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Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness

Eleanor M. Fox*

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I. Introduction

In 1890 the United States Congress enacted the Sherman Anti-trust Act, which, in section 2, prohibits monopolization.¹ In 1957 Western European nations ratified the Treaty of Rome, which, in

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This article is based on a chapter entitled "Abuse of a Dominant Position Under the Treaty of Rome—A Comparison With U.S. Law," in *ANTITRUST AND TRADE POLICIES OF THE EUROPEAN ECONOMIC COMMUNITY*, 1983 FORDHAM CORP. L. INST. (B. Hawk ed. 1984).

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¹ 15 U.S.C. § 2 (1982).

article 86, prohibits abuse of a dominant position.²

The two systems have common objectives. They both seek to advance the interests of consumers and to protect the free flow of goods in a competitive economy. Both seek to protect access of competitors to unfettered markets, freedom of choice, and freedom from coercion.³ Each, however, has its special history and focus.

The Common Market evolved from the perceived need to break down trade barriers between Western European nations and thereby to form one "common market." Accordingly, community law stresses as its cardinal principle the free movement of goods and people across Member State lines.⁴ Moreover, community law evolved from a tradition of hospitality to industrial concentration combined with receptivity to government regulation that would limit the exercise of power.⁵

United States antitrust law evolved from a tradition of inhospitality to concentration and a strong preference for competition over government regulation of performance.⁶ In recent years, judicial decisionmaking has become increasingly sensitive to consumers' interests, to the economic strength of U.S. firms in world markets, and to claims that antitrust enforcement has undermined both. Accordingly, contemporary U.S. decisions back away from the more intrusive antitrust surveillance of the 1960s and tend to defer to business discretion of even large firms.

In this article I examine the major European Court of Justice judgments regarding abuse of a dominant position,⁷ and the EC Commission proceeding against IBM. I compare the analysis and outcomes with U.S. law.⁸ Finally, I suggest some lessons that each system of law might hold for the other. In searching for lessons, I consider recent efforts within the United States to collapse all of antitrust into a single outcome-oriented efficiency rule.⁹ As I ana-

2 Treaty Establishing the European Economic Community, March 25, 1957, art. 86, 298 U.N.T.S. 11, 48 [hereinafter cited as "Treaty of Rome"].

3 Regarding United States law, see Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981). Regarding Common Market law, see Parts VI and VII *infra*. See generally 2 B. HAWK, UNITED STATES COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE chs. 7, 12 (2d ed. 1985).

4 See B. HAWK, *supra* note 3, ch. 7.

5 See *id.* at 7-16; Verloren van Themaat, *Introduction, Antitrust and the Common Market—A Symposium*, 38 N.Y.U. L. REV. 435 (1963).

6 See Fox, *supra* note 3, at 1166-68.

7 First level decisions are taken before the Commission of the European Communities. The Court of Justice is the appellate court. Opinions of the Court of Justice are called "judgments."

8 For a discussion of the case law generally, including decisions of the Commission, see B. HAWK, *supra* note 3, ch. 12.

9 In this article I do not deal with market definition issues. I focus, rather, upon the nature of conduct or structural changes that may constitute abuses of a dominant position.

10 See, e.g., Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). See also R.

lyze the Common Market cases, I ask whether Common Market principles that explicitly incorporate values such as fairness, access, and choice necessarily impair prospects for efficient outcomes, and I suggest a defense in Common Market cases under article 86 that should assure efficient results in the Community and could provide guidance and insight for American policymaking.

II. History and Evolution of the Law

In their inception, the U.S. antitrust laws reflected a pervasive distrust of concentrated economic power and an aspiration to assure economic opportunity to all. By the end of the 1950s, at the time of the adoption of the Treaty of Rome, the Supreme Court of the United States was applying antitrust law to protect the viability of small and middle-sized businesses, to preserve the freedom of action of independent business people, and to disperse economic and political power. These goals and themes became even more explicit in the middle and later 1960s, and dovetailed with the civil rights commitments of that time. Beginning in the mid-1970s, however, U.S. antitrust law took a different course. "Efficiency" became and is the watchword of the 1980s. Government enforcers urge, and some courts accept, the view that antitrust law should be applied only to improve efficiency. At a minimum, most courts would decline to apply the law in ways that impair efficiency.¹⁰

While enforcement objectives have shifted between protecting a process, doing equity, and promoting efficiency, none of the U.S. antitrust statutes are regulatory in the sense of authorizing government intervention to fix price or output, control entry or exit, or determine the fairness of the terms of a bargain.

Europeans have a different political tradition. They tend to be less hostile to government as regulator and more skeptical of private corporations as servants of the public interest. In devising its own antitrust law, the Community embraced a competition policy principally as a means of integrating the economies of the Member States.¹¹ Only secondarily the Community endorsed competition as a way to strengthen the economy and serve buyers within the Community.¹²

Moreover, the founders of the Community did not oppose bigness. They observed that business units within the Common Market were often below optimal scale as a consequence of the trade

BORK, *THE ANTITRUST PARADOX* (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

¹⁰ See generally Fox, *supra* note 3.

¹¹ See Verloren van Themaat, *supra* note 5, at 436-37.

¹² One may infer, from the variety of economic systems, that all Member States do not share the American view that competition is the best way to allocate resources.

barriers that limited the size of available markets. By breaking down the barriers at Member State lines, the drafters of the Treaty hoped to provide markets big enough to support the larger units that efficiency demanded. Mergers were a means to achieve optimal scale. They could also produce desired countervailing forces against foreign-based multinationals that were expanding in the Common Market countries. Further, mergers between firms in different Member States could help to integrate the economies of the Member States. Mergers were viewed as a benefit, not a threat.¹³

For more than the first decade after adoption of the Treaty, no case brought for infringement of article 86 reached the European Community's high court, the Court of Justice. During the same period, the U.S. Supreme Court was giving increasingly expansive interpretations to the United States antitrust laws. In this period, scholars compared article 86 with section 2 of the Sherman Act. Several comparativists saw U.S. law as concerned with protecting competitors at the expense of consumers. Moreover, they noted interpretations of U.S. law that prevented the creation or growth of monopoly power, virtually *per se*.¹⁴ They observed that article 86, in contrast, was neutral towards creation of power.¹⁵ The European Economic Community wished not to prevent the emergence of power but to control its use.¹⁶ At least one commentator urged that Common Market law stay on its separate course and reject the U.S. approach on grounds that adoption of the U.S. model would threaten the interests of Common Market consumers.¹⁷

In the last decade, however, a curious thing happened. Common Market law on abuse of a dominant position moved away from that narrow path that some had thought was laid out for it—regulating performance of firms with power. U.S. law, meanwhile, re-

13 See R. JOLIET, *MONOPOLISATION AND ABUSE OF DOMINANT POSITION; A COMPARATIVE STUDY OF THE AMERICAN AND EUROPEAN APPROACHES TO THE CONTROL OF ECONOMIC POWER* 3-4 (1970); COMMISSION OF THE EUROPEAN COMMUNITIES, *THIRD REPORT ON COMPETITION POLICY* 28-29 (1974); Memorandum of the European Economic Community to the Governments of Member States, *Concentration of Enterprises in the Common Market* 7-9 (Dec. 1, 1965).

The Treaty for the European Coal and Steel Community (Treaty of Paris), which became effective in 1951, includes a provision for merger control. In the Treaty for the European Economic Community (Treaty of Rome), a provision for merger control is noticeably absent. See B. HAWK, *supra* note 3, at 664, for the proposed regulation on merger control.

14 See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

15 See R. JOLIET, *supra* note 13, at 8-13, 131-33; James, *The Concept of Abuse in EEC Competition Law: An American View*, 92 *LAW Q. REV.* 242 (1976). But see A. JACQUEMIN, *ABUSE OF DOMINANT POSITION AND CHANGING EUROPEAN INDUSTRIAL STRUCTURE IN THE UK AND EEC* 129 (George & Joll eds. 1975); Temple Lang, *Abuse of Dominant Positions in European Community Law, Present and Future: Some Aspects*, 1978 *FORDHAM CORP. L. INST.* 25 (B. Hawk ed. 1979).

16 See R. JOLIET, *supra* note 13, at 131-33.

17 James, *supra* note 15, at 256-57.

sponding to fears that expansive applications of antitrust may impair efficiency, retrenched. The two lines of law may already have crossed, with Common Market law controlling conduct and structure more than performance, and protecting equity more than efficiency, and with U.S. law controlling conduct and structure less vigorously, and protecting efficiency more than equity.

III. The Kinds of Offenses Under Article 86

Section 2 of the Sherman Act contains only general language. It is declared a felony to monopolize, to combine or conspire to monopolize, or to attempt to monopolize.¹⁸

Article 86 of the Treaty of Rome is more specific.¹⁹ It lists as examples of abuse of a dominant position: (a) imposing unfair prices, (b) limiting production,²⁰ (c) applying dissimilar conditions to equivalent transactions, thereby disadvantaging the disfavored party,²¹ and (d) tying unrelated articles.²²

In each example, the conduct described may be a way of exploiting existing market power. Conduct described by two of the examples, raising price and restricting output, correspond with the classic uses of market power. The power to raise price and limit output is often identified as the core economic evil which antitrust is designed to deter. Yet the Common Market prohibitions against monopoly pricing and unilateral output restrictions find no parallel in U.S. antitrust law. It is not illegal for a U.S. firm, acting alone, to restrict its output and to charge monopoly prices.²³ This is because the U.S. law is not regulatory (in the sense of direct regulation of

18 Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . ." 15 U.S.C. § 2 (1982).

19 Article 86 of the Treaty of Rome states:

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

20 Thus, monopoly pricing and output restriction may be an abuse.

21 Thus, price discrimination that puts the disfavored party at a disadvantage with its competitors is an abuse.

22 Thus, the tying of unrelated articles is an abuse.

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

price and output) but rather concentrates on preserving conditions whereby free market forces constrain price and induce optimal production.

The Treaty's other two examples of abuse, certain price discrimination and certain tying arrangements, could give rise to a violation of section 2 of the Sherman Act. But in the United States this conduct is, more centrally, the subject of other statutes that do not require a monopoly position for violation, namely section 1 of the Sherman Act,²⁴ section 3 of the Clayton Act,²⁵ and the Robinson-Patman Act.²⁶

While the first two examples in article 86 contain classic economic evils, charging monopoly prices and limiting production, which distort resource allocation by causing too few resources to flow into the monopolized market, the third and fourth examples, certain price discrimination and tying, may even increase output. Tie-ins may be used as a way to price discriminate; that is, to charge more to heavy users. Tying to effectuate price discrimination may increase output because the monopolist's profit-maximizing alternative is to set a uniform price for the tying product that will virtually always be higher than the lowest discriminatory price, causing some potential buyers to forego the purchase. Thus, abuses described in the Treaty, while they may be coercive or inequitable, are not necessarily inefficient.²⁷

The type of conduct or performance that constitutes abuse of a dominant position is not limited to the four examples above. "Abuse" spans a wider range. As revealed by the case law, this range includes not only strategies to maintain or increase market power but also strategies to compete or to increase profits. These

24 15 U.S.C. § 1 (1982).

25 15 U.S.C. § 14 (1982).

26 15 U.S.C. §§ 13-13b, 21a (1982).

