Fordham International Law Journal

Volume 10, *Issue* 3 1986 *Article* 2

Competition Between National Economies and Competition Between Businesses–A Response to Judge Pescatore

Giuliano Marenco*

*

Competition Between National Economies and Competition Between Businesses–A Response to Judge Pescatore

Giuliano Marenco

Abstract

This Article challenges the validity of Judge Pescatore's theory [that Member States of the ECC are prevented by Community law from intervening in the marketplace by legislation].

COMPETITION BETWEEN NATIONAL ECONOMIES AND COMPETITION BETWEEN BUSINESSES—A RESPONSE TO JUDGE PESCATORE

*Giuliano Marenco**

Are Member States of the EEC prevented by Community law from intervening in the marketplace by legislation? The theory set forth by Judge Pescatore in his article in the *Fordham International Law Journal*[1] answers this question with a determined "yes." Indeed, this theory has never before been affirmed with such clarity, detail and authority.

If this theory were correct, then the European Community would have become a centralized structure for economic purposes. It would already have gone further than the United States, where the power to enact economic legislation is federally structured, in the sense that it is distributed between the national government and the states.[2] This Article challenges the validity of Judge Pescatore's theory.

---

* Legal Advisor, Commission of the European Communities. The views expressed in this Article are purely personal.

The author is indebted to Karen Banks, for her many valuable substantive and linguistic suggestions, and Nobert Koch, for his comments on an earlier draft. He also wishes to thank Claudine Girardi and Francine Van Assche for their patient and fine secretarial help.

1. Pescatore, *Public and Private Aspects of European Community Competition Law*, 10 FORDHAM INT'L L.J. 373 (1987).

2. The American reader will find a familiar echo in the discussion. The problems debated here are indeed the same as those which in the United States go under the heading of state action. The legal context is also, for all practical purposes, analogous. The Treaty of Rome is the Community constitution. Article 30 (of the Treaty) is the equivalent in Community parlance of the dormant commerce clause in the United States. The EEC competition rules, Articles 85 and 86 of the Treaty, are roughly the European counterpart to sections 1 and 2 of the Sherman Act. The judicial principle that Community law takes precedence over the law of the Member States corresponds to the supremacy clause of the United States Constitution. A not fundamental difference is that the Community competition rules lie at the constitutional level whereas their American counterparts have statutory rank. It is hoped, given the similarity of the ground rules, that the American reader may take more interest in the discussion than if this merely concerned an obscure point in the law governing a foreign market.

I. *THE PROBLEM AND THE ARGUMENT*

A. *The Problem*

Nearly thirty years after the enactment of the Treaty of Rome, the individual Member States still consider themselves primarily responsible for responding to social needs that arise from time to time and therefore continue to legislate actively in the economic area. Economic legislation inevitably distorts competition. "Regulation displaces competition. Displacement is the purpose, indeed the definition, of regulation."[3] The effects of virtually all economic legislation are comparable to those of an agreement in restraint of trade. Indeed, the backing of the government apparatus generally confers on regulatory schemes the capacity to produce stronger restrictive effects than those caused by a privately engineered cartel.

The facts in a recent case decided by the Court of Justice and discussed by Judge Pescatore offer an eloquent example. In *Cullet*,[4] the French regulatory scheme at stake imposed a minimum retail price for gasoline. The effect, and no doubt the purpose, of the scheme was artificially to keep alive marginal gas stations which would have been driven out of the market had their competitors been able to lower prices freely. Such legislation was aimed at distorting competition, not differently from—but much more effectively than—a price-fixing cartel among all French gas stations.

A cartel of this kind would likely come under the prohibition of restrictive agreements set forth in Article 85 of the Treaty of Rome. If there is any uncertainty as to the illegality of such a cartel, it would bear on the prerequisite that the collusion affect interstate commerce. This prerequisite is as much a condition for the applicability of the Community competition rules as it is for that of the Sherman Act in the United States.[5] If we assume that the cartel would indeed be prohibited by Article 85—which is most probable, for, as in the United States,

---

3. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. ECON. 23 (1983).

4. Judgment of 29 January 1985, Cullet v. Centre Leclerc Toulouse, Case 231/83, 1985 E.C.R. 305, Comm. Mkt. Rep. (CCH) ¶ 14,139.

5. *Compare* Treaty establishing the European Economic Community, art. 85, 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] *with* Sherman Act, Pub. L. No. 94-145, 89 Stat. 801, Pub. L. No. 93-145, 88 Stat. 1708, 15 U.S.C. §§ 1, 2 (1982) (as amended Dec. 12, 1975).

the interstate commerce requirement tends to be loosely construed—then the question arises whether state law may produce results which, if privately engineered, would run afoul of Community competition rules.

The reason why an answer to this question does not emerge simply from the principle of the supremacy of Community law over the law of Member States is precisely that Article 85 prohibits business conduct, not government regulation. A prohibition of restrictive state regulation could only result from some more complex reasoning than a mere application of the supremacy principle.

On the other hand, if the answer were that state law may not restrict competition, the Member States would have lost, for all practical purposes, their legislative powers in the economic field. This would be an unexpected constitutional implication of the antitrust rules. Before accepting it, it would be necessary to check whether the overall constitutional framework is not opposed to it.

