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INTERPRETATION AND APPLICATION OF ARTICLE 86 OF THE TREATY OF ROME: ABUSE OF A DOMINANT POSITION WITHIN THE COMMON MARKET

*Valentine Korah**

I. Introduction

A. *Functions of the Competition Rules*

Although very much more than a customs union was intended by the founding fathers of the European Economic Community (herein called "the E.E.C."), the varied objectives of the Community were to be achieved through the establishment of a common market. Article 2 of the Treaty of Rome (herein called "E.E.C. Treaty") proclaims that:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.¹

Not only did the Treaty provide for the free movement of goods, workers, entrepreneurs, services, and capital unrestricted by national rules, the exercise of market power by firms, whether collectively through cartels, or individually, was also to be controlled. The most immediate objective of the competition rules expressed in the Treaty may have been to prevent the replacement of customs duties and quotas by the conduct of suppliers and buyers, in other words, the integration of the market,² but there was an important longer term objective.³ Unlike the Treaty of Paris, which created the European Coal and Steel Community (E.C.S.C.), the Treaty of Rome provided for few supranational powers. The E.E.C. is more loosely knit than a confederation: member states are still jealous of their powers and unwilling to yield much to the Commission of the European Communities, the executive body of the Communities (herein called "the Commission"). If resources cannot be allocated at the Community level by the Commission, they must be allocated either by national governments,⁴ or by the forces of supply and demand. Competition is an important instrument chosen to raise the standard of living in the Community. Firms which provide goods and services highly valued by consumers may be expected to prosper at

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¹ Other objectives, such as the preservation of the environment are to be found in the preamble.

² Cerexhe, *Les Regles de Concurrence Applicable aux Entreprises*, tit. III, ch. 2, in *LES NOUVELLES, DROIT DES COMMUNAUTÉES EUROPÉENNES* ¶ 2002 (W. Ganshoff van de Meersch ed. 1969).

³ von der Groeben, *La Politique de la Concurrence dans la C.E.E.*, ch. I, *id.* at ¶ 1978 *et seq.*

⁴ This might tend to disintegrate the market as each government favored its own citizens.

the expense of those that achieve less: efficiency, both in using existing resources and in investing in the production of goods or services valued highly in relation to their cost is encouraged, and there will be considerable scope for profit making through buying in cheaper markets and selling in more expensive ones, or producing where labor and raw materials are cheap and selling where they are not. The competition rules contribute both to the integration of the market and to the encouragement of firms that most efficiently meet changing consumer demands.

This paper is not concerned with Article 85—roughly the equivalent of Section 1 of the Sherman Act. Article 85 prohibits as incompatible with the common market, all agreements and concerted practices which may affect trade between member states and have as their object or effect the restriction, distortion, or prevention of competition within the Common Market. Not surprisingly, this provision was early invoked⁵ to forbid agreements fixing prices, dividing the Common Market, or arranging collective boycotts. The Commission, unlike the American authorities, has the power under Paragraph 3 of Article 85, to exempt agreements and classes of agreement that contribute to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. This power has been used, somewhat extensively, to exempt both individual agreements and classes of agreement for the specialization of production and for the exclusive distribution of goods. Individual exemptions have also been given to joint ventures and to patent licenses. To a far greater extent than in America, ideas of “fair” as opposed to “free” competition are reflected in decisions under Article 85, and may account for some of the decisions on individual boycotts to be discussed under Article 86. This paper is intended to focus on Article 86, so Article 85 will rarely be mentioned. Article 86 of the Treaty of Rome provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature of according to commercial usage, have no connection with the subject of such contracts.

B. Administration of the Competition Rules

The competition rules are enforced mainly by the competition department of the Commission: Directorate General IV (herein called D.G.IV). By virtue

⁵ The first formal decisions were made in 1964, whereas the first decision under Article 86 was made only in 1970.

of Regulation 17/62, the Commission may order firms to terminate an infringement and for a deliberate or negligent infringement may impose fines of up to 10 percent of a firm's turnover for the previous year. The proceedings leading to such orders are administrative. An appeal lies under Article 173 of the Treaty to the Court of Justice of the Communities (herein called "the Court"), either on the ground that the Treaty has been violated, or that the Commission has departed from the general principles of good administration, for example, by not allowing the parties an opportunity to make their views about the Commission's points of objection known to it. On occasion, the Court has quashed a decision on the ground that the evidence did not lead conclusively to the view that the competition rules had been infringed.⁶ The law in this area has been developed through the published precedents of both Commission and Court, although both tend to be drafted rather more formally than American judgments, and the economic reasons for condemning particular kinds of conduct are less clearly spelled out.

Community Competition law is still in its infancy. The first decision of the Commission under Article 86 was made in 1970 and the first Court judgment on appeal was delivered in 1973. The Court has made a few general rulings on the construction of Article 86 under Article 177 of the Treaty, but has decided appeals from the Commission on the application of Article 86 only in *Continental Can*, *Commercial Solvents*, *General Motors Continental*, *The Sugar Cartel*, and *United Brands*. These cases are discussed below. The Commission has applied these precedents, and extended their ambit considerably in four decisions, but three of these are subject to appeal.

The development of Competition law has been made more difficult by the slight effect economists have in D.G. IV. Monopolization cases are particularly difficult for lawyers to understand. Competition is concerned less with fairness towards a trader refused supplies, than with the effects of eliminating him from his particular market and the economy as a whole. Lawyers are usually concerned with justice as between two or three groups of interests, not with the economy as a whole, and Article 86 itself is drafted in terms of the abusive exploitation of buyers or sellers. Failure to consider wider economic effects limits the cogency of not only the decisions by D.G. IV—many commentators in the legal journals tend to comment on the developments in a legalistic manner, although some have benefited from the American experience, and occasionally economists comment on the recent cases.

Many important questions remain open, and many practitioners have criticized the recent decisions of the Commission as being excessive. In the next few months, the Court will be provided with excellent opportunities to clarify the ambit of Article 86, and to decide how far it operates to protect traders or whether it is intended to protect competition.

It is not clear whether the competition rules can also be enforced under the law of member states through an action for damages, or an application for an injunction. There is no express provision in the Treaty for multiple damages.

⁶ See, e.g., *The Sugar Cartel*, *infra* note 48, at 342-64. In reference to Court judgments, the formal findings of the Court are set down in numbered paragraphs or motifs.

II. Early Views About the Meaning of Abuse

A. *Literal Arguments: Price Regulation*

At first glance, "abuse of a dominant position" may seem to resemble "monopolization" contrary to Section 2 of the Sherman Act. Certainly, the Commission looks to the American experience, but there are significant differences. Until the Court decided otherwise in *Continental Can*,⁷ it was widely thought that Article 86 provided only for a public utility kind of regulation of prices and output to protect those dealing with the dominant firm,⁸ and even since, it has been held to prohibit excessive charges.⁹

The Treaty of Paris, which established the E.C.S.C., contains express power to control mergers¹⁰ as well as the conduct of the dominant firms, so it was argued that the lack of express power in the E.E.C. Treaty must have been deliberate—that states were not prepared to relinquish such interventionist power to the Commission. In contrast with Article 85(1), in relation to which the reasonableness of the prices agreed is no defense, Article 86 seems to provide for control over the performance of dominant firms by regulating prices directly, rather than indirectly by controlling anticompetitive conduct.

The wording of Article 86 leads to a similar conclusion. In the authentic British text, "abuse" hardly does justice to the double concept of *exploitation abusive*—abusive exploitation—in the French text.¹¹ In French, "exploitation" refers to the reaping of monopoly profits rather than to the consolidation or extension of dominance, while both words have a pejorative connotation inappropriate to practices which may reduce competition, irrespective of any fault. The list of examples of abuse given in the second half of Article 86 is not exhaustive, but must illuminate the definition in the first part. The first two examples clearly relate to the direct control of prices and production, apparently in the interest of those dealing with the dominant firm, although ultimate consumers may benefit indirectly, if the next level of trade or industry is sufficiently competitive for any cost savings to be passed on. Professor Joliet argues that the next two examples are equally unconcerned with anticompetitive effects. Discriminatory price cutting to discourage competitors of the dominant firm is not included in the list—only discrimination that places some of those dealing with

7 *Europemballage and Continental Can Corp. v. Commission E. C.*, Case 6/72, [1973] Reports of Cases of the Community Court [E.C.R.] 215; [1973] COMM. MKT. L.R. 199.

8 See, e.g., JOLIET, *MONOPOLISATION* 247-52; *Der Begriff der Missbrauchlichen Ausnutzung in Article 86 EWG-Vertrag*, *EUROPARECHT* 97; [1973] *La Contrôle des Monopoles dans la C.E.E.*, 4949 *JOURNAL DES TRIBUNAUX*, 217 (1976). See also Focsaneanu, *La notion de l'abus dans la systeme de l'article 86 du Traite instituant la C.E.E.*, [1977] BRUGES WEEK 324; B. GOLDMAN, *DROIT COMMERCIAL EUROPEEN, PRECIS DALLOZ* ¶ 319; Cerexhe, *supra* note 2, at ¶ 2093, with *L'Interpretation de l'article 86 du Traite de Rome et les premieres decisions de la commission* [1972], *CAHIERS DE DROIT EUROPEEN* [CAHIERS DE DR. EUR.] 272, 294 *et seq.*

9 See *General Motors Continental N.V. v. Commission E.C.*, and text accompanying note 79 *infra*.

10 In 1973, the Commission proposed to the Council a regulation taking power to exercise such control over E.E.C. products ([1973] COMM. MKT. L.R. D205), but the Council, which consists of ministers of member states, has not had the political will to pass it.

11 See Focsaneanu [1977] BRUGES WEEK, note 8 *supra*. Except for the Dutch, the other authentic texts correspond to the double concept in the French.

the dominant firm at a competitive disadvantage in comparison with others—another example of unfairness to customers or suppliers. Even tying, which may enable a dominant firm to extend its dominance to the market for the tied product, is prohibited whether or not it has this effect. This, too, is seen as a control over unfair buying and selling practices adopted by a dominant firm.

B. Teleological Arguments: Control of Anticompetitive Conduct

The experience of regulating the charges of privately owned monopolies in other countries, including the United States, has been unsatisfactory and such regulation is hardly compatible with the liberal inspiration of the Treaty of Rome. Moreover, D.G. IV has not been permitted by the Council of Ministers¹² to appoint sufficient staff to undertake such control over all concentrated industries. After receiving the reports of two working parties on the applicability of Articles 85 and 86 respectively to mergers, the Commission published a *Memorandum on Concentration*, in which it stated its view that Article 86 covered more than the examples stated therein, and in particular suggested that it might apply to price competition engaged in for the purpose of ousting a competitor who does not have sufficient financial resources to withstand a period of selling below cost, and to mergers.¹³ It assumed that conduct leading to a reduction of competition would have the same harmful effects as the practices listed in Article 86.

