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The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof

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Bastiaan van der Esch

Abstract

In *Leclerc v. 'Au ble vert'*, the Court of Justice of the European Communities was asked to decide whether national measures imposing resale price maintenance for book could violate Member States' duties under Article 5 of the Treaty Establishing the European Economic Community in conjunction with Articles 3(f), 85 and 86 thereof. The importance of the issues at stake justify yet another attempt to define the implications of the system of undistorted competition for the exercise by Member States of retained powers. I will make this attempt by setting the issues raised against the wider background of the constitutional rank of the objective of Article 3(f). I will also try to distinguish more clearly between State measures directed to particular price levels and State measures setting the essential parameters of the system of competition.

THE SYSTEM OF UNDISTORTED COMPETITION OF ARTICLE 3(f) OF THE EEC TREATY AND THE DUTY OF MEMBER STATES TO RESPECT THE CENTRAL PARAMETERS THEREOF

*Bastiaan van der Esch**

INTRODUCTION

In *Leclerc v. 'Au blé vert'*,¹ the Court of Justice of the European Communities was asked to decide whether national measures imposing resale price maintenance for books could violate Member States' duties under Article 5 of the Treaty Establishing the European Economic Community² in conjunction with Articles 3(f), 85, and 86 thereof. A particularity of the French system at issue was that the retail prices rendered obligatory for book sellers were those fixed unilaterally by publishers, without involvement of either the retailers or of the French authorities.³ Paragraph two of Article 5 ("Article 5(2)") obliges Member States to "abstain from any measure which could jeopardise the attainment of the objectives" of the Treaty.⁴ Article 3(f) defines as one of these objectives that a system of undistorted competition is maintained.⁵ In substance, the Court replied that in the present state of Community law a

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1. *Leclerc v. 'Au blé vert'*, Case 229/83, 1985 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 14,111.

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial English trans.) [hereinafter EEC Treaty].

3. See *Leclerc*, 1985 E.C.R. at 18, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,425.

4. EEC Treaty, *supra* note 2, art. 5(2), 1973 Gr. Brit. T.S. No. 1, at 4, 298 U.N.T.S. at 17. See generally Temple Lang, *Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice*, 10 *FORDHAM INT'L L.J.* 503 (1987).

5. EEC Treaty, *supra* note 2, art. 3(f), 1973 Gr. Brit. T.S. No. 1, at 3, 298 U.N.T.S. at 16, providing, as a purpose of the Treaty, for "the institution of a system ensuring that competition in the Common Market is not distorted." *Id.*

measure of the type at issue was not prohibited by Article 5(2), in conjunction with Articles 3(f) and 85.⁶ It is clear from the reasoning, however, that had the Commission previously condemned resale price maintenance for books instituted by private agreements—in France or elsewhere—State measures of similar content would have violated Article 5(2).⁷

The implication of this ruling is that the retained power to institute resale price maintenance by law must respect not only the Treaty rules on the free movement of goods but also the system of undistorted competition of Article 3(f) in conjunction with Articles 85 and 86 of the Treaty. In a Community in which economic nationalism is still rampant—often in blatant violation of Treaty obligations⁸—this is not a popular idea with national politicians. As to the legal profession, some authors have commented on the judgment favorably⁹ while others have been critical.¹⁰

The importance of the issues at stake justify yet another attempt to define the implications of the system of undistorted competition for the exercise by Member States of retained powers. I will make this attempt from a slightly different angle. Instead of relying mainly—as Judge Pescatore does—on the need for symmetry between the Community's control over

6. *Leclerc*, 1985 E.C.R. at 33, ¶ 20, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,436.

7. *Leclerc*, 1985 E.C.R. at 32-33, ¶¶ 18-20, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435-36. Private agreements stipulating resale price maintenance for books are in force in most Member States. *See id.* at 25-26, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,431.

8. *See generally* COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY (PUBLISHED IN CONJUNCTION WITH THE 'TWENTIETH GENERAL REPORT ON THE ACTIVITY OF THE EUROPEAN COMMUNITIES 1986') (1987).

9. *See* Galmot & Biancarelli, *Les Réglementations Nationales en Matière de Prix au Regard du Droit Communautaire*, 1985 REV. TRIMESTRIELLE DE DROIT EUR. 269; Kuyper, *Comment*, 1985 COMMON MKT. L. REV. 787; Marengo, *Le Traite CEE Interdit-il aux Etats Membres de Restreindre la Concurrence?*, 1986 CAHIERS DE DROIT EUR. 285; Waelbroeck, *Applications des Regles de Concurrence du Traite de Rome a l'Autorite Publique*, 1987 REV. DU MARCHÉ COMMUN 25.

10. Slot, *The Application of Articles 3(f), 5 and 85 to 94 EEC*, 12 EUR. L. REV. 179 (1987). Transatlantic echoes of this debate are found in Pescatore, *Public and Private Aspects of European Competition Law*, 10 FORDHAM INT'L L.J. 373 (1987) [hereinafter Pescatore, *Public and Private Aspects*]; Marengo, *Competition Between National Economies and Competition Between Businesses—A Response to Judge Pescatore*, 10 FORDHAM INT'L L.J. 420 (1987); and Pescatore, *European Community Competition Law—A Rejoinder by Judge Pescatore*, 10 FORDHAM INT'L L.J. 444 (1987).

public and private interference with competition,¹¹ I will set the issues raised against the wider background of the constitutional rank of the objective of Article 3(f).

I will also try to distinguish more clearly between State measures directed to particular price levels and State measures setting the essential parameters of the system of competition. In that approach, I will concentrate on the following points:

— the retained powers of Member States and their interface with Treaty obligations;

— contents and rank of the system of undistorted competition of Article 3(f);

— Article 3(f) in conjunction with Article 5(2) and certain methods used by Member States in the exercise of retained powers;

— Article 3(f) in conjunction with Article 5(2) and resale price maintenance; and

— symmetry or asymmetry in free movement of goods and competition.