To focus on the problem, it must be emphasized that the legislative powers of the Member States in the economic field are indeed restricted by the Treaty of Rome, in that they may not be exercised in such a way as to protect domestic producers from out-of-state competition or to reserve scarce resources to domestic consumers. This restriction flows unquestionably from the detailed Treaty provisions on free movement of goods and services,[6] which constitute the Community counterpart to the dormant commerce clause[7] and which undoubtedly go even further than the United States constitutional provision in the direction of establishing a common market. The problem arises then only in relation to state regulation devoid of any protectionist aspect. In other words, the problem is not whether the Treaty of Rome is opposed to state regulation displacing competition between state economies: it certainly is. The problem is whether the Treaty is opposed to state regulation displacing competition between domestic businesses or, at any rate, between domestic and out-of-state businesses alike.

---

6. Article 30 is the prominent provision on free movement of goods. EEC Treaty, *supra* note 5.

7. U.S. CONST. art. 1, § 8, cl. 3. *See generally* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

As Judge Pescatore writes, "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."[8] Our problem arises at the former level, not the latter.

To limit further the scope of the debate, it should be added that the issue discussed here is whether anticompetitive state *regulation* is compatible with the Treaty of Rome. When a Member State behaves not in a regulatory capacity, but in a business capacity, by supplying goods or services, whether through a nationalized enterprise or even directly, it is generally agreed that its business conduct should comply with the Community competition rules. The best example is probably offered by the *British Telecom* case[9] in which the British Post Office, later British Telecom, was found to have abused its dominant position (a violation of Article 86) by engaging in certain conduct while holding a legal monopoly. In this respect, Community law appears to accept a more extensive application of the antitrust provisions than does the United States. In the United States, the distinction between proprietary and regulatory activities of a governmental authority has been neglected ever since *City of Lafayette v. Louisiana Power & Light Co.*[10]

B. *Judge Pescatore's Theory*

Judge Pescatore acknowledges that Articles 85 and 86 deal with business conduct, whereas the Treaty provisions aimed at ensuring the free movement of goods and services are addressed to the Member States.[11] He believes, however, that an overall interpretation of the Treaty would lead to the conclusion that the antitrust provisions should also apply to States (in their regulatory capacity) while enterprises must comply equally with the rules on free movement.[12] Expressed in

8. Pescatore, *supra* note 1, at 374.

9. Judgment of 20 March 1985, Italian Republic v. Commission, Case 41/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,168 (United Kingdom as intervenor in support of Commission).

10. 435 U.S. 389, 418 (1978) (Burger, C.J., concurring). In that case, Chief Justice Burger advanced the distinction to no avail. In Town of Hallie v. City of Eau Claire, — U.S. —, 105 S. Ct. 1713 (1985), in which the activity was entrepreneurial, no Justice even addressed the problem.

11. Pescatore, *supra* note 1, at 378.

12. *Id.* at 379-80.

American terms, this theory would be tantamount to saying that states violate the Sherman Act when they issue anticompetitive regulations, i.e. whenever they legislate in the economic field, while businesses, like states, should be made to comply with the dormant commerce clause.

The argument advanced to arrive at this conclusion is that the Treaty would otherwise contain a lacuna (Judge Pescatore speaks of "asymmetries") and that the defective drafting—whereby the competition rules apparently apply only to businesses and the free circulation provisions only to States—can and must be remedied by resorting to the preamble to the Treaty and to Article 3.[13] The passage of the preamble on which Judge Pescatore relies recognizes that the removal of obstacles requires "concerted action in order to guarantee steady expansion, balanced trade and fair competition."[14] As to Article 3, Judge Pescatore cites subsections a) and f), which include the elimination of custom duties and quantitative restrictions on the import and export of goods between Member States, as well as the institution of a system ensuring that competition in the Common Market is not distorted.[15] In Judge Pescatore's view, these two provisions enact a general rule of fair competition, which constitutes a trunk, from which two groups of branches develop.[16]

This Article shows that the asymmetries denounced by Judge Pescatore are deliberate and justified and that his gap-closing effort to apply antitrust and free movement provisions indiscriminately to both states and enterprises is therefore neither necessary nor warranted.

II. *THE FREE MOVEMENT PROVISIONS*

Even as he observes that the rules on free movement are

---

13. *Id.* at 380.

14. EEC Treaty, *supra* note 5, preamble.

15. *Id.* art. 3.

16. Pescatore, *supra* note 1, at 378-79.

> 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 basis but unfolds in a somewhat disorderly fashion.

Id.

primarily addressed to Member States, Judge Pescatore states that they must be respected also by private operators.[17] This is a puzzling view, for the purpose of the rules on free movement of goods and services—like the purpose of the dormant commerce clause—is to prohibit protectionist measures on the part of state authorities. These authorities may be prompted to enact protectionist measures on the basis of their perception of the public interest (in other words for political or electoral reasons), and they will be able to carry the project through by using their coercive powers.

In contrast, a private operator will normally lack the motivation to prefer domestic goods or services, since he is supposed to be motivated by a desire for profit. He will also lack the necessary coercive powers to discriminate, unless he colludes with other businesses or takes advantage of a dominant market position, in which case, however, he will come under the prohibitions of Articles 85 and 86, respectively.

Thus, it is hard to see why the rules on free movement should apply to private operators. Moreover, even if they did, they could only stand in the way of sound business judgment and therefore obstruct the best allocation of resources.