27 See A. JACQUEMIN, *supra* note 15, at 135. Price discrimination and tying may be inefficient, even in the narrow sense of reducing aggregate economic welfare. See, e.g., Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985); Mueller, *United States' Antitrust: At the Crossroads*, in MAINSTREAMS IN INDUSTRIAL ORGANIZATION (University of Amsterdam, Aug. 22, 1985) (in publication, de Jong and Shepherd eds.).

Greater output does not necessarily imply increased economic welfare. While a strategy that increases output implies that marginal buyers are better satisfied, the same strategy might harm intramarginal buyers who would have preferred conditions prior to adoption of the strategy. See Spence, *Monopoly, Quality, and Regulation*, 6 BELL J. OF ECON. 417 (1975). The harm to intramarginal buyers may be greater than the gain to marginal buyers. *Id.* Comanor and Kirkwood show the implications of this insight for policy regarding resale price maintenance. Comanor & Kirkwood, *Resale Price Maintenance and Antitrust Policy*, 3 CONTEMP. POL'Y ISSUES 9 (1985).

For a discussion of different conceptions of efficiency put forward by American and Community policymakers and scholars, see Fox, panelist, in ANTITRUST AND TRADE POLICY IN INTERNATIONAL TRADE, 1984 FORDHAM CORP. L. INST. 708-10 (B. Hawk ed. 1985).

latter strategies may not harm consumers but may harm competitors, distributors, or other intermediate buyers.

The first "abuse" case to come before the Court of Justice on its merits was a case of alleged strengthening of a dominant position through merger. I begin with this case, which raised the important question of the scope of article 86: Is it confined to controlling abusive performance of dominant firms, or does it also reach the creation of market structures that lessen competition?

After treating the merger case, I turn to the control of excessive pricing—a European mode of antitrust regulation; and, finally, to a series of acts that may exclude smaller competitors and resellers from opportunities to sell: refusals to deal, price discrimination, loyalty discounts, and exclusive dealing. In connection with the latter category, I consider the relationship between efficiency and the principles that protect opportunities of competitors.

IV. Increasing Dominance by Acquisition

A. Continental Can

At this writing only one acquisition case has been decided by the Court of Justice.²⁸ This is the celebrated case of *Europemballage and Continental Can v. Commission*.²⁹ Continental Can, an American company, acquired firms in related product lines in the Common Market. The case raised the fundamental question whether an acquisition that increases a dominant position can ever, for that reason alone, be an abuse of a dominant position prohibited by article 86.

An affirmative answer required hurdling three obstacles. First, the Treaty does not contain a provision for merger control, apparently by design. Second, the Treaty requires an "abuse," or, according to the French text, "abusive exploitation." All of the four explicit examples of abuse stated in the Treaty are practices that directly harm buyers or trading parties; no example concerns changes in market structure that increase market power. Third, article 86 prohibits only an "abuse . . . of a dominant position." This implies that the power that underlies the dominant position must be used to inflict the harm that constitutes the abuse; in other words, that there must be a causal connection between the domi-

²⁸ The *Philip Morris-Rothmans* case is currently pending before the Court of Justice. This case involves the acquisition by Philip Morris, a major American cigarette company, of stock in a firm that controls Brinkmanns, a major German cigarette company. Philip Morris and Brinkmanns are competitors in European markets. A major issue is whether Philip Morris's planned acquisition—of less than 25% of the voting stock—is sufficient to give it power to influence the activities of Brinkmanns. See COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTEENTH REPORT ON COMPETITION POLICY, points 98-100 (1985).

²⁹ 1973 E.C.R. 215, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8171.

nant position and the abuse.³⁰

While any one of these arguments might have defeated application of article 86 to mergers, the arguments failed. The Court of Justice chose to construe the words of article 86 to give effect to the spirit of the Treaty of Rome rather than to give unbending allegiance to technicalities.

If article 86 did not reach mergers, said the Court, enterprises could achieve through merger "such dominance as to virtually remove any serious possibility of competition," and could thus "jeopardize the proper functioning of the Common Market."³¹ The Court concluded that abuse may occur if a firm in a dominant position "strengthens that position to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market."³²

From the point of view of competition policy, the construction of article 86 to prohibit mergers that strengthen dominance is wise. From a U.S. policy standpoint, the interesting point is not that article 86 has been construed to cover mergers that strengthen a dominant position, but that it was entirely possible that article 86 might have been construed not to reach this core evil and that it may have been found to reprehend only the monopoly prices that the merger enables and invites the firm to charge.

B. *A Comparison*

U.S. antitrust law has grappled with similar questions. At the turn of the century, U.S. law allowed mergers that "merely" created market power. United States Steel Corporation bought 180 independent steel firms, acquiring most of the domestic production of steel. The company, however, had engaged in no "brutalities or tyrannies." The government sued. The district court dismissed the government case, and the case reached the U.S. Supreme Court on appeal. The Supreme Court, in a split decision, found no violation.³³ The Court repudiated the government's position that the size and power of the corporation can be unlawful regardless of whether the power was exerted and regardless of purpose.³⁴

30 See Vogelenzang, *Abuse of a Dominant Position in Article 86; The Problem of Causality and Some Applications*, 13 COMMON MKT. L. REV. 61 (1976). See also Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position Within the Common Market*, 53 NOTRE DAME LAW. 768, 775 n.29 (1978).

31 1973 E.C.R. 215, 243-44, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8171, at 8300.

32 *Id.* at 245, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8171, at 8300.

33 *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

34 In the words of the Court, the government was

reduced to the assertion that the size of the Corporation, the power it may have,

In later years the law changed. It became clear that corporate consolidation was a "contract or combination" and that a merger would violate section 1 of the Sherman Act if it had the effect of unreasonably restraining competition, despite the absence of brutalities or tyrannies.³⁵ In the first half of the century, however, the Supreme Court was reluctant to find that acquisitions without brutalities had the proscribed effect.³⁶ As industry became more highly concentrated through mergers, Congress reacted by passing the Celler-Kefauver Amendment³⁷ to section 7 of the Clayton Act, providing for stronger merger control. U.S. law now clearly prohibits acquisitions that will probably lessen competition. Neither exercise of market power nor preexisting market power is a necessary condition to the violation. Moreover, the merger need not threaten to create (or increase) a dominant position of a single firm. Mergers that threaten competition by facilitating cooperative behavior are likewise illegal.

Thus, while the Court of Justice took an important step toward protection of competition when it decided *Continental Can*, the Common Market law on mergers provides only a part of the protection afforded by U.S. law. It falls short in two respects. First, for mergers to fall within the Common Market proscription, the acquiring company must already have a dominant position. Second, the Common Market law as it applies to mergers seems to address only threats to competition by increasing single-firm dominance and not threats to competition by creating or increasing oligopoly power.³⁸

Law in the Common Market could be developed to cover oligopoly situations. When a market is highly concentrated and non-competitive, the leading firms could be said to share a dominant position. If any one of those undertakings acquires a competitor or potential competitor and thereby increases the joint market power of the incumbents, it could be found to have abused the dominant position.³⁹

Even if law should develop along these lines, a gap in coverage

not the exertion of the power, is an abhorrence to the law, or, as the Government says, "the combination embodied in the Corporation unduly restrains competition by its *necessary effect*, . . . and therefore is unlawful regardless of purpose." . . . To assent to that, to what extremes should we be led?

Id. at 450 (emphasis in original).

35 United States v. Columbia Steel Co., 334 U.S. 495 (1948).

36 See *id.*

37 Ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1982)).

38 The U.S. Justice Department's 1984 Merger Guidelines suggest that the most common harmful property of anticompetitive mergers is the creation or aggravation of oligopoly behavior. See 1984 Justice Department Merger Guidelines, 2 TRADE REG. REPORTER ¶¶ 4490-4495. See generally Symposium, 1982 Merger Guidelines, 71 CALIF. L. REV. 280, 280-672 (1983).

39 See Temple Lang, *supra* note 15, at 72-76; Temple Lang, *Regulating Multinational Cor-*

may remain, for the language of the Treaty of Rome does not seem to reach mergers that *create* a dominant position.⁴⁰ Mergers that create market power are at least as significant a problem as mergers that increase market power. Ideally, the gaps in the law should be closed.

V. Imposing Unfair Prices or Trading Conditions

A. *The Court of Justice Cases*

The Treaty contemplates a role for government in regulating firm performance. Article 86 states as its first example of abuse: "(a) an . . . imposition of any inequitable . . . prices or of any other inequitable trading conditions" ⁴¹ Thus, charging an "unfair" price is an offense.

In three early cases, *Parke, Davis & Co. v. Centrafarm*,⁴² *Sirena v. Eda*,⁴³ and *Deutsche Grammophon v. Metro*,⁴⁴ the Court of Justice noted the possibility that industrial property rights might be used in ways that abuse a dominant position. An excessive price, it said, would be an abusive exploitation. The court said in *Sirena* that although the price level may not be an abuse in itself, a high price may, "if unjustified by any objective criteria and if it is particularly high, be a determining factor."⁴⁵

The above cases discuss the *possibility* of excessive pricing. In two cases, *General Motors Continental N.V. v. Commission*⁴⁶ and *United Brands v. Commission*,⁴⁷ the Commission found that a dominant firm in fact maintained excessive prices and thereby abused its dominant position. In both cases, however, the Court of Justice disagreed that the prices were excessive.

In *General Motors Continental*, Belgium had delegated to all automobile manufacturers' representatives the duty to inspect and issue certificates of conformity for all vehicles coming into the country. For a period of about four months, General Motors charged a very high fee for this service, affecting five Opel automobiles, all imported from Germany. When its customers complained, General

porate Concentration—*The European Economic Community*, in 2 MICHIGAN YEARBOOK INTERNATIONAL LEGAL STUDIES 144 (1981).

40 A proposed regulation on the control of concentrations between undertakings would, however, apply to mergers that create monopoly or oligopoly power. See B. HAWK, *supra* note 3, at 664-65 and app. 25.

41 Treaty of Rome, *supra* note 2, art. 86.

42 1968 E.C.R. 55, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8054.

43 1971 E.C.R. 69, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8101.

44 1971 E.C.R. 487, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8106.

45 1971 E.C.R. 69, 84, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8101, at 7112.

46 1975 E.C.R. 1367, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8320.

47 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429.

Motors immediately gave refunds. The Commission charged and found that General Motors had a dominant position in granting certificates of conformity for General Motors automobiles crossing at the Belgian border and that the high fee was an abuse of a dominant position.

General Motors sued for annulment,⁴⁸ denying dominance, denying abuse, and raising the interesting questions of whether article 86 may be violated even though interbrand competition is not distorted and even though the only challenged act is an intrabrand "toll" charge. The Advocate General⁴⁹ opined that both questions should be answered affirmatively.

The Court of Justice upheld the Commission's view of dominance. Belgium put General Motors in the position of a monopoly by giving it the sole right to inspect and issue the certificate for incoming GM vehicles. As holder of this monopoly, General Motors had a dominant position.

Moreover, the Court determined that a firm could abuse its dominant position by charging a price "which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports^[50] by neutralizing the possibly more favourable level of prices applying in other sales areas in the Community, or by leading to unfair trade in the sense of Article 86(2)(a)."⁵¹ In view of General Motors' immediate refunds, however, the Court found no actionable abuse.

