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## Public and Private Aspects of European Community Competition Law

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# Public and Private Aspects of European Community Competition Law

Pierre Pescatore

## **Abstract**

This Article first presents a short sketch of the competition rules of the EEC Treaty with a view towards showing not only the cohesive factors but also the asymmetries that characterize the Treaty system. In some respects, the case law of the Court of Justice (Court) has remedied those asymmetries; in others it has exacerbated the existing disparities and thereby weakened the present competition rules. This Article then postulates that the Community needs a complete system of competition rules, that is to say, a unified system that facilitates control of the activities not only of private operators but also of the Member States and their economic agencies. Because the regulation of private operators is already well developed, this Article concentrates on the possibility of obtaining greater control over Member States.

# PUBLIC AND PRIVATE ASPECTS OF EUROPEAN COMMUNITY COMPETITION LAW†

*Pierre Pescatore\**

## INTRODUCTION

The European Community may be called a commonwealth of peoples and states. This elementary truth is reflected in the Community's competition law. In addition to private companies, the Member States of the Community themselves remain extremely powerful competitors and it has been difficult to gain control over their manifold activities. Therefore an accurate description of competition must include consideration of both the rules applicable to private operators, referred to as "undertakings" in the Treaty establishing the European Economic Community (EEC Treaty or Treaty), and the rules applicable to public operators, which encompasses the activity of States as such in their legislative and executive branches, public companies, and State monopolies.

The rules applicable to private operators are systematized in Articles 85 and 86 of the EEC Treaty to such an extent that when speaking of competition rules commentators are tempted to restrict themselves to those provisions. By contrast, the rules regulating the activities of the Member States in the field of competition are chiefly specific and are not organized systematically. This Article attempts to show that the rules applicable to public operators are based on the same principles as the rules applicable to undertakings and that therefore it is possible to discern a coherent system of competition control applicable to private operators and Member States alike.

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### I. *THE SYSTEM OF EEC COMPETITION RULES*

As noted, problems of competition and hence the need for rules are found on two distinct levels: on the level of private economic operators and on the level of national economies. We may thus speak of competition problems as having a "microeconomic" and a "macroeconomic" dimension. The latter calls for a word of explanation. Is it not the case that in the perspective of the Common Market national economies are supposed to be merged into a single, homogeneous market? Furthermore, is it not true that the new "Single European Act" promises a market "without internal frontiers" for 1993?<sup>1</sup>

In my opinion, it is highly unrealistic to believe these objectives will be achieved so long as Member States retain legislative sovereignty in the field of economic legislation and separate currencies and are therefore capable of pursuing their own financial policies. It is true that in a common market regime the economies of States are no longer watertight compartments like the economies of States exercising full control over their internal market and their external exchanges. However, as long as Member States retain the means of conducting their own economic and financial policies, as long as they are in control of public companies, public systems of communication, and monopolies commensurate with their territory (and this will remain true for a long time to come), we must con-

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1. Single European Act, 2 E.C. Bull. No. 11 (Supp. Feb. 1986) (quoting art. 8A, amending Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English transl.), 298 U.N.T.S. 11 (1958) (unofficial transl.) [hereinafter EEC Treaty]; see Pescatore, *Die Einheitliche Europäische Akte, Eine ernste Gefahr für den Gemeinsamen Markt*, 2 *EUROPARECHT* 153 (1986).

sider the national economies of Member States as specific sub-units of the common market system. This phenomenon also affects the field of competition. To be more precise: if the competition rules of the Community are to be efficient, they must deal with all competition problems, not only with those on the level of private business.

A. "Private" and "Public" Competition Rules

The rules applying to undertakings are concentrated in Articles 85 and 86 of the EEC Treaty. They are well integrated and, since the implementation of Regulation 17,<sup>2</sup> have enabled the Commission of the European Communities to take multi-form and extensive action, as demonstrated by the successive Reports on competition policy published since 1970. Apart from certain specific gaps that the Council has been extremely slow to close, especially in the fields of agriculture and transport,<sup>3</sup> there is another weakness in the system of private competition rules that derives from the missing link between "anti-trust" rules of Article 85 and the "anti-monopoly" rules of Article 86. How can the Community react against economic abuse when that abuse has not yet attained the dimension of a "dominant position" in the sense of Article 86? How can it control nascent dominant positions when there has not yet been abuse?

The Court has encouraged both bridging the gap between Article 85 and Article 86 and uniting them in a coherent system of competition control. However, despite the long-standing insistence of the Commission, the Council has shown itself unwilling to create the necessary instrument to allow for consistent Community action on the important issue of the control

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2. Council Regulation No. 17, J.O. C 204/87 (1962), Comm. Mkt. Rep. (CCH) ¶ 2401.

3. Agriculture was excluded from the application of the competition rules by Article 42 of the EEC Treaty, *supra* note 1, pending measures to be taken by the Council. A limited application of those rules (which excluded, in particular, any decision making power of the Commission in the case of State aids) was admitted by Council Regulation No. 26, O.J. 993/129 (1962), Comm. Mkt. Rep. (CCH) ¶ 935. Transport was exempted from Regulation No. 17 by Council Regulation No. 141, 5 O.J. 124/2751 (1962) Comm. Mkt. Rep. (CCH) ¶ 1945. By Council Regulation No. 1017/68, 11 O.J. L 175/302 (1968), Comm. Mkt. Rep. (CCH) ¶ 2761, competition rules were extended to include transport by rail, road and inland waterways, meaning that sea-going navigation and air transport remain exempt.

of mergers.<sup>4</sup>

The idea that the competition rules for undertakings form a coherent system was first expressed by the Court in *Italy v. Council and Commission*,<sup>5</sup> in which the Italian Government questioned the validity of two Council regulations and one Commission regulation on competition. In that judgment, the Court explained the purposes of Articles 85 and 86 and the coherence of both provisions in the context of the aims fixed by Articles 2 and 3(f).

The most prominent decision expressing the coherence of the competition rules applicable to undertakings is the *Continental Can* judgment.<sup>6</sup> This decision is based on an argument that embraces Articles 2 and 3(f) as well as Articles 85 to 90 of the Treaty to show that control of agreements and concerted practices, on the one hand, and control of abuse of dominant positions, on the other, also imply control of mergers. As the Court stated, "Articles 85 and 86 seek to achieve the same aim on different levels, *viz.* the maintenance of effective competition within the common market."<sup>7</sup>

In the same spirit, in the *BAT* judgment,<sup>8</sup> the Court introduced the concept of "abuse" as found in Article 86 into the scheme of Article 85. The Court then applied this definition to an agreement made between two tobacco manufacturers of unequal strength, even though the stronger one of the two could

4. A proposal for a Council regulation on the control of mergers was submitted by the Commission in 1974. In spite of periodic reminders by the Commission, the Council has so far not acted upon that proposal. Comm'n, Eleventh Report on Competition Policy 14-15 (Introduction) (1981); Comm'n, Fourteenth Report on Competition Policy 16 (Introduction) (1985).

5. Case 32/65, 1966 E.C.R. 389, Comm. Mkt. Rep. (CCH) ¶ 8048.

6. *Europemballage Corp. & Continental Can Co. Inc. v. Commission*, Case 6/72, 1973 E.C.R. 215, Comm. Mkt. Rep. (CCH) ¶ 8171.

7. *Id.* at 243-45, paras. 20-26. In *Industria Gomma Articoli Vari (IGAV) v. Ente Nazionale per la Cellulosa e per la Carta (ENCC)*, Case 94/74, 1975 E.C.R. 699, Comm. Mkt. Rep. (CCH) ¶ 8311, the Court gave a sketch of the competition rules of the Treaty, distinguishing between Articles 85 and 86 on the one hand, and the rules applicable to anticompetitive actions of Member States on the other, enumerating in particular Articles 90, 92 to 94, 101, 102 and 37. The Court held that the latter Articles were applicable to State agencies not having a commercial character and drew the attention of parties and national courts to the legal possibilities inherent in those provisions. *Id.* at 712-13, paras. 32-36.

8. *BAT Cigaretten-Fabriken GmbH v. Commission*, Case 35/83, 1985 E.C.R. 363, Comm. Mkt. Rep. (CCH) ¶ 14, 151.

not be said to enjoy a dominant position on the market.<sup>9</sup> In other words, an unequal contract may fall under Article 85 even if Article 86 is not applicable.

By comparison, the relevant Treaty provisions pertaining to public operators are much less coherent. They are scattered throughout the Treaty and some do not even explicitly refer to competition.

Article 90 states that the “public undertakings” and “undertakings to which the Member States grant special or exclusive rights” are in principle subject to the rules on competition. However, the same article also provides that those rules may not obstruct the performance of the particular tasks assigned to services of general economic interest.

Article 92 declares State aids incompatible with the Common Market if they distort or threaten to distort competition. It appears from the annual reports of the Commission that State aids continue to be the most typical form of State intervention. Articles 101 and 102, which regulate distortions of competition resulting from differences between national legislation, potentially have a wide bearing—from economic legislation to taxation—but have rarely been used, probably because their cumbersome drafting renders their applications hazardous.

Article 107 refers to alterations in exchange rates resulting in distortions of competition. Considerations of this order may play an important role whenever rates of exchange are modified either in the field of agricultural exchanges (the so-called “green rates”), or readjusted inside the European Monetary System. However, Article 107 has apparently never been used as a legal tool by the Commission, nor has the Court been able to draw legal consequences from that provision.<sup>10</sup>

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9. See *id.* at — (paras. 34-47 of the judgment).

10. A passing reference to Article 107 is to be found in *Cie d'Approvisionnement de Transport et de Crédit S.A. v. Commission*, Case 9/71, 1972 E.C.R. 391, Comm. Mkt. Rep. (CCH) ¶ 8177. This was an action for damages against the Commission for having fixed an inadequate level of subsidies to be granted by the French authorities to compensate for the effect of a devaluation of the French franc. Rejecting the claim, the Court said that Article 107 left a wide discretion to Member States in relation to rates of exchange. *Id.* at 406, paras. 29-32. A similar question was raised in *Carl Schluter v. Hauptzollamt Lörrach*, Case 9/73, 1973 E.C.R. 1135, Comm. Mkt. Rep. (CCH) ¶ 8233, referred by a German Finanzgericht to the Court upon a challenge against the introduction of the system of

Finally, mention must be made of Article 37 relating to "State monopolies of a commercial character." Although this article, contained in the chapter on the elimination of quantitative restrictions, does not refer to competition, the Commission has consistently treated it as part of competition law, as can be seen from its Reports on competition policy. The Court has also recognized the "competition dimension" of Article 37.

Although Articles 85 and 86 constitute the foundations of an almost complete system of competition rules, the provisions applicable to Member States appear to be not only incoherent, but also to some extent severed from the rules applicable to private operators. The subtitle, "Rules applying to undertakings," that precedes Articles 85 and 86 unfortunately creates a false impression in this respect. Despite this initial impression, there are certain common features which enable us not only to give coherence to the existing competition rules, private and public alike, but also to establish a basis from which apparent gaps and shortcomings can be remedied.

#### *B. The Common Basis of the Competition Rules*

In the fourth recital of the Preamble to the EEC Treaty the Contracting Parties recognize that "the removal of existing obstacles calls for concerted action in order to guarantee . . . fair competition." Further on, in Article 3, where the objectives to be attained by the Community are described in more detail, after a reference made under section (a) to the removal of obstacles to free trade, section (f) provides for "the institution of a system ensuring that competition in the common market is not distorted." These provisions are general in scope insofar as they call for fair and undistorted competition without distinguishing in any way between rules applying to undertakings and rules addressed to Member States.

If I were permitted to use the metaphor of a tree for the competition law of the Community, I would say that the trunk is formed by the general rule of fair competition expressed in the fourth paragraph of the Preamble and section (f) of Article

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the so-called "Monetary Compensatory Amounts." In its judgment of 24 October 1973, the Court once again stressed the discretion left to Member States by Article 107, denying direct effect to that provision.

3. The trunk then splits into two groups of branches: the substantial branch of rules applicable to undertakings, on the one hand, and a rather tangled growth of individual provisions relating more particularly to the activity of Member States, on the other. In my opinion, it is possible, by appropriate legal husbandry, to introduce more harmony into this tree that has a solid base but unfolds in a somewhat disorderly fashion.

