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ANTITRUST LAW OF THE EUROPEAN ECONOMIC COMMUNITY – AN INTERPRETATION OF ARTICLES 85 AND 86 OF THE TREATY OF ROME

I. INTRODUCTION

The antitrust law of the European Community (EEC) is fundamentally different from that of the United States. Free and unimpeded competition is not the purpose of the EEC law, but rather is a tool to achieve its goal. That goal is an improved standard of living among the member states, promoted in part by greater market integration. Where competition inhibits growth, however, the former must give way. This balancing process is the essence of European Community antitrust law.

EEC antitrust law is derived from the Treaty of Rome which established the Community in 1958.[1] The competition rules are contained

1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 1, 1 COMM. MKT. REP. (CCH) para. 151. For a general introduction *see* Norton, *Overview of European Community Law: A Primer for Businessmen and Attorneys*, 29 SW. L.J. 347, 348 (1975) [hereinafter cited as Norton].

in articles 85-94. Those articles are summarized as follows: article 85 — restrictive trade practices; article 86 — abuse of a dominant position; articles 87-89 — implementation of articles 85 and 86; article 90 — rules concerning public enterprises; article 91 — transitional anti-dumping rules; and articles 92-94 — rules on state aids.[2] The European Community Commission, in accordance with article 89, is the body which applies the trade restraint and monopoly rules. It has broad powers to investigate alleged violations of articles 85 and 86. If a violation is substantiated, the Commission makes recommendations to correct the conduct. If the recommendations are not followed, a formal decision indicating the existence of a violation and providing for enforcement will be promulgated. Regulation 17, issued pursuant to article 87, provides for enforcement methods such as negative clearances, notification and the requirement that infringement be terminated.[3] These sanctions and methods of control, as well as the option to impose fines, are within the authority of the Commission.[4] It should be noted, however, that enforcement is entirely civil and that it pertains only to corporations. There are no provisions for criminal enforcement or private treble damage suits as in the United States.[5] The decisions of the Commission are subject to ultimate review by the European Court of Justice. Finally, the Treaty of Rome allows the coexistence of national antitrust laws where they do not conflict with those of the European Community; otherwise, it declares that Community laws are supreme.

The primary antitrust provisions are articles 85 and 86 of the Treaty of Rome upon which this discussion will solely focus.

II. ARTICLE 85 — RESTRICTIVE TRADE PRACTICES

Article 85 consists of three parts: section one prohibits certain activities; section two pronounces contracts involving those activities void; and section three provides for exemptions from section one under particular circumstances. In combination, these sections prevent behavior which would be detrimental to the integration and growth of the Common Market. Each section will be dealt with separately.

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2. *Id.* at 365, n.10.

3. Wolfe & Montauk, *Antitrust on the European Economic Community: an Analysis of Recent Developments in the Court of Justice,* 18 SANTA CLARA L. REV. 349, 413 (1978) [hereinafter cited as Wolfe].

4. Norton, *supra* note 1, at 375.

5. Burns, *Antitrust Under the Treaty of Rome,* 11 INT'L LAW. 369, 371 (1977) [hereinafter cited as Burns].

A. *Article 85(1) — Prohibitions*

Article 85(1) prohibits "all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. . . ." Four requirements must be satisfied for the section to be applicable. First, there must be an agreement, a decision of an association, or a concerted practice. Second, there must be more than one undertaking involved, *i.e.*, there must be a plurality of actors. Third, the conduct must be such that it actually or potentially affects trade between member states. And fourth, the object or effect of the conduct must be to prevent, distort or restrict competition within the Common Market.[6]

The language used in the Treaty is rarely defined by it. For the most part, definitions are derived from cases. "Undertaking" refers to "any economic unit"[7] and is identified by the legal entity owning it.[8] Accordingly, where one legal entity has a substantial amount of control over another, the two are considered as a single undertaking.[9] This interpretation results in the presumption that there can be no agreement between a parent corporation and its subsidiary and that if two parties are not independent of each other, the degree of control can be such that an "agreement" cannot exist.[10] In this respect the Common Market rule differs from United States antitrust laws which can find the requisite plurality of action in an intracorporate conspiracy. This apparent shortcoming in the law is, however, compensated for in that a parent may be held responsible for the anticompetitive conduct of its subsidiary.[11] Hence, an "undertaking" is defined by the bounds of its control. Finally, the undertaking itself need not be incorporated in the Common Market. Rather, it is sufficient for purposes of article 85(1) that its behavior be manifested in the Common Market.[12] An undertaking is judged by its impact among the Member States.

An "agreement" will be found whenever at least one party accepts an obligation. The Commission will look at understandings between the parties in relation to the subject matter. The transaction need not be legally binding or labeled an "agreement" for it to be deemed an

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6. Wolfe, *supra* note 3, at 352.
7. Norton, *supra* note 1, at 367.
8. D. BAROUNOS, D. HALL & J. JAMES, EEC ANTITRUST LAW, 23 (1975) [hereinafter cited as BAROUNOS].
9. *Id.* at 23.
10. *Id.* at 17.
11. Norton, *supra* note 1, at 367.
12. BAROUNOS, *supra* note 8, at 24.

"agreement" within the meaning of the Treaty. And agreements may be horizontal (between parties transacting on the same level), vertical (between parties of different trading levels, *e.g.*, manufacturer and retailer), or partly horizontal and partly vertical.[13]

Where a transaction does not fall within the meaning of an agreement, it may still be within the purview of article 85(1) as a "concerted practice." A concerted practice is an "informal combination" resulting in cooperation.[14] The Commission looks at behavior rather than written agreements. Parallel behavior is compelling evidence of a concerted practice, but is not, in itself, conclusive.[15] The determination is made from the aggregate of the circumstances.