In its first decision under Article 86, *re Gema*,¹⁴ the Commission tried to introduce competition into the performing rights industry, rather than ensure that the license fees charged to those using its members' copyright were reasonable, or that the margin between its receipts and payments to its members was not excessive.¹⁵ In condemning discrimination against German producers of records under the *Gema* rules, the Commission asserted that discrimination may infringe Article 86 even in the absence of fault. Professor Focsaneanu has criticized this as misuse of the words "abusive exploitation,"¹⁶ both of which are

12 The Council of Ministers consists of the foreign ministers of each member state, or their delegates. It tends to limit the activities of the central bureaucracy of the Commission. An effective means is its control over the establishment of new posts.

13 CONCENTRATION OF ENTERPRISES IN THE COMMON MARKET: MEMORANDUM OF THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY TO THE GOVERNMENTS OF THE MEMBER STATES ¶ 65 (3 COMPETITION SERIES, 1966) ([1966] COMM. MKT. L.R. 26).

14 [1971] J.O. L134/15; [1971] COMM. MKT. L.R. D35.

15 This has been criticized in relation to performing rights on the basis that there is much to be said for having a single performing rights society in each country, so that those wishing to use any copyright materials can obtain a single package license. See Joliet note 8 *supra*; EUROPARECHT, note 8 *supra*; JOURNAL DES TRIBUNAUX *supra* note 8 at 222; W. Wallace, *Control over the Monopoly Exercise of Copyright*, 3 I.I.C. 480 (1973). The appeal from the *Gema* decision, however, was withdrawn and the Court impliedly approved the decision in *Belgian Radio and Television v. SABAM*. See text accompanying note 75 *infra*.

16 Focsaneanu [1977] BRUGES WEEK, *supra* note 8, at 324, 341-43. Compare Marchini-Camia, *La concentration industrielle, les positions dominantes sur le marche et le droit anti-trust; l'experience americaine et les problemes Europeennes* [1971], 7 REVUE TRIMESTRIELLE DE DROIT EUROPEEN [REV. TRIM. DE DR. EUR.] 353, 407-08 with Cereche, *L'interpretation de l'article 86 du Traite de Rome et les premieres decisions de la Commission* [1972], CAHIERS DE DR. EUR. 272, 292. *Contra* WAELBROECK, CONCURRENCE 67-68; DERINGER, THE COMPETITION LAW OF THE EUROPEAN COMMUNITY 167 (1968).

pejorative, but the Commission's view was eventually upheld by the Community Court.

C. Continental Can

In *Continental Can*,¹⁷ the Commission ordered the American firm which had arranged for its Belgian subsidiary to take over a potential competitor of another of its subsidiaries, to terminate this infringement of Article 86. It acted on the view that the elimination of a potential competitor in a strong position in a neighboring market would alter the structure of the market irreversibly, and so amount to an abuse contrary to Article 86.

Continental Can Corporation held 85 percent of the shares in the German company, Schmalbach, and through this subsidiary, was held to enjoy a dominant position in the Federal Republic of West Germany, in respect of cans for meat and fish products and of metal closures other than crown corks. Continental Can formed another subsidiary, Europemballage to make an offer for the shares in Thomassen,¹⁸ a company which supplied all such cans and 45-50 percent of such closures in the Netherlands. Both companies were licensed under Continental Can's patents and know-how, although the firms had not been competing actively. This may have been due to the exchange of information between Continental Can's licensees, the investigation of which had not been completed by the Commission. The latter wanted to prevent the merger before investigating these agreements lest, once the merger were complete, the abrogation of the agreements would become less effective.

In its decision, the Commission clearly stated its view that action by a dominant firm, which eliminates the competition of a strong¹⁹ potential supplier is forbidden:

23. For an undertaking in a dominant position to reinforce that position by means of a merger with another undertaking with the consequences that the competition which would have existed actually or potentially in spite of the existence of the initial dominant position is in practice eliminated for the products in question in a substantial part of the common market constitutes behavior which is incompatible with Article 86 of the Treaty.

The Commission added that Thomassen held a dominant position in a neighboring market and that the firms were able to compete with each other.

Its view was upheld by the Community Court.²⁰ The Court construed

17 [1972] J.O. L7/25; [1972] COMM. MKT. L.R. D11, D31.

18 It acquired some 91 percent of the shares and convertible bonds.

19 It had already mentioned barriers to entry when establishing Continental Can's dominant position in Germany.

20 [1973] E.C.R. 215 ([1973] COMM. MKT. L.R. 177), at motifs 18-29. *Accord Jacquemin, Application to Foreign Firms of European Rule on Competition*, 18 ANTITRUST BULL. 157, 170 et seq. (1974); *Entreprises étrangères et politique européenne de concurrence* [1973], 9 REV. TRIM. DE DR. EUR. 412, 422; Vandamme, *L'arrêt de la cour de justice du 21 Février 1973 et l'interprétation de l'article 86 du Traité C.E.E.*, CAHIERS DE DR. EUR. 112, 125-26 (1974); S. NERI, *LE CONTROLLO DELLE CONCENTRAZIONI* (1973). *Id.* at 325, 339-53. *Contra Gleiss, Fusionskontrolle in EWG-Kartellrecht*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBSBERATERS [A.W.D.] 1973, 268 et seq. See also Korah, *The Control of Mergers under Article 86 of the Rome Treaty; Continental Can* [1973], CURRENT LEGAL PROBLEMS 82, 88-90.

Article 86 in the light of the objectives of the Treaty set out in Articles 2²¹ and 3(f), which by providing for the establishment of a system that will ensure that competition is not distorted, demands, *a fortiori*, that it should not be eliminated. Articles 85 and 86 were intended to achieve the same aim²² and should be construed together so as to leave no gaps in the rules of competition.²³ Noting that the Commission had referred to the elimination of competition,²⁴ the Court added that substantial reduction²⁵ caused by the conduct of the dominant firm would also amount to an abuse.²⁶

The judgment in *Continental Can* proved a landmark in the development of both the competition rules and the Community constitution. The Court relied on the fundamental objectives of the Treaty rather than on a literal construction of the rules in which they were crystallized and adopted a wide interpretation of Article 86, which its Advocate General²⁷ considered to be penal. Contrary to a widely accepted construction according to which Article 86 protected traders from unfair competition,²⁸ the Court provided the Commission with the means to control anticompetitive conduct adopted by firms already enjoying a dominant position—not only horizontal mergers, but presumably any

21 See text accompanying note 1 *supra*.

22 Yet the means adopted were not the same. Article 85 forbids restrictive agreements whether or not prices are reasonable, under Article 86 the level of prices seemed to be crucial.

23 See also *Standard Oil v. United States*, 221 U.S. 1 (1911), where Sections 1 and 2 of the Sherman Act were similarly construed as one.

24 Although it appears from motif 23 of the decision, quoted above, that the Commission was referring to the elimination of an important potential competitor, rather than the elimination of competition, its order clearly objects to the "practical elimination of competition in the aforementioned container producers in a substantial part of the common market."

25 At motif 26 the Court states:

[A]buse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behavior depends on the dominant one.

Dr. Schlieder, the Director General in charge of D.G. IV and the senior official dealing with competition policy, assumes that fettering competition means no more than reducing it. There is no implication that Continental Can was preventing firms other than Thomassen from competing. The merger did eliminate the most likely potential competitor.

26 The Court did not state whether the reduction must be greater than the "not imperceptible" restrictions that suffice to infringe Article 85. Since monopolization cases are complex, and it is difficult to conceive adequate remedies, it is hoped that such conduct only which has a very substantial effect on competition infringes Article 86. See Siragusa, *Application of Article 86; Tying Arrangements, Refusals to Deal, Discrimination and Other Cases of Abuse*, [1977] BRUGES WEEK 398, 402-07. The extent of the anticompetitive effect necessary to amount to an infringement of Article 86 may be decided by the Court on appeal from three Commission decisions: *Chiquita* (see note 63 *infra*), *Vitamins* (see note 47 *infra*), and *A.B.G.* (see note 37 *infra*). It must be admitted, however, that conduct with only slight effects on the market was condemned in principle by the Court in *General Motors Continental* (see text accompanying note 79 *infra*), and by the Commission in several cases of individual boycotts, perhaps on the ground of protecting existing small traders in accordance with the principle against unfair competition.

27 The four Advocate Generals are members of the Community Court. One is selected for each case. He gives his opinion, rather like a first instance judge, but without further argument. The Court gives a single judgment a month or so afterwards. Since the Advocate General's opinion is his own, and not a compromise, his opinions are often more interesting than the Court's collective judgment.

28 See note 8 *supra*. But see Mestmacker, *Concentration and Competition in the EEC*, 6 JOURNAL OF WORLD TRADE LAW [J.W.T.L.] 615, 643-47 (1972); Festschrift für W. Hallstein, Frankfurt A.M. 322 (1966). Similarly drawing a parallel to Article 85(3), see A. Deringer, *The Competition Law of the European Economic Community 1966-67* (1968); Scheufele, *Beherrschende Stellung und ihre missbrauchliche Ausnutzung in EWG-Kartellrecht*, A.W.D. 457, 468 *et seq.* (1971).

behavior that might substantially reduce competition between existing suppliers or customers, or raise barriers to entry²⁹ without conferring countervailing benefits on consumers. It is hoped that the doctrine will be limited in these ways, and that for a dominant firm efficiently to take advantage of economies of scale and to charge prices yielding modest profits, though making it harder for other firms to enter the market, would not amount to "abuse" since such conduct is likely to further the objectives of the Treaty.³⁰

III. Concept of Dominant Position Adopted by *Continental Can*

The Commission adopted a view³¹ implicitly accepted by the Court, and similar to that accepted in the United States:

3. Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their

29 One difficulty about the Court's view is that abuse of a dominant position does not require a causal link between the dominance and the conduct, as the literal interpretation of "abusive exploitation of a dominant position" seems to require. *Continental Can* had not used its dominant position in West Germany to intimidate Thomassen's shareholders into selling against their will. On the other hand, one can argue that it was only because of *Continental Can's* market position in Germany that the merger reduced competition to the detriment of consumers. The link may have been not between the dominance and the conduct, but between the dominance and the anticompetitive effects of the conduct. Vogelenzang, *Abuse of a Dominant Position in Article 86: the Problem of Causality and Some Applications*, COMM. MKT. LAW REV. [C.M.L.R.] 31, 66 (1976). Advocate General Roemer in *Continental Can*, A. DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 165-66 (1968) and more recently, Focsaneanu, [1977] BRUGES WEEK (see note 8, *supra* at 377), state that Article 86 applies only where there is a link between the dominant position and the conduct. Another authority (see E. MESTMACKER, *EUROPAISCHES WETTBEWERBSRECHT* 388, 390 (1975); *Concentration Competition in the EEC*, 6 J.W.T.L. 615, 644 (1972)), however, clearly thinks that mergers, particularly with competitors, by dominant firms infringe Article 86, although he does not very clearly reconcile this with his belief that there must be a link between the conduct complained of and the dominance.

