# MARKET POWER AND PUBLIC POLICY: A COMPARISON OF NORTH AMERICAN AND EUROPEAN LEGISLATION

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## I. THE ECONOMICS OF MARKET POWER

> There is no oligopoly theory. There are bits and pieces of models: some reasonably well analysed, some scarcely investigated. Our so-called theories are based upon a mixture of common sense, uncommon sense, a few observations, a great amount of casual empiricism, and a certain amount of mathematics and logic. [1]

Microeconomic theory has in many respects suffered from its own history and from the rise of macroeconomic theory. This history has affected the development of any comprehensive policy to deal with market power and in particular the power, actual and potential, exercised by firms in oligopolistic markets.

About one hundred years ago, the notions of "market structure" and "competition", which classical economics had carefully distinguished, were merged by Jevons and others into a theory of competition which was almost entirely structural in its character. [2] Competition in neo-classical theory supposes a situation in which many firms produce similar goods and, facing a perfectly elastic demand for their products, are price-takers rather than price-makers. The behaviour of the firms is so determined by the structure of the market that in a purely competitive situation, firms would have no margin of independent behaviour. Any ability to change price or product would be regarded as evidence of the possession of some monopoly power and thus an indication of a non-competitive market.

It could be shown analytically that, if all markets were structured in a competitive fashion, resource allocation would be optimal and production would take place in the most efficient manner. In the formula of the famous "duality theorem", a competitive structure always results in a situation of Pareto optimality, [3] that is, a situation of optimal economic welfare.

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[1] Shubik, *A Curmudgeon's Guide to Microeconomics*, 8 J. ECON. LITERATURE 405, at 415 (1970).

[2] This evolution is noted in McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639-43 (1968).

[3] Bator, *Anatomy of Market Failure*, 72 Q.J. ECON. 351 (1958), discusses some of the implications of market failure with respect to Pareto optimality. W. NICHOL-

This view of competition (and the neo-classical approach to monopoly) was dominant among economists until the 1930's but had little or no influence on public policy. American and Canadian anti-trust legislation, adopted in the late nineteenth and early twentieth centuries, was not concerned with securing Pareto optimality through perfect competition but with providing a remedy for the economic and political effects of the trust movement by prohibiting anti-competitive activities.

The anti-trust movement and the regulation of utilities by public commissions were manifestations of public concern over the observed reality of market power. In Europe this concern, where manifested at all, generally took the form of demands for the nationalization of key firms or industries, reflecting the desire to make market power, through public ownership, the servant of the public interest.

The mainstream of economic theory, locked into the neo-classical framework described above, refined the theories of competition and monopoly as market structures but had no useful answers to such basic questions as the origin and extent of market power, its consequences and the means by which it could be controlled.

The work of Chamberlin, [4] Robinson [5] and Berle and Means [6] breathed new life into microeconomic theory and brought it to grips with the problem of market power. [7] Neither Chamberlin nor Robinson presented a new analytical apparatus; indeed, their work might be seen as simply a further refinement of neo-classical analysis, the elaboration of yet more structural models of competitive equilibrium. Means' theory of administered prices has been subjected to much criticism. [8] Yet by incorporating the notion of market power into the competitive "model" and by stressing the importance of "conduct" in the study of the firm, these authors departed from the rigid structural framework which had imprisoned microeconomic theory.

The microeconomic revolution also helped to rescue oligopoly theory from near oblivion. [9] The work of Cournot, Edgeworth and Bertrand, concerned essentially with equilibrium under conditions of product homogeneity,

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SON, MICROECONOMIC THEORY (1972), contains a good discussion of the duality theorem and certain policy implications. The relationship of Pareto optimality to perfect competition has been the object of a voluminous literature, including T. SCITOVSKY, WELFARE AND COMPETITION (rev. ed. 1971); W. SHEPHERD, MARKET POWER AND ECONOMIC WELFARE (1970); C. ROWLEY, ANTITRUST AND ECONOMIC EFFICIENCY (1973).

[4] E. CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION (1933).

[5] J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933).

[6] A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[7] E. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM (1957), discusses the significance of the three works cited *supra* notes 4, 5 & 6.

[8] *See, e.g.*, G. STIGLER & J. KINDAHL, BEHAVIOR OF INDUSTRIAL PRICES (1970). Means, *Administered-Price Thesis Reconfirmed*, 62 AM. ECON. REV. 292 (1972), claimed that this study confirmed his thesis, but Stigler & Kindahl, *Industrial Prices, As Administered By Dr. Means*, 63 AM. ECON. REV. 717 (1973), vehemently deny this.

[9] A good general survey of oligopoly theory is contained in both G. STIGLER, THEORY OF PRICE c. 12 (1966), and R. BARRE, 1 ECONOMIE POLITIQUE 608-63 (1969).

produced meagre results. The introduction of product heterogeneity and the emphasis on firm behaviour deterred economists from seeking elusive structural equilibria and directed their attention instead to the nature of competition in a market of few firms producing differentiated products, possessing behavioural interdependence and simultaneously seeking security and competitive advantage.

Neo-classical competition theory has not been jettisoned but its role has been revised. It is now the structural norm associated with optimal efficiency and welfare, against which the actual situation of firms and markets can be analyzed.

The analysis, starting from a structural and essentially static norm, incorporates firm behaviour and the dynamics of changing goals, strategies and structures. [10] It is not, therefore, surprising that there should be no oligopoly "theory", especially if theory is thought of as static equilibrium models. Most economists would admit that no totally adequate methodology exists to study oligopoly power; the type of comparative statics used for classical equilibrium theory is of limited use for a dynamic analysis involving behavioural as well as structural variables.

Over the last forty years, however, a corpus of propositions, to which large numbers of economists give general assent, has developed. These propositions are based on admittedly provisional models, on empirical observation and on a "certain amount of mathematical logic". They are not therefore a dogmatic credo, but rather a statement of economic reality with a substantial basis in theory and observation. The propositions may be summarized as follows:

(1) The characteristic organization of the important industrial markets in the developed world is oligopolistic. [11] This is more pronounced in highly capital-intensive industries and in industries with a heavy investment in advanced technology.

(2) Oligopolies are characterized structurally by the presence of few firms—with either a cluster of small firms or no competition at all. [12]

(3) Whatever may be the ultimate objective of each oligopolist, its behaviour is heavily influenced by the knowledge that control of the market

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[10] *See, e.g.*, Jacquemin, *Strategies d'Entreprise, Structures de Marché et Contrôle Optimal*, 82 REV. D'ECONOMIE POLITIQUE 1104 (1972); but Phillips, *Structure, Conduct, and Performance— and Performance, Conduct and Structure?, in* INDUSTRIAL ORGANIZATION AND ECONOMIC DEVELOPMENT 26 (J. Markham & G. Papanek eds. 1970), suggests an approach in which performance is the starting point leading to conclusions about structure and behaviour.

[11] *See, e.g.*, Krelle, *Au-delà de la Concurrence Parfaite, in* A. PIATIER, FORMES MODERNES DE LA CONCURRENCE 29 (1964); R. DORFMAN, PRICE SYSTEM 97-104 (1964); Stewart, *Structure of Canadian Industry, in* ISSUES IN CANADIAN ECONOMICS 170 (L. Officer & L. Smith eds. 1974); C. Edwards, *The United States, in* 1 STUDIES OF FOREIGN COMPETITION POLICY AND PRACTICE 257 (Can. Dept. of Consumer & Corp. Affairs 1976).

[12] *See, e.g.*, J. BAIN, INDUSTRIAL ORGANIZATION (1959); Bain, *Traits Généraux d'un Oligopole*, 15 ECONOMIE APPLIQUÉE 455 (1962).

is shared with other firms whose reaction can influence the performance of the whole industry. [13]

(4) While the strategy of each firm will be to attempt to gain a competitive advantage, the presence of other firms is an inducement to seek a modus vivendi rather than risk such dangers as price wars, which could "ruin" the whole industry. [14]

(5) This desire for a modus vivendi may produce complete "cartellization", especially where the oligopolists are few in number. In other circumstances, the resulting absence of price competition may be an acceptable method of "competitive behaviour". [15]

(6) The principal techniques of non-price competition are product differentiation, mass advertising and other promotional and distributional activities. These also serve as effective barriers to the possible entry of new firms. [16]

(7) Another barrier to the entry of competitors may be posed by the existence of a threshold level of profitable output combined with a pricing policy by established firms which would render unfeasible any attempt by a newcomer to produce at threshold level. Firms may also possess absolute cost advantages owing to exclusive possession of particular technologies or exclusive access to essential factors of production. [17]

(8) Oligopoly power implies the maintenance of higher and less flexible prices than those which would prevail if the structure of the market were more competitive and the behaviour of firms less interdependent. The output of an oligopoly will also tend to be lower than it would be in a market with more producers and less interdependence. [18]

(9) Oligopolies also channel resources into non-price competition, the cost of such resources being at least partly passed on to consumers. Pro-

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[13] *See, e.g.*, W. FELLNER, COMPETITION AMONG THE FEW (1949); Austruy, *Du Rôle de l'Oligopole dans les Capitalismes Évolués, in* A. PAITIER, FORMES MODERNES DE LA CONCURRENCE 83 (1964).

[14] *See, e.g.*, A. MOORE, HOW MUCH PRICE COMPETITION 21-59 (1970); Sylos-Labini, *Théorie des Prix en Régime d'Oligopole et la Théorie du Développement*, 81 RÉV. D'ECON. POLITIQUE 244 (1971).

[15] *See, e.g.*, J. BAIN, *supra* note 12, and Caves, *Uncertainty, Market Structure and Performance, in* INDUSTRIAL ORGANIZATION AND ECONOMIC DEVELOPMENT 283 (J. Markham & G. Papanek eds. 1970), who review the consequences of uncertainty-reducing behaviour by oligopolies.

[16] *See* J. BAIN, BARRIERS TO NEW COMPETITION (1956), and Orr, *Determinants of Entry*, 56 REV. ECON. & STATISTICS 58 (1974), a recent study which confirms this view.

[17] This point is discussed in the literature reviewed in Baron, *Limit Pricing, Potential Entry, and Barriers to Entry*, 63 AM. ECON. REV. 666 (1973).

[18] *See, e.g.*, Bain, *Traits Généraux d'un Oligopole, supra* note 12, at 468, where it is noted:

> [L]e fonctionnement des oligopoles peut être moins socialement désirables lorsque la concentration des vendeurs est très élevé, et que, de plus, les barrières à l'entrée de firmes nouvelles et à l'expansion de petites existantes sont très élevées.

duct differentiation may raise unit cost of production. Mass advertising, promotional gimmickry and overcapacity in distribution are other sources of economic waste. [19]

(10) Inefficiency can also result from the relative insulation from competitive pressure which market power affords. This "X-inefficiency", the ability of management to "take it easy" or indulge in prestige expenses, adds to production costs—and thus to price. [20]

(11) While there is no agreement on how much the misallocation of resources due to market power costs the economy, there are estimates in the U.S. which place the total "social loss" from such power at up to $60 billion per annum (or 6.2 per cent of G.N.P. at the time of measurement). [21]

These propositions emphasize three central characteristics of market power:

(a) a *structure* characterized by few firms and high barriers to entry;

(b) *behaviour* characterized by a high degree of interdependence, resulting in a tendency towards "cartellization" or at least the substitution of non-price for price competition;

(c) *performance* characterized by high prices and restricted output, economic waste resulting from non-price competition, and the consequences of X-inefficiency.

Beyond the technical domain of resource allocation, oligopolies have social and political consequences of potentially enormous significance.

In defence of the oligopoly, it is sometimes asserted that large firms are necessary if the benefits of scale economies are to be realized or if research and development is to be pursued. However, the evidence is not convincing that large firms result in increased profitability, efficiency or research and development. [22]

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[19] *See, e.g.*, A. MOORE, *supra* note 14, at 65-103, and Kaldor, *Market Imperfection and Excess Capacity*, 2 ECONOMICA 33 (1935).

[20] *See, e.g.*, Leibenstein, *Allocation Efficiency vs. "X-inefficiency"*, 56 AM. ECON. REV. 392 (1966).

[21] *See, e.g.*, Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 85-86 (1954, Proceedings Issue), who calculated the welfare loss at $1.40-$1.50 per year per American. F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 408 (1970), gives the figure quoted in the text. This issue is discussed in Bergson, *On Monopoly Welfare Losses*, 63 AM. ECON. REV. 853 (1973), and in Worcester, *New Estimates of the Welfare Loss to Monopoly in the U.S.*, 40 SOUTHERN ECON. J. 234 (1973). D. WORCESTER, MONOPOLY, BIG BUSINESS AND WELFARE IN THE POSTWAR U.S. (1967), concludes that economic performance is suboptimal owing to a higher degree of concentration than is generally assumed. However, he believes that a program of deconcentration would be of little help. *But cf.* Weston, *Large Firms and Economic Performance, in* IMPACT OF LARGE FIRMS ON THE U.S. ECONOMY 225 (J. Weston & S. Ornstein eds. 1973) which disputes Scherer's estimate and suggests a social gain arising from concentration in U.S. Industry.

[22] Compare Bain, *Economies of Scale, Concentration and Conditions of Entry in 20 Manufacturing Industries*, 44 AM. ECON. REV. 15, at 35-38 (1954), with Markham,

Economists are therefore inclined to be sceptical of arguments advanced in favour of concentration [23] and non-price competition. They feel that enough is known about the nature and consequences of market power to make it a prime target for public policy in the form of nationalization, regulation or anti-trust legislation.

Because there is no "theory" of oligopoly, there is no convenient set of a priori tests which can be infallibly applied where a problem of market power arises. [24] Once it is admitted that structure and behaviour are interrelated and that firms or industries cannot be forced to conform to the structural or behavioural requirements of the classical competitive model, then it follows that the policy objective cannot be the elimination of mraket power but rather its containment at levels at which the economic, social and political benefits outweigh the costs of controlling both firm behaviour and market structure.

