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Gregory B. Adams

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EUROPEAN AND AMERICAN ANTITRUST REGULATION OF PRICING BY MONOPOLISTS†

*Gregory B. Adams**

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* Associate Professor of Law, University of South Carolina; B.S. 1977, J.D. 1973, Louisiana State University; LL.M. 1979, J.S.D. Candidate, Columbia University. Jervey Fellow in Foreign Law 1977-79, Parker School of Foreign and Comparative Law, Columbia University.

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I. INTRODUCTION

Studying the regulation of monopolistic pricing provides meaningful insight into the basic nature of an antitrust system. Comparing the United States and the European Economic Community (EEC) treatment of monopolistic pricing is particularly informative because the EEC antitrust provisions are based on the Sherman Act and the monopolization sections are quite similar. The regulation of the pricing behavior of monopolists in the two systems, however, differs significantly, primarily because of the distinct differences between European and United States antitrust philosophies.

Article 86 of the Treaty of Rome outlaws any "*abuse . . . of a dominant position* within the common market or a substantial part of it."[1] The EEC prohibition is similar to the developed meaning of "monopolization" in section 2 of the Sherman Act[2], requiring both market power and improper conduct.[3] This Article analyzes the type of conduct that is considered improper: specifically, the pricing practices that constitute *abuse* under article 86, or *monopolization* under section 2.

Article 86 provides examples that help determine what *abuse* is:

> Such abuse may, in particular, consist in:
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> (a) directly or indirectly *imposing unfair purchase or selling prices* or other unfair trading conditions;
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> (b) *limiting production,* markets or technical development to the

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1. Treaty of Rome, *done* Mar. 25, 1957, 298 U.N.T.S. 11 (*entered into force* Jan. 1, 1958) (emphasis added). Quotations and subsequent references to the Treaty are to the official English language version, Office for Official Publications of the European Communities, Luxembourg, 1973.
2. 15 U.S.C. § 2 (1982).
3. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

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.[4]

These examples do not resemble the kinds of conduct that fit the principal United States test for monopolization: the willful acquisition or maintenance of monopoly power. The examples, in contrast, represent types of conduct by which monopoly power is exploited. Thus, the early scholarly analysis concluded that article 86 prohibits exploitation, but not predation; the article does not forbid anticompetitive conduct.[5] This view, however, did not survive the first Court of Justice decision in a case initiated by the Commission under article 86. In *Europemballage Corp. v. Commission of the European Communities (Continental Can),*[6] the Court held that eliminating competition by acquiring a competing firm was an abuse.

Subsequent Court decisions found abuse in a variety of conduct, including both the exploitation of the dominant firm's monopoly power and the elimination, or discipline, of its competitors.[7] Pricing cases have occurred within both categories of conduct. Echoing the examples of abuse under article 86, which include charging or paying unfair or discriminatory prices, the cases have involved monopoly pricing and price discrimination. The price discrimination cases provide examples of monopolistic exploitation and anticompetitive pricing behavior. Furthermore, the Commission recently considered its first case involving predatory pricing, the most hotly debated pricing issue under section 2 of the Sherman Act. The Commission held, in an interim order,

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4. Treaty of Rome, art. 86, *supra* note 1 (emphasis added).

5. Adams, *Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States*, 20 TEX. INT'L L.J. 1, 4-6 (1985).

6. 1973 E. Comm. Ct. J. Rep. 215, 242-45, 12 Common Mkt. L.R. 199, 222-25 (1973).

7. C. BELLAMY & G. CHILD, COMMON MARKET LAW OF COMPETITION ¶¶ 7-57 to -76 (2d ed. 1978). Bellamy and Child categorized the article 86 abuses as exploitative or anticompetitive. *Id.* ¶ 7-51.

that predatory pricing is a violation of article 86.[8] Thus, for the first time, sufficient material exists to allow a comprehensive comparison of the antitrust treatment of single-firm pricing practices under both systems.

II. Unfair Pricing: Exploitation and Predation

In the early article 86 cases, the Court of Justice gave doctrinal hints on which pricing practices would constitute abuses. In *Parke, Davis & Co. v. Probel*,[9] the Court held that pricing a patented product higher than a similar, nonpatented product did not necessarily constitute an abuse.[10] The Court's decision, however, implied that in some circumstances, a higher price could be abusive. In *Sirena S.r.l. v. Eda S.r.l.*,[11] the Court applied the *Parke, Davis* standards to trademarked products and concluded that "although the price level of the product may not of itself necessarily suffice to disclose such an abuse, it may, however, *if unjustified by any objective criteria*, and if it is particularly high, be a determining factor."[12] This concept of objective justification became a central element in the analysis of abusively high prices. The third case in which the Court of Justice addressed pricing practices was *Deutsche Grammophon v. Metro-SB-Grossmärkte*.[13] Metro imported Deutsche Grammophon records into West Germany from France and sold them at prices much lower than those charged under Deutsche Grammophon's resale price maintenance agreements. Deutsche Grammophon sued Metro in the West German courts, seeking to enjoin the discount sales. On Metro's claim that Deutsche Grammophon's pricing practices violated article 86, the West German court referred the case to the Court of Justice, which again ruled that the price difference alone did not necessarily justify a finding of abuse, although a "particularly marked" difference might be abusive, "if unjustified by any objective criteria."[14] In each of these cases, the Court determined whether the

8. Engineering and Chem. Supplies (Epsom and Gloucester) Ltd. v. AKZO Chemie UK Ltd., 26 O.J. Eur. Comm. (No. L 252) 13 (1983), 38 Common Mkt. L.R. 694 (1983).
9. 1968 E. Comm. Ct. J. Rep. 55, 7 Common Mkt. L.R. 47 (1968).
10. *Id.* at 72, 7 Common Mkt. L.R. at 60.
11. 1971 E. Comm. Ct. J. Rep. 69, 10 Common Mkt. L.R. 260 (1971).
12. *Id.* at 84, 10 Common Mkt. L.R. at 275 (emphasis added).
13. 1971 E. Comm. Ct. J. Rep. 487, 10 Common Mkt. L.R. 631 (1971).
14. *Id.* at 501, 10 Common Mkt. L.R. at 658-59.

price represented an abusive exploitation by comparing it with the price charged by a nondominant firm for a similar product. If the difference was too great, the dominant firm was required to objectively justify its price. The Court did not require that costs or profit margins be analyzed in determining whether the price charged was excessive. Costs and profit margins could enter the calculations only as part of the justification attempted by the dominant firm.

A. *General Motors Continental*

The first case in which the Commission asserted an unfair price violation under article 86 was brought against General Motors Continental (GM), a General Motors subsidiary that manufactured and distributed vehicles in Europe.[15] Belgian law required that all automobiles licensed in Belgium be certified to comply with safety standards. This certification was obtained through a two-step process. First, the manufacturer or importer requested approval of each automobile model. After granting this approval, the Belgian authorities required the manufacturer to certify that each automobile conformed to the model's specifications and to affix a sticker to each automobile showing that it had been certified. Only then could the owner register the automobile and drive it on public roads.[16]

The certification process worked routinely for automobiles imported into Belgium by manufacturers and sold through regular distribution networks. Problems, however, arose in obtaining certificates of conformity and stickers for automobiles imported by consumers or imported through irregular channels. Before March 1973, automobiles that were not imported by manufacturers were inspected at government testing stations which provided the required certificates and stickers. In March 1973, however, the Belgian Government proclaimed that government stations would only inspect used cars that had been registered abroad for at least six months; newer automobiles had to be certified by the manu-

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15. General Motors Continental N.V. v. Commission of the European Communities, 1975 E. Comm. Ct. J. Rep. 1367, 17 Common Mkt. L.R. 95 (1976); In re General Motors Continental N.V., 18 O.J. EUR. COMM. (No. L 29) 14 (1975), 15 Common Mkt. L.R. D20 (1975).

16. *General Motors*, 18 O.J. EUR. COMM. (No. L 29) at 14, 15 Common Mkt. L.R. at D21-22.

facturer or its Belgian agent.[17]

GM, for the first time, received individual requests to inspect and certify the Opel automobiles that it manufactured in Europe. GM's only previous experience with occasional, irregular inspections of General Motors cars was the inspection of American models imported into Belgium. GM's response to this sudden imposition of the requirement that it perform this service for its European as well as its American cars was to charge the same price for both, 5,000 Belgian francs (BF) or 100 United States dollars ($).[18] At the same time, GM began studying the cost of occasional inspection and certification of the European cars and reviewing the cost of inspection and certification of the American ones. GM realized that the average total cost per automobile would be substantially less for European cars because the sizeable costs of obtaining approval for the model would be spread over the much larger number of cars of each European model, including both cars imported and sold through the regular dealer network and those that arrived through parallel imports.[19] Following the completion of its cost study approximately four months later, GM adopted a differentiated price schedule based upon its average costs of certifying European and American automobiles. Under the new price schedule, GM charged 1,250 BF to inspect European cars and 5,300 to 7,000 BF for American ones.[20] Also, GM refunded the difference between the old and new charges to the owners of the five Opels that had been inspected and certified under the old price schedule.[21]

The Commission then initiated proceedings to fine GM for the original abusive pricing structure, apparently out of concern that such a pricing structure could be used to hinder parallel imports and thus to maintain the segregation of national markets. The Commission, focusing on the 5,000 BF price, made no attempt to determine GM's costs and profits. Instead, the analysis compared GM's inspection charges for the Opels with its charges for American automobiles and with Belgian companies' charges for other makes of automobiles. Although these comparisons were the primary basis for the Commission's finding that the 5,000 BF price

17. *Id.* at 15, 15 Common Mkt. L.R. at D22.
18. *Id.* at 15, 15 Common Mkt. L.R. at D23.
19. *Id.* at 16, 15 Common Mkt. L.R. at D25.
20. *Id.* at 15, 15 Common Mkt. L.R. at D23.
21. *Id.* at 15, 15 Common Mkt. L.R. at D24.

was excessive, the Commission indicated that it also relied upon the facts that the government inspection stations had charged 1,140 BF and that GM had made certain Opel inspections free of charge.[22] Finally, the Commission treated GM's new price schedule as an admission that its earlier charges for European automobiles had been unreasonable. The Commission fined GM 5,000,000 BF ($100,000).[23]

The comparison between the price charged for inspecting American automobiles and that for inspecting European models showed that GM had engaged in price discrimination, in a true economic sense, by charging the same price for services with different costs.[24] Nowhere in its decision, however, did the Commission indicate that it regarded this as price discrimination in a legal sense.[25] The Commission, instead, used the disparity in costs to demonstrate that the price charged was excessive because it did not bear a reasonable relationship to the cost of inspecting and certifying the Opels. Because the total cost of certifying an Opel was much less than the total cost of certifying an American automobile, the prices charged to the Opel owners should have been lower. The Commission assumed that 5,000 BF was a reasonable price for inspecting and certifying an American automobile,[26] and therefore concluded that this was an unreasonable price for the inspection of an Opel. A further comparison by the Commission supported its conclusion that the Opel inspection price was excessive: no other manufacturer charged more than 2,500 BF for inspecting its European automobiles independently imported into Belgium.[27]

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22. *Id.* at 16, 15 Common Mkt. L.R. at D25-26.

23. *Id.* at 19, 15 Common Mkt. L.R. at D30.

24. *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 315 (2d ed. 1980).

25. Where the Commission indicated that this case could be characterized as illegal price discrimination under article 86(c), it was discussing the difference between the price charged for inspecting Opels sold by GM dealers in Belgium and that charged for inspecting the five Opels imported into Belgium outside these channels. *General Motors*, 18 O.J. EUR. COMM. at 17, 15 Common Mkt. L.R. at D26. The Commission concluded that the charges made for cars sold by GM dealers were not "particularly excessive" in relation to the purchase price. *Id.* at 14, 15 Common Mkt. L.R. at D22. This strange measure of comparison appears in no other EEC case. It should not be taken as a serious test of excessive pricing, because even the 5,000 BF price would pass it.

26. *Id.* at 17, 15 Common Mkt. L.R. at D27.

27. This comparison is meaningful only if one assumes that the costs in-

The Commission apparently concluded from these comparisons that GM had charged an excessive, abusive price, but the Commission decision was unclear about whether charging excessive prices, by itself, was abusive or whether aggravating factors were also required to make it so. Introducing its discussion of abusive pricing with the statement that "[t]he fact that the charging of excessive prices was abusive is shown by a number of circumstances,"[28] the Commission implied that other factors contributed to its finding that the excessive price was abusive. However, the discussion following this statement establishes the excessiveness itself, although the Commission's conclusion again emphasizes the abusiveness: "The above circumstances demonstrate that, as is evidenced by the extraordinary disparity between actual costs incurred and prices actually charged . . ., General Motors Continental abused its dominant position . . . and applied unfair prices within the meaning of [article 86(a)]."[29] Although its later characterization of 5,000 BF as an inspection charge that was "excessive and amounted to an abuse"[30] does not clarify the Commission's analysis, its finding of abuse in charging "*substantially* excessive prices"[31] may provide the clearest hint of the Commission's thinking. The "extraordinary disparity" between cost and price probably makes the price "unfair" and, thereby, abusive; it is possible, however, that the Commission considers all excessive prices abusive.

The Commission approved GM's subsequent price schedule, which was based upon the different average total costs of certifying European and American models, and which imposed "a much lower price for inspecting European passenger vehicles than for American passenger vehicles."[32] In spite of this voluntary termination of the abuse,[33] the Commission fined GM, and the company appealed to the Court of Justice.

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volved and the worth of the services provided were roughly equivalent. This assumption about the costs may be correct, particularly in light of the 100% price differential, but does not appear to have been made, even implicitly, by the Commission.

28. *General Motors*, 18 O.J. EUR. COMM. (No. L 29) at 16, 15 Common Mkt. L.R. at D25.

29. *Id.* at 16, 15 Common Mkt. L.R. at D26.

30. *Id.* at 17, 15 Common Mkt. L.R. at D27.

31. *Id.* at 16, 15 Common Mkt. L.R. at D24 (emphasis added).

32. *Id.* at 18, 15 Common Mkt. L.R. at D29.

33. *Id.* at at 18-19, 15 Common Mkt. L.R. at D29-30.

The Court's Advocate General viewed GM's price reduction as an admission that the earlier price was abusive.[34] In doing so, he proposed an incorrect interpretation of the facts and an improvident rule of law. Although GM's reduction may have been an admission that the 5,000 BF price was too high, a fact that it does not seem to have contested during the proceedings, it does not follow that GM had admitted that the price was either unfair or abusive. The effect of the Advocate General's legal approach would have been to tend to freeze prices at the supracompetitive level because of the adverse inference that lowering them would create. Furthermore, his conclusion that charging an unfair price is abusive, regardless of the presence of any anticompetitive purpose or effect,[35] would further compound this tendency to freeze prices.

Although the Court agreed that the price was excessive, it held there had been no infringement of article 86 because GM acted reasonably when it charged the excessive price and as soon as it discovered that the price was too high it refunded the excess.[36] Although the Court's opinion contains little analysis, it does further develop the doctrinal test for abusive pricing. The Court stated that abuse could be found in "the imposition of a price which is excessive in relation to the economic value of the service provided."[37] Because there was no dispute that the 5,000 BF price was excessive under the Court's test,[38] GM would have been guilty of violating article 86 unless it were excused by the circumstances under which the price was charged. The Court cautioned that the issue of abuse "must be considered in light of all the factors"[39] and held that GM had given an adequate justification

34. 1975 E. Comm. Ct. J. Rep. at 1386-87, 17 Common Mkt. L.R. at 103-04 (Opinion of Advocate General).

35. *Id.*

36. 1975 E. Comm. Ct. J. Rep. at 1380, 17 Common Mkt. L.R. at 110. The Commission had rejected this argument, holding that GM should have legally bound itself at the time of charging the 5,000 BF to refund the excess once its cost studies were completed and that the refund did not alter the prior abuse in imposing the price. 15 Common Mkt. L.R. at D28-29. Advocate General Mayras rejected the Commission's finding that the abuse was intentional, and therefore would have quashed the fine. 1975 E. Comm. Ct. J. Rep. at 1388-90, 17 Common Mkt. L.R. at 105-08 (Opinion of Advocate General).

37. 1975 E. Comm. Ct. J. Rep. at 1379, 17 Common Mkt. L.R. at 109.

38. *Id.* at 1379, 17 Common Mkt. L.R. at 110.

39. *Id.* at 1379, 17 Common Mkt. L.R. at 110.

of its conduct.

In explaining why GM was excused, the Court pointed out that the price had been quickly brought "into line with the real economic cost."[40] The Court thus implied that the "economic value" of a service or good is measured by its "real economic cost." Apparently, a dominant firm may only charge a price high enough to cover its costs, including a reasonable profit. A price above that level is excessive and, unless excused by the circumstances, abusive.

In *General Motors* the price charged was clearly supracompetitive because it far exceeded GM's costs, by any method of measurement. Thus, the Court did not consider the appropriate measure of cost nor determine the availability of cost information. The next unfair pricing case which the Court of Justice decided, *United Brands Co. v. Commission of the European Communities*,[41] required the Court to fully consider a dominant firm's pricing policy. *United Brands* demonstrated that cost data is difficult to collect and interpret and that correctly deciding such cases can be hard.

B. *United Brands*

United Brands Company was the largest banana producing and marketing firm in the Common Market and in the world. It also led the banana industry in innovation and vertical integration, operating an enterprise that extended from the plantation to the ripening-distribution stage and that included the largest fleet of refrigerated banana ships in the world. In the early 1960s United Fruit Company, United Brands' predecessor, developed the Cavendish/Valery, a new variety of banana which was hardier and more disease resistant.[42] United Brands introduced two significant changes that contributed to the Cavendish becoming the most widely sold banana in the world. First, United Brands packed its bananas in boxes at the plantation, enabling wholesalers to employ more scientific ripening procedures and produce

40. *Id.* at 1380, 17 Common Mkt. L.R. at 110.

41. 1978 E. Comm. Ct. J. Rep. 207, 21 Common Mkt. L.R. 429 (1978); In re United Brands Co., 19 O.J. EUR. COMM. (No. L 95) 1 (1976), 17 Common Mkt. L.R. D28.

