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The European Court of Justice Judgement in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position

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ARTICLES

The European Court of Justice Judgment in *United Brands*: Extraterritorial Jurisdiction and Abuse of Dominant Position

JOSEPH JUDE NORTON*

The objective of this article is to examine two legal aspects of the European Community antitrust system which are of growing concern to the multinational enterprise doing business in Western Europe: (1) extraterritorial extension of jurisdiction of Community antitrust laws, and (2) the notion of "abuse of a dominant position" under Article 86 of the Treaty of Rome.¹ The recent judgment of the European Court of Justice in *United Brands*,² along with other judgments of the Court and decisions of the European Commission will be used as a focal point for analysis.

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1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (effective Jan. 1, 1958) [hereinafter referred to as the Treaty of Rome]. In a strict sense the "European Community" is comprised of (i) the European Coal and Steel Community established in 1952, (ii) the European Economic Community (EEC or Common Market) established in 1958, and (iii) the European Atomic Energy Community (Euratom), also established in 1958. For purposes of this article, however, "European Community" will be synonymous with the EEC. At present the European Community is comprised of nine member states: the six original members (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) and the three acceding members as of 1973 (Denmark, Ireland, and the United Kingdom). For a consideration of the Community law in general, see *inter alia* E. STEIN, P. HAY & M. WAELEBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* (1976); H. SMITH & P. HERZOG, *THE LAW OF THE EUROPEAN COMMUNITY: COMMENTARY ON THE EEC TREATY* (5 vols. 1976); and A. CAMPBELL, *COMMON MARKET LAW* (1969) (3 vols. with annual supplements). For a general consideration of the impact of EEC laws on American business, see *inter alia* Norton, *Overview of European Community Law: A Primer for Business and Attorneys*, 29 Sw. L. J. 347 (1975).

2. *United Brands Co. and United Brands Continentaal BV v. Commission of the European Communities*, [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429. The judgment was a result of an appeal by United Brands Company from a prior decision by the European Commission, [1976] [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800.

I. BACKGROUND

A. *The Treaty of Rome*

During the past twenty years, the antitrust laws of the European Community have evolved, at least from the perspective of the multinational enterprise, into the primary system of antitrust regulation in Western Europe, being generally applicable (with certain limited exceptions) to all sectors of the Community economy, private or public.³ While Community antitrust laws do not preclude the continuing existence and vitality of national counterparts (Germany's, for example),⁴ the national authorities are precluded from acting when the Community has asserted its authority or when national rules serve objectives different from those of the Community.⁵ One of the fundamental objectives of the Community, as embraced by the Treaty of Rome, is "the institution of a system ensuring that competition in the common market is not distorted."⁶ This system is an integral key to the overall objective of "establishing a common market and progressively approximating the economic policies of Member States."⁷ In any event, whether in antitrust matters or otherwise, where there is a conflict between Community and national rules, the Community rules shall prevail.⁸

3. See generally W. ALEXANDER, *EEC RULES OF COMPETITION* (1973); C. BELLAMY & G. CHILD, *COMMON MARKET LAW OF COMPETITION* (2d ed. 1978); J. BAROUDS, D. F. HALL & J. R. JAMES, *EEC ANTI-TRUST LAW* (1975); J. CUNNINGHAM, *THE COMPETITION LAW OF THE EEC, A PRACTICAL GUIDE* (1973) (with supplement); A. DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (1968); EEC COMMISSION, *PRACTICAL GUIDE OF THE COMMISSION, ARTICLES 85 AND 86 OF THE EEC TREATY AND RELEVANT REGULATIONS: A MANUAL FOR FIRMS* (1962); and C. OBERDORFER, A. GLEISH & M. HIRSCH, *COMMON MARKET CARTEL LAW* (2d ed. 1971).

4. For a discussion of national antitrust laws within the EEC, particularly respecting dominant positions, see *REGULATING THE BEHAVIOR OF MONOPOLIES AND DOMINANT UNDERTAKINGS IN COMMUNITY LAW* (J. A. van Damme ed. 1977). For statutory laws of each Member State, see O.E.C.D., *GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES* (4 vols. 1970).

5. See *Wilhelm v. Bundeskartellamt*, [1969] [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8056.

6. Treaty of Rome, Art. 3(f).

7. *Id.*, art. 2.

8. For a classic statement on the nature of Community law, see *Costa v. ENEL*, [1964] [1961-1965 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8023, at 7390. Also, see generally *Bebr, How Supreme is Community Law in the National Courts*, 11 COMM. MKT. L. REV. 3 (1974); *Bebr, Law of the European Communities and Municipal Law*, 34 MOD. L. REV. 481 (1971); and Warner, *Relationship between European Community Law and the National Laws of Member States*, 93 LAW Q. REV. 349 (1977).

The main prohibitions of Community antitrust laws are contained in Articles 85 and 86 of the Treaty of Rome,⁹ both of which are directly applicable (*i.e.*, fully self-executing) within the Member States.¹⁰ Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition" within the Community.¹¹ Article 86 expressly prohibits any abuse by one or more undertakings of a dominant position within the Community or in a substantial part of it.¹² Activities violative of

9. The provisions of the Treaty of Rome dealing with antitrust matters are articles 85-94. Briefly, article 85 pertains to restrictive trade practices; article 86 to abuses of a dominant position; articles 87-89 to the implementation of articles 85 and 86; article 90 to rules concerning public enterprises; article 91 to transitional antidumping rules; and articles 92-94 to rules on state aids.

10. The significance of a Community provision being self-executing is that such provision is automatically incorporated into the national legal order (*i.e.*, it becomes part of the law of the land) without further intervention of law or of any governmental authority: thus legal rights and obligations under Community law (which could give rise to individual claims before national courts) are directly created within the national legal order. See generally Bebr, *Directly Applicable Provisions of Community Law: the Development of a Community Concept*, 19 INT'L & COMP. L. Q. 257 (1970); and Winter, *Direct Applicability and Direct Effect—Two Distinct and Different Concepts in Community Law*, 9 COMM. MKT. L. REV. 425 (1972).

11. Article 85(1) contains certain illustrative, but not exhaustive, examples of particular restrictive trade activities which would be incompatible with the establishment of a common market, if the general requirements of article 85(1) are met, especially those activities which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supplies;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make 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 agreements.

12. Article 86, which will be the primary concern of this study, reads as follows:

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

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

article 85, which are not subject to a discretionary exemption from the European Commission, are automatically void.¹³ Activities violative of article 86 are absolutely null and void without exception.¹⁴

Council of Ministers Regulation 17 outlines the procedure for implementing and enforcing articles 85 and 86 by essentially providing for an administrative process whereby the European Commission is granted wide discretion to investigate and determine violations or to grant or deny negative clearances and specific exemptions under article 85.¹⁵ While the rules of civil procedure in a relevant Member State determine the ultimate enforcement procedure of a Commission decision,¹⁶ the Commission possesses the power to sanction an offending undertaking by requiring the termination of the illegal activity. It can also exact fines for specific violations and periodic penalty payments for continuing violations.¹⁷ Thus, the Commission can be viewed as both the primary interpreter and enforcer of the Community antitrust rules. The Court of Justice, however, retains the ultimate and unlimited power of review, both with respect to the legal interpretation of such rules and to the propriety of Commission antitrust decisions.¹⁸

The American observer of the Community antitrust system may be quick to conclude that the drafters of Community antitrust laws are undoubtedly astute students of the American counterpart.¹⁹ Nevertheless, a flippant comparison of the two

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

13. Treaty of Rome, Art. 85(2). Under article 85(3) the Commission is granted discretionary authority through the use of a balancing test of good and bad effects to grant specific or group exemptions for activities otherwise violative of article 85(1).

14. *Id.*, art. 86.

15. EEC Council of Ministers Regulation 17/62, 1 COMM. MKT. REP. (CCH) ¶ 2401 *et seq.* [hereinafter referred to as Regulation 17].

16. *Id.*, art. 15, at ¶ 2542.

17. *Id.*, art. 3, at ¶ 2422, and art. 16, at ¶ 2551; see generally Graupner, *Commission Decisionmaking on Competition Questions*, 10 COMM. MKT. L. REV. 291 (1973).