The most recent excessive pricing case to reach the Court of Justice is *United Brands v. Commission*,⁵² involving the producer of the famous Chiquita banana. Because of varying national preferences, different availabilities of fruits, and differentials in currency, bananas are sold at widely disparate retail prices in different Member States. Likewise, United Brands charged different prices to ripener-distributors in different Member States. Its prices in Belgium

48 General Motors claimed in its suit for annulment that: (1) the proper product market was "all automobiles;" (2) General Motors did not have a dominant position; (3) that the fee had no effect on competition and did not interfere with parallel imports (*see note 50 infra*); and (4) that General Motors' acts were justified because the incidents were few and they responded immediately to complaints even before they were aware of the Commission's intervention. 1975 E.C.R. at 1370-74, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8320, at 7729-32.

49 The Advocate General is an individual appointed by the Court of Justice to advise the Court. He or she reads the briefs, hears argument, and writes a learned opinion which the Judges may or may not follow but which is usually influential to the Court. The opinion of the Advocate General is published along with the judgment of the Court.

50 Parallel imports are imports from another Member State of goods that also originate within that Member State. The principle against interference with parallel imports is the same as the principle in favor of market integration.

51 1975 E.C.R. at 1379, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8320, at 7735.

52 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429.

were on an average 80% higher than its prices in Ireland. Using the Irish price level as the benchmark for a fair price, the Commission determined that the higher prices were unfair and ordered United Brands to reduce its other prices by at least 15%.

The Court of Justice annulled the Commission's decision on unfair pricing. It affirmed the principle that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied [would be] . . . an abuse,"⁵³ but held that the Commission had not proved that the prices were excessive. The Irish prices were shown to be at levels below cost as a means to break into the market.⁵⁴

In dictum regarding how the Commission might prove excessive pricing, the Court gave further insight into its conception of the character of the offense. First, it said, one must determine whether the difference between cost and price is excessive. If the answer is affirmative, then the question is "whether a price has been imposed which is either unfair in itself or when compared to competing products."⁵⁵

In no case has the Court of Justice found that a price was excessive and therefore "unfair" in violation of article 86.⁵⁶

B. *A Comparison*

The Common Market law on excessive pricing has profound implications. It assumes that high pricing is unfair, it assumes that unfairly high pricing can be identified by courts, and it implies that courts are better mechanisms than markets to correct unfairly high pricing.

The Community's legal standard is not the model of clarity.

53 *Id.* at 301, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7718.

54 The Court correctly held that the 7% difference between the price of United Brands' Chiquita bananas and the price charged by United Brands' principal competitors could not be the basis for a calculation of "excessiveness." It is possible that United Brands' costs were higher than those of its competitors. It might, for example, have spent more money for higher quality ripening, or for advertising.

55 1978 E.C.R. at 302, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7718. The Court believed that the Commission's task, although difficult, was manageable. The Commission, it said, "was at least under a duty to require [United Brands] to produce particulars of all the constituent elements of its production costs." *Id.* Had the Commission attempted to learn United Brands' costs, it might also have discovered that United Brands' average price was not supracompetitive. According to its accounting records, United Brands lost money over a period of several years before the proceeding. Of course, United Brands may have subsidized low prices in some geographic areas, where it wished to break in or where competition was intense, with profits from higher prices derived from other geographic areas or from winter sales.

56 A firm in a dominant position in a buying market could in theory abuse its dominant position by forcing sellers to sell to it at an unfairly low price, thus misusing its monopsony power. This offense was charged but not proved in *C.I.C.C.E. v. Commission*, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,157 (1985).

The Court of Justice defines a price as excessive when it has no reasonable relation to economic value.⁵⁷ Even if the price is excessive as compared with costs, the Court states, the Commission must consider whether the price is unfair "either . . . in itself or as compared to competing products."⁵⁸ However, the price must have reflected its value to the buyer or there would have been no sale. Moreover, the few competitors may take advantage of the monopolist's price umbrella, so that comparison of the dominant firm's price with its competitors' prices may prove nothing at all. Finally, even if the Court means to say only that it condemns monopolistic pricing, formidable judicial problems of identification and surveillance remain.

A wholly separate problem is, in some cases, the tendency of the law to undermine incentives. The three early cases⁵⁹ hold that if an intellectual property right gives the owner a dominant position in the Common Market, the owner may not exercise the property right to keep price at an "excessive" level. Yet, the right to exploit by charging what the market will bear may be seen as the reward for invention and the incentive for future inventions.⁶⁰

The *General Motors* case raised a question of a different sort. The high price of the toll-taker was seen by the Court of Justice not just as an exploitation but as an obstruction of the flow of commerce. A monopoly toll charge at the Belgian border could indeed be expected to have at least a marginal effect in discouraging parallel imports and thus interfering with the free flow of goods across Member State lines.

U.S. law has no analogue to the Common Market law against unfair prices and other terms of trade. American law rests on the principle that price should be controlled by the free market unless Congress has in effect determined that the market cannot work and has established a regulatory commission. If a firm attains monopoly on its competitive merits and if the firm prices at monopoly levels, the high price itself may invite new entry and expanded competition, and market forces would gradually wear away the monopoly power.⁶¹

The Treaty of Rome, in contrast, bestows upon the Commis-

⁵⁷ 1978 E.C.R. at 301, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7718.

⁵⁸ *Id.*

⁵⁹ *Deutsche Grammophon v. Metro*, 1971 E.C.R. 487, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8106; *Sirena v. Eda*, 1971 E.C.R. 69, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8101; *Parke, Davis & Co. v. Centrafarm*, 1968 E.C.R. 55, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8054.

⁶⁰ See *Dawson Chemical Co. v. Rhom & Haas Co.*, 448 U.S. 176 (1980).

⁶¹ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

sion and the Court the right and duty to limit excessive pricing. This grant of judicial power underscores an essential difference between U.S. and Community law, at least as it appeared at the time of the adoption of the Treaty. Barring transactions that created the power to price "excessively" was at the core of U.S. law, while limiting the exercise of already achieved dominance was at the core of article 86.

VI. Refusals to Deal

A. *The Court of Justice Cases*

Several cases involving refusals to deal have reached the Court of Justice. Of these, *ICI & Commercial Solvents Corporation v. Commission*,⁶² *United Brands v. Commission*,⁶³ *Hugin Kassaregister AB v. Commission*⁶⁴ (*Hugin-Liptons*), and *Centre Belge d'Etudes des Marche-Telemarketing S.A. v. Compagnie Luxembourgeoise de Telediffusion*⁶⁵ (*Tele-marketing*) best illustrate the Common Market principle underlying a dominant firm's duty to deal.

Commercial Solvents Corporation produced the raw materials used to manufacture ethambutol, an anti-tuberculosis drug. Aminobutanol, one of the drugs, was also used as an emulsifier for paint. Commercial Solvents acquired 51% of the shares of Istituto, which bought the raw materials from Commercial Solvents and sold them to an Italian company, Zoja. Zoja used the raw materials to manufacture ethambutol-based anti-tuberculosis drugs.

Istituto sought to acquire Zoja, but the negotiations aborted. Istituto then increased the price at which it sold aminobutanol to Zoja. Zoja, however, discovered a cheaper source for aminobutanol—the firms that bought the raw material from Commercial Solvents for use in paint. Zoja therefore cancelled a large part of its order from Istituto. Soon thereafter, Zoja's supply of cheaper aminobutanol dried up, not by chance but on command of Commercial Solvents, which forbade its buyers in the paint market from reselling the aminobutanol for the higher-valued pharmaceutical use. Commercial Solvents then announced that it would no longer sell the raw material for anti-tuberculosis drugs. Rather, it would vertically integrate to produce the drugs itself, which it did. When Zoja tried to reorder aminobutanol from Commercial Solvents, Commercial Solvents refused to accept the order, in accordance with its new commercial policy.

The case went to the Court of Justice. With only one page of

62 1974 E.C.R. 223, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209.

63 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429.

64 1979 E.C.R. 1869, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8524.

65 1985 E.C.R. ___, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,246.

analysis on point, the Court of Justice found that Commercial Solvent's refusal to sell the raw material to Zoja was an abuse of a dominant position. According to the Court, a firm with a dominant position in a raw material cannot eliminate the "competition" of its customer "just because it decides to start manufacturing" the end product.

[A]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.⁶⁶

The Court rejected Commercial Solvents' factual claim that it did not have sufficient productive capacity to supply Zoja's needs as well as its own, on grounds that Zoja's needs were only approximately 6% of Commercial Solvents' global production of the raw material.⁶⁷

Five years later *United Brands v. Commission* came before the Court of Justice, and the Court applied a similar principle.⁶⁸ United Brands was the biggest banana producer in the world and in the Common Market. It owned the Chiquita brand banana, the best known and most heavily promoted in the world. United Brands was a vertically integrated company that accounted for approximately 40% to 45% of the sales of bananas in the Community. Its system of distribution involved sales to ripener-distributors, who would buy the green bananas, ripen them, and resell them.

Olesen, a ripener-distributor in Denmark, was the largest importer in Denmark of the Chiquita brand banana. Olesen wanted United Brands to give it preferential treatment over United Brands' other ripeners in Denmark, but United Brands refused to do so. In response, while retaining its United Brands distributorship, Olesen became the exclusive distributor for Standard Fruit (which later became Castle and Cooke). Standard Fruit, producer of the Dole banana, announced that it "was going to oust the 'Chiquita' banana throughout the world."⁶⁹ Thereafter, according to United Brands,

66 *Commercial Solvents*, 1974 E.C.R. at 250-51, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209, at 8820. It did not matter that Zoja had cancelled an order and therefore was not a customer at the moment because Commercial Solvents, in any event, would have ceased supplying Zoja at the completion of deliveries it would otherwise have been obliged to make.

67 If Commercial Solvents would have lost economies in distribution by foregoing use of this capacity for its own account, the duty to deal would have imposed an inefficiency upon it. Commercial Solvents apparently did not argue that this was the case.

68 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429.

69 *Id.* at 291, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7713.

Olesen's sales of Chiquita bananas declined, Olesen deliberately pushed the sale of Dole bananas, and it took more care in ripening Dole bananas than in ripening Chiquita bananas. United Brands terminated Olesen.

The Court of Justice held that the cut-off was an abuse of a dominant position. According to the Court, a dominant firm—"which cashes in on the reputation of a brand name known to and valued by the consumers—cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary."⁷⁰ The Court thought that the cut-off "would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market."⁷¹

Moreover, the Court held that the cut-off could not be justified by United Brands' interest in quality performance by its ripener-distributors, although it implied that a quality defense could succeed under some circumstances. Even if the possibility of a "counter-attack" by the dominant firm against its wayward distributor is acceptable, the Court said, it "cannot be countenanced" if its purpose is to strengthen the dominant position, and it must be "proportionate to the threat taking into account the economic strength" of the competition. In *United Brands*, said the Court, the sanction was disproportionate to the alleged offense of Olesen. The Court thought the cut-off would deter other ripener-distributors from supporting United Brands' competitors, thereby increasing its dominance.