Article 85(1) is not applicable unless the conduct in question "may affect trade between Member States." "May" is viewed as a "sufficient degree of probability."[16] "Trade" is "commercial intercourse" and can be actual as well as potential thus it is construed as commerce in the broadest sense.[17] Trade is "affected" whenever natural competition is impeded, the conduct changes the process of trade, and unification of the Common Market is directly or indirectly impaired.[18] It has been stated that "[t]he policy of the EEC is that trade between member states should flow along natural channels resulting from the interplay of the laws of supply and demand across national borders of member states . . . and to the extent that this does not occur such trade has been prejudiced or affected."[19] Conduct is "between the Member States" whenever trade involves two or more of the Common Market countries. (The Common Market countries are Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.)

Finally, the conduct must have as its "object or effect the prevention, restriction or distortion of competition within the Common Market." Under this clause, the first question is whether the conduct has as its object the restriction of competition. If answered affirmatively, it must then be determined whether the restriction is perceptible. It is perceptible when its effects will be felt by participants, other than parties to the agreement, in the relevant market, and by consumers. If the effect is

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13. *Id.* at 16-17.
14. Norton, *supra* note 1, at 367.
15. BAROUNOS, *supra* note 8, at 21.
16. *Id.* at 30.
17. *Id.* at 27.
18. Norton, *supra* note 1, at 368.
19. BAROUNOS, *supra* note 8, at 31.

insignificant, article 85(1) does not apply.[20] Where the restriction of competition is not the object of an agreement, it must still be questioned as to its effect. Where an agreement in fact perceptibly restricts competition, actual as well as potential, it is within the ambit of article 85.[21] The language "prevention, restriction or distortion" is used so that any manner in which competition may be affected is covered by the Treaty.[22] Finally, conduct has an effect "within the Common Market" when the relevant market which is affected is at least partially within the geographical area of the Common Market countries. Again, the domicile of the parties is irrelevant; rather, it is the location affected by their conduct which is determinative.[23] Article 85(1) does not apply where the effect is felt wholly outside the Common Market.

After stating the general prohibition, article 85(1) then enumerates activities which are specifically violative of Common Market competition laws. The purpose of this list is to illustrate by example. It is not exhaustive; nor is it meant to limit article 85 to these activities.

1. Specific Proscribed Activities

Article 85(1)(a) prohibits price fixing and any other trading conditions. The price fixing can be horizontal, *i.e.*, between competitors, or vertical, as in resale price maintenance.[24] Agreements which impose penalties for price undercutting, even though they do not fix specific prices, are included. And direct as well as indirect effects are investigated in determining a violation.[25] "Other trading conditions" includes import and export prohibitions or terms that affect import and export behavior. Restrictions as to use of publicity and descriptions of goods, and requirements for use of trademark are also included. If an undertaking restricts market access by trading only with others having certain qualifications, this is similarly violative. Such conduct is, however, permissive where technical qualifications are required.[26]

Article 85(1)(b) prohibits activities which "limit or control production, markets, technical development, or investment." The following are included under this subsection:

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20. Norton, *supra* note 1, at 368.
21. BAROUNOS, *supra* note 8, at 40–41.
22. *Id.* at 35.
23. *Id.* at 44.
24. Under such agreements the seller fixes the price at which his buyer can resell the products.
25. Norton, *supra* note 1, at 105.
26. BAROUNOS, *supra* note 8, at 47-53.

1. Quotas such as those used in market sharing agreements;
2. Agreements not to produce certain types of goods (specialization);
3. Exclusive distribution agreements, as where a manufacturer sells only to one distributor in the Common Market, or to one portion of the Market;
4. Joint selling and purchasing, *i.e.*, reciprocal agreements to buy and sell entered into on a non-competitive basis.
5. Agreements to limit investment, *e.g.*, not to expand the industry.[27]

These activities tend to divide up or limit markets thereby curtailing competition.

Article 85(1)(c) prohibits sharing markets or sources of supplies. Market sharing has the effect of dividing up territories or allocating quotas. As a consequence, competition and market access may be inhibited, and Common Market integration impeded. These agreements also can be vertical or horizontal.[28]

Subsection (d) prohibits discrimination, *viz.*, applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." Subsection (e) prohibits tying which makes "the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Certain agreements are regarded as beyond the scope of article 85(1). If an agreement satisfies certain conditions the Commission will not find an article 85 violation. Generally, such agreements are those which do not have an adverse effect on the common market in that they either promote, or simply do not prevent, its growth.