In order not to maintain suspense at an intolerable level, I indicate from the outset that I agree with the thrust of the *Leclerc* judgment here at issue. Both its reasoning and its result have solid roots in the case law that deals with the demarcation between Treaty obligations and the exercise of retained powers. No major shift in this demarcation line is either intended or implied. I also share Judge Pescatore's concern for a more symmetrical interpretation of the Treaty and for greater coherence in the way in which the fundamental objectives of free movement of goods and of undistorted competition are made a reality.¹²

Mr. Marengo's fears¹³ are in my view unjustified. His criticisms of the *Leclerc* judgment and of the Pescatore article are on the whole unconvincing. My main objection is that his arguments move outside the mainstream of Community law as defined by the Court.

11. Pescatore, *Public and Private Aspects*, *supra* note 10, at 373.

12. Pescatore, *Public and Private Aspects*, *supra* note 10, at 416-17.

13. Marengo, *supra* note 10, at 442-43.

I. *RETAINED POWERS OF THE MEMBER STATES AND THEIR INTERFACE WITH TREATY OBLIGATIONS*

The EEC Treaty necessarily has reduced the panoply of instruments of government at the disposal of Member States in the pursuit of their national policies. Although Member States retain the main responsibility for such areas of government as economic (monetary and fiscal), social, industrial, and environmental policies, the powers at their disposal are affected in various degrees by their membership in the Community. Some traditional powers have been wholly abandoned, such as the power to impose customs duties or quantitative restrictions on imports from other parts of the Community.¹⁴

Other powers have been retained, but their exercise is subject to express Treaty provisions. State subsidies, for example, apart from certain rules of procedure, must respect a number of substantive criteria.¹⁵ Analogous substantive restrictions apply to state commercial monopolies, public enterprises, and indirect taxation.¹⁶ The use of these national policy instruments must not run counter to the fundamental objectives of the Treaty.¹⁷

Still other powers have been retained without the formulation of specific rules of procedure or of substance to constrain their exercise. This is the case with trading rules promulgated for such purposes as fair competition (minimum quality requirements), consumer protection (safety standards), or standardization. The exercise of these powers is limited by the general obligations of Articles 30 to 36 not to create any protectionist effect, unless strictly defined exceptions apply.¹⁸ In addition these powers are subject to harmonization and to a

14. EEC Treaty, *supra* note 2, arts. 12-13, 1973 Gr. Brit. T.S. No. 1, at 7, 298 U.N.T.S. at 19-20.

15. EEC Treaty, *supra* note 2, arts. 92-94, 1973 Gr. Brit. T.S. No. 1, at 35-36, 298 U.N.T.S. at 51-52.

16. EEC Treaty, *supra* note 2, arts. 37, 90, and 95, respectively, 1973 Gr. Brit. T.S. No. 1, at 15-16, 34, 36-37, 298 U.N.T.S. at 29-30, 50, 53.

17. See *infra* notes 27-34 and accompanying text.

18. See Gormley, *Customs Union and Free Movement of Goods*, in 52 HALSBURY'S LAWS OF ENGLAND 21 (Part 12), ¶¶ 12.56, 12.58, at 102 (Lord Hailsham & D. Vaughan 4th ed. 1986), and cases cited therein. Volumes 51 and 52 of *Halsbury's Laws of England* are a reprint of LAW OF THE EUROPEAN COMMUNITIES (D. Vaughan ed. 1986).

Community obligation to end unjustified distortions.¹⁹

To this last category belong national powers to fix prices, either generally or for certain products. With the exception of coal, steel, and agricultural products,²⁰ no specific rules have been formulated for their exercise; only the general rule of Article 30 applies. This is particularly the case with the establishment of minimum and maximum prices. It is established case law that the level at which such prices are fixed must not interfere with the free movement of goods.²¹ In other words, where imported goods have a cost advantage, the normal fruits of that advantage in the shape of a greater market share may not be taken away by the exercise of the power to fix prices.

Another example of retained powers that are not subject to specially designed Treaty provisions exists in the domain of competition. The competition rules of the Community coexist with national antitrust provisions of varying severity. At a relatively early stage in the life of the Community, the interface between Community competition law and national competition laws was clarified. Within the domain of application of the Community rules, that is to say whenever single market conditions are affected by restrictive or abusive practices, parallel application of national law may not interfere with the full and uniform application of Community law.²²

From what precedes, a distinct pattern emerges. It is a ground rule of the Treaty that the exercise by Member States of retained powers must respect the unity of the market, unless otherwise stated.²³ The same applies to the full uniform application of the competition rules.²⁴ Where this obligation is violated, the measure in question is to that extent incompatible

19. EEC Treaty, *supra* note 2, arts. 100-102, 1973 Gr. Brit. T.S. No. 1, at 37-38, 298 U.N.T.S. at 54-55.

20. See generally Vaughan, Paines, Rainey, & Turner, *Competition*, in 52 HALSBURY'S LAWS OF ENGLAND 857 (Part 19), ¶¶ 19.22, 19.24, at 872-74 (Lord Hailsham & D. Vaughan 4th ed. 1986) [hereinafter Vaughan, *Competition*].

21. Roussel Laboratoria v. Netherlands, Case 181/82, 1983 E.C.R. 3849, 3870, ¶¶ 22-25, Common Mkt. Rep. (CCH) ¶ 14,044, at 14,721. See generally Gormley, *supra* note 18, ¶ 12.79, at 114-15.

22. Wilhelm v. Bundeskartellamt, Case 14/68, 1969 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 8056.

23. Gilli and Andres, Case 788/79, 1980 E.C.R. 2071, 2078, Common Mkt. Rep. (CCH) ¶ 8683, at 8080; Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), Case 120/78, 1979 E.C.R. 649, Common Mkt. Rep. (CCH) ¶ 8543.

24. See *Leclerc v. 'Au blé vert'*, Case 229/83, 1985 E.C.R. 1, 31, ¶ 14, Common

with the Treaty; it may not be applied by any organ of the State concerned and may expose the offending State to potential tort liability.²⁵

How does the power to institute resale price maintenance by law fit into this pattern? It is at this point in the reasoning that the particular nature of a measure of this kind must be underlined. It is only superficially similar to the fixing of minimum or maximum prices. Such actions by Member States trace lower or upper limits to interbrand and intrabrand competition alike, without interfering with the number of competitors operating within these limits. Provided the price is set at a level compatible with the free movement of goods, the competitive system of the Community is not affected in its essence.²⁶

Resale price maintenance imposed by law deprives the retailer of his normal power to determine his prices in the light of his own commercial interests. The retailer is excluded from normal intrabrand price competition, an important parameter of any competitive system. The State does not limit price formation, but rather the effective number of competitors. In so doing, intrabrand competition is withdrawn from the jurisdiction of the Commission. Such measures naturally must respect the free movement of goods. In addition, the question arises of compatibility with the system of Article 3. To solve this problem correctly, the content of that system and its rank in the legal order of the Community must now be examined.

