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United Brands Company v. Commission of the European Communities: Window to Price Discrimination Law in the European Economic Community

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Enterprises operating within the European Economic Community[1] have long faced the difficult task of ascertaining whether they are subject to the price discrimination restrictions of the Treaty of Rome.[2] The difficulty stems from the ambiguity present in the Treaty provisions and is exacerbated by the lack of authoritative interpretation of their restrictions.[3] However, a recent opinion of the European Communities' Court of Justice,[4] *United Brands Co. v. Commission of the European Communities*,[5] has brought the contours of the price discrimination prohibition into sharper focus. Although a year has passed since the opinion was handed down, the Court's decision in *United Brands* re-

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[1] The European Economic Community (EEC) is a supranational institution created by the Treaty Establishing the European Economic Community (Rome Treaty), *entered in force* Jan. 1, 1958, 298 U.N.T.S. 11. The EEC originally consisted of six countries: Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany. On January 1, 1973, Denmark, Ireland, and the United Kingdom became members. *See* Treaty of Accession to the European Economic Community, *done* Jan. 22, 1972, art. 2, 15 J.O. COMM. EUR. (No. L 73) 5 (1972).

[2] Rome Treaty, *entered in force* Jan. 1, 1958, arts. 85(1)(d) & 86(c), 298 U.N.T.S. 11, 47-49. Price discrimination is usually thought to be the practice of selling similar units of output at different prices not related to differences in costs. The practice is regarded as a means by which the monopolistic seller is able to increase his own short run profits above the level attainable by a policy of uniform pricing in given demand conditions. K. GEORGE & C. JOLL, COMPETITION POLICY IN THE U.K. AND THE EEC 152 (1975) [hereinafter cited as GEORGE & JOLL]. The price discrimination prohibitions of the Rome Treaty, however, are phrased in terms of "dissimilar" prices. In the United States, the Supreme Court has construed price differentiation as synonymous with price discrimination. *See* FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

[3] The only two prior cases of illegal price discrimination were Coöperatieve vereniging 'Suiker Unie' UA v. Commission of the European Communities (Sugar Cartel), [1975] E. Comm. Ct. J. Rep. 1663, 17 Comm. Mkt. L.R. 295 (1975), and *Re* GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte), 14 J.O. COMM. EUR. (No. L 134) 15, 10 Comm. Mkt. L.R. D35 (R.P. Supp.), *application for stay granted in part*, [1971] E. Comm. Ct. J. Rep. 791, 11 Comm. Mkt. L.R. 694 (1971), *modified*, 15 J.O. COMM. EUR. (No. L 166) 24 (1972), 11 Comm. Mkt. L.R. D115 (R.P. Supp. 1972). In *Sugar Cartel*, the Court held that an undertaking amounting to eighty-five percent of the Belgian sugar market had abused its dominant position by offering a rebate to customers who bought exclusively from the cartel. *GEMA* involved a West German musical copyright business enjoying a monopoly in its own country. The Commission of the European Communities found that GEMA had engaged in practices which discriminated against nationals of other members of the Common Market.

[4] The Court of Justice of the European Communities acts as the ultimate reviewing body of rulings by the Commission of the European Communities. The Commission, which is the general executive authority of the European Economic Community, has a function similar to the United States Federal Trade Commission in trade matters and is the guiding force in the development of antitrust policy in the European Economic Community. *See* Swan, *The EEC* United Brands *Decision: Can Chiquita Banana Find Happiness in Europe?*, 7 CAL. W. INT'L L.J. 385, 386 (1977).

[5] 21 Comm. Mkt. L.R. 429 (1978).

mains the fundamental interpretation of price discrimination law under the Rome Treaty. Despite some ambiguity, the Court's explanation clarified many of the issues raised in a price discrimination charge.

