

1963

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Recommended Citation

Joseph J. A. Ellis, *Source Material for Article 85(1) of the EEC Treaty*, 32 Fordham L. Rev. 247 (1963).
Available at: <https://ir.lawnet.fordham.edu/flr/vol32/iss2/2>

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Source Material for Article 85(1) of the EEC Treaty

Cover Page Footnote

This article is based on a report made by Mr. Ellis in November 1962, at a meeting of the Institut für ausländisches und internationales Wirtschaftsrecht, at Frankfurt am Main, Germany. A condensed version of this otherwise unpublished paper appeared in 33 *Recueil Dalloz* 35 (1963), under the title "L'interprétation du mot 'affecter' dans l'article 85, § 1er, du Traité de la Communauté économique européenne par rapport aux mots 'empêcher,' 'restreindre,' ou 'fausser' le jeu de la concurrence." *Member of the Bar of The Hague, Netherlands.

SOURCE MATERIAL FOR ARTICLE 85(1) OF THE EEC TREATY†

JOSEPH J. A. ELLIS*

An interpretation of article 85(1) of the treaty establishing the European Economic Community—A review and discussion of the various source materials which reflect the intention of the drafters of the treaty.

I. INTRODUCTION

THE object of the present report is to study the interpretation of Article 85(1)¹ of the European Economic Community Treaty,² and in particular the meaning of the word "affect" in relation to the words "prevent, restrict or distort competition."

Having regard, however, to the numerous opinions, often divergent, which have already been expressed in the literature on the subject of the rules of competition, both as regards the Coal and Steel Community Treaty³ and as regards the treaty establishing the European Economic Community, it seems to me that I may be making a useful contribution by not dealing here with these various opinions but by directing my discourse towards a study of the other sources of law relating to the interpretation of the Treaty, and in particular to the *actes préparatoires* on the one hand and to the case law on the other. The object of this paper is therefore to contribute, by studying these two sources, towards the interpretation to be given to article 85.

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1. Pt. 3, tit. 1, ch. 1, § 1, 298 U.N.T.S. 47, CCH Common Market Rep. ¶ 2005. The English text of the Treaty, used for quotations herein, is the semi-official translation published in 1962 by Her Majesty's Stationery Office, London, except that for practical reasons the word "enterprises" has been preferred to "undertakings" or "concerns" as a translation for the French word "entreprises." This translation with commentaries appears in the CCH Common Market Reporter.

2. Treaty of Rome, March 25, 1957, 298 U.N.T.S. 14, CCH Common Market Rep. ¶ 111 (establishing the European Economic Community) (hereinafter referred to as the EEC Treaty).

3. Treaty of Paris, April 18, 1951, 261 U.N.T.S. 140 (establishing the European Coal and Steel Community).

I should like to start by making the preliminary observation that the majority of the *actes préparatoires* have not been published, nor were they submitted to the national parliaments when the bills to ratify the Rome Treaty were introduced. It can, in fact, hardly be said that any preparatory document is available which has been officially recognized as such by an act of each of the signatory governments. Nevertheless, the report presented by Paul-Henri Spaak,⁴ who was Chairman of the Inter-Governmental Committee which was set up during the Messina Conference on June 1 and 2, 1955, has something of an official character in that this report was accepted by the Conference of Ministers at Venice as a basis for the subsequent negotiations which took place at Val Duchesse near Brussels. Moreover, the various documents produced in the course of those negotiations are not inaccessible, so that on many points it seems perfectly possible to establish with certainty what the intentions of the drafters of the Treaty were and to determine what meaning the various delegations were seeking to convey when drafting the provisions of the Treaty.

Examining the subject in this light, this article will seek to elucidate the text of article 85(1) objectively and to discover the intentions of those who drew up the Treaty as it was subsequently ratified by the member countries of the Community.

II. THE FUNCTION OF ARTICLE 85 IN THE CONTEXT OF THE TREATY AS A WHOLE

In order to assess the significance of article 85, it is essential to view it in relation to the Treaty as a whole and in the context in which it has been placed. Every provision fulfills a function in the general scheme of the Treaty, and it therefore seems opportune and useful to determine the function of article 85 in its context.

As already stated, the interpretation given by the present article is based in the first place on the *actes préparatoires*. To assess the function of article 85 in the context of the EEC Treaty, it is necessary first of all to have recourse to the Spaak report. The first paragraph of the Introduction to the Spaak report describes the object of the common market:

4. Comité Intergouvernemental Créé Par La Conférence De Messine, Rapport Des Chefs De Délégation Aux Ministres Des Affaires Etrangères, Doc. MAE 120 f/56 (1956) (hereinafter referred to as the Spaak report). The Spaak report is available at the United Nations Reference Library in New York City. See also CCH Common Market Rep. ¶ 101.77; Hallstein, Challenge and Opportunity: Lectures on United Europe, CCH Common Market Rep. ¶ 9002.06.

L'objet d'un marché commun européen doit être de créer une vaste zone de politique économique commune, constituant une puissante unité de production, et permettant une expansion continue, une stabilité accrue, un relèvement accéléré du niveau de vie, et le développement de relations harmonieuses entre les Etats qu'il réunit.⁵

The object of a European common market should be to create a vast zone of common economic policy, constituting a powerful unit of production and permitting a continuous expansion, an increased stability, an accelerated raising of the standard of living, and the development of harmonious relations between its Member States.⁵

These points are again to be found in the Preamble to the EEC Treaty,⁶ and they are formally set out in article 2 of the Treaty as constituting the objectives of the Community. The Spaak report continues by setting forth the means that will be necessary to attain these objects of the Community. The second paragraph of the Introduction is worded thus:

Pour atteindre ces objectifs, une fusion des marchés séparés est une nécessité absolue. C'est elle qui permet, par la division accrue du travail, d'éliminer un gaspillage des ressources, et, par une sécurité accrue d'approvisionnement, de renoncer à des productions poursuivies sans considération de coût. Dans une économie en expansion, cette division du travail s'exprime moins par un déplacement des productions existantes que par un développement d'autant plus rapide, dans l'intérêt commun, des productions les plus économiques. L'avantage dans la concurrence sera d'ailleurs de moins en moins déterminé par les conditions naturelles. De même que l'énergie atomique donne une plus grande liberté à l'implantation des industries, le marché commun rendra son plein effet à la gestion des entreprises et à la qualité des hommes: la mise en commun des ressources assure l'égalité des chances.⁷

To attain these objectives, a fusion of the separate markets is an absolute necessity. Through the increased division of labor, such a fusion will enable the wasting of resources to be eliminated and, through an increased certainty of supply, the production of goods regardless of cost to be abandoned. In an expanding economy, this division of labor is expressed not so much by an abandonment of existing production programs as by a relatively more rapid development, in the common interest, of the most economic production programs. Competitive advantage will, moreover, be determined less and less by natural conditions. Just as atomic energy gives greater freedom in the siting of industries, so the common market will do full justice to the management of enterprises and to human abilities: the pooling of resources will ensure equality of opportunity.⁷

This, then, is the starting point: the objectives of the Community are to be pursued by means of a fusion of the separate markets, that is, in the language of the Treaty, by the establishment of a common market. This rule is already expressed in article 2 of the Treaty: "It shall be the task of the Community, by establishing a Common Market. . ."⁸ In the fifth paragraph of its Introduction, the Spaak report sets out the con-

5. Spaak report at 13. All the translations of the Spaak report and other documents (except the EEC Treaty) are by the author.

6. 298 U.N.T.S. 14, CCH Common Market Rep. ¶ 111.

7. Spaak report at 13.

8. 298 U.N.T.S. 15, CCH Common Market Rep. ¶ 201.

ditions which must be fulfilled if the advantages envisaged are to be derived from this common market:

Ces avantages d'un marché commun ne peuvent cependant être obtenus que si des délais sont accordés et des moyens collectivement dégagés pour permettre les adaptations nécessaires, s'il est mis fin aux pratiques par lesquelles la concurrence est faussée entre les producteurs, et s'il s'établit une coopération des Etats pour assurer la stabilité monétaire, l'expansion économique et le progrès social.⁹

These advantages of a common market cannot, however, be obtained unless adequate time is allowed and means are collectively made available to enable the necessary adjustments to be effected, unless practices whereby competition between producers is distorted are put to an end, and unless co-operation between States is established to ensure monetary stability, economic expansion and social progress.⁹

The condition that an end must be put to practices whereby competition is distorted is fully reflected in article 3 of the Treaty, under subdivision (f), where it is laid down that for the purposes set out in article 2 the activities of the Community shall include

[T]he establishment of a system ensuring that competition in the Common Market is not distorted. . . .¹⁰

The relationships between the rules of competition laid down in the Treaty, the functioning of the common market and the objectives of the Community are expressed most clearly in Title II of the Spaak report, where the rules of competition are dealt with in greater detail:

Comme les problèmes de l'agriculture le font déjà apparaître, on est amené à s'interroger sur les conditions qui assureront que la fusion des marchés conduise à la répartition la plus rationnelle des activités, au relèvement général du niveau de vie et à un rythme plus actif d'expansion. Une politique du marché commun pour répondre à ces objectifs essentiels corrige ou complète le fonctionnement automatique du marché par des règles, des procédures ou des actions communes. . . .