Mkt. Rep. (CCH) ¶ 14,111, at 15,435; *Wilhelm*, 1969 E.C.R. 1, ¶ 2, Common Mkt. Rep. (CCH) ¶ 8056, at 8757; Vaughan, *Competition*, *supra* note 20, ¶ 19.224, at 988-89.

25. See, e.g., Vaughan, *Competition*, *supra* note 20, ¶ 19.29, at 876-77, ¶ 19.101, at 921.

26. For a recent confirmation of that position, see Judgment of July 2, 1987, *Ministère Public v. Régis Lefèvre*, Case 188/86, 1987 E.C.R. —. The case concerned the retail selling price of beef. A certain manner of calculating retail margins was ruled contrary to Article 30 and Council Regulation No. 805/68, O.J. L 148/24 (1968), O.J. Eng. Spec. Ed. 1968 II, at 187, Comm. Mkt. Rep. (CCH) ¶ 651 (as amended), on the common organization of the market in beef and veal. Articles 5 and 85 were not considered relevant.

II. CONTENT AND RANK OF THE SYSTEM OF UNDISTORTED COMPETITION OF ARTICLE 3(f)

A. As To Content

Article 3(f) makes the institution of a system ensuring that competition is not distorted one of the fundamental objectives of the Community. That system is defined, first of all, in Articles 85-94 of the Treaty.²⁷ It would be wrong, however, to see in these provisions the sole source from which indications about the content and scope of the system of undistorted competition may be drawn. The commitment of the Treaty to undistorted competition reaches well beyond these specific rules, as various other provisions demonstrate. The main examples are the following:

— during the transitional period the Commission had the task of applying the Treaty rules on the establishment of a common customs tariff in a manner that, *inter alia*, would not distort competition but rather ensure a rational development of Community production;²⁸

— during the same period in the agricultural domain, the Community was obliged to fix criteria for minimum prices that would respect natural advantages and encourage the necessary adaptation and specialization within the Common Market;²⁹

— the absence of any unilateral power to close off a national market as a measure of retribution against other Member States that violate their Treaty obligations. The Treaty contains three limited examples of such measures, but always under Community control;³⁰

— the obligation of the Member States to end distortions of competition resulting from their actions, in accordance with the procedures and criteria contained in Article 101;³¹

— in the domain of common commercial policy, the obli-

27. EEC Treaty, *supra* note 2, arts. 85-94, 1973 Gr. Brit. T.S. No. 1, at 32-36, 298 U.N.T.S. at 47-52.

28. EEC Treaty, *supra* note 2, art. 29, 1973 Gr. Brit. T.S. No. 1, at 12-13, 298 U.N.T.S. at 26.

29. EEC Treaty, *supra* note 2, arts. 44(2) and (3), 1973 Gr. Brit. T.S. No. 1, at 19, 298 U.N.T.S. at 33-34.

30. EEC Treaty, *supra* note 2, arts. 37(3), 46, 107, 1973 Gr. Brit. T.S. No. 1, at 15, 21, 40, 298 U.N.T.S. at 29, 35, 57.

31. EEC Treaty, *supra* note 2, art. 101, 1973 Gr. Brit. T.S. No. 1, at 38, 298 U.N.T.S. at 54.

gation to take account of the increase in the competitive strength of Community firms, which is likely to result from a single market.³²

These converging criteria emphasize that the transformation of hitherto national markets into a single economic space relies on a system of undistorted competition in the sense of a confrontation of all market participants, of all supply and demand, under single market conditions. In principle, this confrontation must be based on the unaided efforts and intrinsic industrial and/or commercial merits of all operators. It is important to note that the addressees of these criteria include Community institutions and Member States alike.

B. *As To Rank*

The Treaty itself does not distinguish explicitly between higher and lower norms or between primary and secondary objectives. Such distinctions are, however, inherent in any highly developed legal system, especially of a federal or quasi-federal nature. It is therefore quite natural that the notion of the so-called fundamental rules or objectives was developed by the Court.³³ Certain Community aims are considered so fundamental to its existence and development that measures in conflict therewith are normally *ultra vires*. The free movement of goods within the Common Market provides the first example of this development. The Community institutions them-

32. EEC Treaty, *supra* note 2, arts. 110, 111(4), 111(5), 1973 Gr. Brit. T.S. No. 1, at 41-42, 298 U.N.T.S. at 58-59.

33. See *Europemballage and Continental Can v. Commission*, Case 6/72, 1973 E.C.R. 215, 246, Common Mkt. Rep. (CCH) ¶ 8171, at 8299-8300; *Commission v. French Republic*, Case 167/73, 1974 E.C.R. 359, 369-71, ¶¶ 17-33, Common Mkt. Rep. (CCH) ¶ 8270, at 9189; *Watson and Belmann*, Case 118/75, 1976 E.C.R. 1185, 1198, Common Mkt. Rep. (CCH) ¶ 8368, at 7680; *Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, 1979 E.C.R. 649, Common Mkt. Rep. (CCH) ¶ 8543. For instances in which the doctrine has been applied see *Musik-Vertrieb Membran v. GEMA*, Joined Cases 55 and 57/80, 1981 E.C.R. 147, 162, ¶ 14, Common Mkt. Rep. (CCH) ¶ 8670, at 7923; *National Panasonic v. Commission*, Case 136/79, 1980 E.C.R. 2033, 2057, Common Mkt. Rep. (CCH) ¶ 8682, at 8067; *Hoffmann-La Roche v. Commission*, Case 85/76, 1979 E.C.R. 461, 552, Common Mkt. Rep. (CCH) ¶ 8527, at 8067. See generally Lasok, *The Communities in 51 HALSBURY'S LAWS OF ENGLAND 11* (Part 1), ¶ 1.09, at 18-20 (Lord Hailsham and D. Vaughan 4th ed. 1986) [hereinafter Lasok, *The Communities*]; Pescatore, *Aspects judiciaires des l'acquis communautaire*, 1981 REV. TRIMESTRIELLE DE DROIT EUR. 617, 620; von Zuleeg, *Grundsätze*, in KOMMENTAR ZUM EWG-VERTRAG, (H. von der Groeben, H. von Boeckh, I. Thiesing & C.-D. Ehlermann eds. 1983).