Several attempts have been made to formulate a public policy mechanism to control market power. The best known of these is the notion of "workable competition", initially formulated by J. M. Clark [25] and subsequently developed as a series of a priori structural and behavioural norms. [26]

Although approved by the U.S. Attorney General's Committee [27] in 1955, the concept has not proved easy to apply; the a priori criteria are too general to be of use in given situations. On the other hand, a complete ad hoc approach runs the risk of inconsistency and corresponding juridical uncertainty. [28]

The formulation of tests to control market power is the most challenging problem facing both economic and legal theory in the anti-trust field. This paper will suggest an approach based on the notion of "market failure". Its object is to answer the question, do the present anti-trust laws provide a sufficient basis for the control of market power? More particularly, does

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*Market Structure, Business Conduct, and Innovation*, 55 AM. ECON. REV. 223 (1965, Proceedings Issue), Caves, *supra* note 15, and Jones, *Market Structure and Profitability in Canadian Manufacturing Industry*, 6 CAN. J. ECON. 356 (1973).

[23] The sceptics include H. DEMSETZ, MARKET CONCENTRATION DOCTRINE (1973); Brozen, *Antitrust Task Force Deconcentration Recommendation*, 13 J. LAW & ECON. 279 (1970); Weston, *supra* note 21; Austruy, *supra* note 13; Peyrard, *Dimension de l'Entreprise et Concurrence*, *in* A. PAITIER, *supra* note 11, at 141. However, Peyrard's criticism of Bain's anti-large size estimates is muted by a recognition of the importance of some of the consequences of market power.

[24] A. JACQUEMIN & H. TULKENS, FONDEMENTS D'ECONOMIE POLITIQUE 162 (1970), note that "la question de savoir si une structure de marché oligopolistique, indépendamment de tout comportement 'cooperatif', est néfaste à l'intérêt général, est davantage l'objet de controverses que d'une politique précise des pouvoirs publics".

[25] Clark, *Towards a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940).

[26] *E.g.*, Markham, *An Alternative Approach to the Concept of Workable Competition*, 40 AM. ECON. REV. 349 (1950).

[27] ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT (1955).

[28] A good review of the literature on the subject of workable competition is contained in Sosnick, *A Critique of Concepts of Workable Competition*, 72 Q.J. ECON. 380 (1958).

the concept of "abuse of a dominant position", as enunciated in the E.E.C. Treaty, provide a more positive response than that found in the laws of the United States and Canada?

## II. The North American Experience

### A. *The United States*

That U.S. anti-trust legislation has failed to provide adequate control of market power is not surprising. In the circumstances, what is surprising is that any real success at all has been achieved. Any attempt to control oligopoly power in the U.S. is handicapped by the fact that the core of American anti-trust legislation, the Sherman, [29] Clayton [30] and Federal Trade Commission Acts, [31] predate the revolution in microeconomic thinking.

We have seen that market power is characterized by certain interrelated structural and behavioural factors and that, insofar as a competition policy is intended to control the extent and importance of market power, this policy must be able to influence not only the behaviour of firms but, where necessary, the industrial structure in which they operate. American anti-trust legislation does provide for the punishment and interdiction of certain types of business behaviour and, through the divestiture technique, for a somewhat crude form of restructuring.

However, the types of behaviour caught in the anti-trust net are limited by the intent of the legislation, which extends to agreements in restraint of trade, monopolization, mergers, unfair trading practices and other specified types of conduct. [32] For a variety of reasons, both economic and political, competition is seen as a value to be preserved free from attack. Anti-competitive activities are thus the objects of judicial sanction.

Insofar as they undertake these specified activities, oligopolies may be punished for their sins. However, the microeconomic revolution has demonstrated that market power, the antithesis of classical competition, can develop, exist and consolidate itself without recourse to the types of activities which are condemned in the anti-trust laws. The Sherman Act, for example, forbids agreements in restraint of trade, and this has been interpreted as applying to price fixing arrangements. Yet such significant barriers to new competition as expensive mass advertising and product differentiation are, in themselves, immune from attack because they are not within the list of anti-competitive activities covered by the anti-trust laws.

The development of the "rule of reason" and the amendment of section

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[29] Sherman Anti-trust Act, c. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. ss. 1-7 (1970)).

[30] Clayton Anti-trust Act, c. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. ss. 12-27 (1970)).

[31] Federal Trade Commission Act, c. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. ss. 41-58 (1970)).

[32] *Cf.* remarks of McKie, *Market Structure and Function: Performance versus Behaviour, in* Industrial Organization and Economic Development 22 (J. Markham & G. Papanek eds. 1970).

7 of the Clayton Act[33] to include the concept of substantially lessening competition have enabled the courts to take at least some account of the economic factors underlying particular types of "anti-competitive" activity. Yet these developments have not altered the essential nature of the classical anti-trust approach—the use of judicial sanction to punish or forbid specified types of business behaviour.

Economists have long been dissatisfied with this "cops and robbers"[34] approach to what is essentially an economic problem, though they have not agreed as to the feasibility of a "new anti-trust" based on a program of promoting competition.

Those lawyers trained in, or converted to, the current economic thinking on the nature of market power also seek a reformed anti-trust policy with emphasis on control and, where necessary, dissolution of undesirable or unnecessary market power.

Until recently, great faith was pinned on the hope that the Sherman Act could be interpreted to include types of oligopolistic behaviour which had been thought to fall outside the net spread by anti-trust legislation. It was felt that if certain types of behaviour could be presumed to constitute or at least to indicate the existence of an agreement or conspiracy, then it might be possible to successfully attack this undesirable behaviour without actually proving the existence of an agreement or conspiracy.

The doctrine of "implied conspiracy" was tested successfully before the Supreme Court in *Interstate Circuit v. United States.*[35] The manager of two affiliated cinema networks wrote to a number of film distributors in Texas informing them that certain conditions, including a minimum admission price on subsequent "runs", would have to be fulfilled by the distributors if they wished to be serviced by the two cinema chains which dominated the business in that part of the United States. Each distributor knew that the others had been similarly informed. After negotiations, all the major distributors accepted the terms laid down by the cinema operators —terms which implied a substantial change in their methods of operation. There was no direct evidence to show the existence of any form of agreement between the distributors, but the Supreme Court declared:

> It [taxes] credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.[36]

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[33] Clayton Anti-trust Act, c. 323, s. 7, 38 Stat. 730, *as amended* c. 1184, 64 Stat. 1125 (1950) (Consolidated 15 U.S.C. s. 18 (1970)).

[34] The term "cops and robbers" was used to describe the similar approach of Canadian anti-trust authorities in G. ROSENBLUTH & H. THORBURN, CANADIAN ANTI-COMBINES ADMINISTRATION 1952-1960 101 (1963).

[35] 59 S. Ct. 467, 306 U.S. 208 (1939).

[36] *Id.* at 473, 306 U.S. 223.

The circumstances justified the inference that the distributors had acted "in concert and in common agreement". [37]

The Supreme Court declared that it was unnecessary to show that an agreement had been made. An unlawful conspiracy would be held to exist if "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it . . . An unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators". [38]

*Interstate Circuit* was a case involving an agreement in restraint of trade, a section 1 offence. In 1946 another significant decision, *American Tobacco v. United States*, [39] was handed down. In that case the notion of implied conspiracy was applied to section 2, which concerns monopolization.

After a lengthy examination of the structure and behaviour of the cigarette industry in the United States between 1931 and 1939 (including pricing policy, advertising practices and buying policy with respect to raw tobacco), Mr. Justice Burton upheld the District Court jury's finding that American Tobacco, Ligget & Myers and Reynolds (the "Big Three" of a highly concentrated industry) had conspired together to monopolize the market—to exclude competition.

The evidence produced was entirely circumstantial and much of it, such as that proving large-scale advertising, concerned totally lawful activities. The "Big Three" were found to hold a dominant position in the market and their behaviour was held to have as its purpose the maintenance and consolidation of that dominant position. There was, however, no evidence to show that any firm had been excluded from the market. According to the Court, "neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act". [40] Nor was it of importance "whether the means used to achieve the unlawful objective are in themselves lawful or unlawful". [41]

The decision is chiefly significant because the Supreme Court upheld the jury's finding of conspiracy though it was based entirely on circumstantial evidence. The Court accepted the government's contentions that "although there was no written or express agreement discovered among American Tobacco, Ligget & Myers and Reynolds, their practices included a clear course of dealing" [42] and that the "record of price changes is circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition coming from cheaper grade cigarettes". [43]

Coming as it did within a year of Mr. Justice Learned Hand's condem-

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[37] *Id.*
[38] *Id.* at 474, 306 U.S. at 226-27.
[39] 66 S. Ct. 1125, 328 U.S. 781 (1946).
[40] *Id.* at 1139, 328 U.S. at 810.
[41] *Id.*
[42] *Id.* at 1135, 328 U.S. at 800.
[43] *Id.* at 1137, 328 U.S. at 804-05.

nation of all forms of monopolization in the *Alcoa* case, [44] the decision in *American Tobacco* was seen by many as evidence of a new lease on life for the Sherman Act, which could now reach out to directly tackle the issue of oligopoly power. [45] If a conspiracy to monopolize could be inferred from circumstantial evidence of the characteristic behaviour of oligopolies, then surely market power had been effectively made subject to anti-trust restraint.

*American Tobacco* was followed by a series of suits launched both by the Department of Justice and by the Federal Trade Commission. In *United States v. Paramount Pictures*, [46] five major film distributing companies were charged with section 1 and section 2 conspiracy under the Sherman Act. While no express agreement to fix prices between the distributors was proved, a system of substantially uniform prices was shown to exist. In condemning the companies Mr. Justice Douglas declared that "it is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement". [47]

In *F.T.C. v. Cement Institute*, [48] the Supreme Court upheld a finding of the Federal Trade Commission that concerted adherence to a system of multiple basing point pricing was a combination among manufacturers amounting to an unfair trading practice in violation of section 5 of the Federal Trade Commission Act.

In *Triangle Conduit and Cable Co. v. F.T.C.*, [49] the Federal Circuit Court upheld an F.T.C. order holding fourteen manufacturers of rigid steel conduit in violation of section 5 of the Federal Trade Commission Act on two grounds:

(a) conspiracy to restrict competition by the use of a basing point method of pricing; and
(b) the companies' "concurrent use of a formula method of making delivered price quotations with the knowledge that each did likewise, with the result that price competition between and among them was unreasonably restrained". [50]

The Supreme Court quashed the Circuit Court decision with respect to point (a) and by a 4-4 tie upheld it with respect to point (b). Though this was hardly an unreserved approval of the F.T.C.'s position, the Commission took the view that the Court had in effect equated consciously parallel action with an agreement. In a notice to its staff the Commission declared that "when a number of enterprises follow a parallel course of action in the

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[44] U.S. v. Aluminum Co. of Am., 148 F. 2d 416 (2nd Cir. 1945).

[45] See Murchison, *Significance of the American Tobacco Company Case*, 26 N.C.L. REV. 139 (1948). Nicholls, *The Tobacco Case of 1946*, 39 AM. ECON. REV. 284 (1949), gives an account of the significance and limitations of the Supreme Court decision.

[46] 68 S. Ct. 915, 334 U.S. 131 (1948).

[47] *Id.* at 922, 334 U.S. at 142.

[48] 68 S. Ct. 793, 333 U.S. 683 (1948).

[49] 168 F. 2d 175 (7th Cir. 1928), *aff'd* 69 S. Ct. 888, 336 U.S. 956 (1949).

[50] *Id.* at 176.

knowledge and contemplation of the fact that all are acting alike, they have in effect formed an agreement". [51]

This position was decisively rejected by the Supreme Court in *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.* [52] A suburban cinema proprietor in Baltimore, to whom all the major film distributors refused, for substantially the same reasons, to provide first run films, alleged consciously parallel behaviour on their part and thus the existence of a conspiracy. The Court refused to accept this argument. Clark J. declared:

> This Court has never held that proof of parallel business behaviour conclusively establishes agreement or, phrased differently, that such behaviour itself constitutes a Sherman Act offence. Circumstantial evidence of of consciously parallel behaviour may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parellelism" has not yet read conspiracy out of the Sherman Act entirely. [53]

Circumstantial evidence of consciously parallel behaviour or other conduct may in some cases be sufficient to raise a presumption of a conspiracy. In other cases it will not be, and without a finding of conspiracy there can be no offence under the Sherman Act. Subsequent decisions, such as *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, [54] weakened the force of the conscious parallelism doctrine. In *Independent Iron Works Inc. v. U.S. Steel Corp.*, [55] a Federal Court of Appeals held that simple proof of consciously parallel behaviour "does not support an inference of conspiracy", [56] much less proof that a conspiracy existed.

In its latest pronouncement, the Supreme Court has affirmed by 3-3 a Circuit Court of Appeals decision, *United States v. Charles Pfizer*, [57] which rejected the contention that a conspiracy could be deduced from a consistent pattern of high prices, high profits and similar behaviour in the marketing of tetracycline products. The government's emphasis on these structural and behavioural aspects of an oligopoly meant, according to the circuit court, that the central issue, the alleged conspiracy, "was subordinated in government summation and charge to the more inflammatory issues of illegally exorbitant prices charged to a victimized public and patent fraud. But the conspiratorial agreements, as charged, did not emanate from these issues". [58]

Conscious parallelism was always an ephemeral concept and those who saw in the *American Tobacco* decision a decisive breakthrough to effective control of market power were too optimistic. At no point in the line of cases from *American Tobacco* to *Theatre Enterprises* did the Court lose sight of the need to show, whether by direct evidence or presumption, the existence

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[51] NOTICE TO STAFF: IN RE: COMMISSION POLICY TOWARD GEOGRAPHIC PRICING PRACTICES (F.T.C. Oct. 12, 1948).

[52] 74 S. Ct. 256, 346 U.S. 537 (1954).