Parties to an agreement may, nevertheless, apply to the Commission for a negative clearance. If granted, the Commission in effect certifies that there is no cause to invoke either article 85 or article 86. The Commission does not investigate the agreement — rather, the facts are presented by the parties. The certification is granted if the object or effect of the agreement is not to appreciably restrict competition and may be revised if new information arises or if the law changes.[29] However, if the agreement does have such an object or effect, certification may still be granted if the effect on the member states is not perceptible.[30] Some

27. *Id.* at 54-57.
28. *Id.* at 57-63.
29. Wolfe, *supra* note 3, at 413-414.
30. BAROUNOS, *supra* note 8, at 254.

writers contend that the negative clearance is "illusory," since it may be revised at any time and, most notably, since it is not binding on the municipal courts of member states.[31]

Where an agreement is "notified" to the Commission, it is beyond article 85's reach for a limited period of time. Most agreements have to be notified if the parties wish an article 85(3) exemption. Once the notification procedure is completed, the parties are exempt from fines until the Commission issues its decision.[32]

Article 85(1) does not apply to four specific classes of agreements. First, exclusive agency agreements are not covered. Where one undertaking acts exclusively on behalf of another — the principal — there is no restriction on competition, hence no violation.[33] Second, agreements of minor importance are excluded. Again, by definition, these are agreements which have no perceptible effect on trade or restriction of competition.[34] Third, cooperation agreements are beyond the purview of article 85 because they further market efficiency and growth. Such agreements are used for an exchange of opinion, joint research, cooperation in accounting matters, and so forth.[35] And fourth, as indicated above, agreements between parent and subsidiary corporations are excluded. However, if the parent conducts its business through subsidiaries which are capable of making an independent choice, a plurality can be found and article 85 would apply.

B. Article 85(2) — Effects of Prohibition

Article 85(2) provides that agreements, decisions or concerted practices which violate 85(1) "shall be automatically void." A prior decision of the Commission or Court of Justice is not necessary and violative agreements are subject to Commission proceedings.[36] Two questions arise from this language. First, is a violative agreement void retroactively and, if so, to what date; and second, what consequences attach to a void agreement? The Treaty is silent on each of these questions, consequently the answers must be derived from case law.

The time at which a violative agreement becomes void depends on the type of agreement involved. The following definitions are necessary to the determination. An "old agreement" is one entered into before March 13,

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31. Norton, *supra* note 1, at 368.
32. Wolfe, *supra* note 3, at 414.
33. BAROUNOS, *supra* note 8, at 70.
34. *Id.* at 74.
35. *Id.* at 79.
36. Norton, *supra* note 1, at 369.

1962 (the date on which Regulation 17 became effective). An "accession agreement" is one brought within article 85 on, and entered into prior to, January 1, 1973 (the date of the accession of the United Kingdom, Denmark and Ireland to the Common Market). A "new agreement" is one entered into on or after March 13, 1962, and which is not an accession agreement. An agreement is "notifiable" if Regulation 17 requires it to be notified before it can be held exempt under article 85(3). A "non-notifiable agreement" is one that need not be notified pursuant to Regulation 17.[37]

It is posited by Barounos, *et al.*, that after the *de Haecht* opinion,[38] the following consequences attach to void agreements falling within the above classifications.[38] Old agreements and accession agreements which are either non-notifiable or notifiable and duly notified are valid until the date on which the Commission or a national court adjudicates them in violation of article 85(1).

The Barounos proposition may of course be amended by subsequent Commission and Court of Justice decisions. Old agreements found to infringe article 85 which are notifiable and not notified are void from March 13, 1962. Similarly, such accession agreements are retroactively void and the authors contend the date from which they are void is January 1, 1973 rather than March 13, 1962. Violative new agreements are simply void *ab initio* and notifiable infringing agreements which have not been notified are void retroactively to their inception.[39]

Just as the Treaty is silent as to when nullity attaches, it is silent as to the consequences of nullity. These consequences are determined by national (not EEC) law, including the private international law of the forum.[40] Where the violative clauses of an agreement are severable, they are voided and the remaining agreement is valid. The Court has stated in the following cases, that national courts, and not Community courts, are vested with the power to determine the existence and extent of severability:[41] *La Technique Miniere v. Mashinenbau Ulm GmbH,*[42] and *Etablissement Consten and Grundig Verkaufs — GmbH v. EEC Commission.*[43] Thus, once an agreement is declared void, national courts have jurisdiction over the consequences of the nullity.

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37. BAROUNOS, *supra* note 8, at 117.

38. Brasserie de Haecht v. Wilken (No. 2), 6 Feb. 1973, [1973] E.C.R. 77, [1973] COMM. MKT. L.R. 287.

39. BAROUNOS, *supra* note 8, at 123-24.

40. *Id.* at 124.

41. *Id.* at 137.

42. La Technique Miniere v. Mashinenbau Ulm GmbH, 30 June 1966, XII REC. 337, [1966] COMM. MKT. L.R. 357, 376.

43. Elablissement Consten and Grundig Verkaufs — GmbH v. ECC Commission, 13 July 1966, XII REC. 429, [1966] COMM. MKT. L.R. 418, 474-475.

C. *Article 85(3) — Exemptions*

Article 85(3) provides exemptions for agreements or conduct which violates article 85(1).[44] The purpose of allowing exemptions is to expedite the growth and integration of the Common Market. Accordingly, exemptions are granted if the beneficial effects of the conduct outweigh the detrimental effects of eliminating competition. Benefits are judged in terms of market growth and detriments are assessed for their anticompetitive effects. The final analysis depends upon a balancing of both interests.[45]

As provided in the Treaty, there are four requisites to the granting of an exemption. First, the conduct must contribute to the improvement of production or distribution of goods, or to the promotion of technical or economic progress. Second, consumers must receive a "fair share of the resulting benefit." Third, the restrictive practices must be necessary for the achievement of the first two requisites. Finally, the restrictions must not, actually or potentially, eliminate competition in a "substantial part" of the relevant product market.[46] It should be noted that there is a final caveat — even if the above requirements are met, the exemption will not be granted unless the benefits cannot be achieved through competition.[47]