selves cannot derogate from that principle.³⁴ It is in that sense that constitutional rank can be attributed to the fundamental objective of Article 3(a) of the Treaty.³⁵

In respect of the system of undistorted competition of Article 3(f), the case law of the Court contains similar indications. The Community itself cannot dispense wholly with competition in the pursuit of other objectives.³⁶ This stands to reason. It must be recalled in this context that Article 85(3)(b) stipulates that the Commission's power to exempt restrictive agreements from the interdiction of Article 85(1) ceases where such agreements offer the "possibility of eliminating competition in respect of a substantial part of the products in question."³⁷ It follows from Article 87(1) and Article 89 that the Community's normative powers to implement Article 85 and 86 must respect the same limitation.³⁸ Coherence within the Community legal order requires that this limitation also apply to the exercise of other powers by the Commission, unless otherwise provided. This points clearly to a preeminent position of Article 3(f) with the same standing as Article 3(a), that is to say with the same constitutional rank.

Confirmation of this status is found in the *Used Oil* judg-

34. *Commissionnaires Réunis v. Receveur des Douanes*, Joined Cases 80 and 81/77, 1978 E.C.R. 927, 944, ¶ 16, Common Mkt. Rep. (CCH) ¶ 8485, at 8708; *see also Charmasson v. Minister for Economic Affairs and Finance*, Case 48/74, 1974 E.C.R. 1383, 1394, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8291, at 7356; *Commission v. United Kingdom*, Case 231/78, 1979 E.C.R. 1447, 1459, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8546, at 7824. The latter two cases dealt with quantitative restrictions within the common agricultural policy and illustrate also the prime importance attached by the Court to the free movement of goods.

35. On the treaties as the constitution of the Community, see Bernhardt, *The Sources of Community Law: The Constitution of the Community*, in E.C. COMMISSION, THIRTY YEARS OF COMMUNITY LAW 69, 71 (1981). The Court itself refers to the treaties as the constitutional charter on which the Community is founded. *See Parti Ecologiste "Les Verts" v. European Parliament*, Case 294/83, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,317.

36. *Maizena v. Council*, Case 139/79, 1980 E.C.R. 3393, 3422, Common Mkt. Rep. (CCH) ¶ 8704, at 8430; *Fruit Company v. Commission*, Joined Cases 41-44/70, 1971 E.C.R. 411, 428, ¶ 74, Common Mkt. Rep. (CCH) ¶ 8142, at 7631.

37. EEC Treaty, *supra* note 2, art. 85(3)(b), 1973 Gr. Brit. T.S. No. 1, at 32-33, 298 U.N.T.S. at 48; *see also Metro v. Commission*, Case 26/76, 1977 E.C.R. 1875, 1906, Common Mkt. Rep. (CCH) ¶ 8435, at 7867.

38. The Council and Commission are directed by the Treaty to take action so as to ensure the application of the principles of arts. 85-86. EEC Treaty, *supra* note 2, arts. 87(1), 89, 1973 Gr. Brit. T.S. No. 1, at 33, 34, 298 U.N.T.S. at 49-50.

ment.³⁹ In that judgment the Court ruled that the principle of free competition, together with the free movement of goods and the freedom to trade, was part of the general principles of Community law. The language varies, as compared to other judgments, but not the underlying idea, and strengthens the conclusion that the system of undistorted competition of Article 3(f) constitutes a criterion of constitutional rank and importance.

III. *ARTICLE 3(f) IN CONJUNCTION WITH ARTICLE 5,
PARAGRAPH 2, AND CERTAIN METHODS USED
BY MEMBER STATES IN THE EXERCISE
OF RETAINED POWERS*

The Court has relied frequently on Article 5 as a legal basis for specific obligations of Member States beyond their express Treaty duties, either to act or to refrain from action.⁴⁰ These obligations arise whenever complete and proper achievement of specific Treaty objectives or compliance with express Treaty duties so requires. The exercise by Member States of their retained powers of economic policy constitutes an important sphere of application of Article 5(2). By virtue of that provision, Member States are obliged to choose such modalities for their actions as will not endanger the integrity and coherence of, inter alia, the system of undistorted competition of Article 3(f).

Unfortunately, certain government actions fail to avoid this danger. Frequently, Member States fix minimum or maximum prices on the basis of proposals previously agreed upon by all or most of the operators, usually meeting in professional or trade organizations. For air tariffs, resale price maintenance is imposed by law at a price level derived from a previous agreement among the airlines.⁴¹ Methods of this type may take

39. *Procureur de la Republique v. ADBHU*, Case 240/83, 1985 E.C.R. 538, Common Mkt. Rep. (CCH) ¶ 14,164.

40. *See, e.g.,* *Pluimveeslachterijen Midden-Nederland and van Miert*, Joined Cases 47 and 48/83, 1984 E.C.R. 1721, 1738, ¶ 23, Common Mkt. Rep. (CCH) ¶ 14,087, at 15,171; *INNO v. ATAB*, Case 13/77, 1977 E.C.R. 2115, Common Mkt. Rep. (CCH) ¶ 8442; *cf. Leclerc v. 'Au blé vert'*, Case 229/83, 1985 E.C.R. I, 31, ¶ 14, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435. *See generally* Lasok, *The Communities, supra* note 33, ¶ 1.39.

41. *See generally* Comment, *Competition and Deregulation: Nouvelles Frontières for the EEC Air Transport Industry?*, 10 *FORDHAM INT'L L.J.* 808 (1987).

various forms. The agreement reached may be “authorized,” “approved,” or “confirmed,” and at times the contents may be made binding on non-participants. In still other cases the national authority may simply use the result of the agreement—mostly the price level agreed—and make it the content of its own legislative, regulatory, or administrative measure. Usually the interdiction of Article 85(1) and the Commission’s powers under Article 85(3) are completely ignored.