Such a course of conduct amounts therefore to a serious interference with the independence of small and medium sized firms in their commercial relations with the undertaking in a dominant position and this independence implies the right to give preference to competitors' goods.⁷²

*Hugin-Liptons*⁷³ is a case of even broader implications because Hugin, the manufacturer, did not hold a dominant position in the market in which it competed. Its refusal to deal was a vertical distribution restraint with no potential to lessen competition between Hugin and its competitors.

Hugin, a manufacturer of cash registers, accounted for approximately 13% of cash registers sold in the United Kingdom. National Cash Register accounted for 40% of the market, and the second and third ranking firms held, respectively, 18% and 16%.

70 *Id.* at 292, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7714.

71 *Id.*

72 *Id.* at 293, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7715.

73 1979 E.C.R. 1869, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8524.

Liptons was in the business of servicing, repairing, and reconditioning cash registers. It bought spare parts from an importer of Hugin cash registers, and later became the main sales agent for Hugin in Great Britain, while continuing its service and repair business. It also entered the business of providing cash registers for rent.

After Liptons had been Hugin's main distributor in Great Britain for a few years, Hugin offered Liptons a new distributorship agreement. Liptons refused because in its view the profit margins were too low. Thereafter, Hugin refused to supply Liptons with cash registers or parts at wholesale. Liptons tried to get the parts elsewhere but failed because Hugin maintained a selective distribution system, confined spare parts to its authorized distributors, and prohibited the distributors from selling the parts to others.

The Commission determined that Hugin's refusal to supply spare parts to Liptons was an abuse of a dominant position in Hugin spare parts. In the Commission's view the refusal deprived users of free choice by excluding a substantial competitor in the market for servicing and repairs of Hugin machines.⁷⁴ Hugin's argument was threefold: (1) the market was cash registers and the cash register market was highly competitive; (2) Hugin confined spare parts to its distributors to oversee quality and promote rapid and inexpensive maintenance; and (3) Hugin could assure such quality and efficiency only by working in close cooperation with qualified technicians.

The Court of Justice held that the conduct did not affect trade between Member States. It therefore need have gone no further, but it did choose to address one of the two central substantive questions: the definition of the relevant market and Hugin's position in that market. The Court did not determine whether the conduct constituted an abuse.

The Court found the relevant market was Hugin spare parts. It observed that there are independent undertakings that specialize in maintenance and repair of cash registers, reconditioning used cash registers, selling used machines, and renting machines. These firms needed Hugin spare parts for Hugin machines because cash register parts made by other manufacturers were not compatible

⁷⁴ In general, the Advocate General agreed with the Commission. He maintained that the refusal to deal eliminated the only important competitor in the secondary market and thus was equivalent to limiting markets and sales outlets. Specifically rejecting the argument that concentration in the provision of spare parts permits increased competition in cash registers, the Advocate General found "fundamental objections to such a 'balancing out' of factual situations which involve the complete elimination of independent maintenance undertakings and thus a fundamental alteration of the structure of competition." *Id.* at 1914, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8524, at 7468. Thus, he rejected the concept, fully accepted in U.S. law, that benefits to interbrand competition justified elimination of intrabrand competition.

with Hugin machines. "Consequently," said the Court, "the market thus constituted by Hugin spare parts required by independent undertakings must be regarded as the relevant market"⁷⁵ The conclusion followed: Hugin had a dominant position.

Had Hugin's acts affected Member State commerce, Hugin would have faced the serious risk of violation of article 86.

Most recently, in *Tele-marketing*,⁷⁶ a Belgian firm, Centre Belge, established the business of telemarketing to the French-speaking community in the Benelux countries. It presented television advertising for its clients. The advertisements invited viewers to call Centre Belge's telephone number to obtain information about the products advertised or otherwise to respond to the advertisement. Centre Belge's telephone staff would answer the calls and provide the information. To conduct this operation, Centre Belge obtained a one-year exclusive contract with the television station, R.T.L. (through its agent I.P.B.). R.T.L. was a legal monopoly. At the end of the year I.P.B. notified Centre Belge and the advertisers that R.T.L. would henceforth accept telemarketing advertising spots only if I.P.B.'s telephone number was used. This would have put Centre Belge out of the telemarketing business. It sued for an injunction in the Belgian court, and the Belgian court referred two questions to the Court of Justice. First, can a firm be in a dominant position within the meaning of article 86 where it enjoys a legal monopoly in a market, and, by reason of the law, there can be no or very little competition in that market? The Court answered in the affirmative.

Second, the Belgian court sought an interpretation of the nature of abuse. Centre Belge claimed that the challenged condition was an abuse on its face. Defendants claimed, to the contrary, that the condition could not be an abuse as such. They argued that an abuse does not occur unless and until power is misused and that abusive conduct "must be likely to harm consumers, for example, by the imposition of unfair prices or conditions."⁷⁷ On the facts, defendants argued that the condition was justified for economic reasons; that I.P.B. was close to the pulse of the television station and would be alert to program changes made on short notice, and that it was necessary to conduct telemarketing in-house to preserve that station's image because viewers assumed that the telephone number was that of the station, they expected their questions about the station to be answered, and they expected attentive service and would fault the station for any shortcomings.

⁷⁵ *Id.* at 1897, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8524, at 7458.

⁷⁶ 1985 E.C.R. ___, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,246.

⁷⁷ [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,246, at 16,458.

The Court's answer most nearly favored the interpretation of *Centre Belge*. Relying on *Commercial Solvents*, the Court said that where a dominant firm supplies a service that is indispensable to the activities of a firm operating on another market, a refusal to supply the service is an abuse if "the refusal is not justified by technical or commercial requirements relating to the nature of the [first market], but is intended to reserve" for itself or its agent the business in the second market, with the possibility of eliminating all competition from another firm.⁷⁸ Thus, defendants would have to justify their refusal to deal. The important point is that defendants lost on their claim that abuse is dependent upon harm to consumers.

B. *A Comparison*

In the United States the law on duty to deal has evolved from quite different first principles. Under U.S. law, the freedom to deal or not to deal is a basic element of freedom of trade. In *United States v. Colgate & Co.*,⁷⁹ the Supreme Court stated that, absent a purpose to create or maintain a monopoly, the Sherman Act "does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal."⁸⁰

Freedom to deal has been accorded even to a monopolist under circumstances in which the monopolist has no incentive to lessen competition by the refusal. In *Official Airline Guides, Inc. v. FTC*,⁸¹ the court held that a monopoly publisher of airline schedules had no duty not to discriminate between certified air carriers and commuter airlines, even if its discriminatory (separate) listings lessened competition in the airline market. The publisher did not participate in competition in the airline market, so it would not benefit from lessened competition in that market. The expected cost of limiting the publisher's freedom of action was therefore deemed greater than the expected cost of competitive harm.

Two principles, however, qualify the basic principle that an individual firm, acting alone, has the right to choose its customers. First, there is a narrow "essential facilities" or "bottleneck monopoly" doctrine which holds that where a firm controls a facility that cannot feasibly be duplicated, where access to the facility by competitors is necessary for effective competition in the market, and where the controlling firm can give access without degrading its

78 *Id.*

79 250 U.S. 300 (1919).

80 *Id.* at 307.

81 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

own performance, the controlling firm must give access.⁸² Second, a firm in a monopoly position may not engage in predatory strategies including refusals to deal when, by the refusal, the dominant firm foregoes profit opportunities and imposes costs on itself in order to impose greater costs on its competitor.⁸³

*United States v. Terminal Railroad Association*⁸⁴ exemplifies the case of the bottleneck monopoly. The defendant railroad controlled the only track across the Mississippi River at St. Louis, and geographic obstacles prevented competitors from constructing another such facility in the near vicinity. Terminal Railroad Association denied its competitors non-discriminatory access. *Lorain Journal Co. v. United States*⁸⁵ exemplifies the case of predatory strategies. Lorain Journal, the only newspaper in town, was faced with competition from a newly-formed radio station. It announced that it would not deal with advertisers who bought time on the new radio station. Knowing that its customers needed to deal with it, the newspaper hoped for a boycott that would cause the demise of its competitor. In both cases, defendants violated section 2.

The recent *Aspen Skiing* case is a less powerful form of the latter scenario. Aspen Skiing Company owned three of the four mountains at the popular Aspen resort. For a number of years Aspen Skiing and the owner of the fourth mountain, Highlands, cooperated in the sale of a four-mountain ticket, to the pleasure of skiers at Aspen. Aspen Skiing then decided not to cooperate in the sale of the four-mountain ticket. It refused to sell tickets to Highlands for use as part of a four-mountain pass, and it refused to honor vouchers supplied by Highlands to its skiers, although the vouchers were equal to the price of a daily lift ticket for the three Aspen Skiing mountains and were guaranteed by funds on deposit in the local bank. Aspen Skiing thus sacrificed profit opportunities, even at the risk of displeasing consumers. It may have believed that most skiers, unable to get a four-mountain pass, would exclusively patronize the three mountains of Aspen Skiing and that the increased revenues from shifting skiers away from Highlands would more than offset the lost revenues from refusing the vouchers.

The *Aspen Skiing* case is a weaker example of monopolization than *Lorain Journal* because in *Lorain Journal* the strategy was in-

82 See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), cert. denied, 104 S. Ct. 234 (1983).

83 See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985). For a recent case holding that a monopolist had no duty to continue its prior practice of encouraging its salesforce to promote its competitor's product, see *Olympia Equip. Leasing Co. v. Western Union Tele. Co.*, 1986-1 Trade Cas. ¶ 67,189 (7th Cir. 1986) (Posner, J.).

84 244 U.S. 383 (1912).

85 342 U.S. 143 (1951).

tended and likely to destroy a competitor, a new entrant into a monopolized market. In *Aspen Skiing* the strategy may or may not have destroyed Highlands, inducing a sell-out to Aspen; the Court did not explore the possibility. The important point was that Aspen Skiing's strategy destroyed an option that consumers wanted, thus undermining the antitrust value of consumer sovereignty. It is not apparent in either case, however, that the dominant firm's strategy was likely to produce an increment in power over price. In *Lorain Journal*, the price of advertising in the Journal was constrained not only by the new radio station but also by numerous other alternatives for advertising and promotion. In *Aspen Skiing*, the price of the ski lift on the three Aspen Skiing mountains was constrained not only by the price charged by Highlands but by numerous other options for skiers.

The U.S. cases suggest a focused framework for analysis. A refusal to deal is allowed if it is simply an instance of choosing one's customers and of deciding how best to provide the goods and services that the consumer wants. A refusal to deal by a firm in a monopoly position is impermissible if its natural effect is to lessen competition and thereby raise prices to consumers or otherwise degrade the price/service package offered to them.

The analysis may be guided by a series of questions. Was the refusal to deal a product of defendant's plan to wage more effective competition and to sell more goods or services by increasing consumers' satisfaction? Or was it a pressure tactic to eliminate or impose costs on a competitor and thereby to increase monopoly power or, at least, market share?