Procedurally, an agreement must be notified to the Commission before that body can grant an exemption. An exemption cannot be granted applicable to a date earlier than the notification and subsection (3) applies only if the conduct violates article 85(1). The Commission can recommend a modification before it hands down the decision of infringement and if the parties comply with the recommendation, an exemption will be granted. Otherwise, termination of the agreement will be required. Exemptions can be granted conditionally and they are valid

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44. The section reads as follows: The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

—any agreement or category of agreements between undertakings;

—any decision or category of decisions by associations of undertakings; and

—any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

45. Norton, *supra* note 1, at 371.

46. Wolfe, *supra* note 3, at 354.

47. BAROUNOS, *supra* note 8, at 82.

only for limited periods of time.[48] The Commission, as held in *Zoja v. Commercial Solvents Corporation*,[49] can require that affirmative action be taken by an infringing party. Further, in accordance with the decision in *Sadolin & Holmblad A/5 (Transocean Marine Paint Association v. E.E.C. Commission)*,[50] before an Commission decision is made, undertakings are entitled to notice and an opportunity to be heard. It should be noted that exemption decisions of the Commission can be appealed to the European Court of Justice.

The Commission may also grant "bloc exemptions." Notification of agreements falling under a "bloc" does not have to be given.[51] Regulation 19/65 provided for this authority[52] and the power is exercised under Regulation 67/67.[53] This Regulation exempts, until December 31, 1982, *inter alia*, the following agreements:

1. Exclusive distributorship agreements whereby a distributor sells within a defined area of the Common Market or the distributor agrees to buy solely from one supplier, or both;
2. Covenants not to compete;
3. Those requiring that distributors purchase a complete line of goods to insure minimum distributor service;
4. Those requiring advertising; and
5. Those requiring buyers to take a minimum quantity.

These exemptions, however, apply only to vertical restraints, *viz.*, those between seller or manufacturer and distributor. They do not apply to intrastate matters or horizontal restraints.[54] Further, the Court of Justice requires that for a bloc exemption to be available, the agreement must not cause a division of markets, prevent parallel imports, or cause goods to be difficult to purchase within the Common Market.[55] Finally, certain agricultural products and processes are exempt from articles 85(1) and 86. These exemptions are granted where productivity will be thereby increased, or where they are required so as to achieve a fair standard of living for the agricultural community, or in order to insure stable markets

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48. Wolfe, *supra* note 3, at 415.

49. Zoja v. Commercial Solvents Corporation, 14 December 1972 O. J. 1973 L 299/51, [1973] COMM. MKT. L.R. D50.

50. Sadolin & Holmblad A/5 (Transocean Marine Paint Association v. E.E.C. Commission), [1974 Transfer Binder] COMM. MKT. REP. (CCH) para. 8241 (Ct. J. 1974), as cited in Wolfe, *supra* note 3, at 424.

51. *Id.* at 414.

52. Regulation 19/65, 1 COMM. MKT. REP. (CCH) para. 2724 (1965).

53. Regulation 67/67, 1 COMM. MKT. REP. (CCH) para. 2727 (1967).

54. Wolfe, *supra* note 3, at 364-365.

55. *Id.* at 372; Van Vliet Kwasten-en Laddenfakriek N.V. v. Fratelli Dalle Crode, [1975 Transfer Binder] COMM. MKT. REP. (CCH) para. 8314 (Ct. J. 1975).

with ready supplies at reasonable prices.[56] Thus, like specific exemptions, bloc exemptions are granted where the growth of the Common Market will be facilitated.

III. ARTICLE 86 — ABUSE OF DOMINANT POSITION

Article 86 prohibits abuse of monopoly power.[57] Such abuse is deleterious primarily because it inhibits market integration and/or growth. In contrast to article 85, there are no exemptions once an abuse is substantiated. Further, there is no requirement of a plurality of actors. Only one undertaking need engage in the proscribed behavior.

Article 86 is applicable only when four elements are present. First, one or more undertakings must hold a dominant position. Second, that position must be occupied within a substantial part of the Common Market. Third, the dominant position must be abused. Finally, that abuse must have an actual or potential effect on trade between the member states.

It is clear that four terms must be defined: "dominant position," "substantial part" of the Common Market, "abuse," and "affecting trade between member states." These terms are not defined in the Treaty, hence, their definitions must be derived from Commission Memoranda and case law.

To date only a handful of cases have involved possible violations of article 86. As a consequence the terms of the article have not yet been clearly defined by either the Commission or the Court. The problems created by this paucity of cases is compounded by the current trend which favors the expansion of the article's scope and which shows no signs of abatement. Due to the prevailing uncertainty which surrounds the article,

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56. Wolfe, *supra* note 3, at 386.
57. Article 86 reads as follows:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

it is necessary to examine the existing decisions both with respect to their individual holdings and with respect to the trends they illustrate. To achieve these dual objectives it is necessary to proceed with a chronological case analysis.

A. *Interpretation by the Commission and Court of Justice*

Initially, article 86 was thought to be solely a regulatory statute. Its apparent purpose was to regulate prices and output and to protect only those individuals dealing with dominant position firms. It was not expected to prevent anticompetitive conduct.[58] As the following discussion shows, this conceptualization may be changing.

The first attempt to define "dominant position" and "dominant position abuse" was presented in a Commission Memorandum of December 1, 1965. Dominant position was described as involving a "question of economic influence." The test was whether the undertaking could eliminate other competitors from the market.[59] "Dominant position abuse" is conduct which "objectively constitutes a deviation from the objectives that have been settled by the Treaty."[60] These definitions are vague and can become workable only through the Court's application.