42. *See* 1978 E. Comm. Ct. J. Rep. at 312, 21 Common Mkt. L.R. at 438 (Opinion of Advocate General).

more uniformly ripened bananas.[43] Second, and more significant, United Brands began to market its bananas under brand names.[44] United Brands' "Chiquita" was the first brand name, but other banana companies soon followed suit.[45]

United Brands successfully used extensive advertising to cultivate public awareness of the brand name.[46] Furthermore, the careful selection of bananas to be branded as Chiquitas and the rigorous oversight of the ripening and distribution process fostered an image of high quality. Because Chiquita bananas were better than unbranded bananas and arguably better than the brands of competitors, United Brands could charge thirty to forty percent more for its Chiquitas than for its unbranded bananas[47] and could maintain a competitive price that averaged nearly 7.5 percent above the prices that other companies charged for their brands.[48]

Although these price comparisons might have been enough to cause the Commission to conclude that the Chiquita prices were excessive and in violation of article 86, United Brands' practice of charging different prices in different national markets probably attracted the Commission's attention.[49] The Commission not only viewed this practice as price discrimination in violation of article 86(c),[50] but also used it as the primary means of showing that the higher prices were excessive and in violation of article 86(a).

United Brands shipped its Chiquita bananas to two European ports, Bremerhaven and Rotterdam, for delivery to distributors

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43. *Id.* at 314, 21 Common Mkt. L.R. at 440.
44. *Id.* at 315, 21 Common Mkt. L.R. at 441.
45. *Id.* at 329, 21 Common Mkt. L.R. at 459.
46. *Id.* at 329, 21 Common Mkt. L.R. at 460.
47. 19 O.J. EUR. COMM. (No. L 95) at 15-16, 17 Common Mkt. L.R. at D53.
48. 1978 E. Comm. Ct. J. Rep. at 301, 21 Common Mkt. L.R. at 502. The premium was even greater at the wholesale and retail levels. *Id.* at 339, 21 Common Mkt. L.R. at 472 (Opinion of Advocate General).
49. In addition to the pricing abuses discussed in this Article, United Brands had terminated one of its ripener/distributors to discipline it for participating in an advertising campaign for a competing brand of banana. *See* Adams, *Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States*, 20 TEX. INT'L L.J. 1, 29-31 (1985). The terminated distributor filed a complaint with the Commission. However, this does not explain what attracted the Commission's attention to United Brands' pricing policies.
50. This charge is analyzed later in this Article. *See infra* text accompanying notes 120-54.

who transported the bananas to their ripening facilities throughout the Common Market. The prices that United Brands charged each distributor depended upon the country in which the distributor operated. Irish ripeners paid the least; Belgians and Danes the most. The Belgians paid an average of eighty percent more than the Irish distributors, while the Danes paid nearly two and one-half times the Irish prices.[51] From a United Brands admission that the Irish prices resulted in a small profit, the Commission concluded that the profit on Continental European sales must have been at least as great as the margin by which the Continental prices exceeded the Irish prices.[52] Relying upon the *Deutsche Grammophon*[53] rule that large, unjustified price differences could be a basis for finding abuse, the Commission held that United Brands' Continental prices violated article 86.[54]

By comparing the price differences between Chiquita bananas and United Brands' unbranded bananas and between Chiquitas and other companies' brands,[55] the Commission sought to further support both its conclusion that the Chiquita prices were abusive and the necessary, but implicit, corollary that the prices significantly exceeded the economic value of the bananas. To the Commission the difference in quality between Chiquita bananas and United Brands' unbranded bananas was insignificant. Considering together the quality difference and United Brands' added cost of advertising the Chiquita name, the Commission found that only one-half of the price difference was objectively justified.[56] The Commission refused to consider the added costs of selecting, branding, and ripening, which United Brands claimed were incurred to produce consistently higher quality Chiquita bananas.

Even more noteworthy is the Commission's substitution of its

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51. 19 O.J. EUR. COMM. (No. L 95) at 9-10, 17 Common Mkt. L.R. at D44.

52. *Id.* at 15, 17 Common Mkt. L.R. at D52-53.

53. *See supra* text accompanying note 13.

54. 19 O.J. EUR. COMM. (No. L 95) at 15, 17 Common Mkt. L.R. at D52-53.

55. *Id.* at 15-16, 17 Common Mkt. L.R. at D53.

56. The Commission's actual language is confusing: "At the very most, half of this difference in price cannot be accounted for by differences in quality or the costs of advertising campaigns." *Id.* at 16, 17 Common Mkt. L.R. at D53. It is unlikely the Commission meant that half or *less* of the difference was unjustified. If it had, the case would have been deficient on its face, because there is no basis for concluding that the prices *significantly* exceeded the economic value. The Commission must have meant "[a]t the very most, half of this difference [can] be accounted for . . . ."

own valuation of the quality increment for that of the marketplace. Ripeners, retailers, and consumers valued the quality of the Chiquita bananas more highly than did the Commission.[57] The Commission's reliance upon its own subjective judgment, rather than upon the business judgment of firms in the banana trade and the preference of consumers in the market, vividly demonstrates the key difference between EEC and United States antitrust enforcement.

An extremely significant result of the Commission's decree is the weakening of United Brands' rivals. Chiquita bananas were the premium product on the market, reputed to be better than any other brand of bananas. Their quality was more uniform and more consistent than that of other bananas, and their prices fluctuated less. Chiquita bananas sold for an average premium of 7.4% over other brands. By ordering the 15% price reduction, the Commission commanded that United Brands sell its premium product, the most popular banana in Europe, for 7.6% less than its competitors had charged for their brands. The competitors, already under United Brands' dominance, faced the dilemma of either lowering their prices to maintain their sales or losing market share to United Brands, if they kept their prices above the new Chiquita prices. One versed in American antitrust doctrine and economics must be puzzled by an attempt to remedy the anticompetitive effects of a firm's dominance by weakening its rivals by diminishing either their profits or their market shares.

In addition to its dubious effect, the Commission's remedy was unworkable in two respects. First, the premiums between Chiquita bananas and other brand name bananas were dictated by consumer preferences. In order to maintain existing levels of sales, competitors had to price their brands lower than the Chiquitas. Thus, had United Brands been forced to lower Chiquita prices, its competitors would have been compelled by the market to lower their prices by roughly the same 15% to maintain the price differential.[58] Once the banana market regained equilibrium,

57. *See* 1978 E. Comm. Ct. J. Rep. at 338-39, 21 Common Mkt. L.R. at 472 (Opinion of Advocate General). Indeed, many retailers based their strategy upon Chiquitas because their uniformity and quality resulted in larger turnover and smaller price fluctuations than could be obtained with other bananas. *Id.* at 339-40, 21 Common Mkt. L.R. at 472.

58. The Commission held that a 15% reduction would end the abuse. 19 O.J. EUR. COMM. (No. L 95) at 16, 17 Common Mkt. L.R. at D53. This would reduce the premium range from 30-40% to 15-25%.

United Brands would regain its 7.4% premium over other brands and again face the potential of being in violation of article 86(a) since the differential, rather than costs, was the basis used to determine the fairness of the Chiquita prices. Thus, the Commission's 15% reduction order that was intended to resolve United Brands' uncertainty about whether its prices were legal, offered, at best, only temporary comfort.

Second, although it disclaimed any intent to take over United Brands' pricing responsibilities, the Commission required United Brands to submit semiannual reports of its prices during the next two years.[59] While continuing supervision may have been necessary to implement and enforce the price controls imposed on United Brands, the Commission was naive in assuming that a two-year period would be sufficient. The Commission's characterization of the two-year period as "sufficient to enable the Commission to satisfy itself that acceptable competitive conditions . . . have been restored"[60] is unwarranted. As demonstrated above, the Commission's decree would likely have worsened competitive conditions during the two-year period. Thus, supervision would have been needed more, not less, at its end.[61]

Furthermore, the efficacy of Commission supervision, even during the two-year period, is questionable. The Commission gave United Brands explicit permission to change its prices to reflect changes in costs.[62] Having failed to investigate United Brands' costs, the Commission would have encountered difficulty in verifying any claimed changes in them. Additionally, under the Commission's order, United Brands could justify higher prices with increased promotional expenditures designed to increase product

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59. *See* F. SCHERER, *supra* note 24, at 232.

60. 19 O.J. EUR. COMM. (No. L 95) at 20, 17 Common Mkt. L.R. at D60.

61. If the case were seen as primarily concerning the segregation of geographical markets along national lines—the cardinal sin against Common Market competition law—the two-year period would be more defensible. With the elimination of United Brands' ban on resale of bananas and its price discrimination, the Commission expected to break down commercial barriers restraining trade between the different countries. Once this had been accomplished there would have been less need to monitor United Brands' prices for discrimination, especially since its distributors would have become accustomed to the uniform prices and would have been likely to complain if they were discriminated against again. However, both the phrasing and the location of the reporting requirement indicate that it was ancillary to the ban on unfair, rather than discriminatory, pricing.

62. 19 O.J. EUR. COMM. (No. L 95) at 19, 17 Common Mkt. L.R. at D58.

differentiation, consumer preference, and United Brands' dominance.

The Court of Justice reversed the Commission's finding that United Brands' prices had been unfair and held that, although the Commission's understanding of the law was correct, its methodology was not. Again, the opinion emphasized legal doctrine but evidenced little comprehension of business practices and even less understanding of economics. The Court found that the key deficiency in the Commission's case was its reliance upon the comparison between Continental European prices and Irish prices to support its finding that Continental prices were unfair.[63] By the time the case reached the Court, United Brands had retracted its admission that Irish Chiquita prices had been profitable, explaining that the admission had been made before the end of its fiscal year and, therefore, without the benefit of year-end figures which revealed that United Brands had sustained a loss in Ireland.[64] The Advocate General did not find "this belated explanation very convincing" and, furthermore, supported the continued use of the Irish prices as a point of reference even if they had been unprofitable.[65] The Court of Justice, however, disagreed with the Advocate General. Because the Commission had failed to disprove United Brands' assertion that Irish Chiquita prices were low introductory prices which were not designed to produce a profit, the Court concluded that the Commission had not carried its burden of proof to establish that the Continental prices were unfair.[66] The Court also gave United Brands the benefit of the doubt because Continental banana prices had remained constant, in real terms, for nearly twenty years.[67] Other comparisons relied

63. 1978 E. Comm. Ct. J. Rep. at 302-03, 21 Common Mkt. L.R. at 502.

64. *Id.* at 303, 21 Common Mkt. L.R. at 503-04.

65. Advocate General Mayras noted that the losses were due to hurricanes in Honduras and Guatemala. 1978 E. Comm. Ct. J. Rep. at 340, 21 Common Mkt. L.R. at 473 (Opinion of Advocate General).

66. 1978 E. Comm. Ct. J. Rep. at 302-03, 21 Common Mkt. L.R. at 503. The Court held that the burden of proof had shifted to the Commission even though United Brands had not supported its claim with any accounting statements or reliable particulars. *Id.* at 303, 21 Common Mkt. L.R. at 503-04.

67. *Id.* at 303, 21 Common Mkt. L.R. at 504. The Advocate General had rejected the argument because United Brands had pioneered improved techniques that lowered its costs of obtaining bananas during that period. The Advocate General seemed driven by his concern that producing and consuming countries had not ratably shared the benefits of these advances. *Id.* at 338-39, 21 Common Mkt. L.R. at 471-72 (Opinion of Advocate General).

upon by the Commission were insufficient to sustain the Commission's charges. By refusing to rely upon the Commission's comparison between United Brands' Chiquita prices and unbranded banana prices, the Court implicitly rejected the Commission's reliance upon its assessment that the differences in quality were minuscule.[68] The Court also found the 7.4% difference between Chiquitas and other brand name bananas insufficient to create a presumption that Chiquita prices were excessive.[69]

In reversing the Commission's finding of a violation of article 86(a), the Court set out the unfair pricing test in more detail than in *General Motors*. Yet, as in the previous case the Court defined the violation as "charging a price which is excessive because it has no reasonable relation to the economic value of the product."[70] In *United Brands*, the "costs actually incurred" replaced "real economic cost" as the basis for comparing costs and price. This change, however, is probably more semantic than substantive.[71]

The first step in the unfair pricing test compares "the selling price of the product in question and its cost of production" to determine the dominant firm's profit margin. This margin "objectively" determines whether the price charged by the dominant firm is excessive.[72] If so, it must next be determined whether the excessive price was unfair either "in itself or when compared to competing products."[73] Although the Court did not delineate when an excessive price would be "unfair in itself," its treatment of the 7.4% difference between the Chiquitas and other brand name bananas may indicate that the extent to which prices are excessive would be the principal focus of the analysis.

When the Commission's decision is viewed within the Court's *United Brands* analytical framework, it is apparent that the Commission skipped the first step of the unfair pricing test and

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68. Certainly the Court would have concluded that an *unjustified* price differential of 20 to 40% established that the Chiquita prices were excessive. The Court, therefore, must have concluded either that the differential was justified and the Commission's assessment was wrong or that branded and unbranded bananas were two different products and the Commission was wrong to compare their prices.

69. 1978 E. Comm. Ct. J. Rep. at 303, 21 Common Mkt. L.R. at 504.

70. *Id.* at 301, 21 Common Mkt. L.R. at 502; *cf. supra* text accompanying note 37 (outlining the test employed in *General Motors*).

71. *See* 1978 E. Comm. Ct. J. Rep. at 301, 21 Common Mkt. L.R. at 502-03.

72. *Id.*

73. *Id.*

had an insufficient factual basis for its second-step comparison. The Court's analysis of the case raises the intriguing question of whether the first step is mandatory. Would the Commission's decision have been overturned if United Brands had not denied the profitability of its Irish prices? Although the court determined that United Brands' retraction undermined the Commission's basis for finding the Continental prices excessive, the Court had earlier chastised the Commission for failing "to require [United Brands] to produce particulars of all the constituent elements of its production costs,"[74] clearly indicating the Court's preference for an "objective" cost-based determination but recognizing that potential complexities in ascertaining costs could require the use of other methods.[75] The Court concluded, however, that the banana market did not present insurmountable cost complexities and that the Commission, had it investigated costs, could have verified the figures supplied by United Brands.

The Court's rationale for using production costs in the first step of its unfairness test demonstrated its disdain for economists ("economic theorists" who "think up" methods for determining whether a price is unfair)[76] and its failure to master the economic concepts. Although the Court claimed to appreciate the difficulties in determining production costs, which in the Court's opinion included "indirect costs and general expenditure,"[77] the Court really failed to understand what was involved.[78] Advocate General

74. *Id.* at 302, 21 Common Mkt. L.R. at 503.

75. *See id.*

76. *Id.*, *see also* Ashley, *Predatory Pricing Under Article 86 of the Treaty of Rome*, 32 INT'L & COMP. L.Q. 1004, 1011 n.36 (1983) (commenting on this patronizing reference).

77. 1978 E. Comm. Ct. J. Rep. at 302, 21 Common Mkt. L.R. at 503.

78. Not only did the Court say that production costs might include indirect costs and general expenditures, but it also noted that important causes of variations in production costs include the firm's size, objectives, complexity, geographical range, number of products, number of subsidiaries, and the subsidiaries' relationships with each other. *Id.* at 302, 21 Common Mkt. L.R. at 503. Thus, the Court included fixed costs such as corporate administrative expenses and other costs not directly involved in production and distribution of the physical product. Presumably, costs of research and development, the banana plantations, the packing plants, domestic and international transportation, marketing research, advertising, and overhead of the European operation would be included. The Court gives no hints on how these and other indirect costs are to be apportioned. The only simplifying fact in the case is that most of these costs need only be allocated between two products, branded and unbranded bananas,

Mayras correctly pinpointed the problems associated with cost analysis in the *United Brands* situation. These problems not only included United Brands' vertical integration and world-wide operation, which made any attempt to allocate costs in an economically meaningful fashion extremely difficult, but also included the effect of taxes and customs duties on transfer prices.[79] The Court refused to acknowledge that these difficulties would hamper the determination of United Brands' costs, but it implied that if the determination were hindered, industry cost studies and industry averages could be substituted for the actual costs of the dominant firm.[80] The Court, however, provided no guidance about when industry cost studies should be consulted and no statement of the costs to be included in either an industry-wide analysis or an analysis of the dominant firm's costs. It is not even clear whether the Court recognized the difference between economic costs and those determined by the use of accounting conventions.[81]

The implications of the Court's suggestion that industry cost averages could replace actual costs incurred by a dominant firm are even more intriguing. A firm that has achieved a dominant position is unlikely to be less efficient than its rivals, but rather, probably will be more efficient. United Brands, for example, was the largest, most completely integrated, and most innovative banana firm in the world. The factors, upon which the Commission and the Court relied to show United Brands' dominance clearly demonstrated that it was the most efficient firm in the industry.

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although general corporate overhead would have to be allocated among United Brands' many products. *See generally* 2 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 512, 513b (1978) (discussing the difficulty of proving costs and the unreliability of accounting figures for that purpose); 3 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 712 (1978) (discussing alternative measures of cost); F. SCHERER, *supra* note 24, at 268-74, (discussing the measurement and apportionment of costs and the discrepancies between accounting and economic figures).

79. 1978 E. Comm. Ct. J. Rep. at 333-34, 21 Common Mkt. L.R. at 477-78 (Opinion of the Advocate General). An additional problem, at least in measuring and allocating costs in future cases, is that firms may engage in adaptive behavior, setting transfer prices to minimize the likelihood of detection and conviction of antitrust violations.

80. *See id.* at 302, 21 Common Mkt. L.R. at 503.

81. *See generally* F. SCHERER, *supra* note 24, at 272-74; 2 P. AREEDA & D. TURNER, *supra* note 78, at ¶¶ 512c, 513b (each distinguishing economic profit from accounting profit).