All Free Trade Agreements concluded by the Community contain in their first article a standard clause stating that they aim "to provide fair conditions of competition for trade between the Contracting Parties." Relying on this formulation, which is no doubt true a fortiori in a common market regime, we may say that the fundamental economic aim of the Community is to ensure the free exchange of goods and services under conditions of fair competition.<sup>11</sup>

This formulation has the advantage of emphasizing that free movement is intimately linked to fair and undistorted competition and that this basic principle is of concern equally to Member States and to private economic operators. Rules applicable to undertakings and rules addressed to Member States are thus no more than the specific expression of a general principle. There may therefore be no discontinuity between rules of a private and rules of a public nature. The rules applicable to undertakings are also binding on Member States,<sup>12</sup> and rules aimed in the first instance at Member States

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11. This is a standard expression, used regularly by the Court since *Republic of Italy v. Council & Commission*, Case 32/65, 1966 E.C.R. 389, Comm. Mkt. Rep. (CCH) ¶ 8048, in which the Common Market was defined by reference to three basic features: the elimination of obstacles to trade, fair conditions of competition and unity of market. *See id.* at 405 (the Court's reasons on the alleged infringement of Article 85). The same idea has been expressed by the Council in the Preamble of several Directives relating to the introduction of the VAT system. *See, e.g.*, Council Directive No. 67/227, 10 J.O. 1301 (1967), Comm. Mkt. Rep. (CCH) ¶ 3111. It remains incomprehensible how all this could be ignored in the Single European Act, *supra* note 1, in which the governments promise an "internal market without frontiers" for 1993, while omitting any reference to fair conditions of competition.

12. We have become so accustomed to viewing the EEC Treaty, *supra* note 1, as both a constitutional and statutory instrument that we forget that it is an international treaty binding on Member States. As such, Articles 85 and 86 must be respected in good faith by the Member States themselves. Article 5 of the Treaty is no more than the expression in Community law of a general principle of international law. This means that Member States are bound to respect both the prerogatives vested in the Community under Articles 85 and 86 and the substantive values embodied in these provisions.

also impinge on private activities. My intention is to show that this vision of the Treaty is not mere speculation, but an expression of existing law or at least of legal possibilities so far unexploited.

After this glimpse of harmony, we must return to the intricacies of reality. There is no doubt that the EEC Treaty is built on a solidly-framed system, but the system is far from perfect. Instead of expressing abstract principles, the Treaty proceeds mostly in an analytical way and this has brought about some asymmetries in its structure.

## II. *SOME ASYMMETRIES OF THE EEC TREATY AND HOW TO REDUCE THEM*

As far as the Member States are concerned, the emphasis of the Treaty's competition rules is placed on the elimination of obstacles that stand in the way of the free movement of goods and services. With the exception of the preamble and Article 3(f), and apart from the obscure provisions of Articles 101 and 102, there is no general operative rule on the elimination of distortions of competition by the action of Member States. For private operators the situation is the exact reverse. Articles 85 and 86 contain an extensive system of rules on competition that have subsequently been complemented by a series of more detailed regulations. On the other hand, there are no rules on free movement addressed to private operators.

In light of this asymmetry, there are some remarkable shifts to be observed in the Court's decisions. Most noteworthy are the various ways the rules on the free movement of goods have been combined with the competition rules or have even been substituted for them. Some of the Court's decisions have helped to clarify the issues and reinforce the impact of Community law. Others have created confusion.

### *A. Extending the Rules on Free Movement to Private Operators*

Private operators are bound not only to observe the competition rules as they are directly addressed to them by Articles 85 and 86. They must also respect the principles of an "open market" policy, even though the rules governing that policy

are primarily addressed to Member States.<sup>13</sup>

The most remarkable development of this doctrine is found in the case law on the free movement of goods covering industrial or commercial property rights such as trademarks, patents or copyrights. This judicial doctrine, conveniently called the "doctrine of exhaustion of rights," is based on the assumption that in a common market regime the substance of the exclusive rights flowing from industrial and commercial property must be respected. However, the owner of such rights may not avail himself of the territorial protection afforded by national legislation to maintain artificial compartments in the common market once he has reaped the benefit of putting protected goods into circulation or authorizing other persons to put them into circulation in any one of the Member States.

It is interesting to note that in the first case of this kind, *Parke-Davis*,<sup>14</sup> the question was raised exclusively in terms of Articles 85 and 86. The Court gave a reply on that basis while hinting quite clearly that the provisions on free movement of goods might be pertinent as well. The decisive step was taken in the *Deutsche Grammophon* judgment,<sup>15</sup> in which the Court, in reply to a question put in terms of Articles 85 and 86, based its decision on the rules on free movement. It is in that judgment that the "doctrine of exhaustion of rights" is clearly explained for the first time. In the *Centrafarm* case,<sup>16</sup> referred some years later by the Supreme Court of the Netherlands, the question was put for the first time in terms of the rules of free move-

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13. In its order, *Acciaierie San Michele SpA v. High Authority of the ECSC*, Joined Cases 9 & 58/65, 1967 E.C.R. 27, made in plenary session, the Court said that the integral and uniform application of the rules of the Treaty establishing the European Coal and Steel Community, art. 18, 1951, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5189), 261 U.N.T.S. 140, to citizens of the Member States formed part of the "ordre public communautaire" (Community public policy), which is a strong way of expressing the idea that Treaty rules are mandatory for everybody and not only for the Contracting States. The concept of an "open market" was referred to with great force by the Court in the well-known judgment *Pigs Mktg. Bd. v. Redmond*, Case 83/78, 1978 E.C.R. 2347, Comm. Mkt. Rep. (CCH) ¶ 8559, para. 57.

14. *Parke, Davis & Co. v. Centrafarm*, Case 24/67, 1968 E.C.R. 55, Comm. Mkt. Rep. (CCH) ¶ 8054.

15. *Deutsche Grammophon GmbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, Case 78/70, 1971 E.C.R. 487, Comm. Mkt. Rep. (CCH) ¶ 8106.

16. *Centrafarm B.V. & Adriaan de Peijper v. Sterling Drug Inc.*, Case 15/74, 1974 E.C.R. 1147, Comm. Mkt. Rep. (CCH) ¶ 8246.

ment of goods. In its judgment, the Court replied on that basis and it was only in relation to a subsidiary question that the Court referred to Article 85.

The most recent expression of the doctrine of exhaustion is found in the *Merck* judgment,<sup>17</sup> in which the Court stated in simple and clear terms the rationale of this whole line of case law. Industrial and commercial property rights are now completely encompassed by the rules of free movement. This is an adequate solution as the obstacle to trade in these cases results exclusively from the territorial character of the laws defining and protecting industrial and commercial property rights.<sup>18</sup>

Another striking example of a direct application of the rules on the free movement of goods to private operators is to be found in the *Dansk Supermarked* judgment,<sup>19</sup> in which the Court in interpreting Article 30 stated "that it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods."<sup>20</sup> This solution was adequate as the

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17. *Merck & Co. Inc. v. Stephar BV & Petrus Stephanus Exler*, Case 187/80, 1981 E.C.R. 2063, Comm. Mkt. Rep. (CCH) ¶ 8707.

18. While placing the solution of this problem (that is of reconciling the territorial limitation of national laws defining and protecting industrial and commercial property rights with the unity of the Common Market) on the basis of Article 30, the Court made it clear that the use of industrial and commercial property may also be relevant to competition law whenever such exclusive rights are the object, the instrument or the result of an agreement prohibited by Article 85. *Terrapin Overseas Ltd. v. Terranova Industrie C.A. Kapferer & Co.*, Case 119/75, 1976 E.C.R. 1039, para. 6, Comm. Mkt. Rep. (CCH) ¶ 8362.

19. *Dansk Supermarked A/S v. A/S Imerco*, Case 58/80, 1981 E.C.R. 181, Comm. Mkt. Rep. (CCH) ¶ 8729.

20. *Id.* para. 17, Comm. Mkt. Rep. (CCH) ¶ 8729, at 8767. *Dansk Supermarked* calls for a word of explanation. In a contract with an English manufacturer of china-ware for the production of a service of artistic dishes, a Danish federation of hardware dealers had agreed that only first-choice pieces could be sold in Denmark. This contract was clearly not an agreement within the meaning of Article 85. A consignment of substandard items having found its way into a Danish chain of supermarkets, the Federation tried to stop the import of that merchandise. Upon a reference from the Danish Højesteret (Supreme Court), the Court said that a private party might not hamper the free import of goods coming from another Member State, but it did not deal with the question of whether selling substandard goods as first choice was a fair trading practice, that being a question to be resolved by the national court. The same idea was expressed in *Musik-Vertrieb Membran GmbH & K-tel Int'l v. GEMA*, Case 57/80, 1981 E.C.R. 147, Comm. Mkt. Rep. (CCH) ¶ 8670, in which the Court stated that no provision of the national legislation of a Member State might permit a national author's society to charge a differential levy on imported records which had been marketed in another Member State by or with the consent of the copyright

contract under discussion had no bearing on competition.

### B. *Combining Rules on Free Movement with Competition Law*

Other cases have also combined competition law with the rules on the free movement of goods. This combination is particularly well adapted to the principle of "free trade in conditions of fair competition." The accent put by the Court on each case depends upon whether the point of departure is competition law or the free movement of goods. It so happened that the first competition cases brought before the Court were cases of exclusive trading agreements. This gave the Court the opportunity to establish firmly, in *Consten/Grundig*,<sup>21</sup> a judgment that remains a leading case, that it is among the fundamental aims of the competition rules to contribute to the establishment of an open market and to prevent compartmentalization of markets by private arrangements or practices. It is now widely acknowledged that the primary objective of the competition rules is to assist in establishing and maintaining a single market in the Community and preventing the rebuilding of economic barriers by private arrangements.<sup>22</sup>

In other cases concerning the free movement of goods, the highly flexible provision of Article 30 on the elimination of measures equivalent to quantitative restrictions on imports has also been used to answer concerns about fair competition. This approach is particularly conspicuous in the Court's treatment of national provisions on price control, by showing that State intervention on prices may, under certain conditions, have an anticompetitive effect. The prohibitive effect of minimum prices as well as of fixed prices is obvious as they deprive foreign producers of any chance of price competition. Maximum prices seem less objectionable but may render a profitable sale of imported goods impossible, especially when maximum price levels are combined with subsidies or tax advan-

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owner. *Id.* at — (para. 18 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 8670, at 7924.

21. *Etablissements Consten SARL & Grundig-Verkaufs-GmbH v. Commission*, Cases 56 & 58/64, 1966 E.C.R. 299, Comm. Mkt. Rep. (CCH) ¶ 8046.

22. In the introduction to the Ninth Report on Competition Policy, the Commission carefully outlines its general philosophy in this field: "The first fundamental objective [of competition philosophy] is to keep the common market open and unified." Comm'n, Ninth Report on Competition Policy 9 (1980).

tages for national producers.<sup>23</sup>

*C. Free Movement Rules are Not Valid Substitutes  
for Competition Rules*

Linking the rules on free movement to the concern for fair competition can be useful, as we have just seen, because there is no sufficiently comprehensive provision that would cope with unfair trade practices of Member States in intra-Community trade. However, recent cases show that such substitution of rules may also have counterproductive results, as in the *Leclerc* case,<sup>24</sup> which concerned French legislation on resale price maintenance for books. The Court, upon a suggestion by the Commission, substituted the rules of free movement of goods for competition rules. *Leclerc* will be discussed more fully in Part III.<sup>25</sup> In the present context, it suffices to note

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23. A study has been made of the influence of national price policies on competition under the auspices of the Commission by Horst Westphal, *Effets des Réglementations Nationales des Prix dans les Communautés Européennes*, 9 SERIE CONCURRENCE—RAPPROCHEMENT DES LEGISLATIONS (1970) (available in French, German, Italian and Dutch versions). That study contains useful indications on the classification of the various devices for price regulations, *id.* at 14-16, and on the anticompetitive effect of vertically imposed prices, *id.* at 27-35, and of floor prices, *id.* at 92-93. See also M. WAELEBROECK, *LES RÉGLEMENTATIONS NATIONALES DE PRIX ET LE DROIT COMMUNAUTAIRE* 51-55 (1975) (with reference to the impact of price regulations on competition); F. CAPELLI, *CONTROLLO DEI PREZZI E NORMATIVA COMUNITARIA* (1981). The latter book contains a profound analysis of the effect of different types of price regulations on competition and of the case law as it stood at that time. *Id.* at 83-297. The author relies mainly on Article 90 to show the coherence of the competition rules of the Treaty and their applicability to price regulations. He thinks that Article 30 relied most frequently upon by the Court is no adequate remedy. The problem has also been discussed in the light of the Court's recent case law by Judge Yves Galmot and Jacques Biancarelli in their article *Les Réglementations Nationales en Matière de Prix au Regard du Droit Communautaire*, in 21 *REVUE TRIMESTRIELLE DE DROIT EUROPEEN* 269 (1985) [hereinafter Galmot & Biancarelli]. The Court's case law on price regulation has been summed up in *Cullet v. Centre Leclerc Toulouse*, Judgment of 29 January 1985, Case 231/83, 1985 E.C.R. 305, *Comm. Mkt. Rep.* (CCH) ¶ 14,139, at 15,742 (para. 23 of the judgment), where references to the most important precedents may be found.