One basic question is whether the defendant would have pursued the same strategy if the market would remain as competitive after the challenged conduct as before the conduct. If the answer is no, then the purpose of the refusal was almost surely to increase market power, and purpose is a proxy for probable effect. If the answer is yes, then the purpose of the refusal was almost surely not to increase market power.⁸⁶ The purpose may have been to gain productive efficiencies. It may also have been to exploit more fully existing power or opportunities.⁸⁷

I now apply the framework of U.S. law to the Common Market cases. I ask the following questions, which are designed to suggest

86 See Ordover & Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981). Cf. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

87 For an example of U.S. law in this third category, see *United States v. E.I. du Pont de Nemours*, 353 U.S. 586 (1957) (du Pont's stock interest in General Motors gave it an advantage in competing for General Motors' purchases of fabrics and finishes, but no claim was made that General Motors got lower quality or paid a higher price).

the purpose and effect of each set of restraints: Is the challenged refusal to deal output-limiting (thus likely to increase market power), is it exploitative, and/or is it cost-reducing?

Commercial Solvents is a case of internal vertical integration. The decision to vertically integrate did not, as the Court of Justice said, eliminate a competitor; it substituted one competitor for another. Unless the integration itself raised barriers to entry, price to the consumer after the integration was likely to be no higher than price to the consumer before the integration.

It is at least possible that the decision to integrate was motivated by Commercial Solvents' prospect of capturing for itself all of the monopoly profits from control over the raw material, rather than sharing these monopoly profits with Zoja. Since aminobutanol had two uses, one of which (anti-tuberculosis drugs) commanded monopoly profits and one of which (paint emulsifiers) did not, Commercial Solvents would profit-maximize by price discrimination; but price discrimination proved difficult because the low-cost buyers were reselling the product for the higher-valued pharmaceutical use and this arbitrage would soon drive the price for the two uses to equality. The profit-maximizing response to arbitrage was integration into the business of the high-valued use.⁸⁸ If the only purpose and effect of the vertical integration and cut-off was to enable Commercial Solvents to discriminate and thus to extract the extra profits from the raw material in its drug use, then the vertical integration combined with the refusal to continue to supply the old customer would not offend section 2 of the Sherman Act.

United Brands' strategy, in contrast, was not vertical integration; it was maintenance of an effective system of independent distributors. One of its major distributors (Olesen) was, allegedly, disloyal because it aggressively supported a competitor's advertising campaign and neglected United Brands' product. United Brands decided to terminate that distributor and, presumably, to appoint a new distributor or to increase the business of its other distributors.

The Court of Justice apparently believed that United Brands' termination of Olesen increased market power, but it did not ask the right question. To determine whether the cut-off could have increased market power, the Court should have asked: Could a banana ripener-distributor realize all significant economies of scale without handling Chiquita bananas? If the answer is yes, then even exclusive dealing contracts between United Brands and its distribu-

⁸⁸ If Commercial Solvents' integration increased barriers to entry into the market for the production of ethambutol or the market for the production of the raw material, the integration might also have been motivated by the prospect of increasing market power.

tors would not impair competition to the detriment of consumers in the banana market. Competitors could develop their own outlets. Under U.S. law, the refusal to deal with the recalcitrant distributor would not violate section 2. If the answer is no, as the Commission argued, then United Brands would have leverage of the sort held by Lorain Journal. By refusing to deal with distributors that handle and promote a competitive brand, it could coerce distributors and destroy or greatly weaken its competitors, to the detriment of competition and consumers. If that were the case, even if the purpose of the termination was a good one—to get a distributor who would take appropriate care in ripening Chiquita bananas—the sanction may have been excessive, even under U.S. law.

In *Hugin-Liptons*, we find an even greater gap between U.S. and Common Market law. First, in the United States, a company's own brand of product is almost never a market.⁸⁹ Under Community law, customer dependence may qualify a brand as a market. In *Hugin-Liptons*, the Court of Justice defined the market as spare parts for Hugin machines in view of the demand by independent servicers and renting agents. In doing so it ignored facts that U.S. courts would deem material; namely, that the independents could get spare parts for the other cash registers from their producers and that Liptons could be expected to shift its business to the servicing and renting of more cash registers produced by other firms. A healthy market of independents who serviced and rented cash registers (made by other producers) would have remained.

When one asks whether Hugin's termination of Liptons was an effort to monopolize, the misfit of the monopoly framework becomes plain. Hugin was not a dominant cash register firm. It surely could not get a monopoly by charging a supracompetitive price for spare parts, and it would undercut its competitive attractiveness as a supplier of new machines if it developed a reputation for overcharging for repairs. Only two hypotheses seem plausible. Either Hugin was charging a low price for service and was providing rapid reliable service itself or through its authorized distributors, so as to wage more effective competition against its highly aggressive competitors, or Hugin wanted to keep the servicing business for itself and its authorized distributors and they were providing at least as good a price/service package as Liptons. Both for lack of dominance and lack of anticompetitive conduct, American courts would dismiss the case against Hugin.

Finally, in *Tele-marketing*, the strategy of the television station

⁸⁹ See *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337 (9th Cir. 1983); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 914-19 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975); *Rea v. Ford Motor Co.*, 497 F.2d 577, 590 n.28 (3d Cir. 1974), *cert. denied*, 419 U.S. 868 (1974).

was probably to appropriate for itself a lucrative business that had been started up by its customer. Had the television station been essentially concerned about confusion of viewers and the image of the station, as it claimed, it could have required Centre Belge to state clearly its identity and its lack of affiliation with the station; and it could have given advertisers their choice of telemarketing service suppliers. It is not possible, however, that the station's challenged condition that all telemarketing on its station must use its agent's number could have given it increased power over price. In other words, it is more likely that the condition unfairly ousted a competitor than that it hurt consumers.

In sum, in its refusal-to-deal judgments the Court of Justice reflects a belief that it is benefiting consumers, but in none of the cases did the Court rely on facts indicating that the refusal to deal harmed consumers. In each of the cases a value other than consumer interests was at stake. In *Commercial Solvents*, Zoja's business and its manufacturing facility in Italy were in jeopardy. In *United Brands*, a major part of Olesen's business in Denmark was threatened. In *Hugin-Liptons*, a major part of Liptons' business in Great Britain was at stake. In *Tele-Marketing*, the dominant firm would have ousted and appropriated the goodwill of Centre Belge. The victims in all four cases had made major investments and were apparently good business citizens.

One suspects that the Court of Justice concludes too quickly that refusals to deal harm consumers. To base a result on harm to consumers where neither evidence nor theory indicates that such harm exists undermines the legitimacy of Court of Justice judgments, although those judgments might have been justified by an interest in protecting entrepreneurs.

I suggest, in the conclusory section, a model pursuant to which the Court of Justice might appropriately find abuse even where the Commission cannot prove that the refusal to deal is likely to harm consumers. Under my model, liability would not result, however, if both of the following situations obtain: the refusal to deal does not increase market power, and the duty to deal would increase the costs of the firm.

VII. Price Discrimination, Loyalty Discounts, and Exclusive Dealing

A. *The Court of Justice Cases*

Four cases involving loyalty discounts, price discrimination, and exclusive dealing in lieu of price discrimination, have reached the Court of Justice. I discuss here the three major cases: *United*

Brands v. Commission,⁹⁰ *Hoffmann-La Roche v. Commission*,⁹¹ and *N.V. Nederlandsche Banden-Industrie Michelin v. Commission*.⁹²

The aspect of *United Brands* treated in this section involves price discrimination. As seen above, *United Brands* sold bananas to distributors, who would ripen the bananas and then resell them locally to dealers. In the Community, there was not a single banana market. Rather, regulations, policies, and conditions of various Member States served to partition national markets. Relevant conditions included taxation, duties, wages, conditions of marketing, currency fluctuations, national tastes, and different availability of seasonal competing fruit. *United Brands* set the price of Chiquita bananas to its ripener-distributors by reference to the supply and demand as it affected the ultimate consumer in each Member State. Accordingly, *United Brands'* prices to distributors in different Member States varied by large margins, such as 54%, 80%, and 138%. Clauses in contracts with its distributors forbade the distributors from reselling green bananas, and *United Brands* supplied its distributors with less than the quantity they ordered, thus guarding against arbitrage of the bananas it sold to its distributors in the lower-price territories.

The Court of Justice assumed that the price discrimination placed certain ripener-distributors at a competitive disadvantage, and it held that the discrimination violated article 86.⁹³ According to the Court, *United Brands* should have set its price with reference to supply and demand as between the producer and the ripener-distributor, not as between the producer and the customer. The Court concluded that the discriminatory prices, varying according to the circumstances of the Member States, "were just so many obstacles to the free movement of goods,"⁹⁴ and that the restrictive effect was aggravated by the green banana clause and the restriction on quantities delivered. "A rigid partitioning of national markets was thus created at price levels which were artificially different, placing certain ripener-distributors at a competitive disadvantage, since, compared with what it should have been, competition had

90 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429.

91 1979 E.C.R. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527.

92 1983 E.C.R. —, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,031. See also *Suiker Unie UA v. Commission*, 1975 E.C.R. 1663, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8334.

93 *United Brands*, 1978 E.C.R. at 298, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7716.

94 *Id.* at 299, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7717. Author's note: Discriminatory prices are not in fact an obstacle to free movement. Rather, if there are no barriers, discriminatory prices would induce movement. Lower-priced bananas would flow into Member States in which bananas commanded a higher price.

thereby been distorted.”⁹⁵

In *United Brands*, price discrimination was a means to extract extra profits from the distributors located where the product was more highly valued, reflecting the higher price available from certain buyers given the preexisting demand for the Chiquita brand. By contrast, in *Hoffmann-La Roche* and *Michelin*, price discrimination was a means to sell more product to buyers who might otherwise have turned elsewhere, reflecting the larger demand for sellers' product that could be secured by a selectively low price.

In *Hoffmann-La Roche*, the vitamin company was found to have a dominant position in the Common Market in each of several vitamins, including vitamin A, of which it held 47%; vitamin B₃, of which it held 41% to 51% (although its share was declining and Japanese manufacturers accounted for nearly a third of the market), and Vitamin B₆, of which it held more than 80%. Roche had contracted to sell vitamins to 22 large purchasers, including companies such as Merck and Unilever.

In some cases the purchaser agreed to buy several kinds of vitamins exclusively from Roche. Some contracts were requirements contracts, entered into at the request of the purchaser who wanted assurance that its requirements would be filled. In other cases, the buyer agreed to buy most of its needs from Roche, and Roche contracted to give the buyer “fidelity rebates.” These were discounts that became effective as to all past purchases when the buyer passed certain thresholds, representing portions of the buyer's requirements. The rebates generally applied cumulatively to the purchase of more than one kind of vitamin.

The Court of Justice held that the exclusive supply and requirements contracts were an abuse of a dominant position, even as to the requirements contracts entered into at the request of the purchaser. According to the Court, these requirements contracts were “not based on an economic transaction which justifies the burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.”⁹⁶

A major concern of the Court, in *Hoffmann-La Roche*, was the practice of giving fidelity rebates. The rebates were price discriminations based on loyalty, not quantity discounts based on lower costs. Once a purchaser began to buy from Roche, the Court said, the customer had a “powerful incentive” not to buy elsewhere.⁹⁷ The Court concluded that the practice distorted competition for

⁹⁵ *Id.*

⁹⁶ *Hoffmann-La Roche*, 1979 E.C.R. at 540, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7553.