Le marché commun ne conduirait pas par lui-même à la répartition la plus rationnelle des activités si les fournisseurs gardaient la possibilité d'approvisionner les utilisateurs à des conditions différentes, en particulier suivant leur nationalité ou le pays de leur résidence. C'est dans ces termes que se pose le problème de la discrimination.

La discrimination peut prendre les formes

As is already apparent from the problems surrounding agriculture, one is led to ask oneself what are the conditions that will ensure that the fusion of the markets will lead to the most rational distribution of activities, to the general raising of the standard of living and to a more active rate of expansion. To meet these essential objectives, a common market policy would correct or complete the automatic functioning of the market by means of rules, procedures or joint actions. . . .

The common market would not in itself lead to the most rational division of activities if suppliers were still allowed to supply users on unequal terms, particularly on terms which differ according to their nationality or country of residence. This is where the problem of discrimination arises.

Discrimination can assume a wide variety of forms; it may, for instance, be reflected

9. Spaak report at 14.

10. EEC Treaty, pt. 1, art. 3, 298 U.N.T.S. 16, CCH Common Market Rep. ¶ 251.

les plus diverses, par exemple sur la qualité ou sur les délais de livraison. Elle peut, dans certains cas, aller jusqu'au refus de vendre, de quelque prétexte qu'il s'entoure. Dans la plupart des cas, elle s'exercera sur les prix, soit sous la forme de double prix, c'est-à-dire de conditions plus onéreuses en dehors du marché national du fournisseur, soit sous la forme de dumping, dont une condition est en tout cas que les prix faits soient inférieurs à ceux que pratique l'entreprise sur son marché national.¹¹

The report continues:

Dans la période finale l'élimination des obstacles aux échanges fera disparaître les possibilités de discrimination d'entreprises en concurrence entre elles. Le problème ne subsiste que du fait des entreprises qui, soit par leurs dimensions, soit par leur spécialisation, soit par les ententes qu'elles auraient conclues, jouissent d'une position de monopole. L'action contre la discrimination rejoint donc celle que sera nécessaire contre la formation de monopoles à l'intérieur du marché commun. Le traité devra sur ces points énoncer les règles de base. . . .

Plus généralement, le traité devra prévoir les moyens d'éviter que des situations ou des pratiques de monopole mettent en échec les objectifs fondamentaux du marché commun. A ce titre, il conviendra d'empêcher:

- une répartition des marchés par entente entre les entreprises, parce qu'elle équivaldrait à en rétablir le cloisonnement;
- des accords pour limiter la production ou freiner le progrès technique parce qu'ils iiraient au rebours du progrès de la productivité;
- l'absorption ou la domination du marché d'un produit par une seule entreprise parce qu'elle éliminerait l'un des avantages essentiels d'un vaste marché, que est de concilier l'emploi des techniques de production de masse et le maintien de la concurrence.¹²

in the quality of the goods supplied or in the delivery times quoted. It may, in certain cases, even go so far as to amount to a refusal to sell, whatever the pretext in which such a refusal may be wrapped. In the majority of cases, it will affect prices, either in the form of double pricing, *i.e.*, more onerous terms outside the supplier's own national market, or in the form of dumping, one of the features of which is always that the prices charged are lower than those charged by the enterprise on its national market.¹¹

In the final period the elimination of trade barriers will lead to the disappearance of the opportunities for discrimination by competing enterprises. The problem only remains because there are enterprises which, owing to their size or specialization, or to the agreements they have concluded, enjoy a monopoly position. The action against discrimination therefore links up with the action that will be necessary to counteract the formation of monopolies within the common market. The Treaty will have to lay down basic rules on these points. . . .

More generally, the Treaty will have to provide means of ensuring that monopoly situations or practices do not stand in the way of the fundamental objectives of the common market. To this end, it will be necessary to prevent:

- a division of markets by agreement between enterprises, since this would be tantamount to re-establishing the compartmentalization of the market;
- agreements to limit production or curb technical progress, because they would run counter to progress in productivity;
- the absorption or domination of the market for a product by a single enterprise, since this would eliminate one of the essential advantages of a vast market, namely that it reconciles the use of mass production techniques with the maintenance of competition.¹²

11. Spaak report at 53-54.

12. *Id.* at 55-56.

The Spaak report therefore sees in the establishment of a common market the road to be followed in order to realize the aims of the European Economic Community and considers that the elimination of anything which might distort competition is one of the fundamental conditions for the success of such a common market. This idea is reflected in Article 2 and in Article 3(f) of the EEC Treaty. The same concept also appears in the guiding principles for the EEC competition policy as adopted by the EEC Council of Ministers and published by the European Commission in the Commission's third General Report to the European Assembly in May 1960.

The first principle, which is especially relevant, reads as follows:

La réalisation de la politique de concurrence doit être envisagée en liaison étroite avec la poursuite des objectifs généraux et l'accomplissement des autres tâches découlant directement du traité de Rome.

The competition policy must be pursued in close harmony with the endeavor to attain the general objectives and the fulfillment of the other tasks directly arising out of the EEC Treaty.

It should be noted, moreover, that the Preamble to the Treaty uses a different expression, *viz.*, "fair competition":

RECOGNIZING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and *fair competition*.¹³

And finally, under point II of its Introduction, the Spaak report speaks of "the establishment of normal conditions of competition":

[L]'établissement de conditions normales de concurrence et le développement harmonieux de l'ensemble des économies intéressés permettent d'envisager de parvenir, par étapes successives, à la suppression de toutes les protections qui font actuellement obstacle aux échanges et qui morcellent l'économie européenne; ces conditions normales de concurrence exigent des règles et des procédures en vue de redresser l'effet des interventions des Etats ou des situations de monopole; et elles appellent une action commune pour écarter les difficultés de balance des paiements qui risquent de s'opposer à l'expansion. . . .¹⁴

The establishment of normal conditions of competition and the harmonious development of the whole of the economies concerned make it possible to envisage arriving by successive stages at the suppression of all protective measures which currently form an obstacle to trade and which are responsible for the fragmentation of the European economy. These normal conditions of competition demand rules and procedures with a view to counteracting the effect of State interventions or monopoly situations, and they call for common action to eliminate the balance of payments difficulties which threaten to stand in the way of expansion. . . .¹⁴

Here then are two positive expressions. It is to be noted that, while the rules of competition contained in the Treaty are exactly those advocated by the Spaak report with a view to attaining normal conditions of

13. 298 U.N.T.S. 14, CCH Common Market Rep. ¶ 111. (Emphasis added.)

14. Spaak report at 15.

fair competition, the expressions "normal" and "fair" competition are not to be found either in the ultimate *actes préparatoires* or in the articles of the Treaty. The Treaty has summarized these conditions and stated them more precisely by prescribing that competition must not be distorted. It follows that the authors of the Treaty conceived this negative expression to cover the essential conditions of competition, necessary for the functioning of a common market as described in the Spaak report. This requirement that competition should not be distorted is one which relates directly to the requirements of a proper functioning of the fused markets, and this expression therefore ties the elements of fair and normal competition to the objectives of the common market.

The drafters of the Treaty therefore recognized in article 3(f) the possibility that competition might be distorted and therefore an element of risk which would threaten the success of the common market. To eliminate this danger they drew up the rules of competition, particularly the rules applying to enterprises.

On the basis of this historic data, it is incontestable that the rules laid down to ensure that competition is not distorted in the common market fulfil a derivative and protective function—which consists in preventing the objectives of the Community from being frustrated by reason of disturbances in the functioning of the common market resulting from the distortion of competition within the common market.