18. Treaty of Rome, Art. 172; and Regulation 17, art. 9, at ¶ 2482, and art. 17, at ¶ 2561.

19. For a comparison of EEC and U.S. antitrust laws, see *inter alia* COMMON

antitrust systems is fraught with danger, as both systems must be analysed within the context of their own respective milieu. For example, the historical and economic conditions which gave birth to the Community laws are wholly different from those which inspired the Sherman and Clayton Acts. In its formation, the Community was confronted with two major dilemmas: first, the attainment of the capacity to achieve economies of scale conducive to European industrial and commercial growth, and second, the amalgamation of the separate economies of the Member States to the extent necessary to form a unified common market. Accordingly, Community law and practice have shown no built-in reflex against size or against large "European" business combinations (cartels). Quite the contrary, Community practice has actively encouraged mergers, combinations, and cooperative groupings of genuinely "European" firms, particularly those of small and medium size, which are conducive to overall economic growth.²⁰ However, where such activities have been deemed to run counter to the basic objectives of the Treaty of Rome, the Commission has been most vigorous in enforcing Community antitrust laws.²¹

Prior to 1970, Article 86 was a dormant provision of the Treaty of Rome, discussed by academics, but neglected by the European Commission and Court of Justice.²² It was not until the Commission's decision in *Continental Can* in 1971,²³ and the Court of Justice's landmark judgment in this case in 1973,²⁴ that the legal potential of article 86 to attack mergers and acquisitions became apparent. Since 1973, there has been a

MARKET AND AMERICAN ANTITRUST, OVERLAP AND CONFLICT (J. A. Rahl ed. 1970); A. CROTTI, *TRADING UNDER EEC AND U.S. ANTITRUST LAWS* (1977); and Jones, *American Antitrust and EEC Competition Law in Comparative Perspective*, 90 *LAW Q. REV.* 191 (1974).

20. For a discussion of the economic objective behind the Community antitrust system, see D. MCLACHLAN & D. SWANN, *COMPETITION POLICY IN THE EUROPEAN COMMUNITY* (1967); and D. SWANN & D. LEES, *ANTITRUST POLICY IN EUROPE* (1973).

21. See generally EUROPEAN COMMISSION, *REPORT ON COMPETITION POLICY*, which has been published annually since 1972.

22. Prior to 1970, the Commission had not instituted proceedings under article 86.

23. For the Commission decision in *Continental Can*, see *U.S. Container Firm Held to Violate Antitrust Rules* [1971] [1970-1972 Transfer Binder, New Developments] *COMM. MKT. REP. (CCH)* ¶ 9481.

24. *Europemballage Corp. and Continental Can Co. v. Commission of the European Communities*, [1973] [1971-1973 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 8171.

series of decisions and judgments (the latest of which is *United Brands*) which have endeavored to put legal meat on the bare bones of article 86, although the Commission and Court of Justice have not always seen eye to eye on the matter. These decisions and judgments, many of which involve American-related multinationals, will be considered.

B. *Extraterritorial Extension of Jurisdiction*

Extraterritorial extension of antitrust laws by administrative and judicial organs has been increasing recently.²⁵ Of particular note are the jurisdictional claims of the European Community. This matter is of concern to the U.S. multinational from several perspectives. First, there is the aspect of direct economic activity within the Community through subsidiaries and branches; second, there is the aspect of multinational activity outside the Community which may be deemed to have an effect within the Community.²⁶

Traditionally, one of the basic principles for determining jurisdiction is the territorial principle, which makes reference to the place where the offense is committed.²⁷ Over the years, however, the territorial principle has been expanded by various jurisdictions. First, the so-called subjective territorial principle has been developed to establish the jurisdiction of a state and its judicial organs to prosecute and punish offenses commenced within the state and completed abroad. Second, the objective territorial principle has been established, which gives jurisdiction to a state and its judicial organs to prosecute an offense commenced outside the state but consummated within its territory.²⁸ For example, under U.S. practice the objective territorial principle has been expanded to cover "conduct that occurs outside its territory and causes an effect within its territory," if such conduct is a constituent element of the offense, is "substantial," is "a direct and foreseeable result of the con-

25. See Yazawa, *Extraterritorial Application of Antitrust and Securities Laws*, to be published in RECEUIL DES COURS (Hague 1976); and Kronstein, *Conflicts Resulting from the Extraterritorial Effects of the Antitrust Legislation of Different Countries*, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 432 (K. Nadelmann et al., eds. 1961).

26. See inter alia Allen, *The Development of European Economic Community Antitrust Jurisdiction Over Alien Undertakings*, 2 LEGAL ISSUES OF EUROPEAN INTEGRATION 35 (1974); and Goldman, *Les effets juridiques extraterritoriaux de la politique de la concurrence*, 1972 REV. MARCHÉ COMMUN 612 (1972).

27. See Harvard Research Study in International Law, *Jurisdiction With Respect to Crimes*, 29 AM. J. INT'L L. SUPP. 435, 439 (1935).

28. See BRIERLY, *THE LAW OF NATIONS*, 299-304 (6th ed. 1963).

duct outside the territory," and is not "inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."²⁹ This exposition of the so-called "effects" doctrine of territorial jurisdiction has developed considerable controversy in international legal circles,³⁰ and has been the subject of heated discussion within the Community.³¹ The question of extraterritorial jurisdiction as it has been developed by the Court of Justice in cases before *United Brands* will be discussed.

C. *The United Brands Case*

For present purposes, a factual background to *United Brands* is needed for a better understanding of the matters to be discussed. The United Brands Company (UBC), a New Jersey corporation, came into existence in 1970 through the merger of the United Food Company and the American Seal Kap Corporation. UBC represents the largest group on the world banana market and had been successful at maintaining somewhere between a 40-45% share of the relevant EEC market. UBC parents a European subsidiary, United Brands Continentaal BV (Continentaal), which maintains a registered office in Rotterdam, and which is responsible for coordinating banana sales in all Community Member States, except the United Kingdom and Italy (where separate affiliates Fyffes and C.I.F. operate). UBC maintains a highly vertically-integrated operation, owning vast banana plantation acreage. It maintains one of the world's largest banana boat fleets (including refrigerator ships), and operates ripening facilities in many of its importing countries. It also controls an elaborate distribution system of banana imports throughout the world (including the EEC), marketing its bananas through a common sales policy, and organizing and paying for advertising and sales promotion itself under the "Chiquita Banana" label. Only bananas satisfying certain quality standards are permitted to bear the Chiquita label; however, these products are sold at a price 30-

29. AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW, SECOND, FOREIGN RELATIONS OF THE UNITED STATES*, § 18 (1965).

30. See, e.g., AMERICAN SOCIETY OF INTERNATIONAL LAW, *PROCEEDINGS*, 1962, at 18-43; 1964, at 124-54; 1972, at 14-22; 1974, at 250-65; and Mann, *Anglo-American Conflict of International Jurisdiction*, 13 *INT'L & COMP. L. Q.* 1460 (1964).

31. Harding, *Jurisdiction in EEC Competition Law: Some Recent Developments*, 11 *J. WORLD TRADE L.* 422 (1977); and Jacquemin, *Application to Foreign Firms of European Rules of Competition*, 19 *ANTITRUST BULL.* 157 (1974).

40% above that of unbranded bananas. Despite this price differential, UBC sales at the time of the Commission's investigation accounted for 40% of total banana sales in the Netherlands, 50% in Belgium and Luxembourg, 45% in Germany and Denmark, over 40% in the United Kingdom (through its Fyffes subsidiary), 40% in Italy (through its Italian subsidiary, C.I.F.), 20% in France, and 25% in Ireland. UBC's main worldwide and EEC competitors, Castle & Cook Company and Del Monte Company (both American corporations), could only account for 9% and 5% respectively of the total EEC market.³²

UBC fixed prices weekly, and these prices appeared to vary significantly from country to country within the Community. For example, the average maximum weekly difference between Germany, the Benelux countries, and Denmark was 13.5% in 1974, with differences being even greater between these countries and Ireland, where UBC had only recently penetrated the market. With respect to conditions of sales to distributor/ripeners, UBC imposed prohibition on resale of UBC bananas to competing ripeners, on the resale of green bananas, and on the sale of non-UBC bananas. In addition, UBC dealers in one country were not permitted to sell bananas to dealers in other countries, which, according to the Commission, led to a segregation of markets within the Community.