[53] *Id.* at 259-60, 346 U.S. at 541.

[54] 297 F. 2d 199 (3rd Cir. 1961).

[55] 322 F. 2d 656 (9th Cir. 1963).

[56] *Id.* at 661.

[57] 426 F. 2d 32 (2nd Cir. 1970), *aff'd* 92 S. Ct. 731, 404 U.S. 548 (1972).

[58] 426 F. 2d 48 (2nd. Cir. 1970).

of a conspiracy in order to secure a conviction under the Sherman Act.

Dirlam and Kahn's assertion that the decisions referred to above "depended essentially on the actual employment of collusive and exclusive tactics" [59] overstates the case against conscious parallelism; the absence of direct proof of collusion was the very reason for resorting to circumstantial evidence to raise an inference of agreement. The Attorney General's Committee was closer to the true significance of the concept when it stated:

> Conscious parallelism is not a blanket equivalent of conspiracy. Its probative value in establishing the ultimate fact of conspiracy will vary from case to case. Proof of agreement, express or implied, is still indispensable to the establishment of a conspiracy under the anti-trust laws. [60]

Conscious parallelism is not dead; it lives on, not as a new anti-trust offence, but as a technique of proof for the very traditional offences of conspiracy in restraint of trade and conspiracy to monopolize.

The decline of conscious parallelism has not meant the end of attempts to extend the notion of implied conspiracy to cover aspects of behaviour and even structure which do not constitute conventional anti-competitive practices. Dean Rostow, who hailed the *American Tobacco* decision as a breakthrough in effective control of market power, was compelled to admit that the doctrine of conscious parallelism is limited in scope; but he argued that it might be possible for the notion of "implied conspiracy" to be applied where a small number of companies charged with collective monopolization merely function interdependently in the market. [61] However, he admitted that such a case has never reached the courts, and may never do so in the future.

Those concerned with the present inability of anti-trust legislation to embrace the significant elements of market power would be pleased if the concept of conspiracy could be stretched to include economic interdependence or other manifestations of oligopoly. Neale is probably correct, however, in asserting that "anti-trust will not succeed in eliminating such restrictive effects as may result from this type of industrial structure by broadening the legal meaning of conspiracy". [62] Courts are still bound to construe the meaning of statutes in a reasonable way. A conspiracy requires a "meeting of the minds", and this concord must either be proved directly, or circumstances must point to its probability.

There remains another possible approach, that of "single firm monopo-

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[59] J. DIRLAM & A. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 69 (1954).

[60] *Supra* note 27, at 36-42.

[61] Quoted in ATTORNEY GENERAL'S . . . REPORT, *id.* at 36-42. *See also* C. Edwards, *supra* note 11, at 256-58. So far no Sherman Act case has invoked the concept of monopolization to cover shared power that was neither segmented into single-firm power nor aggravated as combination or conspiracy. Consequently, much of the development of oligopolies has been beyond the reach of section 2.

[62] A. NEALE, ANTITRUST LAWS OF THE U.S.A. 174 (2nd ed. 1970).

lization". Rahl [63] and Turner, [64] among others, have argued that where a tightly knit oligopoly exists, each member could be prosecuted for monopolization under section 2 of the Sherman Act. As Neale points out, the evidence of the structure of the industry and the behaviour of *other* firms could be used as evidence to show that each firm intended to consolidate the monopoly power, collectively held, to exclude potential competition. In a clever parody of Mr. Justice Learned Hand's judgment in *Alcoa*, Neale demonstrates the plausibility of applying the rules on monopolization to the single oligopoly.

> What could be more exclusionary in effect than for each of the three leading firms in a concentrated industry progressively to embrace each new opportunity in its own segment of the market and face every newcomer with new capacity already geared into one of the three great organizations? He who wills the means wills the end, and no oligopolist oligopolizes unconscious of what he is doing. [65]

The theory of single firm "oligopolization" has at least as much to recommend it as the artificial extension of the notion of "conspiracy to monopolize". Though the Department of Justice and the Federal Trade Commission have apparently considered the matter on more than one occasion, [66] only one complaint has been lodged against single firm oligopolies. This complaint, against the makers of breakfast cereals, has not yet come to trial.

Recent experience still leads us to the conclusion that American anti-trust legislation has yet to transcend the "cops and robbers" stage of prosecuting individual acts of illegal behaviour (or legal acts amounting to illegal monopolization or conspiracy to monopolize). Of the two methods considered as possible bases for a frontal assault on market power, one, single firm oligopolization, has never been attempted and could at most apply only to very tightly knit oligopolies; the other, conspiracy to monopolize, is limited by the necessity to prove directly or circumstantially a "meeting of the minds".

Even if, by magic, either or both of these approaches were to prove successful in securing convictions under the Sherman Act, the existing anti-trust remedies could never control oligopolistic behaviour or restructure whole industries.

To the extent that structure and behaviour are interrelated, there is not much point in supervising one element without also controlling the other. Because American anti-trust legislation is still directed toward punishing or forbidding specific types of illegal behaviour, the sorts of remedies provided

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[63] Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 747 (1950).

[64] Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).

[65] A. NEALE, *supra* note 62, at 177.

[66] In 1969, the U.S. Federal Trade Commission launched a much publicized "non public" investigation of the breakfast cereal industry with a view to deconcentration proceedings. The complaint in F.T.C. v. Kellogg Co., *C.C.H. Trade Reg. R. F.T.C. Complaints, Orders & Stipulations*, para. 19, 898 (Docket 8883, Apr. 26, 1972) is still at the procedural stage.

are fines, injunctions and, in very rare cases, divestiture. These remedies are designed either to exact retribution for wrongdoing, prevent further wrongdoing, or force surrender of the fruits of wrongdoing. They only incidentally control industrial structure and firm behaviour as these phenomena are understood by economists.

This central failure of American anti-trust policy has been the theme both of those, like J. K. Galbraith, who regard the whole exercise as a charade and those who wish to see an effective control placed on market power. [67] Whether in the writings of economists and lawyers or in the proposals of task forces or Congressional committees, the basic message is the one conveyed by Kaysen and Turner:

> We are suggesting that the primary goal of anti-trust policy be the limitation of undue market power to the extent consistent with maintaining desirable levels of economic performance. To carry this out, we propose amendments of the anti-trust laws that would (1) enable a direct attack on undue market power without regard to the presence or absence of conspiracy in the legal sense, and (2) severely limit forms of conduct that contribute to, or are likely to contribute to, the creation of undue market power. [68]

These are brave words but ones which have little chance of being turned into action in the foreseeable future. The White House Task Force on Anti-trust Policy appointed in 1967 by President Johnson reported in 1968 with a proposed Concentrated Industries Act which would have empowered the Attorney General, where an industry is organized as an oligopoly and where "effective relief is likely to be available under this Act", to initiate deconcentration proceedings before a special tribunal. Senator Philip Hart of Michigan, Chairman of the Anti-trust and Monopoly Sub-committee of the Senate Judiciary Committee, introduced a similar proposal in 1972, The Industrial Reorganization Act. The recommendation in favour of a Concentrated Industries Act has never been acted upon, and Senator Hart's proposal is also unlikely to make any headway in the foreseeable future.

Although the United States is not politically prepared for the sort of active deconcentration program just mentioned, the need to break out of current anti-trust restraints makes it desirable to try a different approach to the problem of market power.

B. *Canada*

Canada has the honour of having enacted the first modern national anti-trust law. The original version of the Combines Investigation Act [69] dates from 1889, one year before the adoption of Senator Sherman's bill.

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[67] The statements of Galbraith and Donald Turner to the Select Committee on Small Business, 90th Congress, 1st session, 1967, illustrate these views. They are reprinted in CURRENT ISSUES OF ECONOMIC POLICY 159 *ff.* (L. Reynolds, G. Green & D. Lewis eds. 1973).

[68] C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44-45 (1959).

[69] AN ACT FOR THE PREVENTION AND SUPPRESSION OF COMBINATIONS FORMED IN RESTRAINT OF TRADE, S.C. 1889, c. 41.

The history of Canadian anti-trust legislation has not been happy, with both constitutional and political difficulties hampering the development of any real competition policy. With the exception of prosecutions for price fixing and misleading advertising, activity under the Combines Acts has been sporadic and, for the reasons explained below, virtually moribund as regards attacks on monopoly power.

Section 32 of the modern Combines Investigation Act [70] renders unlawful any agreement, arrangement, combination or conspiracy to lessen competition unduly by price fixing or market sharing or similar restrictive practices. As the recent decision in *Regina v. Armco Canada Ltd.* [71] indicates, the "conspiracy" portion of the section is of limited value in controlling the activities of large oligopolies. In that case ten corporations were found guilty of a conspiracy to lessen competition unduly through price fixing in the metal culvert industry and were sentenced to pay, in some cases, very heavy fines. The finding of guilt turned upon the Crown's success in demonstrating, through the use of circumstantial evidence, that the conduct of the several accused was consistent with the existence of a price fixing agreement and was inconsistent with any other rational inference. [72] This is a burden which the Crown will usually find difficult to discharge [73] and the court specifically held that in the absence of proof beyond a reasonable doubt of an express or tacit arrangement, uncompetitive behaviour would escape the application of section 32 of the Act. [74]

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[70] R.S.C. 1970, c. C-23, s. 32, *as amended* S.C. 1974-75 c. 76, s. 14.

[71] Regina v. Armco Canada Ltd., 6 O.R. (2d) 521 (H.C. 1974); Regina v. Armco Canada Ltd. (No. 2), 8 O.R. (2d) 573 (H.C. 1975). The decision of the High Court was substantially affirmed by the Court of Appeal on February 2, 1976, though with modifications as to sentence and a quashing of the convictions of three companies: Regina v. Armco Canada Ltd., 13 O.R. (2d) 32 (C.A. 1976).

[72] This is, of course, the burden of proof by circumstantial evidence in criminal cases: Hodge's Case, 2 Lewin 227, 168 E.R. 1136 (1838).

[73] *See, e.g.*, Regina v. Alcan (Que. C.S. Nov. 22, 1976), a prosecution of the leading aluminum manufacturers under s. 32. The case is a very recent example of the difficulties.

[74] "If there is to be a finding of guilt on the part of the accused, it must be from inferences drawn from the evidence which satisfies me beyond a reasonable doubt that an arrangement or agreement was effected. Such inferences must be consistent only with the establishment of an illegal and unlawful arrangement or agreement and inconsistent with any other rational conclusion." 6 O.R. (2d) at 568. However, Lerner J. found the distinction between conscious parallelism and conspiracy somewhat ephemeral: "I fail to see on a common-sense basis how conscious parallelism could be achieved without a conspiracy on the part of the accused to come to an agreement or arrangement beforehand." *Id.* at 580.

Nevertheless, the Court specifically refrained from equating conscious parallelism with conspiracy. The Court of Appeal (*per* Houlden J.) did not express itself on this point either, but held that the trial judge had correctly stated the burden of proof and had correctly concluded from the circumstantial evidence presented that an agreement or arrangement had been arrived at. However, the Court of Appeal found that the evidence was not convincing with resepct to the participation of three companies in that agreement or arrangement.

In a recent civil decision, Philippe Beaubien & Cie v. Canadian General Electric, (Que. S.C. Oct. 7, 1976), consciously parallel behaviour in a situation of price leader-

Canadian courts, like their American counterparts, will not accept that anti-competitive behaviour, characteristic of oligopolies possessing extensive market power, can itself be the basis of conspiracy. Furthermore, because the Combines Act is legislation in respect of criminal law, the burden of proof on the Canadian authorities in inferring the existence of conspiracy from evidence of parallel behaviour is heavier than that imposed in the U.S. [75] Recent legislation has widened the scope of the Combines Act and increased the powers of the Restrictive Trade Practices Commission by making such practices as exclusive dealing, tied selling and refusal to deal subject to control by the Commission. However, much of the activity characteristic of oligopolies and constituting the most serious menace to the competitive order remains beyond the reach of section 32 of the Act, and this situation is not appreciably affected by the existence in the Act of a general prohibition against monopolies and mergers.

Section 33 of the Combines Investigation Act makes it an indictable offence to be a party or privy to or to knowingly assist in, or in the formation of, a merger or monopoly. [76] The wording is broader than section 2 of the Sherman Act, for it embraces not only monopolization but the actual possession of monopoly power. Unlike the American statute, the Combines Act contains, in section 2(f), a definition of monopoly:

> [A] situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others . . . . [77]

If accepted at face value, this definition would embrace any major oligopoly; for it includes a situation where several persons "either substantially or completely control" the relevant market. There is no requirement of agreement or conspiracy between the several persons. [78] It is sufficient that they exercise substantial market power. There is an added criterion of detriment to the public, but actual detriment need not be shown. The wording of the definition indicates that a demonstration of potential detriment should be sufficient.

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ship was held to be "l'exercise d'un monopole bénéficiant à quelques-uns, lorsqu'il a établissement de prix identiques pour des marchés homogènes dont on sature pleinement le marché."

[75] The Court of Appeal quashed the conviction of one company operating in Quebec because the evidence did not indicate that competition had been *unduly* lessened in Quebec by the inferred arrangement. The definition of "unduly" was elaborated upon by the Supreme Court in Howard Smith Paper Mills, Ltd. v. The Queen, [1957] S.C.R. 403, 8 D.L.R. (2d) 449.

[76] R.S.C. 1970, c. C-23, s. 33: "Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years."

[77] R.S.C. 1970, c. C-23, s. 2.

[78] In Regina v. Canadian General Electric (Ont. H.C. Sept. 2, 1976), the court specifically rejected the idea that the "persons" mentioned in s. 33 must be linked by a proprietary or contractual relationship, thereby admitting the application of the section of cases of shared monopoly.