24. *Association des Centres Distributeurs Edouard Leclerc v. Au Blé Vert S.à.r.l.*, Case 229/83, 1985 E.C.R. I, *Comm. Mkt. Rep.* (CCH) ¶ 14,111.

25. Of course, one should not lose sight of the fact that the effect of anticompetitive practices on trade currents between Member States is also part of Articles 85 and 86. Those provisions, however, do not necessarily cover the transfer of goods or services over national boundaries, as is envisaged by Articles 30 (restrictions on imports), 34 (restrictions on exports) and 59 (trans-boundary services). Intra-Community trade can be affected in many ways that do not involve such physical transfer, as appears from the anticompetitive actions expressly described in Articles 85 and 86.

that, although the rules on free movement and rules of competition are closely linked, they are by no means identical in scope and effect. Although combining the two is simple and helps to unify Community law, substitution may be counter-productive.<sup>26</sup>

The scope of the competition rules is in some respects much larger than the scope of the rules of free trade for two reasons: (i) the rules on free movement envision only export from and import into national territories, whereas competition law applies to activities affecting trade in any relevant part of the common market, i.e. activities that do not necessarily include the transfer of goods or services from one Member State to another; and (ii) the rules on free movement are concerned only with the free exchange of goods and services, whereas the competition rules pursue much more complex objectives such as optimal allocation of economic resources; economic progress; equitable sharing of economic benefits between producers, distributors and consumers; and defense against unfair trade practice.<sup>27</sup> In other words, *fair* competition is much

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Thus, anticompetitive action *inside* a national market may well affect intra-Community trade. In *Brauerei A. Bilger Söhne GmbH v. Jehle & Jehle*, Case 43/69, 1970 E.C.R. 127, Comm. Mkt. Rep. (CCH) ¶ 8076, at 8103, a judgment of 18 March 1970, the Court said that an agreement may affect trade between Member States even though it does not relate either to imports or to exports. The expression "relate to imports or exports" in Regulation No. 17 is thus narrower than the phrase "affect trade between Member States." *Id.* at 135, para. 5, Comm. Mkt. Rep. (CCH) ¶ 8076, at 8109. The position of the Court has been recalled and summed up in *Greenwich Film Production v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM)*, Case 22/79, 1979 E.C.R. 3275, para. 11, Comm. Mkt. Rep. (CCH) ¶ 8567, at 8240, with reference to precedents. P. van Omneslaghe and B. van de Walle de Ghelke in their *Chronique Concurrence* published in 20 *CAHIERS DE DROIT EUROPEEN* 54, 365, 565 (1984), write in this respect: "Le concept d'atteinte à la structure de la concurrence dans le marché commun (mais non localisée précisément dans un seul Etat membre) permet ainsi de justifier l'application du droit communautaire à des restrictions de concurrence ne visant pas directement les échanges intra-communautaires." The authors drew attention to the fact that that criterion has been applied repeatedly by the Commission. *Id.* at 109.

26. The tendency to substitute the rules on the free movement of goods for the rules of competition is well explained in *Galmot & Biancarelli*, *supra* note 23, who speak of "integrating" competition rules into the rules on free movement. *Id.* at 291-311.

27. All this is summed up by the Commission in the introduction to the Ninth Report, which encompasses both questions of economic structure and the defense of social and consumer interests. See Comm'n, Ninth Report on Competition Policy 10-11 (1980). This aspect deserves a more articulate analysis of the aims of competition policy, apart from open-market considerations.

more than *free* competition.

The effect of the two bodies of rules also differs. The rules on free movement can be directly enforced by the Commission only against Member States, not against private parties, though private parties may avail themselves of those rules in national courts. As will be shown in Part III, the reverse is true for the competition rules: the Commission has authority to enforce them directly against private parties under Regulation 17, but the powers of the Commission are more limited in actions directed against Member States.

Finally, the rules on free movement (like the rules on non-discrimination), are rigid, not allowing for any derogations. By contrast, the rules of competition are flexible, as is shown by the exemptions available in Articles 85 (concerted practices) and 92 (State aids).

For these reasons, and despite the close link between free movement and competition, one should not lightly substitute one set of rules for the other. Rather, the proper *locus applicandi* for each must be sought as a precondition for combining the two. This could be achieved by trying a more systematic approach to the rules applicable to Member States, with a view to ensuring free exchange in conditions of fair competition for *everyone*, not just private operators. Part III demonstrates a solution.

### III. RULES OF COMPETITION APPLICABLE TO MEMBER STATES

In his talk on the European Court's recent jurisprudence in the area of competition, Advocate General VerLoren van Themaat said that one should not "underestimate the impact of State interventions on competition and neglect investigation on the legal systems of which these State interventions make part and their relationship with forces of the market and with the law of competition."<sup>28</sup> This phrase has been the starting point of my investigation, which proceeds from the specific

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28. *La Jurisprudence Récente de la Cour de Justice des Communautés Européennes en Matière d'Ententes*, 39 BULLETIN DES JURISTES EUROPEENS 25 (1985). G. DRUESNE & G. KREMLIS, *LA POLITIQUE DE CONCURRENCE DE LA CEE* (1986), is to be commended for the fact that it strikes an even balance between "private" and "public" competition law. The same may be said of the comments by Helmuth Schröter, *Vorbemerkung zu den Artikeln 85 bis 94*, in KOMMENTAR ZUM EWG-VERTRAG 857 (H. von der Groeben,

provisions of the EEC Treaty, State aids, public undertakings and public monopolies (on which we find abundant material in the annual Reports of the Commission), to the *terra incognita* of some less well-defined complexes, where guidance comes mainly from the Court's decision.

A. *Distortions of Competition Due to State Aids, Public Undertakings and Public Monopolies*

Of these three subjects, State aids represent by far the most important problem area, and they have given rise to a systematic survey and manifold action by the Commission.<sup>29</sup> By contrast, the Community still seems close to nowhere in relation to public undertakings, and its action on monopolies concerns only certain narrowly circumscribed matters in a few Member States, such as monopolies for alcohol and tobacco.

1. State Aids

In the field of State aids I dare to claim that the Commission has fully responded to the task entrusted to it by Article 93 of the EEC Treaty to "keep under constant review all systems of aid existing in [the Member] States." Aids are now well categorized, from general aid schemes through sectoral aids (both vertical and horizontal), to regional aids. From the viewpoint of the economic function of these various aids, we may distinguish those whose aim is static and conservative—considered by the Commission as being generally incompatible with the Treaty rules—from dynamic aids designed to adapt the European economy to the challenges of the future. It is not within the scope of this Article to explain the economic problems involved and the objectives of the Commission's policy.<sup>30</sup> My purpose is to show the impact of the law as

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H. von Boeckh, J. Thiesing & C. Ehlermann 3d ed. 1983) [hereinafter VON DER GROEBEN].

29. RECHT UND PRAXIS DER BEIHILFEN IN GEMEINSAMEN MARKT (B. Borner & K. Neundorfer eds. 1984). State aids have been one of the subjects of the Twelfth Congress of Fédération Internationale pour le Droit Européen (FIDE). See vol. II (1986) and, more particularly, the *Community Report*, by Bastiaan van der Esch, at 31-67.

30. The reports on competition contain abundant references to the policy followed by the Commission in this matter, as it is reflected in individual cases. The Fifteenth Report contains a general policy statement from which it appears that the Commission is reluctant to approve aids which serve no other purpose than salvaging undertakings which find themselves in difficulty. By contrast, it favors aids devoted

it is reflected mainly through the cases decided by the Court.

By way of introduction, it must first be emphasized that Articles 92 and 93 of the EEC Treaty impliedly grant wide discretion to the Community institutions, and more particularly to the Commission, in the assessment of the facts and determination of the policy objectives underlying the exemptions for certain types of aids made according to Article 92(3). It would therefore appear that the Treaty articles on aid leave little room for the exercise of judicial control.

However, Article 93 requires Member States to notify the Commission of any plans to grant new aids or to alter existing schemes and provides for a procedure that allows all interested parties, Member States as well as private operators, to make their views known on such projects. After this hearing, the Commission enjoys the right to create a binding decision. By contrast with questions of substance, over which the Court has only limited control, the procedural requirements can be easily checked by the judges, and it is in this field, therefore, that we find the most visible impact of judicial control.

One further remark must be added. Article 94, which parallels Article 87, provides for implementing regulations to be made by the Council. No such regulations have ever been put into force. Therefore, both the Commission and the Court have to live with the few elements laid down by Articles 92 and 93 of the Treaty. The attitude of the Court in this regard has been quite consistent with its general attitude in similar cases; namely, that the absence of appropriate implementing rules cannot prevent the judges from deciding cases on the basis of the legal elements available in the Treaty, insufficient though they may be.<sup>31</sup>

Introduction aside, a quantitative analysis is most re-

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to research and economic development (R & D) projects. Comm'n, Fifteenth Report on Competition Policy ¶¶ 167-74, 218 (1985).

31. I have tried to show this in *La Carence du Législateur Communautaire et le Devoir du Juge*, my contribution to *GEDÄCHTNISCHRIFT CONSTANTINESCO* 559-80 (1983). The attitude of the Court shows that not only politics, but also the law is "L'art du possible." In relation to State aids, the same attitude has been expressed in the judgments of 11 December 1973, *Gebr. Lorenz GmbH v. Federal Rep. of Ger. & the Land Rheinland/Pfalz*; *Markmann KG v. Federal Rep. of Ger. & the Land Schleswig-Holstein*; *Nordsee, Deutsche Hochsee Fischerei GmbH v. Federal Rep. of Ger. & the Land Rheinland/Pfalz*; *Fritz Lohrey & the Land Hessen*, Cases 120-122, 141/73, 1973 E.C.R. 1471, 1495, 1511, 1527, *Comm. Mkt. Rep. (CCH)* ¶¶ 8249, 8250, 8251,

vealing. The Fifteenth Report on Competition, which contains comparative figures for the last five years (1980-1985), shows that notifications of new aids by Member States have increased steadily, culminating in 200 new aid schemes in 1982.<sup>32</sup> Most of these did not meet with any objection from the Commission. If we add up all projects examined during this period, comparing the total of notifications, the cases in which the Commission has decided to open a public investigation procedure under Article 93(2) and the number of negative decisions to which these procedures have led, we come to a very striking result. On average, out of every ten aid schemes notified, eight are approved offhand by the Commission after an exchange of views with the Member State concerned, which may lead to alteration of the scheme to adapt it to the requirements of the Treaty. Only two schemes in ten lead to the opening of the public investigation procedure, and only one in ten is rejected. This relationship reflects a picture similar to what we know of the functioning of the Article 169 procedure used when Member States disregard their Treaty obligations.<sup>33</sup> It appears that the procedure of Article 93, which, in fact, is only a reinforced variation on the general procedure of Article 169, allows the Commission to clear most of the aid projects in its preliminary exchanges with the Member States so that finally only a small minority of cases gives rise to a formal decision by the Com-

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8252; and of 20 March 1984, *Federal Rep. of Ger. v. Comm'n*, Case 84/82, 1984 E.C.R. 1451, para. 10, *Comm. Mkt. Rep. (CCH)* ¶ 14,090.