30 The United Kingdom Monopolies and Mergers Commission objects only to the artificial raising of entry barriers. See, e.g., A REPORT ON THE SUPPLY OF PRIMARY BATTERIES, 7th Nov., 1974, H.C.I., para. 429, where it expressly denied any criticism of the entry barrier caused by the dominant firm's efficient van service, which a new entrant would not be able to match. Compare *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); but see *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D.C. Mass. 1953) (Wyzanski, J.). In *Continental Can*, at 29, the Community Court said:

It can, irrespective of any fault, be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market. . . .

Efficient exploitation of scale economies coupled with low profits may discourage alternative suppliers between which consumers might otherwise choose, but, presumably they would prefer one low price supplier in several too small to enjoy scale economies where these are significant. The Court's judgments are couched in such succinct and abstract language, that it is difficult to know whether one is reading in too much.

31 Compare the Commission's MEMORANDUM ON THE PROBLEM OF CONCENTRATION IN THE COMMON MARKET ¶ 54 (3 COMPETITION SERIES 1966); Cerexhe, [1972] CAHIERS DE DR. EUR., note 8, *supra* at 272, 286.

economic partners, but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour, even if there are differences in intensity in their influence on the different partial markets.

According to this definition, it is not only discretion in setting prices but also in making other market decisions that is relevant. A dominant firm can choose, for instance, whether to build sufficient capacity to meet seasonal fluctuations, or whether to make its customers hold stocks.³² Conversely, a buyer may enjoy a dominant position if he has a discretionary power to set his buying prices and other terms of purchase. In *re Eurofima*,³³ in proceedings that were terminated without formal decision, the Commission came to the conclusion that the most important buyer of a certain kind of rolling stock had abused its dominant position by insisting on unfair buying conditions in development contracts.

A. Market Analysis

Dominance presupposes that there are barriers to entry which prevent other firms competing with the dominant firm and a lack of substitutes to which buyers could turn if monopoly prices were charged.

1. Entry Barriers

The source of a dominant firm's independence is some barrier to entry which protects it against potential competition from new firms entering the market.³⁴ Existing firms have discretion over their market decisions only when they enjoy some advantage over others who may be considering whether to enter the market or expand their output. The most difficult barriers to overcome often are exclusive rights imposed by law, when there are no close substitutes—*e.g.*, patents for important inventions.³⁵ The exclusive right granted by the Belgian Government to the exclusive dealers of a foreign manufacturer to certify that new cars brought into Belgium comply with the safety standards required if they are to be driven on the Belgian highway was also held to confer a dominant position in *re General Motors Continental N.V.*:³⁶

9. This legal monopoly, combined with the freedom of the manufacturer or sole authorised agent to fix the price for its service, leads to the creation of a dominant position within the meaning of article 86 as, for any given make, the approval procedure can only be carried out in Belgium by the manufacturer or officially appointed authorised agent under conditions fixed unilaterally by that party.

32 This was condemned by the United Kingdom Monopolies Commission in its REPORT ON THE SUPPLY OF MAN-MADE CELLULOSIC FIBRES, March, 1968, H.C. 130.

33 Press release, [1973] COMM. MKT. L.R. D217.

34 R. Joliet, orally in class; Jacquemin, *Firme Dominante et Politique Antitrust*, [1977] BRUGES WEEK 7, 17 *et seq.*; E. J. MESTMACKER, EUROPAISCHES WEITBEWERBSRECHT 378, 383; Brozen, *Competition, Efficiency and Antitrust*, J.W.T.L. 659, 661 *et seq.* (1969).

35 Parke Davis v. Probel, case 24/67 [1968] E.C.R. 55, 72 in relation to trade marks. See also the passage cited in text accompanying note 50 *infra*, from *Sirena v. Eda*.

36 See note 79 *infra*, confirmed in this respect by the Court in case 26/75, [1975] E.C.R. 1367. The passage quoted is from the Court's judgment.

The first sentence of the quotation seems to imply that the decision might have been different had G.M.C.'s charges been limited by Belgian law to a level fairly low in relation to its costs, or to those of an efficient operator. Yet in a recent decision that is subject to appeal, *A.B.G.*,³⁷ the Commission held that during the acute shortage each oil refiner in the Netherlands was dominant in respect of its customers, although maximum prices were imposed by the Dutch Government at a level below world prices.

In *Continental Can*, the Commission referred to barriers to entry which do not appear to have been very high:

9. Furthermore, Continental Can has the advantage over most of its competitors of itself manufacturing the machines necessary for the production and use of the metal containers.

As Herr Roemer, the Advocate General, objected, the Commission did not state whether a firm wishing to make meat and fish cans could have obtained machines from other sources, nor whether Continental Can was prepared to supply closing machines to canners who did not buy their cans from it. The Commission referred also to its patents and know-how, but the basic patents had long expired and it did not discuss whether other firms wishing to compete with the Continental Can group could have obtained know-how licenses from other manufacturers, such as American Can, its major competitor in the United States. The Commission also referred to Continental Can's financial strength, although one might have thought that the amount of capital necessary to finance a single can-making plant of optimal size would not have been so great as to deter all but a few firms. The expense of investment in a specialized plant is not likely to be a high barrier to entry, unless the size of plant necessary to achieve most of the scale economies is large in relation to the market or to the expected increase in demand.³⁸ As long as there are a few firms who might enter in market and compete with the existing firm(s), the latter's pricing and other policies may be constrained even if they never actually do so. Yet the Commission habitually considers that the need for substantial investment amounts to an entry barrier without stating that the size of plant required is large in relation to the market.

The Commission stressed the market shares of Schmalbach, a company in which Continental Can held 85 percent of the shares and whose dominance in West Germany was imputed to the parent company. It produced 55 percent of the metal closures and tops in the Federal Republic and over 85 percent of the cans for meat and fish.³⁹ Quite apart from the question whether other methods of packing meat and fish products limited the prices Schmalbach could obtain,

37 [1977] O.J. L117/1; [1971] 2 COMM. MKT. L. R. D1. The Commission argued that there was no one else to whom buyers could turn, during the crisis, as they would not obtain supplies from other oil companies. Yet BP was not permitted to sell at a price at which it could import and not make a loss. The case has been criticized by Williams, 2 EUR. L. REV. 294 (1977), and Korah, *Refusal to Supply Normal Customers During Crisis Held to Infringe Article 86*, 74 LAW SOCIETY GAZETTE 857 (1977).

38 Jacquemin, *Firme Dominante et Politique Antitrust*, [1977] BRUGES WEEK 7, 17.

39 The Community Court has gone further in *Sugar* (see text accompanying note 88 *infra*), and confirmed a Commission finding that Tirllemontoise enjoyed a dominant position on the basis of large market shares, without any consideration being given to barriers to entry.

market shares do not seem to the writer to be decisive in the absence of high entry barriers. A firm supplying virtually the whole market may be able to earn no more than competitive profits, without encouraging entry.⁴⁰ Yet a firm with a far smaller share of the market, but with lower costs than its competitors, either because it enjoys better access to sources of raw materials, etc., or because of a more efficient method of operation, may be able to reap monopoly profits.⁴¹ In *Continental Can*, however, the Commission stressed the conjunction of high market shares and entry barriers which it seems to have considered substantial.

The Advocate General, Herr Roemer, however, would have required a more comprehensive market analysis. He criticized the Commission for having failed to give more information not only about substitute ways of packing meat and fish products, but also about barriers to entry—the importance of the patents and know-how and production flexibility, that is, the likelihood of the makers of cylindrical cans starting to make more complex shapes used for meat and fish products. The Court agreed with him, at least in part. It quashed the decision for failure to explain the facts and appraisal on which it was based in relation to potential competition: production flexibility and the likelihood of large customers starting to make cans and closures for sale. Some of these large customers already made some of their own cans, and one also disposed of part of its production. The Court also criticized the Commission for having failed to explain why the parties to the merger, which had not been actively competing before, would start to do so if the merger were prohibited⁴²

In requiring the Commission to consider production flexibility, the Court went somewhat further than had American courts.⁴³ In this regard, J. Vandamme, then an official in D.G. IV, has criticized the Court for requiring too much,⁴⁴ but the judgment has been approved by Mestmäcker.⁴⁵ The present writer supports the Court's view: *Continental Can* would not long have been able to reap monopoly profits, were the producers of cylindrical cans able easily to start making those for meat and fish, nor if existing customers extended their plant to make cans for sale.

40 Jacquemin, [1977] BRUGES WEEK 7, 16.

41 Such a firm may well practice limit pricing—that is, it may sell at prices just below those at which it expects that its customers would turn to substitutes, new entrants would join the industry, or existing firms expand their output. E.J. MESTMACKER, *EUROPAISCHES WETTBEWERBSRECHT* 376, and Thiesing in Grosben, Boeckn, Thiesing, *EWA Vertrag, Kommentar*, 2 *SUFLAGE BADEN-BADEN* 773 (1974), both regard market shares as only one of many elements constituting a dominant position. Compare Commission's MEMORANDUM ON CONCENTRATION, *supra* note 13, at ¶63. In the United States, the courts have tended to look more to market shares than to the height of entry barriers, a practice criticized by L. SULLIVAN, *ANTITRUST*, 53-58, 74, 79; P. AREEDA, *ANTITRUST ANALYSIS, PROBLEMS, TEXT, CASES* ¶¶ 231-47 (2d ed. 1974).

42 This may have been a little harsh, since *Continental Can* and Thomassen were parties to an agreement for the exchange of information etc., which the Commission had not yet examined under Article 85. While this agreement could have been abrogated, if condemned by the Commission, an order to unscramble a merger after the event would have been difficult to frame and have caused far greater disturbance to the company's operations.

43 Although the 10th Circuit Court of Appeals has done so since in *Telex Corp. v. I.B.M.*, 510 F.2d 894 (10th Cir. 1975).

44 *L'Arret de la Cour de Justice du 21 Fevrier 1973 et L'Interpretation de L'Article 86 du Traite C.E.E.* [1974] *CAHIERS DE DR. EUR.* 112, 122.