It is not difficult to imagine the amount of activity to which a similarly worded Sherman Act would have given rise, yet there have been only a few prosecutions for monopoly in the whole history of Canadian anti-trust. [79]

A first attempt was made with a prosecution against the Eddy Match Company. [80] The wooden macth industry in Canada was dominated by Eddy Company and four others, three of which were Eddy subsidiaries and the fourth, Valcourt Co., a holding company for Eddy. Evidence was introduced to show that Eddy had bought out competitors and used predatory tactics to stifle potential competition. Eddy's defence was that the public had not suffered as a result of monopolization and that an essential requirement of the offence of "monopoly" was missing.

In upholding the trial court's finding of guilt, Casey J. of the Quebec Court of Appeal declared that Eddy Match possessed "a control that . . . excluded for all practical purposes the possibility of any competition. Such a condition creates a presumption that the public is being deprived of all the benefits of free competition and this deprivation, being the negation of the public right, is necessarily to the detriment or against the interest of the public". [81]

Given that the definition of "monopoly" includes oligopoly situations, the effect of the *Eddy Match* decision would have been to create a presumption of public detriment whenever substantial market power existed. The Supreme Court of Canada, in *Howard Smith Paper Mills, Ltd. v. The Queen*, [82] declared that public detriment consists of the lessening of competition, regardless of public benefit from any other standpoint. Cartwright J. declared that once virtual elimination of competition has been proved, "injury to the public interest is conclusively presumed". [83]

The rigidity of this type of formula has been criticized by those econ-

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[79] In the REPORT OF THE RESTRICTIVE TRADE PRACTICES COMMISSION ON ELECTRICAL LARGE LAMPS (1971), a finding of monopoly power in contravention of s. 33 was made against Canadian General Electric, Canadian Westinghouse and Sylvania Electric (Canada). *See also* Henry, *Anti-Combines Legislation in Canada*, [1971] MEREDITH MEMORIAL LECTURES 7, at 83-84 (1971), where the then Director of Investigation and Research (Combines Investigation Act), Department of Consumer and Corporate Affairs, declared: "The importance of this case lies in the fact that it is the first case in which an oligopoly situation characterized by price leadership and by conscious parallelism of action has been dealt with in formal proceedings under the Act as a case of monopoly." Although the report provides grounds for supposing that s. 33 could be used as a technique for control of oligopoly power, legal proceedings under the Combines Act did not result in a s. 33 conviction (Regina v. Canadian General Electric, *supra* note 78) although in a civil case, where the burden of proof was lighter, the three companies were held to constitute a monopoly within the meaning of s. 33 (Philippe Beaubien & Cie. v. Canadian General Electric, *supra* note 74).

[80] Rex v. Eddy Match Co., 13 C.R. 217, 104 C.C.C. 39 (Que. B.R. 1951), *aff'd* 18 C.R. 357, 109 C.C.C. 1 (Que. C.A. 1953).

[81] *Id.* at 374-75, 109 C.C.C. at 21.

[82] [1957] S.C.R. 403, 8 D.L.R. (2d) 449.

[83] *Id.* at 425, 8 D.L.R. (2d) at 473.

omists [84] who would like the courts to be able to consider cases where the public interest may be better served by no competition at all. It remains, however, an opinion from the highest tribunal. It would seem, then, that if an oligopoly could be shown to have eliminated or unduly lessened competition (actual or potential), it would not have a public interest argument to fall back on. This supposes, however, that the decision in *Howard Smith Paper Mills* is applicable to the present section 33 of the Act. That decision concerned a price fixing arrangement prosecuted under a section of the Act which, at the time of judgment, also dealt with "monopolies and mergers" but is now a separate section. [85]

To complicate matters, the Ontario High Court applied the Supreme Court's test in *Regina v. Canadian Breweries Ltd.*, [86] a merger case, but only after equating the notion of public detriment with the word "unduly", which is not found in the definition of a merger that lessens competition in the present section 33, but is found in the offences enumerated in the present section 32. If the Ontario court were correct, then the *Howard Smith* test may have applied to any section 33 offence. On the other hand, the *Canadian Breweries* case was concerned with a merger and not a monopoly, so that remarks made in that case concerning section 33 might be held to apply only to the part of the section dealing with mergers. [87]

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[84] *E.g.*, Brecher, *Combines and Competition: A Re-Appraisal of Canadian Public Policy*, 38 CAN. B. REV. 523 (1960), and *An Economist's Evaluation*, *in* ANTITRUST LAWS: A COMPARATIVE SYMPOSIUM 45 (W. Friedman ed. 1956).

[85] The previous Combines Investigation Act, R.S.C. 1952 c. 314, s. 2 (repealed S.C. 1960 c. 45), contained the following definition of "combine":

> otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others.

The New Brunswick Court of Appeal, in Regina v. K. C. Irving Ltd., 11 N.B.R. (2d) 181, at 210, 215, 23 C.C.C. (2d) 479, at 504, 508 (C.A. 1975), decided that the Supreme Court's remarks in Howard Smith Paper Mills, Ltd. v. The Queen, *supra* note 82, were not applicable to a charge under s. 33.

[86] [1960] O.R. 601, 34 C.P.R. 170 (H.C.).

[87] Cartwright J. in the Supreme Court defined the word "unduly" to mean a reduction of competition to the extent that a virtual monopoly was created: *see* Howard Smith Paper Mills, Ltd. *supra* note 82, at 425, 8 D.L.R. (2d) at 473. This interpretation has been followed in some cases, *e.g.*, Regina v. J. J. Beamish Construction Co., [1966] 2 O.R. 867, [1967] 1 C.C.C. 301 (H.C.), but has been rejected in other decisions, where Cartwright J.'s remarks have been considered to be obiter: *see, e.g.*, Regina v. Abitibi Power & Paper Co., 36 C.R. 96, 131 C.C.C. 201 (Que. B.R. 1960); Regina v. Electrical Contractors Assoc. of Ont., [1961] O.R. 265, 36 C.R. 1 (C.A. 1962); The Queen v. Canadian Coat and Apron Supply Ltd., [1967] 2 Ex. C.R. 53, 2 C.R.N.S. 62.

The meaning of "unduly" has not yet been determined by the Supreme Court of Canada. In such cases as Weidman v. Shragge, 46 S.C.R. 1, 2 D.L.R. 734 (1912); Stinson-Reeb Builders Supply Co. v. The King, [1929] S.C.R. 276, [1929] 3 D.L.R. 331; and Container Materials, Ltd. v. The King, [1942] S.C.R. 147, [1942] 1 D.L.R. 529, "unduly" was merely said to be "undue and abusive lessening of competition" or "prejudice to the public interest in free competition [which is] undue". Criteria for judging when such prejudice has occurred were not established. However, a recent amendment to the Combines Investigation Act, S.C. 1974-75, c. 77, s. 14(2), provides:

Adding to the confusion, the British Columbia Court of Appeal, in *Regina v. Morrey*, [88] interpreted the "public detriment" criterion as requiring the Crown to show actual and not merely potential detriment arising from the reduction in competition. This point was echoed by the Manitoba Supreme Court in *Regina v. B.C. Sugar Refining Co.*, [89] which also accepted that mergers must "unduly" lessen competition.

The courts of many provinces had thus made confusing pronouncements on section 33, Quebec (in *Eddy Match*) declaring that a substantial control by a monopoly (which by the definition of the Act includes some types of oligopolies) raises a presumption of public detriment, Ontario and Manitoba (in *Canadian Breweries* and *B.C. Sugar*) declaring that, at least as regards mergers, criteria applicable to section 32 are also applicable to section 33. However, while Ontario favoured a conclusive presumption of detriment arising from the elimination of competition, Manitoba and British Columbia (in *Regina v. Morrey*) required that actual detriment be shown.

None of the cases mentioned above, on which the tribunals of four provinces gave inconsistent, not to say irreconcilable opinions, was taken to the Supreme Court of Canada. [90] The severity of the test imposed on mergers in both the *Canadian Breweries* and *B.C. Sugar* cases effectively killed any hope of organizing an anti-merger policy, while the confusion surrounding the interpretation of "monopoly" discouraged any thought of systematic use of section 33. [91] Only one further case, *Regina v. Electric Reduction Co. of Canada*, [92] has been successfully prosecuted under the anti-monopoly provision.

The British Columbia Supreme Court decided in *Regina v. Allied*

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(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1) [of s. 32], it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

This amendment has the effect of repealing Cartwirght J.'s definition of "unduly" as regards arrangements, combinations, conspiracies and agreements in violation of s. 32. It did not appear to affect, as such, the interpretation of the implied expression "unduly" in s. 33.

In The Queen v. K. C. Irving, Ltd. (S.C.C. Nov. 16, 1976) the Court rejected the idea advanced in *Canadian Breweries* that monopoly "to the detriment of the public" was equivalent to an undue lessening of competition, and so read "unduly" out of s. 33.

[88] 19 W.W.R. 299, 6 D.L.R. (2d) 114 (B.C.C.A. 1956).

[89] 32 W.W.R. 577, 129 C.C.C. 7 (Man. Q.B. 1960). This opinion was followed by the New Brunswick Court of Appeal in Regina v. K. C. Irving, *supra* note 85, at 214, 23 C.C.C. (2d) at 507.

[90] In the case of Regina v. Morrey, *supra* note 88, leave to appeal was refused by the Supreme Court.

[91] *See* Lyon, *Recent Canadian Ant-Combines Policy: Mergers and Monopoly*, 15 U. TORONTO L.J. 155 (1963-64).

[92] 61 C.P.R. 235 (Ont. H.C. 1970).

*Chemical Canada Ltd.* [93] that the "unduly" criterion was not applicable to section 33 offences, while at the same time holding that an illegal monopoly under section 33 must be actually detrimental to the public and that monopoly power was not in itself such a detriment. The Ontario Supreme Court recently applied the same principle to the three major lamp makers and acquitted them of monopoly. [94]

In *The Queen v. K.C. Irving Ltd.*, [95] the Crown was successful at first instance in showing that the possession by one holding company, in effect one individual, of all the English language daily newspapers in the Province of New Brunswick was a monopoly having a detrimental effect on the public. The provincial appeal court quashed the convictions on the ground that the Crown had not shown that the monopoly was detrimental within the meaning of section 33, since such detriment must arise not from the monopolization itself but from other factors. The Supreme Court of Canada, in a recent unanimous decision, upheld the Court of Appeal's interpretation of section 33. It found that there was no detriment to the public independent of the monopolization of the provincial newspaper market arising from the activities of the Irving Companies. It specifically rejected the notion that the test of presumed detriment stated in the *Howard Smith* case could be applied to section 33 and rejected also the contention advanced in the *Canadian Breweries* case that an undue lessening of competition within the meaning of section 32 will amount to a detriment to the interest of the public within the meaning of section 33.

In delivering the judgment of the Court, Laskin C.J. stated:

> The charges involving "merger, trust or monopoly" under the previous legislation and involving "monopoly" under the present Act bring up the question of operation or likely operation of a completely controlled class of business in a market area to the detriment or against the interest of the public. In my opinion . . . proof must be adduced of this element and it cannot be presumed, as the Crown would have it, merely by showing complete

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[93] [1975] 6 W.W.R. 481 (B.C.S.C.).

[94] In Regina v. General Electric Ltd., *supra* note 78, at 72, Pennell J. examined the meaning of the words "detriment to the public" and held that a lessening of competition among companies was not in itself a detriment. He felt that the objective of s. 33 was to protect the public against the abuse of power of monopolies (*id.* at 69) but not to forbid monopoly itself, since monopoly is not an offence *per se* under the Combines Investigation Act (*id.* at 72). "The Court must judge the purported monopoly mainly in terms of market performance; a presumption of detriment does not attach to monopoly control." *Id.* at 71.

In an almost contemporaneous civil judgment, the Superior Court in Montreal found the the lamp makers' refusal to deal with a retail dealer was a form of dishonest competition (concurrence deloyale), an unjustified restrictive practice, an abuse of power (abus de droit) and an unjustified restraint of trade. The Court found that CGE, Sylvania and Westinghouse were an illegal monopoly within the meaning of s. 33 of the Combines Investigation Act as well as under the civil law: Philippe Beaubien & Cie v. Canadian General Electric, *supra* note 74.

[95] (S.C.C. 16 Nov. 1976) (per Laskin C.J.), *aff'g* 11 N.B.R. (2d) 181, 23 C.C.C. (2d) 479 (C.A. 1975), *rev'g* 7 N.B.R. (2d) 360, 45 D.L.R. (3d) 45 (S.C. 1974).

> control of a business let alone substantial control only. The evidence must go beyond that and it was not adduced in the present case. [96]

The court felt that there were sound juridical reasons for distinguishing between the offences under section 32 and those under section 33 and for giving the words "detriment to the public" an independent meaning from the word "monopoly" in the latter section. The result of this interpretation, however, is that an agreement between two firms which might, if acted upon, have some effect on competition is illegal, although it is never in fact put into operation, while the actual and complete monopolization of an industry by a firm or group of firms is not, in itself, illegal. [97]

American attempts at a frontal attack on oligopoly power have failed because the narrowly worded legislation could not be interpreted in a manner wide enough to permit such an attack. Canada's legislation was framed in terms wide enough to permit an attack on market power, but confusion has frittered away this initial advantage to such a degree that U.S. anti-trust authorities have accomplished far more with their disadvantageously worded law than have Canadians with their more commodious legislation. [98]

It is interesting to note that Bill C-256 [99] of 1971, which would have provided Canada with one of the most comprehensive competition Acts in the world, though widening anti-trust scope generally, contained a narrower definition of oligopoly than the present section 33. Section 41 of Bill C-256 required that for two or more persons to be in a monopoly position they must act actually or apparently in concert. However, section 54 of Bill C-256 would have provided for dissolution of monopoly and oligopoly positions, a feature not found in the present law.

Had Bill C-256 become law, the definition of monopoly position, combined with the possibility of dissolution, might have provided a substantial,

[96] *Id.* at 19-20 (reasons for judgment).