⁹⁷ *Id.* at 543, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7555.

three reasons: (1) it is “designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers;” (2) it constituted discrimination based on exclusivity; and (3) it entrenched dominance, especially in an expanding market, “by means of a form of competition which is not based on the transaction effected and is therefore distorted.”⁹⁸

Likewise, the Court of Justice held that the tire manufacturer Michelin abused its dominant position by price discrimination through discounts.⁹⁹ Michelin, which was losing ground to competitors, devised a system of variable discounts based on annual sales targets tailored to each dealer/customer. The Court found that the system put increasing pressure on the dealers to meet their targets in order to avoid suffering a loss for the entire year. The effect was accentuated, said the Court, by the fact that Michelin’s market share was much larger than those of its main competitors. A competitor would have to offer a much larger discount to make it worthwhile for the dealer to purchase its tires from the competitor at the end of the year. Referring also to the vagueness and changing nature of the Michelin discount system, and the ubiquity of Michelin representatives who were always on hand to remind dealers of their situation, the Court characterized the strategy as calculated to prevent dealers from freely choosing the most favorable offer.

It thus limits the dealers’ choice of supplier and makes access to the market more difficult for competitors. Neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer’s freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified.¹⁰⁰

B. *A Comparison*

Study of the American analogue invites basic distinctions that the Court of Justice ignored. In the banana case, *United Brands* engaged in the most typical kind of price discrimination: it sold at a higher price for resale where the demand for bananas was less elastic and at a lower price for resale where it was more elastic. It prevented arbitrage by restrictions against resale of green bananas and by selling to ripener-distributors no more bananas than they needed for the Member State in which they sold. It thus equalized

98 *Id.* at 540, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7553.

99 *N.V. Nederlandsche Banden-Industrie Michelin v. Commission*, 1983 E.C.R. 3461, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,031.

100 *Id.* at 3518, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,031, at 14,521.

profit margins among its distributors, rather than giving some distributors the prospect of monopoly profits.

If the ripener-distributors who bought at the higher price were actually in competition with the ripener-distributors who bought at the lower price, United Brands would ostensibly have abused a dominant position under the terms of the third example of article 86. However, if there had been competition between favored and disfavored distributors, United Brands would not normally have been able to maintain the price differential; the differential would have been arbitrated away.

If there were culprits in the *United Brands* case, price discrimination was not among them. One source of distortion of competition was the green banana clause, which prevented arbitrage.¹⁰¹ Another was United Brands' refusal to sell more than the ripener's needs, which reinforced the ban against selling green bananas. The third source of restraint was Member State regulations, different customs, and different consumer preferences, making bananas dearer in some states than in others.

United Brands was held liable for abusing a dominant position by secondary-line discrimination, although the favored and disfavored buyers did not compete. Under U.S. law, if favored and disfavored buyers are in competition and competition may be lessened, price discrimination is illegal under the Robinson-Patman Act even without proof that the discriminator has market or monopoly power.¹⁰² But the U.S. law does not proscribe price discrimination even by a dominant firm where the only effect is greater ability to exploit by the discriminator.

A finding of illegal price discrimination in a case such as *United Brands* may force a transfer of extra profits from the producer to the distributor, or cause the producer to perform its own distribution function (thus, vertically integrate) in the areas in which its product is dearer.¹⁰³

Unlike *United Brands*, *Hoffmann-La Roche* and *Michelin* are cases of primary-line discrimination. That is, discrimination is used to expand (or maintain) a dominant position to the disadvantage of competitors of the discriminator. As the Court articulates the problem, the dealer also suffers a detriment because its choice of sup-

101 1978 E.C.R. at 218, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7665. Such a clause might have been necessary to protect the quality of the ripening and thus to protect the Chiquita name. Apparently the Court did not accept United Brands' argument to this effect, and it held the green banana clause to be an infringement. *Id.*

102 15 U.S.C. § 13(a) (1982). See *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). See also Piraino, *The Legality of Distributor Incentive Discount Plans Under the Robinson-Patman Act*, 58 WASH. U.L.Q. 807, 838-39 (1980).

103 *ICI & Commercial Solvents Corp. v. Commission*, 1974 E.C.R. 223, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209.

plier is limited (supposedly by the irresistible pressure to buy at a low price). Exclusive dealing and requirements contracts by dominant firms are likewise thought to have the infirmity of tying up the incremental business of important customers and thereby leading to the expansion of the dominant firm's market share for reasons not on the merits, at the expense of the remaining competition.

U.S. courts would not conclude, with strokes so broad, that fidelity rebates and discounts, exclusive dealing, and requirements contracts by dominant firms are illegal. Loyalty discounts are low-priced competition. Requirements contracts tend to save costs (reduce risks and lower transaction costs) for buyers, and exclusive dealing contracts can save costs for sellers, particularly when knowledge of demand is important for production planning. Competition by lowering costs and lowering prices, even by a monopolist, is favored under U.S. law.¹⁰⁴

Under U.S. law, loyalty discounts and exclusive dealing contracts by a dominant firm could constitute monopolization only if they maintain or increase market power or unnecessarily exclude rivals and are not means of giving consumers what they want.¹⁰⁵ Loyalty discounts and exclusive dealing contracts could fit this description if:

1. The discounts constitute predatory pricing. That is, the seller charges a price below its applicable cost or in any event it charges a temporary low price that makes sense only on the hypothesis that it would eliminate or disable competitors and then allow the dominant seller to raise price and reap a monopoly profit.¹⁰⁶ (This was not the case in either *Hoffmann-LaRoche* or

104 See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), cert. denied, 104 S. Ct. 370 (1983); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981); *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979).

At one time, U.S. courts looked with suspicion on all acts of aggressive competition by a firm with a monopoly or near monopoly share. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). This is no longer the case. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *In re E.I. du Pont de Nemours & Co.*, [1979-1983 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,770 (1980) (titanium dioxide); cases cited in the paragraph above.

105 See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 1163 (1985).

106 *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), cert. denied, 104 S. Ct. 3370 (1983); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981). See also *Ordover & Willig*, *supra* note 86, at 9-15.

In *O. Hommel*, the leading firm gave secret, selective price reductions to three of its major customers. In doing so it priced below its average cost. 659 F.2d at 342. There was no showing that the seller intended to or would drive competitors out of business, gain monopoly power, and raise prices. *Id.* at 354. The court found no violation. The court decided the case under the Robinson-Patman Act. It construed the Act to serve the broader purposes of the Sherman Act. *Id.* at 346.

A dominant firm can monopolize by, for example, a plan of geographic price discrimination whereby the firm lowers its price below cost whenever a new entrant attempts to

Michelin.)

2. The acts are or amount to unreasonably exclusionary exclusive dealing. Thus, in the case of loyalty discounts, the practice must have the effect of inducing exclusive or nearly exclusive dealing. In any case, barriers to entry must be significant and the arrangements must foreclose access to outlets necessary to support a sufficient number of productively efficient competitors.¹⁰⁷

On the other hand, U.S. courts would not condemn discounts as monopolistic simply because they exert "irresistible" pressure (to accept a good deal) and thus induce the customer to buy its incremental needs from the dominant firm. A seller's sustained lower prices are an irresistible incentive to buy from that seller; yet sustained low prices are procompetitive.¹⁰⁸

*Hoffmann-La Roche*¹⁰⁹ presents the possible example of a strategy that may have unreasonably excluded competitors and lessened competition in the sense proscribed by American law, although the Court never explored the facts necessary to draw this conclusion. The vitamin company's exclusive or near exclusive dealing through rebates and other more explicit arrangements may have tied so much of the existing and incremental demand to Roche as to squeeze out competitors from an already concentrated market. The fact that all significant buyers probably needed at least some vitamin B₆ from Roche (which accounted for more than 80% of this market), and the fact that the discounts were cumulatively available on the basis of all vitamins bought from Roche would aggravate the negative effects. Roche might thus have used its market power in

enter or expand in a new geographic market. See *In re Borden, Inc.*, [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,490 (1978), *aff'd*, 674 F.2d 498 (6th Cir. 1982), *vacated and remanded on request of FTC*, 1983-1 Trade Cas. (CCH) ¶ 65,383 (Sup. Ct. 1983). See 44 ANTITRUST & TRADE REG. REP. (BNA) No. 521 (Mar. 3, 1983) for the FTC's modification of the order. Also, a monopolist may violate section 5 of the Federal Trade Commission Act when it uses its monopoly power in one market to discriminate against its competitors in another market. *La Peyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). See also *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) (no violation where the monopolist is not a competitor of the complainant).

107 See *In re Beltone Electronics Corp.*, [1979-1983 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,934 (1982) (upholding exclusive dealing contracts by the largest hearing aid manufacturer where the arrangement was important to wage effective competition).

108 See *Zenith Radio Corp. v. Matsushita Elect. Indus.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 106 S. Ct. 1348 (1986), wherein the district court stated:

[I]t is plainly in the interest of a purchaser to obtain a rebate so as to get the lowest possible price. Although plaintiffs decry the activities of Sears in securing rebates from Sanyo and Toshiba, . . . it appears to be procompetitive and in Sears' interest for Sears, or any buyer, to get the best price it can.

513 F. Supp. at 1251 (footnote omitted).

109 1979 E.C.R. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527.

vitamin B₆ both to expand its position in that market and to consolidate its position in the market for other vitamins.

The above analysis makes numerous assumptions, however. If the question is whether the rebate scheme increased Roche's market power, one would wish to know more about the competitive structure of the various vitamin markets, the percentage of the markets and the percentage of incremental demand effectively foreclosed by Roche's practices, the size necessary for a producer to achieve efficient scale, and whether entry involved significant unrecoupable costs. One would also wish to explore other conditions of and facts about entry, including the likelihood that the big buyers would integrate backwards if Roche charged higher prices.¹¹⁰

Similar questions are likewise unexplored in *Michelin*,¹¹¹ where the Court of Justice stressed the competitors' right to access to the market and the dealers' right of freedom of choice and independence.

There may be a middle ground in which the dominant firm's act does not hurt competition in the sense of raising price but neither does the enforcement raise price. The loyalty discount schemes may increase the ability of dominant sellers to exploit their existing market power and to expand their market share at the expense of competitors, without reducing costs.¹¹² A ban against such strategies might encourage general rather than selective lower prices. The Roche and Michelin strategies could then be seen more clearly as exploitative offenses illegal under article 86, particularly in view of the objective of the Community to preserve opportunities for small and middle-sized firms to compete on the merits.

VIII. Technological Progress—The IBM Example

A major issue for the next decade involves the extent to which

110 If, for example, Roche's prices for all vitamins were tightly constrained by the buyers, Roche's strategies were not a means to get excess profits (although they undoubtedly were a means to take extra market share from competitors).

The competitors would have had a fair chance to compete if (1) Roche's competitors were equally efficient with Roche at existing scale and there were no significant additional efficiencies to be achieved by greater scale, or (2) if Roche's practices did not deprive the competitors of sufficient outlets for them to realize available efficiencies. Then, if Roche was not selling below its costs, Roche's average price to a customer that bought only from it would be no less than a competitive price. The higher price at the outset, before discounts, would return more than a competitive profit. By charging only a competitive price, the competitors could have won the business at the outset.

111 1983 E.C.R. 3461, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,031.