The Court's boldest interpretive stroke was its determination that a single enterprise with a market share of less than forty-five percent occupied a position of dominance in the market. Prior to the *United Brands* case, neither the Commission nor the Court of the European Communities had found any enterprise with a market share of less than seventy percent to be in a dominant position.[6] The significance of this more inclusive definition of dominance for firms operating within the Community is far reaching. Formerly, the discrimination provisions of the EEC competition laws[7] appeared to reach only price discrimination practiced by firms with very large market shares[8] and by anticompetitive business combinations.[9] After *United Brands*, all firms operating within the EEC are on notice that their pricing practices are subject to the Community laws against price discrimination. In view of the laws' broadened reach, the significance of the Community's policy on price discrimination is correspondingly increased, and each element of the Community's price discrimination prohibition assumes new importance to firms operating within the EEC. The opinion, therefore, merits

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6 Note, 11 TEX. INT'L L.J. 329, 336 (1976).

7 The competition laws of the European Economic Community are embodied in articles 85-90 of the Rome Treaty. Article 85 is strikingly similar to § 1 of the United States Sherman Antitrust Act, 15 U.S.C. § 1 (1976). Article 86 resembles § 2 of the Sherman Act, 15 U.S.C. § 2 (1976), but differs in that article 86 is not directed at the achievement of market power but only its abuse.

8 The prohibition in article 86 applies to firms in a dominant position. In its pertinent parts, article 86 provides:

> To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.
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> Such improper practices may, in particular, consist in:
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> . . . .
>
> (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage . . . .

Rome Treaty, *entered in force* Jan. 1, 1958, art. 86(c), 298 U.N.T.S. 11, 48-49.

9 The prohibition in article 85 is applicable to all agreements between undertakings, decisions by associations of undertakings and other concerted practices. The text of article 85 relating to price discrimination provides:

> 1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:
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> . . . .
>
> (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage . . . .

Rome Treaty, *entered in force* Jan. 1, 1958, art. 85(1)(d), 298 U.N.T.S. 11, 47-48.

close scrutiny by business advisers and by students of Common Market competition laws.

This note examines the components of a price discrimination violation as they were developed in the *United Brands* case and identifies lines of future development suggested by the decision. In particular, the *United Brands* decision refined the elements of a price discrimination violation—dominant position, abusive practice, and competitive injury—in the following ways. In its discussion of dominance, the opinion suggests that firms which successfully engage in price discrimination, regardless of market share, risk attack under the Rome Treaty. The decision also indicates that a dominant firm's price differentials which can be justified by differences in the seller's costs and risks will not be considered illegal. Finally, the decision demonstrates that possible competitive injury will suffice to establish a violation when the pricing practices in question produce market segmentation along national borders.

The Community's concern with discriminatory pricing predates the establishment of the EEC in 1957.[10] Because charging different prices for equivalent transactions was judged detrimental to trade between the Member States when the party discriminated against suffered competitive disadvantage, such practices were proscribed in articles 85 and 86 of the Rome Treaty.[11] The provisions do not prohibit price discrimination by every person, however. Article 85(1)(d) prohibits discriminatory practices pursuant to an agreement between enterprises, while article 86(c) forbids such practices by a firm in a dominant position. Considered together, the provisions appear to allow single sellers who do not command market shares traditionally synonymous with dominance to charge dissimilar prices.[12]

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[10] The treaty which created the European Coal and Steel Community includes a provision against price discrimination similar to those contained in the Rome Treaty. *Compare* Treaty Instituting the European Coal and Steel Community, *entered in force* July 23, 1952, art. 60, 261 U.N.T.S. 140, 189-91, *with* Rome Treaty, *entered in force* Jan. 1, 1958, arts. 85(1)(d) & 86(c), 298 U.N.T.S. 11, 47-49.

[11] The "price discrimination" provisions of article 86 clearly cover only those affecting competition at the buyer level. R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION 244 (1972). This note will focus on the Community's actions toward discriminatory practices which affect secondary-line competition. However, classic monopolistic price discrimination aimed at putting competitors at a disadvantage would appear to constitute an abuse of "imposing unfair selling prices under Article 86(a)" and are therefore prohibited if trade between member states is affected. GEORGE & JOLL, *supra* note 2, at 161.