[97] Mention should be made of the decision of Gibson J. of the Exchequer Court (now the Federal Court) of Canada in Regina v. Canadian Coat and Apron Supply Ltd., *supra* note 87, in which the problem posed by market power was lucidly discussed. Gibson J. declared: "[T]he structure of markets in Canada must be such as to enforce acceptable competitive behaviour. In other words, there must be limits to the permissible degree of market power in any individual or group of individuals." *Id.* at 59, 2 C.R.N.S. at 69. "Free competition . . . is quite compatible with the presence of monopoly, for the antithesis of the economic conception of monopoly is not free competition as understood by the Courts, but pure competition." *Id.* at 68, 2 C.R.N.S. at 77-78. Gibson J. equated "pure competition" with the Chamberlin model of monopolistic competition. While certain portions of the judgment are not above possible reproach as economic analysis, the judicial recognition of the interdependence of market structure and firm behaviour and of the co-existence of monopolistic elements with elements of neo-classical equilibrium in an effectively competitive order are welcome as a contrast to the refusal of other Canadian judges to concern themselves with the economic realities underlying competition policy. *Cf., e.g.*, Rex v. Container Materials Ltd., 74 C.C.C. 113, at 117-18, [1940] 4 D.L.R. 293, at 298 (Ont. H.C.). *See also* Phillips, *Canadian Combines Policy—The Matter of Mergers*, 42 CAN. B. REV. 78, at 88 (1964). In the *Linen Supply* case, *supra* note 87, suppliers of towels and other linen were convicted of conspiracy in violation of s. 32 of the Combines Investigation Act.

[98] R. GOSSE, LAW ON COMPETITION IN CANADA 179 (1962).

[99] The Competition Act, Bill C-256, Third Session, 1971 (withdrawn).

even if not totally adequate, basis for an attack on undue market power. As it is, Canadian law is gravely defective in the face of oligopoly and its manifestations. [99a]

In an attempt to remedy this defect the government announced its intention to revamp the law concerning mergers and monopolies as stage two of its amendments to the Combines Investigation Act. In their proposals to the government for such revamping, the independent committee, led by Professor L. Skeoch, concluded that a policy of applying criminal sanctions to what is basically an economic problem is of very limited use. "The judgment and remedy are usually (and properly, in the context of criminal law) backward-looking and behaviourally oriented, and pay little concern to fostering desirable market situations. They are, in short, largely unconstructive so far as the economy is concerned." [100]

One of the recommendations of the Skeoch Committee is that the abuse of monopoly power by dominant firms should be prohibited by a proposed National Markets Board—a specialist tribunal which would enforce competition policy. Dominant firms are those firms whose market power is such that their behaviour is largely undeterred by any ability on the part of rivals to offer more favourable terms to customers in the relevant market. A misuse of a dominant position occurs when a firm behaves in such a way as to increase a "significant artificial restraint in a market" [101] without there being any real cost economies to justify that increase in power. The proposed National Markets Board would be empowered, on finding such misuse of a dominant position, to prohibit the abusive conduct and to enforce "any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market". [102] In cases of persistent abuse the Board could recommend that tariff protection be reduced or eliminated for the industry in question or order a divestiture by the dominant firm of such assets as the Board prescribes. [103]

Although the draft legislation submitted by the Skeoch Committee would permit the National Markets Board to order structural changes in any market subjected to abuse by a dominant firm, such abuse is defined in terms of behaviour only. The result is that the Committee has recommended control of undue market power essentially based on control of abusive conduct and only rarely on the enforcement of alterations in the structure of the relevant market. The Committee advanced six reasons for avoiding a general attack on the structural basis of undue market power. [104]

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[99a] *See also* the monopoly provisions in the most recent bill, The Competition Act, Bill C-42, Second Session, 1977 and commentary thereon *in* CAN. DEPT. OF CONSUMER & CORP. AFFAIRS, PROPOSALS FOR A NEW COMPETITION POLICY FOR CANADA 120 (1977).

[100] L. SKEOCH & B. MCDONALD, DYNAMIC CHANGE AND ACCOUNTABILITY IN A CANADIAN MARKET ECONOMY 41 (1976).

[101] *Id.* at 156.

[102] *Id.*

[103] *Id.* at 151.

[104] *Id.* at 148-150.

(1) Such a policy would be difficult to apply in a non-discriminatory manner.
(2) It might incidentally breakup efficient firms and deprive them of real economies of scale.
(3) It might have adverse internal effects on the firms affected and discourage the healthy desire for growth.
(4) It might damage the international competitiveness of firms since large scale appears to be necessary for effective competition in international markets.
(5) Control of abusive conduct will itself help to eliminate most of the undesirable aspects of the conduct of large firms.
(6) It is dangerous to allow a few people, unaware of all the factors involved, to dictate the structure of industry.

For these reasons, advanced with hardly any discussion, the Skeoch Committee recommended what might be described as symptomatic relief for undue market power, while refraining, except in rare cases, from challenging the basis of that power. The Committee recognized that its proposed solution was second best but could not recommend that the notion of abuse of a dominant position be defined so as to enable the public authorities to correct deficiencies in the competitive order resulting from defects in structure as well as uncompetitive behaviour. It may be that the approach adopted by the Skeoch Committee will prove to be the only feasible method of controlling undue market power, but in the European Economic Community, where the notion of abuse of a dominant position has come to play an important role in competition policy, it has been held that undue market power is itself inconsistent with the Common Market's objective of open competition and that such power can be prohibited, whether it results from anti-competitive behaviour or from the structure of the relevant market.

## III. Abuse of a Dominant Position in E.E.C. Law

Article 3 of the Treaty of Rome, establishing the European Economic Community, includes among the policies to be followed by the community "the institution of a system ensuring that competition in the common market is not distorted". [105] The "Rules on Competition" are in fact the first chapter of that part of the treaty dealing with "the policy of the community", an indication that much importance was attached to them by the drafters of that document. [106]

Many of the rules of competition are familiar to students of North American anti-trust law, as indeed they should be, since they are based on provisions of the Sherman, Clayton and Federal Trade Commission Acts. Price fixing agreements are declared illegal, as are certain exclusive dealership arrangements and tied selling.

[105] Treaty Establishing the European Economic Community, Art. 3(f) (Treaty of Rome 1957).
[106] Pt. 3, Title I, c. 1.

However, the E.E.C. rules are perhaps more interesting in their divergence from American law than in their similarity. Article 85, for example, speaks of "enterprises"; whereas the Sherman Act is violated by "anyone" who acts in a specified manner. Paragraph 3 of Article 85 contains provisions by which practices already declared to be anti-competitive can be absolved from the resultant illegality, a situation for which there is no real parallel in American practice.

Of particular interest is Article 86, which provides that the exploitative abuse by one or more enterprises of a dominant position held in the Common Market or in a substantial part of it is forbidden as being incompatible with the existence of the Common Market itself.

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. [107]

Although U.S. courts have occasionally referred to the "dominant position" of particular firms, [108] the term is not found in American anti-trust legislation. French and Belgian law both contain provisions respecting the activities of firms or persons holding either a dominant position in the market or economic power. However, these dispositions were introduced into France in 1963 and into Belgium in 1960. When the Common Market was established in 1958, the only legislative dispositions explicitly concerned with dominant positions were Article 22 of the German Anti-Cartel Law (GWB) of 1957 and Article 66(7) of the Treaty of Paris, which established the European Coal and Steel Community.

The German Law [109] provided that an enterprise has a dominant posi-

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[107] *Id.* Art. 86.

[108] *E.g.*, Am. Tobacco Co. v. U.S., 328 U.S. 781, at 796 (1946), where reference is made to the dominant position of the "Big Three" cigarette manufacturers.

[109] *See* OCDE. LA PUISSANCE ECONOMIQUE ET LA LOI (1970), for a discussion of the various national legislative approaches to market power. E.E.C. rules are also surveyed. The article deals with the law as it stood when the E.E.C. treaty came into force. In 1973, s. 22 of the GWB was amended so as to provide a new definition of dominant positions that included the criterion that a firm should have at least a one-third share in the relevant market or, in the case of oligopolies, three or fewer enterprises should have a combined market share of 50 per cent or more or five or fewer enterprises a market share of two-thirds or more. *See also* Cairns, *West Germany Competition Policy and Practices, in* 2 STUDIES OF FOREIGN COMPETITION POLICY AND PRACTICE 410-21 (1976), where the possible effectiveness of the amended s. 22 is discussed.

tion when, in what American lawyers would call the relevant market, it faces little or no competition. If two or more enterprises together faced little or no competition and, furthermore, were not notably competitive amongst themselves, they were also said to be in a dominant position.

Paragraph 3 of Article 22 provides that the Bundeskartellamt may sanction any abusive exploitation of such dominant positions. The Treaty of Paris does not define the concept of dominant position, although Article 66(7) speaks of "a dominant position which removes them (enterprises) from effective competition in an important part of the Common Market". The Article is not concerned with "abusive exploitation" as such but imposes sanctions when a dominant position is used for purposes contrary to the treaty.

Like Article 66(7) of the Treaty of Paris, Article 86 of the Treaty of Rome offers no definition of the term "dominant position", but, like Article 22 of the GWB, Article 86 specifically sanctions abusive exploitation, a term which neither document defines. However, Article 86 had, in common with the other two provisions, the distinction of being very rarely resorted to in practice. The absence of judicial pronouncement or of commission opinion left the field wide open to doctrinal speculation in the late 1960's and early 1970's. A review of the main controversies aired in the journals of the period is of more than historical interest because it shows the contrast not only among the different opinions about the meaning of the terms in Article 86 but the different notions of competition to which these various interpretations were attached.

One position, of which Joliet [110] may be taken as a typical exponent, held that the concept of a "dominant position" was akin to "monopoly" as understood in U.S. anti-trust law following the judicial interpretation of Section 2 of the Sherman Act. Monopoly does not require the absence of all competition but the ability of the firm to exclude competition from the market. Although the Sherman Act forbids the acquisition of such power, the provisions of Article 86 specifically accept it.

Similarly, the GWB concerns only certain aspects of firm behaviour. Neither it nor Article 86 is concerned with industrial structure *per se*. Firms are permitted by law to achieve and use monopoly power. Only if they abuse it may they be sanctioned, and those sanctions would apply to the abuse itself, not to the market structure with which it is associated. Joliet admits, however, that a policy to maintain competition must be concerned not only with abusive behaviour but with market structure as well. Therefore Article 86 (like Article 22 of the GWB) is not really a "competition" disposition at all but constitutes the equivalent of regulation by public authority. Writing of Article 22 of the GWB (and with specific reference to Article 86), Joliet declared:

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[110] *E.g.*, R. JOLIET, MONOPOLIZATION AND ABUSE OF A DOMINANT POSITION (1970); Joliet, *Monopolisation et Abus de Position Dominante*, 5 REV. TRIM. DE DROIT EUROPÉEN 645 (1969).

> Although it appears from the legislative history of the amended section 22 that one of the purposes of the amendment was also to ensure protection of competitive processes in the dominated market we think that those two objectives are not compatible with each other. The monopolization system and the abuse of market power system cannot be applied simultaneously under a similarly worded provision because these two systems reflect a different choice in economic policy. [111]

Others took the position that Article 86 was indeed a "competition policy" disposition, but then asserted that it was concerned only with firm behaviour and not with market structure. Thus, for example, Oberdorfer, Gleiss and Hirsch: "[Article 86] clearly distinguishes between the structure of the market and behaviour in the market. Only behaviour can be prohibited if a dominant position is exploited abusively." [112]

Both these interpretations of Article 86 were based on certain common elements. They considered it significant that the examples of abusive exploitation given in Article 86 itself were all behavioural in character. It was also carefully noted that while the Treaty of Paris contained explicit provisions dealing with structural change through concentration, there was no similar provision in the Treaty of Rome. Such an omission must be significant. Both these interpretations took it for granted that "dominant position" must mean monopoly or significant market power, whether exercised by one or several enterprises. Both views arrived at substantially the same interpretation of Article 86 but drew different conclusions as to the purpose of the Article.

Jean-Pierre Dubois [113] attempted to reconcile these divergent conclusions by dividing restrictions of competition into two categories: (1) "passive restrictions" where competition is absent and (2) "active restrictions" which consist of abusive behaviour causing damage. The existence of a dominant position presumes the absence of competition, and if this "passive restriction" is all that exists, there is no violation of Article 86. But "toute restriction abusive de la concurrence par position dominante est un abus de position dominante". [114]

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[111] *Id.* at 162-163. *See also* J. SCHAPIRA, CONCEPTS ECONOMIQUES ET DROIT EUROPÉEN 5 (1972), and J. GUYENOT, DROIT ANTITRUST EUROPÉEN 139 (1970).

[112] C. OBERDORFER, A. GLEISS & M. HIRCH, COMMON MARKET CARTEL LAW 117 (2nd ed. 1971). *See also* P. Van Ommeslaghe, *L'Application des Articles 85 et 86 du Traité de Rome*, 3 REV. TRIM. DE DROIT EUROPÉEN 457 (1967); K. DE ROUX & D. VOILLEMOT, LE DROIT DE LA CONCURRENCE DES COMMUNAUTÉS EUROPÉENNES (1969); R. FRANCESCHELLI, R. PLAISANT & J. LASSIER, DROIT EUROPÉEN DE LA CONCURRENCE (1966).

[113] J.-P. DUBOIS, LA POSITION DOMINANTE ET SON ABUS DANS L'ARTICLE 86 DU TRAITÉ DE LA CEE (1968).

[114] *Id.* at 57. Generally, Dubois' book is an affirmation of the pro-competition purpose of Article 86 stated in terms which approximate those employed by the Court of Justice in *Continental Can*. However, the protection of competition is assured by Article 86 only in the case of active restriction contrary to the general interest defined as "un dommage causé aux partenaires dans la concurrance, soit aux consommateurs, soit aux concurrents dans l'hypothèse de monopole ou d'oligopole partiels par une atteinte à leur liberté de choix économique que cette atteinte leur soit portée

This distinction between active and passive restrictions has substance only if structural and behavioural elements of competition can be separated both in theory and in fact. The weight of economic theory is against such an interpretation of competition, [115] and it is doubtful if Joliet would accept such a distinction. If the notions of "dominant position" and competition are mutually exclusive, then Article 86 must be considered a mechanism of behaviour regulation and not a "competition policy" disposition.