Judge Pescatore takes the view that the jurisprudence of the Court of Justice already applies the rules on free movement to private operators—most notably in the field of intellectual property rights.[18] In certain specified circumstances, Judge Pescatore points out, the Court of Justice has ruled that in exercising his right, an intellectual property right holder runs counter to the free movement rules.[19] To be sure, the reference to the *exercise* of a private operator's right seems to warrant the view that the rules on free movement apply to businesses. However, this is only appearance, facilitated by the fact that intellectual property legislation generally delegates its own implementation to those upon whom a right is conferred. In fact, the state legislation itself is contrary to the rules on free movement, to the extent that the legislation would allow a right holder to enforce his right in the circumstances singled

17. *Id.* at 380.

18. *Id.* at 380-82. The American reader should remind himself at this point that, in contrast to United States law, intellectual property legislation in Europe is primarily *state*, and not Community, legislation.

19. *Id.*

out by the Court. This is generally recognized by the commentators[20] and clearly emerges also from the Court's language in *Musik-Vertrieb v. GEMA*.[21] Judge Pescatore himself concludes the argument with a sentence contradicting his own purported demonstration, aimed at showing that the Court has applied the rules on free movement to private operators in its cases on intellectual property. He writes about the *Merck* judgment: "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."[22] It would be impossible to point out more clearly that what runs afoul of the rules on free movement is a feature of the state legislation, not of private conduct.

The passage in the *Dansk Supermarked* judgment,[23] quoted by Judge Pescatore,[24] is likewise insufficient to allow the conclusion that the rules on free movement also apply to businesses. To be sure, taken literally, that passage supports Judge Pescatore's view. It must not be overlooked, however, that the Court was considering whether the Danish fair competition *law*

---

20. *See* Koch, *Article 30 and the Exercise of Industrial Property Rights to Block Imports*, 1986 FORDHAM CORP. L. INST. 609 (1987).

21. Musik-Vertrieb Membran GmbH & K-tel Int'l v. GEMA—Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, Joined Cases 55 & 57/80, 1981 E.C.R. 147, Comm. Mkt. Rep. (CCH) ¶ 8670.

> Articles 30 and 36 of the Treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical work reproduced on gramophone records or other sound recordings in another Member State is permitted to invoke those rights where those sound recordings are distributed on the national market after having been put into circulation in that other Member State by or with the consent of the owners of those copyrights, in order to claim payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the Member State of manufacture.

Id. at 166, para. 27, Comm. Mkt. Rep. (CCH) ¶ 8670, at 7925; *see also* Judgment of 9 July 1985, Pharmon v. Hoechst, Case 19/84, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ —, in which the Court ruled that Articles 30 and 36 of the EEC Treaty do not preclude the application of legal provisions of a Member State which give a patent proprietor the right to prevent the marketing in that State of a product which has been manufactured in another Member State by the holder of a compulsory licence granted in respect of a parallel patent held by the same proprietor. *Id.* at — (para. 5 of the judgment).

22. Pescatore, *supra* note 1, at 382 (emphasis added).

23. Dansk Supermarked A/S v. A/S Imerco, Case 58/80, 1981 E.C.R. 181, 195, para. 17, Comm. Mkt. Rep. (CCH) ¶ 8729.

24. Pescatore, *supra* note 1, at 382.

was contrary to the rules on free movement. In that context, the Court had intended merely to exclude any possibility that the notion of fair competition inscribed in the Danish law was a matter that private parties could settle by contract. If the Court had not ruled out that possibility, private parties could, by agreement, have triggered the application of the fair competition law. Thus, the passage quoted by Judge Pescatore is immediately followed by this one: "It follows that an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another Member State may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice."[25]

The reference by Judge Pescatore to the "open market" concept in *Pigs Marketing Board*[26] is no more convincing. The Court stated that the pigmeat market, like other Common Market organizations, "is based on the concept of an open market to which every producer has free access and the functioning of which is regulated solely by the instruments provided for by that organization." Thus, national practices "alter[ing] the pattern of imports or exports or influenc[ing] the formation of market prices by preventing producers from buying and selling freely within the State in which they are established, or in any other Member State . . . are incompatible with the principles of such organization of the market."[27] To begin with, the Community provisions in question were those setting up a common organization for agricultural products, not those on free movement. What is more important is that the Court states clearly that these provisions prohibit *government* action, not *business* conduct. Producers are mentioned as the *beneficiaries* of the prohibition, not as *addressees*.

Finally, it is submitted that the *San Michele* Order of the Court[28] is inapposite to this issue. An Italian steel company

25. *Dansk Supermarked*, 1981 E.C.R. at 195, para. 17, Comm. Mkt. Rep. (CCH) ¶ 8729.

26. Pigs Mktg. Bd. v. Redmond, Case 83/78, 1978 E.C.R. 2347, 2371, para. 57, Comm. Mkt. Rep. (CCH) ¶ 8559. For a discussion of this, see Pescatore, *supra* note 1, at 377-78 n.10.

27. *Pigs Mktg. Bd.*, 1978 E.C.R. at 2371 (para. 58 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 8559, at 8118.

28. Order of 22 June 1965, Acciaierie San Michele SpA v. High Authority of the

had asked the Court for the interim suspension of a decision addressed to it by the High Authority until the Italian Corte Costituzionale had ruled on the constitutionality of the Coal and Steel Treaty. The Court of Justice dismissed the application as "contrary to Community policy" inasmuch as its admission would establish a discrimination in favor of Italian nationals.[29]

It may be concluded on this point that the Court of Justice has correctly refrained from applying the rules on free movement to private operators. Not only are these rules expressly concerned solely with government measures, but also their extension to private conduct would at best make no sense, and at worst obstruct the allocation of resources between Member States.