There is here a fundamental difference from certain other provisions of the Treaty which prescribe a positive action; the rules of competition laid down in articles 85 and 86, and the rules governing competition in general, have a function which is neither autonomous nor positive, but derivative and protective. This function was embodied in the Treaty in order to prevent the distortion of competition from jeopardizing the functioning of the common market. A further proof of the function of articles 85 and 86 in the Treaty as a whole is to be found in the first words of these two articles, which (in the four official texts) read: "[are] incompatible with the Common Market."¹⁵ This shows also that what these articles are seeking to prevent and to prohibit are actions or situations incompatible with the conception of a common market. We find here the direct link with article 3(f); and tracing that article back to its source, we note the link between the rules of competition and the general principles of the Spaak report, as expressed in article 2 of the Treaty.

Some observations will now be made on the views of the Court of Justice

15. EEC Treaty, pt. 3, tit. 1, ch. 1, § 1, 298 U.N.T.S. 47, 48, CCH Common Market Rep. ¶¶ 2005, 2101.

in Luxemburg as regards the relationship between the rules of competition and the fundamental principles in the European Coal and Steel Community Treaty,¹⁶ the only treaty on which it has expressed an opinion in this regard.

The pooling of basic industries by the creation of a common market, which was the principal object of the ECSC Treaty, shows a certain parallelism with the establishment, on a much larger scale, of the European Economic Community.

The Court of Justice has on several occasions recognized this parallelism between the two Treaties, and notably between the rules of competition laid down in those Treaties. In *Geitling v. Haute Autorité*,¹⁷ it observed:

que si on admet une communauté d'inspiration entre les articles 65 du traité C.E.C.A. et 85 du traité C.E.E. . . .¹⁸

that if it is admitted that there is a common inspiration between article 65 of the ECSC Treaty and article 85 of the EEC Treaty. . . .¹⁸

Although this parallelism between the two Treaties should perhaps not be thought of in too absolute a manner, it would appear to be perfectly legitimate to consult the case law of the Court of Justice relating to the ECSC Treaty in cases where the EEC Treaty deals with a certain subject in a manner more or less analogous to that in which that subject was dealt with by the provisions of the ECSC Treaty, if only because the ECSC Treaty antedates the Treaty of Rome by several years and has already given rise to quite an extensive body of case law.

The close relationship between the basic principles laid down in Articles 2, 3, 4 and 5 of the ECSC Treaty and Article 65 of that Treaty, in the sense that this latter article has a protective function towards the principles of the Coal and Steel Community, has been expressed most clearly in *Geitling v. Haute Autorité*, where the Court held:

qu'elle ne peut admettre la suppression des exigences fondamentales de l'article 65, paragraphe 2, c, exigence qui tendent à sauvegarder sur le marché oligopolistique du charbon et de l'acier la dose de concurrence indispensable pour que soient respectées les exigences fondamentales énumérées aux articles 2, 3, 4 et 5 du traité, et notamment

that it cannot allow the suppression of the fundamental requirements of article 65, paragraph 2(c), which requirements are directed towards safeguarding, on the oligopolistic market for coal and steel, the degree of competition which is indispensable if the fundamental requirements enumerated in articles 2, 3, 4 and 5 of the Treaty are to

16. Treaty of Paris, April 18, 1951, 261 U.N.T.S. 140 (hereinafter referred to as the ECSC Treaty).

17. Cour de Justice de la C.E.C.A., May 18, 1962, 8 Rec. de la jurisprudence de la Cour 165.

18. Id. at 201.

pour que ne cesse pas d'être assuré "le maintien et le respect de conditions normales de concurrence. . . ."¹⁹

be respected, and in particular if "the maintenance and the observance of normal conditions of competition" are not to cease to be assured. . . ."¹⁹

This derivative and protective function of Article 65 of the ECSC Treaty was also accepted by the Court in its Advisory Opinion of December 13, 1961:

Considérant que le manque de précision quant à la nature des accords susceptibles d'être autorisés ne permet pas de constater si la proposition porte ou ne porte pas atteinte aux dispositions des articles 2, 3 et 4 du traité, puisque la rédaction proposée n'exclut pas que parmi les accords ainsi désignés il y en ait dont l'autorisation ne serait pas compatible avec un ou plusieurs de ces articles. . . .²⁰

Whereas the lack of precision as to the nature of the agreements likely to be authorized does not make it possible to ascertain whether the proposal does or does not infringe the provisions of articles 2, 3 and 4 of the Treaty, since the proposed wording does not exclude the possibility that among the agreements thus designated there may be some whose authorization would not be compatible with one or more of those articles. . . .²⁰

These pronouncements by the Court of Justice seem to me to give solid support to the conclusions to which we have come in our study of the *actes préparatoires* as regards the function of Article 85 in the EEC Treaty as a whole.

We have seen from the excerpts from the Spaak report that distorted competition was partly envisaged as one aspect of the general problem of discrimination.

Taking up the Spaak report once again as our starting point, we find as the next step the first version proposed for the EEC Treaty. This document, dated July 17, 1956, bears the reference index "Marché Commun 17." In this draft we find as Title II: "La Politique du Marché Commun"; Chapter I: "Les règles de concurrence"; Section 1: "Les normes applicables aux entreprises." This section consists of two paragraphs; paragraph 1: Les discriminations; paragraph 2: Les monopoles. It is from the rules contained in paragraph 2 that articles 85 through 89 were derived. Let us now see what became of the rules in paragraph 1. These were the rules on discrimination, and the first debate on the first draft was extremely revealing.²¹ It had been proposed to incorporate in the Treaty a general ban on discrimination of all kinds. The German delegation proposed that, instead of inserting a general ban on all discrimination:

19. Id. at 214.

20. Modification de l'article 65, du traité C.E.C.A., Cour de Justice de la C.E.C.A., Dec. 13, 1961, 7 Rec. de la jurisprudence de la Cour 505, 515.

21. See Doc. MAE 252/56.

a) à établir dans le Traité, le principe général que tout traitement différentiel fondé sur la nationalité et ayant pour effet un dommage ou désavantage pour une entité économique est interdit;

b) à prévoir dans le Traité, un contrôle visant à empêcher que les entreprises en situation de monopole n'abusent de cette situation; le même contrôle serait applicable aux entreprises en situation d'oligopole et opérant de manière concertée.²²

a) there should be established in the Treaty the general principle that any differential treatment based on nationality and having the effect of damaging or operating to the disadvantage of an economic entity is prohibited;

b) provision should be made in the Treaty for a control aimed at preventing enterprises in a monopoly position from abusing that position; the same control would be applicable to enterprises in an oligopolistic position and operating in a concerted manner.²²

The Chairman, Dr. Von der Groeben, had prepared a note for the discussion of the same subject at the next meeting of the Common Market Group.²³ This note advocates contemplating separately the problem of discrimination and the problems of competition. An autonomous (*per se*) prohibition of discrimination should, according to this note, be limited to discrimination on the basis of nationality.²⁴

In a later note by the Chairman of the Common Market Group,²⁵ an account is given of the progress made in the discussions on this subject. It is stated in particular in this document:

Reste controversée la question de savoir s'il faut interdire expressément, à l'intérieur du marché commun, les discriminations fondées sur la nationalité, et si, dans l'affirmative, cette interdiction doit être énoncée dans le chapitre sur les règles de concurrence ou dans le préambule du Traité.²⁶

It remains an open question whether discrimination based on nationality should be expressly forbidden within the common market, and if so, whether such prohibition should be laid down in the chapter on the rules of competition or in the Preamble to the Treaty.²⁶

The minutes of the meetings held by the Common Market Group from November 27 through 29, 1956, conclude:

Le Groupe estime, en effet, que le champ d'application des dispositions concernant la discrimination en raison de la nationalité dépasse le domaine des règles de concurrence et que ces dispositions, contenant un des principes fondamentaux du marché commun, auraient leur place au début du Traité, par exemple, comme article 2 bis.²⁷

The Group believes, in fact, that the field of application of the provisions concerning discrimination by reason of nationality goes beyond the domain of the rules of competition, and that these provisions, containing one of the fundamental principles of the common market, should have their place at the beginning of the Treaty, for instance as article 2 bis.²⁷

22. *Id.* at 2.

23. Note on the Rules Relating to Discrimination in Agreements, Oct. 26, 1956, Doc. MAE 468/56.

24. *Id.* at 3.

25. Note of Nov. 24, 1956, Doc. MAE 627/56.

26. *Id.* at 3.