Faced with that type of situation, Community law developed a two-pronged response, designed to protect the exclusive power of the Commission under Article 85(3) to decide whether to exempt restrictive practices. For its part, the Commission attacked such agreements as incompatible with Article 85(1).⁴² This approach was later shared by the Court in a reply to a preliminary question concerning another violation of the same type.⁴³ Furthermore, the Court, in reply to another preliminary question, held that Member States violated Article 5(2) whenever they required or favored the adoption of agreements contrary to Article 85 or reinforced the effects thereof.⁴⁴ In other words, both the agreements in question and the State action empowering them fall within the prohibitions of the Treaty and are unenforceable.

The remedy to this state of affairs is twofold. Either industry abstains from presenting agreed prices to the public authorities and limits itself to the transmission of individual preferences and possibilities, or the agreement is notified and negative clearance or exemption is requested from the Commission.

42. See *Pabst & Richarz KG v. BNIA*, O.J. L 231/24, at 27 (1976), *Common Mkt. Rep. (CCH)* ¶ 9863, at 9901-5; *AROW v. BNIC*, O.J. L 379/1, at 14 (1982), *Common Mkt. Rep. (CCH)* ¶ 10,458, at 11,020.

43. *BNIC v. Clair*, Case 123/83, 1985 E.C.R. 391, *Common Mkt. Rep. (CCH)* ¶ 14,160.

44. *Ministere Public v. Asjes (Nouvelle Frontieres)*, Joined Cases 209-213/84, 1986 E.C.R. —, *Common Mkt. Rep. (CCH)* ¶ 14,237, confirmed in the Court’s judgment of October 1, 1987, *Vzw Vereniging van Vlaamse Reisbureaus v. Vzw Sociale Dienst van den Plaatselijke en Geviestelijke Overheidsdiensten*, Case 311/85, 1987 E.C.R. —. Following the ruling in *Nouvelles Frontieres*, the Commission adopted reasoned decisions under art. 89(2) of the Treaty enjoining a number of airlines to bring their actions within the terms of the Treaty. *Comm’n Press Release*, IP (87)115 (Mar. 18, 1987), announced in *Common Mkt. Rep. (CCH)* ¶ 10,867; *Comm’n Press Release*, IP (87)151 (Apr. 9, 1987), announced in *Common Mkt. Rep. (CCH)* ¶ 10,871.

IV. ARTICLE 3(f) IN CONJUNCTION WITH ARTICLE 5,
PARAGRAPH 2, AND THE IMPOSITION OF
RESALE PRICE MAINTENANCE BY LAW

Measures of this type are in force in a number of Member States, mostly in respect of pharmaceutical products, tobacco products, and books.⁴⁵ In the service sector, the over-the-counter or retail price of air tickets and/or certain insurance and bank rates⁴⁶ are similarly bound. Taken together, these sectors form a sizable part of the Community's economy. In most instances the price level of a product or a service that is rendered obligatory for the retailer is decided unilaterally by the manufacturer, the publisher, or the provider of the service. If concertation occurs about retail price levels, the constraints of procedure and of substance of Article 85 must be respected. If there is no concertation, there remains the question of compatibility with Article 3(f) in conjunction with Article 5(2) of resale price maintenance imposed by law as such.

In the *GB-INNO-BM* case⁴⁷ this question was addressed for the first time, but only under Article 86 of the Treaty and not with reference to Article 85, so the Court did not examine the issue from that perspective.⁴⁸ The questions put to the Court in the *van de Haar/Kaveka* case⁴⁹ did raise the Article 85 aspect of the matter, but in terms that were too narrow and that gave the Court the opportunity to limit itself to stating the obvious, namely that Article 85 did not apply to State measures. Only in the *Leclerc* case did the national court focus its question more on the compatibility of the French law on book prices with the system of undistorted competition of Article 3(f) in conjunction with Article 5.⁵⁰ As the prices for books are

45. See *BNIC v. Aubert*, Judgment of Dec. 3, 1987, Case 136/86, 1987 E.C.R. —, where the Court refers to such actions.

46. In the domain of banking a case is pending before the Court: *P. van Eyke v. ASPA NV*, Case 267/86 (referral from the *Vrederegerecht* for the Canton of Beveren with respect to legislation on interest that may be paid on savings deposits challenged as incompatible with arts. 59-66 and 95 of the EEC Treaty).

47. *INNO v. ATAB*, Case 13/77, 1977 E.C.R. 2115, Common Mkt. Rep. (CCH) ¶ 8442.

48. *Id.* at 2151, Common Mkt. Rep. (CCH) ¶ 8442, at 7968.

49. *van de Haar and Kaveka de Meern*, Joined Cases 177 and 178/82, 1984 E.C.R. 1797, Common Mkt. Rep. (CCH) ¶ 14,094.

50. *Leclerc*, 1985 E.C.R. at 29-30, ¶ 8, Common Mkt. Rep. (CCH) ¶ 14,111 at 15,434.

fixed unilaterally by the publishers, without concertation with the booksellers, the restriction of intrabrand competition was achieved by State action only. French law did not require or favor anticompetitive behavior by market participants; it made such behavior superfluous.⁵¹

The fundamental significance of the *Leclerc* judgment resides in the fact that the Court did not use the absence of concertation as a pretext to deny the existence of a problem of compatibility with Article 3(f) in conjunction with Article 5, but on the contrary recognized that resale price maintenance imposed by law did have to be looked at in the light of the system of undistorted competition.⁵² One may have doubts about the terms in which this recognition was couched and about the consequences the Court drew from it, but the fact of the recognition is undeniable. As to the reasoning leading up to the Court's question in paragraph 15 of the judgment,⁵³ the arguments are not set in the broader framework here developed, but clearly have their roots in the idea that the system of undistorted competition reaches beyond the implementing provisions of Articles 85 and 86. The submissions of Advocate General Darmon point in the same direction.⁵⁴

This result can and should be approved. Resale price maintenance imposed by law excludes a whole category of operators from the market mechanism. Retailers are deprived of the opportunity normally provided by price competition to contribute to the allocative efficiencies of the Common Market as a whole. The Court has always been attached to price competition on the retail level⁵⁵ and it would be inconsistent to make an exception for intrabrand competition just because its suppression happens to be a national policy objective and is achieved by the exercise of a retained power.