The rules on free movement constitute the central core and the primary purpose of the Treaty of Rome, the main objective of which is to abolish state protectionist measures obstructing the international allocation of resources. These rules, immediately applicable today without any implementing measures, prevent Member States from exercising their powers in a protectionist manner. Member States remain free to regulate their economies, however, provided that this is done without protectionist effects. A confirmation of the fact that the Treaty is not intended to deprive Member States of their economic regulatory powers is afforded by Articles 100 to 102, which assume the continued existence of state regulations that may adversely affect the functioning of the Common Market or distort the conditions of competition in this market. Article 100, in particular, provides that state legislation that affects the functioning of the Common Market may be harmonized through a statutory procedure at the Community level. This provision thus performs a function comparable to the commerce clause of the United States Constitution. A legislative power at the Community level is established, but this does not exclude—indeed it implies and confirms—the continued existence of regulatory power at the state level.

The American reader will find this situation familiar and

European Coal & Steel Community, Case 9/65, 1967 E.C.R. 27 (cited by Pescatore, *supra* note 1, at 377-78 n.13).

29. *Id.* at 30.

obvious. Although the exercise of the powers conferred on Congress by the commerce clause limits the states' maneuverability, the states retain the power to legislate in the areas not displaced by federal law, provided they do not exceed the limits imposed by the dormant commerce clause. After 200 years, the United States remains a federation in the economic area. This situation is generally credited with a number of advantages: social needs can be taken care of by a government closer to the people; states perform as social laboratories; and the federal government is not encumbered by the necessity of providing a solution for local problems.

It should come as no surprise that the drafters of the Treaty of Rome made a similar choice. While it is true that they restricted the powers of the Member States through the rules on free movement, they had not intended to abolish those powers altogether. The American experience shows that it was not necessarily a second best solution. A distribution of powers at different levels, as in a federal system of government, may be deemed preferable to a concentration of powers at the highest level.

III. *THE RULES ON COMPETITION*

To the central core represented by the rules on free movement addressed to Member States, the drafters of the Treaty added the competition rules addressed to enterprises. One must agree with Judge Pescatore that there is a link between these two sets of rules. This link probably will not appear evident to the American reader, to whom the idea that the Sherman Act should contribute to interstate market integration would sound very strange indeed.

Antitrust was a foreign experience to the six states of continental Europe that adopted the competition rules, first in the 1951 Treaty establishing the Coal and Steel Community, and then in the 1957 Treaty establishing the Economic Community. The main reason behind the Community antitrust rules appeared to be the concern that the obstacles to interstate trade, banned by the Treaties, might be resurrected in the form of horizontal cartels set up by enterprises of the various Member States which would divide markets among themselves

along state lines.[30] Such a phenomenon would have frustrated the international allocation of resources which it was intended to promote. The Rapport de la Délégation Française, for example, emphasized that the elimination of quantitative restrictions and tariff barriers would have served no purpose if territorial allocation by manufacturers were permitted to replace market division with governmental action.[31] The Spaak Report stated: "Des règles de concurrence qui s'imposent aux entreprises sont donc nécessaires pour éviter que des doubles prix aient le même effet que des droits de douane, qu'un dumping mette en danger des productions économiquement saines, que la repartition des marchés se substitue à leur cloisonnement."[32] It went on to say that the Treaty must provide the means necessary to prevent monopoly power and conduct from jeopardizing the fundamental objectives of the Common Market. In particular, it should prevent market division brought about through the concerted action of private companies.[33]

The drafters of the Treaty were not blind, however, to the more general objective of the antitrust rules of helping to achieve allocative and productive efficiency. Thus, according to the Rapport de la Délégation Française:

> En outre, l'établissement du marché commun ne concourt pleinement au développement des productions les plus économiques, tant de charbon que d'acier, dans les industries utilisatrices, que si cette concurrence joue librement en fonction des avantages économiques et de la productivité: il est donc nécessaire d'exclure les éléments de domination aussi bien que de discrimination à l'interieur du marché commun.[34]

Judge Pescatore himself recognizes that "[t]he scope of the competition rules is in some respects much larger than the

---

30. This can be gathered from the *Rapport de la Délégation Française sur le Traité instituant la Communauté Européenne du Charbon et de l'Acier* (Ministère des Affaires Etrangères, Paris, 1951), a report drafted a posteriori by the French negotiators of the Coal and Steel Treaty, its principle inspirational force, and from the *Spaak Report, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères* (Bruxelles, 1956), which constituted the basis of the EEC Treaty.

31. *Rapport de la Délégation Française, supra* note 30, at 91.

32. *Spaak Report, supra* note 30, at 16.

33. *Id.* at 55.

34. *Rapport de la Délégation Française, supra* note 30, at 91.

scope of the rules on free trade [because]," as he points out, "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."[35] Articles 85 and 86 contain no reference to a market integration purpose,[36] so that there is no obstacle to using these rules for more general objectives. The market integration purpose has nevertheless played a particularly important role in the actual implementation of the competition rules—probably even an excessive one, because many restrictive agreements tailored along state lines and brought to the attention of the Community institutions were not the horizontal cartels feared by the drafters of the Treaty, but less dangerous vertical arrangements (usually providing for territorial exclusivity at the distribution level). Yet, the fact that state lines were involved caused these vertical arrangements to be regarded as serious offenses to the very objectives of the Treaty and so triggered a particularly (and arguably, excessively) harsh treatment.