The first three article 86 cases did not find violations. *Parke, Davis and Co. v. Probel Co.* held that the ownership of an exclusive patent does not constitute a violation.[61] Similarly, "[A]rticle 86 is not compromised by the mere ownership of a trademark." (*Sirena S.R.L. v. Ed S.R.I.*)[62] And article 86 is not violated by "the simple holding of a copyright." (*Deutche Grammophon Gesellschaft mbII v. Metro —SB — Grossmarkte GmbII & Co. K.G.*)[63]

The Commission first established dominant position abuse in the case of *Re GEMA*.[64] GEMA was the German music performing rights society. It was the only such society in Germany and was held to be in a

58. "Article 86 seems to provide for control over the performance of dominant firms by regulating prices directly, rather than indirectly by controlling anticompetitive conduct." Korah, *Interpretation and Application of Art. 86 of the Treaty of Rome: Abuse of a Dominant Position within the Common Market,* 53 NOTRE DAME LAW. 768, 771 (1978) [hereinafter cited as Korah].

59. Swan, *The EEC United Brands Decision: Can Chiquita Banana Find Happiness in Europe?,* 7 CALIF. W. INT'L L.J. 385, 390 (1977) [hereinafter cited as Swan].

60. *Id.* at 391.

61. Parke, Davis & Co. v. Probel Co., 7 COMM. MKT. L.R. 47 (1968).

62. Sirena S.R.L. v. Ed. S.R.L., 10 COMM. MKT. L.R. 260 (1971).

63. Deutche Grammophon Gesellschaft mbII v. Metro-S.B.-Grossmarkte GmbII & Co. K.G., 10 COMM. MKT. L.R. 631 (1971). This case and the two just mentioned are referred to in *Swan, supra* note 59, at 391-92.

64. Re GEMA, 10 COMM. MKT. L.R. D35 (1971).

dominant position. It was found to have abused its position because it discriminated against authors from other Common Market countries by excluding them; it held its members to unjustified obligations; its conduct prevented an integrated market; and it applied "dissimilar conditions to equivalent transactions with other trading parties" by requiring German importers to pay different and higher licensing fees. The above activities were held to "affect trade between member states."[65] The decision is notable for two reasons. It indicates that the Treaty proscribes discrimination against nationals of other member states and that a single state could be treated as a "substantial part of the Common Market."

The *Continental Can* decision was the first indication of the potentially broad reach that article 86 could have.[66] The Court focused primarily on the objectives of the Treaty rather than on its literal meaning.[67] It also defined for the first time the word "abuse." The facts of the case were as follows. Continental Can, an American corporation, had its Belgian subsidiary acquire control of a potential competitor of another of its subsidiaries. The Commission held that Continental Can was in a dominant position and that the merger constituted an abuse. On appeal, Continental Can argued that the act of merger is just a structural change and so cannot constitute an abuse within the meaning of the Treaty.

The Court agreed with the Commission's construction of the Treaty. It indicated that there could be no distinction between structural measures and actual practice in that both can affect the market.[68] Moreover, the Court felt that the purpose of the Treaty was to prevent the elimination of competition.[69] Accordingly, the Court stated:

> There may therefore be abusive behavior if an undertaking in a dominant position strengthens that dominant position so that the degree of control achieved substantially obstructs competition, *i.e.*, so that the only undertakings left in the market are those which are dependent on the dominant undertakings with regard to their market behavior.[70]

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65. BAROUNOS, *supra* note 8, at 156-58. *See also* STEIN, HAY & WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE, 871-878 (1976) [hereinafter cited as STEIN], which reprinted the GEMA decision.

66. Europemballage Corp. & Continental Can Co. Inc. v. E.C. Commission, 19 REC. 215 (1973), [1973] COMM. MKT. L.R. 199 *reprinted in* STEIN, *supra* note 65, at 822.

67. Korah, *supra* note 58, at 774.

68. STEIN, *supra* note 65, at 823.

69. *Id.* at 824.

70. *Id.* at 825.

The Court furthermore declared:

> In fact, apart from any fault, it may be regarded as abusive if an undertaking has such a dominant position that the objectives of the Treaty are frustrated by a substantial change in the supply structure seriously jeopardizing the consumer's freedom of action in the market; this is necessarily the case if competition is almost eliminated.[71]

In this way the Court defined abuse in terms of the effect on competition and its elimination indicating that there can be abuse when competitors become dependent upon the undertaking in question or when consumers' freedom of choice is reduced. Furthermore, abuse can be found indirectly in structural changes as well as in market strategies which have a direct effect on competition. However, all of the above was rendered dicta when the Court ultimately annulled the decision upon finding that the Commission did not adequately "explain the facts and appraisals on which [its decision was] based."[72]

Although the Commission's decision was annulled, the *Continental Can* case is noteworthy for its indications of the Court's theoretical basis for determination. Briefly, that basis is as follows: First, competition need not be completely eliminated but only "substantially obstructed," or "almost eliminated." The obstruction can even be defined in terms of "dependence." Second, because abuse can be founded in the "dependence" of other undertakings and need not always be a consequence of directly anticompetitive activity, a wide range of activities could conceivably fall into the abuse category if a firm is in a dominant position. The Court's interpretation of abuse is thus an expansive one. And finally, a Commission decision will not be accepted by the Court unless it clearly states and proves the facts on which it bases its opinion.