Thus, the use of industry averages, rather than a dominant firm's own costs, overstates the firm's costs, understates its profit margin, and, therefore, increases the dominant firm's permissible prices and related profits by the amount of its enhanced efficiency. Although the Court of Justice surely did not intend this result under its excessive price test, the economic benefits counsel its continuance, especially now that its effect has been explained. Innovation that improves productive efficiency is a central goal of any rational economic system. Both market and mixed systems use competition to foster this goal. A firm that improves efficiency through innovation should be rewarded, not penalized, for its success. Consequently, United Brands and other dominant firms should be allowed to benefit from their superior efficiency by including the cost savings in their profits as these firms are able to do in the United States.[82]

In the final analysis, what cost test the Court intended to adopt remains uncertain. The Court's inclusion of indirect costs and overhead indicates that the average total cost of the product is to be used. Thus, the first step in the test would be to determine whether the price markedly exceeded the average total cost. It is unclear exactly how the Commission will determine costs. If the Commission attempts to do so on its own, the results certainly will be suspect because the Commission lacks the accounting and economic sophistication to properly assess which costs should be included in the analysis or to readily recognize dubious figures that are supplied by the firm being investigated. In addition, the accounting records of a dominant firm may be located outside the geographical territory of the EEC and thus, may not be subject to direct inspection by Commission officials. The dominant firm frequently will have the upper hand because it will control most of the relevant cost information and because its own accounting and economic experts may select and present that information to the firm's advantage. This latter difficulty is compounded by the firm's ability to make unsupported assertions about its costs or profits and, thereby, put the burden on the Commission to disprove them.[83] Because the best that one reasonably can expect of the Commission is crude measurement of cost using a variety of methods to produce corroborating results,[84] the first step in the

82. *See* F. SCHERER, *supra* note 24, at 280-82.
83. *See supra* note 66 and accompanying text.
84. *See* V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND

Court's test, comparing costs to prices to determine whether the profit margin is excessive, gradually may be discarded or, at least, made optional. In the meanwhile, the decision in the next case may be controlled by whether the Court accepts the Commission's rough calculation of costs.[85]

C. Unfairly Low Prices

The exact relationship between cost and price that will result in prices being declared "unfair" is not clear. Because the Court in *United Brands* was concerned with excessive prices, it emphasized excessive profits. The unfairness that resulted was to the purchasers who paid more than they should have.[86] Might unduly low, predatory prices be outlawed under the unfairness test of article 86(a), as monopoly pricing is? Is limit pricing forbidden, too?

As a practical matter, the answers probably differ even though the principles appear to apply to both limit and predatory pricing.[87] While predatory pricing will be prohibited, limit pricing is unlikely to be.

1. *Limit Pricing*

In doctrinally assessing limit pricing, the focus of the Court's test could be shifted from the unfairness to customers who paid the excessive price to the unfairness to purchasers generally. This general unfairness to purchasers results from the ability of a successful limit pricing scheme to continually distort the competitive system.[88] Limit pricing, however, probably will not be attacked

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PRACTICE 124-25 (2d ed. 1981).

85. A common pattern that has emerged in EEC cases is for the Court of Justice to approve the Commission's interpretation of article 86 but to reject the Commission's methodology and factual proof. *See, e.g., supra* notes 63-69 and accompanying text.

86. The Court referred to the price as one that was "unfair in itself." 1978 E. Comm. Ct. J. Rep. at 301, 21 Common Mkt. L.R. at 503.

87. In a sense, limit pricing is permanent predatory pricing. *See* F. SCHERER, *supra* note 24, at 538-39; Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 880-81, 888-89 (1976); Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & ECON. 129, 132-33 (1972).

88. Moreover, this would run afoul of article 86 as the Court has interpreted it to implement article 3(f)'s goal of assuring that "competition in the common market is not distorted." *See* Europemballage Corp. v. Commission, 1973 E. Comm. Ct. J. Rep. 215, 243-45, 12 Common Mkt. L.R. 199, 223-25 (1973). *See*

under article 86 because it produces no direct victims. The Commission brings cases against dominant firms after a victim of the alleged abuse has filed a complaint.[89] The Commission, instead of actively seeking violations, usually reacts to situations that come to its attention.[90] Neither general purchasers nor potential entrants have sufficient reason or information either to report limit pricing to the Commission or to file a complaint. Thus, a challenge to limit pricing is no more likely to be made in Europe than it is in the United States, where concern is found only in academic writing.[91]

2. *Predatory Pricing*

In contrast to limit pricing, temporary predatory pricing has been the subject not only of intense academic interest[92] but also

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also Adams, *supra* note 5, at 4-6. Additionally, limit pricing could be forbidden under article 86(b) which declares abusive "limiting production, markets or technical development to the prejudice of consumers."

89. This was true, for example, in Istituto Chemioterapico Italiano v. Commission (Commercial Solvents), 1974 E. Comm. Ct. J. Rep. 223, [1974] 1 Comm. Mkt. L.R. 309; United Brands Co. v. Commission, 1978 E. Comm. Ct. J. Rep. 207, [1978] 1 Comm. Mkt. L.R. 429; Benzine en Petroleum Handelmaatschappij v. Commission (British Petroleum), 1978 E. Comm. Ct. J. Rep. 1513, [1978] 3 Comm. Mkt. L.R. 174; Hugin Kassaregister AB v. Commission, 1979 E. Comm. Ct. J. Rep. 1869, [1979] 3 Comm. Mkt. L.R. 345; Nederlandsche Banden-Industrie Michelin NV v. Commission, 1983 E. Comm. Ct. J. Rep. 3461, 42 Comm. Mkt. L.R. 282 (1983); and Engineering and Chemical Supplies Ltd. v. AKZO Chemie Ltd., 26 J. Eur. Comm. (No. L252) 13 (1983), 78 Common Mkt. L.R. 694 (1983).

90. In European Economic Community v. Hoffmann-La Roche, 19 O.J. EUR. COMM. (No. L 223) 27 (1976), 18 Common Mkt. L.R. D25, D26 (1976), which the Commission claims to have initiated itself, a former employee of the defendant had provided incriminating company documents to the Commission before it commenced proceedings. Hoffmann-La Roche v. Commission of the European Communities, 1979 E. Comm. Ct. J. Rep. 461, 598-99, 26 Common Mkt. L.R. 211, 261 (1979) (Opinion of Advocate General).

91. *See, e.g.*, 3 P. AREEDA & D. TURNER, *supra* note 78, at ¶ 714b; F. SCHERER, *supra* note 24, at 232-52; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 118-21 (1977). *But see* Note, Telex v. IBM: *Monopoly Pricing Under Section 2 of the Sherman Act*, 84 YALE L.J. 558 (1975).

92. The debate began with Phillip E. Areeda and Donald F. Turner's article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) [hereinafter cited as *Areeda & Turner, Predatory Pricing*]. In that article, Areeda and Turner proposed that the conclusive test for predatory pricing should be whether the price was above the seller's reasonably anticipated short-run marginal cost (or its surrogate, average variable cost).

of numerous cases under section 2 of the Sherman Act.[93] In 1983 the Commission heard the first predatory pricing case in the Common Market, *Engineering and Chemical Supplies Ltd. v. AKZO Chemie Ltd.*[94] As expected, the Commission ruled that predatory pricing can be unfair under article 86(a).[95] The *United*

Prices above this level would be conclusively presumed legal; those below, predatory. *Id.* at 733. F.M. Scherer quickly challenged Areeda and Turner in Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 HARV. L. REV. 869 (1976), with Oliver E. Williamson's critique not far behind. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 YALE L.J. 284 (1977). Many others joined the fray. The debate is summarized in Hurwitz and Kovacic, *Judicial Analysis of Predation: The Emerging Trends,* 35 VAND. L. REV. 63 (1982); Brodly & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards,* 66 CORNELL L. REV. 738 (1981); and Easterbrook, *Predatory Strategies and Counterstrategies,* 48 U. CHI. L. REV. 263 (1981). When the dust settled, there was no clear winner, although even Areeda and Turner agreed that their initial test was too simple and its conclusive presumption too rigid. *See* 3 P. AREEDA & D. TURNER, *supra* note 78 at ¶ ¶ 711, 712, 715 (1978) and ¶ ¶ 711.2, 714.1-.2 (1982 Supp.).

93. Initial judicial reaction to Areeda and Turner's article was quick, albeit qualified, acceptance. *See, e.g.,* Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977); International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976). But courts soon voiced second thoughts. *See, e.g.,* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); Pacific Engineering & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 802 (1977). As the academic debate heated up, the courts grew far more cautious. Calvani and Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction,* 51 ANTITRUST L.J. 375, 395-96 (1982). United States courts generally now view cost-based tests as one of the most informative tools for determining whether prices are predatory, but not the *sine qua non* originally proposed by Areeda and Turner. Monroe & Hill, *The Predatory Pricing Controversy: Academic Theories Enter the Courtroom,* 13 U. TOL. L. REV. 539, 543 (1982). *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 125-30 (2d ed. 1984). In the final analysis, courts are seeking evidence of predatory intent, and inferring it from below-cost pricing is just one of the means of inquiry.

94. 26 O.J. EUR. COMM. (No. L 252) 13, 78 Common Mkt. L.R. 694 (1983) (interim order).

95. Commentators, including Commission officials, have repeatedly stated that predatory pricing can be condemned as unfair under article 86(a). *E.g.,* 2 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE E.E.C. TREATY ¶ 86.16 (1976); Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law,* 3 FORD-

Brands test, which outlaws prices that are unfair "when compared to competing products," supports the Commission's conclusion.[96]

AKZO Chemie, a large Dutch chemical company with operations throughout the Common Market, produced and sold a wide range of chemicals, including organic peroxides used in the milling of flour and the manufacturing of plastics. AKZO, the leading producer of organic peroxides in the EEC, had a market share of approximately forty-eight percent. Its share of the United Kingdom (U.K.) market for benzoyl peroxide, which was used in the milling of flour, was fifty-two percent. AKZO's largest competitor in the U.K. benzoyl peroxide market was Engineering and Chemical Supplies Ltd. (ECS), which had a thirty-five percent share of the market. A third producer, with close commercial ties to AKZO, sold the remaining thirteen percent.[97]

When ECS began selling organic peroxides to the plastics industry, a market that AKZO historically had dominated, AKZO threatened to sell peroxides to ECS' U.K. milling customers at prices below cost, unless ECS withdrew from the plastics industry, particularly in Germany. ECS refused to withdraw, and AKZO implemented its plan of predation, despite an injunction issued by the High Court of Justice in London prohibiting it from doing so.[98] In issuing an interim restraining order, the Commission relied on three elements of proof of predatory pricing. First, unambiguous "smoking pistol" internal memoranda of high-level AKZO executives demonstrated that the price cuts were designed to discipline, if not destroy, ECS in response to its expansion into the plastics industry. The memoranda outlined a plan explicitly

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HAM INT'L L.F. 1, 37 (1979-80); U. TOEPKE, EEC COMPETITION LAW: BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES 536, 570, 573 (1982); *see also* Commission of the European Communities, Memorandum on Concentration (1966). Dr. Toepke would not categorize predatory pricing as "unfair" under article 86(a), but would leave it to be condemned under the article 86's general prohibition of abuse of a dominant position. His view seems analytically unsupportable and has not been followed by the Commission, although this is not a question of practical import, but rather an issue of fascination, principally to the Continental legal mind.

96. 1978 E. Comm. Ct. J. Rep. at 301, 21 Common Mkt. L.R. at 503.

97. 26 O.J. EUR. COMM. (No. L 252) at 14-15, 38 Common Mkt. L.R. at 697-98.

98. *Id.* at 14, 38 Common Mkt. L.R. at 696. Technically, the prohibition was part of a settlement before the High Court, but it had the force of an injunction.

involving below-cost pricing that was carefully targeted against ECS through offers to its major customers. The memoranda also corroborated ECS's claim of an AKZO ultimatum. Second, AKZO's price reductions, were temporally selective, geographically restricted, and directed against a specific competitor unable to withstand prolonged predatory pricing. Third, the prices were significantly below cost.[99]

The Commission made its doctrinal views clear when it defined predatory pricing as pricing "at excessively low levels." It concluded that predatory pricing violates the article 86(a) prohibition against unfair pricing when used to drive a competitor out of business or to force a competitor to sell out to the dominant firm.[100]

Below-cost prices may be justified if they are offered to meet competition. AKZO raised this defense, but the Commission concluded that the internal memoranda of AKZO refuted the claim that its price cuts were simply legitimate responses to competition.[101] The Commission also rejected the "meeting competition" defense because AKZO did not assert that all of its low-price offers were made in response to ECS's prices. Because the Commission based its rejection of the meeting competition defense on factual rather than legal grounds, the defense would appear to be available within the Common Market under a different set of facts.[102]

Two sharp contrasts can be seen between the Commission's *AKZO* decision and recent United States predatory pricing cases. The first difference, the Commission's lack of concern for the proper economic measure of cost, may result from the facts of the case. AKZO, for example, admitted that its prices were significantly below its costs.[103] Perhaps AKZO's prices were so low that the choice of a cost measure was immaterial. Certainly, the failure to discuss costs did not result from a lack of information. The Commission had obtained detailed information about AKZO's

99. *Id.* at 18, 38 Common Mkt. L.R. at 703.

100. *Id.*

101. *Id.*

102. This conclusion is buttressed by the Commission's allowing AKZO to charge a price below those fixed in the interim order "if it is necessary in good faith to do so to meet (but not to undercut) a lower price shown to be offered by another supplier ready and able to supply the same product to that [customer]." *Id.* at 20, 38 Common Mkt. L.R. at 707.

103. *Id.* at 19-20, 38 Common Mkt. L.R. at 704.

costs, prices, and profits. AKZO had provided the Commission with production costs,[104] and Commission officials had conducted surprise raids at AKZO's U.K. and Dutch headquarters, during which they inspected and copied files and records that were relevant to the investigation.[105] The Commission apparently measured costs by accounting, rather than economic, standards, but the decision does not indicate the Commission's rationale for its choice of standards. Nor does the decision indicate whether the Commission recognized that there was a choice to be made and that different results might flow from the use of different cost measures. The only clue to the Commission's thinking is found in its discussion of the interim order, where the Commission indicated that it had separated production costs from transportation costs and had not included profit as an element of cost, although it recognized that profit must be included in the price.[106] The Commission's treatment of costs as excluding normal profits, although different from that accorded by economists, conforms to both general accounting practices and the scholarly analysis of article 86 by John Temple Lang, one of the Commission's antitrust lawyers.[107] Although the failure to label normal profits as costs does not affect the outcome if normal profits are included separately in the calculations, it is significant to show that the Commission did not use economic definitions of costs.

Temple Lang has proposed that exclusionary prices at or near cost be considered unfair and, therefore, in violation of article 86(a).[108] While this proposal initially may appear radical to antitrust lawyers who are familiar with the recent academic debate and United States cases, nonetheless, this proposal is similar to the accepted test in the United States prior to 1975.[109] Interestingly, Temple Lang contends that "[e]ven prices slightly above

104. *Id.* at 19, 38 Common Mkt. L.R. at 705.

105. *Id.* at 14, 38 Common Mkt. L.R. at 696. Because AKZO's corporate headquarters were located in the EEC, the Commission could gather its own information rather than merely rely upon that furnished by the defendant, as was necessary in *United Brands.*

106. The Commission also indicated that a contribution to overhead could properly be counted as a production cost. *Id.* at 19-20, 28 Common Mkt. L.R. at 705, following the Court's pronouncement in *United Brands*, 1978 E. Comm. Ct. J. Rep. at 302, 21 Common Mkt. L.R. at 503.

107. *See* Temple Lang, *supra* note 95, at 37.

108. *Id.*

109. *See, e.g.*, Yamey, *supra* note 87.

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."[110] This is the crux of the predatory pricing debate and the central difference between Areeda and Turner's short-run marginal cost test[111] and the Commission's approach. Neither Temple Lang nor the Commission has given any indication that short-run marginal cost or average variable cost are standards for predatory pricing under article 86.[112]

The second major contrast between the EEC's *AKZO* decision and recent predatory pricing cases in the United States is the Commission's willingness to engage in detailed price regulation, its claims to the contrary notwithstanding. The Commission not only specified the appropriate method to calculate minimum prices but also attached an annex to its opinion listing the minimum prices that it would allow AKZO to offer or charge each of its customers for each product.[113] Although the interim order set prices only for a limited period, the Commission's willingness to engage in a high level of specificity has been established and can be expected to influence any final order that the Commission issues in *AKZO* and future cases.

Predatory pricing appears destined to face harsher treatment in the EEC than it has recently in the United States. Accounting costs usually are skewed upward by the desire to minimize taxes and, therefore, are likely to exceed economic costs.[114] Full eco-

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110. Temple Lang, *supra* note 95, at 37; *cf.* Yamey, *supra* note 87.

111. *See*, Areeda & Turner, *Predatory Pricing*, *supra* note 92, at 697.

112. *But see* Toepke, *Pricing of Products in the EEC*, 16 INT'L LAW. 233, 236 n.6 (1982) (arguing for the use under article 86 of the Areeda & Turner short-run marginal cost/average variable cost test). However, the force of Toepke's argument is weakened by his inconsistency. He not only agrees with Temple Lang's assessment that article 86 forbids exclusionary prices above cost but insufficient to produce a normal return, *id.* at 257-58 n.74, but also opines that "Areeda and Turner . . . have demonstrated that *the only meaningful and practical way to prove predation* is to focus on cost [sic] below marginal or average variable cost." *Id.* at 236 n.6 (emphasis added). Apparently since Temple Lang did not use the label "predatory pricing", Toepke did not notice that Temple Lang and Areeda and Turner were analyzing the same problem.

113. 26 O.J. EUR. COMM. (No. L 252) at 19-21, 38 Common Mkt. L.R. at 705-06, 708.

114. Accelerated depreciation methods and LIFO inventory accounting are two of the more obvious ways in which costs are increased. *See* S. SIEGEL & D.

nomic cost usually will exceed the Areeda and Turner test's short-run marginal cost or its surrogate, average variable cost.[115] Thus, more prices will be declared predatory in the Common Market than under the Areeda and Turner test or its modifications.[116] Because EEC competition law is complaint driven and because there is no shortage of victims willing to complain of allegedly predatory pricing by a powerful competitor, it is foreseeable that additional predatory pricing cases will reach the Commission.[117] Under the Commission's standards, defendants will have difficulty in proving that low prices are not predatorily unfair under article 86(a), even absent the "smoking pistol" memoranda of *AKZO Chemie.*

In summary, a dominant firm operating in the Common Market faces possible attack on its pricing policy from two directions. The Commission may consider prices that are too high unfair to customers and, therefore, prohibited. Alternatively, the Commission may consider prices that are too low unfair to competitors and distortive of the competitive system, and, therefore, also prohibited. Noting the uncertainties may provide little help, but two observations may provide some insight. First, a dominant firm should not take any action which may be construed as dividing the market along national lines or as fostering such divisions. The Commission's attacks on the pricing policies of General Motors

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SIEGEL, ACCOUNTING AND FINANCIAL DISCLOSURE: A GUIDE TO BASIC CONCEPTS 37-38, 43-45, 59-60 (1983); 2 P. AREEDA & D. TURNER, *supra* note 78, ¶ 512c. Historic cost accounting may tend to offset this, especially in times of rapid inflation. Because accounting costs do not include the cost of capital, it is necessary to include a reasonable return or profit. *See* 2 P. AREEDA & D. TURNER, *supra* note 78, ¶¶ 508, 512b.