32. Statistical data have been published in *Comm'n*, Tenth Report on Competition Policy ¶ 159 (1980), for the period covering the years 1970-1980, and in *Comm'n*, Fifteenth Report on Competition Policy ¶ 169 (1985), for the period covering the years 1981-1985.

33. Since 1983, abundant data, both qualitative and quantitative, on actions under Article 169 have been available in the Commission's Annual Reports monitoring the application of Community law, published in the C Series of the Official Journal of the European Communities. These Reports have been established pursuant to the European Parliament's Resolution of 9 February 1983, O.J. C 68/32 (1983), on the basis of Sieglerschmidt, Report on the Responsibility of Member States for the Application of Community Law (European Parliament Working Documents, 1982-83, 1-1052/82 of 10 January 1983). According to the latest report available, O.J. C 200 (1986), aggregate figures show that in a period covering the years 1978-1985, the Commission had opened investigations on presumed failures in 2,348 cases. Of these, 978 led to a "reasoned opinion" in the sense of Article 169 and, of these, 365 to the introduction of an action in court. This means that on average, for every ten investigations opened by the Commission, approximately four have led to a reasoned opinion and 1.5 to a court action.

mission after a public investigation. This explains the extreme scarcity of judgments of the Court on questions relating to State aids.

In my opinion, the lack of decisions is a highly satisfactory state of affairs because it shows that recourse to the Court of Justice remains the *ultima ratio*, most of the outstanding problems being settled on a political level. The only dark area in this picture is the eighty percent of aid schemes that meet with the Commission's approval without a public procedure in accordance with Article 93(2). These aids remain untouchable by other Member States as well as competitors.

Despite the Court's limited activity, it has nonetheless provided certain landmarks in this still uncertain field. One of the first questions settled by the Court was that of the admissibility of applications for the annulment of decisions on aids under Article 173. Such decisions are of necessity addressed to a Member State. The question therefore arises whether an appeal can be brought by other Member States or by private operators. Two typical situations must be envisioned.

It must be ascertained whether an undertaking which is, or will be, the beneficiary of an aid can challenge a decision recognizing an aid as being incompatible with the Common Market. It has never been disputed that in such circumstances an economic operator can bring an action for annulment though the decision is addressed to a Member State, even if that decision has not been challenged by the State concerned. This has been settled law since the *Philip Morris* judgment<sup>34</sup> and was affirmed recently in the *Intermills* judgment.<sup>35</sup>

More delicate problems arise when a complaint is brought by competitors who claim that their interests are harmed or might be harmed by the grant of aid. Recently, in *COFAZ*,<sup>36</sup> the Court ruled that competitors from other Member States would have standing if they established that they had participated in the preliminary phase of proceedings by raising complaints or by making their interest known in the framework of

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34. *Philip Morris Holland B.V. v. Commission*, Case 730/79, 1980 E.C.R. 2671, Comm. Mkt. Rep. (CCH) ¶ 8695.

35. *SA Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, Comm. Mkt. Rep. (CCH) ¶ 14,154.

36. *COFAZ S.A. v. Commission*, Case 169/84, 1986 E.C.R. — (para. 28 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284.

the public investigation opened by the Commission and if they could show that their position on the market was "substantially affected" by the grant of the aid. This decision comports with the criteria adopted by the Court in competition and dumping cases, as can be seen from the precedents quoted in the judgment itself. Undoubtedly, this decision will put a great deal of pressure on the Commission not to close an investigation without giving it due consideration.

A further point is worth mentioning. In several cases in which restrictive or discriminatory measures of Member States in the field of intra-Community trade were challenged, the defendant Member States tried to justify them by claiming that they were a form of State aid covered by Article 92. At first sight one may wonder what the advantage of such a defense could be. The explanation is obvious. Whereas provisions such as Article 30 or 95 of the EEC Treaty are recognized to be directly applicable, Articles 92 and 93 are based on flexible criteria and entail moreover a procedure which must be followed before an aid can be characterized as incompatible with the Treaty. To this type of defense, however, the Court has given a twofold reply.

First, a Member State cannot claim that a given measure constitutes an aid under Articles 92 and 93 if it has not previously notified the Commission that the aid is intended as such.<sup>37</sup> In other words, a State may not attach such qualification a posteriori to a given measure. Second, aid may never be granted in the guise of measures which contravene the rules on free movement of goods or fiscal discrimination.

For example, in the *Hansen* judgment,<sup>38</sup> the Court made clear that the rules on the free movement of goods take precedence over the rules on aids. In *Essevi & Salengo*,<sup>39</sup> the Court remarked that "under the system of the Treaty, an aid cannot be introduced or authorized by a Member State in the form of fiscal discrimination against products originating in other

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37. See Judgment of 7 May 1985, *Commission v. French Rep.*, Case 18/84, 1985 E.C.R. — (para. 13 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,207 (on tax advantages for the French press).

38. *Hansen GmbH & Co. v. Hauptzollamt Flensburg*, Case 91/78, 1979 E.C.R. 935, paras. 8-10, Comm. Mkt. Rep. (CCH) ¶ 8562.

39. *Amministrazione dello Finanze Stato v. Essevi & Salengo*, Cases 142 & 143/80, 1981 E.C.R. 1413, Comm. Mkt. Rep. (CCH) ¶ 8759.

Member States.”<sup>40</sup> This position was summarized and reaffirmed recently in *Commission v. France*,<sup>41</sup> a case involving tax advantages intended to benefit the French press. By these decisions the Court has thwarted attempts by Member States to cover their infringements against Treaty rules on free movement or non-discrimination by retreating into the jungle of State aids.

In the same spirit, the Court has made it clear that the introduction of any new aid requires notification, which in turn opens the possibility of an Article 93 procedure. In other words, an aid cannot be validly granted by a Member State if it has not been duly notified to and approved by the Commission. Undeclared aids are thus per se invalid. Problems may arise, however, when the Commission, after having been duly notified, does not react within a reasonable period of time or when, after having discovered an aid that they were not notified of, does not draw the appropriate conclusions by requesting that the State concerned withdraw the aid. This problem should have been resolved by the regulations referred to in Article 94, but such regulations have never been made by the Council. Under those circumstances, the Court has had to settle the question to the best of its ability, as in the judgment delivered on March 20, 1984,<sup>42</sup> upon a complaint by the Federal Republic of Germany against a decision by which the Commission had provisionally authorized an aid granted by Belgium to its textile industry (the so-called “Claes Plan”). In that judgment, the Court had to disentangle the confusion created by the Commission. The decision authorizing the aid was declared void.

From the indications given so far, the Court has exercised control mostly on the level of preliminaries and procedures, but the efficacy of this type of control should not be underestimated. Through its liberal handling of the admissibility of actions by all parties concerned, the Court has allowed pressure to be brought on the Commission with a view to a complete and timely use of the powers conferred upon it by the Treaty.

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40. *Id.* at 1436, para. 28.

41. Case 18/84, 1985 E.C.R. — (paras. 13-17 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,207.

42. Federal Rep. of Ger. v. Commission, Case 84/82, 1984 E.C.R. 1451, Comm. Mkt. Rep. (CCH) ¶ 14,090.

It has not allowed Member States to take refuge behind the procedural shortcomings arising from the absence of implementing regulations in conjunction with Article 94. It has left them no hope of getting away with the undeclared regimes of public aid or with hiding behind the uncertainties inherent in the economic criteria that govern the application of Article 92.

It remains true, however, that the existing case law is too sparse to allow us to gain much insight into the substantive conditions under which aid may be granted under the Treaty. For the time being there remains great, and so far unchallenged, discretion in the hands of the Commission.

In this respect, the recent *Intermills* judgment<sup>43</sup> showed that decisions of the Commission must be sufficiently grounded to enable the parties to recognize the basis of the decision and to allow the Court to exercise its legal control. According to established case law on actions for annulment, the Court may not go further than sanctioning manifest errors of fact or abuses of power by the Commission, but this at least allows the Court to test whether the decisions are based on sound reasoning and to clear up legal problems such as defining the scope of the relevant Treaty provisions.

In this way the Court has made it clear that Article 92 is based on a broad concept of State aids regardless of the source or the form of the aids, including aid by central governments or by decentralized or local authorities, aid channelled through professional organizations, and aid given under the guise of subsidies, tax relief, or by participation in the capital of undertakings.<sup>44</sup>

Similarly, the Court has given some indications as to what is meant by distortions of competition and by what criteria they may be tested, such as selling under the normal market price or gaining market shares on competitors who are not benefi-

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43. *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, Comm. Mkt. Rep. (CCH) ¶ 14,154.

44. *Id.* at 3830-31, paras. 29-34; Judgment of 13 March 1985, Kingdom of the Netherlands and Leeuwarder Papierwaren Fabriek v. Commission, Cases 296, 318/82, 1985 E.C.R. — (para. 20 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,170; *Commission v. French Rep.*, Case 290/83, 1985 E.C.R. 439, Comm. Mkt. Rep. (CCH) ¶ 14,161; *Intermills*, Case 323/82, 1984 E.C.R. 3809, para. 29, Comm. Mkt. Rep. (CCH) ¶ 14,154.

ciaries of similar advantages.<sup>45</sup>

On the whole, the control of public aids seems to be a rather successful chapter of the Community's action in the field of competition. This can be explained by the fact that Article 93 has conferred clearly defined powers on the Community executive and has provided an appropriate procedure. The same is not true for sectors in which the Community's powers are less clearly defined.

## 2. Public Undertakings

Article 90 of the EEC Treaty has reserved special treatment to "public undertakings" and undertakings vested with "special or exclusive rights."<sup>46</sup> This provision contains a clear principle with ill-defined, and therefore troublesome, exceptions. In principle, public undertakings are subject to all relevant rules of the Treaty, some of which are specifically mentioned in the first paragraph of Article 90, namely:

- the rules on the free movement of goods;
- the general rule of non-discrimination in Article 7, which means that a Member State may not grant a preference to its own public undertakings;
- the competition rules of Articles 85 and 86, the latter being of particular importance in this field;
- Articles 92 and 93 on State aids; and
- Article 95 on non-discrimination in tax matters.

It appears from Article 90 that whatever the particular status of such public undertakings, of which a wide variety operates in the different Member States, these undertakings are in principle subject to general rules of the Treaty relating to free

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45. *Belgium v. Commission*, Case 40/85, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ —.

46. The Eighth Congress of FIDE, held in Copenhagen in 1978, devoted a part of its discussions to "Equal treatment of public and private enterprises," General Rapporteur Arved Deringer. The "Community Report" presented on that occasion by P. Mathijsen shows that at that time, practically nothing had been done by the Community in this respect. See Vol. II of the Congress Acts. On the present state of affairs, see Virole, *L'Entreprise Publique et le Droit des Communautés Européennes*, 32 *REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE* 141-52 (1984) (providing some interesting statistical data on the importance of public undertakings in Member States (approximately 10 percent of the global economy and in no case exceeding 20 percent)). On the Court's case law, see P. van Ommeslaghe & B. van de Walle de Ghelke, *supra* note 25, at 101-05.

movement, non-discrimination and competition. It is only in Article 90(2) that we find a derogation for the benefit of two categories of such undertakings: "services of general economic interest" and undertakings "having the character of a revenue-producing monopoly." With respect to these, it is again stated that they remain subject to the rules on competition, but that they are exempted insofar as the application of such rules might "obstruct the performance, in law or in fact, of the particular tasks assigned to them." This exception in turn is subject to a limitation saying that the privileges reserved to public undertakings must not be such that the development of trade might "be affected to such extent as would be contrary to the interests of the Community." Article 90(3) entrusts the Commission with the task of ensuring the application of these provisions. The Commission may, where necessary, "address appropriate directives or decisions to Member States."

This recital of the relevant texts shows that the problem boils down to the question of how far the performance of the "particular tasks" assigned to services of general economic interest or revenue-producing monopolies requires exemption from the Treaty rules on free movement, non-discrimination and fair competition. It must be understood that Article 90 underlines no less than three times the principle that public undertakings are subject to the ordinary rules of the Treaty, which makes derogations from this rule appear as exceptions to be strictly interpreted. In other words, the Treaty does not restrict the freedom of Member States to maintain or create public undertakings or to vest them with particular form of economic management but may do so only while respecting the general rules of the Common Market. If they claim exceptions, the *onus probandi* falls upon them and they may make use of such derogations only to the extent strictly required by the performance of the particular tasks conferred on these undertakings in the general interest.