27. Doc. MAE 785/56, at 5.

This quotation shows that the prohibition of discrimination on the grounds of nationality was considered to be a fundamental principle of the Community. It was dealt with separately from the provisions concerning the possibility of distorting competition, "which it goes beyond," and it was ultimately formulated in article 7, which is one of the articles expounding the principles of the Treaty. Here once more is solid proof that the rules of competition in the Treaty do not fulfil any autonomous and positive function but that they are only there to ensure the realization of the positive aims of the Treaty. To the extent that discrimination is based on nationality, the elimination of such discrimination is a positive aim of the Treaty. Discrimination in the matter of competition is considered only as one of the ways of distorting competition, and is therefore prohibited only insofar as it impedes the functioning of the common market.

III. THE HISTORY AND INTERPRETATION OF THE WORDS "PREVENT, RESTRICT OR DISTORT COMPETITION"

We have already seen that the drafters of the Treaty sought to establish rules of competition likely to eliminate the possibilities of competition being distorted. In addition to the sources already mentioned, we may cite the final Resolution of the Messina Conference, which contains the following passage:

Sa mise en application (c'est-à-dire le Traité) nécessite l'étude des questions suivantes: . . . l'élaboration des règles assurant *un jeu non faussé de la concurrence* au sein de la Communauté, qui exclut notamment toute discrimination nationale.

Its (*i.e.*, the Treaty's) application necessitates a study of the following questions: . . . the elaboration of rules to ensure *undistorted competition* within the Community, which will in particular exclude any national discrimination.

The Spaak report also follows the model of the Messina Conference and, in addition to "the normal conditions of competition," mentions also the elimination of obstacles, using the word "distort." We have further seen that the Preamble and article 3(f) of the Treaty fit in exactly with this idea. It is known that the Preamble and the first articles of the Treaty received their final form at the end of the negotiations when the various chapters of the Treaty had already been finalized. In this respect we may refer to Document MAE 543 f/57 dated February 15, 1957, in which article 3, as drafted on February 14 by the Common Market Group, provides for:

L'établissement d'un régime assurant que les conditions de concurrence ne soient faussées dans le marché commun, ni par des pratiques des entreprises, ni par l'exploita-

The establishment of a system ensuring that the conditions of competition in the common market are not distorted, either by practices of enterprises, or by the improper exploita-

tation abusive de situations de monopoles, ni par des subventions ou autres mesures émanant des autorités publiques.²⁸

tion of monopoly situations, or by subsidies or other measures emanating from the public authorities.²⁸

The Committee of Heads of Delegations replaced this text with the present text of article 3(f), the decision to do so being taken on February 16, 1957.²⁹ The reason why I am going into such great detail is to show that article 3(f) was drafted on February 16, 1957, at a time when the articles on competition had already been adopted by the negotiators. This fact is relevant here because article 3(f) uses only the word "distorted," whereas article 85 speaks of "prevent, restrict or distort competition."

If article 85 had been drafted after article 3(f) in order to amplify it, the question might arise as to whether article 85 did not go further than article 3(f), but since article 3(f) was given its final wording *after* the adoption of article 85, it is obvious that the scope of article 85 cannot go beyond that of article 3(f), the latter article having been drafted after the text of article 85 had been finalized.

What significance is to be attached to the addition of the words "prevent" and "restrict" to the word "distort" in the text of article 85? There is an obvious similarity with the text of article 65 of the ECSC Treaty, but this fact does not in itself provide very much help when it is borne in mind that the real significance of article 85 is to prevent distorted competition from prejudicing the functioning of the common market. The words "prevent" and "restrict" appear for the first time in Document MAE 468/56, of October 26, 1956. Document Marché Commun 17 of July 17, 1956, proposes only as the text for article 42 (article 85 of the Treaty):

Sont incompatibles avec le marché commun, dans la mesure où le commerce entre Etats membres s'en trouve affecté. . . .

[The following] shall be incompatible with the common market to the extent that trade between Member States is thereby affected.

. . .

A counterproposal submitted by the French delegation and introduced on September 4, 1956, reads:

Sont incompatibles avec le marché commun toutes les situations ou pratiques d'ententes ou de monopole ayant pour objet ou pouvant avoir pour effet d'entraver l'exercice de la concurrence, en particulier . . .³⁰

[The following] shall be incompatible with the common market: all agreement or monopoly situations or practices which are designed to impede the exercise of competition or might have that effect, in particular . . .³⁰

28. Doc. MAE 543f/57, at 5.

29. See Doc. MAE 586 (rev.)/57.

30. Doc. MAE 233/56.

In his Note on the rules relating to discrimination, agreements and monopolies, the Chairman of the Common Market Group proposed the following text as a basis of discussion when the rules of competition were given a second reading:

Sont interdits (et nuls) tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées ayant pour effet ou pour objet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun, dans la mesure où le commerce entre Etats membres s'en trouve affecté, et notamment³¹

[The following] shall be prohibited (and void): all agreements between enterprises, all decisions by associations of enterprises and all concerted practices which are designed to prevent, restrict or distort competition within the common market or which have this effect, insofar as trade between Member States is thereby affected, in particular³¹

During this second reading (November 5-7, 1956), after examining the various wordings proposed, it was decided to entrust a restricted group with the task of drafting new draft articles. I have not been able to examine the documents relating to the work of this restricted group. All I know is that Dr. Von der Groeben, Chairman of the Common Market Group, submitted a new compromise draft on November 14, 1956, in which the words

qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence

which are designed to prevent, restrict or distort competition . . . or which have this effect.

were retained.³² We do not know the motives for adding the words "prevent" and "restrict" to the notion of "distort competition."

Under these circumstances, all that we can do is to take as our basis a statement made by one of the German members of this Group, Dr. Thiesing, in the *Handbuch für Europäische Wirtschaft*. In his commentary on article 85, Dr. Thiesing says under point 4:

dass die Verfälschung des Wettbewerbs den Oberbegriff darstellt, der eine Verhinderung oder (teilweise) Einschränkung des Wettbewerbs mitumfasst.

that the distortion of competition represents the main concept, comprising also a prevention or (partial) restriction of competition.

Dr. Thiesing affirms, moreover, that this can be deduced from article 3(f). This statement is in conformity with what has already been mentioned above, namely, that article 3(f), which was drafted later, uses only the word "distort." This leads us to the conclusion that article 3(f) is still the dominant article, and that the idea underlying article 85 is the notion of "distorting competition," and that the complete or partial

31. Doc. MAE 468/56.

32. Doc. MAE 525/56.

limitation of competition expressed by the words "prevent" and "restrict" merely constitutes an example of one way of distorting competition.

A systematic interpretation of the Treaty on this point confirms this statement by Dr. Thiesing. The proper functioning of the common market may also be threatened by elements which distort competition other than those specifically referred to in article 85. One of these elements is mentioned in article 92:

[A]ny aid granted by a Member State . . . which distorts or threatens to distort competition by favoring certain enterprises or the production of certain goods. . . .³³

Such aid is declared to be incompatible with the common market. It will be noted that this article, the function of which is completely identical with that of article 85, uses only the word "distort."

Then, in article 101, mention is made of another element which may threaten the proper functioning of the common market by distorting competition, *viz.*, a discrepancy between the legislative or administrative provisions of Member States. This article provides that where the Commission finds that such a discrepancy

is interfering with competition within the Common Market and consequently producing distortions which need to be eliminated, it shall consult the Member States concerned.³⁴

Again, it is only a question here of discrepancies which distort competition, while this article, too, has a function similar to that of article 85.

In the same spirit, article 107(2) declares that

if a Member State makes an alteration in its rate of exchange which is incompatible with the objectives laid down in Article 104 and which seriously distorts conditions of competition, the Commission may . . .³⁵

Finally, article 112 reflects the same anxiety on the part of the authors of the Treaty to safeguard the functioning of the common market from being jeopardized by distorted competition, providing that

they [the Member States] shall, before the end of the transitional period, progressively harmonize the systems under which aid is granted to exports to third countries, to the extent necessary to ensure that competition between enterprises in the Community shall not be distorted.³⁶

33. EEC Treaty, pt. 3, tit. 1, ch. 1, § 3, art. 92, 298 U.N.T.S. 51, CCH Common Market Rep. ¶ 2901.

34. EEC Treaty, pt. 3, tit. 1, ch. 3, art. 101, 298 U.N.T.S. 54, CCH Common Market Rep. ¶ 3401.

35. EEC Treaty, pt. 3, tit. 2, ch. 2, art. 107(2), 298 U.N.T.S. 57, CCH Common Market Rep. ¶ 3851.

36. EEC Treaty, pt. 3, tit. 2, ch. 3, art. 112, 298 U.N.T.S. 59, CCH Common Market Rep. ¶ 4401.

The above shows that whenever the basic rule laid down in article 3 (f) is applied in other articles of the Treaty, it is a question solely of protecting the functioning of the common market from distorted competition. It is difficult, therefore, to conceive that article 85 would form an exception to this rule in that the words "restrict" and "prevent" have been added to the word "distort." It follows, therefore, that these additions have no meaning of their own but are merely terms already comprised within the notion "distort."