The point that needs to be emphasized here, however, is that competition rules pursue objectives which go far beyond the market-integration purpose. For instance, if a horizontal cartel between producers of the whole Community fixed uniform prices for the Common Market, no barrier to interstate trade would ensue, yet such a cartel would be a classic case for the application of Article 85. Similarly, vertical arrangements demonstrate the difference between the evil fought by the rules on free movement and the evil at the origin of the competition rules. Such arrangements also run afoul of Article 85.

---

35. Pescatore, *supra* note 1, at 385.

36. The requirement that interstate commerce be affected in order to trigger the application of the EEC competition rules (not those of the Coal and Steel Treaty, because for these two concentrated industries, the Community rules were designed to be exclusive of state rules) is of course not a reference to a market integration objective, as will be obvious to an American lawyer. Community lawyers sometimes mistakenly view the interstate commerce condition as the object of the prohibition, instead of as a limit on its application designed to take minor restrictions or abuses out of the scope of Community rules. *See* Criminal Proceedings against Jan van de Haar & Kaveka de Meern BV, Joined Cases 177 & 178/82, 1984 E.C.R. 1797, Comm. Mkt. Rep. (CCH) ¶ 14,094.

Yet, an exclusive distribution agreement between producer in Member State A and distributor in Member State B, far from hampering imports from A to B, is intended to promote such imports. If the Treaty outlaws this arrangement, the reason is that it tends to channel imports through a given firm to the exclusion of other firms belonging to the same Member State.

Thus, the competition rules protect competition between individual businesses, not (or at least only incidentally) between national economies. While the rules on free movement may exercise a legitimate role in the interpretation of the competition rules (businesses should not be able to achieve by private conduct results that are forbidden to Member States by the rules on free movement), the reverse (that Member States should not be able to achieve results forbidden to businesses by the competition rules) is not true. As the court in *Kaveka* stated: "Article 30 of the Treaty, which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article 85, which seeks to maintain effective competition between undertakings."[37]

IV. *THE ALLEGED "COMMON TRUNK"*

The foregoing sections are intended to show that the two sets of rules (on free movement and on competition) have only partially overlapping objectives and cannot have the same addressees: their "asymmetries" are deliberate and justified.

To bring the two sets of rules to a unity of purpose and scope, Judge Pescatore tries to find them a "common trunk." However, the fourth recital of the preamble[38] is a vague formula, which can no doubt be taken as testimony to the link perceived by the authors of the Treaty between the free movement and competition rules. It neither denies the broader scope of the latter, nor postulates that both sets of rules must have the same addressees. Article 3 is an anticipation of the main chapters of the Treaty, so when it mentions the "institu-

37. *Van de Haar & Kaveka*, 1984 E.C.R. at 1813, para. 14, Comm. Mkt. Rep. (CCH) ¶ 14,094.

38. EEC Treaty, *supra* note 5, preamble, 4th recital ("[r]ecognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition").

tion of a system ensuring that competition in the common market is not distorted,"[39] it says nothing about the content of the said regime. Such content can only emerge from a reading of the specific provisions of the Treaty. In his Article, Judge Pescatore makes a thorough inventory of these provisions and arrives at the conclusion that while, as to rules applying to enterprises, 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."[40] But if this is the picture that emerges from the specific provisions of the Treaty, it is hardly possible that anything more can be gained from Article 3(f) itself.

In fact, the competition rules applicable to Member States are limited to Article 90(1) (on the relations between Member States and public enterprises) and to Articles 92-94 (on state subsidies). And when one looks at Articles 37 and 90(1), it is plain that both provisions assume the legality in principle of Member States granting legal monopolies. This reveals a distinct pattern, which is that a Member State, unless otherwise provided (as in relation to state subsidies), *may* restrict competition among enterprises. It may regulate the economic context in which they compete or set limits to their competitive behavior.

Contrary to Judge Pescatore's view, this pattern, far from revealing any inconsistency with other Treaty provisions, is consistent with the kind of structure the framers of the Treaty intended. This structure is *federal* in character, which means that, provided competition is not restricted *between national economies*, each Member State is allowed to continue to regulate, or not to regulate, its economy according to the political drives prevailing at the time. This was not only a wise choice, but, given the variety of political climates and traditions of government in the different Member States, was also the only possible one. It is simply unimaginable that, by establishing the Community in 1957, the Member States renounced all independent economic regulation. By not outlawing anticompetitive state regulation, the Treaty allows the use of interven-

39. EEC Treaty, *supra* note 5, art. 3(f).
40. Pescatore, *supra* note 1, at 378.

tionist measures which may become necessary even in a free-enterprise economy and manifests its neutrality in the political debate going on within the Member States between laissez-faire and government intervention.

V. *ARTICLE 5 OF THE TREATY*

Article 5 imposes on Member States an obligation to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."[41] Because many preliminary references by state judges to the Court of Justice, and as a result many judgments of the Court, address the legality of state regulations in light of the combination of Article 5 and the competition rules (in most cases Article 85), one must ask whether this cocktail is so explosive as to reverse the reasoning developed above by rendering state regulation unlawful.