In 1969, UBC's second largest distributor/ripeners in Denmark, Olesen, acquired the exclusive distributorship for "Dole" (the trade name for Castle & Cook) bananas in Denmark. It then appeared that UBC began undersupplying the orders placed by Olesen. In particular, in 1973, when Castle & Cook embarked upon a major sales promotion campaign in Denmark, UBC notified Olesen that it was discontinuing supplies of Chiquita bananas altogether. Olesen then endeavored to obtain products from other Danish and German customers of UBC, but was unable to acquire any green bananas for ripening from these sources. In February 1974, Olesen submitted a complaint to the Commission; however, in February 1975, an agreement was reached between Olesen and UBC, with supplies to Olesen being resumed. Olesen withdrew its complaint to the Commission in March 1975. In May 1974, certain Irish

32. For background information regarding United Brands Co. see Litvak & Maule, *Transnational Corporations and Vertical Integration: The Banana Case*, 11 J. WORLD TRADE L. 537 (1977).

petitioners also submitted an application to the Commission complaining of UBC activities.³³

On March 19, 1975, six days after the Olesen complaint was withdrawn, the Commission initiated proceedings against UBC on the basis that UBC was engaging in abuse of its dominant position. After an administrative hearing on the matter, the Commission, on December 17, 1975, decided that UBC had in fact infringed Article 86 of the Treaty of Rome.³⁴ As a consequence of this violation, the Commission assessed a fine of one million units of account against UBC. UBC appealed to the Court of Justice to set aside the Commission's decision and to order the Commission to pay UBC moral damages in the amount of one unit of account, and in the alternative, if the decision be upheld, cancel or at least reduce the fine.³⁵

On February 14, 1978, the Court of Justice rendered its judgment in the case by:

(i) annulling that part of the Commission's decision which found that UBC had imposed unfair prices for the sale of its bananas;

(ii) reducing the amount of the fine to 850,000 units of account;

33. For a general discussion of the facts, see [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9775-85.

34. The Commission based its conclusion on the findings that UBC:

(i) required its distributor/ripeners not to sell green bananas;

(ii) charged its distributor/ripeners in various Member States prices which differed considerably, without any objective justification, for bananas of the same quality, even though the conditions of the market were to all intents and purposes the same;

(iii) applied differing prices to its distributor/ripeners, the difference sometimes amounting to 138%; and

(iv) refused to supply Chiquita brand bananas to Olesen on the ground that Olesen had taken part in an advertising campaign for bananas of a competing brand.

Id. at 9785-92.

35. UBC based its appeal on the following contentions:

(i) it challenged the Commission's finding and analysis of the relevant market, the product market, and the geographic market;

(ii) it denied that it was in a dominant position within the Community for purposes of article 86;

(iii) it considered the clause related to the conditions of sales of green bananas to be justified in order to safeguard the quality of the product sold to the consumer;

(iv) it purported to show that the refusal to continue to supply Olesen was justified;

(v) it asserted that it had not charged discriminatory prices, nor that the prices charged were unfair; and

(vi) it complained that the Commission's administrative procedure was irregular. 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7704.

(iii) dismissing the rest of UBC's application; and

(iv) ordering each party to bear its own cost.³⁶

A discussion of the merits of the case will be made subsequently in this article.

II. EXTRATERRITORIAL JURISDICTION

What is significant about *United Brands* and the question of extraterritorial jurisdiction is that neither UBC nor the Court of Justice ever raised the issue. This silence, in this writer's view, indicates that, at least for the moment, the Commission and the Court have struck upon a common approach to which plaintiffs, such as UBC, will acquiesce. The underpinnings for this approach are derived from earlier jurisprudence of the Court.

A. *The ICI Case: The Search for a Noncontroversial Theory*

The references in Articles 85 and 86 of the Treaty of Rome with respect to "effect" upon trade between Member States or within the Common Market provide a literal basis for exposition of an "effects" doctrine respecting extraterritorial extension of subject matter jurisdiction by the European Community in antitrust cases. The Commission has been quite amenable to expound such a theory of extraterritorial jurisdiction and from an early stage has made clear that "the fact that several or all of the undertakings involved have their principle head offices outside the Community is no obstacle to the application of this rule insofar as the agreements, decisions or concerted practices have effects extending to the Common Market."³⁷ The Commission took solace in earlier language of the Court of Justice in its 1971 judgment in *Béguelin* (which language was not critical to the outcome of the case), wherein the Court gratuitously noted that "the fact that one of the enterprises participating in an agreement is located in a third country does not prevent the application of Article 85 . . . where the effects of the agreement extend to the territory of the Common Market."³⁸ However, as will be seen, the Court of Justice has

36. *Id.* at 7721-22.

37. European Commission, *Opinion relating to imports into the Community of Japanese products covered by the Treaty of Rome*, C111 OFFICIAL J. EUR. ECON. COMMUNITY 13 (Nov. 21, 1972).

38. *Béguelin Import Co. v. G. L. Import Export* [1972] [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8149, at 7697.

been reluctant to date to espouse explicitly the "effects" concept.

The 1972 decision of the Court of Justice concerning Imperial Chemical Industries of Great Britain (ICI) was the first clear exposition by the Court of its views on the extraterritorial applicability of Community antitrust laws.³⁹ One of the main issues in this case was the extent of the Commission's authority to fine a non-EEC enterprise for alleged violations of Community antitrust law. ICI, which at the time of the suit was a non-Community enterprise, had been fined in 1969 by the Commission, along with nine other dye stuff manufacturers, pursuant to article 85(1) for price fixing. ICI challenged the EEC's jurisdiction to impose such fines merely because of the effect produced in the EEC by acts it may have committed outside the Community. ICI further asserted before the Court of Justice that the acts in question, which may have been committed within the Community, were those of its subsidiary within the Community and not the parent company.

The Commission in its 1969 decision in *ICI* stated:

In view of these circumstances, there is no doubt that the price increases which the Commission found had taken place are at least the result of concerted practices within the meaning of Article 85, paragraph 1. There is therefore no need to examine whether these price increases are the result of an agreement.⁴⁰

The Commission avoided proof that the effects were a direct and causal offshoot of the concerted practices in question, that is, whether the concerted practices were "an essential constituent element of the offense" as is traditionally required by the objective territorial principle. While the facts of the case appear to indicate that there were concrete effects occurring within the EEC which were traceable to the concerted practices in question, the Commission apparently wished to avoid meeting this burden of proof.⁴¹

The Commission's decision was sharply criticized for a variety of reasons. First, the exposition of the effects doctrine by the Commission has been characterized as lacking the limi-

39. *Imperial Chemical Industries, Ltd. v. Commission of the European Communities* [1972] [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161.

40. *Commission Rules Against Dyestuff Manufacturers* [1969] [1965-1969 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9314, at 8691.

41. See Allen, *supra* note 26, at 51.

tations required by international law under the objective territorial principle.⁴² Moreover, one writer has questioned whether or not the Treaty of Rome establishing the EEC could have a binding effect upon nonsignatory states and their nationals.⁴³ The answer to this latter question depends entirely upon the legal status of the EEC itself.

From the point of view of the Court of Justice, the EEC is not analogous to an international organization but constitutes a separate, distinct, and autonomous legal order in and of itself.⁴⁴ This concept of the Community legal order provides the basis for the Commission's actions.⁴⁵

On appeal before the Court of Justice, however, the Commission offered the Court an alternative argument to support jurisdiction. This alternative argument was based on the fact that ICI as well as certain other foreign firms had acted within the EEC inasmuch as the foreign parent and its EEC subsidiaries were a "single enterprise" and as such, acts of a subsidiary could be imputed as actions of the foreign parent. The offering of this alternative, which ironically had previously been used to exclude activities between a parent and its subsidiaries from the Community antitrust laws,⁴⁶ appears to have been made on strategic grounds, perhaps based on a fear by the Commission that the "effects" concept might be rejected by the Court of Justice, particularly since this concept was not well received among European legal experts.⁴⁷

42. Steindorff, *Annotation on the Decisions of the European Court in the Dyestuff Cases of July 14, 1972*, 9 COMM. MKT. L. REV. 502 (1972).

43. Mann, *The Dyestuffs Cases in the Court of Justice of the European Communities*, 22 INT'L & COMP. L. Q. 35 (1973).

44. [1961-1965 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8023, at 7390.

45. The rules of competition of the Treaty are therefore applicable to all restrictions of competition that produce within the Common Market effects to which Article 85, paragraph 1, applies. There is therefore no need to examine whether the enterprises that originated such restraints of competition have their head office within or outside of the Community.

[1965-1969 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9314, at 8694.

46. See Commission Decision, *Relating to a Request for Negative Clearance* (Christiani & Nielsen), [1965-1969 Transfer Binder, New Developments] COMM. MKT. REP ¶ 9308, in which a genuine parent-subsidiary relationship was held to preclude the application of EEC antitrust laws to the intracorporate activities of the two corporations.