115. *See* 3 P. AREEDA & D. TURNER, *supra* note 78, ¶ 715. This is true unless the monopolist is producing at a level above its most efficient output, a situation not likely to encourage predation. Areeda and Turner make an exception in this rare case and measure predation by the higher average total cost. Probably the same result would occur in the Common Market, since accounting costs generally will then also be below marginal cost.

116. The principal variation of the Areeda and Turner test gaining judicial acceptance is a hybrid per se/rule of reason approach. It conclusively presumes prices at or above average total cost to be legal, rebuttably presumes prices below short-run marginal (or average variable) cost to be illegal, and analyzes under various rule of reason standards those prices below average total cost and above or equal to short-run marginal cost. Huritz & Kovacic, *supra* note 92, at 100-10, 150.

117. *But see* Toepke, *supra* note 112, at 235-36.

and United Brands is directly attributable to this kind of market division. In addition, AKZO Chemie also attempted to prevent a British firm from invading its German market and, if successful, would have isolated one market from the competition originating in another. Second, price discrimination makes a pricing case much easier for the Commission to win, if not on the article 86(a) unfair pricing charge, then at least on article 86(c) discrimination. Although the Commission has never won an unfair pricing case on appeal to the Court of Justice, it has never lost a price discrimination decision. Thus, a dominant firm that discriminates on the basis of nationality or national location is doubly damned.

III. Differential Pricing: Article 86(c)

A. Exploitation

Price discrimination, one of the examples of abuse that is given by article 86, has been one of the principal objects of Commission scrutiny. Article 86(c) forbids "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[118] The language of this example would enable EEC authorities to focus upon true price discrimination and to avoid many of the problems of the Robinson-Patman Act.[119] Unfortunately, this potential remains unrealized because the Commission and the Court of Justice have been deciding these cases without sufficient understanding of or concern for the economic and business consequences.

The decided cases have addressed three types of differential pricing: 1) profit enhancing, 2) customer tying, and 3) predatory. The first type is exploitative and, thus, is important in a legal system that seeks to regulate the exploitation of economic power by dominant firms. The second and third types are anticompetitive abuses. Several significant differences arise from this analytical categorization, as will be seen later in this study.

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118. Treaty of Rome, art. 86, *supra* note 1.

119. 15 U.S.C. §§ 13-13b, 21a (1982). Article 86(c), however, does share the Robinson-Patman Act limitation of applying only to discriminatory differential pricing and not to discriminatorily charging the same price in transactions having different costs. This limitation is probably inherent in any legal proscription of price discrimination.

1. *United Brands*

United Brands is the principal EEC case on exploitative price differentiation.[120] Analysis of this charge and its relationship to the unfair pricing charge is instructive.

United Brands' price differentials between the Irish and Continental markets were the basis for both charges.[121] The Commission found the prices charged on the Continent by United Brand to be unfair because they significantly exceeded those charged in Ireland. The Court rejected this finding on the grounds that (1) the Commission should have based its determination upon cost studies which established United Brands' profit margin and (2) the Commission had not proven that the Irish prices were profitable.[122] The Court, however, did accept the Commission's conclusion that United Brands had violated article 86(c) by engaging in illegal price discrimination.[123]

Article 86(c) establishes three elements of a violation: (1) different prices, (2) applied to equivalent transactions, and (3) placing trading parties at a competitive disadvantage. In *United Brands* there was no doubt that the firm charged different prices, although the extent of the differences was in dispute. Three types of price differences were present. First, United Brands charged approximately 30 to 40 percent more for its Chiquita bananas than for unbranded bananas of lower quality.[124] Although the Commission considered this difference significant in concluding that the Chiquita prices charged Continental customers were unfairly high and abusive under article 86(a), it did not attempt to base the price discrimination violation of article 86(c) upon this difference in price. Second, United Brands changed its prices from week to week. The Commission did not attempt to base the price discrimination case upon this difference either.[125] Instead,

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120. Although the Commission in *General Motors* expressed some concern that the excessive price charged to inspect imported Opels constituted price discrimination that harmed dealers who imported GM cars outside of the normal channels, the decision was not based upon this effect nor did it rely upon article 86(c). 15 Common Mkt. L. R. at D26.

121. For the facts of *United Brands*, see *supra* text accompanying notes 42-54.

122. 1978 E. Comm. Ct. J. Rep. at 303, 21 Common Mkt. L.R. at 503-04.

123. *Id.* at 299, 21 Common Mkt. L.R. at 501.

124. 19 O.J. EUR. COMM. (No. L 95) at 15-16, 17 Common Mkt. L.R. at D53.

125. 1978 E. Comm. Ct. J. Rep. at 336, 21 Common Mkt. L.R. at 468 (Opinion of Advocate General).

the Commission focused exclusively on the third difference, the disparity in Chiquita prices in different countries. According to the Commission, the prices United Brands charged to its German distributors from 1971 to 1974 averaged between 11.3 percent and 17.6 percent lower than those it charged its distributors in Belgium, the Netherlands, and Luxembourg.[126] The highest weekly difference was 54 percent.[127] Similar differences existed between Danish ripeners and ripeners in the Benelux countries,[128] with even greater differences calculated when the Irish market was included, for United Brands' prices were lowest there.[129] Although United Brands claimed the differential was lower, averaging only 5 percent in 1975,[130] nonetheless, United Brands clearly was charging significantly different prices to its different customers, depending on the country in which their ripening facilities were located and their distribution occurred. Thus, the first element was satisfied.

The Commission, without any difficulty, found the second element present, holding that the transactions involved had been equivalent. This Commission finding is superficially appealing. All United Brands' bananas that were destined for European markets were imported through the ports of Rotterdam and Bremerhaven. Furthermore, all Chiquita bananas that United Brands imported into the European market were the same premium Cavendish variety, were grown in the same locations, and were labelled with the same Chiquita brand.[131] In addition, all sales of Chiquitas to Continental ripeners were made on the same contractual terms.[132] Thus, United Brands, through a single Euro-

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126. *Id.* at 295, 21 Common Mkt. L.R. at 498.

127. *Id.* at 295-96, 21 Common Mkt. L.R. at 498-99.

128. *Id.*

129. The Commission placed the average differential at 80% higher in Belgium than Ireland. The greatest difference was in Denmark, where prices were 138% higher than prices in Ireland for one week. *Id.* at 296, 21 Common Mkt. L.R. at 499.

130. *Id.*

131. *Id.* at 294-95, 21 Common Mkt. L.R. at 498.

132. Although United Brands' Irish prices included the cost of delivery of the bananas to Ireland (these sales were made c.i.f. Dublin. *Id.* at 299, 21 Common Mkt. L.R. at 501) while the Continental sales prices did not include transportation from the port (these bananas were sold f.o.r. the port,*id.*), this involves no transactional significance; deducting the cost of freight and insurance yields a comparable price. 19 O.J. EUR. COMM. (No. L 95) at 9-10, 17 Common Mkt. L.R. at D44.

pean subsidiary, sold the identical brand-name product to different buyers with delivery at the same time and at the same port. The transactions seemed equivalent.

Whether the transactions actually were equivalent, however, is doubtful. The bananas were destined for different markets. The Commission had failed to establish a unified market for bananas throughout the Community.[133] Distinct national markets existed, each with its own tariffs and market organizations. Undoubtedly, United Brands faced different supply and demand curves in each market, a fact that United Brands offered to justify its method of pricing. Explaining its pricing mechanism, United Brands stated that the week before each shipment of bananas was scheduled to arrive in port, while it was on the high seas, United Brands discussed with its distributors the market conditions, including wholesale prices, which it should expect for each local market when the shipped bananas were ripe.[134] United Brands then solicited orders and fixed the quantity offered to each distributor. Four days before the bananas arrived, United Brands set the price for each market and notified the ripeners, who were entitled to cancel or reduce their orders.[135] United Brands alleged that the goal of this system was to enable it to base the price to each distributor on the price the distributor could charge for the bananas when he had ripened them. Because the distributors operated in different markets, United Brands claimed that it had to treat them differently.

Rather than analyze this as a question of equivalence of the transactions, the Commission and Court viewed it as an issue of "objective" justification for United Brands' conduct, holding that the difference in retail prices in the various national markets did not objectively justify the different prices charged to the distributors doing business in those countries.[136] In reaching their respective conclusions, the Court of Justice, and to a lesser extent the Commission, enunciated remarkable economic views. The Court

133. 1978 E. Comm. Ct. J. Rep. at 275, 21 Common Mkt. L.R. at 485.

134. *See id.* at 296-97, 21 Common Mkt. L.R. at 499.

135. *Id.* at 298-99, 21 Common Mkt. L.R. at 499.

136. 19 O.J. EUR. COMMON (No. L 95) at 18, 17 Common Mkt. L.R. at D58; 1978 E. Comm. Ct. J. Rep. at 298, 21 Common Mkt. L.R. at 500; *see* Siragusa, *Application of Article 86: Tying Arrangements, Refusals to Deal, Discrimination and Other Cases of Abuse,* in REGULATING THE BEHAVIOR OF MONOPOLIES AND DOMINANT UNDERTAKINGS IN COMMUNITY LAW 398, 427 (J. Van Damme ed. 1977).

chastised United Brands for violating the law of supply and demand:

> 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).[137]

Apparently, the Court of Justice does not realize that the law of supply and demand is descriptive, not prescriptive.[138] More significantly, the Court demonstrated its lack of understanding of the factors that affect demand and the methods by which a firm must determine its demand curve. The Court unrealistically suggested that United Brands, by considering the wholesale demand for the ripened bananas, adversely affected the "mechanisms of the market."[139] How else was United Brands to set its prices? By definition, a dominant firm cannot merely match an established market price; it must set its price. The Court and Commission apparently would require that a dominant firm not consider the position of its customers. The Commission held that the factors which necessarily affect the resale prices charged by distributors could never objectively justify United Brands' practice of charging the distributors different prices.[140] A firm with a carefully developed distribution chain, similar to United Brands', has an interest in seeing that its distributors prosper. The Court, however, would prohibit a dominant firm from considering this interest in making its pricing decisions. It is difficult to understand why. Considering the distributors' success is not evil; it serves the interests of the distributors, as well as the dominant firm, and, therefore, represents a realistic attempt to assess the various market forces at work.

The Court justified its prohibition of United Brands' consideration of market conditions at the wholesale level by reasoning that

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137. 1978 E. Comm. Ct. J. Rep. at 298, 21 Common Mkt. L.R. at 500.

138. The Advocate General responded to United Brands' explanation of its price calculation, "[s]uch an argument is tantamount to a blunt acknowledgement that it has the power to dictate its own laws." *Id.* at 337, 21 Common Mkt. L.R. at 46-9 (Opinion of Advocate General).

139. 1978 E. Comm. Ct. J. Rep. at 298, 21 Common Mkt. L.R. at 500.

140. 19 O.J. Eur. Comm. (No. L 95) at 14-15, 17 Common Mkt. L.R. at D52.

the distributors alone bore the risks of that market.[141] Again the Court was wrong. United Brands set its prices only subsequent to shipment of the bananas. Except for the three day period immediately before the arrival of the bananas, United Brands bore all risk of price fluctuations while the bananas were en route. If United Brands had required distributors to place firm orders at a set price prior to shipment from South America, United Brands would have borne substantially less risk. Furthermore, under the system it used, had it set its prices at levels that did not reflect the expected wholesale prices for ripened bananas in the following week, United Brands might have found itself with unsold, perishable bananas to unload and dispose of in Rotterdam and Bremerhaven.[142] Thus, United Brands clearly was the major risk-bearer.

United Brands' allocation of risks probably was more efficient than an allocation which placed greater risk on the ripeners.[143] United Brands had better knowledge of the supply of bananas and of world conditions than did its ripeners and probably had better knowledge of the European market as a whole than did any individual ripener. Additionally, United Brands had greater resources than its distributors, and, thus, its existence and profitability were not threatened by the risks of price fluctuations in the European markets the way some of its ripeners might have been. Consequently, United Brands probably was less averse to risk than were many of its ripeners.[144] All of these reasons indicate that the United Brands' allocation of risks was not only efficient but also beneficial to the ripeners. Because the Court failed to perceive correctly where the risks lay, it did not consider the benefits of the allocation. Even if it had, the Court probably would not have allowed United Brands to consider market condi-

141. 1978 E. Comm. Ct. J. Rep. at 298, 21 Common Mkt. L.R. at 500.

142. *See* United Banana Co. v. United Fruit Co., 245 F. Supp. 161, 166-67, 172 (D. Conn. 1965), *aff'd per curiam*, 362 F.2d 849 (2d Cir. 1966).

143. The Advocate General discussed the tendency of large purchasers to ripen enough bananas to meet their basic requirements but to buy the rest of their needs from other suppliers "to take advantage of the future market trend." 1978 E. Comm. Ct. J. Rep. at 320, 21 Common Mkt. L.R. at 448 (Opinion of Advocate General). In other words, even these large purchasing organizations preferred not to bear the risks themselves.

144. The Advocate General noted that United Brands had wanted to require its ripeners to place their orders before the bananas were shipped, but had been unable to do so. *Id.* at 331, 21 Common Mkt. L.R. at 462.

tions when setting its prices.

Barry E. Hawk has inferred from the Court's language in *United Brands* that the Court would allow a dominant firm to base discriminatory prices upon "different demand between immediate purchaser and supplier."[145] What he means by this is unclear. If he is simply referring to the willingness of some buyers to pay more than other buyers would be willing to pay, which is a necessary condition for the occurrence of any profitable price discrimination,[146] he must be wrong. Otherwise, the use of price discrimination by a dominant firm to exploit more fully its monopoly power would always be permissible.

Additionally, the facts in *United Brands* do not support Hawk's inference. United Brands' ripeners in the Benelux nations were willing to pay more for Chiquita bananas than were its ripeners in Germany, Denmark, or Ireland. There was a "different demand" in those markets, even at the level of sales to the distributor. United Brands faced different demand curves in each geographical market but the Court prohibited charging different prices in each market. Hawk's inference, therefore, is unwarranted. It would be a dangerous basis upon which to advise a client with a dominant position in the Common Market.

The third element of article 86(c) is the competitive injury requirement. The Commission sought to show the potential for competitive injury, at least in the absence of United Brands' prohibition against resales of green bananas by its ripeners.[147] Distributors, the Commission argued, could have resold the bananas in countries other than those in which they were located. Consequently, the distributors who paid higher prices than similarly located distributors would be at a competitive disadvantage, whether competing in the low-price or high-price market.[148] Although the factual basis for this argument was dubious,[149] and the

145. B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 751 (1979).

146. F. SCHERER, *supra* note 24, at 315; L. SULLIVAN, *supra* note 91, at 681.

147. United Brands' contracts with its distributors/ripeners prohibited them from reselling Chiquita bananas while they were still green (unripened). Since ripened bananas can be transported only limited distances, this ban effectively prevented any trade in bananas between the ripeners. The Commission charged that the resale ban violated article 86, and the Court agreed.

148. 19 O.J. EUR. COMMON (No. L 95) at 14, 17 Common Mkt. L.R. at D51-52.

149. *But see* 1978 E. Comm. Ct. J. Rep. at 332-33, 21 Common Mkt. L.R. at

argument itself was speculative until the green-banana clause actually had been withdrawn, the Commission's attempt to satisfy the article 86(c) requirements is laudable.

The Court of Justice, however, made no such attempt. It merely recited the obviously incorrect conclusion that certain ripeners/distributors for United Brands were placed at a competitive disadvantage because competition had been distorted.[150] Even accepting, *arguendo*, the Court's doubtful conclusion that competition had been distorted, United Brands' distributors did not necessarily suffer a competitive disadvantage from that distortion. Because the weekly prices that United Brands charged its customers were uniform throughout each market, the Commission correctly perceived that competitive injury could occur only if competition between distributors located in different markets were possible. Since the Court disregarded that necessary condition, it effectively dispensed with the Treaty of Rome's requirement of competitive injury. Consequently, the Commission need show only that a practice "distorts competition," a phrase that has lost the economic meaning it once had in Common Market antitrust law. Originally, in *Continental Can*[151] "distorting competition" referred to any change in the market structure that lessened competition. Partitioning markets or refusing to deal with competitors to eliminate them are examples of distortion of competition. More recently the phrase has come to mean competing in a manner of which the Commission or the Court does not approve. For example, the Commission and the Court have outlawed such common commercial practices as granting fidelity rebates[152] and failing to inform dealers in writing of the terms of their dealership contracts.[153] It is this latter meaning that the phrase has in *United Brands*. This is an even lower standard than the competitive injury requirement of section 2(a) of the Robin-

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464-65 (Opinion of Advocate General) (containing an extended discussion of the possibility of trade between ripeners in different countries).

150. *Id.* at 299, 21 Common Mkt. L.R. at 500.

151. 1973 E. Comm. Ct. J. Rep. 215, 12 Common Mkt. L.R. 199 (1973). *Continental Can, supra* note 6, involved an already dominant firm's merger. This merger would have eliminated a significant competitor and strengthened the dominant position.

152. *See infra* notes 232-324 and accompanying text.