Strikingly enough, the Commission did not use the powers conferred upon it by the third paragraph of Article 90 for many years. Nothing is to be found in this respect in the Commission's reports on competition until the mid-1970s. During that period, the sole references to the problems raised by Article 90 are to be found in the Court's case law, as questions

relating to this provision were included in several references by national courts for preliminary rulings under Article 177, to which we shall return in a moment. It is in the Sixth Report on Competition, covering the year 1976, that we find for the first time a policy statement of the Commission relating to this matter. Here the Commission complains about the fact that its action has been so far hampered by a lack of "transparency" of financial relations between Member States and their public undertakings. On 25 June 1980 the Commission finally issued Directive 80/723<sup>47</sup> on the transparency of financial relations between Member States and public undertakings. That directive was later amended by Directive 85/413 of 24 July 1985.<sup>48</sup>

Directive 80/723 was attacked immediately in Court by three Member States—France, Italy, and the United Kingdom—which have the highest percentage of public undertakings. This action resulted in a judgment of 6 July 1982.<sup>49</sup> The plaintiff's most substantial argument was that the Commission had encroached upon the powers of the Council by issuing a directive of general effect under Article 90(3), the directives and decisions envisaged by the Treaty being restricted in their opinion to particular instances. It is striking and at the same time highly significant for the attitude of the plaintiff's to see that they claim for the Council (in other words for themselves) the function accomplished by the Commission at a time when they were systematically procrastinating over a whole series of proposals put forward by the Commission implementing regulations in the field of competition.

It is against that background that one must understand the reasons for which the Court rejected the claims of those governments, drawing attention to the general system of allocation of powers in the Community and making it clear that under Article 90(3) the Commission may issue both general directives and decisions in particular cases.<sup>50</sup> A second argument put forward by the plaintiffs was that there was no real necessity for introducing the rules fixed in that Commission's directive. On that point the Court held that, precisely because

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47. Comm'n Directive 80/723, O.J. L 195/35 (1980).

48. Comm'n Directive 85/413, O.J. L 229/20 (1985).

49. French Rep., Italian Rep., & U.K. v. Commission, Cases 188-190/80, 1982 E.C.R. 2545, Comm. Mkt. Rep. (CCH) ¶ 8852.

50. *Id.* at 2572-76, paras. 4-15.

of the great diversity of public undertakings in different Member States and in view of the high degree of complexity of existing relationships and the scarcity of sources of information, one could not deny the interest of the Commission in establishing a general framework inside which it could secure information on the basis of identical criteria for all the Member States.

The Commission's directive, as it has subsequently been complemented, together with the Court's judgment, have created a solid basis for the future action of the Commission. But it must be said that up to now nothing has come of this action which might be compared to the achievements in other fields, such as State aids. As far as can be seen, the Commission for the time being is acting by stimulation and persuasion rather than by legal proceedings.

This having been said on account of the Commission, I should like to draw attention to a few points on the interpretation of Article 90 to be found in some judgments of the Court. The first decision to touch upon Article 90 was the *Muller-Hein* judgment,<sup>51</sup> which concerned a small port on the Moselle River managed by a public corporation to which the State of Luxembourg had granted exclusive rights. The Court said in this judgment that an undertaking entrusted with the task of establishing a port which is the only outlet of the State concerned for inland water traffic may be qualified under Article 90(2) to enjoy certain exclusive rights.<sup>52</sup> However, it added that the provisions of Article 90 were of no avail in such a case, as they could not be relied upon by private persons for lack of direct applicability.<sup>53</sup>

In two later cases, the Court had to determine whether companies entrusted with the collection of author's royalties may be regarded as being "services of general economic interest" which might be exempted from the observation of the monopoly rules of Article 86. In *BRT v. SABAM*,<sup>54</sup> and *GVL v.*

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51. Public Prosecutor of Lux. v. Muller, Case 10/71, 1971 E.C.R. 723, Comm. Mkt. Rep. (CCH) ¶ 8140.

52. *Id.* at 730, para. 10.

53. *Id.* para. 16.

54. Belgische Radio en Televisie & Société Belge des Auteurs, Compositeurs et Editeurs v. SV SABAM & NV Fonior, Case 127/73, 1974 E.C.R. 51, Comm. Mkt. Rep. (CCH) ¶ 8269.

*Commission*,<sup>55</sup> the Court ruled that because the provisions of Article 90(2) constituted an exception to the general rules of the Treaty, they must be narrowly construed and that this exception may not be extended to companies which, although they may be placed under public supervision, are concerned with the management of private interests.

The most illuminating decision in this context is the *Sacchi* judgment,<sup>56</sup> a preliminary ruling given by the Court at the request of an Italian tribunal on the compatibility with the principles of the EEC Treaty of certain provisions of the Italian legislation relating to the grant of exclusive rights in the matter of television, in particular for commercial advertising. Some of the questions raised by the Italian tribunal related to the interpretation of Article 90 with a view to determining the compatibility with the competition rules of the Treaty of the grant of exclusive rights by the State to a private company. The Italian and the German Governments, which both submitted their observations in the proceedings, explained that in their opinion television could not be qualified as being an "undertaking" and, even if this could be the case, it was one of the "services of general economic interest" exempted by Article 90(2) from observation of the competition rules.

In its opinion, the Court emphasized that Article 90 implied that Member States might grant exclusive rights in the public interest for non-economic reasons to operators in the field of radio and television, but that in the performance of their mission those operators remained subject to the rules of competition in their market activities, unless it was established that those activities would be incompatible with the exercise of their particular mission. However, the Court added that it would be abusive if an advertising undertaking took advantage of its dominant position to impose inequitable conditions or to discriminate between economic operators or products according to their nationality. The Court added that the rule of Article 86 certainly had direct effect even if it were applied through Article 90.

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55. *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH v. Commission*, Case 7/82, 1983 E.C.R. 483 (paras. 29-33 of the judgment), *Comm. Mkt. Rep.* (CCH) ¶ 8910.

56. *Ex parte Guiseppe Sacchi*, Case 155/73, 1974 E.C.R. 409, *Comm. Mkt. Rep.* (CCH) ¶ 8267.

A passing reference to Article 90 is also found in the *Van Ameyde* judgment,<sup>57</sup> relating to automobile insurance, and in the "British Telecom" case that resulted in the judgment of March 20, 1985, *Italy v. Commission*.<sup>58</sup>

### 3. Public Monopolies

Article 37 on public monopolies is quite forthright in its provisions but actually relates only to a narrowly circumscribed field.<sup>59</sup> Apart from the monopolies for postal service and telecommunications, which seem to be commonplace, monopolies exist only in a few Member States (France, Germany, Italy, and Greece). They exist in limited number of specific goods such as spirits, tobacco, oil and potash. It must be emphasized that Article 37 does not provide for the elimination of existing monopolies, but only for their adjustment by the end of the transitional period to open monopolies allowing for the free import and merchandising of corresponding goods imported from other Member States. Though monopolies may thus be legitimately maintained, the Commission has pressed for their elimination. The Commission has been successful with respect to certain minor monopolies that remained as relics of by-gone economic conditions. However, a new problem may have been created by the accession of Greece, which has brought into the Common Market an impressive number of outdated monopolies. Greece even created a new monopoly for pharmaceutical products after accession.

Article 37 is not part of the competition rules. The text refers only to the elimination of discrimination in the procurement and marketing of goods and to the abolition of quantitative restrictions. There is no mention of competition. Quite rightly, the Commission and the Court have nonetheless

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57. *Srl Ufficio Henry van Ameyde v. Srl Ufficio Centrale Italiano di Assistenza Assicurativa Automobilisti in Circolazione Internazionale*, Case 90/76, 1977 E.C.R. 1091, Comm. Mkt. Rep. (CCH) ¶ 8425.

58. *Italy v. Commission*, Case 41/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,168.

59. Information on public monopolies is available in the Commission's Reports on Competition. See also Hochbaum, *Beseitigung der mengenmässigen Beschränkungen zwischen den Mitgliedstaaten*, in VON DER GROEBEN, *supra* note 28, at 310 (comments on Article 37); Pappalardo, *Position des Monopoles Publics par Rapport aux Monopoles Privés*, in LA REGLEMENTATION DU COMPORTEMENT DES MONOPOLES ET ENTREPRISES DOMINANTES EN DROIT COMMUNAUTAIRE 538 (J.A. van Damme ed. 1977).

treated this provision as forming part of the complex of competition rules. This is also the approach expressed by the Court. In the *Hansen* judgments of October 10, 1978<sup>60</sup> and March 13, 1979,<sup>61</sup> involving the German spirit monopoly, the Court explains that Articles 37, 92, 93 and 95 pursue the same objective insofar as they aim to eliminate distortions in competition in the Common Market as well as discrimination against the products or trade of other Member States.<sup>62</sup>

While the Commission was engaged in protracted negotiations to persuade Member States to alter or eliminate their monopolies, the Court, in the *Manghera* judgment,<sup>63</sup> which concerned a preliminary ruling referred to the Court by an Italian court under Article 177 regarding the Italian tobacco monopoly, recognized that Article 37 did not provide for the abolition of monopolies altogether, but instead provided that, from the end of the transitional period, Member States could no longer oppose the exclusive rights of their national monopolies against the free importation of corresponding products coming from other Member States. Because the provisions of Article 37 were unconditional, the Court ruled that they had direct effect and must be applied by national courts.<sup>64</sup> The same principles were reiterated in the *Rewe*<sup>65</sup> and *Miritz*<sup>66</sup> cases.

In one of several *Hansen* cases,<sup>67</sup> the Court dealt with the subtleties of the German system of taxation on spirits, which is closely linked to the operation of the alcohol monopoly. It is unnecessary to enter into the intricacies of that case. In the present context it is sufficient to say that the Court brought out the close link existing in the operation of a monopoly between the operation of the relevant market, the grant of public aid,

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60. Case 148/77, 1978 E.C.R. 1787, Comm. Mkt. Rep. (CCH) ¶ 8511.

61. Case 91/78, 1979 E.C.R. 935, Comm. Mkt. Rep. (CCH) ¶ 8562.

62. *See id.* paras. 13-14 and 9, respectively.

63. *Pubblico Ministero v. Manghera*, Case 59/75, 1976 E.C.R. 91, Comm. Mkt. Rep. (CCH) ¶ 8342.

64. *Id.* at 953, para. 9.

65. *Rewe-Zentrale des Lebensmittel-Grosshandels GmbH v. Hauptzollamt Landau/Pfalz*, Case 45/75, 1976 E.C.R. 181, 217, Comm. Mkt. Rep. (CCH) ¶ 8343.

66. *Hauptzollamt Göttingen & Bundesfinanzminister v. Wolfgang Miritz GmbH & Co.*, Case 91/45, 1976 E.C.R. 181, 217, Comm. Mkt. Rep. (CCH) ¶ 8344.

67. *Hansen GmbH & Co. v. Hauptzollamt Flensburg*, Case 91/78, 1979 E.C.R. 935, Comm. Mkt. Rep. (CCH) ¶ 8562.

the pricing policy of the monopoly and the parallel taxation of products not subject to the monopoly. The Court made it clear that pricing and taxing by the monopoly could well affect the conditions of competition in the Common Market.<sup>68</sup>

In 1983, the Court assessed whether certain practices of the Italian and French tobacco monopolies were compatible with fair commercial practices. In the *Italian Monopoly* case,<sup>69</sup> the Court found that the Italian legislation that applied a uniform profit margin to the retail sale of tobacco, including the sale of imported tobacco, did not prevent importers from determining their sales prices freely in relation to their net costs and that therefore there was no infringement of the rules of competition. As a consequence, the action brought by the Commission was rejected. By contrast, in the *French Monopoly* case,<sup>70</sup> decided June 21, 1983, the Court found that the French administration fixed the retail price of tobacco so that importers were at a competitive disadvantage to the French monopoly. Both judgments are based on competition law considerations.