There is a certain logical neatness in the assumption that acceptance of the existence of dominant positions means acceptance of a state of non-competition. This position is more plausible because the terms of Article 22 of the GWB, at the date the Treaty of Rome came into force, defined "dominant position" to mean the exclusion of all or virtually all competition in the relevant market. There are, however, both economic and juridical reasons for refusing to accept this interpretation of Article 86.

To assert that dominant positions are incompatible with competition is to risk confusion, raised by neo-classical marginal analysis, between the notions of "market" and "competition", reducing the meaning of competition to a series of unrealistic and, generally, structural norms. The burden of the microeconomic revolution has been to demonstrate, or at least draw the attention of economists to, the fact that in a world of heterogeneous products, imperfect knowledge and imperfect factor and product mobility, market power and elements of neo-classical competitive structure must, necessarily, co-exist. [116]

"Competition" cannot, therefore, be held to exclude market power, although a sufficient degree of market power will preclude the existence of effective competition. To admit a degree of market power, as Article 86 clearly does, would not signify acceptance of non-competition and would not, therefore, preclude the application of that disposition to anti-competitive activity, whether by the behaviour of firms or through alterations in market structure itself.

Furthermore, there is no definition of the term "dominant position" in Article 86. There is no presumption that the authors of the Treaty of Rome had Article 22 of the GWB in mind when drafting the rules on competition. [117] If anything, it should rather be presumed that Article 86 was to correspond to Article 66(7) of the Treaty of Paris, which, as mentioned earlier, sanctions a dominant position which removes enterprises from effective competition in a substantial part of the Common Market. This could mean either that all dominant positions were presumed to have

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par une restriction ou une suppression de la concurrence ou par l'exploitation à leurs dépens d'une absence de concurrence." *Id.*

[115] *See, e.g.*, A. JACQUEMIN, ABUSE OF DOMINANT POSITION AND CHANGING EUROPEAN INDUSTRIAL STRUCTURE (1974), where, in a discussion of Article 86, the inter-relationship between structure and performance is emphasized.

[116] Chamberlin, *Product Heterogeneity and Public Policy*, 40 AM. ECON. REV. No. 2, at 85, (May 1950, Proceedings vol. 62nd Annual Meeting 1949).

[117] The GWB dates from 1957 and was promulgated only in July of that year, by which time the Treaty of Rome had been written and signed.

the effects noted above or that, while dominant positions having these particular effects were to be sanctioned, other positions of dominance would not be attacked because they did not have such anti-competitive connotations. On this interpretation, dominant positions as such would not be considered as equivalent to non-competition.

A third approach to the interpretation of Article 86 is therefore possible.[118] It may be presumed that Article 86 is not misplaced, as Joliet suggested, but is included among the rules of competition so that the objective of the community, as enunciated in Article 3(f), may be realized and a regime established which assures that competition is not thwarted in the Common Market.

The notion of competition underlying Article 3(f) and Chapter 1 of Title 1 of Part III of the Treaty is itself undefined. It may be considered, however, as providing for market structures and patterns of firm behaviour which are consistent with both producer and consumer freedom and efficient resource allocation. In sanctioning "abuses of dominant positions", Article 86 presumes that such abuses are inconsistent with the competitive order or, conversely, that infringements of the competitive order may be abuses of a dominant position, whether these abuses consist in specific types of firm behaviour or in alterations of market structure. In describing abuses of dominant positions as being incompatible with the Common Market, Article 86 could be interpreted as rendering them incompatible with the competitive order which the community is pledged by the Treaty to uphold.

Although accepting, as it clearly does, the existence of dominant positions, Article 86 does not necessarily accept the existence of non-competition (or render the term "competition" devoid of economic meaning by applying it only to certain specified types of behaviour) but rather accepts the inevitability of at least some market power and acknowledges its consistency with the competitive order sought in Article 3(f).

This approach has the advantage of reconciling the policy objective of the Treaty with the idea of competition propounded by the general body of economic theory. The theory, however, is based on a number of presumptions:

(1) that, although the word "competition" does not appear in the general paragraph of Article 86, the disposition is concerned with the establishment and maintenance of a competitive order as enunciated in Article 3(f);

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[118] Amongst those who have promoted this approach are: D. McLACHLAN & D. SWANN, COMPETITION POLICY IN THE EUROPEAN COMMUNITY (1967); P. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (1973); Canello & Silber, *Concentration in the Common Market*, 7 COMMON MARKET L. REV. 138 (1970); M. CARDON DE LIGHTBUER & F. HERBERT, EVOLUTION RÉCENTE DE LA NOTION D'ABUS DE POSITION DOMINANTE DANS LA CEE (1970); Waelbroek, *Concurrence*, *in* J. MÉGRET, 4 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENE (1972).

(2) that this competitive order is based on the ideas of market structure and firm behaviour previously described; and
(3) that the "dominant position" which Article 86 permits represents acceptance of no greater market power than that which is consistent with a competitive order.

If these three presumptions are well-founded and the consequent interpretation of Article 86 is correct, then a potentially powerful mechanism has been made available for an attack on undue market power and particularly on undue oligopoly power. However, since the wording of the Treaty gives no real clue as to the correctness of the presumptions, they can only be tested against the interpretations of Article 86 given both by the Commission and the Court of Justice of the EEC.

It was not until 1965 that the Commission made its first substantial pronouncement on Article 86. This may have been due to its submergence beneath almost 40,000 notifications of agreements under Article 85 or because it was felt necessary in the early years of the community to encourage the formation of larger and presumably more efficient enterprises through concentrations. After consultation with a group of professors, led by Jacques Houssiaux, the Commission presented a *Memorandum on Concentration in the Common Market.* [119]

The document unequivocally declares that "la concurrence n'est pas seulement le résultat d'un comportement, elle nécessite aussi certaines structures économiques". [120] However, competitive structure and behaviour do not preclude the existence of all market power since it is admitted that "une concurrence efficace entre entreprises oligopolistiques répond aux objectifs du traité". [121] Such oligopolistic competition could not be eliminated from the market because of cartel or other arrangements among firms or because of the activities of firms which achieved dominant positions. [122] The professors emphasized the possibilities for anti-competitive behaviour inherent in the dominance that exists "lorsqu'une ou plusieurs entreprises peuvent agir de façon essentielle sur les décisions d'autres agents économiques au moyen d'une stratégie indépendante de sorte qu'une concurrence praticable et suffisamment efficace ne peut apparaître et se maintenir sur le Marché". [123]

For the professors, the abuse of a dominant position lay in the possibilities offered to holders of market power "pour obtenir des avantages qu'ils n'obtiendraient pas en cas de concurrence praticable et suffisamment efficace". [124] The Commission described abuse as "comportement fautif au

[119] *Memorandum de la Commission de la C.C.E., CEE sur la Concentration dans le Marché Commun*, 2 REV. TRIM. DE DROIT EUROPÉEN 651 (1966). Note: official EEC documents issued before January 1, 1973 are quoted here in French. After the above date, English became an official language of the community.

[120] *Id.* at 655.

[121] *Id.* at 657.

[122] *Id.* at 676.

[123] *Id.* at 670.

[124] *Id.*

regard des objectifs fixés par le traité. Les pratiques abusives d'une entreprise dominante peuvent se manifester vis-à-vis des concurrents actuels, des concurrents potentiels, vis-à-vis des fournisseurs et des utilisateurs". [125]

Although the phraseology is different, the two descriptions agree that abuse is inconsistent with the existence of competition. The emphasis placed by the Commission on the effects of abuse on actual or potential competitors indicates a concern with changes in market structure as well as behaviour, a concern given concrete expression in the case of certain types of concentration: "Une concentration d'entreprises se traduisant par la monopolisation d'un marché doit être traitée, exception faite de circonstances particulières, comme l'exploitation abusive d'une position dominante au sens de l'article 85." [126]

In the first case presented to it in which alleged abuse of a dominant position was a central issue, the Commission decided that *GEMA* [127] (a German authors' rights society for musical compositions) held a dominant position in that country. Although it emphasized that the dominant position *per se* was not in issue, the Commission, in the course of judgment, listed a series of abusive practices, which included: refusal to admit non-Germans to full voting membership; extensive use of tie-in clauses in contracts which were not objectively necessary to the performance of the contract itself; and discrimination practised against various importers of records and tapes.

In condemning GEMA and ordering drastic changes to be made in its methods, the Commission noted the different individual acts of the society but declared "qu'il est précisement reproché à la GEMA de vouloir faire de sa position dominante un monopole absolu, par le biais de certaines dispositions de contrats de cession". [128]

In other words GEMA's offence was not so much the individual practices in which it had engaged as the attempt to use its market power to eliminate all effective competition. Article 86 could not be used to attack market power *per se* but could and would be used to maintain, if possible, a regime free of monopoly in the relevant market. [129]

In the meantime, the Court of Justice had had occasion to refer to Article 86. In *Parke, Davis & Co. v. Probel Reese,* [130] a company which held an exclusive license in the Netherlands to a product patented in that country attempted to stop the importation of the same product from Italy where, by law, the product was unpatentable. One of the issues raised was

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[125] *Id.* at 676.

[126] *Id.*

[127] 14 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENES L134/15 (Commission 1971).

[128] *Id.* at 22.

[129] *See, e.g.*, Foscaneanau, *Première Application de l'Article 86 du Traité de Rome par la Commission de la C.E.E.*, 14 REV. DU MARCHÉ COMMUN 476 (1971). The author notes this element of the decision somewhat "en passant" and expresses his reservations while acknowledging the difference between a "monopoly" and a "dominant position".

[130] [1968] C.M.L.R. 47 (C. of J. of Eur. Comm. Case 24/67).

whether the attempted blocking of parallel imports constituted an abuse of a dominant position.

The court decided that the application of Article 86 required three distinct elements: (1) the existence of a dominant position; (2) the abusive exploitation of that position; and (3) the possibility of that abuse affecting trade between member states. Without defining either "dominant position" or "abuse", the court declared that a difference in price between the patented and non-patented products is not itself proof of the abuse of a dominant position but could, in certain cases, be an important indication of the existence of abuse.

In *Sirena S.R.L. v. Eda S.R.L.*,[131] a case involving the protection of a trademarked beauty cream by blocking of parallel imports, the court was again asked whether the use of trademarks obtained in different member states was an abuse of a dominant position. After reiterating the necessity for the presence of the three elements referred to in the *Parke, Davis* case, the court proceeded to elaborate on the requirements of a dominant position. As well as the territorial criterion, "il faut en outre que ledit titulaire ait le pouvoir de faire obstacle au maintien d'une concurrence effective sur une partie importante du marché à prendre en consideration, compte tenu notamment de l'existence éventuelle, et de la position, de producteurs ou distributeurs écoulant des marchandises similaires ou substituables".[132] This position was restated in the *Deutsche Grammophon* case.[133]

It is quite clear that the court considered

(1) that a dominant position could co-exist with effective competition, even though it gave its holder the power to obstruct such competition; and

(2) that effective competition must be conceived not simply in terms of behaviour but also in association with certain types of market structure.

These two considerations represent two of the three assumptions on which the theory of Article 86, described above, is based. The third assumption, it will be recalled, is that effective competition, its establishment and maintenance, are the goals of Article 86 and that attempts by holders of dominant positions to substantially disturb effective competition will be sanctioned as abuses of their dominant positions.

This third assumption was not discussed in the *Sirena* case, where the

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[131] [1971] C.M.L.R. 260, 7 REV. TRIM. DE DROIT EUROPÉEN 818 (C. of J. of Eur. Comm. Case 40/70).

[132] *Id.* at 275, 7 REV. TRIM. DE DROIT EUROPÉEN at 829. The Commentaries on this case tend to focus on the issues raised with respect to industrial property rights. Even where reference is made to the Article 86 aspect of the decision, the phrase cited and its implications are passed over. *See, e.g.*, Chavanne, *Observations*, 7 REV. TRIM. DE DROIT EUROPÉEN 830.

[133] Deutsche Grammophon GmbH v. Metro-SB-Grossmarket GmbH, [1971] C.M.L.R. 631, 7 REV. TRIM. DE DROIT EUROPÉEN 481.

Article 86 issue was somewhat marginal. But in *Re Continental Can Co.*, [134] Article 86 was the central issue and the court pronounced on the third assumption in no uncertain manner.

Continental Can, the leading American producer of metallic packaging material, was also a leading producer in Germany through its subsidiary, SLW. It made an attempt to take over the leading Dutch firm, TDV, creating a holding company, Europemballage, to which the assets of TDV and SLW were transferred. The Commission, after investigating the circumstances of the take-over, in a decision given on December 9, 1971, pronounced it to be in violation of Article 86. The Commission thus gave a further interpretation of the terms "dominant position" and "abuse" and of the nature and role of Article 86.