The *Commercial Solvents* case was the next decision in this series.[73] The facts reveal that a drug producer refused to sell raw materials to a former customer and competitor. Sales were terminated after the buyer refused to merge with the seller. Commercial Solvents, the seller, had a world monopoly on the production and sale of the drug in question. Two issues were raised — namely, whether the refusal to sell to a former customer constituted an abuse of a dominant position; and whether the

71. *Id.* at 826.
72. *Id.* at 829.
73. Institute Chemioterapico Italiano S.p.A. & Commercial Solvents Corp. v. E.C. Commission, 20 REC. 223 (1974), [1974] 1 COMM. MKT. L.R. 309, *reprinted in* STEIN, *supra* note 65, at 812.

trade between member states was affected. With respect to the first issue, the Court found an abuse:

> [A]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of the customer, is abusing its dominant position within the meaning of Article 86.[74]

Regarding the second question, the Court noted that the buyer sold ninety percent of its production outside the Common Market. Despite this fact the Court held that Common Market trade was affected.

> When an undertaking in a dominant position within the Common Market abusively exploits its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.[75]

Moreover, the Court stated that the abuse which affects trade between member states and so prejudices consumers may be indirect as well as direct.[76] In accordance with this analysis, the Court found an abuse which affected trade, and Commercial Solvents was held to be in violation of article 86.

Charging excessive prices in comparison to the value of a service may also amount to abuse of a dominant position. In the case of *General Motors Continental N.V. v. Commission,*[77] GMC was the only authorized agent of the manufacturer in Belgium. Among other operations GMC performed inspections, required by Belgian law, on all GM cars imported into Belgium. The Commission held that GMC charged excessive prices and so abused its dominant position. The Court indicated that while charging excessive prices might constitute an illegal abuse, such a

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74. *Id.* at 816.
75. *Id.* at 817.
76. *Id.*
77. General Motors Continental N.V. v. E.C. Commission, [1975] O.J. L 29/14; confirmed by the Court but quashed on other grounds, [1976] 17 COMM. MKT. L.R. 95.

finding was not appropriate in this case. The existence of certain circumstances, for instance, GMC's efficiency, was sufficient to justify overruling the Commission's decision. This result has led some to suggest that the Court may be carving out an exception to article 86 whereby mitigating circumstances might prevent the finding of abusive business conduct.[78] In the wake of the *GMC* decision, it is not clear when excessive prices will be considered an abuse. The case does illustrate the broad discretion which the Court has with respect to these provisions of the EEC antitrust laws.

The Court continued to extend the reach of article 86 with its decision in the case of *Re The European Sugar Cartel.*[79] The result there was significant for two reasons. First, the Court found market dominance even though the market share was eighty-five percent — a percentage which was lower than that in any prior case.[80] Second, the Court avoided a purely geographical definition of "substantial part of the Common Market."[81] Instead, the Court looked at the "pattern and volume of the production and consumption of said product as well as the habits and economic opportunities of vendors and purchasers. . . ."[82]

B. The United Brands Case

The most recent article 86 case is that of *United Brands Company v. Commission of the European Communities.*[83] The controversy primarily concerned the importation and marketing of bananas in the European Community. United Brands Company of New York [hereinafter UBC], the largest banana marketer in the world, markets "Chiquita" bananas, and supplies and controls forty to forty-five percent of the EEC banana market. Chiquita bananas sell at a price thirty to forty percent higher than the corporation's unbranded lower quality bananas. Strict quality controls are maintained for the branded bananas and a substantial amount of money is spent for their advertisement.[84]

Since bananas are extremely perishable, shipping is an integral part of the export process. The bananas are shipped from the growing country while green in high-speed refrigeration vessels. The fruit is then

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78. Korah, *supra* note 58, at 790.

79. Re the European Sugar Cartel, [1973] O.J. L 140/17/ [1973] COMM. MKT. L.R. D65; Aff'd by the Court 55/73 [1975] E.C.R. 1663.

80. Korah, *supra* note 58, at 797.

81. *Id.* at 792.

82. Swan, *supra* note 59, at 399.

83. United Brands Company v. Commission of the European Communities, 3 COMM. MKT. REP (CCH) para. 8429 (Ct. J. 1978).

84. Swan, *supra* note 59, at 403-406.

artificially ripened in the consumer country in large, complex ripening plants. The price of a particular order is determined three days after an order is placed. Once the distributor/ripenor (buyer) receives the price, it can change the amount it wishes to purchase while UBC can reduce the amount it will deliver.[85]

Since the introduction of the "Chiquita" brand name in January, 1967, a number of conditions have been attached to the sale of those bananas. The original conditions were that a distributor/ripenor could not sell non-UBC bananas while selling UBC bananas; that UBC distributor/ripenors were not allowed to sell their bananas to competitors or to foreign dealers; and that UBC bananas could not be sold while they were green.[86] All conditions except the ban on resale of green bananas were dropped after the Commission's initial intervention. That particular ban virtually eliminated resale, however, due to the likelihood of spoilage before reaching the ultimate buyer, the consumer.[87]

UBC banana prices differed substantially among the EEC member states. The Belgian price was eighty percent higher than the price in Ireland, and the Danish price was 138% higher (2.38 times) than the Ireland price. The production and transportation costs as well as differing EEC imposed costs could not account for the disparity.[88]