47. See Allen, *supra* note 26, at 53.

The most lucid exposition in this case of the "effects" concept in light of the objective territorial doctrine was made in the submissions of the Advocate General to the Court.⁴⁸ The Advocate General submitted a persuasive argument in favor of the "effects" concept, his position being grounded on the following reasoning:

(i) Article 85 presents as criteria the anticompetitive effect in the EEC, without taking into account either the nationality or the locality of the headquarters of the undertaking responsible for the breaches of competition;

(ii) The statutes and case law of the Member States of the EEC prohibit or penalize interference with competition, the effects of which are produced on a territory, "irrespective of the nationality or place of residence of the infringer;"

(iii) As to nonmembers of the EEC, the acceptance of the "effects" doctrine is recognized in statutes and laws of such countries as the United States, the United Kingdom, and Switzerland, the Advocate General placing particular emphasis upon American case law and the *U.S. Restatement on Foreign Relations*; and

(iv) According to both EEC and international law, the Community, as constituting a separate legal order, has the same powers as a state to apply its competition laws to undertakings, even if foreign to the EEC.⁴⁹

The ultimate conclusions reached by the Advocate General approximate those contained in Section 18(b) of the *Restatement*: the concerted practices in question must cause a direct and immediate restriction within the EEC and must be of a foreseeable character with substantial effect.⁵⁰ In addition, the Advocate General suggested that the effect of the infringement would be one of its constitutive elements and probably even the essential element. The Advocate General did concede that, while the EEC does have subject matter jurisdiction, the Community would not have executory or enforcement jurisdiction inasmuch as the Commission would not be entitled to take coercive measures against the foreign undertakings within ter-

48. For the function of the Advocate General, see Treaty of Rome, Art. 166.

49. Discussion of Advocate General Mayras, [1971-1973 Transfer Binder] COMM. MKT. REP. ¶ 8161, at 8049-58.

50. Note 29 *supra*.

ritory where the EEC could assert no authority.⁵¹

In spite of the lengthy debate of the "effects" doctrine, the Court of Justice, in reaching its decision, made no reference to the Advocate General's submissions, but instead accepted the Commission's alternative basis of jurisdiction (*i.e.*, the single enterprise theory).⁵² On the basis of the facts, particularly that binding telex instructions had been sent by ICI to its subsidiary and that ICI held all, or at least a majority of, its subsidiary's stock, the Court concluded that ICI and its subsidiaries constituted a single economic unit.⁵³ This single enterprise theory appears to be an aberrant version of the corporate law "alter ego" concept, which hinges not on legal criteria, but on economic considerations.⁵⁴

Although circumventing the "effects" doctrine, the Court reached the same conclusion with its single enterprise doctrine. Moreover, the Court avoided major international reactions against a broad extension of the extraterritorial jurisdiction doctrines. The Court did not, however, reject the "effects" doctrine: it never formally considered it.

B. From "Continental Can" to "United Brands"

The European Commission, apparently sensing that it was not worth the battle to press the "effects" doctrine when the single enterprise doctrine would suffice, primarily applied this latter theory in its 1971 *Continental Can* decision.⁵⁵ For pur-

51. [1971-1973 Transfer Binder] COMM. MKT. REP. ¶ 8161, at 8056.

52. *Id.* at 8031.

If the subsidiary does not in fact have autonomy in determining its course of conduct on the market, the prohibition of Article 85, paragraph 1, is inapplicable to the relationship between it and the parent company, with which it forms an economic unity. Since an affiliated group so structured forms a unity, the parent company can, under certain circumstances, be held responsible for the actions of the subsidiary. . . . Under these circumstances, the separation between parent firm and subsidiaries arising out of the fact that each has a distinct legal personality does not prevent their conduct on the market from being viewed as a unity for purposes of the application of the rules of competition. For this reason, it is the plaintiff that brought about the concerted practice within the Common Market.

53. Griffin, *The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 L. & POL'Y INT'L BUS. 375 (1974).

54. For further discussion of the case, see Acevedo, *The EEC Dyestuffs Case: Territorial Jurisdiction*, 36 MOD. L. REV. 317 (1973); and Mann, note 43 *supra*.

55. For the Court of Justice decision, see [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171; for the Commission decision, see [1970-1972 Transfer

poses of finding jurisdiction, the Commission spent little time analyzing the facts and concluded that, primarily because of stock ownership, Continental Can controlled its subsidiary, Europemballage, and accordingly, the behavior of the subsidiary could be imputed to the parent. The Advocate General provided further elaboration by noting that Continental Can's subsidiary did not display any autonomous behavior, nor did it have any economic independence. This conclusion was drawn partly from the fact that the funds for the acquisition of a Dutch corporation were made available by Continental Can. At the time that Continental Can caused Europemballage to make an offer to purchase, the latter company was still not fully organized.⁵⁶ Moreover, the Advocate General justified jurisdiction on both the subjective and objective territorial principles, since certain conduct (*i.e.*, the consummation of the acquisition) had occurred within the EEC and the acts of the enterprises involved had effects within the EEC. While affirming the single enterprise theory, the Court did use further language which would appear to indicate that even if Continental Can did not have a "controlled" EEC subsidiary, jurisdiction could have been exercised.⁵⁷

In its 1972 decision against Commercial Solvents Corporation (CSC),⁵⁸ another U.S. corporation, the Commission again

Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9481.

56. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171, at 8284-85.

57. *Id.* at 8298.

Plaintiffs cannot deny that Europemballage, which was formed by Continental on February 20, 1970, is a subsidiary of Continental. The fact that the subsidiary has its own legal personality is not sufficient to rule out the possibility that its conduct can be imputed to the parent company. This applies particularly where the subsidiary does not determine its market conduct autonomously but in the main follows the instructions of the parent company. . . . Such an acquisition, which affects market conditions within the Community, is the type to which Community law applies. The fact that Continental does not have its seat in the territory of one of the Member States is not sufficient to remove this enterprise from the application of Community law.

For further discussion of the case, see *inter alia*, Chandel, *Common Market—Antitrust—Use of Article 86 to Invalidate Mergers*, 15 HARV. INT'L L. J. 333 (1974); Hurwitz, *The Impact of the Continental Can Case on Combinations and Concentrations Within the Common Market*, 25 HASTINGS L. J. 469 (1974); Singley, *Abuse of a Dominant Position by Acquisition in the Common Market: The Continental Can Cases*, 12 COLUM. J. TRANSNAT'L L. 359 (1973); and Haubert, *Continental Can—New Strength for Common Market Anti-Trust*, 11 SAN DIEGO L. REV. 227 (1973).

58. *Commercial Solvents Corporation Fine Announced*, [1973-1975 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9543.

based its decision on the single enterprise theory. The Commission relied upon the definition of controlled companies under Italian company law and the fact that in its annual report the Italian subsidiary was listed as belonging to CSC. The Commission apparently did not feel entirely comfortable with its basis for linking CSC and its Italian subsidiary as one entity.⁵⁹ The twist in this case was that the Commission imputed the liability of the parent to that of the subsidiary, which seems to contradict the "nonautonomous behavior" test for the subsidiary.

On appeal to the Court of Justice, the Commission emphasized that CSC controlled its Italian subsidiary, "at least as regards its relation with complainant."⁶⁰ This emphasis appears to modify the single enterprise doctrine, requiring proof relating to the single conduct in question, and not with respect to the general activities of the parent and subsidiary. In *Commercial Solvents*, the Advocate General attempted to broaden even further the single enterprise theory by asserting that:

there is a presumption that a subsidiary will act in accordance with the wishes of its parent, because according to common experience subsidiaries generally do so act; . . . that unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Articles 85 and 86 of the EEC Treaty; and that the presumption can be rebutted only if it is shown affirmatively, by those concerned to rebut it, that the subsidiary in fact conducted its business autonomously.⁶¹

Such a presumption appears to place an insurmountable burden upon the defending parent and subsidiary corporations and runs contrary to the traditional corporate law presumption that related corporate entities are separate and distinct by virtue of their respective corporate personalities.

59. *Id.* at 9215-5.

CSC holds the power of control over ICI [its Italian subsidiary] and does, in fact, exercise that power, at least as far as relations with Zoja [complainant corporation] are concerned in such a way that no distinction can be made between the will and the actions of CSC and those of ICI. The CSC and ICI companies must, therefore, be treated as forming . . . a single undertaking or economic unit.

60. It should be noted that the Commission also, secondarily, relied on the "effects" doctrine.

61. *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v. Commission of the European Communities* [1974] [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209, at 8827.