153. *See* Bandengroothandel Frieschebrug BV v. Nederlandsche Banden-Industrie Michelin NV, 24 O.J. EUR. COMM. (No. L 353) 33, 43 (1981), 33 Common Mkt. L.R. 643, 661-62 (1982); *see also infra* text accompanying notes 299-324.

son-Patman Act[154] interpreted in *FTC v. Morton Salt Co.*[155]

Several underlying factors help to explain the *United Brands* decision. First, United Brands had the temerity to point to the Commission's failure to create a common market for bananas throughout the EEC as the reason that price differentials existed in the various member countries. The Community authorities clearly resented this suggestion.[156] Second, the Commission and the Court perceived the pattern of different national prices as violating the major goals of Common Market antitrust law—the destruction of barriers to interstate trade and the unification of markets throughout the Community. Third, although it had not created the market differences, United Brands nonetheless used its prohibition on the resale of green bananas to maintain the existing market segregation.[157]

One European commentator, Lucia Zanon di valgiurata, has suggested that United Brands resale ban possibly did not perpetuate the existing market segregation.[158] Zanon noted that United Brands was not a monopolist but the leading firm in an oligopolistic market; its competitors retained a fifty-five percent share of the Community banana market. Thus, by itself, United Brands could not maintain the market segregation necessary for effective price discrimination. Unfortunately, Zanon's analysis discounted the likelihood that oligopolistic pricing was occurring, with United Brands serving as the price leader and the other firms setting prices at a standard differential below United Brands' price in each market.[159] Following United Brands' leadership, not only on price but also on contract terms, could maximize returns for the other firms, especially since United Brands had demonstrated a willingness and capacity to engage in aggressive competition to protect its market share. Any firm allowing resale of its branded bananas into a high-priced market, thus lowering the prices there,

154. 15 U.S.C. § 13(a) (1982).

155. 334 U.S. 37 (1948).

156. *See* 1978 E. Comm. Ct. J. Rep. at 337, 21 Common Mkt. L.R. at 499 (Opinion of Advocate General).

157. 19 O.J. EUR. COMM. (No. L 95) at 13-14, 21 Common Mkt. L.R. at 494, 500.

158. Zanon, *Price Discrimination Under Article 86 of the E.E.C. Treaty: The United Brands Case*, 31 INT'L & COMP. L.Q. 36, 55-57 (1982).

159. *See* F. SCHERER, *supra* note 24, at 176, 232. Zanon refuses to base his conclusions upon this possibility because the Court did not do so. Zanon, *supra* note 158, at 55-57.

might find United Brands' reaction unprofitable for all concerned. In fact, the Court's reference to other banana companies engaging in conduct similar to that of United Brands suggests oligopolistic behavior in the Community banana market.[160] If the other firms were following the lead of United Brands, its resale ban certainly could have perpetuated the existing market segregation.

The Commission, the Advocate General, and the Court of Justice viewed the resale ban as particularly objectionable because of its maintenance of the existing market segregation. Yet they also evidenced confusion about how a dominant firm could segregate markets. All three stated that the differential pricing was a barrier to the ripeners' sales of bananas in other countries and that it tended to maintain the different price levels.[161] Of course, this is not so. Price disparity in different geographical markets encourages sales from low-priced markets into high-priced markets and thus, increases interstate trade in bananas while breaking down the barriers to such trade.

According to the Court, United Brands' policy of supplying its ripeners with fewer Chiquita bananas than they ordered each week enhanced the effectiveness of its resale prohibition.[162] Again, the Court's analysis is questionable. First, it is doubtful that United Brands restricted output below the quantity which it expected to be demanded at the prices that it was going to charge. As explained earlier, orders were placed and quotas allocated while the banana shipments were at sea; thus, the available quantity was fixed. United Brands subsequently set its prices and allowed its ripeners to cancel or reduce their orders.[163] While United Brands' goal undoubtedly was to sell all of the bananas en route, it also may have sought to maximize its profits by selling the available quantity at the highest prices possible by encourag-

160. *See* 1978 E. Comm. Ct. J. Rep. at 283-84, 21 Common Mkt. L.R. at 429-30.

161. 19 O.J. EUR. COMM (No. L 95) at 14, 17 Common Mkt. L.R. at D51 (decision of E.C. Comm'n); 1978 E. Comm. Ct. J. Rep. at 336-37, 21 Common Mkt. L.R. at 469 (Opinion of Advocate General); 1978 E. Comm. Ct. J. Rep. at 299, 21 Common Mkt. L.R. at 500 (Judgment of Court of Justice).

162. 1978 E. Comm. Ct. J. Rep. at 286, 21 Common Mkt. L.R. at 492.

163. 1978 E. Comm. Ct. J. Rep. at 335, 21 Common Mkt. L.R. at 466-67 (Opinion of Advocate General). In the event that this resulted in a surplus, United Brands apparently offered these bananas to its other distributors. *See id.* at 335, 21 Common Mkt. L.R. at 467.

ing sales in the high-price markets.[164] Although such exploitative pricing conceivably would violate article 86(a), it does not support the conclusion that United Brands systematically kept its distributors short of bananas to prevent their potential resale. Second, the Commission admitted that the price differentials between geographic markets allowed ripeners to trade profitably during only a few weeks each year.[165] It is unlikely that United Brands would choose to diminish its profitability throughout the year merely to discourage such occasional trading. Third, even if United Brands had restricted its output to enhance the effectiveness of the resale ban, the restriction probably would not have produced the intended result. If the distributor could make a greater profit engaging in arbitrage rather than ripening and wholesaling his entire allocation of Chiquitas, he likely would resell the bananas even if they were in short supply. In fact, restricting the supply of bananas actually could increase the attractiveness of arbitrage to the distributors because (1) the artificial shortage would drive prices and profits on resale even higher and (2) the distributors would have already turned to other brands of bananas to fill their deficit in Chiquitas and therefore would more readily expand the use of substituted brands.

The Court mischaracterized the resale ban because it failed to appreciate that United Brands bore most of the risk of shifts in the demand curve for Chiquita bananas. If the Court had realized where the risks lay, it might have viewed United Brands' policy as one of risk reduction by attempting to prevent losses that resulted from the spoilage of perishable bananas.[166] Additionally, United Brands' shipment in complete shiploads and the distributors' anticipatory exaggeration of orders may have exacerbated the magnitude of the supply reductions. However, even if the Court had correctly understood the reasons for United Brands' actions, it nonetheless might have found them illegal, since the Court believed that the niggardly supply policies and the ban on the resale of green bananas maintained the separation of geographical markets in contravention of the Treaty's basic goal of creating a common market.

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164. 1978 E. Comm. Ct. J. Rep. at 320, 21 Common Mkt. L.R. at 447.

165. *Id.* at 333, 21 Common Mkt. L.R. at 464.

166. *Cf.* Robinson-Patman Act, § 2(a), 15 U.S.C. § 13(a) (1982) (recognizing the disposition of perishable goods as a defense to a charge of illegal price discrimination).

2. *The Effects of* United Brand *on the Common Market*

Although the *United Brands* decision is understandable from a market integration viewpoint, it nonetheless promises unrecognized detrimental economic effects. First, the decision may promote inefficient forward integration. To avoid the restrictions on price discrimination, United Brands can take over the ripening and distributing functions in the low-price markets of Ireland and possibly, Germany and Denmark. If United Brands did not sell to ripeners in low-price markets, it would have no "equivalent transactions" to trigger article 86(c).[167] Alternatively, forward integration into the high-price markets could be attractive to some dominant firms desiring to engage in price discrimination.[168] Other solutions include changing the nature of the transactions in some markets so that they no longer appear equivalent and ceasing to sell Chiquita brand bananas in some markets, replacing them with either another brand, perhaps of a different variety, or with unbranded bananas. Each of these solutions threatens to produce a distribution system artificially designed to cope with legal restrictions through less efficient means than those prohibited by the Court's interpretation of article 86(c) in *United Brands.* Professor W. Bishop of the London School of Economics notes that no one benefits from this "inefficiency created solely by legal decision;" it is pure waste.[169] Surely the Commission and the Court of Justice do not really believe the European economy is doing so well that it can afford such waste.[170]

The second unrecognized, detrimental economic effect of the decision is that it will affect the quantity of bananas sold in the national markets of the EEC. United Brands must chose either: (1) to price for the high-priced market, and, thus, eliminate sales

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167. *Cf.* O'Byrne v. Cheker Oil Co., 727 F.2d 159 (7th Cir. 1984) (holding that transfers to company-owned stations could not be used as sales to establish price discrimination in violation of section 2(a) of the Robinson-Patman Act).

168. *See, e.g.,* Instituto Chemiaterapio Italiano S.p.A. & Commercial Solvents Corp. v. Commission of the European Communities, 1974 E. Comm. Ct. J. Rep. 223, 13 Common Mkt. L.R. 309 (1974).

169. Bishop, *Price Discrimination Under Article 86: Political Economy in the European Court,* 44 MOD. L. REV. 282, 285 (1981).

170. Commentators have estimated that the waste caused in the United States economy by the Robinson-Patman Act runs at least into the hundreds of millions of dollars a year. R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 384 n.* (1978). Although the basis for such an "estimate" may be suspect, there can be little doubt that the waste in such cases can be staggering.

in Ireland and reduce sales in Germany and Denmark; (2) to price for the low-priced market and increase sales in Benelux; or (3) to price for the market as a whole, producing a combination of these effects. Since the Commission lost its exploitative pricing case under article 86(a), United Brands is not compelled to cut its prices; it might choose to raise them in the low-priced markets. Whatever its choice, the effect will not be limited to Chiquita bananas because other firms may be expected to follow its leadership.

The third unrecognized, and most startling, detrimental economic effect of the *United Brands* decision is the redistribution of income from the poorer countries in the EEC to the wealthier ones.[171] Since United Brands can no longer price discriminate, it undoubtedly will raise its prices in Ireland, if it sells bananas there at all, and it may lower its prices in the Benelux countries as well. Although the banana market produces anomalous redistributive effects between the other EEC countries, it is true, as Professor Bishop suggests, that a decision outlawing price discrimination usually *"redistributes income away from consumers in the poorer regions of Europe and toward consumers in the richer regions."*[172] This is a bizarre, and obviously unintended, result for the Community, which spends vast sums of money to narrow the economic gaps between its regions.

On the other hand, the decision may have unintended favorable economic effects. It is likely to contribute to the break-down of oligopolistic pricing coordination by facilitating "cheating" by banana importers. One of the criticisms of the Robinson-Patman Act in the United States is that it maintains oligopolistic interdependence and the attendant higher prices.[173] The prohibition of price discrimination contained in section 2(a) of the Act applies to any seller and thus to every member of an oligopoly. The section outlaws sporadic price discrimination which is competitive and which might serve to break down the coordinated pricing in

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171. Bishop, *supra* note 169, at 288-89.

172. *Id.* at 289. The banana market appears to be anomolous because some of the lower prices are found in the wealthier areas such as Germany. This merely demonstrates that factors other than income levels affect demand curves. Nonetheless, Professor Bishop's claim that discriminating monopolists will usually find it profitable to charge higher prices in higher income countries and lower prices in lower income countries seems generally correct.

173. F. SCHERER, *supra* note 24, at 324, 571; *see* L. SULLIVAN, *supra* note 91, at 682, 686.

the oligopoly and thus reduce price levels.[174] Because the prohibition in article 86(c) does not apply to every member of the oligopoly, but only to the dominant firm, smaller firms in the Common Market can compete with the largest firm through sporadic price-cutting, with the knowledge that the large firm's response is legally restricted.[175] The dominant firm, of course, can cut its prices generally, but such price cutting is a costly course. Certainly, the dominant firm cannot engage in widespread price discrimination to discipline the price cutter. Whether the dominant firm can respond to the lower price offered by its competitor, matching it for that customer or class of customers, remains uncertain.

Although the *United Brands'* decisions contain no discussion of the "meeting competition" defense, Professor Hawk believes that it is available in the EEC because the Court and Commission rejected it on factual, not legal, grounds.[176] No specific language in either *United Brands* opinion supports this proposition; instead, one merely finds a statement by the Advocate General that a dominant firm may not "align his prices on those of his competitors."[177] More instructive are the Commission's treatment of the meeting competition defense in *AKZO Chemie*[178] and the Court's *United Brands* holding, in connection with another type of abuse, that a dominant firm has the right to defend itself but that its response must be proportional to the competitive threat that it is combating.[179] Apparently, a dominant firm is entitled to discriminate to meet a competitive bid, but it cannot undercut that bid or extend the discriminatory lower price to other customers. Even such a restricted meeting-competition defense would encourage cheating by the smaller firms in the oligopoly because they are protected against retaliatory price discrimination by the dominant leader. Thus article 86(c), as interpreted in *United Brands,* undermines oligopolistic price rigidity.

Had the Commission and the Court engaged in careful, in-

174. *See* L. SULLIVAN, *supra* note 91, at 683-86.

175. *See* F. SCHERER, *supra* note 24, at 200, 222-25 (discussing how limitations upon the dominant firm's ability to respond to sporadic price cutting undermine oligopolistic coordination).

176. B. HAWK, *supra* note 145, at 751.

177. 1978 E. Comm. Ct. J. Rep. at 336-37, 21 Common Mkt. L.R. at 469 (Opinion of Advocate General).

178. 26 O.J. EUR. COMM. (No. L 252) 13, 78 Common Mkt. L. R. 694 (1983) (interim order). *See supra* notes 101-02 and accompanying text.

179. 1978 E. Comm. Ct. J. Rep. at 293, 21 Common Mkt. L.R. at 496-97.

formed economic analysis, they might have concluded that the price discrimination practiced by United Brands was, on balance, harmful and that it should therefore be prohibited. In addition to their market integration rationale, they properly could have expressed concern that such systematic price discrimination would harm competition and increase barriers to entry.[180] Furthermore, since United Brands used this price discrimination to exploit more fully whatever power it had by virtue of its product differentiation,[181] consistency dictates that Common Market antitrust law prohibit it as other forms of exploitation are prohibited. However, *United Brands* was not carefully nor rationally decided. The Commission and the Court of Justice understood neither the conduct they were judging nor the effects of their decisions. If one believes that antitrust authorities and courts ought to understand what they are doing, *United Brands* is a most disturbing case.

3. *Comparison of United States and Community Treatment of Price Discrimination*

Only a few United States cases touch upon the issues raised in *United Brands.* It is interesting that some of them involve United Fruit Company, the corporate predecessor of United Brands. In *United Banana Company v. United Fruit Company*[182] the complaint alleged that United Fruit had violated section 2(a) of the Robinson-Patman Act[183] by charging the plaintiff, a Connecticut banana ripener and wholesaler, more than its New York competitors paid. In concluding that the plaintiff had not proven any injury to competition, the court commented upon the legality of charging different prices in different geographical markets.[184] Although the opinion is far from a model of clarity, it indicates that the Robinson-Patman Act can only be violated if there is compe-

180. *See* F. SCHERER, *supra* note 24, at 324.

181. Although the Commission, 9 O.J. EUR. COMM. (No. L 95) at 11-13, 17 Common Mkt. L.R. at D46-50, and the Court based their findings of dominance upon other factors, 1978 E. Comm. Ct. J. Rep. at 270-85, 21 Common Mkt. L.R. at 481-90, United Brands possessed power because Chiquita bananas were to some extent, and to a greater extent were perceived to be, better than other bananas.

182. 245 F. Supp. 161 (D. Conn. 1965), *aff'd per curiam* 362 F.2d 849 (2d Cir. 1966).

183. 15 U.S.C. § 13(a).

184. 245 F. Supp. at 172-76.

tition between the participants in the two markets.[185]

In addition, the court in *United Banana* carefully considered the equivalence of each of the transactions for which discriminatory prices were alleged and concluded that only two of them were equivalent, since the other transactions involved a different type or poorer quality fruit.[186] The two instances of discrimination were *de minimis* and, therefore, could have no competitive impact.[187]

The *United Banana* case highlights one of the principal differences between the treatment of price discrimination in the United States and that in the Common Market. Usually price discrimination is challenged in the U.S. under the Robinson-Patman Act rather than section 2 of the Sherman Act, even if the discriminator is a monopolist. Although *United Banana* included a claim that United Fruit had violated section 2 of the Sherman Act, the price discrimination allegation was not included in that count.

United Fruit is a secondary-line injury case, as are most of the price discrimination cases brought under the Robinson-Patman Act.[188] In such cases, the Act's competitive injury requirement is satisfied by showing that the disfavored purchasers were placed at a competitive disadvantage relative to those purchasers receiving the lower price. In *Corn Products Refining Co. v. FTC*,[189] for example, the defendants sold glucose to candy manufacturers at discriminatory prices that varied as much as nineteen percent.[190] The Court concluded that manufacturers who had paid higher prices suffered competitive harm,[191] because glucose was the principal ingredient in much low-priced candy, profit margins were low, and price was the principal determinant of sales.[192] However, the harm suffered was not "competitive" at all; the competitive structure and process of the industry had not been injured. The most serious harm that could be claimed was that several manufacturers had moved their factories from Kansas City to Chicago

185. *See id. See also* Corn Products Refining Co. v. FTC, 324 U.S. 726, 734 (1945) (holding that a seller's discrimination between buyers in different localities was forbidden if they competed with each other).

186. 362 F.2d at 851.

187. *Id.* at 851, n.2.

188. L. SULLIVAN, *supra* note 91, at 691.

189. 324 U.S. 726 (1945).

190. *Id.* at 731.

191. *Id.* at 731-32.

192. *Id.* at 738-39.

to take advantage of the lower prices[193] and that the profit margins of the disadvantaged buyers had been reduced.[194] The FTC could not show that sales had been diverted from those buying at higher prices, and the Court did not find that the existence of even a single buyer had been threatened. Thus, the Robinson-Patman competitive injury requirement is satisfied in secondary line cases by any competitive or financial harm to any buyer.

In *FTC v. Morton Salt Co.*,[195] the Supreme Court took the diversion test a step further, holding that a threat of substantial injury could be shown even in the unquestioned absence of any possibility of competitive injury to the disfavored buyers or any injury to the competitive structure or process.[196] Nonetheless, the Court continued to emphasize that the disfavored customers competed with those receiving the lower price.[197] Competitive injury under the Robinson-Patman Act, therefore, still requires a showing that the purchasers in the discriminatory transactions compete with each other. This sharply contrasts with the Court of Justice's elimination of competitive disadvantage from article 86(c) in *United Brands.*

The recent United States Supreme Court decision in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*[198] provides an interesting comparison with the treatment of price discrimination in *United Brands.* Like United Brands, Falls City Industries sold a homogeneous product at a single location at prices that depended upon the state in which the buyer distributed the product. The discrimination provoked a high-priced buyer, Vanco, to bring an antitrust suit because it believed that its wholesale sales had been reduced by the lower price Falls City charged a neighboring distributor, Dawson Springs. Vanco was the sole distributor of Falls City Beer in Evansville, Indiana, and Dawson Springs was the wholesaler for Henderson, Kentucky, a community located only ten miles from Evansville. However, the two distributors could not compete directly, because it was illegal for the Indiana wholesaler to sell to retailers in Kentucky and for Indiana retailers to

193. *Id.* at 739.
194. L. SULLIVAN, *supra* note 91, at 692.
195. 334 U.S. 37 (1948).
196. *See* 334 U.S. at 55, 60-61 (Jackson, J. dissenting).
197. *Id.* at 46-47.
198. 460 U.S. 428 (1983).

buy from out-of-state wholesalers.[199] However, Henderson and Evansville constituted a single metropolitan market within which residents of one state would go into the other state to buy beer if it was significantly cheaper.[200] Therefore, in *Falls City* the competition was at the retail, or tertiary, level.