[12] This, at least, appears to have been the conventional interpretation of these provisions:

> The prohibition against discrimination applies only to agreements, decisions and practices within the meaning of . . . article [85], but not to the conduct of the individual enterprises. Accordingly, an enterprise may sell at different prices to its customers, but may not enter into horizontal or vertical agreements on boycott, exclusivity, etc.

Few cases involving discriminatory practices have come before the Commission or the Court. While some interpretive comment has focused on bilateral agreements in contravention of article 85,[13] the contours of the article 86(c) prohibition against price discrimination have hardly been explored.[14] Long before *United Brands* the Commission had indicated its intention to apply article 86 to situations where an enterprise occupying a dominant position abuses its position in a way that may affect trade between the Member States,[15] but each element of an article 86(c) violation remained largely uninterpreted.[16]

It was against this background of uncertainty that the Court confronted the price discrimination issue in *United Brands*. The Commission had found that United Brands, a multinational conglomerate and the world's largest banana trader,[17] had engaged in a practice of selling bananas to European wholesalers at dissimilar prices.[18] The price to each middleman was derived by United Brands from a formula based on the projected retail price of the product in the country of destination.[19] In upholding the Commission decision on price discrimination,

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1 COMM. MKT. REP. (CCH) ¶ 2021.43. For a similar analysis of these provisions, see A. CROTTI, TRADING UNDER EEC AND U.S. ANTITRUST LAWS 190 (1977).

13 *See, e.g.*, 2 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 85.07-.09 (1976) [hereinafter cited as SMIT & HERZOG].

14 *See* note 3 *supra*.

15 COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, CONCENTRATION OF ENTERPRISES IN THE COMMON MARKET ¶ 62 (1965), *translated in* COMM. MKT. REPORTS (CCH) No. 26, pt. 1 (1966).

16 Since the early 1970's there have been several cases fleshing out the requirements of article 86 violations. *See* Swan, *supra* note 4. None of these cases, however, carefully analyzes the requirements of price discrimination abuses.

17 The United Brands Company was formed in 1970 by the merger of the United Fruit Company and the American Seal-Kap Corporation, a major meat producer in the United States. United Brands accounted for thirty-five percent of world banana exports in 1974. The company operates in the EEC through its subsidiary, United Brands Continental BV. *See* Commission Decision of 17 December 1975 Relating to a Proceeding under Article 86 of the EEC Treaty, 19 O.J. EUR. COMM. (No. L 95) 1, 2, 17 Comm. Mkt. L.R. D28, D32 (R.P. Supp.), *application for stay granted sub nom.* United Brands Co. v. Commission of the European Communities, [1976] E. Comm. Ct. J. Rep. 425, 18 Comm. Mkt. L.R. 147 (1976), *modified*, 21 Comm. Mkt. L.R. 429 (1978).

18 The Commission also found that United Brands had abused its dominant position by prohibiting its distributor/ripeners from reselling green UBC bananas, by refusing to supply bananas to a long-time customer for two years, and by charging excessive prices for its bananas in Germany, Denmark, the Netherlands, and the Belgo-Luxembourg Economic Union. *Id.* at 19, 17 Comm. Mkt. L.R. at D59.

19 The pricing procedure utilized by the United Brands Company began with the distributor/ripener sending orders to the company for Chiquita-branded bananas the Monday of the week preceeding the delivery of the bananas. On Tuesday or Wednesday, United Brands confirmed the orders as well as the weekly quota allocated to the individual purchasers based on the orders received compared to the number of bananas on the ship. The actual selling price was only fixed and announced to the customer four days before the arrival of the ship. Prior to the price