Possible objections are rather of a policy nature. Resale price maintenance, whether instituted by private agreement or

51. *Id.* at 32, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

52. *Id.* at 31-32, ¶¶ 14-15, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

53. *Id.* at 32, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

54. *Id.* at 10-11, ¶¶ 12-13 (submission of Advocate General Darmon).

55. *See, e.g.,* *Metro v. Commission*, Case 26/76, 1977 E.C.R. 1875, 1904-06, Common Mkt. Rep. (CCH) ¶ 8435, at 7866-67; *Consten and Grundig v. Commission*, Joined Cases 56 and 58/64, 1966 E.C.R. 299, 342-43, Common Mkt. Rep. (CCH) ¶ 8046, at 7652.

by law, is usually justified by considerations of so-called middle class policy. Such a policy seeks to maintain a sound economic basis and an adequate geographic spread for the retailing business. Is it really a requirement of Community law to inhibit the use by Member States of the most effective instruments for such a policy, especially since the Community itself has no powers in that domain?

The question is a fair one and deserves a proper answer. In my view, this is provided by the same Article 5, as interpreted by the Court of Justice. Several times in recent years the Court has relied on Article 5 in order to define a reciprocal duty of assistance and cooperation of the Institutions and the Member States alike in the search for and application of solutions for specific Community problems not otherwise regulated.⁵⁶

In the instance that occupies us here, the conflict with Article 3(f) resides in a lasting and total or quasi-total interdiction of intrabrand price competition. Given the particular nature of such a conflict, the reciprocal duty to cooperate obviously points toward the definition of such parameters of intrabrand price competition as would permit the co-existence of national middle class policies and the system of undistorted competition of Article 3(f). To that effect it would suffice to render resale price maintenance more flexible by defining a price bracket rather than a single price level. The width of the bracket should reflect not only objective differences in retailing costs, but also the social cost of over-concentration on the distribution level. Member States that for societal reasons wish to maintain a balanced distribution network are entitled to do so, but not at the cost of wholly paralyzing the system of undistorted competition of Article 3(f). Basically, this requires only a modest adjustment in the way the retained power in question is exercised.

This fact demonstrates how justified it is to rely on Article 3(f) in conjunction with Article 5 in these matters. In the final result, proper application of Community law as defined by the Court would give substance to the obligation contained in Ar-

56. The latest example may be seen in *Commission v. Belgium*, Case 52/84, 1986 E.C.R. —, —, ¶ 16, *Common Mkt. Rep.* (CCH) ¶ 14,297, at 16,852 ("Article 5 . . . imposes a duty of genuine cooperation on the Member States").

ticle 6 of the Treaty to coordinate economic policies of which middle class policy is only a sectoral application. A Community that in the Single Act has solemnly reaffirmed the obligation to create a single market, and even set the date of December 31, 1992, for its achievement, should seize the opportunities offered by the Court in its *Leclerc* judgment with an open mind.

V. FREE MOVEMENT AND COMPETITION RULES:
SYMMETRY OR ASYMMETRY?

Judge Pescatore shows the correlation between the Treaty obligations of Member States and private operators in respect of both the free movement of goods and of the system of undistorted competition of Article 3(f) in conjunction with Articles 85 and 86.⁵⁷ His contention is that control over the actions of Member States specifically intervening in competition within the Community's jurisdiction should be strengthened. He sets this contention in the broader context of the concept that the rules applicable to undertakings and the rules addressed to Member States are "no more than the specific expression of a general principle."⁵⁸ This general principle he defines as the obligation not to interfere with "the free exchange of goods and services under conditions of fair competition."⁵⁹

The logic of this position is impeccable. In a single market, competition is not fair when the free exchange of goods is interfered with. Inversely, when competition is interfered with, the free exchange of goods is impaired. On the level of the single market, only a question of perceptibility remains. It arises when the conceptual interrelationship between the two instruments of integration is so weak in actual fact that Community concern is not justified.

A different question is whether the mechanics of this relationship justify the application of Article 30 to actions of private parties interfering with the free movement of goods.⁶⁰

57. Pescatore, *Public and Private Aspects*, *supra* note 10, at 378-80.

58. *Id.* at 379.

59. *Id.*

60. For a more elaborate, cautious reply to this question, see Quinn & MacGowan, *Could Article 30 Impose Obligations on Individuals?*, 1987 EUR. L. REV. 163.

Here, one should distinguish between physical obstacles to trade created by angry farmers or truck drivers and legal obstacles to trade created by invoking industrial property rights or national unfair competition laws. The former are in the domain of national police powers and Article 30 would apply to a systematic refusal to use them. The latter collapse before national courts, which are prevented by Article 30 from treating the free movement of goods as such as an infringement of those rights or as unfair competition. Beyond these two instances, private operators have no means of effectively obstructing intra-Community trade except by way of agreement, concerted practice, or abuse. There is, of course, the phenomenon of private appeals to consumer nationalism and related attitudes. Rather than swing the heavy gun of Article 30 around, confidence in the market mechanism should be relied upon to deal with actions of that kind. If that is so, then from the perspective of the free movement of goods, symmetry and coherence exist already between the obligations of Member States and those of private operators.

There remains the case for symmetry in the other direction, that is, the control of the exercise by Member States of certain retained powers in the light of the system of undistorted competition. In my view, the problem is not the principle of such control, but its delimitation, the definition of its scope. Only national measures specifically directed at the system of undistorted competition should be apprehended by this control. When does a national measure belong to that category? When a Member State either intervenes in the circle of participants in the competitive process by excluding some of them or deprives participants of significant influence over the central parameters of their effective competition, that is to say over prices or quantities. A telling example of such measures is precisely the institution by law of retail price maintenance. Large groups of operators are deprived of the instrument of price competition and thus excluded from the system that forms a fundamental objective of the Treaty. The context of the *Leclerc* judgment indicates that it is this phenomenon that the Court must have had in mind for the test that it formulated

in interrogative form.⁶¹

On this particular point Judge Pescatore welcomes the judgment. He is disappointed, however, that the Court did not draw the full consequences of this approach.⁶² He regrets that the Court did not declare the incompatibility of regulations of the type in force in France and instead played the ball back to the political institutions of the Community.