Because Falls City had made sales at different prices, the Court was faced with two issues: (1) Was there a reasonable possibility that the price differential might cause competitive injury under the *Corn Products/Morton Salt* test? and (2) Were Falls City's lower prices in Kentucky privileged under the meeting competition defense? The Court answered both questions affirmatively.

Although the case involved tertiary, rather than secondary, competitive injury, the Court applied the *Morton Salt* holding that "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time."[201] The competition between the customers of Vanco and Dawson Springs satisfied the competing purchasers requirement.[202] The Court not only inferred lost sales and profits from the persistent price differential, but also relied upon direct evidence as well. The only competitive injury that Vanco needed to prove to establish a violation of section 2(a) was that it had lost sales of Falls City Beer due to the discrimination.[203] Since Vanco did not have to show that its existence or competitive strength was threatened, it easily met the competitive injury requirement.

The Court's treatment of the second issue is more remarkable. Falls City sought to defend itself under section 2(b)'s meeting competition defense, arguing that it had aligned its prices with prevailing prices in the markets. The Court of Appeals had rejected this defense on three grounds: (1) Falls City's price discrimination had been on a territorial rather than a customer-by-customer basis; (2) Falls City had not *lowered* its prices to meet competition in Kentucky; and (3) Falls City's prices in Indiana were "artificially high."[204] The Supreme Court rejected all three arguments and held that Falls City would be entitled to the meet-

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199. *Id.* at 432.

200. *Id.* at 433, 437 n.8. Although crossing state lines to purchase beer was illegal under Indiana law, evidence showed that this occurred regularly and significantly affected sales volumes. *Id.* at 437 n.8.

201. *Id.* at 435.

202. *Id.* at 437-38.

203. *Id.* at 437.

204. *Id.* at 441-42.

ing competition defense if it could show, on remand, that its lower prices in Kentucky had been offered in the good faith belief that the same prices were generally available from its competitors there.[205]

Thus, under the Robinson-Patman Act a firm is permitted to align its prices with the prices of its competitors in each geographical market.[206] In the low-price market the firm is protected by the meeting competition defense; in the high-price market it is free to price its product to maximize its profits.[207] Although *Falls City* did not involve a dominant firm, the same principles would seem to apply since the decisive issue in the case was the meeting competition defense, not the question of competitive effect.[208] Even under the Sherman Act a monopolist is generally free to price its product to maximize profits unless it does so to acquire or maintain monopoly power.

One group of secondary line cases involved challenges to price discrimination under section 2 of the Sherman Act and section 5 of the FTC Act rather than section 2(a) of the Robinson-Patman Act.[209] The LaPeyre family owned and operated the Grand Cail-

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205. *Id.* at 451.

206. *Falls City* makes this clear with regard to secondary and tertiary line injury. Although Anheuser-Busch, Inc. v. FTC, 363 U.S. 536 (1960), 289 F.2d 835 (7th Cir. 1961) (on remand), might be interpreted as indicating that matching the prices of rivals in a market violates section 2(a) if it causes primary-line competitive injury, this seems a doubtful result today. Predatory conduct is unlikely to be found from matching, rather than undercutting, the prices of rivals. *See, e.g.*, O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Pacific Engineering & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). *But see* Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973); *cf.* Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29 (7th Cir. 1976) (basing its holding that there was evidence sufficient to support the jury inference of primary line injury upon, *inter alia*, the defendant's undercutting its competitor's prices).

207. 460 U.S. at 439.

208. *See* Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 839 (7th Cir. 1961) (indicating that the market share of the defendant was relevant to the determination of competitive effect); Standard Oil Co. v. FTC, 340 U.S. 231, 250-51 (1951) (holding that the meeting competition defense is available regardless of whether the price discrimination injured competition).

209. This line of cases did not consider violations under the Robinson-Patman Act because the challenged discrimination involved lease rates, a subject not covered by the Robinson-Patman Act. *See, e.g.*, Export Liquor Sales, Inc. v.

lou Packing Company, a shrimp packing business on the Louisiana Gulf Coast. During the late 1940s the LaPeyres invented, perfected, patented, and began using a shrimp-peeling machine that was much cheaper than traditional hand-peeling. In 1949 the LaPeyres, through their new company, Peelers, offered to lease the machine to other Gulf Coast packers; soon, all area packers had become lessees. Without the Peelers machine, no packing company could stay in business.

During the 1950s the LaPeyre family offered to lease the Peelers machine in the Pacific Northwest, where the prohibitive cost of hand-peeling the smaller Pacific shrimp had prevented the development of a shrimp canning industry. Because the shrimp were about half the size of Gulf shrimp and it took approximately the same labor to peel a small shrimp as a large one, Peelers set the rental rate at double that charged Gulf Coast plants.[210]

In 1964 the Federal Trade Commission brought an action against the LaPeyres and their companies under section 5 of the FTC Act[211] because they were charging discriminatory prices that injured the industry they had created by leasing their machine to Northwestern processors.[212] The FTC thought it irrelevant that the "victims" were much better off than they would have been had Peelers declined to lease the machines to them, as was indisputably its right.[213] The FTC held that the LaPeyres had engaged in an unfair trade practice or method of competition. The majority of the Commissioners based the holding upon their finding that the LaPeyres had used their monopoly in the market for shrimp peeling machinery to protect their interests as shrimp canners.[214] One Commissioner disagreed and found no factual basis for the majority's finding. In addition, the Commissioner concluded such a finding was unnecessary for a section 5 violation. In his opinion, section 5 had been violated because the discriminatory prices inflicted a competitive injury upon a class of custom-

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Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971). *Contra,* Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis,* 76 YALE L.J. 267, 296-97 (1966).

210. LaPeyre v. FTC, 366 F.2d 117, 119-20 (5th Cir. 1966).

211. 15 U.S.C. § 45 (1982).

212. Grand Caillou Packing Co., 65 FTC, 799, 804 (1964), *aff'd sub nom.* LaPeyre v. F.T.C., 366 F.2d 117 (5th Cir. 1966).

213. *See* W. BOWMAN, PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 107-08 (1973); Baxter, *supra* note 209, at 289-91.

214. 65 F.T.C. at 845-47.

ers. Under this theory, Peelers had abused its monopoly power and had engaged in an unfair method of competition by preventing canners in the Pacific Northwest from competing effectively.[215]

The Fifth Circuit declined to choose between the two theories, holding that both were valid: "the utilization of monopoly power in one market resulting in discrimination and the curtailment of competition in another" violates section 5.[216] However, the Second Circuit has refused to follow this broad rule. Accepting the Commission majority's finding that the LaPeyres had charged the discriminatory prices to aid their shrimp packing operations, it characterized *LaPeyre* as a leveraging case and refused to extend the prohibition to cases that did not involve leveraging.[217] The Second Circuit held that a monopolist has no duty to deal fairly unless it competes with the disfavored customers and thus stands to gain from their injury.

Whether a monopolist's discrimination against customers with whom it does not compete violates section 2 of the Sherman Act is as uncertain as the issue under section 5 of the FTC Act. Federal district courts have reached conflicting results.[218] However, the Fifth Circuit has held that its *LaPeyre* standard does not apply under section 2,[219] and the Seventh Circuit has indicated that it agrees.[220] Thus, such discrimination probably does not violate section 2 and possibly does not violate section 5 except in the

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215. 65 FTC 867-69 (Elman, Comm'r, concurring in part and dissenting in part). The theory of Commissioner Elman logically would forbid not only discriminatory terms but also discriminatory refusals to deal.

216. 366 F.2d at 121.

217. Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 926 (2d Cir. 1980), *cert. denied,* 450 U.S. 917 (1981). Leveraging is the use of monopoly power in one market to curtail competition in another market in which the monopolist competes. Using this theory to explain LaPeyre's conduct is economically dubious; the LaPeyres could have avoided competition from shrimp canners in the Pacific Northwest by not leasing the machine to them and thus not creating competitors in the first place. *See* W. BOWMAN, *supra* note 213, at 108.

218. *Compare* Peelers Co. v. Wendt, 260 F. Supp. 193 (W.D. Wash. 1966) (finding illegal monopolization) *with* Laitram Corp. v. King Crab, Inc., 245 F. Supp. 1019 (D. Alaska 1965) (supplemental opinion reversing a prior finding of violation).

219. *See* Fulton v. Hecht, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979).

220. *See* Bela Seating Co. v. Poloron Products, Inc., 438 F.2d 733, 739 (7th Cir. 1971),*cert. denied,* 403 U.S. 922 (1971).

Fifth and Eleventh Circuits. This result sharply contrasts with the article 86 rule that a dominant firm may not unfairly discriminate against some of its customers, even if it will not benefit thereby.

Although the Shrimp Peelers cases have been rightly criticized,[221] as a general proposition it is proper to base a claim of illegal monopolization upon price discrimination which causes primary-line injury. In such a case, the monopolist stands to gain from the harm inflicted; it is acquiring, maintaining, or enhancing monopoly power.[222] In *Janich Brothers, Inc. v. American Distilling Co.*,[223] the Ninth Circuit discussed the standards for finding competitive harm in a primary-line case under the Sherman Act. The court held that the substantial injury requirement of Robinson-Patman Act section 2(a) was also a requirement of section 2 of the Sherman Act when the claim of monopolization or attempted monopolization is based upon the infliction of primary-line injury by geographical price discrimination.[224]

Although *Janich Brothers* requires a finding of substantial injury to competition as an element of monopolization, courts can gut this requirement by falling into the trap of *Utah Pie Co. v. Continental Baking Co.*[225] Doing so would pervert *Janich Brothers* by lowering the standards under section 2 instead of raising them as the Ninth Circuit intended. The test for illegal monopolization is acquiring, maintaining, or enhancing monopoly power.[226] Merely competing successfully and, therefore, harming competitors by taking business away from them or reducing their profits is not monopolization.[227]

Herein lies the anomaly. Because Robinson-Patman section 2(a) is an incipiency statute, discrimination having only the potential to cause competitive harm may violate it.[228] Although the

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221. *E.g.*, 3 P. AREEDA & D. TURNER, *supra* note 78, at ¶ 729d; W. BOWMAN, *supra* note 213, at 105-11; L. SULLIVAN, *supra* note 91, at 451; Baxter, *supra* note 209, at 289-99.

222. *See, e.g.*, Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973).

223. 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

224. *Id.* at 855.

225. 386 U.S. 685 (1967).

226. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

227. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

228. 15 U.S.C. § 13(a).

statutory language requires that the threatened harm be substantial, courts have not treated this as a significant limitation. Indeed, as an example of how United States courts typically cannot distinguish competitive harm from competition itself, the Supreme Court was willing in *Utah Pie* to find substantial primary-line injury to a firm having the largest share of the market, with increasing sales and revenues throughout the period of the discrimination, although the defendant had a market share ranging from 1.8 percent to 8.3 percent[229] and the Court admitted that the impact on Utah Pie as a competitor was negligible.[230] In contrast, the court in *Janich Brothers* used the substantial injury requirement of section 2(a) to heighten the requirements for Sherman Act condemnation of discriminatory pricing. A firm can violate the Robinson-Patman Act even though it has no market power but cannot violate section 2 of the Sherman Act without it. Thus, logically, a showing of a smaller threat of competitive injury by a powerful firm might satisfy the section 2 requirements than would be necessary under Robinson-Patman.[231] Nonetheless, surely some degree of competitive harm is required to convict a firm of monopolizing a market.

This points out the difference between monopolization and abuse of a dominant position. The former involves the acquisition, enhancement, or maintenance of monopoly power; the latter, its misuse. United States' law seems principally designed to encourage erosion of market power, while EEC policies attempt to regulate its use. However, the Robinson-Patman Act cases' concern about "fairness" and protecting small firms from the effects of competition is echoed in the Common Market enforcement of article 86(c).

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229. 386 U.S. at 689, 691 n.7 (1967).

230. *Id.* at 699-700. But in Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968), the court was much more rigorous in demanding that the FTC demonstrate competitive harm in a primary-line case, especially since the defendant only obtained a two percent share in the market it had entered with lower prices. The court required that the FTC establish a causal link between the discrimination and the alleged harm. This represents another stark contrast between United States and EEC law regulating price discrimination.

231. *See* L. SULLIVAN, *supra* note 91, at 685, *citing* Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 839 (7th Cir. 1961).

B. Fidelity Rebates and Quantity Discounts

1. *Sugar Cartel*

Fidelity rebates by dominant firms have been a major concern under EEC competition law. Beginning with the *European Sugar Cartel* case,[232] fidelity rebates have been treated as an abuse prohibited by article 86(c). In the *Sugar* case Sudzucker-Verkauf (SZV), one of the defendants, had a dominant position in the sugar production industry in southern Germany. SZV granted rebates to customers who purchased all of their sugar requirements from it. In many cases these rebates were contained in written contracts that obligated the purchaser to buy all of its sugar from SZV. In others, the obligation was understood but not express. Furthermore, if the purchaser preferred, SZV would deduct the amount as a discount from the invoice price.[233]

The Commission and the Court drew a clear distinction between the fidelity rebates offered by SZV and quantity discounts. The reduction SZV offered did not depend upon the quantity of sugar each buyer purchased, but upon its purchasing all of its needs from SZV. This was a fidelity or loyalty rebate, and as such it presented more serious possibilities for abuse. The Court characterized loyalty rebates as violating both article 86(c)'s prohibition of discrimination and article 86(b)'s prohibition upon limiting markets.[234]

The Court's application of article 86(c) to SZV's fidelity rebates was formalistic, not analytical. Each element of the provision was checked off. The Court concluded that:

(1) Because some buyers got the rebate and others did not, they paid different net prices. Therefore, dissimilar conditions had been applied.[235]

(2) The transactions were equivalent because the quantities purchased by favored and disfavored purchasers might have been

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232. Re European Sugar Cartel, O.J. Eur. Comm. (No. L 140) 17 (1973), 12 Common Mkt. L.R. D65 (1973); In re the European Sugar Cartel: Coöperatieve Vereniging 'Suiker Unie' UA v. Commission of the European Communities, 1975 E. Comm. Ct. J. Rep. 1663, 17 Common Mkt. L.R. 295 (1976).

233. 12 Common Mkt. L.R. at D105-07.

234. 17 Common Mkt. L.R. at 472-73. The violation of article 86(b)'s prohibition was the more serious, although the Court did not seem to realize it.

235. *Id.* at 472.

identical.[236] The Court focused upon the physical, not economic, equivalence of the transactions, as it would in *United Brands,* and thought that the economic differences between the transactions—that the purchasers receiving the loyalty rebates had permitted SZV to plan its production and to save selling and other transaction costs, and thus to achieve efficiencies—were irrelevant.

(3) The disfavored purchasers were placed at a competitive disadvantage simply because they competed with the favored purchasers.[237]

The Court's focusing upon article 86(c) and characterizing loyalty rebates as exploitative abuses under it was unfortunate. The true difference between loyalty rebates and quantity discounts is not in the effect they have upon customers. Customers are paid for their loyalty; there is no reason to believe that they accept less than such loyalty costs them.[238] Nor is a meaningful distinction found in the equivalence of transactions. The Court could as logically conclude that purchases of different quantities, after adjustment for cost differences, should be considered equivalent and, therefore, that quantity rebates which are not fully cost-justified violate article 86(c), too.[239]

The analysis should focus on the effect that the rebates or discounts have upon competitors of the seller. By determining whether the rebate is anticompetitively abusive, producing primary-line injury, the Court of Justice could establish a meaningful basis for distinguishing between rebates that should be forbidden and those that should be allowed.[240] Article 86(b) ought to be the gauge. Although the Court did condemn SZV's loyalty rebates

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236. *Id.*

237. *Id.* at 472-73. Siragusa recognized, even before the Court's *United Brands* decision completed the process, that *European Sugar Cartel* threatened to deprive article 86(c)'s "competitive disadvantage" requirement of any significance. Siragusa, *supra* note 136, at 425.

238. *See* Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position within the Common Market,* 53 NOTRE DAME LAW. 768, 796-97 (1978).

239. Siragusa, *supra* note 136, at 426; *cf.* FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948).

240. *See* F. SCHERER, *supra* note 24, at 584-86. Bellamy and Child, who first suggested the now widely accepted analytical device of dividing article 86 abuses into anticompetitive and exploitative abuses, classify loyalty rebates as anticompetitive abuses akin to requirements contracts. C. BELLAMY & G. CHILD, *supra* note 7, ¶ 7-60.

under article 86(b),[241] this condemnation seems to be an afterthought, without analysis, and not the true basis for the decision.[242]

In assessing the legality of fidelity rebates, the Court should weigh the benefit against the harm.[243] Because fidelity rebates operate like requirements contracts, but with less complete foreclosure, they should be subjected to similar scrutiny. In *Standard Oil Co. v. United States (Standard Stations)*,[244] the United States Supreme Court, when confronted with the question of the appropriate standard for determining the legality of requirements contracts under section 3 of the Clayton Act, acknowledged their possible significant benefits.[245] Justice Frankfurter, however, doubted the ability of courts to recognize and weigh the pro- and anticompetitive effects of requirements contracts, and thus he adopted a rule of modified per se illegality that outlawed requirements contracts that foreclose "a substantial share of the line of commerce affected."[246] Justice Jackson, in dissent, displayed no such reservations; he argued that the courts could and must obey the statutory mandate to determine whether the practice substantially lessened competition or tended to create a monopoly.[247]

Surely the Common Market would be better off if the Commission and the Court of Justice were to adopt a test based upon the effects of fidelity rebates. However, their acceptance of the economically enlightened approach of Justice Jackson, weighing the pro- and anticompetitive effects of the particular restraint and thus avoiding unnecessary loss of efficiencies and other advantages,[248] seems too much to realistically expect in the foreseeable

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241. 17 Common Mkt. L.R. at 473.

