neither of which is possible under Articles 30 and 36.

In any case, it is clear that enterprises which are increasing their market power, and are at or near the threshold of dominance, need to review their market position and market behaviour more widely and more carefully than hitherto.

If Article 86 prohibits all behaviour, whatever its nature, which has sufficiently substantial effects on competition (at least when no strong justification can be shown), otherwise lawful practices that unnecessarily exclude competition are unlawful. To determine whether any given behaviour violates Article 86, its effects and not merely its nature must be looked at. This is nothing new for United States corporations accustomed to avoiding what might seem to be "monopolising." Taken together with the *United Brands* decision on what constitutes a dominant position, this involves a very significant increase in the practical importance of Article 86 for many corporations and necessitates a major widening of the antitrust compliance programmes of companies in Europe.