We are left now with the problem of what significance is to be attached to the word "distort" in article 85(1). As we have seen, the rule that competition in the common market must not be distorted was inserted in the Treaty to protect the functioning of the common market.

As the Spaak report puts it, the common market results in the first place from a fusion of the separate markets. This fusion is intended to put an end to the economic fragmentation of Europe. This wider market will make it possible to eliminate the wasting of resources and to abandon production programs pursued regardless of cost. The Spaak report continues in its Introduction:

Cette fusion des marchés ouvre des débouchés assez vastes pour l'emploi des techniques les plus modernes. Il existe déjà des productions exigeant des moyens si énormes ou des machines d'un rendement tel qu'elles ne sont plus à la mesure d'un marché national isolé. Mais surtout, dans beaucoup de branches d'industrie, les marchés nationaux n'offrent la chance d'atteindre la dimension optima qu'à des entreprises qui disposeraient d'un monopole de fait. La force d'un vaste marché, c'est de concilier la production de masse et l'absence de monopole.

Les protections qui éliminent la concurrence extérieure ont d'ailleurs pour le progrès de la production et le relèvement du niveau de vie une conséquence particulièrement novices: les facilités et l'incitation qu'elles donnent à l'élimination de la concurrence interne. Dans un marché plus vaste, il n'est plus possible d'organiser le maintien de modes d'exploitation vieillis qui déterminent à la fois des prix élevés et des salaires bas; et les entreprises, au lieu de préserver des positions immobiles, sont soumises à une pression permanente pour investir, en vue de développer la production,

This fusion of markets will open up vast outlets for the employment of the latest techniques. There are already some types of production calling for such huge resources or for machines with such a large output that they are no longer within the capability of a single national market. But above all, in many branches of industry, the national markets offer the chance of attaining optimum dimensions only to enterprises having a de facto monopoly. The strength of a vast market lies in the fact that it reconciles mass production with the absence of monopoly.

Systems of protection which eliminate outside competition have, moreover, particularly harmful consequences on the progress of production and the raising of the standard of living, *viz.*, the facilities and the incentive that they provide for the elimination of internal competition. In a vaster market, it will no longer be possible to organize the maintenance of outmoded operating methods which lead to high prices and low wages; while enterprises, instead of preserving static positions, will be under constant pressure to invest, with a view to developing production, improving quality

d'améliorer la qualité et de moderniser l'exploitation: il leur faut progresser pour se maintenir.³⁷

and modernizing their operations: they will have to progress in order to keep going.³⁷

This economic transformation of Europe is one essential condition (the progressive approximation of the economic policies of the Member States is the other) for the realization of the fundamental objectives of the Community as expressed in article 2 of the Treaty.

But, as the Spaak report remarks:

[O]n est amené à s'interroger sur les conditions qui assureront que la fusion des marchés conduise à la répartition la plus rationnelle des activités, au relèvement général du niveau de vie et à un rythme plus actif d'expansion. Une politique du marché commun pour répondre à ces objectifs essentiels corrige ou complète le fonctionnement automatique du marché par des règles, des procédures ou des actions communes.³⁸

One is led to ask oneself what are the conditions that will ensure that the fusion of the markets will lead to the most rational distribution of activities, to the general raising of the standard of living and to a more active rate of expansion. To meet these essential objectives, a common market policy would correct or complete the automatic functioning of the market by means of rules, procedures or joint actions.³⁸

And then:

Le marché commun ne conduirait pas lui-même à la répartition la plus rationnelle des activités³⁹

The common market would not in itself lead to the most rational division of activities.³⁹

Corrective measures will be necessary to eliminate, for example, double pricing, which has the same effect as customs duties; the dumping practices which endanger economically sound production methods; and finally all the industrial arrangements which tend to substitute market sharing for the compartmentalization of the market.

This then is the functioning of the common market as envisaged by the authors of the Treaty: it was to be a real and perfect fusion of the separate markets, "a pooling of resources to ensure equality of opportunity." This functioning of the common market was to be preserved from all disturbances, whether they came from national governments or from industry.

By declaring all agreements between enterprises which "distort competition" to be incompatible with the common market, article 85(1) can have no other object, in the conception of the Spaak report and in accordance with the general scheme of the Treaty, than to protect this functioning of the common market. The notion of "distorting competition," therefore, refers to agreements which prejudice the functioning

37. Spaak Report at 13-14.

38. *Id.* at 53.

39. *Ibid.*

of the common market as a fusion of the separate markets, this fusion being one of the two essential conditions for attaining the objectives of the Community. It follows that article 85 does not apply to *any* impediment to competition, but only to those impediments that are incompatible with the conception of a common market, that is to say, incompatible with a real and complete fusion of six separate markets.

We have already seen that the rules of competition in the EEC Treaty have a protective, indeed defensive, function. Their *raison d'être* is to safeguard an undisturbed functioning of the common market so that the fundamental objectives shall not be thwarted by distorted competition between enterprises.

Before tackling the question of the meaning of the word "affect," it may be well to say a few words about article 85(3).⁴⁰

Neither the Spaak report nor Common Market Document 17 of July 17, 1956, allow for the possibility of an exception to the protective rule incorporated in article 85(1). It was once again Dr. Von der Groeben, Chairman of the Common Market Group, who, in his Note of October 26, 1956, proposed inserting a second paragraph in article 42 (now article 85) reading as follows:

Sont toutefois autorisés (et valables) les accords entre entreprises et les décisions d'associations d'entreprises qui ont été déclarés à la Commission (en vue de leur enregistrement) et au sujet desquels le déclarant peut fournir la preuve qu'ils contribuent, d'une façon profitant également aux utilisateurs, à améliorer la production ou la distribution des produits ou à promouvoir le progrès technique ou économique sans imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables à la réalisation de ces objectifs, et sans leur donner la possibilité, pour une partie substantielle des produits en cause, de fixer les prix, de limiter la production ou les débouchés ou d'éliminer la concurrence d'autres entreprises.⁴¹

Agreements between enterprises and decisions by associations of enterprises shall nevertheless be authorized (and valid) if they have been declared to the Commission (with a view to their registration) and the declarant can furnish proof that, in a manner which is equally of benefit to consumers, they help to improve the production or distribution of goods or to promote technical or economic progress, without subjecting the enterprises in question to any restrictions which are not indispensable to the achievement of these objectives and without enabling them to fix prices, limit production or markets or eliminate the competition of other enterprises in respect of a substantial part of the goods concerned.⁴¹

It is interesting to note that the possibility of an exception being made to the protective rule of article 85(1) is not linked with the prohibitive character attaching to that rule but with the principle of incompatibility with the common market of industrial agreements which distort compe-

40. EEC Treaty, pt. 3, tit. 1, ch. 1, § 1, 298 U.N.T.S. 48, CCH Common Market Rep. ¶ 2051.

41. Doc. MAE 468/56, at 6.

tition. In his compromise proposal of November 14, 1956, the Chairman of the Common Market Group reproduced in his draft article 42(1) the text of Common Market Document 17 reading:

Sont incompatibles avec le marché commun
tous accords

[The following] shall be incompatible with
the common market: all agreements

But nevertheless he proposed that an additional convention should regulate:

notamment les cas d'exception de l'article 42 ainsi que la question de savoir si les accords entre entreprises et les décisions d'associations d'entreprises qui rentrent dans le cadre de ces exceptions, doivent être déclarés à la Commission en vue de leur enregistrement, ou s'ils doivent être autorisés par la Commission.⁴²

In particular, the exceptions to article 42 and the question whether agreements between enterprises and decisions by associations of enterprises which come within the scope of these exceptions should be declared to the Commission with a view to their registration, or whether they should be authorized by the Commission.⁴²

In the draft text drawn up by the Common Market Group in the course of its meeting of November 28, 1956, the word "prohibited" was again added to the text of article 42(1), while at the same time the possibility of exception was inserted in paragraph 2 of that article:

Peuvent être déclarés valables les accords
. . . .⁴³

Agreements . . . may be declared valid
. . . .⁴³

The Group therefore seems to me to have come to the conclusion that the possibility of exception relates in principle to the rule of incompatibility with the common market. As is shown by the Spaak report and the draft article 42 in Common Market Document 17, both of which adopted only the criterion of incompatibility, it is this criterion which is the basic one in article 85; the prohibition and the nullity are only its consequences.