According to the Commission, firms hold a "dominant position" when they have "une possibilité de comportement indépendent qui les met en mesure d'agir sans tenir notablement compte des concurrents, des acheteurs ou des fournisseurs". [135] This possibility will exist with certain types of market structures or technologies or with such barriers to new competition as preferred access to capital or raw materials. Firms in this position have the possibility of substantially influencing price and production levels; *i.e.*, they possess market power. But this power, this possibility, "ne doit pas nécessairement découler d'une domination absolue permettant aux entreprises qui la détiennent d'éliminer toute volonté de la part de leurs partenaires économiques, mais . . . il suffit qu'elle soit assez forte dans l'ensemble pour assurer à ces entreprises une indépendance globale de comportement même s'il existe des différences d'intensité de leur influence sur les différents marchés partiels". [136]

This certainly meant that a dominant position could consist in market power of a lesser degree than monopoly (or the "joint monopoly" of tightly knit oligopolies). It did not, however, mean that the acceptable level of market dominance was simply that consistent with the maintenance of effective competition. In its consideration of the notion of "abuse", the Commission reinforced its tendency to allow for breaches in the system of competition, a tendency already apparent in the 1965 memorandum: "considérant que constitue un comportement incompatible avec l'article 86 du traité, le fait pour une entreprise en position dominante de renforcer cette position par voie de concentration avec une autre entreprise avec la conséquence que la concurrence qui aurait subsisté effectivement ou potentiellement malgré l'existence de la position dominante initiale *est pratiquement éliminée* . . . dans une partie substantielle du marché commun." [137]

To constitute abuse of a dominant position, the practical elimination

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[134] 15 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES L7/25, [1972] C.M.L.R. D11.

[135] *Id.* at 35, [1972] C.M.L.R. at D27.

[136] *Id.*

[137] *Id.* at 37, [1972] C.M.L.R. at D31 (emphasis added).

of effective competition would have to occur. Any breach in the competitive order short of this drastic situation could not be checked by Article 86. The Commission allowed that dominant positions could co-exist with effective competition, but in sanctioning abuses of dominant positions, it did not seek to maintain effective competition but to prevent the elimination of all competition in the relevant market.

In the case in question, Continental Can was held to have practically eliminated all competition, actual or potential, in the market for light metallic packing in North Germany and the Benelux and thereby to have abused its dominant position.

The case generated considerable interest because of the Commission's application of Article 86 to a merger, a development which many commentators had considered impossible. In the excitement of the merger question, the positions taken by the Commission on the issues of "dominance" and "abuse" were either not given much attention or were altogether ignored by the commentators. But they surfaced once more when Continental Can appealed to the Court of Justice in Luxembourg.

The case that developed in that Court [138] is remarkable in many ways, beginning with the fact that the real argument took place not between the parties themselves, although each advanced an interpretation of Article 86 supporting its position, but between the Advocate-General, a sort of official adviser to the Court, and the Court itself. It is fairly rare for the Court to disagree with the substance of the Advocate-General's interpretation of the issues at hand. In *Continental Can* there was fundamental disagreement not just on the meaning of Article 86 but on the very purpose of the competition policy of the E.E.C.

The thesis advanced by the Advocate-General, Mr. Roemer, was that while in some circumstances Article 86 could be applied to changes in market structure, these changes must consist of abusive tactics employed by a dominant firm in order to force other firms to merge: "its application can be considered only if the position in the market is used as an instrument and is used in an objectionable manner; these criteria are therefore essential prerequisites of application of the law." [139]

Furthermore, since Article 86 was to be interpreted strictly, the type of objectionable behaviour must be of "the kind enumerated in the examples set out in Article 86 paragraph 2(a) to (d)". [140]

What part did the idea of competition have to play in Article 86? Was the Article not part of the rules of competition—an objective enunciated in Article 3(f)? The Advocate-General first asserted that "it is probably agreed that the provisions under discussion amount to declarations and rules

[138] Europemballage Corp & Continental Can v. E.C. Commission, [1973] C.M.L.R. 199, C.C.H. Common Market Reporter Court Decisions, para. 8171, p. 8279-3 (C. of J. of Eur. Comm. Case 6/72, 1973).

[139] *Id.* at 206, C.C.H. at 8306, col. 1.

[140] *Id.* at 207, C.C.H. at 8306, col. 2.

which are not suitable for direct applicability", [141] and then went on to state an interpretation of the Article corresponding to what has here been described as the Joliet position, *i.e.*, that Article 86 is not concerned with competition *per se* but with regulating the behaviour of monopolies.

> The treaty will even accept the total absence of any competition, *i.e.* a complete monopoly. One is in my opinion entitled to say this because Article 86 clearly does not distinguish between different degrees of domination of the market and because it does not declare to be prohibited even an attempt at creating a monopoly situation as was done by section 2 of the Sherman Act, well known to those who drafted the treaty. [142]

To this clear statement of the argument against the existence of a competition policy in Article 86 the Court gave a forthright reply. Article 86 could only be understood in the context of the objectives of the EEC treaty and more particularly Article 3(f), which pledged the community to the establishment and maintenance of a competitive order. The various structural and behavioural components of such an order cannot be separated: "the distinction between measures which concern the structure of the undertaking and practices which affect the market cannot be decisive, for any structural measure may influence market conditions if it increases the size and the economic power of the undertaking." [143]

The objective of Article 86 was to ensure that market dominance was not used to stifle the competitive order. While dominant positions were in themselves immune from attack, these positions, as defined in the *Sirena* case, represented the possession of a degree of market power consistent with the maintenance of effective competition.

But if such a dominant position is strengthened, if market power is increased "in such a way that the degree of dominance reached substantially fetters competition, *i.e.* that only undertakings remain in the market whose behaviour depends on the dominant one", [144] then there will be an abuse of a dominant position forbidden by Article 86. It is irrelevant that there is no causal link between the dominance and the abuse, nor any consideration of subjective fault. The violation lies not in the behaviour or activity *per se* but in the damage done to the competitive order.

In referring to an intolerable reduction in competition, the Court spoke of a condition that "substantially fetters competition", the dominant firm being present in the market only with undertakings "whose behaviour depends on the dominant one". Both in the 1965 memorandum and in its decision in *Continental Can*, the Commission had taken the view that abuse consisted in the elimination of all or practically all competition in the relevant market, *i.e.* that Article 86 was an anti-monopoly disposition but not necessarily a pro-competition one.

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[141] *Id.* at 208, C.C.H. at 8306, col. 1.
[142] *Id.*
[143] *Id.* at 223, C.C.H. at 8299, col. 2.
[144] *Id.* at 225, C.C.H. at 8300, col. 2.

The Court replied to this view by holding that an abuse occurred "if an undertaking holds a position so dominant that the objectives of the treaty are circumvented by an alteration of the supply structure which seriously endangers the consumer's freedom of action in the market". [145] This would necessarily exist if practically all competition is eliminated, but "such a narrow precondition as the elimination of all competition need not exist in all cases". [146]

In emphasizing the objectives of the Treaty and consumer freedom of action, the Court, where it uses the word "competition", can be taken to have meant "effective competition", and in specifically disagreeing with the Commission's view of the role of Article 86, it may also be taken to have affirmed the pro-competition purpose of that disposition. The dependence referred to in the description of abuse is not simply the relationship between leader and follower—between quasi-monopolist and satellites—but is more akin to the interdependence which characterizes highly concentrated and closely knit oligopolies.

If this interpretation of *Continental Can* is correct, the Court has decisively upheld the remaining presumption on which the theory of Article 86, as advanced in this paper, is based: namely, the presumption that the disposition is concerned with the establishment and maintenance of a competitive order as enunciated in Article 3(f). Maintenance of a competitive order against the abuses arising from the dominant positions held by one or more enterprises in turn implies that anti-competitive activities will be sanctioned whether these consist in anti-competitive behaviour or in alterations to the structure of the relevant market.

## IV. After Continental Can

The Commission's decision and especially the judgment of the Court generated considerable controversy and provoked the hostility of writers who had accepted interpretations of Article 86 now declared to be erroneous. Some of the criticisms were petulant, for example de Richemont's comment: "aucun texte du traité ne proscrit le monopole; c'est l'avis formel de la doctrine". [147]

At least for Anglo-American lawyers, the observation is totally worthless in the face of an unequivocal statement to the contrary by a Supreme Court.

For Saint Esteben the decision of the Court was not merely an incorrect

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[145] *Id.*, C.C.H. at 8301, col. 1.

[146] *Id.*

[147] De Richemont, *Concentrations et Abus de Positions Dominantes*, 9 Rev. Trim. de Droit Européen 463, at 481 (1973). *See also* K. Lipstein, The Law of the European Economic Community (1974). For a Canadian view of *Continental Can*, see MacDonald, *The Role of Competition in the European Economic Community*, *in* 2 Studies of Foreign Policy and Practice 69-78.

interpretation of the treaty, "l'arrêt Continental Can constitue une décision avant tout politique". [148]

There were, however, a number of substantial comments indicating disagreement either with individual aspects of the judgment or with the role which the court had assigned to Article 86. Van Ommeslaghe [149] noted the absence of any causal link between the abuse and the dominant position. Unless such a link or nexus were established, firms ran the danger of being held to have abused a dominant position "dès lors que [leur] comportement est déterminé sans tenir compte des réactions de [leurs] concurrents, fournisseurs ou clients"; [150] but if a firm possesses a dominant position it must at least in some cases be able to act in the manner described above. Therefore, the Court has confounded the notion of dominance and the notion of abuse, which Article 86 is supposed to distinguish.

In fact, according to Vandamme, [151] the judgment in *Continental Can* has altogether read out of Article 86 the idea of dominant position as a distinct notion:

> Il n'est en effet plus nécessaire de prouver une "domination" préalable sur un marché ou interviendrait la concentration: il suffirait que le résultat global de l'opération, par example dans le chef d'une entreprise financièrement et économiquement très puissante aboutisse à la création sur ce marché d'une structure de concurrence fortement diminuée. [152]

If this view is correct, then *Continental Can* has by implication reversed the position, adopted in both *Parke, Davis* and *Sirena*, that a specific finding of the existence of a dominant position is required in order to apply Article 86.

These criticisms may, however, be seen as peripheral to the substantive basis for the attack on the *Continental Can* judgment. The central objection, formulated by Foscaneanu, [153] de Richemont, [154] Saint Esteben, [155] Cerexhe [156] and others, is that Article 86 has been converted into something it was never intended to be—an instrument for the preservation and maintenance of an order of effective competition.

According to Saint Esteben, the authors of the Treaty never intended to attack concentrations or market power. "En réalité l'article 86 a pour

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[148] St. Esteben, *Le Régime de Concentration en Droit Communautaire*, 101 J. DU DROIT INTERNATIONAL 428 at 440 (1974).

[149] Van Ommeslaghe, *Les articles 85 et 86 du traité de Rome . . . 2e partie*, 9 CAHIERS DE DROIT EUROPÉEN 548 (1973).

[150] *Id.* at 573.

[151] Vandamme, *L'Arrêt de la Cour de Justice du 21 Fevrier 1973 et L'Interprétation de L'Article 86 du Traité CEE*, 10 CAHIERS DE DROIT EUROPÉEN 112 (1974).

[152] *Id.* at 125.

[153] Foscaneanu, *L'Abus de Position Dominante Après L'Arrêt Continental Can*, 15 REV. DU MARCHÉ COMMUN 145 (1973).

[154] *Supra* note 147.

[155] *Supra* note 148.

[156] Cerexhe, *L'Interprétation de L'Article 86 du Traité de Rome Les Premières Décisions de La Commission*, 8 CAHIERS DE DROIT EUROPÉEN 272 (1972).

objet de controler les comportements sur le marché lorsque et parce que la concurrence n'est plus effective." [157]

To see Article 86 as a pro-competition device is both to misread Article 3 of the Treaty of Rome and to fail to grasp the distinction between Article 86 itself and Article 66 of the Treaty of Paris, where a specific control mechanism is established for concentrations.

Both Cerexhe and Saint Esteben criticize any definitive interpretation of Article 86 based on the application of Article 3(f) since, in their view, Article 3(f) can only be interpreted in light of the objectives of Articles 85 and 86. That is, competition is not a goal defined independently of the Treaty but is rather, for the purposes of the Treaty, defined by Articles 85 and 86. Therefore "il est dès lors paradoxal de vouloir étendre le champ d'application de l'article 86 à partir d'un texte (article 3) dont la portée ne peut se déterminer que par référence à ce même article 86". [158]

Furthermore, since the Treaty of Rome postdates the Treaty of Paris, the authors of the former document, had they wished to control changes in market structure through concentrations, could have specifically included in Article 86 prohibitions on undue concentration similar to those found in Article 66 of the Treaty of Paris. That they did not do so must indicate an acceptance of concentrations even unto complete monopoly.

All of which amounts to the general proposition, previously encountered, that Article 86 "ne vise pas à garantir un ordre économique fondé sur la concurrence il condamne seulement certains agissements qualifiés d'abusifs en ne condamnant pas la position dominante, qui se caracterise par l'absence de toute concurrence réelle, il légitime dans une certaine mesure des structures monopolistiques". [159]

This line of criticism makes the assumption that dominant positions and competition are mutually exclusive concepts. The notion of effective competition can in economic theory accomodate the existence of at least some market power. The interpretation given by the Court of Justice to the notion of competition in the Treaty of Rome is also to that effect; the Court insisted that dominant positions can co-exist with effective competition.

If this view is accepted, the criticisms above are left without any substantial foundation. There can be no complaint that the *notions* of dominance and abuse are left indistinct (whatever may be the practical aspects of the problem) or that the idea of dominance has been merged into the idea of abuse. Dominance is a state of affairs compatible with effective competition, which Article 86 accepts; abuse is a state of affairs incompatible with effective competition, which Article 86 opposes.

Nor can it be said that Article 86 has been unjustifiably extended by a misreading of the role of Article 3(f). Since there is no definition in Article 86 of a "dominant position" or an "abuse", it was the prerogative

[157] *Supra* note 148, at 438.
[158] Cerexhe, *supra* note 156, at 296.
[159] *Id.* at 295.

of the Court to interpret those terms. In doing so it regarded Article 3(f) as expressing the aims of the Treaty which Articles 85 and 86 are designed to uphold, and interpreted Article 3(f) as signifying the establishment of "effective competition". But if the court was willing to interpret Article 86 as a "competition policy" disposition, it could have satisfied the critics by interpreting Article 3(f) in the light of Article 86, thereby achieving the same result given that the term "competition", as the Court understood it, was construed as effective competition associated with unconcentrated market structures and freedom of action for both producers and consumers.