#### B. Distortions Due to Non-Specified Measures of Member States

After having surveyed fields that have already been largely explored by the Commission and to some extent by the Court, we come now to the less well-defined area of interference with competition by public authorities. Such interference was envisioned but not properly defined by Articles 101 and 102 of the Treaty.

Article 101, which follows the general clause on approximation of laws, refers to Member State laws, regulations, or administrative actions that "distor[t] the conditions of competition in the common market." In such cases, the Commission will first "consult" the Member State concerned. If such consultation does not result in an agreement eliminating the distortion in question, the Commission may propose that the Council issue "the necessary directives." The Council then de-

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68. *Id.* at 951-53, paras. 6-11.

69. *Commission v. Italian Rep.*, Case 78/82, 1983 E.C.R. 1955, Comm. Mkt. Rep. (CCH) ¶ 14,004.

70. *Commission v. French Rep.*, Case 90/82, 1983 E.C.R. 2011, Comm. Mkt. Rep. (CCH) ¶ 8942.

cides by a qualified majority, which precludes a blocking vote by the Member State concerned. The Commission and the Council may also "take any other appropriate measures provided for in this Treaty." These measures can include an action brought by the Commission under Article 169. If the Council fails to act upon a proposal by the Commission (which experience has shown is the most likely situation), the Commission may bring an Article 175 action before the Court for default of the Council. Such an action can be based on Article 101, which speaks of distortions that "need" to be eliminated and of "necessary" directives. Therefore, the Council is under an obligation to act, and the Commission could then request the Court to make that obligation binding under Article 176.

In addition, Article 102 (the effect of which is far from clear), provides that in case of new measures instituted by a Member State the Commission may issue recommendations and authorize other Member States to take corrective measures, a method quite alien to the general style of the Treaty.

Unfortunately, Articles 101 and 102 are among the most obscure of the Treaty, because neither their subject matter nor possible courses of action by Community institutions are clearly defined. This may explain why these provisions have never been properly implemented.<sup>71</sup> After a few attempts in

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71. In the early years, the Commission published two illuminating studies which shed light on this problem. In 1966 it published in its *ETUDES, SERIE CONCURRENCE*, vol. 2, a report of Professor J. Zijlstra on *Politique Economique et Problèmes de la Concurrence dans la CEE et dans les Pays Membres de la CEE*, based on national reports by Duquesne de la Vinelle (Belgium/Luxembourg), Möller (Germany), Houssiaux (France), Bernini (Italy) and Hertog (Netherlands). Those reports examine the relationship between the Community's competition policy and general economic policy, one main focus being planning. In 1971, the Commission published in the same series, vol. 11, a report on *Les Distorsions Globales de la Concurrence et Leurs Répercussions sur le Marché Commun* by Professor Rudolf Regul, which both analyzes the problem of distortions and provides an historic overview starting from the Spaak Report which, as is well known, was the basis of the negotiations leading to the conclusion of the EEC Treaty, *supra* note 1. Both reports, like the Westphal report on price regulation, *supra* note 23, relate to the pre-enlargement situation in the late 1960's and early 1970's. It would be highly desirable to take up this range of problems again in the perspective of the Community as it stands in the late Eighties. The problem has been considered recently in an illuminating report by the Netherlands Scientific Council for Governmental Policy, 28/1986, on *The Unfinished European Integration*, under the chapter "Competition Policy", *id.* at 95-111. The same problem is touched upon by Michel Waelbroeck in his contribution *La Constitution Européenne et les Interventions des Etats Membres en Matière Economique*, in *LIBER AMICORUM VERLOREN VAN THEMAAT* 331-38 (1982).

the early years of the Community,<sup>72</sup> they have remained dormant and it is only in some recent reports that the Commission has shown an intention to make Article 101 "more operational."<sup>73</sup> However, nothing has since ensued. It is true that the successive reports of the Commission contain a chapter devoted to the application of national and Community law on competition in the Member States, but these accounts are limited to a neutral description of competition law inside Member States. Such reports are certainly useful from the point of view of comparative law, but they do not suggest any critical approach and completely avoid the question of whether national rules and practices are in harmony with the Community competition rules and Commission policy. On the contrary, in the Eighth Report on Competition, the development of national legislation is proceeding "in the sense of an ever closer harmonization with the rules of the Community," thereby diminishing the risk of "theoretical" conflicts between national competition law and Community law.<sup>74</sup>

The sole criticism is found in a phrase from the Fifteenth Report on Competition, which reads "the Commission cannot restrict itself to applying the principles of a dynamic competition to the anticompetitive behavior of undertakings. It is as important to make sure that these principles are also respected by Member States."<sup>75</sup> In the same volume there is a promising subsection under the heading "Public Interventions of a Member State and Competition Rules Applicable to Undertakings—Respect by Member States of Principles Contained in Articles 85 and 86 of the EEC Treaty," but the reader quickly discovers that the text following this title is nothing but an attempt to justify the Commission's attitude in *Leclerc*<sup>76</sup> and an account of

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72. For these attempts, none of them conclusive, see J. MEGRET, J.-V. LOUIS, D. VIGNES, M. WAELBROECK, & R. WÄGENBAUR, 5 *LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE* 195-202 (1973) (comments on Articles 101 and 102). The matter has not advanced further in the meantime, as can be seen from the comments of Jörn Pipkorn on Articles 101 and 102 in VON DER GROEBEN, *supra* note 28, at 1726-48.

73. Comm'n, Fourteenth Report on Competition Policy 11 (Introduction) (1984); Comm'n, Thirteenth Report on Competition Policy 11 (Introduction) (1983).

74. These expressions of optimism are to be found in Comm'n, Eighth Report on Competition Policy ¶ 50 & at 13 (Introduction) (1978).

75. Comm'n, Fifteenth Report on Competition Policy 12-13 (1985).

76. Case 229/83, 1985 E.C.R. 1, Comm. Mkt. Rep. (CCH) ¶ 14,111.

the relevant decisions of the Court, to which we shall return later.<sup>77</sup> The Commission concludes that it will ensure that Member States as well as undertakings observe the principles laid down in Articles 85 and 86.<sup>78</sup> However, at present it must be maintained that by contrast to its systematic monitoring of State aids, and the mild interest it takes in public undertakings and monopolies, the Commission has completely neglected the problem of distortions in competition due to interference in the Common Market by other anticompetitive actions of Member States.

However, some guidance in this field may be found in the Court's cases, although a completely coherent judicial doctrine cannot be discerned. Through the Court's decisions it is possible to observe that distortions of competition stem from certain well-defined types of legislations, namely:

- national laws on competition, whether generic or specific, which cause not only problems of duplication of Community law, but also of conflicts and interference;<sup>79</sup>
- economic legislation, especially legislation on various types of price control, as we have already seen;
- national market organizations as they have been found to exist in the fields of agriculture, oil supply and transport; and
- taxation.

A supplementary remark regarding the effect of taxation seems appropriate. It is well known that taxation can have a direct incidence on the conditions of competition. As envisioned by Article 96 of the EEC Treaty one well-known cause of distortion—tax refunds on exports—has disappeared with the generalized introduction of the VAT system (nevertheless discrepancies in the levels of taxation continue to create some distortion). Distortions also exist in other areas of internal taxation as is demonstrated by the numerous cases that have come

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77. See *infra* notes 95-114 and accompanying text.

78. Comm'n, *supra* note 75, ¶ 91-93 *in fine* (1985).

79. The optimism displayed by the Commission in its Eighth Report, *supra* note 74, seems to be misplaced. The different categories of legislation mentioned here deserve systematic and critical scrutiny. In particular, national legislations on competition allow for exemptions which may interfere either with the prohibitions contained in Articles 85 and 86 or with the Commission's power to grant exemptions on its own terms under Article 85(3).

before the Court in the framework of Article 95. It is not possible to enter into the detail of the case law relating to that provision in this Article; suffice it to say that discriminatory taxation has the same effect as customs duties by making imported goods less competitive by comparison with nationally-produced goods, to the extent of reducing their market share or even excluding them altogether.<sup>80</sup>

In light of these remarks, and with a view to defining more precisely a range of problems that have not yet been properly identified, either in theory or in practice, I should like to demonstrate how distortions of competition by the operation of national economic or fiscal legislation have become apparent in cases brought before the Court. The problem has manifested itself in two ways.

### 1. Public Interference in Competition Used as an Excuse by Undertakings

In the first instance, national legislation interfering with the behavior of operators in the market has been brought before the Court as an excuse to show that the anticompetitive activities of undertakings stemmed not from the free will of the parties concerned, but from some legislation that placed them under an irresistible constraint.

This arose for the first time in an action brought by the major European sugar producers for the annulment of a 1973 decision by the Commission on concerted practices in the sugar market. In *Suiker Unie*,<sup>81</sup> the Court substantially confirmed the Commission's decision, but declared void the section concerning the Italian producers. The Court stated that the Commission had failed to account for the severe limitations on competition resulting from the fact that the Italian authorities had superimposed their national regulations on an already restrictive Community market organization.<sup>82</sup> Noting this decision in its Fifth Report on Competition, the Commission announced that it had begun an action against Italy based

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80. On this area generally, see Easson, *Fiscal Discrimination: New Perspectives on Article 95 of the EEC Treaty*, 18 COMMON MKT. L. REV. 521 (1981).

81. *Suiker Unie UA v. Commission*, Cases 40-48, 50, 54-56, 111, 113, 114/73, 1975 E.C.R. 1663, Comm. Mkt. Rep. (CCH) ¶ 8334.

82. *Id.* paras. 29-73, and more particularly, paras. 65 and 72.

on Article 169 of the EEC Treaty.<sup>83</sup> The outcome of that action is unknown, but some years later, on April 21 and May 21 of 1980, the Court delivered two judgments against Italy<sup>84</sup> on the basis of Article 169, establishing that certain features of the Italian regulations on the sugar market were incompatible with the Treaty.

The public constraint argument was taken up again in *Heintz Van Landewyck*,<sup>85</sup> an action for annulment against a decision which the Commission had taken in 1978 in relation to a concerted practice of Belgian tobacco manufacturers. In this action, the plaintiffs based one of their main arguments on the fact that the combined effect of the national legislation on tobacco taxes and price control left no room for effective competition between manufacturers. The Court recognized that the Belgian legislation left little room for competition.<sup>86</sup> Nevertheless, there remained a narrow margin for competition and this had been totally eliminated by the concerted practice of the plaintiffs. Thus, the defense was rejected and there was no criticism of the Belgian legislation.

The same line of defense was adopted in two recent actions for annulment brought by Dutch tobacco manufacturers and distributors against a Commission decision relating to agreements and concerted practices in the distribution of manufactured tobacco.<sup>87</sup> The plaintiffs argued once more that the combined effect of the system of taxation and price control, as well as pressures exerted by the Dutch authorities on the fixing of prices and margins, had restricted their freedom of action to such an extent that they were compelled to enter into the agreements and practices prosecuted by the Commission. Here again, after a careful analysis of the legislative framework and the alleged facts, the Court concluded that although the Dutch legislation and the action of the Dutch authorities had

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83. See Comm'n, Fifth Report on Competition Policy ¶ 20 (1976).

84. *Commission v. Italy*, Case 73/79, 1980 E.C.R. 1533, Comm. Mkt. Rep. (CCH) ¶ 8675; *Commission v. Italy*, Case 72/79, 1980 E.C.R. 1411, Comm. Mkt. Rep. (CCH) ¶ 8674.

85. *Heintz van Landewyck S.à.r.l. (FEDETAB) v. Commission*, Cases 209-215, 218/78, 1980 E.C.R. 3125, Comm. Mkt. Rep. (CCH) ¶ 8687.

86. *Id.* at 3263, para. 130.

87. *Stiching Sigarettenindustrie v. Commission, and Nederlandse Organisatie Sigarenwinkeliers v. Commission*, judgments of 10 Dec. 1985, Cases 240-269/82, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶¶ 14,265, 14,266.

restricted the freedom of the producers and distributors, the latter were not compelled to enter into the contested agreements.

## 2. Public Interference in Competition Complained of by Undertakings

In the preceding cases, economic operators had given way or claimed to have given way to pressures created by national legislation or exerted by national authorities and had attempted to use this as an excuse. Recently cases have been coming to the Court in which economic operators, far from submitting to State pressure, have tried to resist such pressures or to protect themselves by relying on the competition rules of the Community. Such conflicts came up in several national courts which have availed themselves of the procedure of Article 177 with a view to ascertaining whether certain provisions of their national authorities were compatible with the competition law of the Community.