In 1969, a UBC customer, Olesen, became the exclusive distributor for a competitor. UBC then began to reduce the amounts supplied for Olesen's orders. At a later time, Olesen participated in the competitor's large scale advertising campaign. Citing the campaign as a reason, UBC decided to terminate all sales to Olesen. Olesen attempted to purchase Chiquita bananas from other UBC distributor/ripenors but they refused to sell.[89] As a consequence, Olesen lost major customers and was unable to fully utilize all of its ripening facilities, thereby suffering losses. Supplies were resumed on February 11, 1975 after UBC and Olesen entered into a new agreement.[90]

The Commission decision, published in the Official Journal of the European Community[91] held that UBC had violated article 86 of the Treaty of Rome for four reasons. First, it prohibited its distributor/ripenors in the relevant market from reselling green UBC bananas. The

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85. *Id.* at 402-407.
86. *Id.* at 407.
87. This single ban was the key to the antitrust action in that UBC could substantially control the resale of bananas thereby maintaining its illegal market divisions.
88. *Id.*
89. *Id.* at 410-411.
90. 3 COMM. MKT. REP. (CCH) at 7664.
91. OFF'L J. OF THE E.E.C., vol. 19, No. L95, at 9800 (1976).

relevant market constituted the Belgo-Luxembourg Economic Union (BLEU), Denmark, the Netherlands and Germany. Second, it charged dissimilar prices for equivalent transactions. Third, it imposed unfair prices on its customers in the member states of the relevant market. Fourth, it refused to supply Olesen from October 10, 1973 to February 11, 1975. UBC was fined one million units of account for these infringements.[92]

The Commission ordered UBC to discontinue its improper business practices and to take the following action: First, to inform, by February 1, 1976, all of its distributor/ripenors in the relevant market that the prohibition on the resale of green bananas had been lifted with notification of the Commission to follow: and secondly, to inform the Commission by April 20, 1976, and thereafter twice yearly for a period of two years, of the prices charged during the previous six months in the relevant market.[93]

On March 15, 1976, UBC applied for an annulment of the Commission's decision or, in the alternative, a reduction of the fine. On March 18, it applied for an interim remedy, that of suspension of enforcement until the decision of the Court. The application was granted April 5, 1976, by the President of the Second Chamber of the Court of Justice of the European Community.[94]

On appeal, UBC made the following claims. It challenged the analysis of the relevant market by contending that the market should comprise all fruit in general, rather than simply bananas as determined by the Commission. As to the geographic market, UBC sought to exclude certain member states by alleging that conditions of competition in those states were significantly different. UBC further claimed that it was not in a dominant position, pointing to the existence of strong and aggressive competitors and the absence of barriers to market access.[95] It also asserted that the company had incurred losses more frequently than profits in the five years prior to trial, and had never gleaned "monopoly profits." The charges of unfair, excessive and discriminatory prices were rebutted with the claim that prices were determined by market forces.

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92. A unit of account is a quantity based on the budget in the Community. In the early 1970s, it was equal to 0.88867088 grams of pure gold or the equivalent of the U.S. dollar before the 1971 devaluation. BAROUNOS, *supra* note 8, at 294.

93. 3 COMM. MKT. REP. (CCH) at 7704.

94. *Id.* at 7668–69, and 7704.

95. *Id.* at 7670–7683.

1. Dominant Position

The Court's treatment of UBC's "dominant position" began by defining the relevant product and geographic markets. The degree of substitutability was determined to be the proper standard for ascertaining the product market. An analysis of the relation of competition between bananas and fruits in general was conducted. The Court concluded that bananas were not reasonably interchangeable with other fruits by consumers. "[T]he banana market is a market which is sufficiently distinct from the market for other fresh fruits."[96] The geographic market was determined to be "an area where the objective conditions of competition applying to the product in question must be the same for all traders."[97] The Court found that France, Italy and the United Kingdom had been properly excluded from the geographic market by the Commission because governmental price fixing, quotas or product preferences existed in those countries which distorted trading conditions. In the six other member states, conditions of competition were regarded as virtually the same.

The Court next considered whether UBC did in fact hold a dominant position in the relevant market. Recognition was given to the broad language of the Treaty which the Court characterized in the following way:

> The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.[98]

The Court stated quite clearly that the elimination of *all* competition is not required for a showing of dominance. In fact, UBC's market share was between forty and forty-five percent. And the existence of aggressive competitors does not negate a finding of dominance where the financial and practical obstacles to increasing market share are "almost insuperable."[99] Similarly, a reduced profit margin or even loss does not preclude a

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96. *Id.* at 7706.
97. *Id.* at 7707.
98. *Id.* at 7708.
99. *Id.* at 7710–7711.

determination of dominance, just as strong competition and large profits are not antithetical. Rather, the Court noted that "[t]he finding that, whatever losses UBC may have, the customers continue to buy more goods from UBC, which is the dearest vendor, is more significant and this fact is a particular feature of the dominant position; and its verification is determinative in this case."[100] Accordingly, the Court decided that "[t]he cumulative effect of all the advantages enjoyed by UBC thus ensures that it has a dominant position in the relevant market."[101]

2. Abuse of Dominant Position

With respect to UBC's use of its dominant position, the Court first declared that the clause prohibiting the resale of green bananas was a clear abuse. Its effect was to limit markets "to the prejudice of consumers and affect trade between Member States, in particular by partitioning national markets."[102] In addition, the conduct toward Olesen was found to be abusive. The sanction UBC took against Olesen was viewed as excessive,[103] and more importantly, its refusal to supply a prior customer resulted in eliminating a competitor and thus affected trade between Member States. The effect on trade was measured by "repercussions."