This demonstrates that article 85(3) contains the possibility of making an exception to the incompatibility rule. The protective rule is aimed at ensuring an undisturbed functioning of the common market, while this functioning of the common market is in turn the necessary basis for attaining the objects of the Community as envisaged in article 2; the exceptions provided for in article 85(3), therefore, to some extent set aside this protective rule, which is only comprehensible if those exceptions are predicated on a higher interest. This interest cannot be anything other than the fundamental objects of the Treaty, *viz.*, the attaining of the objects of the Community.

The applicability of article 85(3) is reserved, again on certain con-

42. Doc. MAE 541/56, at 4.

43. Doc. MAE 657/56.

ditions, to agreements which help "to improve the production or distribution of goods or to promote technical or economic progress. . . ."⁴⁴ The improvement of production and distribution and the advancement of technical and economic progress are among the objectives which, as we have seen, were mentioned in the Introduction to the Spaak report and which are reflected in article 2 of the Treaty.

The exception to the rule protecting the functioning of the common market or, in other words, the applicability of article 85(3), therefore concerns only those agreements that are so useful for the attainment of the objectives of the Treaty that, though they have to be judged incompatible with the proper functioning of the common market, their prohibition would be contrary to the fundamental objectives of the Community. It is for this reason that the rule of article 85(1) has to give way to such extent as may be necessary.

The function of article 85(3), viewed within the framework of the Treaty as a whole, therefore underlines the derivative function of article 85(1). Article 85(1) constitutes only a means of safeguarding the advantages to be obtained from a fusion of the separate markets. But in its turn, this fusion is only a means of realizing the fundamental objectives of the Treaty, namely the objects of the Community. The rule of article 85(1) and, in consequence, the protection of the functioning of this common market, have to give way as soon as and insofar as they might become prejudicial to the attainment of these fundamental objectives of the Treaty to which they are always subordinate.

IV. HISTORY AND SIGNIFICANCE OF THE WORD "AFFECT"

Starting once again with the Spaak report, we find the following observation:

Les règles et les procédures communes pourront être limitées aux pratiques qui affecteraient le commerce inter Etats, laissant aux Etats nationaux eux-mêmes le soin d'empêcher des discriminations ou la formation d'ententes à effet purement local.⁴⁵

The common rules and procedures can be limited to the practices which would affect inter-State trade, leaving it to the national States themselves to prevent discrimination or agreements having a purely local effect.⁴⁵

Originally, therefore, the function of the expression "affect trade between Member States" was to circumscribe the field of application of the rules of competition of the EEC Treaty. As we have seen previously, the rules of competition were only inserted to ensure that the functioning of the common market would not be prejudiced by a distortion of competition within that market. Competition can be distorted either in the in-

44. EEC Treaty, pt. 3, tit. 1, ch. 1, § 1, 298 U.N.T.S. 48, CCH Common Market Rep. ¶ 2051.

45. Spaak Report at 55.

ternal trade of the various national markets or in the trade between Member States. In the Spaak report, we have seen that the rules of competition envisaged were aimed at preventing competition from being distorted insofar as such distortion might occur in the trade between Member States. It is for this reason that the idea of "affecting trade between States" was originally envisaged as a limit imposed on the field of applicability of the EEC Treaty.

It is very interesting and enlightening to follow the development of this thesis throughout the subsequent discussions on the various drafts for the wording of the Treaty. The first draft of article 85, which is to be found in Common Market Document No. 17, under article 42, reads as follows:

Sont incompatibles avec le Marché Commun, dans la mesure où le commerce entre Etats Membres s'en trouve affecté

[The following] shall be incompatible with the Common Market to the extent that trade between Member States is thereby affected

This draft thus followed to the letter the criteria set out in the Spaak report. Then came a proposal from the French delegation, contained in Document MAE 233/56 of September 4, 1956, in which that delegation sought to make a distinction between the field of applicability of the Treaty and the jurisdiction of the European Commission. According to the French version, the Treaty would be applicable whenever competition was distorted, whether within the limits of the national market or in the trade between Member States. The national governments would have to assume the task of eliminating the obstacles in the field of the national markets, while the European Commission would be responsible for taking measures to prevent competition from being distorted in the trade between Member States. The national governments would be entitled to approach the European Commission should they find that there were obstacles in the trade between the States. The French proposal was worded as follows:

Sont incompatibles avec le marché commun toutes les situations ou pratiques d'ententes ou de monopole ayant pour objet ou pouvant avoir pour effet d'entraver l'exercice de la concurrence, en particulier

Lorsque les situations ou pratiques visées à l'article X + 2 affectent le commerce entre deux ou plusieurs Etats membres, chacun d'eux peut saisir la Commission pour violation de ces dispositions. La Commission peut également se saisir d'office.⁴⁶

[The following] shall be incompatible with the Common Market: all agreement or monopoly situations or practices which are designed to impede the exercise of competition or might have that effect, in particular

When the situations or practices referred to in article X + 2 affect the trade between two or more Member States, any of them may refer the matter to the Commission as constituting a violation of these provisions. The Commission may also consider such matters *proprio motu*.⁴⁶

46. Doc. MAE 233/56.

It should be mentioned, incidentally, that article X + 2 uses the words "impede the exercise of competition," which were borrowed from article 59 bis of the French Price Ordinance of 1945, except that that Ordinance speaks of the "full exercise of competition" whereas the French proposal uses in article X + 2 the expression "the exercise of competition." This is fully in line with what has already been said, namely that those who drafted the Treaty did not lay down any rule whereby competition had to be unlimited, but prescribed only that competition should not be distorted. Seen from this angle, it is perfectly logical that the French delegation should not demand "the full exercise of competition," but only "the exercise of competition."

In the Note by the Chairman of the Common Market Group, dated October 26, 1956, in which the results are given of the discussions following the first reading of the rules of competition, we then find the following observations:

Plusieurs délégations estiment que les dispositions du Traité ne devraient viser que les ententes et les monopoles que affectent le commerce entre deux ou plusieurs Etats Membres. En revanche, une délégation (c'est-à-dire la délégation française)⁴⁷ . . . désire ne faire dépendre de cette condition que la possibilité de saisir les institutions de la Communauté d'une violation des dispositions en question, sans suggérer en même temps une limitation du champ d'application de ces dernières. On peut toutefois se demander s'il est indispensable de prévoir, en vue de l'ouverture du marché commun, des dispositions relatives aux ententes et aux monopoles qui n'affectent pas le commerce entre les Etats membres, et si ces dispositions auront une importance pratique, au cas où l'on exclut à priori la possibilité de saisir la Commission, le Conseil ou la Cour de Justice de la Communauté en cas d'infraction.

Several delegations are of the opinion that the provisions of the Treaty should deal only with agreements and monopolies which affect the trade between two or more Member States. On the other hand, one delegation [*i.e.* the French delegation]⁴⁷ . . . desires that this condition should only give rise to the possibility of referring a violation of the provisions in question to the institutions of the Community, without at the same time suggesting any limitation of the field of application of those provisions. It may be wondered, however, whether it is indispensable, with a view to the opening of the common market, to lay down provisions relating to agreements and monopolies which do not affect the trade between Member States, and whether such provisions would have any practical importance if the possibility of referring infringements to the Commission, the Council or the Court of Justice of the Community were excluded *a priori*.

We see here that the other delegations did not accept the French thesis because they had come to the conclusion that it would be useless to make the Treaty applicable to impediments to competition which operated only on the national markets and did not affect the trade between Member States, if the European Commission was in any case to have jurisdic-

47. See Doc. MAE 233/56, art. X + 3, ¶ 1.

tion only as regards impediments in this latter category. They therefore judged it to be more logical to limit the field of application of the Treaty itself to those impediments to competition which affect the trade between Member States.