For my part, I share the Court's prudence, as anticipated by Advocate General Darmon.⁶³ As a legal norm, Article 5 of the Treaty assures the coherence and integrity of the Community's legal order, its immunity against being evaded, undermined, or overtaken, and its seamlessness. By the very nature of a norm of this kind, its application raises delicate issues, particularly when linked to the fundamental objective of undistorted competition. Such issues preferably should be solved through the process of reciprocal cooperation and assistance that Article 5 also implies. Judicial restraint commands that that process should be given its chance first. True, the *Leclerc* judgment proceeds on a narrower base for its restraint, namely the absence of administrative practice in respect of retail price maintenance for books. In the context of the case this was sufficient, but in other configurations the broader basis here developed may be more adequate.

Mr. Marengo puts the case for asymmetry. Within their jurisdiction, and as long as they do not rely on agreements between firms, Member States must be free to intervene in the workings of the competitive system if they are to be able to have national policies at all, as the Treaty allows them.⁶⁴ The idea contained in the *Leclerc* judgment that Community law puts restraints on this freedom other than the ones resulting from the free movement of goods is anathema to him.⁶⁵ He similarly disagrees with Judge Pescatore's demonstration of the fundamental symmetry of objectives underlying the Treaty

61. See *Leclerc*, 1985 E.C.R. at 32, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

62. Pescatore, *Public and Private Aspects*, *supra* note 10, at 411-12; see also Kuyper, *supra* note 9, at 806-08.

63. See *Leclerc*, 1985 E.C.R. at 15-16, ¶ 19 (submission of Advocate General Darmon).

64. Marengo, *supra* note 10, at 428, 433-34.

65. *Id.* at 439-40.

in this respect and the consequences thereof for the exercise of retained powers. Mr. Marengo sees great dangers in this trend. Member States will be deprived overnight of important regulatory powers and the Community would take a step away from the decentralized approach towards more centralism.⁶⁶ American case law about the state action defense to antitrust actions is recommended as an example for a Community that is even more diverse than the United States.⁶⁷

The trouble with these fears is that they are based on a literal reading⁶⁸ of the Court's question, in paragraph 15 of the *Leclerc* judgment, whether restrictive agreements are made superfluous by state action, without paying attention either to the context of the case and the way in which it was argued, or to the broader case law on fundamental rules or objectives generally and on Article 3(f) in particular. This is to be regretted and flaws his case. It may well be that a particular judgment is not a pinnacle of clarity and consistency. Nevertheless, commentators do well to see whether a reasonable interpretation is possible rather than to draw *ad absurdum* consequences and never look up again from there.

I submit that a reasonable interpretation is possible. All the *Leclerc* judgment does is confirm that Member States may neither interfere unilaterally in the Commission's prerogatives under Article 85(3) nor distort unilaterally the central parameters of the competitive system envisaged by the Treaty. This is far removed from a dramatic confrontation between *laissez-faire* and government intervention.

It is not only Mr. Marengo's point of departure that is wrong. Most of his supporting arguments are equally unconvincing. For instance he reads far too much in Article 37 and Article 90 of the Treaty. These provisions concern state enterprises of various kinds and assimilated enterprises, and Article 90 in particular provides that all Treaty rules apply, unless the

66. *Id.* at 429, 442-43.

67. *Id.* at 436-37.

68. *Id.* at 439. Mr. Marengo's insistence on a literal reading of point 15 is all the more surprising as he qualifies a literal reading of *Dansk Supermarked v. Imerco*, Case 55/80, 1981 E.C.R. 181, Common Mkt. Rep. (CCH) ¶ 8729, as insufficient. Marengo, *supra* note 10, at 426. The Court itself discards literal interpretation if it leads to absurd results. *See, e.g.*, *Fellinger v. Bundesanstalt für Arbeit*, Case 67/79, 1980 E.C.R. 535, 549-51.

very function of an undertaking would become impossible. The rules in question have been included in the Treaty in order to make sure that Member States do not use their public sector as a means of evading Treaty obligations. Thus understood, these articles are rather in support of the Court's position that retained regulatory powers equally should not enter into conflict with fundamental objectives of the Treaty. The idea that because Member States by virtue of Article 222 are free to extend their public sectors,⁶⁹ their regulatory powers should also know of no other limits than the requirements of free movement of goods is a non-sequitur of the first magnitude.

It is true that the Treaty remains wisely neutral in the political debate on the respective merits of private and public ownership. The question of Treaty limits on the exercise of retained powers is a different one, the answer to which must be found in the letter, spirit, and system of the Treaty as interpreted by the Court. In that approach, the weight of the argument is in favor of the position that State intervention in intra-brand competition between independent private operators must respect the system of undistorted competition of Article 3(f) and the Commission's jurisdiction in respect thereof.

It is significant in this context that Mr. Marengo remains silent about the Court's methods of interpretation. As is well known, the Court relies frequently on the useful effect of Treaty provisions. Many provisions of the Treaty, and especially those implementing the fundamental objectives of free movement of goods and of undistorted competition, are emphatically comprehensive in their formulation and are interpreted by the Court in a manner that gives the maximum of substance to their all-embracing character.⁷⁰ When, as in the present instance, the precise scope of a ruling of the Court is in doubt, a reference to this characteristic of the Court's case law is indispensable and silence on the point leads to bad results.

This shortcoming of Mr. Marengo's approach is particularly visible in his rendering of both Article 3(f) and Article

69. "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." EEC Treaty, *supra* note 2, art. 222, 1973 Gr. Brit. T.S. No. 1, at 70, 298 U.N.T.S. at 88.