45 E.J. MESTMACKER, *EUROPAISCHES WETTBEWERBSRECHT* 378 *et seq.* See also J. F. Bellis, *Potential Competition and Concentration Policy: Relevancy to EEC Antitrust*, 10 *J.W.T.L.* 23 (1976).

Entry barring practices have been considered by the Commission only when it has been considering "abuse" and not when it has established the existence of a dominant position, although such conduct is equally relevant to this issue.⁴⁶ Thus, in *Vitamins*⁴⁷ and *Sugar*⁴⁸ the grant of loyalty discounts, which might foreclose competitors, was found to be an abuse, but not considered in relation to the existence of a dominant position.

2. Substitutes

Dominance presupposes not only barriers to entry, but also that there are no substitutes freely available at comparable prices, at least for some uses. To ascertain the existence of market power, the market must be analyzed to determine whether buyers can obtain their needs elsewhere in the short and longer terms. Buyers may be able to obtain other products that would meet their needs, as well as entice new suppliers to the market.⁴⁹ In its decision in *Continental Can*, the Commission gave some reasons, treated as sufficient by the Court, for thinking that canners of meat and fish products would not switch readily to plastic or glass containers.

In several cases relating to industrial property rights, the Community Court has stressed the need to consider substitutes. In *Sirena v. Eda*,⁵⁰ it stated that the exclusive right to market goods bearing a mark did not necessarily confer a dominant position:

[I]t is also necessary that the proprietor should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence and position of any producers or distributors who may be marketing similar goods or goods which may be substituted for them.

3. Geographic Market

The Advocate General gave other reasons for doubting the Commission's market definition. He questioned whether the Federal Republic was the relevant geographic market for metal closures, transport of which is less costly than of cans in relation to their values. He suggested that closures made in England might well compete in Germany, but neither he, nor the Court, criticized the finding that the whole of West Germany was the relevant market for assessing Schmalbach's dominance in meat cans, despite the high cost of transport, which strongly discouraged the purchase of cans from a distance. The Federal Republic may

46 E. J. MESTMACHER, *EUROPAISCHES WETTBEWERBSRECHT* 378, 382.

47 [1976]; O.J. L223/27: [1976] 2 COMM. MKT. L.K. D 25. See also Korah, [1977] *JOURNAL OF BUSINESS LAW* [J.B.L.] 72-75.

48 Re European Sugar Cartel, [1973] O.J. L140/17; [1973] COMM. MKT. L.R. D65; confirmed on this point by the Court, case 55/73 [1975] E.C.R. 1663, ¶¶ 499-528. For a criticism, see Korah, [1977] J.B.L. 187, 192.

49 A matter relevant to barriers to entry, discussed above.

50 Case 40/70, [1971] E.C.R. 69, 83; [1971] COMM. MKT. L.R. 260, 275. See also Parke Davis v. Probel, case 24/67, [1968] E.C.R. 55, 72, in relation to patents and Deutsche Grammophon v. Metro, case 78/70, [1971] E.C.R. 487, 501, in relation to copyright in sound recordings.

well have been a single market for fish cans, since the fish are brought into only two North Sea ports and canned there, but the question was not considered.

4. Market Analysis or Definition

The Court insisted that in accordance with Article 190 of the Treaty, the Commission should state the facts and reasons on which its decisions are based. This requires that it should state the grounds for treating a particular product or geographic market as relevant. It seems that a thorough analysis of the market is necessary if the Commission is to apply its own test of dominance; the discretion of the dominant firm to make its market decisions may be constrained by potential as well as actual competition. It would lose sales if it charged monopoly prices when buyers could turn to substitute products, when other firms could enter the market, or make close substitutes, or existing competitors could expand their output at a competitive cost.

In *Continental Can* and other cases, however,⁵¹ the Court seems to have gone further and required the Commission to define the market. The writer regrets this requirement. Many markets do not have precise limits: a chain of substitutes may not offer such intense competition as more of the identical product, so to include them in the relevant market would result in underestimating the power of the dominant firm. Moreover, the cost of making the substitutes may be high enough to allow the firm to reap considerable monopoly profits before meeting competition. Yet to exclude such substitutes altogether would be equally misleading. The Commission should be asked to analyze the competitive pressures operating or likely to operate on a supplier, rather than to define the market, by stating at exactly what point remoter substitutes should be considered irrelevant.⁵² Nevertheless, the Court's statement that the Commission should state the reasons that have led to its definition should ensure a proper market analysis. Difficulties are likely to arise in practice, however, as such an analysis takes time and economic and commercial expertise. D.G. IV, the Competition Department of the Commission, has fewer officials than the Bundeskartellamt, which is charged to protect competition within a single member state, or employed in the various United Kingdom bodies with similar functions. Most of its officials are jurists.⁵³

51 H. Schroter, *Le Concept de Position Dominante dans L'Application des Articles 66, Paragraphe 7, du Traite CEEA et 86 du Traite CEE*, [1977] BRUGES WEEK 434; *Le Concept de 'Marche en Cause' dans l'Application des Articles 77, Paragraphe 7, du Traite CEEA et 86 du Traite CEE*, *id.* at 460. See also the Commission's MEMORANDUM ON CONCENTRATION, *supra* note 13, which speaks of market definition rather than analysis at paragraph 64.

52 H.W. DE JONG, *THE RELEVANT MARKET* 524; Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. LAW REV. 281 (1956); P. AREEDA, *ANTITRUST ANALYSIS, PROBLEMS, TEXT, CASES* ¶¶241, 2(c) (2d ed. 1974); M. HANDLER, H. BLAKE, R. PITOFSKY AND GOLDSCHMID, *TRADE REGULATION, CASES AND MATERIALS* 283-87 (1975).

53 The Commission officials include two economists neither of whom deal with particular decisions. Nor do they advise the rapporteurs who do. A few of the rapporteurs have, however, had some experience in commercial or industrial firms and eight have some economic qualification.

Frequently, the Commission has defined the market without giving very cogent reasons for its selection. In *Hugin/Liptons* (see note 80 *infra*), it asserted that the relevant market for assessing a refusal to supply spare parts, which had the effect of insulating the manufacturer from competition in repairs and rentals, was spare parts for the particular brand. Spares for

IV. Later Judgments of the Community Court

A. Commercial Solvents

Many new issues arose in *Zoja v. Commercial Solvents*.⁵⁴ The Commission found that Commercial Solvents, an American Company, held a dominant position in the common market over the supply of the raw materials needed to produce the drug ethambutol, and condemned it⁵⁵ jointly and severally with its half owned subsidiary in Italy for abusing that position by refusing to supply the raw materials to a former customer, one of the principal producers of ethambutol in the common market. It also ordered immediate supplies based on the quantity used by Zoja over the previous two years, and required the parties to negotiate longer term supplies. The decision was confirmed by the Community Court in almost all respects.

1. Dominant Position⁵⁶

Commercial Solvents was the only producer on an industrial scale of nitropropane in the world. From this product it is comparatively easy to produce aminobutanol, which in turn may be used to make the drug ethambutol, widely used in combination with other drugs for the treatment of pulmonary tuberculosis. Although the master patents for the production of nitropropane had expired, Commercial Solvents alone had the necessary technical know-how, and other ways of producing aminobutanol on an industrial scale had not been proved. There were other entry barriers in that nitropropane is but one of several

other brands were not compatible, but the Commission did not say why the relevant market was not cash registers, of which Hugin supplied only 12 percent. If the other makers of such register were prepared to supply spares freely, much of the market would not be foreclosed.

In *Chiquita, infra* note 63, the relevant market was said to be all bananas supplied in certain member states, without any reasons being given for not treating the Chiquita brand separately, although it was said to enjoy a premium of 40 percent over unbranded bananas. The wider definition, *e.g.*, to include all fruit, was rejected on the basis of an F.A.O. study of the cross elasticities between bananas and certain summer fruits, prepared for a different purpose, for which only very high cross elasticities were relevant. But to determine the range within which a firm can set its prices, it is not enough to look only at the cross elasticities with the nearest substitutes. There are hundreds of products, including milk puddings and anchovies, that have some slight effect on banana prices. In practice, one could not hope to discover the cross elasticities between bananas and each of a very large number of products. The cross elasticities may be used to define market power in some American cases, but it is not easy to quantify them. *de Jong*, note 52 *supra*. It would have been much easier to infer market power from the wide spread of prices charged free on rail Rotterdam in any particular week. The reasons given for excluding certain member states were also inadequate.

⁵⁴ [1972] J.O. L299/51; [1973] COMM. MKT. L.R. D50, confirmed by the Court, cases 6 & 7/73, [1974] E.C.R. 223.

⁵⁵ It is not intended to consider the extraterritorial operation of the EEC rules in this paper, although Commercial Solvents did nothing in the Common Market. By imposing the fines jointly and severally on both companies, the Commission avoided the difficulties of enforcing a penal order abroad. The Commission and two Advocates General have adopted the effects doctrine, but not yet the Court.

⁵⁶ Comments on this aspect of the case include Ramsey, *In Support of the Treaty's Fundamental Objectives: A Survey of Recent Developments Concerning the Interpretation of an Abuse of Dominant Position under Article 86 of the Treaty of Rome*, [1975] LEGAL ISSUES OF EUROPEAN INTEGRATION [L.I.E.I.] 1, 15-17; Linssen, *The Commercial Solvents Case: Some Further Reflections*, 9 J.W.T.L. 665, 667-70 (1975); Piriou, *Refus de Vente et Abus de Position Dominante*, [1975] CAHIERS DE DR. EUR. 79, 102-06.

by-products and a new entrant would have to find markets for the others. It was alleged that as there are other drugs for treating tuberculosis, the raw materials for making ethambutol should not be treated as a separate market, but on this point the Commission was upheld. If the various drugs for treating the disease were complementary, and there were no substitutes for ethambutol,⁵⁷ it is submitted that it was right to treat the raw materials for its production as a separate market. The person able to control their supply would be able to raise prices above a competitive level.⁵⁸

2. Enterprise Entity⁵⁹

Unless Commercial Solvents and its half owned subsidiary, I.C.I.,⁶⁰ were treated as a unit, it could be argued that Commercial Solvents had done nothing in the Common Market—it had only refused to supply the raw materials f.o.b. an American port, and that I.C.I. had no dominant position to abuse—it could not supply raw materials which its parent company refused to let it have for the purpose. The Commission held that Commercial Solvents was able to exercise and did exercise such a degree of control over I.C.I. that they should be treated as forming, in their relations with Zoja and for the purpose of Article 86, a single undertaking. This finding was confirmed by the Court as being adequately supported by reasons. The Advocate General, Mr. J.P. Warner, went very much further in treating a company together with all the companies it controls as a single undertaking and invoking a strong presumption⁶¹ that parent companies control their subsidiaries.