242. *See* 2 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY, 3-268 (1984 Supp.).

243. *See* Zanon, *Price Discrimination and Hoffmann-La Roche*, 15 J. WORLD TRADE L. 305, 316-17 (1981).

244. 337 U.S. 293 (1949).

245. *Id.* at 306-07. *See* F. SCHERER, *supra* note 24, at 584-86 (discussing their possible efficiencies).

246. 337 U.S. at 314.

247. *Id.* at 321-24 (Jackson, J., dissenting).

248. *Id.* at 321-22 (Jackson, J., dissenting). Jackson's argument presaged the recent judicial willingness to use a rule of reason analysis to weigh the economic effects of challenged conduct. *E.g.* Continental T.V., Inc. v. G.T.E. Sylvania, 433 U.S. 36 (1977); *see also* United States v. General Dynamics Corp., 415 U.S. 486 (1974).

future.[249] At least, though, the Court should require that the Commission demonstrate that the fidelity rebate affects a substantial portion of the market.

Standard Stations and *Tampa Electric Co. v. Nashville Coal Co.*[250] are indicative of the results which might be expected from such an approach. In *Standard Stations* the principal defendant, Standard Oil of California, was the largest gasoline supplier in the western United States, controlling about twenty-three percent of the market. Standard had requirements contracts with 6,000 independently owned stations, sixteen percent of the retail outlets, covering seven percent of the gasoline sold. In addition, Standard sold about the same amount of gasoline through company-owned stations. The use of the requirements contracts was widespread; they were employed by Standard's six leading competitors, who together possessed forty-two percent of the retail market.[251] The Court found that Standard's contracts foreclosed a substantial share of the market and were, thus, illegal.[252] Conversely, in *Tampa Electric* the Court concluded that a twenty-year requirements contract to supply $128 million worth of coal for an electric generating station[253] did not foreclose a substantial share of the market. Broadly defining an economically meaningful market, the Court concluded that the foreclosure was less than one percent, an amount not substantial enough to render the contract illegal.[254] The significant analytical difference between the two cases is not that *Standard Stations* involved the leading firm in the market,[255] but that the percentages of the market foreclosed by each firm's requirements contracts were different.[256] A dominant

249. *See, e.g.*, Hoffmann-La Roche & Co. v. Commission of the European Communities, 1979 E. Comm. Ct. J. Rep. 461, 584-86, 26 Common Mkt. L.R. 211, 245-47 (1979) (Opinion of Advocate General) (considering and rejecting this approach under article 86).

250. 365 U.S. 320 (1961).

251. 337 U.S. at 295.

252. *Id.* at 314.

253. 365 U.S. at 322.

254. *Id.* at 331-34.

255. A firm in Standard's position within the Common Market might be held to be dominant, so that its conduct would be measured under article 86.

256. Because *Tampa Electric* interpreted the *Standard Stations* holding to embody a partly structural test, the foreclosure caused by similar contracts of competing firms is relevant as well. *See* Zanon, *supra* note 243, at 315-16.

A similar approach was used under sections 1 and 2 of the Sherman Act in United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949) (decided firm might enter into requirements contracts, or fidelity rebate agreements having similar effects, with only a few of its customers, or only for limited periods, and the foreclosure would be minimal.[257]

2. *Hoffmann-La Roche*

In *Community v. Hoffmann-La Roche*[258] the Commission attacked loyalty rebates that tied an entire line of products, instead of merely operating as surrogate requirements contracts. Although relying in part on the same formalistic application of article 86(c) that had been successful in the *Sugar Cartel* case,[259] the Commission went beyond this simplistic formalism. The Court engaged in a more detailed analysis of the rebate practices, measuring their supposed economic effects against article 86's general prohibition of abuse of a dominant position as well as the specific kinds of conduct outlawed in paragraphs (b), (c), and (d) of the article.[260]

Hoffmann-La Roche, the world's largest pharmaceutical company, was the leading seller of bulk vitamins throughout the world as well as in the Common Market. It was the only firm that offered all thirteen types of vitamins.[261] Although La Roche sold vitamins in the EEC through an extensive sales network to 5,000 customers in the pharmaceutical, food, and animal feed industries, it only granted loyalty rebates to twenty-two of the largest of these customers, whose purchases accounted for twenty-six

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after and discussing the Supreme Court's decision in *Standard Stations*), in which the court applied a limited rule of reason analysis to hold five-year requirements contracts illegal because their duration was excessive. *Id.* at 31.

257. *See, e.g., Hoffmann-La Roche*, 19 O.J. EUR. COMM. (No. L 223) 27, 31, 18 Common Mkt. L.R. D25, D32 (1976) (where only twenty-two of the firm's 5,000 customers were granted fidelity rebates).

258. Community v. Hoffmann-La Roche, 19 O.J. EUR. COMM. (No. L 223) 27 (1976), 18 Common Mkt. L.R. D25 (1976); Hoffmann-La Roche & Co. v. Commission of the European Communities, 1979 E. Comm. Ct. J. Rep. 461, 26 Common Mkt. L.R. 211 (1979).

259. 19 O.J. EUR. COMM. at 36-37, 18 Common Mkt. L.R. at D41; *see* Siragusa, *supra* note 136, at 425.

260. *See* 1979 E. Comm. Ct. J. Rep. at 554-55, 26 Common Mkt. L.R. at 301.

261. La Roche manufactured eight types of vitamins and purchased and resold the other five vitamins. La Roche's market share ranged from 47% to 95% for vitamins that it manufactured and from 10% to 68% for vitamins that it resold. Its share of the total vitamin market was 60%. 19 O.J. EUR. COMM. at 28-29, 18 Common Mkt. L.R. at D28-30.

percent of its sales and sixteen percent of the total vitamin sales in the Common Market.[262]

The fidelity rebates took three forms: some customers entered into contracts with La Roche obligating them to purchase a substantial percentage of their requirements, usually eighty or ninety percent, from La Roche in return for a rebate upon the year's purchases; other contracts provided for the rebate if a specified percentage of the customer's vitamin needs were purchased from La Roche, but contained no requirement that the customer do so; the rest of the fidelity rebates were granted on an informal basis if the customer had purchased all or nearly all of its requirements from La Roche during the year.[263] La Roche calculated the percentages purchased by aggregating vitamins of all types; purchasers could not earn the rebate with respect to particular types. The rebates were usually a fixed percentage, ranging from one to five percent depending upon the contract; a few contracts provided a sliding scale of rebates based upon the percentage of the customer's purchases which was obtained from La Roche.[264] Some of the fidelity rebates were disguised as *del credere* commissions paid to the purchaser's parent corporation in return for its guarantee of payment for the vitamins.[265] In one case, the rebate was based upon the quantities purchased, but the scale was set to assure sales of most of the customer's requirements.[266]

The Commission's decision focused on the proper classification of the rebates. La Roche claimed they were quantity discounts, legal under article 86(c) as interpreted in the *Sugar* case. The Commission, however, concluded that they were fidelity rebates.[267] Although it found that the rebates violated article 86(c) since each of the requirements of that provision, as watered down in previous cases, was met,[268] the Commission did not rest its decision merely on such formalistic reasoning. Instead, it sought to determine the economic effects of the rebates on the Community

262. *Id.* at 31, 18 Common Mkt. L.R. at D32.

263. *Id.* at 34-35, 18 Common Mkt. L.R. at D37.

264. 1979 E. Comm. Ct. J. Rep. at 568-87, 26 Common Mkt. L.R. at 248 (Opinion of Advocate General). Merck, one of La Roche's largest customers, was given rebates ranging between 12.5% and 20%. *Id.* at 589, 26 Common Mkt. L.R. at 251.

265. 19 O.J. EUR. COMM. at 34, 18 Common Mkt. L.R. at D36-37.

266. *See id.* at 34, 18 Common Mkt. L.R. at D37.

267. *Id.* at 36, 18 Common Mkt. L.R. at D40.

268. *Id.* at 36-37, 18 Common Mkt. L.R. at D39-41.

vitamin market and to measure those effects against the general prohibition of article 86. In this analysis, the Commission was guided by the basic objective of article 3(f) of the Treaty—that competition in the Common Market not be distorted.[269] It concluded that the rebates did distort competition, especially because of the tying effects of the across-the-board rebates and the foreclosure of those major customers to La Roche's competitors.[270]

The Court's analysis started off simply, but quickly got deeper, wider-ranging, and more troubling than the Commission's. The Court first labelled La Roche's discounts, approving the Commission's conclusion that fidelity rebates were involved in each type of contract.[271] It next ruled that fidelity rebates granted by a firm in a dominant position are abusive, thus virtually deciding the issue.[272] As in the *Sugar* case, the Court based its conclusion partly on article 86(c), and, as in *Sugar*, its analysis of the discrimination was formalistic and selective. Neither the Advocate General[273] nor the Court[274] considered whether the transactions were actually equivalent. Furthermore, the Court's treatment of competitive disadvantage was neither principled nor realistic. The Court simply concluded that because the rebates were significant to customers and important to La Roche, they must have caused competitive disadvantage to disfavored customers.[275]

In addition to applying the specific provisions of article 86(c), the Court tried to analyze the rebates under more general principles of Community law, such as distortion of competition. The analysis is confusing; the standard, obscure:

> Finally, these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of *competition which is not based on the transactions effected and is therefore distorted.* . . . 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*

269. *See id. See also* Siragusa, *supra* note 136, at 431-32.
270. *See* 19 O.J. EUR. COMM. at 36, 18 Common Mkt. L.R. at D39-40.
271. 1979 E. Comm. Ct. J. Rep. at 541-44, 26 Common Mkt. L.R. at 291-93.
272. *Id.* at 539-40, 26 Common Mkt. L.R. at 289-90.
273. *See* 1979 E. Comm. Ct. J. Rep. at 591-92, 26 Common Mkt. L.R. at 252-54 (Opinion of Advocate General).
274. *See* 1978 E. Comm. Ct. J. Rep. at 540-41, 548-51, 26 Common Mkt. L.R. at 290, 295-98.
275. *See id.* at 552, 26 Common Mkt. L.R. at 299.

> *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 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.[276]

Thus, the Court set forth four characteristics of abusive conduct: it is competition not based on the transactions themselves; it uses methods different from those of normal competition; it influences the structure of the market; and it must have an adverse effect on competition and not merely on competitors.

Considering the *Hoffmann-La Roche* facts, the Court's first characteristic is easily understood. Since the rebate was fixed not merely with regard to the quantity purchased from La Roche but also the quantity not purchased from it, there was competition not based on the transactions with La Roche.

The Court's second characteristic is far more troubling. Both the Court and Commission have demonstrated a tendency to substitute their judgment of what is "normal competition" for that of businessmen and the marketplace.[277] "Normal" is not used descriptively to indicate common or usual practices, but normatively, with the norms being the subjective ones of the Court and Commission. Thus "methods different from those which condition normal competition" may be paraphrased as methods of competition of which the EEC authorities do not approve, such as fidelity rebates, requirements contracts, or reciprocal dealing arrangements. The Court expressed its view that "such contracts . . . contain a sufficient incentive to reserve to Roche the sole right to supply the purchaser for them to be, for this reason alone, an abuse. . . ."[278] The Court also condemned one of La Roche's requirements contracts even though it did not provide for rebates

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276. *Id.* at 540-41, 26 Common Mkt. L.R. at 290-91 (emphasis added).

277. The Court describes the concept of abuse with its favorite talisman, the word "objective." The Court and the Commission regularly condemn defendants because their proffered justifications are not "objective" or because their conduct violates the "objective" standard of abuse. "Objective" violations usually mean that the Court and Commission do not understand or appreciate the significance of the justification or that the conduct violates their moral or ethical sensibilities. Thus, the Court and Commission use the term "objective" as a euphemism for their subjective predilections.

278. *Id.* at 547, 26 Common Mkt. L.R. at 295-96.

or discounts of any kind.[279] "[W]here exclusivity has been formally accepted the granting or not of a rebate is in the final analysis irrelevant. . . ."[280] The Court also condemned under article 86 a reciprocal dealing agreement between La Roche and its largest customer, Merck.[281] The implication of these condemnations is that any contract or sales method which provides an incentive for purchasers to buy exclusively from the dominant firm is abusive;[282] no matter how commonly such contract or sales method is used in the industry it is not "normal."

Although the Court's third characteristic seems to indicate that structural analysis is called for, it undertook only very limited structural analysis in *Hoffmann-La Roche*. It is doubtful that the Court meant that detailed structural analysis was necessary, that it understood what could be learned from structural analysis, or that either the Commission or the Court could undertake in-depth structural analysis.[283] The Court's only discussion of structure was its inquiry into the duration of the contracts and its remark that there was excess capacity in vitamin production.[284] Its characterization of the former is questionable, and it did not explain what it thought was the significance of the latter.

Finally, the Court treated its fourth requirement, that the challenged conduct hinder the maintenance or growth of competition, in the same cavalier manner as it has used with the far less stringent requirement of article 86(c). However, even if the Court had seriously addressed this issue, little improvement in the quality of the decision would have likely resulted, because the Court has an unusual conception of competition. In discussing a clause contained in most of La Roche's rebate agreements, under which the customer was entitled to buy from any other supplier that offered a lower price if La Roche chose not to match that price, the Court commented that La Roche had the power to decide whether it

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279. *Id.* at 550-51, 26 Common Mkt. L.R. at 298.

280. *Id.* at 541, 26 Common Mkt. L.R. at 291.

281. *Id.* at 548-49, 26 Common Mkt. L.R. at 296-97.

282. *See* 1979 E. Comm. Ct. J. Rep. at 551, 26 Common Mkt. L.R. at 298.

283. *Cf.* L. SULLIVAN, *supra* note 91, at 478-86 (discussing the use of structural analysis in determining the legality of requirements contracts and exclusive dealing agreements under section 3 of the Clayton Act).

284. *See* 1979 E. Comm. Ct. J. Rep. at 539-40, 26 Common Mkt. L.R. at 289-90; *cf. id.* at 583, 26 Common Mkt. L.R. at 244 (structural analysis by Advocate General). *See* Zanon, *supra* note 243, at 314.

would "permit competition."[285] By "competition," the Court apparently means the instances of commercial rivalry in which the non-dominant competitor gets the business. If the dominant firm wins, what has taken place is not competition, but anticompetitive conduct. The Court treats as antithetical that which benefits the dominant firm and that which promotes "competition."[286]

Neither the Commission nor the Court considered La Roche's efficiency justifications. The Advocate General did, but only in a superficial way that demonstrated his lack of understanding of, and hostility toward, both efficiency and common business practices.[287]

In *Hoffmann-La Roche*, as in the *Sugar* case, the Court should have focused on the primary-line injury to competition and not on the secondary-line effects. Those customers who entered into La Roche's rebate agreements were paid for their loyalty. They simply were not harmed by the agreements. Even if market conditions had changed so significantly that they would be better off buying significant portions of their vitamin needs from other suppliers, they were free to do so and forego the rebates.[288] Since rebates were not paid by La Roche in advance as SZV had often done, the customers never had to make restitution to La Roche. Similarly, the favored customers' competitors were not harmed by the La Roche rebates. Those who bought large quantities of vitamins from La Roche presumably could have obtained the rebates by entering into fidelity agreements. Smaller customers' purchases were not equivalent, at least to the extent of cost differences, which might well have justified the one to five percent differentials.

It is instructive to note that the Advocate General felt compelled to accept the Commission's contention that the "competitive disadvantage" requirement of article 86(c) does not necessi-

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285. 1979 E. Comm. Ct. J. Rep. at 545-46, 26 Common Mkt. L.R. at 294.

286. *See id.* at 551, 26 Common Mkt. L.R. at 298. There the Court said that an abuse was indicated by the dominant firm's benefitting from a provision even if it had been agreed to by a powerful customer which also benefitted from it.

287. *See* 1979 E. Comm. Ct. J. Rep. at 584-85, 587-91, 26 Common Mkt. L.R. at 245-46, 249, 251-52 (Opinion of Advocate General).

288. Even those customers who had entered into contracts obligating them to purchase a specified percentage of their requirements from La Roche could purchase elsewhere; the only penalty for breach was the loss of the rebate. 1979 E. Comm. Ct. J. Rep. at 547, 26 Common Mkt. L.R. at 295.

tate a finding of any adverse effect on competitive capacity.[289] La Roche had argued that there could be no effect on competition between its customers because the amount of the discrimination was so infinitesimal that it could not possibly affect the price of the final products into which the vitamins were incorporated by La Roche's customers.[290] The argument fared no better in the EEC than it had before the United States Supreme Court in *Morton Salt*.[291] The Court of Justice did not even address the issue, for it apparently did not intend to be constrained by the statutory requirements.[292]

On the other hand, the across-the-board fidelity rebates may have had significant anticompetitive effects by foreclosing sales by other vitamin manufacturers. Had the Commission and the Court concentrated their analyses on horizontal, primary-line injury, the *Hoffmann-La Roche* decision would have been more analytically defensible and possibly more enlightening.[293]

For example, in *SmithKline Corporation v. Eli Lilly & Company*,[294] a practice similar to La Roche's was challenged under section 2 of the Sherman Act. From 1964 through 1973, Lilly had a complete, patent-protected monopoly of cephalosporins, a family of antibiotics. Lilly produced a range of cephalosporins, but its most successful were Keflin and Keflex; Lilly's Kefzol ranked a distant third.[295] When its cephalosporin patents expired and competition arose, Lilly adopted a pricing plan designed to maintain its premier position by tying sales of Keflin and Keflex, for which there were no direct substitutes, with sales of Kefzol, which was in competition with Ancef, SmithKline's generically equivalent product.[296] Lilly offered a three percent rebate to hospitals that purchased specified quantities of at least three of its

289. 1979 E. Comm. Ct. J. Rep. at 592, 26 Common Mkt. L.R. at 253-54 (Opinion of Advocate General).

290. *Id.* at 592, 26 Common Mkt. L.R. at 253.

291. 334 U.S. at 47-51.

292. *See* Zanon, *supra* note 243, at 318-19.

293. *Cf.* 1979 E. Comm. Ct. J. Rep. 547, 554-56, 26 Common Mkt. L.R. at 294, 301-02 (indicating the lack of focus).