The wording proposed by the Chairman of the Common Market Group at the end of these debates defined the criterion thus:

dans la mesure où le commerce entre Etats	to the extent that trade between Member
Membres s'en trouve affecté ⁴⁸	States is thereby affected ⁴⁸

In a draft put forward during the second reading of the rules of competition, dated November 14, 1956, the Chairman of the Common Market Group proposed a broader formula:

qui sont susceptibles d'affecter le commerce	<i>liable</i> to affect trade between Member
entre les Etats Membres ⁴⁹	States ⁴⁹

This is the formula which carried the day and which was adopted in the final wording of the Treaty.

This historical review of the expression "affect trade between Member States" thus shows that the sole function of this expression was to circumscribe and delimit the field of application of the Treaty.

The notion "affect trade between Member States" delimits the field of application of the rule that competition within the common market must not be distorted, and it consequently constitutes a qualification of that rule. Article 85(1) is directed only to agreements which are incompatible with the functioning of the common market as being a fusion of the separate markets. By their nature, these will on the whole only be agreements which affect the trade between Member States. The addition of the words "which are liable to affect trade between Member States" therefore underlines the significance to be attributed to the word "distort," taken in conjunction with "incompatible with the Common Market." The word "affect" is not an autonomous element of article 85, but a qualification of the function of the word "distort" in article 85, namely the function of protecting the functioning of the common market. The impediments to competition which fall within the scope of the term "affect" are impediments which in fact are already covered by the notion "distort."

In the light of the foregoing, there would not be much point in exploring the question whether a neutral or a pejorative meaning should be attributed to the word "affect" in article 85; it seems obvious that

48. Doc. MAE 468/56, at 6.

49. Doc. MAE 541/56, at 2. (Emphasis added.)

the word "affect," related as it is to the notions "distort" and "incompatible," is equally charged with a pejorative meaning.

It is therefore perfectly logical that the word "affecter" should have been used in the French text, just as the word "beeinträchtigen" (impair or prejudice) is used in the German text, and not in the word "beeinflüssen" (influence) as used in the German cartel law. It is logical also that the Dutch text of the Treaty should speak of "ongunstig beïnvloeden" (adversely influence) and that the Italian text should have "pregiudicare" (prejudice), while it is interesting to note that the linguistic group which compared the four texts when the final draft of the Treaty had been completed had no doubts, according to its reports, about the correctness of these translations.

Articles 85 and 86 are not the only passages in which the word "affect" has been employed in the Treaty. In article 90, paragraph 2, we find in the last sentence:

The development of trade shall not be *affected* to such an extent as would be contrary to the interests of the Community.⁵⁰

Here the word "affect" ("affecter" in the French text) is obviously used in a pejorative sense. The German text of the Treaty here again uses the word "beeinträchtigen." The Italian text employs the word "compromesso" (compromised), while the Dutch text says: "beïnvloed in een mate, die strijdig is met het belang van de Gemeenschap" (influenced to an extent contrary to the interests of the Community).

The same applies to the word "affecter" in article 92, which deals with State aid declared to be incompatible with the Common Market

in so far as it adversely *affects* trade between Member States. . . .⁵¹

There is no counterpart in the French text to the word "adversely"; but here again, the only possible meaning of the word "affecter" is a pejorative one.

Article 224 also contains the word "affect" which is used there twice. The article deals with the steps to be taken by a State in the event of serious internal disturbances "affecting law and order" ("affectant l'ordre public"). Here the intention is so plainly evident that the German text says simply: "Störung der öffentlichen Ordnung" (disturbance of public order). The Italian text says: "che turbino l'ordine pubblico" (which disturb public order). And the Dutch text: "waardoor de openbare

50. EEC Treaty, pt. 3, tit. 1, ch. 1, § 2, art. 90, 298 U.N.T.S. 50, CCH Common Market Rep. ¶ 2351. (Emphasis added.)

51. EEC Treaty, pt. 3, tit. 1, ch. 1, § 3, art. 92, 298 U.N.T.S. 51, CCH Common Market Rep. ¶ 2901. (Emphasis added.)

orde wordt verstoord" (whereby public order is disturbed). This article goes on to stipulate that, in the event of one of them taking such emergency measures, the Member States shall consult one another with a view to preventing the operation of the Common Market from being "affected" by those measures. Here again, it is not possible to understand the word "affect" otherwise than in a pejorative sense.

There is nowhere a passage in the Treaty where the word "affect" is used in a neutral sense. Systematic interpretation therefore leads to the conclusion that in articles 85 and 86, where it was necessary to define a qualification for the types of impediments covered by the rules of competition to be laid down in the EEC Treaty, this same word "affect" is used in a pejorative sense just as it is wherever else the word "affecter" has been used in the French text of the Treaty.

The decision by the Court of Justice in *Société Kledingverkoopbedrijf de Geus v. Bosch*,⁵² affirming that it should not be automatically concluded that export bans are prohibited under article 85, seems to be fully predicated on the conception that the word "affect" is not a neutral term, because export bans in all probability always exert some influence on the trade between Member States in that they are directly related to that trade. But it is only by construing the term "affect" in a pejorative sense that the Court can come to such a conclusion.⁵³

I would refer, in conclusion, to the letter dated July 31, 1959, addressed by the President of the European Commission to the President of the Assembly on the question whether the cartel agreement authorized by the German Government, whereby the petroleum industry had agreed not to compete with the coal industry in the matter of prices and to refrain for a certain period from attracting new customers from among those who had hitherto been purchasers of coal, did or did not come within the terms of article 85(1) of the Treaty. Here is the text of the letter, as reproduced in the Report of the European Assembly's Internal Market Committee (the Darras report), A.P.E. Number 51 of September 1959:

Le ministre fédéral de l'économie a pris contact avec la Commission de la CEE avant d'autoriser ce cartel et il a fait valoir qu'il ne tombait pas sous le coup des interdictions de l'article 85 du traité de la CEE.

Pour apprécier le cas d'espèce, la Commis-

The Federal Minister of Economics approached the EEC Commission before authorizing this cartel and submitted that it did not fall within the scope of the prohibitions laid down in article 85 of the EEC Treaty.

52. Cour de Justice de la C.E.C.A., April 6, 1962, 8 Rec. de la jurisprudence de la Cour 89, CCH Common Market Rep. ¶ 8003.

53. It should be noted that the original text of the Bosch case was in Dutch, and in that text the words used are "ongunstig beïnvloeden" (adversely influence).

sion est partie du point de vue qu'il y avait lieu, pour prendre une décision sur le point de savoir si ce cartel était de nature à affecter le commerce entre les Etats membres, de ne pas prendre en considération la clause du contrat selon laquelle tous les producteurs, importateurs et commerçants d'huile combustible peuvent adhérer au cartel. L'adhésion d'autres entreprises créerait un fait nouveau et pourrait, le cas échéant, provoquer une révision de la question. Dès lors, la Commission s'est bornée à vérifier si la mise en oeuvre de l'entente, telle qu'elle est prévue aux termes de la demande, affectait le commerce entre les Etats membres.

La Commission n'a pu relever aucune répercussion directe de cette entente sur le commerce entre les Etats membres. De l'avis de la Commission, les effets indirects dont il faudrait éventuellement tenir compte, sont trop limités pour qu'on puisse y voir une atteinte au commerce entre les Etats membres. Dès lors, la Commission n'a aucune raison de considérer que les conditions prévues à l'article 85-1 du traité de la CEE sont réalisées.

In assessing this specific case, the Commission adopted the standpoint that, in deciding whether this cartel was of such a nature as to affect the trade between Member States, it should not take into consideration the clause of the contract whereby all producers, importers and dealers in fuel oils may join the cartel. If other enterprises were to join, this would create a new fact and might in certain cases lead to a review of the whole matter. The Commission accordingly confined itself to ascertaining whether the implementation of the agreement as envisaged in the terms of the request affected the trade between Member States.

The Commission has been unable to find any direct repercussion of this agreement on the trade between Member States. In the opinion of the Commission, the indirect effects which it might be necessary to take into account are too limited for it to be possible to see in them an impairment of the trade between Member States. The Commission therefore has no reason for finding that the conditions referred to in Article 85(1) of the EEC Treaty have been fulfilled.

It is particularly the last paragraph of this quotation which is interesting, since it speaks of a "direct repercussion of this agreement on the trade between Member States" and declares that the indirect effects "are too limited for it to be possible to see in them an impairment of the trade between Member States." This view expressed by the European Commission, and particularly the use of the word "impairment" (French: "atteinte") shows that the European Commission also interprets the word "affect" in a pejorative sense.