112 Fidelity rebates, like exclusive dealing contracts, reduce transaction costs because the firm does not have to compete for future sales to the customer. But this is a cost-saving device only in the sense that monopolies save costs—it eliminates the costs of competition. Under a system that chooses competition over monopoly, it would be inappropriate to count these costs as a waste.

antitrust obligations will be imposed upon dominant, technologically advanced firms that stand astride several functionally related markets and whose strategies promise both to advance the state of the art and to derail competitors who are dependent upon compatibility.¹¹³ No case involving these problems has yet come before the Court of Justice.¹¹⁴ The importance of the issue, however, warrants

113 See *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), cert. denied, 104 S. Ct. 370 (1983); *California Computer Prods. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). See Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587 (1982).

114 Two recent cases, however, mention. One is a Court of Justice judgment involving rather clear-cut anticompetitive conduct; the other is a case expected to come before the Court of Justice involving predatory pricing strategies.

In the latter case, *Akzo Chemie*, Akzo Chemie and Engineering & Chemical Supplies (ECS) both manufactured benzoyl peroxide, which is a raw material used in flour milling and also in plastics. ECS established its position as supplier to flour millers. When it found itself with excess capacity it decided to sell also to plastics manufacturers, who were largely supplied by Akzo. When Akzo learned of ECS's intentions, it began a campaign to attack ECS in the smaller (milling) market segment. It gave ECS an ultimatum to drop its plans within the week or to expect to be put out of business. When ECS did not change course, Akzo sold ECS's milling customers at selectively low prices, to pressure ECS to leave its (Akzo's) plastics customers alone. Akzo's prices were not below its variable costs. The Commission viewed Akzo's conduct as a predatory campaign, and levied a heavy fine on Akzo. 374 O.J.L. 1 (Dec. 31, 1985). See 50 ANTITRUST & TRADE REG. REP. (BNA) No. 32 (Jan. 2, 1986).

The Court of Justice judgment is *Italian Republic v. Commission*, 1985 E.C.R. —, [1983-985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,168, which concerns anticompetitive rulemaking by British Telecommunications (BT), a nationalized firm having a statutory monopoly of the management of telecommunication systems in the United Kingdom. A lucrative part of BT's business was retransmitting international messages which passed through Great Britain but neither originated nor terminated there. Seizing the profit opportunity, reforwarding agencies developed. These private agencies used new computer technology which allowed the receipt and rapid forwarding of a large volume of messages. The private agencies charged prices much lower than BT. BT responded by issuing rules prohibiting private message reforwarding in international telecommunications.

The case principally concerned the applicability of article 86 in view of BT's status as a lawful government monopoly and in view of obligations under the International Telecommunications Convention (article 86 was held applicable). The case also concerned the propriety under article 86 of BT's reserving ancillary activities to itself.

Students of the U.S. antitrust laws will recognize BT's arguments on the merits as falling within the familiar free-rider claim. BT argued that the private agencies were making abnormal use of the lines carrying the heaviest traffic, thus threatening to degrade BT's facilities. It also asserted that the agencies' activities helped third parties to evade the full charge for the complete route. (The latter claim was just another way of saying that the competition from the private agencies siphoned off lucrative business.)

Examining the competitive effect of the rules, the Court of Justice first noted the technological advances utilized by the private agencies, and thus the consumer benefits they provided. The Court then proceeded to give short shrift to BT's justifications. The judgment reads in terms of failure of proof: Plaintiff "totally failed to demonstrate" that the activities of the private agencies—which may have attracted more international business on routes through the United Kingdom—"were, taken as a whole, unfavorable to BT, or that [invalidation of BT's rules] put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view." [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,168, at 16,019. The judgment implies that the Court was unsympathetic

a brief look at the EEC proceedings against IBM.¹¹⁵

IBM is a large multinational company which has substantial production facilities in the European Community (as well as in the United States and elsewhere) and holds a dominant share of all sales of large computers in the Community. IBM's major architectural system, at least for purposes of the Common Market litigation, is System 370. IBM makes software usable in System 370, and it makes peripheral attachments to the mainframe (or central processing unit (CPU)) such as memories and disks. As a maker of software and peripheral attachments, IBM is in competition with a number of other firms, which also make products specially for attachment to System 370.

IBM "bundled" its software with its hardware; that is, it sold them in one package at one price. Also, IBM periodically improved the technological design of the CPU, causing changes in the interface between the mainframe and the peripheral equipment designed to be plugged into it. IBM announced these improved products and took orders for them often a year before they would be available. The peripheral competitors, however, even when fully capable of making similar improvements, could not give a firm delivery date for their improved product until after IBM shipped the preannounced IBM units to its customers, for only then did IBM make available the configuration of the new interface and thus only then could the peripheral competitors complete the other side of the interface.¹¹⁶

In 1980, the Commission filed a Statement of Objections charging IBM with an abuse of a dominant position. It characterized as abuses bundling, changing interfaces and announcing new products to customers without timely disclosure of the new interfaces, and certain other practices that IBM abandoned. The Commission maintained that IBM's commercial strategy did not derive exclusively from the merits of its product and that the strategy unreasonably excluded competitors in the manufacture of software

to the alleged justifications (as it should have been, particularly since BT accepted the Commission's censure, the United Kingdom did not appeal, and the latter task fell to the Government of Italy, which wanted to protect the power of state). One suspects, however, that even had the UK appealed, the plaintiff would have had a heavy burden of proof on justifications.

The case is fully compatible with substantive U.S. monopoly law, and is somewhat reminiscent of *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 104 S. Ct. 234 (1983) and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

115 The author consulted with the EC Commission on certain jurisdictional matters relating to the *IBM* case.

116 See COMMISSION OF THE EUROPEAN COMMUNITIES, *FOURTEENTH REPORT ON COMPETITION POLICY* § 6, points 94-95 (1985); *IBM Settles Antitrust Suit with Common Market; Rivals Welcome Concessions, but Hoped for More*, Wall St. J., Aug. 3, 1984, at 2, col. 2.

and peripheral attachments from opportunities to meet consumer demand, to the detriment of competitors, buyers, and users of IBM computers in the Community. No "bad" intent was alleged.¹¹⁷

The case was suspended in August 1984 upon IBM's acceptance of a unilateral undertaking to modify its business practices. IBM agreed not to bundle its main memory with its CPUs and to disclose interface information necessary to attach peripherals to its CPUs. It also agreed to disclose this information to makers of IBM-compatible peripherals and to customers, upon request, within 120 days after announcement of a new product or the date of general availability, whichever was earlier. It retained the right to charge a reasonable, nondiscriminatory fee and the right to withhold product design information. IBM also agreed to make timely disclosure to competing makers of systems and networks in order to enable them to interconnect their systems with IBM's System 370.¹¹⁸

The Commission described the expected effect of IBM's agreement as follows:

The undertaking will have the effect of substantially improving the position of both users and competitors in the markets for System 370 products in the EEC. As a result, competition in the Common Market can be expected to be strengthened and made more effective. Users will now be given the possibility of a choice between different suppliers at an earlier time. They may also be free to choose from a wider selection of products because other manufacturers will now have the incentive to develop new products in the knowledge that the essential interface information will be made available.¹¹⁹

While the Common Market proceeding against IBM presented a serious issue of abuse of dominance,¹²⁰ in the United States private plaintiffs suing IBM for equivalent conduct fared badly.¹²¹ Moreover, in 1982, the U.S. Department of Justice withdrew its fourteen-year-old suit against IBM because the Assistant Attorney

117 See COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 116.

118 [1982-1984 New Developments] COMMON MKT. REP. (CCH) ¶ 10,608 (1984). See also COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 116, § 6, point 95. IBM's undertaking is set forth in full at [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708.

119 COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 116, § 6, point 95. The Wall Street Journal, however, saw the Commission's victory as symbolic only. See *IBM Settles Antitrust Suit with Common Market*, *supra* note 116.

120 See, e.g., *ICI & Commercial Solvents Corp. v. Commission*, 1974 E.C.R. 223, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209; *United Brands v. Commission*, 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429.

121 IBM won the private U.S. cases that went to trial (e.g., *Transamerica and Calcomp*, *supra* note 113), and settled the cases that were apparently more difficult. See, e.g., *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Control Data Corp. v. IBM Corp.*, 1973-1 Trade Cas. (CCH) ¶ 74,363 (D. Minn. 1973).

General in charge of the Antitrust Division believed that the case was substantially without merit and that a victory for the government would chill innovation by IBM and other technologically progressive firms.¹²²

I focus here on technology aspects of the case and consider choices for antitrust policy where the only admissible policy concerns are efficiency and progressiveness.¹²³ Comparing Common Market enforcement policy and U.S. enforcement policy, I suggest that the superior wisdom of one approach over the other is not apparent. More freedom of the dominant firm implies less price competition in general, and less technological development by smaller firms; more access by competitors to interface information implies less technological development by the dominant firm. It is not easy to predict, and it may not be possible to predict, which emphasis has stronger efficiency and progressiveness properties.

Policy choices may be seen as follows:

Efficiency and Progressiveness

	A	B
1	Freedom of the dominant firm to choose strategy and not to disclose	Freedom of the dominant firm, unless plaintiff proves that the dominant firm's strategy imposes costs on competitors in order to increase its dominance
2	Access of competitors to information necessary to make product compatible, unless the dominant firm proves that a duty to provide the information will unduly interfere with incentives to invent and will therefore harm consumers	Access of competitors to information necessary for compatibility

¹²² See *Recent Actions of the Department of Justice in United States v. American Tel. & Tel. Co. and United States v. International Business Machines Corp., Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1982)* (statement of William F. Baxter).

¹²³ "Fairness" is a proper policy concern. I have eliminated the concern here for reasons of simplicity. If I were to treat fairness I would want to recognize different notions of fairness. Common Market law generally sees the fairness concern as the right of the smaller competitor to access. Dominant firms assert, to the contrary, that fairness lies on their side because smaller firms copy the dominant firm's products and capitalize on opportunities in a market that the latter has created.

In general, to the extent that a legal principle is established (*e.g.*, smaller firms have rights of access, or dominant firms have rights of exploitation), a fairness concern exists in support of the established right; it is fair to follow the established rules of the game.

If a system follows the principle of Grid 1A, the functionally integrated dominant firm whose competitors are dependent upon compatibility will have maximum incentives to invest in whatever technology it decides buyers want, and also in whatever product changes will suppress the efforts of competitors, as long as the expected payback is more than the costs.¹²⁴ Under this regime, the dominant firm is likely to produce more technological change, and the changes are more likely to be impervious to competitor penetration.¹²⁵ The net increase (or decrease) in efficiency and progressiveness will be the technological advances by the dominant firm, less the sum of the contribution in technology and lower price that would otherwise have been made by the competitors, the amount spent by the dominant firm on setting back its competitors, and the amount spent by the competitors in "reinventing the wheel" to figure out the new interface configurations.

If a system follows the principle of Grid 2B, the competitors will have maximum incentives both to copy and to invent, and their more immediate competition with the dominant firm will tend to push down price. If the required disclosures necessarily reveal trade secrets (thus, more information than the dimensions and configurations of a plug), then the competitors will have the incentive to free ride on the investment of the dominant firm and the dominant firm is likely to make a lower level of investment in technology. The net increase (or decrease) in efficiency and progressiveness will be the technological contributions, lower price and higher output brought about by the competition of the competitors, less the "lost" technological contributions by the dominant firm.