the Court found that the sum of competitive advantages enjoyed by United Brands assured the company a position of dominance in the relevant market. One advantage the company enjoyed was its market share of approximately forty-five percent in the relevant geographic and product markets.[20] The Court emphasized, however, that market dominance was not measured solely by market share. It cited other factors which contributed to its finding of a dominant position. The company's vertically integrated structure, technical expertise and product differentiation were all regarded as indicia of a dominant position.[21] The Court further recognized the enormous capital outlay necessary to achieve parity with United Brands as a formidable barrier to entry into the banana trade.[22] In addition, the Court acknowledged the potential relevance of a firm's course of discriminatory conduct to a determination that the firm holds a dominant position.[23] It is this suggestion—that the discriminatory behavior itself might be evidence of a dominant position—which may have the most impact on the pricing policies of firms operating within the EEC.[24] When the Court suggests that an ability to engage in long-term price discrimination shows dominance in the market, it is recognizing that only an enterprise with considerable market power[25] can successfully charge different prices for the same commodity.[26] The ability to successfully charge discrimina-

announcement, agents of United Brands calculated the price to be charged based on market conditions in the buyer's nation. After the prices were set the distributors/ripeners had the option of cancelling or reducing their orders. *Id.* at 5, 17 Comm. Mkt. L.R. at D36.

20 21 Comm. Mkt. L.R. at 490.

21 *Id.* at 487-88.

22 *Id.* at 490-91.

23 The Court held that "[i]n order to find out whether UBC is an undertaking in a dominant position . . . it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses." *Id.* at 487. "In other words, behavior can be evidence of dominance." Address by John Temple Lang, Fordham Corporate Law Institute (Nov. 14, 1978). Lang is Legal Advisor, Legal Service for the Commission of the European Economic Community.

24 *See* Lang, *supra* note 23, who believes "that behavioral evidence of dominance may become as important in the future in appropriate cases as the features of the allegedly dominant firm and the extent of competition."

25 Market dominance is defined in *United Brands* as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." 21 Comm. Mkt. L.R. at 486-87. In deciding whether the United Brands Company held a dominant position, the Court followed the Commission decision, which in turn closely adhered to the guidelines established in *Europemballage Corp. v. Commission of the European Communities*, [1973] E. Comm. Ct. J. Rep. 215, 12 Comm. Mkt. L.R. 199 (1973). Interestingly, except for its language defining dominant position, the Court did not significantly rely on prior article 86 decisions in deciding *United Brands*. In fact, the Court did not cite a single case in the decision portion of its opinion.

26 This speaks only to those situations in which the seller initiates the discriminatory practice.

tory prices suggests that the seller practicing discrimination has some control over the marketing system which it is able to impose upon competition. Under completely effective competition, the presence of other producers in the market selling the same product removes the ability of the discriminator to continue to sell goods to some at a higher price.[27] According to the Court, the ability of an enterprise to exercise such control over the market shows that the enterprise occupies a dominant position.[28] Under the *United Brands* analysis, the long term existence of a successful price discrimination practice tends to signal an abuse of a dominant position. However, a seller with a small market share which is able to charge dissimilar prices because the customer paying the higher price is unaware of a lower price or is unwilling to take advantage of it for some reason would not occupy a dominant position.[29] In all likelihood, such a seller will prevail only in the short run because it is presumably operating in competition. It is probable that the customer paying the price will eventually be lured away by a competitor of the price discriminator.[30]

If market dominance may be shown by citing a course of successful price discrimination, the restriction on discriminatory pricing reaches a larger class of business than was previously recognized. Thus read, the breadth of the *United Brands* prohibition moves closer to a general prohibition of discriminatory pricing, such as that contained in the United States Robinson-Patman Act.[31] Admittedly the Court in *United Brands* was not required to adopt such a broad holding; United Brands' dominance was not demonstrated solely by its ability to engage in price discrimination.[32] Furthermore, the drafters of the Rome Treaty may not have intended such a broad injunction against price discrimination. Indeed, some commentators assert that a general pro-

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Often large purchasers attempt to procure discount terms from small sellers. In these cases the market power is in the buyer rather than the seller.

27 "[P]rice discrimination is a symptom of market imperfection. If competition is completely effective, price discrimination will not persist." GEORGE & JOLL, *supra* note 2, at 152.