As in *ICI and Continental Can*, the Court of Justice in *Commercial Solvents* avoided any discussion of the "effects" doctrine. The Court held that the conduct of CSC and its Italian subsidiary constituted a "united action" responsible for the conduct complained of, and that the "entity" needed to be proved only with regard to CSC and its subsidiary's relationship with the complainant. This assertion approximates the Commission's position; however, the Court of Justice provided no objective test for determining what constitutes a "united action."⁶²

The Commission has again recently applied the single enterprise doctrine in its decision against Hoffman-LaRoche (LaRoche), the Swiss pharmaceutical company, for abuse of its dominant position in the EEC as a supplier of vitamins.⁶³ By a fleeting reference, the Commission promptly based its jurisdiction on the fact that LaRoche had various subsidiaries within the Community, through which LaRoche could be considered to have acted.

As indicated above, in its 1975 decision against UBC, the Commission imposed a fine of one million units of account against UBC for the abuse of dominant position that it holds in the banana market within the EEC.⁶⁴ Because UBC is a highly integrated corporation whose operations are directed by a central board of directors in New York, the Commission concluded that the EEC subsidiaries did not possess any real autonomy, but formed a single economic unit with UBC. The facts in this case were perhaps the strongest of all preceding cases in justifying the assertion of the single enterprise concept. Moreover, unlike *Commercial Solvents*, the Commission decision held only the parent company liable.⁶⁵

III. ABUSE OF A DOMINANT POSITION

In its 1968 judgment in *Parke Davis*, the Court of Justice

62. For further discussion of the case, see Korah, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities*, 11 COMM. MKT. L. REV. 248 (1974).

63. *Vitamin Maker Fined for Distortions of Competition*, [1976] [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9853.

64. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9793.

65. For a discussion of the Commission decision, see Swan, *The EEC United Brands Decision: Can Chiquita Banana Find Happiness in Europe?* 7 CAL. W. INT'L L. J. 385 (1977).

first delineated the essential elements for proving a violation of Article 86 of the Treaty of Rome: "The prohibited situation therefore requires a combination of three elements: the existence of a dominant position; an improper exploitation of that position; and the possibility that trade between Member States may be affected thereby."⁶⁶ However, it has not been until recent years that the Court has begun to develop a body of jurisprudence respecting article 86.

A. *Presence of a Dominant Position*

Article 86 and related regulations of the Council of Ministers are silent as to what constitutes the presence of a dominant position. Clearly, a dominant position may be something less than outright monopoly; yet, it also appears that it must be more than mere dominance in terms of market share.⁶⁷

From the *Continental Can* decision to the *United Brands* decision, the Commission has remained persistent in its characterization of a dominant position.⁶⁸ The Commission's primary emphasis is on "overall independence of behavior," which is based on a broad economic analysis of the given fact situation.

The Court of Justice, in its various judgments centering around article 86, has considered a number of criteria to be significant in determining the existence of a dominant position. Perhaps the most enduring theme of the Court was first articulated in the 1971 *Deutsche-Grammophon* case, wherein the Court held that an enterprise is in a dominant position when it is able "to prevent effective competition on an important

66. *Parke, Davis & Co. v. Probel*, [1968] [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8054, at 7825.

67. See generally R. JOLIET, *MONOPOLIZATION AND ABUSE OF A DOMINANT POSITION* 241 (1970); and D. McLACHLAN & D. SWANN, *supra* note 20, at 218-27.

68. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7736.

Undertakings are in a dominant position when they have the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers. Such is the case where an undertaking's market share, either in itself or when combined with its know-how, access to raw materials, or capital enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive all other market participants of their commercial freedom, so long as it is strong enough in general terms to devise its own strategy as it wishes, even if there are differences in the extent to which it dominates individual submarkets. (Emphasis added.)

part of the relevant market.”⁶⁹ In *Continental Can*, the Court of Justice found dominance in a “relevant product market” to be critical, which was the first instance in which the Court had examined this criterion in any depth.⁷⁰ In other cases (e.g., *Suiker Unie*)⁷¹ the Court placed primary focus upon the market share of an enterprise within a relevant product market.

The most helpful and comprehensive enunciation by the Court of Justice with respect to its concept of a dominant position is contained in the *United Brands* judgment:

The dominant position referred to in this article [86] relates to a position of economic strength enjoyed by an undertaking which enables it to *prevent effective competition* being maintained on the *relevant market* by giving it the *power to behave to appreciable extent independently* of its competitors, customers and ultimately of its consumers. In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative. (Emphasis added.)⁷²

On the basis of the above synthesis made by the Court of Justice, in assessing whether an enterprise is in a dominant position within the Common Market, it is necessary to determine: (1) the relevant product market, (2) the relevant geographic market,⁷³ and (3) the position of economic power such enterprise enjoys within the market. This latter requirement combines the Commission’s notion of “independent behavior” with the Court’s early theme of “power to prevent effective competition.” As evidenced by *United Brands*, the Court is establishing a sophisticated economic analysis on a case-by-case basis in order to determine the existence of a dominant position.

1. *Relevant Product Market*

In the *Continental Can* judgment, the Court of Justice decided against the Commission primarily for failure to clearly define the “relevant product market.” In this case the Commis-

69. *Deutsche-Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. K.G.*, [1971] [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106, at 7193.

70. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171, at 8301-2.

71. “*Suiker Unie*” (Cooperative Vereniging) UA v. Commission of the European Communities [1975] [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334.

72. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7708.

73. Art. 86, note 12 *supra*. The criterion for establishing the relevant geographic market is that the dominant position must be in the Common Market or “in a substantial part of it.”

sion declared a merger between a newly-formed, wholly-owned Delaware subsidiary of Continental Can (Europemballage) and a Dutch corporation (Thomassen) which produced metal and other containers, to be an abuse of a dominant position. Europemballage was specifically created for the purpose of effecting the merger. Continental Can also transferred its interest in an 85%-controlled German subsidiary (Schmalbach) to Europemballage. Schmalbach held between 80-90% of the German supply market for tins used for fish and shellfish, 70-80% in the German market for meat cans, and between 50-55% in the market for metal lids. The Commission determined that there were three relevant product markets: (1) a "market for light metal containers for canned meat products;" (2) a "market for light metal containers for canned sea food;" and (3) a "market for metal enclosures for the food packing industry, other than crown corks." The Commission concluded that Continental Can, through its subsidiaries, dominated each of these markets.⁷⁴

The Court of Justice stressed that:

the limits of the relevant market are of major importance, since the possibilities for competition can only be judged on the basis of the properties of the products in question, which are especially suited for satisfying a continuing demand and appear to be changeable with other products only to a small degree.⁷⁵

In this respect, the Court gave deference to the question of "demand substitution," that is, the extent to which demand may be satisfied by interchangeable products, such as glass and plastic containers. However, in criticizing the Commission for failing to "state in detail the peculiarities which distinguish these three markets from one another and, therefore, necessitate their separate treatment,"⁷⁶ the Court seemed more concerned with the possibility of "production substitution" than "demand substitution." Production substitution essentially arises when, with simple adjustments in the manner of production and/or supply, a producer of one product can produce and supply products of the type in question or suitable substitutes therefor.⁷⁷ The Court held against the Commission primarily

74. [1970-1972 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9481, at 9032.

75. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171, at 8301.

76. *Id.*

77. For a general discussion of the economic implications of "production" and

because the Commission had failed to prove that competitors in other fields in the market for light metal containers could not "by mere adaptation" enter into this market with sufficient strength to form a serious counterweight. In effect, the Commission had not stated sufficiently why the alleged relevant markets were separate and distinct from each other.⁷⁸ A better factual showing by the Commission may well have changed the day.

In the 1972 decision in *Commercial Solvents*,⁷⁹ the Commission found that a group of companies controlled by Commercial Solvents enjoyed a worldwide monopoly in the production of a raw chemical used to produce an end drug product, and that its denial of the raw chemical through its Italian subsidiary to an Italian enterprise constituted an abuse of its dominant position within the EEC. The Commission held that both the raw chemical and the end drug product constituted separate markets, and that Commercial Solvents held a dominant position in each of such markets. Commercial Solvents contested this finding on appeal and asserted that no separate markets existed, particularly as other raw chemicals could be used, and were in fact being used, to produce the end product. The Court of Justice was unimpressed with the arguments for product substitution, as such adaptations had not been demonstrated on an industrial scale and would result in uneconomic prices. With respect to the question of whether there were two distinct markets, the Court decided that a dominant position could exist in the market for the raw chemical without having to take into consideration the market for the end product.⁸⁰ The Advocate General had argued to no avail that the question of the two markets could not logically be treated independently.⁸¹

"demand" substitution, see P. SAMUELSON, *ECONOMICS*, chs. 20, 22 (10th ed. 1976).