Grids 1B and 2A are intermediate choices. Grid 1B leans towards freedom of discretion by the dominant firm while Grid 2A leans towards incentives for the challengers. The reader will recognize Grid 1B as a description, more or less, of the state of the U.S. law of monopolization.¹²⁶ Grid 2A may be said to reflect the com-

124 Predicted success of predatory strategies may depend on beliefs regarding how quickly the market works to discipline exploitative and exclusionary behavior. Compare Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1983) and Easterbrook, *supra* note 9 (the market works faster than government intervention to cure market failures; predation seldom promises a pay-back, therefore it cannot be expected to exist) with Sullivan, *supra* note 113 (setting forth some of plaintiff's evidence of predation in the U.S. Government case against IBM) and *Strategy, Predation, and Antitrust Analysis* (S. Salop ed. FTC 1981). See Thomas, *Antitrust and the Issue of Competitive Advantage: Economic Analysis and United States v. IBM*, 1985 AM. BAR FOUND. RESEARCH J. 165.

125 If, of course, barriers to the creation of another system of architecture are surmountable, one would expect competitors to introduce new systems and not subject themselves to the foreseeable obstacles of compatibility.

126 See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2874 (1985); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1373 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983); *California*

promise between IBM and the EEC Commission.

Economic learning does not dictate the "right" choice among options.¹²⁷ Given our inability to predict what dynamic losses and gains will result from any one of the options, the choice is a value judgment. This is particularly so if some product design information is inextricably intertwined with the interface information.¹²⁸ The Treaty of Rome's concern for small and middle-sized enterprises and its prescription for regulating discretionary private power are compatible with the choice, made by the Commission, to rein in the dominant firm.

IX. Conclusion

Community law against abuse of a dominant position regulates excessive pricing, proscribes acquisitions that increase dominance, and forbids strategies that unnecessarily exclude competitors from markets, deprive entrepreneurs of access to inputs, and deprive buyers of freedom of choice.¹²⁹ United States law against monopolization and attempts to monopolize proscribes acquisition or entrenchment of monopoly by acts not based on competitive merits, which may include monopolistic mergers and unreasonably exclusionary strategies.¹³⁰

United States law is increasingly sensitive to the prospect that some business strategies that tend to increase the market share of even a dominant firm may be more helpful than hurtful to consumers,¹³¹ and some influential policymakers and scholars argue that the consumer is best protected by respect for the freedom of action

Computer Prods., Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

In *Transamerica*, the plaintiff proved at least one instance in which IBM changed an interface only because the existing interface made it too easy for the peripheral competitors to attach their equipment to the IBM CPU, and at least one other instance in which IBM changed an interface with the predominant intent of precluding or delaying competition by peripheral competitors (the Apricot and Mallard incidents). But even these incidents were not enough to persuade the court to impose liability. The court was swayed, instead, by the fact that the interfaces adopted were virtually always accompanied by credible claims that they improved the state of the art. 481 F. Supp. 965, 1002-05 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1373 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983).

127 Regarding antitrust and technology, see Scherer, *On the Current State of Knowledge in Industrial Organization*, in MAINSTREAMS IN INDUSTRIAL ORGANIZATION (University of Amsterdam, Aug. 22, 1985) (in publication, de Jong and Shepherd eds.).

128 If on the other hand the interface information is discrete, and giving interface information is equivalent to describing only the protrusions and dimensions of a plug and socket, it is likely that efficiency and progressiveness will be enhanced by a duty to provide the information to manufacturers of the plug compatible equipment. Whether interface information necessarily conveys product design information was a question of fact in the *IBM* cases.

129 See generally text accompanying notes 62-89 *supra*.

130 *Id.*

131 See note 113 *supra*.

of the private firm.¹³² Community law, by contrast, seems to draw virtually conclusive presumptions that dominant firm conduct with exclusionary tendencies is against the consumer interest.¹³³ Moreover, in the Community, the sentiment that freedom of private action will nearly always protect the public interest finds relatively few sympathetic ears.¹³⁴

The two systems of law might provide substantial lessons for one another. Within the framework of article 86, for example, a dominant firm might be permitted to justify conduct that would otherwise amount to a prohibited exploitation but does not increase market power by showing that the conduct reduced its costs,¹³⁵ or that it increased its product quality or was otherwise procompetitive.¹³⁶

The *Commercial Solvents* case presents a framework for analysis. Commercial Solvents vertically integrated into the production of drugs for treatment of tuberculosis, and upon integration it no longer offered to Zoja the scarce raw material needed in the pro-

132 See, e.g., Easterbrook, *supra* note 9, at 15; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 23 (1981). See also the opinion of Justice Posner in *Olympia Equip. Leasing Co. v. Western Union Tele. Co.*, 1986-1 Trade Cas. ¶ 67,189 (7th Cir. 1986).

133 See, e.g., *N.V. Wederlandsche Baden-Industrie Michelin v. Commission*, 1983 E.C.R. 3461, [1983-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 14,031; *Hoffman-La Roche v. Commission*, 1979 E.C.R. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527; *United Brands v. Commission*, 1978 E.C.R. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429; *ICI & Commercial Solvents Corp. v. Commission*, 1974 E.C.R. 223, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209.

134 See COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 11, 14 (1982) (Community competition policy "is not based on the laissez-faire model"; and describing attempts "to strengthen the position of small and medium-sized undertakings."). For a comparison of a Common Market conception of "economic reality" and an American conception of "economic reality," see Fox, *supra* note 27.

135 I would not include in this definition of "costs": (1) the costs of competition (e.g., the transaction costs of competing for the business saved by tie-ins), or (2) cost savings that could be achieved only by imposing equivalent or higher costs on competitors (e.g., a dominant firm's reduction of costs through larger scale that could be achieved only by depriving competitors of sales necessary to reach efficient scale). In the latter category, an exception could be made in the case of a truly contestable market, if one exists, where larger scale reduces costs and, by hypothesis, competitive pressures push price down to costs.

In this middle ground of prohibited exploitative restraints there are certain efficiency trade-offs. Certain price discrimination may be banned even though it may lead to increased output and increased aggregate wealth. Certain tying and exclusive dealing may be banned even though it saves the seller's transaction costs, and even though the tying may be a form of price discrimination that increases output and total wealth. Moreover, a ban against refusals to deal that are a by-product of vertical integration may induce firms to enter the market fully integrated, thus blocking opportunities for the growth of firms such as Zoja.

136 This is essentially the principle I have proposed for U.S. law. See Fox, *supra* note 3, at 1183. I suggest modification of existing principles of law that are derived from noneconomic values embedded in the law, upon proof by the proponent of change that on balance the principle harms consumers. *Id.* at 1179-85.

cess. Let us assume, for purposes of this example, that the integration did not raise barriers to entry. The integration did not cause limitation of output or increased price to consumers because one firm was simply substituted for another.¹³⁷ Since the Community has a strong principle against cutoffs of traditional customers, Commercial Solvents is put to its proof that the vertical integration will reduce its costs, that continued supply to Zoja would increase its costs, and, perhaps, that a fair share of the cost savings from the integration will be passed on to consumers.¹³⁸

If Commercial Solvents cannot meet its burden, it might be inferred that the purpose of the integration and cutoff was to better exploit its monopoly power in the raw material. In that case the only point at issue would be the division of supracompetitive profits between Commercial Solvents and Zoja. The antitrust enforcement would not cause competitive harm, and recognition of a duty to deal would legitimate a fairness and access principle important to the Community.

In a second situation, Hoffmann-La Roche executed exclusive dealing contracts with the largest buyers of vitamins, whose purchases comprised most purchases of vitamins. I assume for purposes of this example that the larger market share assured by the contracts did not give Roche increased power over price because the larger buyers would integrate if Roche raised its price. Since the Community has a strong principle in favor of preserving the ability of small and middle-sized producers to compete for these purchases, Roche is put to its proof that the contracts save costs,

137 If Commercial Solvents' vertical integration saved it costs in an amount that exceeded the dislocation losses to Zoja and did not make consumers worse off, the integration would have increased "economic welfare" in the sense that that phrase is often used in the literature on antitrust economics. That is, society would be using fewer of its resources for the same output, making society, in the aggregate, wealthier.

138 The U.S. antitrust thinkers who advocate minimal use of antitrust generally propose that the law should not reprehend transactions that enhance economic welfare even if only the producer realizes all of the efficiency gain; that is, even if no cost saving is passed on to consumers of the relevant product. It is said that we are all consumers of a multitude of products and that we are all better off if producers save money which they can then invest in other productive activity that (by definition) people desire. Thus, "consumer welfare" is frequently used to mean aggregate economic welfare. See R. BORK, *THE ANTITRUST PARADOX* (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Interview with William F. Baxter, 50 *ANTITRUST L.J.* 151 (1981). This word usage obscures the possibility that producers of the product in question gain, consumers of that product lose, and consumers at large do not proportionately gain.

Community law, however, is concerned with consumer well-being in relation to the relevant product and would ordinarily not allow an increase in producer welfare to trump consumer benefit. Article 85(3) explicitly looks in this direction, for it allows a justification for combinations that distort competition only when a fair share of the benefits are passed on to consumers. Article 86 could incorporate the concept of Article 85(3)—a showing that a fair share of benefits are passed on to consumers—in a justification defense for otherwise exploitative conduct.

other than the cost of competing for the sales. If Roche does not meet this burden, the exploitative act is prohibited. If Roche cannot meet this burden, it might be inferred that Roche's objective was simply to gain more market share, even without the promise of a higher profit rate in the near term.

If the Community should embrace this mode of analysis, Common Market developments might provide helpful insights for U.S. antitrust policy.¹³⁹ If defendants in Community forums consistently fail to satisfy their burden of proof that acts of a certain kind, such as cutoffs or loyalty rebates, are justified by cost-savings or preservation of the integrity of a system, this evidence will tend to disprove the hypothesis that acts that do not increase market power are efficient. Conversely, if defendants consistently satisfy their burden of proof as to acts of a certain kind, such as the selective service-and-repair system of Hugin in marketing its cash registers, the evidence will tend to confirm the efficiency hypothesis for acts of the genre.

Thus, article 86 jurisprudence may contribute to U.S. law in the middle ground where antitrust enforcement is not necessary to keep the consumer from facing a higher price for known goods but is important to protect other public interests in a competitive system.

¹³⁹ Community law might provide particular guidance in the perplexed area where the plaintiff cannot prove that the challenged acts increase a dominant firm's market power, but principles of U.S. antitrust law—based on non-efficiency values now coming into question—provide for a cause of action.

A number of these U.S. cases involve claims that defendant's acts foreclosed competitors from the chance to compete for significant segments of the market. *See, e.g.*, *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1965); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

Other U.S. cases not involving output restriction concern boycotts and other forms of coercion. For an example of the latter, see *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986) (dentists agreed to refuse to give x-rays to insurers); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930) (film producer-distributors agreed to refuse to deal with exhibitors unless they signed a standard form contract requiring arbitration of disputes; their agreement offended the Sherman Act). For a statement of how output theory (*i.e.*, no government intervention unless the activity restricts output) could apply to a concerted secondary boycott by "traditional" orthopaedic surgeons against discounting orthopaedic surgeons, see the opinion of Judge Posner in *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1982), *vacated and replaced*, 706 F.2d 1488 (7th Cir. 1983).