Clearly, Article 5 stresses a broad obligation of loyalty to the Community on the part of Member States, but does not inject any new substance into the obligations of the Member States. The substantive obligations of the Member States must be found elsewhere in the Treaty, and the foregoing analysis shows that none of the substantive provisions of the Treaty prevent Member States from restricting competition. If the Treaty does not pursue the objective of depriving the Member States of their power to regulate in the economic field, but only of trimming this power of all protectionist features, then the reference to the objectives of the Treaty in Article 5 could not be understood as actually furnishing such objective.

Article 5 can only contribute to a far more modest result. Because Articles 85 and 86 outlaw certain specified *business* conduct, Member States may not, in the process of regulating the economy, make room for this prohibited conduct. They may not send to businesses signals which are contrary to the Community prohibitions. Thus, they may not impose, legitimize, or encourage *business* behavior banned by Community law, such as restrictive agreements. This is probably not a very severe limitation on state powers and could be attained even in the absence of Article 5. It is merely a case of preemption of

41. EEC Treaty, *supra* note 5, art. 5.

state powers in the face of superior law, in this case Articles 85 and 86.

It should be noted that the supremacy of Community law over state law has a double effect in this case. Not only is the state scheme that sanctions prohibited business conduct pre-empted and therefore unenforceable, but at the same time it is incapable of legalizing the prohibited conduct in which it may encourage some businesses to engage. Thus, if the state scheme purports to compel some firms to enter into anticompetitive agreements, the firms can successfully resist enforcement. However, if they do comply with the state imposition, the agreements they have entered into will be null and void. In the latter case, the firms will also, in principle, be liable for damages and fines. The most that could be argued in their favor is that, in relation to fines, the state scheme would represent a mitigating factor.

VI. *THE RECENT CASE LAW OF THE COURT OF JUSTICE*

Judge Pescatore's theory prompts him to criticize the way the Court of Justice and the Commission have recently dealt with four cases involving state schemes providing for anticompetitive prices to the detriment of consumers.[42] Judge Pescatore appears to think that in all cases the state scheme should have been struck down. He summarizes his criticism in the following terms: "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."[43] It is necessary at this point to re-examine these cases in light of the arguments developed above.

In the *Clair* case,[44] cognac prices were fixed by representatives of producers and distributors in the framework of an inter-trade organization set up by law. The law provided that such agreements could be made binding by ministerial decree on all traders concerned. The question put to the Court was

42. Pescatore, *supra* note 1, at 416.

43. *Id.*

44. Judgment of 30 January 1985, Bureau National Interprofessionel du Cognac (B.N.I.C.) v. Clair, Case 123/83, 1985 E.C.R. 391, Comm. Mkt. Rep. (CCH) ¶ 14,160.

whether the *agreement* (*not* the *statute* or *decree*) was contrary to Article 85. In holding Article 85 applicable, the Court rejected all arguments that the agreement was legal because it had been struck under the auspices of governmental action.[45] Judge Pescatore does not advance any specific criticism of this judgment. Nor does any criticism follow from this Article. Business conduct was challenged in *Clair*. It follows from the supremacy of Community law that business conduct contrary to Community competition rules may not be legitimized by state action.[46]

While no question was raised in *Clair* as to the legality of state enactments, such a question was put to the Court in *Asjes*, the air tariffs case.[47] The state scheme, the legality of which was in question, was, for all practical purposes, identical with those underlying the facts considered by the United States Supreme Court in *Southern Motor Carriers*:[48] it provided for state approval of rates jointly proposed by transport companies.

The Court of Justice held that Member States would violate the Treaty if they required or favored the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforced their effects. However, for technical reasons linked to the particular industry concerned (air transport), which do not need to be expounded here, the Court did not decide whether in the instant case the joint proposal of air tariffs to a government body was to be characterized as prohibited conduct, leaving this issue to the Commission. Judge Pescatore's criticism seems to bear only on this last point, for—in his view—the Court should itself have characterized the conduct in question as illegal. Although this criticism is questionable, and the issue of the illegality of that conduct presents

---

45. *Id.* at —, Comm. Mkt. Rep. (CCH) ¶ 14,160, at 15,954.

46. *Cf.* Parker v. Brown, 317 U.S. 341 (1943). "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." *Id.* at 351. This ruling has been weakened by subsequent decisions. *See, e.g.*, Southern Motor Carriers Rate Conference, Inc. v. United States, — U.S. —, 105 S. Ct. 1721 (1985); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

47. Judgment of 30 April 1986, Ministère Public v. Asjes (Nouvelles Frontières), Joined Cases 209-213/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,287.

48. 471 U.S. 48 (1985).

more problems than Judge Pescatore is ready to accept, his criticism is extraneous to the problems discussed here and therefore does not need to be explored further in this response. In contrast, what should be stressed is the reason for a possible illegality of state enactments advanced by the Court: such enactments may neither *require* nor *favor* business conduct contrary to Article 85, nor *reinforce their effects*. As already observed, this illegality derives from the principle of supremacy, or possibly from Article 5. On this point, Judge Pescatore also appears to find the judgment quite convincing. It may be added that strikingly similar language can be found in the decisions of the United States Supreme Court.

In *Rice v. Williams*,[49] for example, the Supreme Court noted that federal antitrust law does not preempt a state statute if the statute "might have an anticompetitive effect."[50] Further, the Court noted that a state statute may be struck down under the antitrust laws "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."[51] These passages were recently quoted with approval and followed in *Fisher v. City of Berkeley*,[52] the most recent Supreme Court decision on this subject.