3. Abuse⁶²

Supplies of ethambutol in the Common Market came mainly from three sources: from the Commercial Solvents Group through I.C.I., from a subsidiary of American Cyanamid and from Zoja. Since 1966, Zoja had been I.C.I.'s main customer for aminobutanol, but in 1969, it asked to be excused from its contract to buy since it could obtain the product more cheaply, presumably from distributors supplying the paint market. But during the second half of 1970, supplies began to dry up and eventually ceased altogether. In November 1970, Zoja asked I.C.I. for further supplies, which, after consultation with Commercial

⁵⁷ This was not expressly stated by the Commission but seems to have been assumed by the Court.

⁵⁸ Not that it is easy to say what this would be in the case of one of several by-products—the apportionments must be arbitrary within wide limits.

⁵⁹ On this aspect of the case, see V. Korah, *Instituto Chemioterapico Italiano S.P.A. and Commercial Solvents Corporation v. Commission of the European Communities*, 11 C.M.L.R. 248, 250-53 (1974).

⁶⁰ There is no connection between this company and the more famous British company known by the same initials.

⁶¹ Mr. Warner stated that the presumption could rarely be rebutted where they carry on related businesses. "Subsidiary" is not yet a term of art in Community Law, although there is a definition in the draft directive on company accounts, and it may have to be developed from the general principles of law common to member states. See V. Korah, *supra* note 59, at 251.

⁶² For this aspect of the case, see V. Korah, *supra* note 59, at 256-65.

Solvents, were refused the following January. In April 1971, Zoja complained to the Commission that this refusal to supply amounted to an abuse of a dominant position.

Even before the Court's judgment in *Continental Can* was delivered, the Commission treated conduct that substantially reduced competition as an abuse:

13. In fact, the group has ceased supplying the raw material to one of its principal users.

14. This conduct is such as to provoke the elimination of one of the principal producers of ethambutol in the common market and thus makes a heavy blow at the maintenance of effective conditions of competition within the common market itself. It therefore constitutes an abuse of the dominant position within the meaning of Article 86.

Mr. Warner took the view that a refusal to supply was an extreme form of discrimination, and discrimination which affects competition downstream is one of the examples of abuse given in Article 86(c). He also referred to the *Continental Can* judgment, which had been delivered between the Commission's decision and the Court hearing. If in the light of Article 3(f), competition must not be distorted, then, *a fortiori*, it must not be eliminated.⁶³

a. Economic Theory

Yet why should a dominant firm be required to supply former customers against its will? Is Article 86 designed to protect the vulnerable firms such as Zoja that want supplies, or the consumers—here sufferers from tuberculosis or those paying for their treatment? In his classic article, Professor Bork has pointed out that:

The joining of two monopolies vertically related in the preparation of a product for market adds nothing to total monopoly profit . . . a single monopoly would set its price so that the price to the ultimate consumer would be at the point of returning the greatest profit. The ownership of an additional monopoly vertically related to the first would afford no way of extracting additional return. . . . It would not alter prices, output or the allocation of productive resources on the second level monopolized.⁶⁴

Since Commercial Solvents could extract the full monopoly profit when selling the raw materials, the earning of a further monopoly profit at the ethambutol

⁶³ Like the Commission and Court in *Continental Can*, Mr. Warner assumes that the elimination of a competitor is the elimination of competition. Ethambutol was also made by Cyanamid Italia, but competition would have been substantially reduced by the elimination of Zoja than by Continental Can's acquisition of Thomassen. The Commission has since been concerned about refusals to supply less important customers. See *Chiquita*, [1976] O.J. L95/1; [1976] 1 COMM. MKT. L.R. D28, criticized by Korah, [1976] 1 EUR. L. REV. 322; A.B.G., *supra* note 37. In *Hugin/Liptons* (see note 80 *infra*), the Commission condemned a refusal by a supplier of machines enjoying 12 percent of the EEC market to supply spares, thus protecting monopoly of the repair and rental market in machines of its own design.

⁶⁴ Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157, 165, 197 (1954).

stage would reduce supply beyond the point where profits would be maximized.⁶⁵

Professor Areeda, however, has listed four reasons for concern about monopoly being extended to the second level,⁶⁶ one of which is the raising of entry barriers.⁶⁷ It looks as if there were high entry barriers to the production of ethambutol because American Cyanamid had been granted patents. These caused no difficulty in Italy, which does not grant patent protection for drugs, but Zoja, which also had patent rights, was being sued for infringement in France and Germany. It had succeeded in resisting injunctions at the interlocutory stages, and thus had partly overcome the entry barriers downstream. A new entrant upstream would have the advantage of being able to compete to supply ethambutol to Zoja. If Zoja were eliminated, the entry barriers at the nitropropane level would be a trifle higher,⁶⁸ and another firm would have greater difficulty than Zoja in overcoming its patents and those of American Cyanamid at the ethambutol level.

b. American Experience

Boycotts by a dominant firm to eliminate a competitor downstream have been the subject of litigation only recently. *Otter Tail Power Co. v. United States*,⁶⁹ for example, differed from *Commercial Solvents* in that the dominant firm was a publicly regulated natural monopoly. Otter Tail owned most of the sub-transmission lines in Minnesota, North and South Dakota, taking electric power from the main bulk supply lines owned by the U.S. Bureau of Reclamation to the centers of population, where the voltage was reduced before being supplied retail. Otter Tail earned most of its profits at the retail level, but some from "wheeling in" power to townships it did not supply retail. Several of the townships it had been supplying retail asked it to supply them wholesale, but it refused to do so on the ground that such a practice would lead to its own demise. By a majority of four to three, the Supreme Court confirmed that a unilateral refusal to deal with another, motivated by a purpose to preserve a monopoly situation is illegal as monopolization or an attempt to monopolization.⁷⁰

Yet the cases cited were not on all fours and the questions of policy were ignored by the majority. The Court paid no attention to the terms on which Otter Tail should be required to provide wholesale supplies, except to say that the rate should be compensatory. In that case, power was wheeled in to other

65 Indeed, two vertically related but independent monopolies might produce less than a single monopolist operating at both levels. It would take considerable negotiating skill to ensure that either should reduce supply to its own advantage, but to the greater disadvantage of the other.

66 P. AREEDA, *ANTITRUST ANALYSIS, PROBLEMS, TEXT, CASES* 521 (1st ed. 1967). His treatment in the second edition is rather different.

67 The others are that (1) vertical integration may facilitate discrimination, (2) consumers of ethambutol would be less vocal in raising antitrust problems, than a powerful buyer of nitropropane and (3) monopoly may threaten innovation downstream. This argument may also have been applicable.

68 Only a trifle, since there were uses for aminobutanol in the paint market, though it seems that they were less valuable, and outlets had also to be found for the other by-products.

69 410 U.S. 366 (1973), criticized in Hale & Hale, *The Otter Tail Power Case: Regulation by Commission or Antitrust Laws*, SUP. CT. REV. 99 (1973); L. A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 127-32 (1977).

70 410 U.S. at 377-79.

townships, and those charges, or the methods of fixing them, might have been used as a guide. There seems to be no reason for enabling other firms to take over the natural retail monopoly from Otter Tail for the asking. The position would be no more competitive, and some incentive to the original invention would be lost. In some industries, economies of vertical integration might also be lost if the Court's ruling were extended without exception.

c. *The Community Court*

The Community Court in *Commercial Solvents* also failed to discuss the merits of holding that a dominant firm should not refuse to supply a former customer:

However, an undertaking being in a dominant position as regards the production of raw materials and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the common market. Since such conduct is contrary to the objectives expressed in Article 3(f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86 . . .⁷¹

The Court spoke of the elimination of Zoja as a producer of ethambutol and later observed that Zoja was one of the principal producers of that drug in the Common Market. It did not attempt to show that the market for ethambutol would be more competitive with Zoja still receiving supplies, presumably at a price to be regulated by the Commission, still less that the price would be lower, or as low as it would be if most of the supply should come from I.C.I. or American Cyanamid.⁷² We appear to have a *per se* rule that a dominant firm should not eliminate a substantial supplier of the derived product by refusing supplies, or at least by cutting off supplies to a former customer whose contract has been determined. The difference is not stressed. Professor Areeda has made out a case for concern about a refusal to supply even new customers, but it is regretted that in extending the law, neither the Commission, the Advocate General, nor the Court appears to have analyzed the public interest being served. Not only might such analysis have increased confidence in the Court's legislative role in the Community, it would have made it easier to advise dominant firms in

⁷¹ See *Commercial Solvents*, *supra* note 54.

⁷² We are told nothing about economies that might be achieved by producing ethambutol on a larger scale, whether either I.C.I. or Zoja had achieved such a scale, nor whether there was a market price for the raw materials. It is possible that the cost of making ethambutol would be less for a maker of the raw materials. It may be that research and development would be less wasteful etc.

what circumstances it is lawful to refuse supplies to existing customers and to those wishing to buy in increased quantities or for the first time.

4. Effect on Trade between Member States

Abuse of a dominant position is forbidden only if it may affect trade between member states, and the appellants argued that I.C.I. was prepared to supply sufficient material to satisfy Zoja's needs for sale in the Common Market, but that 90 percent of its production was being exported to third countries where tuberculosis is more common. The Commission's order for supplies was based on the quantities used by Zoja in the previous two years for sales throughout the world. The Advocate General concluded that in the absence of a finding that supply for Community countries only would not have ensured Zoja's continued viability,⁷³ the order to supply specific quantities was vitiated. This seems rather strict treatment of an interlocutory order conceived as a lifeline to preserve the victim of monopolization while a final order was being negotiated. He considered that Zoja was exporting to France and Germany and might be able to continue to do so even if it lost its patent action, through compulsory licenses, etc. In any event, it would still be abusive to cut off a competitor downstream, even if its long-term chances of survival were slight.

The Court was more radical. After reciting Articles 2 and 3(f), it said:

By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between member states, Article 86 therefore covers abuse which may directly prejudice consumers as well as abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3 of the Treaty.

33. The Community authorities must therefore consider all the consequences of the conduct complained of for the competitive structure in the common market without distinguishing between production intended for sale within the market and that intended for export. When an undertaking in a dominant position within the common market abuses its position in such a way that a competitor in the common market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the common market, once it has been established that this elimination will have repercussions on the competitive structure within the common market.

34. Moreover the contrary argument would in practice mean that the control of Zoja's production and outlets would be in the hands of Commercial Solvents and I.C.I. Finally, its cost prices would have been so affected that the ethambutol produced by it would possibly become unmarketable.