28 *See* 21 Comm. Mkt. L.R. at 486-87.

29 But if his activity affected markets in the United States, such a seller would be violating the Robinson-Patman Act, 15 U.S.C. §§ 13(a)-(b), 21(a) (1976), which prohibits any seller from charging dissimilar prices.

30 Assuming a competitive market, other sellers would enter the market to gain some of the abnormal profits being reaped by the discriminator.

31 The Robinson-Patman Act makes it "unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . ." 15 U.S.C. § 13(a) (1976). Even read broadly, the price discrimination prohibition contained in article 86(c) of the Rome Treaty is still narrower than that contained in the Robinson-Patman Act.

32 *See* text accompanying notes 18-21 *supra*.

hibition was explicitly rejected when the Treaty of Rome was drafted because the drafters sought to preserve the price elasticity necessary for real competition.[33] On the other hand, a broad reading of article 86 may be essential to fully protect the intended beneficiaries of the law.[34] This is especially so if the ability to effectively discriminate actually reflects the ability to place others at a competitive disadvantage, as the Court in *United Brands* assumed.

One concrete indication of the EEC policy toward discriminatory pricing evident in the *United Brands* decision is that dominance plus differential pricing does not automatically equal an abuse of dominance. Read literally, the language of 86(c) would seem to prohibit any price differentiation. Nevertheless, the Court in *United Brands* displayed a receptiveness toward cost and risk justifications for price differentials.[35] Before finding United Brands' practices in violation of article 86, the Court considered the company's costs of supplying its customers. United Brands' Europe-bound bananas were unloaded in two main ports. The unloading charges in the two ports differed by only a few U.S. cents per box. The conditions and terms of each sale were essentially the same. The costs of transportation and customs duties were borne by the buyers, not United Brands. In viewing these facts, the price discrepancies could not be attributed to disparities in the cost of doing business.

United Brands' contention that it was entitled to price its product in a manner responsive to the banana consumption patterns of each national market was also considered. The Court did not object to the principle of charging what the market will bear, provided the seller complied with the Treaty of Rome,[36] but soundly rejected profit max-

[33] A general prohibition of discrimination was intentionally omitted from these treaty provisions because it would jeopardize the elasticity of prices which is necessary for real competition. It is also unnecessary for the creation of a "common market," as is shown by the fact that there is as yet no such general prohibition in any of the Member States. 1 COMM. MKT. REP. (CCH) ¶ 2021.43. An American commentator has also acknowledged an incompatibility between rigid restrictions on competitive pricing and the antitrust objective of price flexibility. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 547 (1962) [hereinafter cited as ROWE].

[34] Article 86(c) expresses the Community's concern with the competitive injury which accrues to the disfavored customer in situations involving price discrimination. *See* note 11 *supra*; JOLIET, *supra* note 11, at 244-45.

[35] 21 Comm. Mkt. L.R. at 500. Even before *United Brands* several commentators speculated that the Court and Commission would permit differences which are economically justified. SMIT & HERZOG, *supra* note 13, at ¶ 86.18. *See, e.g.*, JOLIET, *supra* note 11, at 244-45 (meeting the competition and the cost and risk related to creditworthiness); C. OBERDORFER, A. GLEISS & M. HIRSCH, COMMON MARKET CARTEL LAW ¶ 217 (1963) (functional level of the customer, the size of his stock, and the bad reputation of the customer which is detrimental to the goodwill of the product or manufacturer).

[36] 21 Comm. Mkt. L.R. at 500.

imization as an acceptable justification for price discrimination.[37] This rejection contrasted sharply with the Court's willingness to hear cost and risk justifications.

The Rome Treaty seems to indicate that two additional requirements are necessary for an article 86(c) violation. First, price discrimination must place certain customers at a competitive disadvantage.[38] Second, the price discrimination must be capable of affecting trade within the Common Market.[39] Therefore, the Treaty suggests that a difference in terms is only abusive if it places certain customers at a competitive disadvantage and violates article 86 only if an effect on trade between member states may result. In contrast, the *United Brands* Court seems to say that price discrimination by a firm in a dominant position is abusive when it *may* place some customers at a competitive disadvantage. The decision also contains a strong indication that the Court will dispense with an inquiry into the effect on trade in cases where the price differentials are drawn along national boundaries.