Under the logic followed by both Courts—which, for the reasons already advanced, appears to be the only logic warranted—the treatment by the Court in *Cullet*[53] of a state scheme providing directly for minimum retail prices for gasoline, is straightforward and readily comprehensible. The Court noted that the scheme was not intended "to compel suppliers and retailers to conclude agreements or to take any other action of the kind referred to in Article 85(1) of the Treaty. On the contrary, [it] entrust[s] responsibility for fixing prices to the public authorities . . . ."[54] Because the rules concerned were "state rules," not business arrangements, the

49. 458 U.S. 654 (1982).

50. *Id.* at 659.

51. *Id.* at 661.

52. — U.S. —, 106 S. Ct. 1045 (1986).

53. *See* Judgment of 29 January 1985, Cullet v. Centre Leclerc Toulouse, Case 231/83, 1985 E.C.R. 305, Comm. Mkt. Rep. (CCH) ¶ 14,139.

54. *Id.* at —, Comm. Mkt. Rep. (CCH) ¶ 14,139, at 15,746.

Court concluded that they were "not capable of depriving the rules on competition applicable to undertakings of their effectiveness."[55] The Court then considered the scheme under the rules on free movement and found that the mechanism used to fix prices was such as to put domestic production in a more favorable position with respect to imports from other Member States. To that extent it held the scheme unlawful.

Judge Pescatore criticizes the fact that the Court resorted to the rules on free movement. He notes that, in so doing, the Court repeatedly referred to competition between domestic and imported products, apparently implying that this very reference to competition should have led the Court to strike down the scheme under the competition rules rather than under the rules on free movement.[56] This criticism is not justified for the same reason stated above by Judge Pescatore himself. Because the concept can hardly be better expressed, his words are quoted again here: "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."[57] The problem of competition which the Court had to face and which it solved correctly in *Cullet* lies at the level of national economies.

Judge Pescatore's strongest criticism is reserved for the *Leclerc* judgment concerning book prices.[58] That judgment will not be defended here, but the criticism advanced will be diametrically opposed to Judge Pescatore's. The state statute in *Leclerc* had the same purpose as that in *Cullet*: it was aimed at protecting marginal firms (in this case, small bookstores) from the competition of chain stores. However, books are not as fungible a product as gasoline. Thus, the state did not assume the task of fixing a retail price for each book. Rather, the law required each publisher to fix such prices for the books he published. Retailers were limited to undercutting that price by a maximum of 5 percent. Was the statute contrary to Articles 5 and 85?

The Court replied in the negative and, unlike Judge Pes-

---

55. *Id.*

56. Pescatore, *supra* note 1, at 412-14.

57. *Id.* at 374.

58. Judgment of 10 January 1985, Leclerc v. Au Blé Vert, Case 229/83, 1985 E.C.R —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

catore, I do not quarrel with this result. However, it reached this conclusion via a tortured reasoning process, which is extremely difficult to summarize and also too long to quote. The quotation must be confined to the following key passage, which represents the high point of the judgment's inconsistencies:

> Legislation of the type at issue does not require agreements to be concluded between publishers and retailers or other behaviour of the sort contemplated by Article 85(1) of the Treaty; it imposes on publishers and importers a statutory obligation to fix retail prices unilaterally. Accordingly, the question arises as to whether national legislation which renders corporate behaviour of the type prohibited by Article 85(1) superfluous, by making the book publisher or importer 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.[59]

In the first sentence, the Court follows the same line of reasoning as *Cullet* and *Asjes* (which, it must be stressed, were decided after this case): the statute did not sanction prohibited business conduct. Under this logic, the Court could have stopped there by upholding the statute with regard to the competition rules.

The second sentence modifies the whole picture, however, and it is ironic that it should begin with the word "accordingly": what is the logical relation between that word and the previous statement? According to the Court, the question arises whether legislation which renders prohibited corporate behavior superfluous is contrary to Articles 5 and 85. The trouble is that it is possible to say of every coercive regulation that, because it has effects comparable to those of a restrictive agreement, it renders such an agreement superfluous. Did not, for instance, the gasoline price scheme render a cartel between gas stations superfluous?

If it were accepted that such a "rendering superfluous" was illegal, Member States could no longer enact anticompetitive legislation and would therefore no longer be able to regulate their economies. I have already tried to show that the

59. *Id.* at —, Comm. Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

Treaty not only affords no leverage point for such a theory, but that on the contrary it offers the clearest indications to the contrary: the legality of state monopolies is explicitly assumed by Articles 37 and 90(1). The core of the Treaty consists of provisions aimed merely at trimming the regulatory powers of the Member States of their protectionist features; and express rules are laid down (Articles 100 to 102) to deal with cases in which a difference in state regulations could produce distortions of competition.

Judge Pescatore believes that all this can be swept away on the basis of the preamble and of Article 3 of the Treaty. In this we differ, and of course it is not a minor difference. But I agree with him entirely on one point: under the "rendering superfluous" approach, the Court of Justice should have struck down the statute: the reasoning whereby it has managed to avoid this result is incomprehensible.[60]

With regard to the *Leclerc* case, Judge Pescatore criticizes not only the Court, but also, (and very harshly) the Commission for the position taken before the Court as amicus curiae. First, Judge Pescatore finds that the Commission "retreated far from the position it had vigorously defended so recently in the case of the Dutch language book market."[61] However, that case[62] involved a classic cartel among businesses, so that the two situations were not comparable.