70. See, e.g., *Europemballage and Continental Can v. Commission*, 1973 E.C.R. 215, Common Mkt. Rep. (CCH) ¶ 8171.

5(2) of the Treaty. As to Article 3(f), it is wrong to limit its scope to the competition articles of the Treaty as the only indication of what the authors of the Treaty had in mind.⁷¹ It is equally wrong to state that Article 5 “does not inject any new substance into the obligations of the Member States.”⁷² In a considerable number of cases the Court relied on Article 5 as a source of additional obligations of Member States and not just as a principle of interpretation of pre-existing specific duties.⁷³

Another weakness of Mr. Marengo’s reasoning is the premise that the Treaty of Rome only aims at competition between state economies.⁷⁴ The matter of state internal competition between domestic and out-of-state operators alike—so he argues—is reserved for Member States, provided the rules they lay down are indistinctly applicable.⁷⁵ Here his thinking reflects a theory about Article 30 that limits its application to discriminatory treatment of imports. It is well known, however, that the Court attaches a wider meaning to Article 30 that includes the obligation of Member States to choose such national measures as hinder imports least.⁷⁶ The test is not only equal treatment of imports and domestic supplies; but also minimum perturbation of the free movement of goods compatible with the national policy aims pursued. With this in mind, the issue is not whether anticompetitive state regulation is compatible with the Treaty but whether State intervention in competition, apart from being non-discriminatory, must respect the same principle of proportionality. Seen in this light the narrower premise put forward by Mr. Marengo does not correctly reflect the Court’s assessment under Article 30 of the exercise by Member States of retained powers.

71. Marengo, *supra* note 10, at 433. For the broader frame of reference that I think more correct, see *supra* notes 28-39 and accompanying text.

72. Marengo, *supra* note 10, at 434.

73. See *supra* note 40.

74. Marengo, *supra* note 10, at 422.

75. See *id.*

76. *Cinéthèque v. Fédération Nationale des Cinémas Français* (“Video Cassettes”), Joined Cases 60-61/84, 1985 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,220; Judgment of March 12, 1987, *Commission v. Federal Republic of Germany* (Reinheitsgebot), Case 178/84, 1987 E.C.R. — (German standards for manufacture of beer may not operate to preclude imports of beer lawfully manufactured elsewhere); see *supra* notes 18-26 and accompanying text. For a comment on the Reinheitsgebot case, see *Germany Must Admit Foreign Beers Even Though Not Up to German Standard*, Common Mkt. Rep. (CCH) ¶ 10,866.

In vain Mr. Marengo attempts to bolster his case by references to United States case law on state action.⁷⁷ Some parallelism can indeed be discerned, but that does not make United States law an example to be followed. Quite apart from the fact that United States case law on state action does not always shine with analytical depth or consistency, the United States legal order does not have the precise equivalent of Article 3(f). What is more, the societal context of the problem is very different. In the United States the forces of unity largely dominate the centrifugal tendencies. In the Community the situation is the reverse. The danger of disintegration is omnipresent. This alone explains the different attitude of the Court towards state action that endangers vital parameters of the competitive system.

In sum, the main legal techniques deployed by Mr. Marengo in the defense of his views and in the criticisms of both the *Leclerc* judgment and Judge Pescatore's article are not well founded. His is an approach to Community law that neglects the comprehensiveness of the Community legal order and its defenses against the disintegration that may be caused by the exercise of retained powers in the absence of adequate Community control. These defenses are an essential element of the original intent of the authors of the Treaty and they should not be weakened by narrow interpretations more appropriate to the application of Justinian's Digest than to the implementation of the Treaty of Rome. The Court at any rate has always avoided that error. Both Advocate General Darmon's submissions and the *Leclerc* judgment itself are additional proof that these defenses are kept intact. To reason otherwise is to confuse partial integration with incoherence in the distribution of powers between Member States and the Community.

CONCLUSION

Historically, the Community has always struggled with the interface between integrated and retained powers. The first attempt at a general formula gave birth to Article 67 of the European Coal and Steel Community Treaty and the balancing

77. Marengo, *supra* note 10, at 436-37.

mechanism it contains, always under Community control.⁷⁸ Article 101 of the EEC Treaty contains another attempt, but it has not been very successful either.⁷⁹ The *Leclerc* judgment is an important judicial step toward a more modern mechanism for the EEC domain as a whole. The conceptual underpinnings for this development still need refinement. Judge Pescatore has made a significant contribution to that. My own hope is that the Commission will forget its reluctance to go forward on this road and activate the instrument that the Court has given it. When operators complain that they are deprived of their rights as market citizens in a system of undistorted competition, the Commission should face the issue and go to the root of it.⁸⁰

This does not apply only to Member States' interventions in the system of undistorted competition. The Community itself occasionally intervenes in a manner that raises serious questions. This is demonstrated by two examples. Isoglucose, a sugar substitute, is prevented from obtaining the market share that its intrinsic merits would justify.⁸¹ As a transitional measure designed to keep the necessary adjustment of sugar production within the terms of Article 39, this is justified. As a quasi-permanent sharing of the market by Community legislation, it is in my view a violation of Article 3(f). A second example is resale price maintenance for tobacco products.⁸² This particular measure is closely intertwined with the way in which indirect taxation on tobacco products is organized with Community blessing. In other words, the Community has provided

78. Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, art. 67, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140 (1951).

79. See Vaughan, *Competition*, *supra* note 20, ¶ 19.29, at 876-77, ¶ 19.101, at 921.

80. A new opportunity is provided by a request for a preliminary ruling by the Tribunal de Grande Instance of Alençon, *Syndicat des Libraires de Normandie v. L'Aigle Distribution—Centre Leclerc*, Case 254/87, O.J. C 236/2 (1987). The questions raised are closer than ever to the real issues and could be focused on them with little rephrasing.

81. See *Maizena v. Council*, Case 139/79, 1980 E.C.R. 3393, Common Mkt. Rep. (CCH) ¶ 8704; *Royal Scholten-Honig v. Intervention Bd. for Agricultural Produce*, Joined Cases 103 and 145/77, 1978 E.C.R. 2037, Common Mkt. Rep. (CCH) ¶ 8646; *Koninklijke Scholten-Honig v. Council and Commission*, Case 143/77, 1979 E.C.R. 3583, Common Mkt. Rep. (CCH) ¶ 8641; *Amylum v. Council and Commission*, Joined Cases 116 and 124/77, 1979 E.C.R. 3497, Common Mkt. Rep. (CCH) ¶ 8640.

82. See *supra* notes 47-49 and accompanying text; see also Marengo, *Note*, 1984 REV. TRIMESTRIELLE DU DROIT EUR. 527.

the legal basis for a system that technically makes free movement of goods practically impossible and that favors national interdictions of intrabrand price competition. The compatibility of such a measure with the fundamental objectives of the Treaty is highly questionable. The *Leclerc* judgment of the Court should encourage the Commission not only to grasp the nettle of the few national measures that suppress central parameters of competition, but also to reconsider some of the Community's own interventions in the market.