Yet, after almost reading out of Article 86, and perhaps 85, the interstate com-

⁷³ The fact finding process by the Commission was hurried. It feared that unless it acted rapidly, Zoja might be eliminated and it might not be possible to restore the competitive situation. At that time it thought that it had power to grant injunctive relief only after a formal decision that Article 85 or 86 had been infringed. This seems, from a case decided since under the Coal and Steel Treaty not to be so, and in later cases, the Commission may make an interlocutory order to continue supplies while making its investigation. Such an order would probably be on terms as to payment by the victim should no infringement be found. See *National Carbonising Co. Ltd. v. E.C. Commission and National Coal Board*, [1975] E.C.R. 1193; [1975] 2 COMM. MKT. L.R. 457, motifs 7 and 8.

merce condition, the Court added that Zoja had started to export to France and Germany. One may conjecture that this paragraph has been inserted to satisfy a minority of the Court unwilling to go as far as the majority. Dissenting opinions are not given, and, not infrequently, a strong, general statement is followed by a narrower statement that would cover the case in issue.

5. Validity of Order to Supply Specific Quantities

In holding that the Commission may make mandatory orders, as well as merely order the termination of the infringement as expressly provided in Regulation 17, Article 3, the Court has greatly strengthened the hand of the Commission. Yet, difficulties may be expected over a period of time: the Commission may presumably be called upon to settle the terms on which supply is to be made—a mandatory injunction for a contract of sale between unwilling parties! This may accord with the original view of Article 86 as a regulatory provision, but may give rise to difficulties.

6. Conclusion on *Commercial Solvents*

The judgment of the Court and the opinion of the Advocate General have extended the powers of the Commission substantially. The broad concept of enterprise entity suggested by Mr. Warner, from which the Court did not dissent although it adopted a narrower view on the facts, not only enables the Commission to impose fines on parent companies operating outside the Community, it enables it to link the market power of one member of a corporate group with the conduct of another. Its powers have also been extended by the wide statement about the effect of a dominant firm's conduct on trade between member states—any conduct restricting competition between existing firms, or raising entry barriers, provided that the effects on the market are substantial, seems to come within the prohibition. Competition may be desired as a spur to efficiency and as a resource allocator, even when interstate trade is not directly affected. The power of the Commission to make positive orders has also been confirmed.

Yet none of the Community bodies gave very good reasons for deciding that refusal to supply a competitor downstream should be prohibited. Not only does this reduce the confidence one might otherwise have in the Court's extensions of the application of the competition articles, but also makes it difficult to advise dominant firms what conduct is permissible. It is not even clear what interest is being protected—that of the competitor downstream, who would like to continue a profitable trade, or that of consumers. The latter interest would require the decision to be extended to refusals to supply new customers too. It would also seem to require that the attempted merger between Zoja and I.C.I., which never came to fruition for commercial reasons, should have been prohibited. It would equally have restricted competition. If, however, Zoja's interests are those to be protected, then it is not clear that vertical mergers which foreclose substantial competition infringe Article 86. It is hardly fair, however, to criticize the Community institutions for failing to give more cogent reasons for their

solution of an intractable problem, which so far as is known to the writer has not been well analyzed by any court.

The extended application of Article 86 has given rise to concern on the ground that there is no provision equivalent to Article 85(3) expressly providing for exemption. Yet the Court may be beginning to develop such a possibility by way of limitation, rather than by exemption. In answer to the Court's questions at the end of the hearing, the Commission objected to a refusal to supply Zoja only if no objective justification were apparent, while the Advocate General suggested that a manufacturer whose research had led to the possibility of making the raw materials might be entitled to refuse to supply them at all in order to secure the market for the final product. Can one infer that a horizontal or vertical merger that was intended to lead to the installation of a newer plant that would have far lower unit costs would be justified, provided that those cost savings could not otherwise be achieved? If so, this will be an important development.⁷⁴ The Commission has exempted from Article 85 some examples of cooperation between small and medium sized firms which appear to restrict competition substantially. It would be strange if these were to infringe Article 86, if adopted by a small firm dominant over some product, perhaps the small maker of a component, which enjoys the protection of an important patent.

B. B.R.T. v. SABAM⁷⁵ II: *Imposing Unfair Trading Conditions*

In 1974, the Community Court gave a ruling about the conditions on which authors and others were able to join SABAM, the only body which exploited copyright in performing rights in Belgium. After observing that the first example of an abuse given in Article 86 is directly or indirectly imposing unfair trading conditions, it added that to see whether SABAM's rules were unfair

[8.] . . . account must be taken of all the relevant interests, for the purpose of ensuring a balance between the requirement of freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights by an undertaking which in practice they [cannot] avoid joining.⁷⁶

The Court went on to advise the national court to consider the extent to which a performing rights society, negotiating with powerful bodies, such as national radio and television companies, needs a global assignment of all copyright, in both existing and future works. It suggested strongly at motif 12 that it did not⁷⁷ and concluded:

⁷⁴ See also *General Motors Continental N.V. v. Commission*, *infra* note 79 (where the Court quashed a finding of abuse because of mitigating circumstances); *B.R.T. v. SABAM* (*see* note 75 *supra*). In *Hugin/Liptons*, *infra* note 80, the Commission objected to a refusal to supply "without objective justification."

⁷⁵ Case 127/73, [1974] E.C.R. 313; [1974] 2 COMM. MKT. L.R. 272.

⁷⁶ Clearly a negative has been omitted in the E.C.R. It is included in the COMM. MKT. L.R.

⁷⁷ Yet performing rights societies may be natural monopolies. See Joliet & Wallace, *supra* note 15.

15. It must thus be concluded that the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.

From the requirement in motif 8 of a balancing of the freedom of authors against the need for collecting sufficient bargaining power to negotiate with large users, P. Vogelenzang infers the possibility of justification:

A limitation of that freedom of authors, etc. is not considered an abuse in itself, but only when it cannot be justified in terms of more efficient management, *i.e.*, a more efficient operation of the market mechanism. Only such a justifiable limitation of freedom becomes *undue* and is an abuse.⁷⁸

But how far can the statement of the Court be generalized beyond the imposition of unfair terms on those who are in practice bound to deal with a *de facto* monopoly? The Court pins its ruling limiting restrictions on competition on the example of abuse in Article 86 that is generally thought to provide for price regulation rather than to control anticompetitive behavior developed by the Court in *Continental Can*. Article 86 is being applied ambivalently to protect both traders and competition.

C. General Motors Continental N.V.: *Exploitation through Overcharging*

Although the Commission has obtained power to control anticompetitive conduct from the Court's judgment in *Continental Can*, it continues to use Article 86 also to control excessive prices. In *General Motors Continental N.V. v. Commission*,⁷⁹ the Commission had fined the appellant for grossly overcharging for the inspections and certificates which only it could legally provide,⁸⁰ and which were required before new cars bought abroad might lawfully be driven by residents on Belgian highways. The Commission compared the F.B. 5,000 charged by G.M.C. on five occasions with the charge of half that amount or less

⁷⁸ Vogelenzang, *Abuse of a Dominant position in Article 86; the Problem of Causality and Some Applications*, 13 C.M.L.R. 62, 65 (1976).

⁷⁹ [1975] O.J. L29/14; [1975] 1 C.M.L.R. D 20, confirmed in principle by the Court, although quashed on grounds, apparently of G.M.C.'s good faith, case 26/75 E.C.R. 1367; [1976] 1 COMM. MKT. L.R. 95.

⁸⁰ It has been objected that the Court should not have treated the provision of certificates for Opel cars as a separate market from that for other models. Yet, since only the manufacturer or its exclusive distributor was permitted to conduct the inspections, a Belgian resident, who had already acquired an Opel car abroad would have had no one to whom he could turn, were G.M.C. to overcharge. G.M.C. would therefore have a proportionately wider range within which it could profitably set the charges for this service than it enjoyed in respect of the supply of cars themselves. The writer would respectively agree with this aspect of the decision, although she would have liked to see the reasoning more fully set out.

In *Hugin/Liptons* [1978] O.J. L22/23, criticized by A. Dashwood in (1978) 3 EUR. L. REV. (Feb.) now subject to appeal, the Commission found that Hugin, which supplied only 12 percent of the cash registers in the E.E.C. and 13 per cent in the U.K., and which was not held to enjoy a dominant position in that market, did enjoy a monopoly in respect of spare parts for machines of its own design, and condemned the company for cutting off supplies of such parts to a former distributor in the U.K., who rented out and services cash registers, thereby ousting it from those markets.

by those providing similar services for other brands of vehicles, and with the F.B. 1,140 charged shortly before this period in question by government testing stations. It did not, however, have to decide on the maximum charge permissible, since before it knew of the Commission's intention to open proceedings against it, G.M.C. had itself voluntarily reduced the charge to F.B. 1,000.

The Court quashed the finding of abuse by the Commission, but not on the ground that Article 86 relates to anticompetitive conduct rather than to the direct regulation of monopoly profits. Indeed, it confirmed that excessive prices in relation to the economic value of a service provided by a dominant firm may be an abuse, although it gave no guidance as to how the economic value of a service was to be ascertained in the absence of a competitive market. The Court quashed not merely the decision to fine G.M.C., but also the finding of abuse in the light of the circumstances of the case: first, that the activity was a new and unusual one for the dominant firm; secondly, that it constituted an inconsequential part of G.M.C.'s turnover; and thirdly, that after receiving complaints, G.M.C. had rapidly reduced the charge and made refunds before it knew that the Commission intended to open proceedings against it.

It is not easy to reconcile the Court's decision in *Continental Can* (motif 29) that the absence of fault did not prevent an anticompetitive merger from amounting to an abuse of a dominant position with its view that overcharging is an abuse only in the absence of mitigating circumstances. The Court made no general statement about the circumstances in which overcharging would not be abusive, still less did it state whether any circumstances would justify anticompetitive conduct by a dominant firm. It is thought, however, that the germ of an idea conceived in *Commercial Solvents* may have been a little further developed in *General Motors Continental*: conduct that might sometimes amount to an abuse does not do so when a reduction in the number of competitors is required for efficient operation, or excused by mitigating circumstances. Even dominant firms must ensure, for instance, their requirements of raw materials, and to the extent that forward orders, or vertical integration, enable it to ensure regular supplies to the public, any anticompetitive effects through the foreclosure of competitors may be outweighed by the immediate benefit to customers of the dominant firm.