Second, Judge Pescatore finds "surprising" the statement by the Commission that a measure taken by a Member State might "*in principle validly* produce effects comparable to those of an agreement prohibited under Article 85."[63] Judge Pescatore's own article, however, shows that such surprise is unjustified. Does he not write that the competition provisions applicable to Member States appear to be "not only incoherent, but also to some extent severed from the rules applicable to private operators,"[64] and that more harmony could only be in-

60. Pescatore, *supra* note 1, at 411.

61. *Id.* at 410.

62. VBVB & VBBB v. Commission, Joined Cases 43 and 63/82, 1984 E.C.R. 19, Comm. Mkt. Rep. (CCH) ¶ 14,042.

63. Pescatore, *supra* note 1, at 410 (quoting *Leclerc*, Case 229/83, 1985 E.C.R. at __, Comm. Mkt. Rep. (CCH) ¶ 14,111 at 15,430) (Pescatore's emphasis).

64. *Id.* at 378.

troduced "by appropriate legal husbandry"?[65] After these acknowledgments, he can hardly be surprised that the Commission was not struck by the idea that the preamble and Article 3(f) of the Treaty would suffice to compel Member States to give up their "legislative sovereignty in the field of economic legislation."[66]

Third, Judge Pescatore characterizes as "a disconcerting legal position" the submission made by the Commission that state measures would only be contrary to Article 5 when they (i) favored or facilitated conclusion of agreements between undertakings, or (ii) extended the effect of such agreements to third parties, or (iii) permitted undertakings to escape the obligations of Articles 85 and 86 of the Treaty.[67]

It is hoped that the foregoing sections of this Article have explained the logic of this theory, which one cannot accurately summarize, as Judge Pescatore does, by saying that state measures interfering with the Community's competition rules would only be prohibited *in exceptional cases*.[68] In fact, according to the theory criticized by Judge Pescatore, the cases enumerated above are the *only* ones in which there would be interference with the competition rules, because it is only in these cases that state measures appear to contradict the prohibition addressed to businesses by those rules. Where does the interference with the competition rules lie, when a state measure restricts competition *without* prompting or otherwise condoning illegal *business* behavior? In this respect, Judge Pescatore writes: "[T]he 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 French book market was concerned."[69] This statement is not easily understood. The effect of the French legislation was to impose an obligation not to enter into a resale price maintenance agreement, but to charge a price unilaterally fixed by the publisher. Such an obligation could not render ineffective the powers reserved to the Commission under Arti-

65. *Id.* at 379.
66. *Id.* at 374.
67. *Id.* at 411.
68. *Id.*
69. *Id.* at 411-12.

cle 85(3) precisely because these powers exist only with respect to business agreements. Judge Pescatore should also acknowledge that if the Commission standpoint was a disconcerting legal position, it is a position which, as pointed out above, is shared by both the Court of Justice and the United States Supreme Court.[70]

CONCLUSION

Judge Pescatore's theory purports to deprive Member States of their regulatory powers in economic matters. This theory carries with it two sets of values, one relating to the need to accelerate the political integration of Western Europe, the other involving a preference for laissez-faire over government economic interventionism (the first presumably being Judge Pescatore's prime motivation).

It is not altogether impossible that if, by judicial fiat, the Member States found themselves deprived overnight of their economic regulatory powers, instead of reacting in a way that could be dangerous for the Court of Justice and consequently for the Community as a whole, they would agree to improve the decisionmaking power of the Community, thus triggering a giant step toward more political integration. Even on this idyllic hypothesis, however, the theory has a major disadvantage: it would predetermine the choice about the distribution of powers in the economic field. A Community monopoly of these powers is not necessarily a better solution than a "federal" distribution of powers between the Community and the Member States. The American model should a fortiori fit the European environment, with its greater variety of economic situations and relations between peoples and governments, entrenched in centuries-long traditions and in linguistic differences. A Community directly in charge of all economic problems arising here and there without the screen of the state

70. The facts in *Leclerc* bear some resemblance to those in California Retail Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), in which the United States Supreme Court struck down the state statute at issue under the antitrust laws. There was, however, a major difference in the American case: the California statute *required* all wine producers and wholesalers to file fair trade *contracts* or price schedules with the state. Therefore, it provided for an obligation or at least for a strong incitement to the businesses concerned to violate the federal antitrust statutes. In contrast, in *Leclerc*, only unilateral conduct was required.

governments would be a giant with clay feet, weakened rather than strengthened by the minutiae of its responsibilities.

As to the choice in favor of laissez-faire, it is a respectable one, but it remains to be seen whether all political forces in the Member States are ready to embrace it, particularly in a rigidly legal form. It remains above all to be seen whether this political position is warranted by the law. Judge Pescatore's legal view moves from the postulate that the rules on free movement must apply not only to Member States, but also to enterprises, and that conversely the competition rules must apply not only to enterprises, but also to Member States. It goes on by assuming that if the foregoing is not expressed in the Treaty, it is due to defective drafting, and it suggests that harmony could be introduced by resorting to the preamble and to Article 3. As to his postulate, Judge Pescatore acknowledges that the specific provisions of the Treaty do not support it. That this is not due to any defect is proved by the alternative (and arguably preferable) model of a federal economic Europe and by the American example. Finally, as to the preamble and Article 3, Judge Pescatore artificially forces them to express what plainly they do not say.