This type of problem first arose when proceedings were brought before the Berlin Kammergericht between a group of German producers of aniline dyes and the Bundeskartellamt concerning the "aniline cartel," while the same concerted practice was being investigated by the Commission. Before the Kammergericht, the plaintiffs disputed the competence of the German authorities, the matter having been taken up in the meantime by the Community. In the questions which it referred to the Court, the Kammergericht drew attention to the fact that simultaneous application of national and Community competition law entailed the risk of divergent legal assessments of the same facts and of distortions of competition in the Common Market, to the detriment of those who were simultaneously subject to national law.

In the *Walt Wilhelm* case,<sup>88</sup> the Court made it clear that there was room for simultaneous application of national and Community competition law to an agreement that had produced effects at national as well as at Community level. However, it added that the parallel application of a national system of competition rules could be admitted only insofar as it would

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88. *Walt Wilhelm v. Bundeskartellamt*, Case 14/68, 1969 E.C.R. 1, Comm. Mkt. Rep. (CCH) ¶ 8056.

not prejudice the uniform application of the Community rules throughout the Common Market and the full effect of measures adopted in implementation of those rules. The Court specified in that respect that the sphere of application of the Community's competition rules was to be preserved in the light not only of the prohibitions of Article 85(1), but also of the exemptions granted under Article 85(3) which gave the Community authorities scope for certain positive action with a view to promoting a harmonious development of economic activities within the whole of the Community. Concluding this point of its reasoning the Court emphasizes that conflicts between Community law and national competition law cannot be resolved otherwise than on the basis of the principle of precedence of Community law.

Some years later, in the *INNO v. ATAB* case,<sup>89</sup> the Belgian Court of Cassation submitted a reference for a preliminary ruling on the question of the compatibility with Community law of the Belgian system of taxation of manufactured tobacco, which provided for a fixed retail price which had to be stated on the tax label placed on each package. A suit had been brought in the Belgian courts by the Federation of Tobacco Dealers against a well-known Belgian chain supermarket which had sold cigarettes at a discount rate below the fixed price. The Court of Justice was asked to decide whether a legal system of that kind was compatible with Article 3(f) in conjunction with Article 5(2) and Article 86 of the EEC Treaty, as it favored the constitution of monopolies of tobacco producers on the market. Moreover, the national court asked whether such action was compatible with Article 30, as its effect was to restrict imports of tobacco manufactured in other Member States. In its reply to those questions, after having recalled the provisions of Articles 3(f), 5(2), and 86 of the Treaty, the Court stated that "while it is true that Article 86 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness."<sup>90</sup>

Recently, the Court has been faced with a series of re-

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89. Case 13/77, 1977 E.C.R. 2115, Comm. Mkt. Rep. (CCH) ¶ 8442.

90. *Id.* at 2144, para. 31.

quests for preliminary rulings by French courts seeking guidance on the compatibility with the Community's competition rules of French legislation relating to fixed prices for books (the *Leclerc* case),<sup>91</sup> price regulation for fuel (*Cullet*),<sup>92</sup> pricing of cognac (*Clair*)<sup>93</sup> and air tariffs (*Asjes*).<sup>94</sup> As far as one can see from the resulting judgments of the Court, the question submitted to the Court had been formulated exclusively in the framework of competition rules, mostly a combination of Articles 3(f), 85, and 86, in relation to Article 5(2). It may be recalled that Article 3(f) provides that the Community must ensure "that competition in the Common Market is not distorted," while Article 5(2) imposes on Member States an obligation to "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

Let us now examine the Court's reaction to those questions that were arranged coherently, though they originated from various different corners of France (Poitiers, Toulouse, Saintes, and Paris). The leading case is *Leclerc*.<sup>95</sup>

In 1981, France introduced a law on book prices,<sup>96</sup> under which all publishers or importers are required to fix retail prices for the books they publish or import. Retailers are bound to charge at least 95 percent of that price. If the fixed price is not adhered to by a distributor, any competitor or professional association may seek an injunction ("astreinte") or claim damages. The law also provides for criminal proceedings to be initiated. Apart from criminal proceedings, they were in the hands of competitors, not of a public authority. The law has given rise to much litigation in France. In the course of one of those proceedings, directed against the well known discount chain Leclerc, the Court of Appeal of Poitiers asked the Court whether this type of legislation was compatible with Articles 3(f) and 5(2) of the Treaty.

In contrast to its recent attitude in a case involving the

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91. Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

92. Case 231/83, 1985 E.C.R. 305, Comm. Mkt. Rep. (CCH) ¶ 14,139.

93. Bureau Nat'l Interprofessionel du Cognac v. Clair, Case 123/83, 1985 E.C.R. 391, Comm. Mkt. Rep. (CCH) ¶ 14,160.

94. Cases 209-213/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,287.

95. Centres Leclerc v. Au Blé Vert, Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

96. Loi no. 81-766 de 10 août 1981 relative au prix du livre, J.O. R.F. at 2198.

Dutch book cartel,<sup>97</sup> the Commission, in its observations presented to the Court, did not adopt a position on the problem of competition but shifted its focus from the outset to the question of the compatibility of the French legislation with Article 30, a question that had not been raised by the French judges. When pressed by the Court to adopt a position on the competition issue as well, the Commission gave an evasive answer that showed it had meanwhile retreated far from the position it had vigorously defended so recently in the case of the Dutch language book market. The Commission made the surprising statement that a measure taken by a Member State might "*in principle validly* produce effects comparable to those of an agreement prohibited under Article 85."<sup>98</sup> Such measures would be prohibited by Article 5(2) only in exceptional circumstances, if a Member State

- favored or facilitated conclusion of agreements between undertakings; or
- extended the effect of such agreements to third parties; or
- permitted undertakings to circumvent obligations of Articles 85 or 86 of the Treaty when it could not be argued that it was in the public interest.

The Commission did not explain why measures of Member States that might interfere with the Community's competi-

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97. *Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) & Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v. Commission*, Cases 43/82 & 63/82, 1984 E.C.R. 19, Comm. Mkt. Rep. (CCH) ¶ 14,042. In 1962, the Dutch and the Flemish associations of publishers and book dealers had notified to the Commission an agreement relating to fixed retail prices for books, together with the corresponding agreements in force inside each of the two Associations. The Commission chose to concentrate its attack on the so-called "transnational" agreement, which clearly affected intra-Community trade, leaving the "national" agreements for further consideration. In 1981, the Commission declared that the transnational agreement infringed Article 85(1) and at the same time dismissed the application for exemption under Article 85(3). *Id.* at 67-68, paras. 49-53. Upon appeal of the Associations, the Court found itself in an awkward position, as it turned out to be extremely difficult to rule upon the "transnational" agreement without simultaneously being allowed to take into consideration the "national" agreements to which it was closely tied. At the end of the day, the Court rejected the appeal, but the reasoning is fraught with so many reservations that it is difficult to recognize the Court's attitude on the substance of the problem: price fixing for books. The Advocate General, VerLoren van Themaat, had taken a more outspoken position in his submissions, in favor of the Commission's decision.

98. Case 229/83, 1985 E.C.R. —, 3.2.1. at 24, Comm. Mkt. Rep. (CCH) ¶ 14,111, at 15,430 (emphasis added), reproduced approximately in Comm'n, Fifteenth Report, *supra* note 75, ¶ 50.

tion rules were "valid in principle" and prohibited only in exceptional cases, and it did not in any way justify the content of these exceptions. This disconcerting legal position has remained unexplained.

The judgment of the Court, delivered on January 10, 1985, has clarified the principles to some extent, but in its final result comes quite close to the Commission's position. The Court held that

whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are nonetheless obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.<sup>99</sup>

The Court here cited the *Walt Wilhelm*<sup>100</sup> and *INNO v. ATAB*<sup>101</sup> judgments. After remarking that French legislation does not require agreements between publishers and retailers because it imposes on publishers and importers a statutory obligation to fix retail prices unilaterally, the Court added that "the question arises as to whether national legislation which renders corporate behavior of the type prohibited by Article 85(1) superfluous, by making the book publishers or importers responsible for freely fixing binding retail prices, detracts from the effectiveness of Article 85 and is therefore contrary to the second paragraph of Article 5 of the Treaty."<sup>102</sup>

The answer to this question should have seemed obvious, as the effect of the French legislation was to impose corporate behavior squarely opposed to Article 85(1), which expressly prohibits fixing of retail prices, and to nullify the powers reserved to the Commission under Article 85(3) as far as the

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99. Case 229/83, 1985 E.C.R. — (para. 14 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,111, at 15,435. At the time when the *Leclerc* case was pending, the German Chancellor and the French Minister for Cultural Affairs came out strongly in favor of fixed book prices in public speeches made at the 1984 Frankfurt Book Fair.

100. Case 14/68, 1969 E.C.R. I, Comm. Mkt. Rep. (CCH) ¶ 8056.

101. Case 13/77, 1977 E.C.R. 2115, Comm. Mkt. Rep. (CCH) ¶ 8442.

102. Case 229/83, 1985 E.C.R. — (para. 15 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,111.

French book market was concerned. However, the Court did not draw that conclusion. It continued by criticizing the Council and the Commission for not having yet defined "a Community competition policy" in the field of book trade, and concluded that Member States' obligations "are not specific enough to preclude them from enacting a legislation of the type at issue."<sup>103</sup> Therefore, in a nutshell, Member States are bound by the rules of competition, but there are no specific rules for Member States in this matter.<sup>104</sup> The Court then turned to Article 30 to find that one particular provision in the French law, relating to price fixing for imported books, was "liable to impede trade between Member States" and was therefore incompatible with the Community law.<sup>105</sup>

Thus, the judgment boils down to a kind of *non liquet*: the Court gave no substantive reply to the competition law question as it had been put by the Poitiers court. Instead, it answered a question that had not been raised and which was apparently of no interest to the referring court. In fact, that answer related only to one minor aspect of the whole complex issue of book prices.<sup>106</sup> When other French courts brought the same problem back to the Court insisting on a reply, they had to be satisfied with a reference to the *Leclerc* precedent.<sup>107</sup>

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103. *Id.* at — (paras. 18-20 of the judgment).

104. This change of emphasis is well explained by Galmot & Biancarelli, *supra* note 23, at 305. The Court refers specifically to national systems and practices "in the book trade", which seems to mean that there must be specific rules for each commodity—a novel proposition which opens disquieting prospects for the future application of Articles 85 and 86. The *Leclerc* judgment has thus resulted in a double standard: one for France and one for those Member States where fixed prices for books rest on private agreements. The same observation has been made by P.J. Kuyper in his commentary under the *Leclerc* judgment, in 22 *COMMON MKT. L. REV.* 797-811 (1985).

105. *Leclerc v. Au Blé Vert*, 1985 E.C.R. at — (para. 25 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 14,111.

106. As a matter of fact, import of French-language books into France is only marginal, whereas export of French books to other Member States is significant, but the latter aspect was not considered by the Court.

107. *See, e.g., Saint-Herblain S.A. v. Syndicat des Libraires de Loire—Ocean*, Case 299/83, 1985 E.C.R. —, *Comm. Mkt. Rep. (CCH)* ¶ 14,219; Judgment of 10 July 1986, Reference to the Court under Article 177 for a Preliminary Ruling between Boriello, Chief Police Commissioner, and Alain Darras & Dominique Tostain, Case 95/84, 1986 E.C.R. —, *Comm. Mkt. Rep. (CCH)* ¶ —. In the pending *Driaucourt v. Cognet*, Case 355/85, the Tribunal de Police of Bressuire has raised the question of the "double standard" introduced by the *Leclerc* judgment, by requesting guidance on Article 3(f) of the Treaty combined with Article 7, under which

Next, the Court had to concern itself with the pricing of fuel in France. This is the *Cullet* case<sup>108</sup> of January 29, 1985, which contains a careful analysis of the French regulations fixing a minimum price for fuel on the basis of the cost of French refineries. The regulations eliminated any competitive advantage for retailers who were in a position to offer fuel at lower prices. After having found that, under the French legislation, prices were fixed directly by the State,<sup>109</sup> there being no need or compulsion for producers and distributors to conclude agreements or adopt corporate behavior as envisaged by Article 85, the Court once more shifted the problem to Article 30.<sup>110</sup> On the basis of this provision, the Court stated that the French system was incompatible with Community law because it puts imported products at a disadvantage in "competition."<sup>111</sup>

The following day, the Court decided the *Clair* case<sup>112</sup> on cognac prices. Under the relevant legislation, prices for cognac are agreed upon between representatives of producers and distributors in the framework of a professional organization set up by law and controlled by the State. The price fixed

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"any discrimination on grounds of nationality shall be prohibited." In its judgment of 23 October 1986, the Court (in fact a section of three judges) avoided taking a position on the essential point in relation to competition law by saying that it did not "appear" that the Tribunal was seeking a reply on this account. The Court admits that there is a difference of treatment between books directly marketed in France and imported books, but in its opinion this situation does not hurt the principles of the Treaty as long as imports are not restricted. Thus, it appears once more that the Court is not willing to open a way for the application of the Community's competition rules on a market where they have been eliminated by national legislation.