78. [1971-1973 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 8171, at 8301-2.

79. [1973-1975 Transfer Binder, New Developments] *COMM. MKT. REP. (CCH)* ¶ 9543.

80. [1974 Transfer Binder] *COMM. MKT. REP. (CCH)* ¶ 8209, at 8819.

[I]t is in fact possible to distinguish the market in raw material necessary for the manufacture of a product in the market in which the product is sold. An abuse of the dominant position on the market of raw materials may thus have effects restricting competition in the market on which the derivatives of the raw materials are sold, and the effects must be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market.

81. *Id.* at 8829.

In its 1975 decision in *General Motors*,⁸² the Commission evolved a strained definition of the relevant market. The Commission had alleged that General Motors of Belgium had violated article 86 by charging excessive prices in a substantial part of the Common Market for the issue of certificates and shields. After inspecting Opel vehicles to check their conformity with the generally approved type, and after determining identification of the vehicles and those registered abroad for no more than six months, General Motors was required to issue the certificates and shields under Belgian law. General Motors was the sole authorized agent for Opel in Belgium. General Motors countered that this inspecting function was ancillary to the automobile market, that such activity did not constitute a separate market, and that by virtue of Belgian law, General Motors' ability to fix prices was sanctioned by the Belgian government. The Court held, however, that this legal monopoly, when combined with the freedom to fix prices, led to a dominant position, the function of inspecting the particular car brand itself being the relevant market for purposes of article 86.⁸³

In its 1976 decision in *Hoffman-LaRoche*,⁸⁴ the Commission determined that the Swiss pharmaceutical company had abused its dominant position with respect to each group of thirteen vitamins available for sale within the Common Market. It considered each individual group of vitamins to constitute a distinct product market inasmuch as each group was "particularly suited to satisfy stable requirements and [was] not, or at least not to any significant extent, interchangeable with any other group or with any other products."⁸⁵ Here the

[I] do not think that the question whether the market for the raw materials for the production of a particular compound is a relevant market can, logically, be divorced from the question of whether the market for that compound is a relevant one. The consumer, after all, is interested only in the end product, and it is detriment to the consumer, whether direct or indirect, with which Article 86 is concerned. . . . So it was legitimate, in my opinion, for CSC to seek . . . to establish that the market for ethambutol was but one of a number of interchangeable antituberculosis drugs.

82. *General Motors Fined for Monopoly Practices*, [1974] [1973-1975 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9705.

83. *General Motors Continental N.V. v. Commission of the European Communities* [1975] [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320.

84. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9853.

85. *Id.* at 9875-11.

Commission focused on the possibility of demand substitution.

In *United Brands*, the Commission asserted that the relevant market was bananas. UBC countered that the relevant market was the fruit market in general. The Commission based its arguments on the relevant market primarily upon research conducted by the Food and Agriculture Organization in parts of France, Germany, and England.⁸⁶ This study demonstrated that the prices and availabilities of other fruits had little impact on the prices and availabilities of bananas and that this finding was applicable not only to year-round fruits (*e.g.*, oranges and apples), but also to many seasonal fruits. The Commission concluded that "the effects of the prices and availabilities of other types of fruits [were] too brief, too ineffective and too sporadic, applying to different fruit in different places, for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefor."⁸⁷ The Commission also emphasized that bananas form a significant part of the diets of certain consumer sectors, such as the very young, the sick, and the elderly. In effect, the Commission concluded that the choice of bananas is "a matter of customer preference, and customers do not readily accept other fruits as a substitute."⁸⁸ The Court of Justice supported the Commission's position.

In considering whether the banana was in fact interchangeable with other fruit products, the Court of Justice considered such factors as the production of bananas over the course of the year, possible cross-elasticity of demand (*i.e.*, the degree to which the relevant demand for the product responds to changes in the price of each relative to the price of the other), the physical characteristics of the banana distinguishing it from other fruits, and the composition of consumer sectors. Based on this analysis, the Court concluded that there was a small degree of "substitutionability," that there was a relatively consistent consumer demand for bananas, which could be satisfied by UBC throughout the course of the year, and that

86. FAO Commodity Policy Studies, Demand Interrelationships between Major Fruits, No. 19, Rome 1969; Competition between Bananas and Summer Fruits: Preliminary Case Studies, CCP BA 73/8, July 1973.

87. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9785.

88. *Id.*

a large number of consumers could not be "enticed away from the consumption of this product by the arrival of fresh fruit on the market, even when the seasonal peak periods affected it for a limited period of time." Accordingly, the Court held that the banana market was in fact the relevant market, inasmuch as it was "sufficiently homogeneous and distinct from the market for other fresh fruits."⁸⁹

2. *Relevant Geographic Market*

In determining the relevant geographic market, the Court of Justice stated in *Suiker Unie*:

For the purpose of determining whether a specific territory is large enough to amount to 'a substantial part of the common market' within the meaning of Article 86 of the Treaty the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.⁹⁰

In this case, the Court held that the Belgo-Luxembourg sugar market constituted a "substantial part" of the Community. In so concluding, the Court analyzed the increased production in this market between 1969 and 1972 and its increased percentage share in comparison with the overall Community market. By use of these same criteria, the Court also held Holland and the southern part of Germany each to constitute a "substantial part" of the Community. Thus, the determination rests not only upon the extent of the geographical area, but also upon the product market in that area and the relationship of that product market to that of the entire Community market.⁹¹

In *United Brands*, the Commission found that Germany, Denmark, Ireland, the Netherlands, and Belgium-Luxembourg comprised the relevant geographic market within which it was necessary to consider whether UBC had the power to hinder effective competition. The Commission was of the view that the "[e]conomic conditions in this part of the Community allow importer/distributors to carry on their trade in bananas normally and there are no noticeable economic obstacles in the way of UBC as compared with other importer/distributors."⁹²

89. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7705.

90. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8214.

91. For a discussion of the case, see Gijlstra and Murphy, *Some Observations on the Sugar Cases*, 14 COMM. MKT. L. REV. 45 (1977).

92. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9785.

The Commission asserted that the whole structure of UBC's European operations, with concentration on its Dutch subsidiary, was geared to the marketing of its bananas in a single center for the whole of that part of the Community. The other Member States of the Community (*i.e.*, France, Italy, and the United Kingdom) were excluded from this geographic market, notwithstanding the significant economic presence of UBC (or its affiliate) in these countries, because of the special circumstances pertaining to import arrangements and trading conditions and the fact that bananas of various types and origins were sold in those countries.⁹³

UBC countered that the Commission should have more clearly determined the geographic market because of the differences in conditions of competition in the Member countries within the alleged geographic market (*e.g.*, differences in systems of customs duties and consumer habits). The Court, conceding that such differences existed with respect to applicable tariffs and transportation costs, concluded that the conditions of competition within the countries comprising this relevant market were "sufficiently harmonious" to be considered in their entirety, and therefore, a relevant geographic market for purposes of article 86.⁹⁴

3. *Economic Power*

An analysis of the economic position enjoyed by an enterprise within a relevant market usually commences with a quantitative analysis, particularly with respect to the market share. For example, in *Suiker Unie*, the Court focused on the fact that the leading Belgian producer of sugar accounted in prices for 85% of Belgian production. However, the Court noted that while this figure is "highly significant," it must still be "evaluated in light of the negligible volume of sugar imports in Belgium." As a result of all the circumstances, the producer enjoyed sufficient economic power "to impede effective competition" on the market in question, and consequently, during the relevant period, occupied a dominant position on this market.⁹⁵

In *United Brands*, the Commission concluded that there was sufficient economic power enjoyed by UBC to constitute

93. *Id.* at 9785-86.

94. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7706-7.

95. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8215.

a dominant position. This determination was based on a series of factors which, when taken together, produced "a degree of overall independence in its behavior on the market in question which enable[d] it to hinder effective competition within this part of the Community."⁹⁶ These factors included the market share compared with that of its competitors, the diversity of its sources of suppliers, the harmonious nature of its products, the organization of UBC's production and transportation systems, UBC's marketing system and publicity campaigns, the diversified nature of UBC operations, and most significantly, UBC's overall vertical integration. UBC denied this conclusion as unsupported by any evidence. UBC asserted that an objective evaluation of its structure and the relevant market conditions would indicate that it was not in a dominant position in a relevant market.⁹⁷

The Court of Justice analyzed UBC's market position from two perspectives: first, UBC's internal operating structure, and second, the competitive situation within the market. In considering the high degree of vertical integration of UBC at all stages (*i.e.*, producing, packaging, transporting, selling, and displaying), the Court concluded that UBC had firm control over the economic destiny of the product. The Court of Justice next considered the impact on competition within the relevant market. The fact that UBC's share of the relevant market was always more than 40% and nearer 45% was significant, but did not automatically infer that UBC dominated this market. In addition to market share, the Court felt it necessary to consider the strength and number of competitors. UBC's share of the market was seven times greater than its closest competitors, with all other competitors falling far behind. The Court interjected temporal considerations (which may in future cases evolve as a separate criterion), by observing that, while there were certain periods when competition was enhanced, these periods were limited both in time and space. Moreover, the Court stressed that UBC's overall economic strength permitted it the flexibility to direct strategy against new competitors within the market, which provided additional obstacles to the existing practical barriers for the entry of new competition

96. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9787.

97. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7708.

(e.g., large capital expenditures).⁹⁸

UBC raised two objections concerning this issue, namely that its other competitors were able to use the same methods of production and distribution if they so chose, and that UBC had suffered financial losses in its banana division for a five-year period from 1971 to 1976. To the first objection, the Court responded that none of UBC's competitors were able to use the same methods as they "came up against almost insuperable practical and financial obstacles." With respect to the latter objection, the Court noted that an undertaking's economic strength "is not measured by its profitability." On the basis of this total economic analysis of UBC's structure and its situation with respect to the relevant market, the Court held that the "cumulative effect of all the advantages enjoyed by UBC thus ensures that it has a dominant position on the relevant market."⁹⁹

B. *Abusive Practices*

In the *United Brands* judgment, the Court of Justice was concerned primarily with four alleged abuses of article 86:

- (i) restrictions on the resale of green bananas;
- (ii) refusal to continue to supply a longstanding customer;
- (iii) discriminatory pricing; and
- (iv) unfair pricing.¹⁰⁰

Under the terms of article 86, the mere presence and enjoyment of a dominant position is not in and of itself prohibited. What is prohibited is the abuse or the improper exploitation of the position.¹⁰¹ In this sense, article 86 is neutral with respect to the matter of size.¹⁰² However, article 86(2) does set forth certain broad, illustrative types of activities which would constitute an abuse. Such abusive activities include: imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets, or technical development; applying dissimilar conditions to equivalent transactions; and

98. *Id.* at 7708-11.

99. *Id.* at 7711.

100. Note 34 *supra*.

101. Treaty of Rome, Art. 86, note 12 *supra*.

102. See generally European Commission, *Annual Report on Competition Policy*, issued annually since 1971.

making the conclusion of contracts subject to acceptance of supplementary obligations which have no connection with the subject of the contracts.¹⁰³ These criteria indicate that they apply "not only to practices that are likely to cause an immediate detriment for consumers, but also to practices which, because of their effect on the structure of actual competition . . . are harmful to them [consumers]."¹⁰⁴ Moreover, while these categories of activities do not purport to be exhaustive, they are sufficiently broad that most activities (including the alleged abuses in *United Brands*) which could be determined to be abusive would fall within one of these four categories.¹⁰⁵ "[T]he restrictions of competition, which the Treaty permits under certain circumstances because the various Treaty objectives must be reconciled, find a limit in the requirements of Articles 2 and 3, beyond which there is a danger that a weakening of competition would be contrary to the goals of the Common Market."¹⁰⁶ Therefore, irrespective of any specific classification of an activity, every alleged "abusive exploitation" under article 86 must be tested objectively, regardless of any consideration of fault.

1. *Prohibitions on Resale*

In *United Brands* the Commission specifically objected to UBC's above-mentioned conditions of sale to its distributor/ripeners.¹⁰⁷ These general conditions had been in effect since 1967, although not always in writing. In January 1976, UBC circulated a letter to all its established customers to the effect that these general conditions were not intended to forbid the sale by a duly appointed ripener to another Chiquita ripener of green Chiquita bananas or the resale of unbranded green bananas.¹⁰⁸ The Court of Justice, however, rejected UBC's position and upheld the Commission's order to cease the prohibition on resale.¹⁰⁹ The Court viewed this general condition of sale

103. The text of article 86(2) is quoted at note 12 *supra*.

104. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171, at 8300.

105. See Samkalden and Druker, *Legal Problems Relating to Article 86 of the Treaty of Rome*, 3 COMM. MKT. L. REV. 158, at 176 (1965).

106. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171, at 8299.

107. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7668.

108. *Id.* at 7769.

109. *Id.* at 7713.

Although it is commendable and lawful to pursue a policy of quality . . . such a practice can be justified only if it does not raise obstacles whose effect goes beyond the objective to be obtained. In this case, . . . the

in a similar manner as it would a prohibition of exports.¹¹⁰

2. *Refusal to Continue Supplies*

The Commission also concluded that UBC's refusal to continue supplies to Olesen could not be justified objectively and was an arbitrary interference in the management of Olesen's business, which had caused it to suffer damage and which was designed to dissuade UBC's ripeners from selling bananas bearing competing brand names or at least from advertising them. The Commission viewed these facts as tantamount to a violation of article 86.¹¹¹ UBC endeavored to justify their refusal to sell because of Olesen's dealings with UBC's primary competitor. Moreover, UBC contended that the refusal did not constitute an abuse inasmuch as it did not affect the actual competition on the Danish market and did not affect trade between Member States.¹¹² The Court of Justice was not impressed with UBC's argument:

[A]n undertaking in a dominant position for the purpose of marketing a product—which cashes in on the reputation of a brand name known and valued by the consumers—cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by the customer are in no way out of the ordinary. Such conduct is inconsistent with the objectives laid down in . . . the Treaty [of Rome] . . . since the refusal to sell 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. . . . Such a course of conduct amounts therefore to a serious interference with the independence of small or medium sized firms in their commercial relations with the undertaking in a dominant position

prohibition on resale imposed upon duly appointed 'Chiquita' ripeners and the prohibition on the resale of unbranded bananas . . . are without any doubt an abuse of the dominant position since they limit markets to the prejudice of consumers and affect trade between Member States, in particular by partitioning national markets. Thus, UBC's organization of the market confined the ripeners to the role of suppliers of the local market and prevented them from developing their capacity to trade vis-à-vis UBC.

110. *Id.* at 7711. "Apart from the fact that this obligation indirectly helps to strengthen and consolidate UBC's dominant position, it makes any trade in UBC's green bananas, whether branded or not, either within a single State or between Member States, almost impossible."

111. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9790.

112. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7714.

and this independence implies the right to give preference to competitor's goods.¹¹³

The applicant also argued that in view of a 40% fall in the price of bananas on the Dutch market in the latter two weeks of 1974 that competition had not been affected by the refusal to supply Olesen. The Court of Justice dismissed this contention, finding that this fall in prices was attributable to the lively competition in which UBC and Castle & Cook were engaged. The Court also found that it was immaterial whether this behavior on the part of UBC related to trade between Member States "once it [had] been shown that such elimination [would] have repercussions on the terms of competition in the Common Market."¹¹⁴

The Court of Justice in *Commercial Solvents* had previously made clear that if an enterprise in a dominant position with respect to the supply of goods to its customers in fact competes with its customers, it cannot act in such a manner as to eliminate or impair competition, whether by a refusal to supply or by other discriminatory means.¹¹⁵ If there is a refusal to supply regular customers, the dominant enterprise must justify objectively such refusal. In all events, the refusal to supply a longstanding customer who purchases with a view to reselling to another Member State is deemed by the Court of Justice to have "an appreciable effect" on trade between Member States, and therefore, the refusal is violative of article 86.

3. *Discriminatory and Unfair Pricing*

The most significant aspect of *United Brands* with respect to the determination of abuse of a dominant position centers around UBC's pricing practices, particularly whether these practices were discriminatory and/or unfair.

In determining whether UBC's pricing practices were discriminatory, the Commission concluded: "For an undertaking in a dominant position, a policy of systematically setting prices at the highest possible level, resulting in wide price differences, cannot be objectively justified, particularly where that undertaking maintains market segregation."¹¹⁶ In reaching this con-

113. *Id.*

114. *Id.* at 7715.

115. [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209, at 8819.

116. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9788.

clusion, the Commission utilized the same test previously suggested by the Court of Justice in *Deutsche-Grammophon*, which was an analysis of price differences for the same products in different Member States.¹¹⁷

UBC countered that its prices were determined by market forces and therefore were not discriminatory. Moreover, UBC asserted that the average difference in the price of Chiquita bananas between the various markets in question was only 5% in 1975. Prices were calculated in any given week in order to reflect as much as possible the anticipated yellow market price of the following week for each national market. UBC insisted that so long as the Community had not set up institutions and machinery for a single banana market, the various markets would remain national and would respond to a variety of distinctive factors.¹¹⁸

The Court of Justice agreed with the Commission that the policy of differing prices enabled UBC to apply dissimilar conditions to equivalent transactions with other trading parties, thus placing them at a competitive disadvantage. The Court recognized that because of the lack of a Community market, price differentials may legitimately arise; however, the Court appears to suggest that the dominant firm must be able to justify price differentials between national markets. Accordingly, while conceding that the responsibility for establishing a single banana market did not rest with UBC, the Court stressed that UBC's pricing practices must comply with the rules and regulations and coordination of the market laid down by the Treaty of Rome. Therefore, once the differences in such matters as transportation costs, taxation, customs duties, wages, differences in parity of currency, and the density of competition have been assessed and taken into account, the Treaty of Rome would require UBC to exercise responsibility toward consumers with respect to the final pricing.¹¹⁹

The Court of Justice derived from the facts that UBC did impose its selling price on the intermediate purchaser and that these discriminatory prices, which varied according to the circumstances of the Member States, constituted "many obsta-

117. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106, at 7193.

118. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7716-17.

119. *Id.* at 7717.

cles to the free movement of goods and were intensified by the clause forbidding the resale of bananas while still green and reducing the deliveries of the quantities ordered."¹²⁰ The Court concluded that UBC's pricing policy amounted to a "rigid partitioning of national markets . . . at price levels which were artificially different, placing certain distributor/ripeners at a competitive disadvantage." Such practice was an abuse of a dominant position for purposes of article 86.¹²¹

The point on which the Commission and Court differed concerned whether the prices charged by UBC to its customers in Germany, Denmark, the Netherlands, and the Belgo-Luxembourg area were unfair. In *General Motors*, the Court had proposed a test of price unfairness based on the relationship of the price to the economic values of the services provided, particularly when the effect was to curb parallel imports by neutralizing the possibility of more favorable price levels as applied in other sales areas of the Community.¹²² The Commission felt that UBC's pricing practices met this test; however, the Court of Justice, in applying the *General Motors* test, rejected the Commission's view, and annulled that part of the Commission's decision which found that UBC had imposed unfair prices for the sale of its bananas.

The Court of Justice did not disagree with the legal arguments of the Commission. However, the Court found that the Commission had failed to produce "adequate legal proof of the facts and evaluation which form the foundation of its findings that UBC had infringed Article 86 of the Treaty by directly and indirectly imposing unfair selling prices for bananas."¹²³ The Court specifically criticized the Commission for its failure to analyze UBC's cost structure, which made it impossible for a proper analysis of differentials in profit margins. The Court felt that the Commission was at least under a duty to require UBC to produce particulars of all the constituent elements of its production cost and not simply to base its view of excessive prices on an analysis of the differences between prices charged in the different Member States. The Court was particularly unimpressed by the comparisons between prices charged in the

120. *Id.*

121. *Id.*

122. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320, at 7735.

123. [1978] COMM. MKT. REP. (CCH) ¶ 8429, at 7719.

Irish market (which were the lowest) and those charged in other parts of the Community. Consequently, the Court held that the burden of proof of showing unfair prices rested with the Commission and that the Commission had failed to meet this burden.¹²⁴

C. *Effect on Trade Between Member States*

The requirement of article 86 that the abuse of the dominant position be apt to "affect trade between Member States" is analogous to that requirement contained in article 85(1). Under article 85(1) the Court of Justice has deemed trade between Member States to be affected whenever the restrictive practice may impair, directly or indirectly, potentially or actually, the realization of the unified Common Market.¹²⁵ Paradoxically, a practice may in fact increase trade between Member States, yet also be deemed a restrictive agreement for purposes of article 85(1) because the actual or potential effect upon trade between the Member States does not necessarily have to be *prima facie* adverse.¹²⁶ These applications of principles under article 85(1) would appear to be equally apropos for purposes of article 86.¹²⁷

Both the Commission and the Court of Justice have generally had little difficulty in interpreting the facts of a given case as meeting this requirement of article 86. The only major qualification had been the application of a *de minimis* rule which requires that trade between Member States be "appreciably" affected by the agreement or act in question.¹²⁸ In *United Brands*, the Commission determined that UBC's

124. *Id.*

125. *See, e.g.*, *S. A. Cadillon v. Firma H6ss Maschinenbau K.G.*, [1971] [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8135, at 7542.

126. *See, e.g.*, *Consten and Grundig v. Commission of the European Communities*, [1966] [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8046.

127. *Cf.* [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209, at 8821.

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

Here, the Court of Justice appears to be equating possible repercussions with the possibility of effect on trade between Member States.

128. *See, e.g.*, *European Commission, Guidelines to Promote Cooperation between Firms*, [1970] [1970-1972 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9367.

dominant position was capable of affecting trade between Member States to an appreciable extent as follows:

(i) the prohibition on the resale of green bananas impeded trade between distributor/ripeners in different Member States and deflected the flow of trade from its normal course;

(ii) the refusal to supply a longstanding customer who purchased with a view toward reselling in another Community state limited markets and could have eliminated a trading party from the relevant market;

(iii) the application of dissimilar prices for equivalent transactions was liable to encourage or discourage the export of those bananas from one Member State to another according to the different price levels in the various Member States; and

(iv) the imposition of unfair prices on customers in certain Member States was liable to affect the quantities of Chiquita bananas traded between Member States, in that it encouraged export from Member States where such unfair prices were not opposed and vice versa.¹²⁹

The rationale used by the Commission with respect to points three and four above is difficult to accept, because such conduct would in fact produce a beneficial effect on trade between the Member States. Such considerations, however, do not appear to be relevant, as the Court of Justice sustained the Commission's findings on point three above and would most likely have sustained the finding with respect to the effect on trade between Member States as to number four if the Commission had met its burden of proof in showing unfair prices.¹³⁰ The Court of Justice also concurred with the Commission on point one above because this prohibition was capable of affecting trade between Member States and dividing up national markets¹³¹ and on point two because this had an influence on the normal movement of trade and an appreciable effect on trade between Member States.¹³² When there is evidence of actual harmful effect on the market, as was the case in *United Brands*, any consideration of possible beneficial effect is appar-

129. [1976-1978 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9800, at 9790.

130. [1978] 3 COMM. MKT. REP. (CCH) ¶ 8429, at 7717.

131. *Id.* at 7713.

132. *Id.* at 7715.

ently precluded. The emphasis of both the Commission and the Court of Justice is, therefore, directed toward the potentiality of a harmful effect brought about by abusive exploitation of a dominant position on the market. The factual situation of *United Brands* provided the Commission and Court with an opportunity to find both a dominant position and an abuse of that position.

IV. CONCLUSION

Article 86 will undoubtedly continue to be a fertile device for the European Commission in attacking the activities of dominant corporations doing business within the Community, whether such corporations are based within the EEC or outside. The European Court of Justice appears to appreciate the legal and economic potential of article 86 and has shown itself substantially in agreement with the Commission with respect to the legal analysis of this article. However, the Court of Justice appears to be signalling the Commission to take a more careful and detailed approach in developing and proving its allegations.

This writer does not view the differences between the Court of Justice and the Commission as a significant clash in basic legal or economic antitrust philosophies, nor does he believe that such differences will have a long term effect upon the energetic institution of cases under article 86 by the Commission. The aggressiveness of the Commission will, however, most likely be tempered by the requirement of the strict, analytical proof of facts required by the Court of Justice.

With respect to the question of the extraterritorial application of the EEC antitrust laws, it appears that for the moment both the Commission and the Court of Justice will continue to favor the "single enterprise" theory over any embrace of the "effects" doctrine of extraterritorial jurisdiction. Although one can argue the legal consistency of the "single enterprise" doctrine, and particularly its refinement into the "unity of action" doctrine, there is little doubt that the Commission will continue to act with confidence against foreign multinationals acting through EEC subsidiaries in situations in which the Commission feels there is a violation of either Articles 85 or 86 of the Treaty of Rome. Moreover, it appears clear that the Court of Justice will uphold such an extension of jurisdiction both on the basis of its interpretation of articles 85 and 86 and of its

overall view of the legal personality of the Community. Given a fact situation that does not accommodate the "single enterprise" theory, it is most likely that the Commission will once again resurrect its "effects" doctrine of extraterritorial jurisdiction, and if necessary, press for a clear resolution of the matter before the Court of Justice.