The court's affirmation that Article 86 may still be used to control excessive prices, however, is subject to challenge. The experience of controlling the charges made by regulated industries in America has been discouraging. In Germany, attempts have been made to decide whether the prices of dominant firms are far higher than they would have been had the market been more competitive.⁸¹ Occasionally, there has been evidence obtainable about a neighboring market which was more competitive, but this is not always possible. The United Kingdom Monopolies and Mergers Commission has also had experience of investigating whether the price levels of a dominant firm are contrary to the public interest. It has usually considered whether the profits earned on capital employed are

⁸¹ Described by Markert, *The Concept of Undertaking(s) in Dominant Position and the System of Control in German Antitrust Law*, [1977] BRUGES WEEK 195, 214-20. See also HERMANN & JONES, FAIR TRADING IN EUROPE 174-77 (1977).

much higher than those *e.g.*, for manufacturing industry generally.⁸² The difficulties are particularly acute when the dominant position results from patent protection: price control might prevent a firm that had successfully invested in innovation from reaping the expected reward in full.⁸³ Mestmäcker suggests⁸⁴ that prices should be controlled directly only as a last resort, when structural remedies are not possible. In the writer's opinion, it is not possible to control prices without distorting conduct to an extent incommensurate with the benefits to be expected.⁸⁵ To the extent that the principles of price control are not known in advance, the possibility of control may reduce the incentive to investment by increasing the risk. To the extent that they are, they may distort business behavior and lead to higher costs or other unsocial consequences. If price control is based on the value of capital, the use of capital intensive methods of production is encouraged, while multi-shift working is discouraged. If the control is based on costs, or an increase therein, it may pay the dominant firm to increase costs, provided it is protected by sufficiently high entry barriers and there are no close substitutes.

When describing its decision that the prices charged by United Brands for Chiquita bananas in some countries were excessive,⁸⁶ the Commission stated that it

had no wish to set itself up as a price control authority or to interfere in internal price setting by examining cost components or the like. On the other hand, it did wish to make it clear that the provisions of Article 86 which prohibit discriminatory and unfair prices must be enforceable.⁸⁷

The writer sympathizes with the Commission's reluctance to examine costs when deciding whether monopoly profits are being earned. Quite apart from the objections in principle mentioned in the previous paragraph, it does not have the staff necessary for such an exercise and is not likely to be allowed them by the Council. Yet it seems even more arbitrary to fine a firm for having charged

82 Until recently it valued capital on a historic cost basis, as there are better series of statistics with which profits calculated on this basis can be compared. Frequently it also published tables of the return on capital valued on a replacement basis, though it appears to have been less influenced by such comparisons. With increasing inflation it has had to permit some adjustment for inflation in recent reports. The Commission has also found great difficulty in distinguishing monopoly profits from those due to exceptional efficiency, unusually intensive use of capital or a normal premium for high risk activities.

The criteria of the public interest developed by the Commission are described by Korah in a contribution to be distributed in a loose-leaf Encyclopaedia entitled *COMPETITION LAW IN WESTERN EUROPE AND THE USA* (D. J. Gijlstra & F. Murphy eds.).

83 In its *REPORT ON THE SUPPLY OF CHLORDIAZEPOXIDE AND DIAZEPAM*, April 1973, H.C. 197, the Commission condemned the profits earned by Hoffman La-Roche as far too high without any consideration of the conflict of this view with patent policy, which encourages investment in innovation by enabling those paying for it to reap monopoly profits for a limited period.

84 E. MESTMACKER, *EUROPAISCHES WETTBEWERBSRECHT* 361 *et seq.*, 397.

85 Some of the difficulties are analyzed by Schwarz, *Imposition de Prix non Equitables par des Entreprises en Position dominante*, [1977] *BRUGES WEEK* 380-97 (1977). See also Turner, *Monopolizing and Abuse of Dominant Position under American Antitrust Law* (paper given at the Seminar on Joint Ventures and Monopolizing, Berliner Institut für Weiterbildung von Führungskräften der Wirtschaft, Brussels, April, 1975). The paper has been translated into German and published.

86 *Chiquita*, *supra* note 63.

87 *FIFTH REPORT ON COMPETITION POLICY* ¶76 (1976).

unfair prices when no criteria of fairness are laid down in advance or determinable, than to regulate price changes in advance. Since the *Continental Can* judgment has allowed the Commission to protect consumers indirectly, by controlling anticompetitive conduct, it is unfortunate that it should pursue the other, less effective, and even conflicting remedy of direct price control.

C. *Judgment In re European Sugar Cartel*⁸⁸: *Foreclosure*

1. Dominant Position

a. "Within a Substantial Part of the Common Market"⁸⁹

The *Sugar Cartel Case* was extremely complex and mainly concerned with alleged concerted practices between the main sugar refineries in the Community contrary to Article 85. Certain counts, however, related to Article 86. The Raffinerie Tirlemontoise had been condemned by the Commission for having abused its dominant position in the Belgo-Luxembourg market in bringing pressure on its dealers not to export sugar except to specific destinations or consignees. The Court said:

371. For the purpose of determining whether a specific territory is large enough to amount to "a substantial part of the common market" within the meaning of Article 86 of the Treaty the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.

372. So far as sugar in particular is concerned it is advisable to take into consideration in addition to the high freight rates in relation to the price of the product and the habits of the processing industries and consumers the fact that Community rules have consolidated most of the special features of the former national markets.

Over four years, Belgian production had been about 8 percent of that in the Community and consumption about 6 percent. It appears from other parts of the judgment that no sugar was produced in Luxembourg. The Court concluded that "these market shares are sufficiently large for the area covered by Belgium and Luxembourg to be considered, so far as sugar is concerned, as a substantial part of the common market in this product." On similar reasoning it held that "the Southern part of Germany" in which Sud-Zucher-Verkauf operated, an area covering two lander and parts of neighboring ones, with a population of 22 million and where rather more sugar was produced and consumed, was also a "substantial part of the common market."

The Court followed the attempt of Advocate General Mayras to avoid a purely geographical definition of the words "a substantial part of the common market." Yet the factors mentioned seem to be more relevant to the existence of

⁸⁸ See note 48 *supra*.

⁸⁹ Gijlstra & Murphy, *Some Observations on The Sugar Cases*, 14 C.M.L. Rev. 44, 63 (1977).

a dominant position than to the substantiality of the part of the common market affected. Market power is rarely confined to very small areas, so why does the Treaty control only those dominant in a "substantial part of the common market"? Presumably, it is a *de minimis* jurisdictional limitation, avoiding the trouble and expense of making an economic analysis and deciding what conduct amounts to an abuse where the dominant firm has little power to inflict harm.⁹⁰ If this is so, then it is thought that the substantiality should be judged by reference to those who can be exploited: in the case of an undertaking dominating supply, by the aggregate importance of the buyers within the area affected by dominance, and in the case of an undertaking with buying power, by the interests of sellers in the area. There is no hint of such a distinction in the judgment,⁹¹ but the Court does imply that an area may be "a substantial part of the common market" for some products, but not others. Care must be taken in arguing from precedents dealing with different products.

Professor Waelbroeck has suggested⁹² that the Court would never be so insensitive politically as to deny that any member state was a substantial part of the common market, and it has held that Belgium was such a part in relation to performing rights,⁹³ and the Commission has held that the Netherlands was in relation to sugar.⁹⁴ No sugar is produced in Luxembourg, but since the Raffinerie Tirlémontoise supplied virtually all the sugar used there, it is submitted that even if it had not also enjoyed a dominant position in Belgium, any abusive practices it might have adopted in the Luxembourg market could have been controlled under Article 86.

b. Market Power

Professor Waelbroeck has also raised the question whether the Commission should have been required to assess the area of effective competition.⁹⁵ The writer's view is that the Court was right not to require this. Some markets have imprecise limits, with a chain of substitutes on both the demand and supply side, both progressively affected by increasing distances. It is pointless to cut off "the relevant market" at some arbitrary point and the distortions that can be caused by a firm dominant in one area are increased, not minimized, by dominance elsewhere.

The Court's reasons (motifs 376-83) for confirming that Tirlémontoise was

90 It is anomalous that the *de minimis* rule should relate apparently only to the geographic limitation of the market. It seems that dominance over a product may be controlled, even if there are substitutes for almost all uses.

91 In arguing that its decision that the Netherlands was a substantial part of the common market in relation to sugar (*see* [1975] E.C.R. 1838), the Commission referred to the population, and the fact that almost everyone uses sugar, the factors relevant on the criteria I have suggested. Unfortunately, the Court did not deal with this point, since it quashed the finding of joint dominance.

92 At a weekend seminar at the Polytechnic of Central London in January, 1977.

93 *B.R.T. v. SABAM*, *supra* note 75.

94 *See* note 91 *supra*.

95 At the conference mentioned in note 92 *supra*. Sugar prices were lower in Belgium, where Tirlémontoise was held to be dominant, than in Germany. Unless freight exceeded the difference, it would seem that it enjoyed a greater discretion over its prices in West Germany, despite its smaller market share.

dominant in Belgium and Luxembourg were not very cogent.⁹⁶ No objection is taken to the Court's addition to Tirllemontoise's own 65 percent of sugar production in Belgium or the 20 percent produced by companies of whose shares it held half, etc., since they adopted similar sales policies and seem to have acted virtually as one with Tirllemontoise.⁹⁷ Yet should even a very high market share be held sufficient to establish a dominant position without any consideration apparently being given to barriers to entry or to the discretion within which a producer is able to set its prices profitably?⁹⁸ Of course, if large market shares persist for several years, during which producers earn more than normal profits, one might infer that there must be barriers to entry. But the Court does not refer to the omission by the Commission of independence from suppliers and customers when defining the test of dominance.⁹⁹

c. Joint Dominance

The Commission condemned two undertakings in the Netherlands for abusing a dominant position jointly enjoyed. Since it alleged that they cooperated closely in all their activities there was no difficulty in finding joint dominance—the Treaty refers to the abuse of such a position by “one or more undertakings.” The Court did not consider this point, since it found that the Commission had not given adequate reasons for concluding that there were in fact concerted practices.

More difficult problems arise where there are only a few suppliers in the market, and no collaboration can be proved. In such circumstances the Dutch Minister of Economic Affairs, acting under Dutch national law, considered that in view of their parallel behavior towards a particular customer, A.B.G., the oil companies in the Netherlands jointly held a dominant position and he ordered them to supply it with petrol.¹⁰⁰ The Commission, in its decision over the same refusal to supply A.B.G.¹⁰¹ did not adopt this concept of joint dominance, but stated that since during the crisis there was a shortage of petrol spirit in the Netherlands, a wholesaler could not obtain supplies except from his former supplier, the latter was in a dominant position in relation to former customers.

⁹⁶ See Korah, *Restrictive Trade Practices; Re the European Sugar Cartel*, [1977] J.B.L. 187, 190-91.

⁹⁷ See *Commercial Solvents* in text accompanying note 54 *supra*.