The *United Brands* Court mentioned no evidence regarding effect. In fact, after noting the rigid partitioning of national markets and concluding that certain of United Brands' customers were placed at a competitive disadvantage, the Court ended its discussion of the discriminatory practices without mentioning any effect on trade.[40] The Commission, on the other hand, speculated that United Brands' practices were likely to have some effect on import and export trade between the Member States.[41] In finding a violation without investigating the effects of the pricing policy, the Court appeared to presume that abusive price discrimination, when practiced by dominant firms, hinders trade within the Community. A like presumption may be found in past decisions of the Court.[42] If a firm must first be in a dominant

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37 *Id.* at 501.

38 The text of article 86(c) is reprinted at note 8 *supra.*

39 *Id.*

40 21 Comm. Mkt. L.R. at 498-501.

41 The Commission had reasoned that:

> [t]he application in respect of sales of Chiquita bananas of dissimilar prices for equivalent transactions according to the Member State in which the customer operates and the bananas are to be sold, is 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.

Commission Decision of 17 December 1975 Relating to a Proceeding under Article 86 of the EEC Treaty, 19 O.J. EUR. COMM. (No. L 95) 1, 17, 17 Comm. Mkt. L.R. D28, D55 (R.P. Supp.), *application for stay granted sub nom.*, United Brands Co. v. Commission of the European Communities, [1976] E. Comm. Ct. J. Rep. 425, 18 Comm. Mkt. L.R. 147 (1976), *modified*, 21 Comm. Mkt. L.R. 429 (1978).

42 *See, e.g.*, Deutsche Grammophon Gesellshaft mbH v. Metro-SB-Grossmärkte GmbH, [1971] E. Comm. Ct. J. Rep. 487, 10 Comm. Mkt. L.R. 631 (1971). *But cf.* Groupement des fabricants de papiers peints de Belgique v. Commission of the European Communities, [1975] E.

position and potential market effect is implied from dominance, it follows that a failure to establish an effect on trade is inconsequential once an abuse is established.[43] However, as previously mentioned, there is no abuse under 86(c) unless the discriminatory practices impose a competitive disadvantage upon certain customers.[44] Nevertheless, the *United Brands* Court assumed competitive injury at the buyer level. Its assumption of competitive injury from market dominance seems to result in a broader restriction on pricing practices than is embodied in article 86(c). Price discrimination only affects competition at the buyer level when a buyer charged a higher price suffers a loss of business because its potential customers can purchase from another supplier at a lower cost. Thus, a competitive disadvantage results only if the enterprise receiving a lower price is capable of being a competitor. In *United Brands*, the Court presumably concluded that certain customers suffered competitive disadvantages from the evidence that some wholesalers had competed before United Brands instituted its differential pricing policy.[45] Once it is established that a seller's customers are in competition, it is obvious that the discriminatory practices put certain customers at a competitive disadvantage.[46] The *United Brands* decision additionally suggests the Court's willingness to find a competitive injury from evidence that the customers would be capable of competing if the price differentials were removed.[47] From this conclusion it appears that the Court is including in its definition of competitive disadvantage potential foreclosure from a market. Defining competitive disadvantage in this way does not conflict with the rationale for requiring a competitive injury to be shown. The reason for demanding a showing of competitive harm is to avoid unnecessary restrictions on price flexibility.[48] If no showing were required, a dominant firm would not be able to charge different prices to different customers. Once the Court determined that the banana wholesalers were capable of competing but for United Brands' discriminatory pricing, it inferred that the

Comm. Ct. J. Rep. 1491, 17 Comm. Mkt. L.R. 589 (1976) (where the Court overturned the Commission's finding of an article 85 violation because the Commission failed to set forth facts to show that a small amount of intrastate trade affected by the agreement could have had an impact on trade between Member States).