> [I]f the occupier of a dominant position . . . aims at eliminating a competitor who is also established in the Common Market, it is immaterial whether this behavior relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market.[104]

The Court then considered the questions of discriminatory and unfair prices. As to allegations of discrimination, the Court said that the price structure had the effect of partitioning the Community into national markets. Consequently, certain distributor/ripenors were placed at a competitive disadvantage thereby distorting competition. Moreover, the pricing policy "applied dissimilar conditions to equivalent transactions with other trading parties," which was in contravention of article 86(c). The discriminatory pricing policy thus constituted an abuse of a dominant position.[105]

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100. *Id.* at 7711.
101. *Id.*
102. *Id.* at 7713.
103. *Id.* at 7714.
104. *Id.* at 7715.
105. *Id.* at 7717.

The Court disagreed with the Commission finding of unfair pricing. The prices were held by the Commission to be unfair because they were regarded to be excessive. The standard against which prices were tested was the Irish market price which was, however, kept deliberately low so as to gain access to the Irish market. The Court felt that the Commission had failed to adequately discuss all the relevant evidence and had failed to make the necessary examination of production costs. Further, only a seven percent difference in price actually existed between UBC bananas and those of its competitors.

The Court decided that unfair prices should be measured as follows:

> The question therefore to be determined is whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this is in the affirmative, to consider whether a price has been imposed which is either unfair in itself or when compared to competing products.[106]

With respect to the Commission's decision on excessive prices the Court annulled it, declaring that "The Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding that UBC had infringed article 86 of the Treaty by directly or indirectly imposing unfair selling prices for bananas."[107]

The monetary sanction was reduced in respect of the partial annulment. Despite UBC's claims that it did not know it was in a dominant position or that it abused it, the Court held against UBC on both points. It stated that UBC "knew or ought to have known [that its conduct] contravened the prohibition set out in Article 86 of the Treaty" and that the Commission was justified in finding that UBC's infringements "were at the very least negligent."[108] Because of the partial annulment, the Court reduced the fine to 850,000 units of account.

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106. *Id.* at 7718.

107. *Id.* at 7719.

108. *Id.* at 7721. This aspect of the Court's decision contains what might be regarded as the most serious faults in the Court's analysis. To reach the conclusion that UBC "knew or ought to have known" that it was violating article 86, the Court reasoned that "UBC is an undertaking which, having engaged for a very long time in international and national trade, has special knowledge of antitrust laws and has already experienced their severity." *Id.* Such reasoning offends present United States standards of due process and in so doing raises two serious questions about future EEC antitrust litigation. These questions are, first, whether business concerns which operate solely within the Common Market are to be judged by a different standard than businesses like UBC which operate transnationally; and second, whether younger and less "experienced" businesses

IV. CONCLUSION

The United Brands decision represents an important step in the evolution of the Common Market's efforts to regulate improper business practices. The single most important aspect of the decision is the Court's treatment of the "dominant position" requirement. The strict numerical test, which required monopoly or near monopoly, was formally dispensed with. The Court established that it was appropriate to look at additional factors such as market power and barriers to entry. Particular attention was drawn to the fact that UBC was able to attract and retain a growing number of consumers despite its high prices. The Court expressly rejected UBC's contention that its low profit levels were proof of strong competition and a lack of market dominance.

The findings on the question of abuse are also significant. On the one hand the Court followed prior decisions thus strengthening the positions they represented.[109] On the other hand, the Court continued to expand the scope of article 86. First, it held that resale restrictions may violate article 86. In so doing the Court brought the Common Market rules even closer to those which presently exist in the United States.[110] Second, the Court announced that geographically differentiated pricing policies may constitute an illegal abuse when the economic circumstances in which the transactions take place are fundamentally the same. Based on the facts of this case the Court found that UBC's pricing practices had the effect of partitioning the Common Market into separate national markets, thereby obstructing integration. The Court did indicate that the particularly low prices which were set for Ireland were justified by the desire to enter that market. The two questions which remain unanswered are first: Under what other circumstances will differential pricing be justified; and

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are to be judged differently from those like UBC which have been around a "very long time" and have "already experienced" the severity of other antitrust laws. It is impossible to predict what the Court's answer to these questions will be. In light of this decision, however, several large U.S. transnational corporations would be well advised to reevaluate their Common Market business practices.

109. The Court showed the same reluctance to find illegally excessive prices that it had demonstrated in *GMC*. Certain portions of this decision were based upon reasoning similar to that used in *Continental Can* where the Court stated that any commission finding of abuse must be factually substantiated by the Commission. The Court also reiterated that cutting off a customer turned competitor can be a violation of the law, as was found in *Commercial Solvents*.

110. While resale restrictions are generally held to be a violation of U.S. antitrust laws, there is currently some controversy as to when and in what circumstances certain limited restrictions may be enforceable. *See* Comment, *Vertical Restrictions and the Distribution Process: A Practical Review of Economics and the Rule of Reason after Sylvania* 38 LA. L. REV. 1022 (1978).

second: Given similar trading conditions within two or more countries, to what extent can a company deviate from a policy of uniform prices?

The United Brands decision masterfully demonstrates the Court's desire to promote Common Market integration and to weed out business practices which impede a widespread improvement in the standard of living. With this case the Court continues to expand the overall scope of article 86 as well as its own degree of intervention. The extent to which it will continue this expansion, particularly in the area of differential marketing practices, remains to be decided through future litigation.

Susan Sugar Nathan