If Article 86 is pro-competition legislation, then the contrast between it and Article 66 of the Treaty of Paris is less significant than it would be if Article 86 were tolerant of non-competition. Article 66 of the Treaty of Paris is essentially a concentration policy providing for prior notification of proposed mergers or take-overs. This is clearly not the case with Article 86, which is why the Commission has proposed the adoption of a regulation providing for prior notification. [160] But if Article 86 is a pro-competition policy, then, at least as regards mergers involving a firm in a dominant position, the only difference between Articles 86 and 66 is one of technique and not of principle, the more so since mergers involving firms not in dominant positions, as that term is now understood, are unlikely to have any substantial effects on competition.

The judgment in the *Continental Can* case overruled the Commission's decision on the basis that the relevant market used to assess the existence of a dominant position was not correctly defined. The attention of most commentators was directed, whether favourably or unfavourably, to the declared applicability of Article 86 to mergers and concentrations. The real significance of the decision is not so much the particular application but the statement of principle underlying the role of Article 86. The principle, stated in the *Sirena* case and elaborated in *Continental Can*, [161] is that some market power, whether exercised by one or a number of firms, is compatible with effective competition but that undue market power, whether exercised by one firm (a monopoly) or a number of firms (an oligopoly), [162] is *in itself* incompatible with Article 86 regardless of how such undue market power was acquired.

Thus the concepts of "dominant position" and "abuse" have been interpreted so as to succeed where American and Canadian law have failed. There is no need to imagine the existence of a conspiracy, as in the U.S., nor a public detriment from "undue" interference (whether actual or pre-

[160] *Proposition de Règlement (CEE) du Conseil Sur le Contrôle des Concentrations*, 16 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENES C92/1 (1973).

[161] Some recent articles have focused attention on the broader implications of the *Continental Can* decision. *See, e.g.*, Korah, *Instituto Chemioterapico Italiano S.P.A. and Commercial Solvents Corporation v. Commission of the European Communities*, 11 COMMON MARKET L. REV. 248 (1974).

[162] This implication was noted in the case of oligopolies by Neri, *Le Contrôle des Concentrations dans le Traité CEE*, 9 CAHIERS DE DROIT EUROPÉEN 339 (1973).

sumed) with competition, as in Canada. If the market power of oligopolies is not consistent with effective competition, then, in theory, there has been an abuse of a dominant position—an abuse which is sanctionable by law.

In practice the vitalized Article 86 raises a number of problems for which economic and juridical analysis have either imperfect answers or none at all. There is the essentially political problem of the use to which such a potentially powerful weapon can be put. It is hardly an exaggeration to suggest that dominant positions abound in the industrial system and that the abuses (undue market power) are very frequent.

A systematic attack on all suspected cases of abuse would entail investigation, with a view to the possible application of quite drastic sanctions, of great parts of the European industrial system and in particular of key sectors like petroleum, automobiles and chemicals. In the United States, where the anti-trust tradition is stronger, or at least supposedly stronger, than in Europe, there is much resistance to the idea of a "new anti-trust" to attack undue market power. [163] In Canada the government's proposed new competition law (Bill C-256), [164] which involved the establishment of a specialist tribunal to examine mergers and other forms of concentration, was withdrawn after the purely ceremonial first reading because of fierce business opposition.

If Europe is less competition-minded than North America, then it would not be surprising if the vitalized Article 86 were rarely applied. However, two developments subsequent to the decision in *Continental Can* indicate that the Commission is anxious to use the new-found strength of the previously neglected disposition. The first of these is its proposal to the Council for the adoption of a regulation on concentrations which would give the Commission the power of prior scrutiny and approval of mergers and take-overs, a power which neither the Canadian Department of Justice nor the American Federal Trade Commission possesses. Business interests in Canada successfully lobbied against this type of regulation.

A second development is the Commission's lodging of complaints against the "seven sisters", the major oil companies—Exxon, Shell, Gulf, Texaco, Mobil, Standard Oil (California) and British Petroleum—and against the United Brands Co. The complaint against the oil companies alleges abuse of a collective dominant position in the Netherlands. [165] The technical ground for the complaint is the reduction of supplies to a cooperative buying agency practiced by all these companies during the oil crisis of 1973-74, a measure which almost forced out of business the nineteen independent European petroleum companies supplied through the co-operative. The Commission may feel that the major oil companies violated Article 86(b) simply

[163] J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 216 (1974), notes that in the U.S. the prevalance of market power makes a larger number of firms potential antitrust defendants, "but a government cannot proclaim half of the economic system illegal."

[164] *Supra* note 99.

[165] THE ECONOMIST, November 16, 1974, at 72.

in limiting sales; it may choose not to regard the issue as one going to the structure of the industry itself. In the case of United Brands, the abuse appears to be price discrimination in the marketing of bananas. [166] Whatever may be the formal basis of the complaints, they indicate an intention to make use of the wide scope for action allowed by Article 86.

Another difficulty, just as serious as the political one, is the "operational" problem inherent in the vitalized Article 86. This article is supposed to uphold effective competition, but what does that term mean? It prohibits actions having "substantial effects" on effective competition, but when are effects substantial?

## V. CONCLUSION

The opening section of this article described how the microeconomic revolution, in breaking with the neo-classical confusion of "competition" and "market", was able to incorporate market power and particularly oligopoly power into the idea of competition. As a result, there is now a fairly general consensus as to what types of market power and what kinds of barriers to new competition pose serious problems.

No serious consensus has emerged with respect to the kinds of structure and behaviour that would characterize effective competition. The neoclassical model of "perfect competition" can serve as a theoretical norm but cannot serve, in itself, as an immediately applicable basis for anti-trust policy. The various concepts of workable competition elaborated since the 1940's, though applauded by the 1955 U.S. Attorney-General's Committee on the Antitrust Laws, [167] have proved unsatisfactory as anti-trust criteria because they are either too vague and abstract or, when more concrete, too ad hoc, too linked to the existing structure and behaviour of given industries to constitute anything like an objective standard.

This absence of any satisfactory and objective criteria of effective competition may explain in part the somewhat reticent approach adopted by both the Court and the Commission in cases involving Article 86. Despite the wide scope accorded to that disposition by *Continental Can*, Article 86 cases still involve the sort of obvious abuses that were sanctionable even under the old interpretation, which in effect denied to Article 86 the status of competition policy. [168]

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[166] The Commission's conviction of United Brands on December 17, 1975, for infringement of Article 86 resulted in a fine of 1000 Units of Account per day (1 U.A.=$1.20 approx.). An order was given to cease forbidding the resale of unripe bananas and to monitor prices charged by United to its clients. These measures were in part suspended by an interim order of the Court of Justice on April 5, 1976, pending a decision by the Court on the merits of United's appeal. United Brands Co. v. European Communities Commission, 19 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES C136/9 (C. of J. of Eur. Comm. Case 27/76, 1976).

[167] *Supra* note 27.

[168] Writing before the first decisions on Article 86 by either the Court or the Commission, and after surveying the various national laws embodying different concepts of dominant positions, Corwin Edwards wrote: "[the foreign laws] contain little

The *C.S.C.—Zoja* case [169] (in which the Court explicitly upheld the views proclaimed in *Continental Can*) involved predatory tactics by a near-monopoly against a consumer which was also a competitor of one of the monopoly's subsidiaries. The *General Motors* case [170] is a classic example of price discrimination by a dominant firm. The unfair behaviour engaged in by these powerful firms was sanctioned through Article 86. [171] Yet the real threat, or at least the most serious one, to the competitive order comes not from these obvious activities but from developments in market structure and in the behaviour of firms causing non-price competition, excessive differentiation and consequent economic waste and the erection and maintenance of barriers to new competition.

Yet it is unrealistic to expect attacks to be launched on these central elements of undue market power if no generally agreed criteria exist for distinguishing, in given cases, between that market power which is acceptable and consistent with effective competition and that undue power which constitutes an abuse of a dominant position. The possibilities opened up by the judgment in *Continental Can* cannot be effectively exploited until usable criteria for effective competition are established. The development of these criteria is the single most important challenge in contemporary competition policy.

One possible approach to the elaboration of such criteria may lie in the notion of "market failure", a term coined in welfare economics to describe the various circumstances in which the Pareto-optimality associated with neo-classical competitive equilibrium is frustrated. [172] Some of these problems, such as the ones posed by externalities and Samuelson type "public goods", where market failure exists even when the usual conditions of per-

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relevant to acquisition or possession of economic power, and, except as to refusal to sell and price control . . . they have been given only sporadic application to aspects of the conduct of large firms that are not subject to action under the American Clayton Act." C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES: AN INTERNATIONAL COMPARISON 219 (1967).

[169] Instituto Chem. Ital. SpA & Commercial Solvents Corp. v. European Communities Commission, [1974] 1 C.M.L.R. 309 (C. of J. of Eur. Comm. Cases 6-7/73, 1974).

[170] General Motors Continental N.V. v. European Communities Commission, 18 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES L29/14 (Commission 1974); decision annulled by C. of J. of Eur. Comm. Case 26/75, 1975; C.C.H. Common Market Reporter Court Decisions para. 8320.

[171] In its decision of Dec. 16, 1975 in Cooperative Vereniging "Suiker Unie" UA v. European Communities Commission, C.C.H. Common Market Reporter Court Decisions para. 8334 (C. of J. of Eur. Comm. Case 40/73, 1975) the Court modified a decision of the Commission which had, *inter alia*, penalized some sugar refiners for abuses of dominant positions. However, the modification was not based on any reversal by the Court of its views expressed in *Continental Can*, *supra* note 138, and reiterated in Commercial Solvents—Zoja, *supra* note 169, but on the particular mitigating circumstances surrounding the marketing of sugar in certain E.E.C. countries. In both the "*Suiker Unie*" and *Continental Can* cases the Commission was faulted not for using Article 86 but for inadequate analysis of the concrete circumstances in the relevant markets.

[172] *See* Bator, *supra* note 3.

fect competition are present, are not of immediate concern here. But two types of market failure, that caused by imperfections in product and factor substitution (so-called "failure by existence") and that resulting from too few independent firms in the market (failure by structure), are concerned with "failure" in the production and allocation of conventional private goods.

The concept of "market failure" has received comparatively little consideration in recent years, and writing on the subject has tended to focus on externalities (a favourite topic in theoretical economics) or on the "trendier" subject of public goods. However, Professor Williamson [173] has recently suggested that market failure criteria be applied to dominant firms as an alternative to the present Sherman Act monopoly dispositions.

According to Professor Williamson, the Sherman Act applies only to firms which have reached a dominant position through wheeling and dealing. It does not cover other circumstances, such as dominance through chance or inept competition, although in these cases there is also "market failure" and an absence of any self-correcting mechanism. Therefore the authorities should intervene, where intervention can be efficacious, and apply appropriate remedies (including structural ones) in all instances of dominance arising from market failure.

The advantage of the "market failure" approach is that it shifts attention from the activities of the dominant firm to the factors which permitted or encouraged dominance. In examining the nature and causes of the market failure associated with most cases of dominant position, there is a better chance of discovering the remedies which, in preventing the recurrence of market failure, will in themselves ensure against the rebirth of market dominance. Furthermore, where, as in developing industries, dominant positions are not the result of market failure, there would be no attempt to sanction dominance if the sanction would ultimately have adverse effects. [174]

A "market failure" approach to market dominance may therefore assist in developing usable criteria for an effective competition policy. [175] Instead

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[173] Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972). Professor Williamson uses the term "dominance" to describe a state of non-competition. The summary and discussion of his argument in this paper use this description rather than what is asserted here to be the different definition of the term "dominant position" in E.E.C. law.

[174] This approach would go some way towards meeting the objection by some commentators, *e.g.* James, *The Concept of Abuse in E.E.C. Competition Law: An American View*, 92 L.Q. REV. 242 (1976), that recent interpretations of Article 86 make competition defined in terms of specific structural and behavioural characteristics an end in itself, to the detriment of possible economic and social advantages from non-competition. However, as Jacquemin, *Le Critère de L'Intérêt Public et Le Projet de Réforme de la Politique Canadienne de Concurrence*, 4 CAN. J. OF ECON. 395 (1971) notes, there is a strong argument in favour of limiting the jurisdiction of anti-trust authorities to questions of competition, leaving the issue of the value from an economic or social viewpoint of non-competition in a particular market to other authorities.

[175] The use of market failure criteria for competition policy does not of itself imply adherence to the view that particular structures or degrees of concentration presume particular structures or degrees of undesirable market power. A market failure

of fashioning tests of competition in the abstract, the authorities would be concerned with the concrete basis of the particular type or types of market failure associated with particular situations of market dominance and with steps to correct that failure. Such an approach will, however, require that considerable thought be given to the nature and kinds of market failure with a view not to the theoretical elegance of the proposals but to their practical application to particular cases of market dominance. [176]

Even if "market failure" criteria were to be successfully developed, their application in the United States and Canada would require changes, and changes of a fundamental kind, in the anti-trust laws of these countries. The advance made in the rules of competition of the E.E.C., particularly by the *Continental Can* decision, ensures that when and if workable criteria are developed, the law will provide a basis for their full and immediate application.

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approach is designed to focus attention on a particular circumstance—*i.e.*, market dominance as indicated by structural and behavioural factors—with a view to examining the extent to which the market failure in question can and should be corrected and the most appropriate means for such correction.

[176] In DYNAMIC CHANGE AND ACCOUNTABILITY IN A CANADIAN MARKET ECONOMY, *supra* note 100, L. Skeoch and B. McDonald propose an approach to the monopoly problem that appears to be based on the notion of market failure. "The preferred approach would be to define dominant firms and then examine how that dominance was maintained or extended (and perhaps how it had been achieved)." *Id.* at 145. However, as already noted, they limit the scope of policy on dominance to controls of conduct and only in very exceptional cases to control of structures. "Therefore, what we propose, in substance, is that dominant firms be prohibited from engaging in forms of conduct which constitute the abusive use of monopoly power." *Id.* at 150.