43 *See, e.g.*, Deutsche Grammophon Gesellshaft GmbH v. Metro-SB-Grossmärkte GmbH, [1971] E. Comm. Ct. J. Rep. 487, 10 Comm. Mkt. L.R. 631 (1971).

44 *See* text accompanying note 38 *supra*.

45 It is difficult to determine the validity of the Court's assumption since all trade in United Brands' bananas was precluded by the resale prohibition.

46 GEORGE & JOLL, *supra* note 2, at 154.

47 Lang, *supra* note 23.

48 *See* note 33 *supra*.

disadvantaged wholesalers suffered a competitive harm because of the price discrimination. Having found the competitive injury necessary for an article 86(c) abuse, the Court could easily presume the requisite effect on trade.

To an economist a finding of competitive injury sufficient to have an effect on trade should not be so quickly inferred when different prices are charged competitors on the basis of a geographic pricing scheme such as that instituted by United Brands. In cases of discrimination by location, an in-depth study of economic impact may be warranted. It cannot be assumed that one who receives a better price always enjoys a competitive advantage. For example, the customer receiving the more advantageous terms may face higher transport costs so that it is in no better position in the market place than the customer receiving the less advantageous terms.[49] But, to members of the EEC, the goal of a "common market" necessitates greater vigilance in protecting free movement of goods between the Member States.[50] Therefore, it seems that the Court of Justice is more likely to dispense with any express inquiry into "effect" when the discrimination appears to segment the market along national borders. The Court may have meant to establish a rule against discriminations which have no objective justification and have the effect of segmenting markets along national boundaries even when competitive harm is not demonstrated. Such a rule could preclude some pricing practices which do not place customers at a competitive disadvantage.[51] On the other hand, it would tend to foster a system in which national borders are not in any way barriers to trade—a result which is congruent with EEC competition policy.[52]

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49 *See* ROWE, *supra* note 33, at 180-81.

50 Rome Treaty, *entered in force* Jan. 1, 1958, preamble ¶ 2, 298 U.N.T.S. 11, 14.

51 The author acknowledges that a discriminatory pricing scheme may serve to inhibit entry into the market by those who wish to compete across national boundaries but such a practice would likely establish a competitive disadvantage and would therefore clearly constitute a violation of article 86.

52 Jones, *A Primer on Production and Dominant Positions Under E.E.C. Competition Law*, 7 INT'L LAW. 612, 612 (1973). The essential nature of the goal is further explained in EUROPEAN ECONOMIC COMMUNITY COMMISSION, ACTION PROGRAMME OF THE COMMUNITY FOR THE SECOND STAGE (1962):

> The community's objectives could not be attained simply by eliminating the barriers of trade between the member countries. The opening of the domestic markets and the establishment in the Common Market of conditions similar to those of an internal market might be held up or even inhibited by means of economic or fiscal legislation, aids, agreements limiting competition or the improper exploitation of dominant market positions.

Id. at 20.

CONCLUSION

Although it was twenty years before the Court of Justice decided a case of price discrimination, it made a strong effort to clarify an ambiguous area of the law when faced with a very blatant case. At a minimum the decision means that an enterprise with a forty percent share of the market and substantial technical, financial, and organizational resources, will be found to have abused its dominant position in violation of article 86 of the Rome Treaty if the firm engages in price discrimination which results in market segmentation along national borders. Businesses operating or intending to operate within the EEC may also profitably consider the decision to ascertain the future directions of the EEC enforcement policy. *United Brands* displays the traditional concern for maintaining a common market,[53] but the decision also exemplifies an emerging aggressiveness in protecting competition in the EEC.[54]

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[53] Article 2 of the Rome Treaty provides:

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated rising of the standard of living and closer relations between its Member States.

Rome Treaty, *entered in force* Jan. 1, 1958, art. 2, 298 U.N.T.S. 11, 15.

[54] Swan, *supra* note 4, at 416.