⁹⁸ In *A.B.G.*, *supra* note 37, the Commission decided that BP enjoyed a dominant position in the Netherlands over motor spirit, although there was no price at which it could legally sell and recover its replacement costs.

⁹⁹ In *Continental Can*, the Commission referred to independence from competitors, purchasers and suppliers—here only to independence from competitors. This had been assured, according to the Commission, by concerted practices to sell only to or with the consent of the producers in the country of importation. Yet it seems that Belgian customers were prepared to pay less than those elsewhere. Producers in other countries may have enjoyed more discretion over their market decision than did Tirllemontoise, unless costs in Belgium were lower. We are not told whether Tirllemontoise was earning high profits.

It has been suggested informally that where market shares are very large the onus in the administrative proceedings of the Commission should shift, and the large supplier required to show that he is virtually a price taker.

¹⁰⁰ Described by B. Baardman, *La Notion D'Entreprise(s) en Position Dominante et les Methodes de Controle en Droit Antitrust Neerlandais*, [1977] BRUGES WEEK 276, 284.

¹⁰¹ See note 37 *supra*.

It is suggested that both concepts are false. In oligopolistic markets—those with only a few suppliers—each is constrained by the probable reactions of the others to its market behavior. Where these are controlled by agreement, there may be joint dominance, but not otherwise, although as long as no one is undertaking prices competitively, each may enjoy a wider discretion over its market decisions than in markets where there are more suppliers. In the writer's view, there may conceivably be several individual dominant positions, at least temporarily, although the absence of appropriate remedies makes intervention under Article 86 rather pointless.¹⁰² Mestmäcker,¹⁰³ however, leaves this question open, although J. Schmidt¹⁰⁴ considers conscious parallelism sufficient.

2. Abuse

a. *Restrictions on Dealer's Outlets*

The Court confirmed the Commission's decision that the Raffinerie Tirlemontoise had abused its dominant position in Belgium and Luxembourg by restraining its dealers from exporting freely to other member states. It had used economic pressure to restrict competition by protecting the markets of the other sugar refiners, and, although these agreements might more easily have been controlled under Article 85, there can be no objection to the Court's confirmation that they also came within Article 86.

b. *Agents and Distributors Restrained from Dealing in Competing Odds*

The Commission had found that Sudzücher-Verkauf had abused its dominant position in parts of Southern Germany by restraining its agents from selling sugar produced by refiners elsewhere and by granting loyalty rebates. The Court held that Sudzücher was entitled to refuse to sell to some of its large customers except through its commercial agents and was free to restrain its agents from dealing with other sugar refiners and, to this extent quashed the decision. Yet, it added that a restriction on buying elsewhere imposed even on a truly dependent agent, not carrying out the functions of an independent dealer might amount to the abuse of a dominant position if there were no independent operators to market competing goods on a sufficient scale. The Court also confirmed the decision that the practice of Pfiefer & Langen in restricting more independent agents, who also carried on business as independent traders did infringe Article 85.

Why should a distinction be made between highly dependent agents on the one hand and independent dealers, and the agents carrying out similar functions on the other? Only if foreclosure is extreme are exclusive restrictions accepted by the former contrary to Article 86, while slighter degrees of foreclosure may be controlled under Article 85 in respect of the latter. The distinction may depend

¹⁰² See *Report of the United Kingdom Monopolies Commission in Parallel Pricing*, July 1973, CMND. 5330.

¹⁰³ E. J. MESTMÄCKER, *EUROPAISCHES WETTBEWERBSRECHT* 386.

¹⁰⁴ *Marktbeherrschung in GWB and EWGV/Wuw* 6/1965 453, 469.

on which Article is being invoked by the Commission, inasmuch as Article 85 may control agreements that restrict competition only perceptibly, while it is thought that the difficult market analysis required for the application of Article 86 makes it sensible to limit its application to more serious restrictions of competition.

Nevertheless, it is also thought that the distinction between dependent agents, integrated into the supplier's undertaking, and independent agents or traders, who are not so integrated, may be justifiable under either Article taken alone. Competition authorities face basic difficulties in determining the units between which competition may not be restricted. An employer may require loyalty from his employees, even if it limits the opportunities of his competitors. In 1962, the Commission issued its "Christmas Message" stating its opinion that agreements with commercial agents, who accepted no risk for unsold stocks, did not restrict competition. Presumably the unit on which Community competition policy operates is the producer or brand owner, together with such commercial agents.¹⁰⁵ Yet this is not universally true, since the Court went out of its way to state that limitations imposed even on such agents may restrict competition if the foreclosure effects on competitors are very serious.

c. *Loyalty Discounts or Rebates*

Loyalty discounts are an attenuated form of requirements contracts. Customers may not be required to buy all their requirements from the same supplier, but offered a discount if they promise to do so, or if they do so in practice. Even a small discount may have considerable foreclosing effects. A customer losing one percent on his entire purchases would buy ten percent elsewhere only if the second source were at least ten percent cheaper, or he expected to buy further quantities elsewhere during the period, as he would lose the loyalty rebate on the ninety percent placed with the firm offering the one percent rebate, as well as on the quantity bought elsewhere. The Court stated:

502. The grant of such a rebate placed customers who also buy sugar from other sources at an unjustifiable disadvantage and enabled SZV to "control" the volume of supplies to its customers by foreign producers.¹⁰⁶

The writer is less concerned about the disadvantage to customers wishing to buy elsewhere¹⁰⁷—they have been paid for their loyalty—than to the artificial barrier to entry raised against other suppliers. Yet, loyalty discounts and require-

¹⁰⁵ In the *Sugar* judgment, at motifs 544-53, the Court made it clear that the concept of commercial agent for this purpose is a Community one, narrowly defined to include only auxiliary organs of the principal, and probably capable of acting only under detailed instruction. Nevertheless, it quashed the fine on Pfeifer & Langen on the ground that it might have been misled by the "Christmas Message." J.O. No. 139, 24 Dec. 1962, at 2921.

¹⁰⁶ Occasionally SZV allowed customers to buy elsewhere without forfeiting their loyalty discount. In this way, it controlled the amounts bought elsewhere.

¹⁰⁷ Although the examples of abuse given in Article 86 protect buyers from unfair trading terms.

ments contracts were not mentioned when the Court was discussing SZV's dominant position.¹⁰⁸

3. Conclusion on *The Sugar Case*

The Sugar Case was extremely complex, involving many firms and a large number of different practices and much disputed evidence. The Court must have had great difficulty in keeping all the issues clear and separate, and the small parts of the judgment devoted to Article 86 are not all as cogent as they might have been had a large part of the Court's attention not been devoted to the issues arising under Article 85.

V. General Conclusions

A. *Dominant Position*

The test of dominance adopted by the Commission in *Continental Can* and based on the firm's independence—its discretion in making pricing and other decisions, is much the same as that adopted by economists and courts in America. The Court has stressed the need to analyze the market carefully in terms not only of substitutes, but also of production flexibility. Nevertheless, it has accepted decisions by the Commission based on entry barriers that do not always seem to have been very high, and eventually, in *Sugar*, confirmed a finding of dominance based, apparently, only on a finding of a market share of 85 percent. Entry barring practices were mentioned in relation to abuse but not to establish the existence of a dominant position. The application of a test based on a firm's discretion in market decisions is difficult for an enforcement authority consisting mainly of jurists. The Commission has a tendency to define rather than analyze the market, and pays insufficient attention to the height of the barriers to entry.

B. *Abuse*

The Decisions of the Commission of the European Communities, largely supported by the Court, have radically altered the original concept of Article 86. The judgment in *Continental Can* enabled the Commission to control anti-competitive conduct by firms already dominant in a substantial part of the Common Market. Yet the concept of anticompetitive behavior does not fit the examples of abuse set out in Article 86 and to which the Court and Commission refer. These seem to be intended to protect those dealing with the dominant firm from conduct that interferes with their business—to protect fair rather than free competition. This may have led the Commission to extend the *Commercial Solvents* judgments to refusals to deal with far less important customers, whose elimination, even if it occurred, would have had far less effect on the market than the demise of Zoja would have had.¹⁰⁹ Nevertheless, "abuse of a dominant

108 See the Commission's decision in *Vitamins* and the text accompanying note 47 *supra*.

109 *A.B.G.*, *supra* note 37; *Chiquita*, *supra* note 63; *Hugin/Liptons*, *supra* note 80.

position" seems to imply some causal link between the dominant position and the conduct complained of, even if only in the attenuated form that the conduct is harmful only because of the actor's dominance. This would seem to exclude many examples of unfair competition, though the question remains whether it suffices for it to harm an individual trader, or whether only damage to the public counts. Despite the radical judgment of the Court in *Continental Can*, Article 86 is very different from Section 2 of the Sherman Act.

Strangely enough, despite its victory in *Continental Can*, the Commission has challenged no more mergers, apparently as a matter of policy,¹¹⁰ although it now seems clear that the more extensive power to control them for which it has asked the Council of Ministers will not be forthcoming. Several practices that both reduce competition and are unfair to some customers, such as loyalty discounts, exclusive restrictions imposed on dealers and resale restrictions on customers have been held by the Court to be abusive on both grounds. There are now three decisions of the Commission under Article 86 subject to appeal,¹¹¹ and this will give the Court an opportunity to decide how far Article 86 protects competitors and how far it protects competition.

Although Article 86 can be used like Section 2 of the Sherman Act to control anti-competitive conduct, it is also being used to regulate the prices and other trading conditions imposed by dominant firms. This the writer regrets. D.G. IV does not purport to regulate prices on the basis of costs; nor does it have sufficient staff to regulate them before they come into effect. No criterion of excessive prices has been suggested, so it seems arbitrary for the Commission to fine firms, after the event, for having charged excessive prices. A large proportion of decisions seems to be made on the basis of complaints, and the products selected for this treatment do not seem to have been very important.

These are early days in the history of competition law and policy in the E.E.C. and dramatic developments may occur in 1978. The American experience should prove very useful in analyzing the detrimental effects certain kinds of conduct may be expected to have. It is hoped that it may also steer the authorities away from concepts of fair competition, to those of free competition, although there is a long Continental tradition to the contrary. American lawyers come to this branch of law with the advantage of greater exposure to economic thinking than is common in Europe, but must be careful not to be deceived by words like "competition," which bear different connotations in the European context.

110 It is understood that in 1978, proceedings have been started under Article 86 in relation to one merger, so the policy may have changed.

111 The appeal in *Chiquita* was largely dismissed by the Court, the hearing in *A.B.G.* has taken place, and appeals have also been lodged in *Vitamins* and *Hugin/Liptons*. Since I have criticized all these decisions, except *Hugin/Liptons* (see A. Dashwood, note 80 *supra*), there seems to be little point in discussing them so soon before judgment is expected.