294. 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

295. *Id.* at 1059.

296. *Id.* at 1061. Although the plan also was challenged as an illegal tie-in, violating section 3 of the Clayton Act and section 1 of the Sherman Act, the court held that the plan was not illegal under those sections because it was insufficiently coercive. *Id.* at 1061 n.3.

cephalosporins. The practical effect was that hospitals had to purchase Kefzol instead of Ancef in order to get the rebate for Keflin and Keflex, drugs they had to buy from Lilly. SmithKline had to offer rebates of sixteen to thirty-five percent on Ancef to offset the hospitals' loss of the three percent across-the-board rebate on Lilly's cephalosporins.[297] The Third Circuit found that this linking of products on which Lilly faced no competition with the product which did face competition constituted the willful maintenance of monopoly power because it threatened to destroy the competition between Kefzol and Ancef by driving SmithKline out of the cephalosporin market.[298]

3. *Michelin*

The most recent case developing the Community law of fidelity rebates and quantity discounts under article 86 is *Nederlandsche Banden-Industrie Michelin NV v. Commission of the European Communities,*[299] in which the Commission challenged the reductions from list price that Michelin granted its Dutch truck tire dealers. Again, the case turned on the issue of characterizing the reductions as fidelity rebates or quantity discounts; again, the decision was based primarily on article 86(c)'s prohibition of discrimination; again, the Court and Commission's focus was on secondary-line injury and unfairness to the dealers. In marked contrast to *Hoffmann-La Roche,* however, the Court and Commission's solicitude may have been justified in *Michelin,* at least as a matter of fairness and proper commercial relations between a powerful manufacturer and its dependent dealers, although perhaps not as a matter of general economic welfare.

Michelin was the dominant tire manufacturer selling on the Dutch market, with a fifty-nine to sixty-five percent share of the

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297. *Id.* at 1061-62.

298. *Id.* at 1065. The Second Circuit has indicated that the same type of pricing plan by Xerox, tying competitive and non-competitive products in a joint discount arrangement, violates section 2. SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1200-01, 1212-13 (2d Cir. 1981) (denying recovery because the plaintiff failed to prove that the violation caused its damages). *See also* P. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 112-13 (1982 Supp.).

299. 24 O.J. EUR. COMM. (No. L 353) 33 (1981), 33 Common Mkt. L.R. 643 (1981); N.V. Nederlansche Baden-Industrie Michelin v. Commission of the European Communities, 1983 E. Comm. Ct. J. Rep. 3461, 42 Common Mkt. L.R. 282 (1985).

replacement market for truck and bus tires and a thirty-three percent share of the automobile tire replacement market.[300] Manufacturers commonly granted their dealers discounts from wholesale list prices. Michelin used two basic types of discounts: invoice and cash discounts, which were uniformly available to its dealers, and annual bonuses, which varied from dealer to dealer.[301] These annual bonuses and the monthly or quarterly advances that were made against them were based upon the attainment of individual purchase targets. The Commission attacked only the annual bonuses and not the invoice and cash discounts.

The Commission found the annual bonus plan abusive on two grounds. First, it tended to tie the dealers to Michelin, thereby foreclosing Michelin's competitors. Second, it constituted discrimination having adverse secondary-line effects.[302] In addition, the Commission condemned a special .5% bonus on the combined purchases of truck and bus tires and automobile tires in 1977; because the special bonus could only be earned by meeting a target for the purchase of auto tires,[303] the Commission characterized it as using Michelin's stronger position in the bus and truck tire market to promote sales of its automobile tires.

Although it is encouraging that the Commission has expanded its focus to include the horizontal anticompetitive effects of the discount and rebate plans of dominant firms, the quality of the analysis would be improved if the Commission understood the economic and commercial effects of the practices being examined. For example, two aspects of the bonus plan that especially troubled the Commission were the pressure placed upon dealers to sell more Michelin tires and the dealers' uncertainty about what they must do to qualify for the annual bonus. Each year a dealer's target was raised; Michelin sales representatives visited him regularly to check his progress and encourage him to sell more tires.[304] The pressure on the dealers often grew toward the end of the year, in part because the failure of Michelin to confirm the target levels in writing caused dealers to wonder whether they would

300. 24 O.J. EUR. COMM. (No. L 353) at 36-37, 33 Common Mkt. L.R. at 649-50.

301. *Id.* at 37-38, 33 Common Mkt. L.R. at 652-53.

302. *Id.* at 42, 33 Common Mkt. L.R. at 659.

303. *Id.* at 44, 33 Common Mkt. L.R. at 663.

304. *Id.* at 41, 33 Common Mkt. L.R. at 658.

qualify at all.[305] Michelin took advantage of this uncertainty by pressuring the dealers to place a final large order to insure that they would get the bonus for the entire year's purchases.[306] Although the Commission's conclusion that there was significant market foreclosure caused by the bonus plan was amply supported by the evidence, its open hostility toward a dominant firm's encouraging heightened sales efforts by its dealers is troubling.[307]

The Commission's limited discrimination analysis was only slightly more rigorous than that in previous cases. Basically, the Commission recited the requirements of article 86(c) and proclaimed each of them satisfied.[308] The Commission emphasized the significance of its characterization of the bonuses as loyalty rebates.[309] Because the difference in the bonuses was not negligible, it found an adverse effect on competition,[310] reiterating its unsupported view that discrimination between dealers strengthens the discriminator's dominant position—a view that evidences the Commission's continuing confusion of primary and secondary-line injury and its failure to distinguish between anticompetitive and exploitative abuses.[311] The most encouraging aspect of the Commission's discrimination analysis is that it was not really an important basis of the decision.

The 1977 special bonus troubled the Commission because it viewed this bonus as a *Griffith*-type leveraging of power in the truck and bus tire market to gain an advantage in the more competitive automobile tire market.[312] If the Commission's understanding of the purpose or effect of this special bonus were correct, its conclusion that the special bonus violated article 86 would be unexceptionable. Such conduct also violates section 2 of

305. *Id.* at 39, 33 Common Mkt. L.R. at 655.
306. *Id.* at 41, 33 Common Mkt. L.R. at 658.
307. *See id.* at 39, 33 Common Mkt. L.R. at 654.
308. *Id.* at 42, 33 Common Mkt. L.R. at 659.
309. *Id.* at 43, 33 Common Mkt. L.R. at 661.
310. *Id.* at 42, 33 Common Mkt. L.R. at 660.
311. Perhaps this indicates that the Commission is using a third operative category of abuses, unfairness abuses, that neither strengthen nor exploit the dominant position. *See* Temple Lang, *Monopolisation and the Definition of "Abuse" of a Dominant Position Under Article 86 EEC Treaty,* 16 COMMON MKT. L. REV. 345, 357-58, 363-64 (1979).
312. 24 O.J. EUR. COMM. (No. L 353) at 44-46, 33 Common Mkt. L.R. at 663-64, 666-67.

the Sherman Act.[313] Even if one were to accept the Chicago School rejection of the *Griffith* theory that leveraging can be anticompetitive,[314] the special bonus may have taken advantage of Michelin's leverage in an exploitatively pernicious way. In 1977 Michelin faced a temporary shortage of truck and bus tires in Holland.[315] Rather than directly exploit this situation by temporarily raising prices, Michelin may have chosen to exploit its temporary power in the truck and bus tire market to increase sales and profits in the automobile tire market. Analyzing Michelin's conduct in this manner does not involve the sin of double counting, which so troubles former Professor Bork; rather, it focuses on the market in which the power was exercised. Leveraging may thus offend article 86's prohibition upon the exploitation of monopoly power, although it should not have been treated as an anticompetitive abuse or characterized as a violation of article 86(d).[316]

Several aspects of the Commission's decision are cause for concern. First, the Commission rejected, without consideration, Michelin's contention that the bonus plan had an important efficiency justification.[317] Second, the Commission commented that it was clear that "a discount system under which, through financial benefits, an undertaking in a dominant position attempts to prevent supplies being obtained from competitors" violates article 86.[318] Since no rational firm would adopt a discount system that it did not expect would increase its sales, necessarily preventing those supplies being obtained from its competitors, all discount plans would run afoul of this overbroad proscription. Does the Commission really mean that any discount scheme which is successful is abusive? Finally, the Commission prohibited Michelin from adopting *any* discount system to promote sales of truck and

313. *See* United States v. Griffith, 334 U.S. 100 (1948); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1058 (3d Cir.), *cert. denied,* 439 U.S. 838 (1978).

314. Bork notes that the *Griffith* analysis counts market power twice and argues that this is deceptive because if in fact the company did have left-over bargaining power, it would use the power to obtain a lower price. As a consequence, reciprocity is erroneously viewed as an economic danger. R. BORK, *supra* note 170, at 257-59, 372-74.

315. 24 O.J. EUR. COMM. (No. L 353) at 39, 33 Common Mkt. L.R. at 655.

316. *See* 24 O.J. EUR. COMM. (No. L 353) at 44, 33 Common Mkt. L.R. at 663-64; 1983 E. Comm. Ct. J. Rep. at 3520-21, 42 Common Mkt. L.R. at 335-36.

317. 24 O.J. EUR. COMM. (No. L 353) at 42-43, 33 Common Mkt. L.R. at 661.

318. *Id.* at 45, 33 Common Mkt. L.R. at 666.

bus tires unless the discounts reflected actual cost savings and were confirmed in writing in advance.[319] The Commission did not differentiate between discriminatory and uniform discounts nor between those set at single rate and those which are graduated. Surely the Commission did not mean what it said! For instance, Michelin granted a two percent cash discount to all its dealers. What possible anticompetitive or exploitative effect could such a discount have, even if it were not completely cost justified? Yet the Commission's language would forbid it, although there is not the least basis for doing so under article 86.

The Court of Justice upheld the Commission's findings that Michelin's annual bonus plan foreclosed sales by its competitors and helped maintain its dominant position, but rejected the other conclusions of abuse. Although the Court excused Michelin's failure to confirm the bonus targets in writing because no dealer had requested confirmation and the Commission had not shown that the dealers were afraid to make such a request,[320] the Court concluded that all of the circumstances showed that the system operated to pressure the dealers, to make them more dependent upon Michelin, and to foreclose Michelin's competitors.[321] The Court, however, correctly determined that the Commission had not established any article 86(c) discrimination. The Commission admitted before the Court that it had mistakenly calculated many of the instances of unequal discounts upon which it had relied.[322] The Court accepted Michelin's contention that its discounts were quantity rebates based upon each dealer's purchases, with only justifiable variations.[323] Finally, the Court rejected the attack upon the 1977 special bonus, agreeing with Michelin that the Commission had misunderstood its nature and purpose. Rather than leveraging power from the truck tire market to that for car tires, Michelin was merely seeking to compensate its dealers for the loss of the truck tire bonus that the supply shortage caused. This, the Court concluded, was not abusive.[324]

The Court's *Michelin* decision is cause for hope, if not jubilation, because it may mark the beginning of a trend toward more

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319. *Id.*, 33 Common Mkt. L.R. at 665.
320. 1983 E. Comm. Ct. J. Rep. at 3514, 42 Common Mkt. L.R. at 330.
321. *Id.* at 3517-19, 42 Common Mkt. L.R. at 333-34.
322. *Id.* at 3519, 42 Common Mkt. L.R. at 334.
323. *Id.* at 3519-20, 42 Common Mkt. L.R. at 334-35.
324. *Id.* at 3520-22, 42 Common Mkt. L.R. at 335-36.

careful analysis and a tendency to focus on more important issues. If this trend continues, perhaps in some future case the Court will conclude that article 86 is only violated by discount and rebate plans that have anticompetitive effects or that involve "unfair" exploitation of the dominant position.

IV. Conclusion

Different pricing practices of dominant firms have been challenged as abusive, with remarkably different results. From the decided cases, it is possible to predict certain trends in the development of the EEC regulation of pricing by monopolists.

Article 86(a)'s ban on unfair prices can be violated by prices unfairly high or unfairly low: both monopolistic and predatory prices are outlawed. However, for unfairly high prices, the *United Brands* decision may prove to be an illusory victory much like *Continental Can.* Although the principle that monopolistic pricing is an abuse has been established and another weapon has been added to the Commission's arsenal, that weapon is so difficult to use that it may sit upon the shelf gathering dust. The Commission has indicated that it does not intend to engage in the extensive investigation of costs necessary for meaningful price regulation. In order to avoid this, in *United Brands* it tried to bootstrap the easily established price differences into two violations, monopoly pricing under article 86(a) as well as price discrimination under article 86(c). Having failed, the Commission must recognize that only by investigating the dominant firm's costs can it expect to successfully defend a monopoly-pricing decision before the Court. With its acute shortage of economists, accountants, and resources in general, the Commission is unlikely to search actively for monopoly-pricing cases to investigate. Because most monopoly-pricing cases also involve discriminatory pricing, as in *United Brands,* the Commission's emphasis will be upon violations of article 86(c),with its easily satisfied checklist of elements.

Predatory pricing is the kind of conduct that the Commission probably will attack. Although the Court of Justice has yet to decide a predatory pricing case, there is every reason to expect it to uphold a Commission finding of predation based upon evidence of intent and harm. The Court is unlikely to impose cost-based tests to hinder the Commission in such cases, though a finding that prices were below the dominant firm's costs, meaning average total costs, will be damning evidence. Since allegedly predatory prices often are lower than those the dominant firm charges in other markets, many predatory pricing cases could be decided under article 86(c). Although the Commission did not rely heavily upon the discrimination in deciding *Akzo Chemie,* it may place more reliance on article 86(c) in future predatory pricing decisions. The complaint-driven nature of the EEC competition system assures an adequate supply of cases for full development of the Common Market treatment of predation.

Complaints of discrimination violating article 86(c) will continue to be filed with the Commission. These have been the easiest of all pricing violations for the Commission to establish before the Court. Costs are relevant only as a defense, and thus, probably must be proven by the defendant. In addition, since the Court has read the competitive disadvantage requirement out of article 86(c) and does not measure equivalence rigorously, the only significant test is whether different prices were charged. Exploitative price discrimination, particularly that involving different national markets, will probably be held abusive; if the dominant firm has erected barriers to segregate the markets, condemnation is sure. Price differentials that arise from the application of discount or rebate schemes will be held legal or abusive depending upon the nature of those schemes. Quantity discounts, at least those based on cost savings, will be upheld; fidelity rebates and similar plans will be condemned. One may suspect, however, that often the characterization may reflect the outcome desired, with programs that have been satisfactorily justified being accorded a benign label.

The Common Market's application of article 86 to the pricing practices of dominant firms is subject to several criticisms. First, the Commission's disclaimers notwithstanding, the EEC is flirting with price regulation, as it must to halt exploitative pricing by dominant firms. The Commission recognized in its *United Brands* order that decrees forbidding the continuation of unfair pricing must usually require some form of price reporting. The Commission, in reviewing these reports, will have to analyze changes in costs as well as prices. This oversight seems an unwise use of the Commission's scarce resources, especially since one inescapable effect of successful Commission bans on exploitative pricing is to maintain or strengthen the dominant position or to retard its demise, thus producing further opportunities for abuse. Although EEC authorities could argue that the Treaty makes the policy choice to regulate prices rather than to permit supracompetitive pricing and that the Commission is powerless to reject this approach, the responsibility for the decision is not so easily evaded. The language of article 86 is general, not specific, and does not compel price regulation. Although the article prohibits unfair pricing, "unfair" is a nebulous term. The Commission and the Court could set a very high standard for exploitative prices to be regarded as unfair. Additionally, the Commission certainly has the freedom to determine how best to use its scarce enforcement resources.[325] By this use of discretion the Commission most likely will avoid becoming extensively enmeshed in price regulation.[326]

Second, the hostility of the Commission and the Court toward, and their lack of understanding of, ordinary business practices and the efficiencies those practices may produce holds potential for great loss to the European economy. So does their inability to distinguish between competitive and anticompetitive conduct. To condemn an industry's most successful, innovative, and efficient firm for its success, innovation, and efficiency threatens to deprive the competitive system of one of its most important incentives.

Third, decisions resulting in wealth transfers from the poorer countries in the EEC to the richer countries seem misguided. Although these effects may have been unintentional in the past, that excuse is dead. EEC officials must come to grips with the wealth transfers their policies are causing.

Fourth, the decisions ignore the likelihood of strategic adaptation to the analysis employed and the rules adopted. Dominant firms will not merely avoid committing abuses, but also will act to prevent their abuses being discovered, the Commission prosecuting them, or the Court upholding a finding of abuse. Several of the EEC rules encourage strategic adaptation without elimination of the abuse. This strategic adaptation produces economic waste and competitive distortion, harmful effects which the EEC authorities have not considered in formulating their rules or methods of analysis.

EEC officials could learn important lessons from the experience in the United States with price regulation. Outlawing monopoly

325. *But see* Metro-SB-Grossmärkte v. Commission of the European Communities, 1977 E. Comm. Ct. J. Rep. 1875, 22 Common Mkt. L.R. 1 (1978) (implying that the Commission has a legal duty to deal with every complaint). Temple Lang, *supra* note 95, at 49-50.

326. *See* Temple Lang, *supra* note 95, at 48-49.

pricing causes undesirable structural effects because it discourages supracompetitive prices and accompanying monopoly profits which would stimulate market entry and erode the dominant firm's market share and power. Additionally, the unfortunate results of recent fascination in the United States with misleadingly simple cost-based economic tests for predation should be a warning to use economic analysis as a servant and not to allow it to become a master, and especially the sole master, of the outcome. Perhaps the most significant lesson involves price discrimination. In this area, more than any other, the Community should eschew the follies of the United States courts and Congress. To create a Robinson-Patman type statute—with its blatantly anticompetitive results—from article 86(c) would be most unfortunate. Early signs that the Common Market was doing this have waned somewhat, but the EEC's expressed concern with fairness, defenseless competitors, and vulnerable customers keeps alive the potential for a full-fledged European Robinson-Patman debacle.

The Community appears to be at a crossroads in its treatment of pricing by dominant firms. The early, mechanical approach has been partially supplemented by more thoughtful, albeit frequently incorrect, analysis. Important effects are being recognized, while trivial ones are downplayed. Economic vocabulary has crept into the decisions, and there are attempts to use economic concepts and tools. All of these are cause for hope.