108. *Cullet v. Centre Leclerc Toulouse*, Case 231/83, 1985 E.C.R. 305, Comm. Mkt. Rep. (CCH) ¶ 14,139.

109. On this point, there is a certain difference between prices for fuel, fixed *ex officio* by the French authorities on a protective level, and price fixing for books. Under the 'Loi Jack Lang,' prices are fixed by publishers and importers in their own best interests. It is a matter for guessing whether those interests coincide with the general interest (e.g. greater variety of the titles published and better service) or whether fixed prices are nothing more than an economically unjustified profit shared by publishers and distributors. That point, which is at the heart of the matter, was not examined by the Court when it gave—for the time being—an unqualified fiat to the French legislation in the context of the competition rules.

110. *Cullet v. Centre Leclerc Toulouse*, Case 231/83, 1985 E.C.R. — (paras. 17-18 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,139.

111. *Id.* paras. 26-29 (each containing an express reference to competition).

112. *Bureau Nat'l Interprofessionnel du Cognac v. Clair*, Case 123/83, 1985 E.C.R. 391, Comm. Mkt. Rep. (CCH) ¶ 14,160.

by that body is made compulsory for all concerned by a government decree. In the opinion of the Court, that method of price fixing was subject to Article 85, notwithstanding the approval by the Government.<sup>113</sup>

A very recent case relating to the fixing of airline fares in Europe placed the same type of problem before the Court once more. The *Asjes* case<sup>114</sup> was a reference for a preliminary ruling submitted by the Tribunal de Police of Paris in the course of criminal proceedings brought against the managers of certain airlines and travel agencies who had offered air tickets below the level of fares fixed in accordance with the French Code of Civil Aviation. The relevant decisions of the French authorities were based in turn on agreements between the main European airlines. The question was whether those provisions of the French legislation were compatible with the competition rules of the Community.

The Court's opinion resembles a legal steeplechase that ends somewhere in the middle of the track. The first hurdle in the way of the Court was Article 84 of the EEC Treaty which, for the time being, excludes air transport from the application of the common transport policy. On this point, recalling its judgment in *Commission v. France*,<sup>115</sup> the Court ruled that the exception contained in Article 84 was restricted to transport policy properly speaking, which meant that all other Treaty rules, including those on competition, were applicable to air transport. Second, there were no implementing measures for the application of Articles 85 and 86 to air transport as this section was expressly excluded from Regulation 141 of November 26, 1962. In these circumstances, according to the Court, Articles 88 and 89 of the EEC Treaty were applicable. Articles 88 and 89 provide for an interim action by the competent "authorities in Member States" and by the Commission.

So far so good. The Court was then faced with two further

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113. The *Clair* judgment has another interesting feature insofar as it brings out, in reply to a question put by the Tribunal de Grande Instance (Regional Court), Saintes, that pricing of cognac at an intermediate stage of production taking place in France affects trade between Member States as the final product will be sold "elsewhere in the Community." It may be remarked here that books as well as spirits have legs!

114. *Ministère Public v. Asjes (Nouvelles Frontières)*, Case 209-213/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,287.

115. Case 167/73, 1974 E.C.R. 359, Comm. Mkt. Rep. (CCH) ¶ 8270.

hurdles that it refused to jump. On the one hand, the question arose as to whether a French Tribunal de Police might be regarded as an "authority" for the purposes of Article 88. Relying on a dictum in the *BRT* decision,<sup>116</sup> the Court answered this question in the negative. In other words, it gave a narrow interpretation to the term "authority." It is difficult to reconcile that position with the spirit of the *BRT* decision referred to, which underlines the necessity of effectively protecting private rights in the field of competition.

The matter might have ended there, but the Court took pains to explain why it was also unable to leap the last hurdle: the Commission had not yet taken any decision under Article 89. For that purpose, the Court recalled the *Bosch* judgment,<sup>117</sup> which relates to the period preceding the effectiveness of Regulation 17. As a matter of fact, the present situation in the field of air transport is not altogether dissimilar from the pre-regulation period, although the whole economic and legal context has fundamentally changed. It is questionable whether it was advisable to return to that chapter of legal prehistory. In any event, after denying the French tribunal the competence to rule on the question it had raised, and after having found that the Commission had taken no action so far, the Court concluded with a ruling that nonetheless came very close to the substantive issue: the obligations imposed on Member States by Article 5 of the EEC Treaty, read in conjunction with Articles 3(f) and 85, prevent national authorities from approving air tariffs if, in the absence of any rules adopted by the Council pursuant to Article 87, it is established, on the basis of either Article 88 or Article 89, that those tariffs result from an agreement or a concerted practice contrary to Article 85. Thus, the Commission's future course of action seems to be quite clearly determined, but a Police court cannot draw any conclusions from the Court's position as long as the Commission has not acted.

These four cases have a great deal in common, as in each the Court was faced with anticompetitive high-price systems

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116. *BRT v. SABAM*, Case 127/73, 1974 E.C.R. 51, Comm. Mkt. Rep. (CCH) ¶ 8268.

117. *De Geus v. Bosch*, Case 13/61, 1962 E.C.R. 45, Comm. Mkt. Rep. (CCH) ¶ 8003.

imposed in one way or another by a Member State for the benefit of certain economic operators and to the detriment of others, including, in all cases, the consumers. The questions raised by the referring French courts, as we have seen, related exclusively to competition law. The Court decided two cases on the basis of competition law and two others on the basis of Article 30, without revealing any consistent doctrine.<sup>118</sup> That is where we stand for the time being.

### *CONCLUSION*

The preceding analysis enables us to draw a series of conclusions about certain problems that so far have not received due attention. Some of these conclusions are general, others are more specific.

First, the manifold problems due to distortion of competition caused by the actions of Member States can be properly identified and resolved only by a coherent and unitary construction of the principles applying to competition in the Community. It must be recalled that the Common Market is based on the idea of free exchange in conditions of fair competition and that this principle applies equally to Member States and private economic operators. The Member States are bound by the Treaty to implement the competition rules in Articles 85 and 86.

Private operators are likewise subject to the rules on free movement that not only confer rights, but also impose obligations. As that general aim has only found incomplete expression in the specific rules of the Treaty and its implementing regulations, there remains a need for additional legal construction. The system of rules of competition applicable to undertakings is relatively more complete than are the rules applicable to Member States. The incoherence of the provisions applicable to Member States makes systematic control of their anticompetitive activities extremely difficult. More specifically, it remains necessary to fill the gaps that still exist between the

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118. This results from an observation by Galmot & Biancarelli, *supra* note 23, at 303, who explain that the *Leclerc*, *Cullet* and *Clair* cases were located in a "grey area." This is a good explanation, but not a legal argument. In this author's opinion, all of those cases were crystal clear, insofar as they concerned anticompetitive pricing and therefore had a primary relationship with the competition rules, not with quantitative restrictions.

aims proclaimed in the Preamble of the EEC Treaty and in Article 3(f), and the specific rules applicable to public operators in the Common Market.

Second, little has been done so far by the Member States, whether acting individually or through the Council, to fill these gaps. After having adopted Regulation 17, the Council has been extremely slow to adopt further implementing regulations on matters such as merger controls, transport, or State aids. When the Commission tried to introduce more transparency in the field of public undertakings, some Member States immediately attempted to block that action.

As for the Commission's record, it too is far from unblemished in many respects. It is true that the control of private undertakings and the monitoring of State aids seem to function normally. By contrast, control of public undertakings was almost nonexistent and still seems extremely weak. The surveys of the competition legislation of Member States appear to be conducted in a basically uncritical manner. Open challenges to competition policy, such as the French legislation on book prices, have drawn no reaction from the Commission. Action against distortions due to national legislation, as provided for by Article 101 and 102, has been completely neglected. The periodic reports of the Commission on competition reflect no systematic approach and no coherent political line on the overall action of Member States, either in general or in specific sectors.

Thus the situation is characterized by the destructive attitude of Member States and an absence of political leadership on the part of the Commission. The Court of Justice, through the medium of references for preliminary rulings by the national courts of the Member States, is therefore increasingly faced with competition problems which manifestly exceed the possibilities of judicial investigation and adjudication. The recent *Asjes* judgment<sup>119</sup> on air tariffs is a striking case in point.

In other words, we are presently facing a real crisis in the area of "public" competition law. Not much can be expected here from the Member States. Nor can we hope for much from the Court, which has made it plain that it has exhausted its possibilities for action. Therefore the Commission alone is in a

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119. Cases 209-213/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,287.

position to give new impetus to "public" competition law by making full use of some of the yet unexplored potential of the Treaty, particularly within Articles 90 and 101/102. The Court has clearly shown in its recent judgments that it is willing to follow suit once the Commission has traced the appropriate policy lines. This is the message which may be drawn from the *Leclerc*<sup>120</sup> and *Asjes*<sup>121</sup> judgments.

Third, in the perspective of a coherent law of competition, Articles 85 and 86 must be envisioned not as two separate provisions, each having its own field, but rather as two aspects of one coherent set of rules. Specifically, the concept of "abuse" in Article 86 can be usefully introduced into the field of corporate behavior encompassed in Article 85 (as done in the *BAT* judgment).<sup>122</sup> Additionally, Article 86 can be used to prevent the creation of dominant positions that might eventually lead to abuse (as done in *Continental Can*).<sup>123</sup>

Fourth, to achieve a better balance in the system of the Treaty provisions, it should be made clear that the rules on free movement addressed primarily to Member States are mandatory rules that, as such, also apply to private operators. Conversely, attention must be drawn to the danger of the Court applying the rules on free movement instead of the rule of competition, as was most conspicuously done in *Leclerc*<sup>124</sup> and the ensuing decisions on book prices. This substitution has limited the manifold applicability of competition law solely to the problem of the free exchange of goods between Member States. The competition rules of the Community apply *in* the Member States (or, rather, *in* the Common Market) and not only *between* them.

Finally, in light of *INNO v. ATAB*<sup>125</sup> and *Leclerc*,<sup>126</sup> Member States are bound by Articles 85 and 86 not to allow or constrain private operators to take actions prohibited by those provisions. Nor may Member States seek to prevent the Com-

120. Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

121. Cases 209-213/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,287.

122. *BAT Cigaretten-Fabriken GmbH v. Commission*, Case 35/83, 1985 E.C.R. 363, Comm. Mkt. Rep. (CCH) ¶ 14,151.

123. *Europemballage Corp. v. Commission*, Case 6/72, 1973 E.C.R. 215, Comm. Mkt. Rep. (CCH) ¶ 8171.

124. Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

125. Case 13/77, 1977 E.C.R. 2115, Comm. Mkt. Rep. (CCH) ¶ 8442.

126. Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

mission from properly exercising the power of exemption conferred upon it by Article 85(3). The Commission and the Court have not yet explored the full consequences of this basic position.

We have now reached a critical point from which a return is needed to the fundamental principles of the Common Market enunciated in the EEC Treaty. The best way of preparing solutions to the many unresolved problems is to establish a sufficiently comprehensive study of the factors influencing the behavior of Member States in the field of competition, ranging from price regulation, through taxation, to competition properly speaking, in view of defining coherent rules applicable on the level of "private" as well as "public" competition. This would be preferable to haphazardly exploring "grey areas."