V. SIGNIFICANCE OF ARTICLE 85(3)

Although I have now concluded my discourse proper, this is perhaps a suitable moment for making one or two observations on the task of the Commission in carrying out article 85(3).

It has often been maintained that if article 85(1) applied only to restrictive agreements whose effect would be to constitute an obstacle to the proper functioning of the common market, article 85(3) would become devoid of meaning. This reasoning purports to show that article 85(3) is intended to enable the Commission to grant exemptions in cases where, however restrictive it may be, an agreement could never-

theless be held to be compatible with the common market by reason of its beneficial long-term effects.

Now this reasoning, as I have shown earlier in this article, omits to distinguish between, on the one hand, the objects of the Community, and, on the other, the proper functioning of the common market necessary for the attainment of those objects. It should be fully realized that the proper functioning of the common market is not the final aim of the Treaty, but only a means of ensuring the success of the Community. That is why it may happen in special cases, which I agree are likely to be rather rare, that application of the rules intended to protect the functioning of the common market would not be conducive to the fundamental objectives of the Treaty as set forth in article 2. These are cases in which the mechanism of the common market is inadequate to attain these objectives by itself.

To avoid any conflict between the fundamental provisions of article 2 and the provisions intended to protect the functioning of the common market, the Treaty has provided the possibility of setting aside this protective rule which is directed only at an object which is always subordinate to the fundamental objectives of the Community, in order that the latter may prevail. This then is the significance of article 85(3). It entrusts to the Commission the task of applying the Treaty as a whole in matters of competition, and of deciding, in specific cases, whether the objectives of the Community would be better served by maintaining the unencumbered mechanism of the common market, or whether those objectives require that protection of the functioning of the common market be occasionally set aside.

This task, based on the conception that the fundamental principles of the Treaty and the rules elaborating those principles form an indivisible whole and should be applied as such,⁵⁴ implies that the decisions taken under article 85(3) are decisions of a political character which are truly of the utmost importance from the point of view of the execution of the Treaty.

Another example, equally characteristic, in which the Commission is

54. The Court has on a number of occasions recognized, as far as the ECSC Treaty is concerned, this fundamental coherence between the principles underlying the Treaty and the provisions elaborating these provisions. See *Modification de l'article 65 du traité C.E.C.A.*, Cour de Justice de la C.E.C.A., Dec. 13, 1961, 7 Rec. de la jurisprudence de la Cour, 505, 515 (advisory opinion); *Geitling v. Haute Autorité*, Cour de Justice de la C.E.C.A., May 18, 1962, 8 Rec. de la jurisprudence de la Cour 165, 201; *Groupeement des Hauts Fourneaux v. Haute Autorité*, Cour de Justice de la C.E.C.A., June 21, 1958, 4 Rec. de la jurisprudence de la Cour 223; *Gouvernement de la République Française v. Haute Autorité*, Cour de Justice de la C.E.C.A., Dec. 21, 1954, 1 Rec. de la jurisprudence de la Cour 7.

entrusted with the task of weighing the interest of the Community against the interests subordinate to it, is to be found in article 90(2). This provision relaxes the rules of competition of the Treaty for enterprises entrusted with the management of services of general economic interest. But article 90(3) imposes on the Commission a supervisory function, authorizing it to order the cessation of any action of this kind and to issue directives or decisions to Member States as soon as the interests, not of the common market, but of the *Community*, are thereby affected.

A better example could scarcely be given of the difference between the objectives of the common market and the mission of the Community. But it would be quite illogical to suggest that it is only in the case of the types of enterprise mentioned in article 90(2) that circumstances may arise in which the interests of the Community do not coincide with the perfect functioning of the common market.

Viewed in this light, the function of the Commission falls into its true perspective. If article 85(1) had been conceived solely in order that restrictive agreements should be prohibited by the mere fact of their restrictive character, even if they were compatible with the common market—an interpretation which would not be in accordance either with the text of article 85(1) or with the Spaak report—the work of the European Commission would be reduced to summarizing and studying numerous agreements, even if they did not in any way concern the functioning of the common market, simply because they contained restrictive provisions. But this is not work which ought to be done by the highest executive body in Europe.

The task of the Commission under the terms of article 85(3) of the Treaty is, on the other hand, analogous to the task entrusted to it under article 90(2), *i.e.*, of assuming responsibility for deciding in particular and exceptional cases whether there are grounds for departing from the normal functioning of the common market with a view to better serving the higher aim of the Community. Such a task could only be entrusted to the highest executive body in Europe because it involves assuming full responsibility for assessing the aims of the Community and for laying down a policy in conformity with those aims. It is a task which requires the Commission to make thorough and detailed studies of certain important cases and to make full use of its powers of investigation.

Viewing the function of the Commission in this light, agreements which infringed article 85(1) would obviously continue to fall within the competence of the Commission and the latter would have full powers to institute inquiries and prosecutions whenever and wherever necessary.

But the decisions taken in virtue of article 85(3) would contain declarations of high policy, and the task of the European Commission would not be reduced to answering the question whether such private agreements were restrictive in the technical sense although compatible with the common market.

I can think of no better way of elucidating the true significance of the function entrusted to the Commission by article 85(3) than by citing the following successive steps in the reasoning on which the Court of Justice based its judgment *Geitling v. Haute Autorité*,⁵⁵ with which I will conclude:

Attendu que le traité instituant la Communauté européenne du charbon et de l'acier n'a pas méconnu l'évolution technique et commerciale qui augmente constamment la dimension des unités économiques et tend à donner, chaque jour davantage, au marché du charbon et de l'acier un caractère oligopolistique;

que les dispositions du paragraphe 2 de l'article 65 et du paragraphe 2 de l'article 66 marquent la volonté des auteurs du traité de ne pas faire obstacle à cette évolution, sous la condition qu'elle serve les fins du traité et notamment qu'elle laisse subsister, entre grandes unités, la dose de concurrence nécessaire pour que soit sauvegardée l'exigence fondamentale de l'article 2, imposant "l'établissement progressif de conditions assurant par elles-mêmes la répartition la plus rationnelle de la production au niveau de productivité le plus élevé, tout en sauvegardant la continuité de l'emploi et en évitant de provoquer, dans les économies des Etats membres, des troubles fondamentaux et persistants";

que cette préoccupation de sauvegarder une certaine dose de concurrence dans le régime de concurrence imparfaite qui est celui du charbon et de l'acier a inspiré manifestement l'une des conditions imposées par le paragraphe 2 de l'article 65 aux accords de vente en commun susceptibles d'être autorisés, à savoir qu'ils ne donnent pas aux entreprises intéressées le pouvoir de déter-

Whereas the Treaty establishing the European Coal and Steel Community has not failed to recognize the technical and commercial evolution which is constantly increasing the size of economic units and is tending more and more each day to give the coal and steel market an oligopolistic character;

and whereas the provisions of paragraph 2 of article 65 and of paragraph 2 of article 66 indicate the intention of the authors of the Treaty not to place any obstacles in the way of this evolution, on condition that it serves the ends of the Treaty and that in particular it leaves intact, between major units, the amount of competition necessary to safeguard the fundamental requirement of article 2, which calls for "the progressive establishment of conditions which will in themselves assure the most rational distribution of production at the highest possible level of productivity, while safeguarding the continuity of employment and avoiding the creation of fundamental and persistent disturbances in the economies of the Member States";

and whereas this preoccupation with safeguarding a certain modicum of competition in the system of imperfect competition prevailing in the coal and steel industries has manifestly inspired one of the conditions laid down in paragraph 2 of article 65 which have to be fulfilled by joint marketing agreements if they are to be authorized, namely that they must not give the enterprises concerned the power to fix prices for

55. 8 Rec. de la jurisprudence de la Cour 165.

miner les prix d'une partie substantielle des produits en cause dans le marché commun;

attendu que le Traité a été plus loin encore que l'article 65, dans le souci de ne pas faire obstacle aux évolutions indispensables, puisqu'il a été jusqu'à reconnaître, dans l'article 95, "qu'un changement profond des conditions économiques ou techniques" pourrait "rendre nécessaire une adaptation des règles relatives à l'exercice par la Haute Autorité des pouvoirs qui lui sont conférés";

attendu que la Haute Autorité et le Conseil spécial de ministres de la Communauté européenne du charbon et de l'acier ont, en application de l'article 95, demandé le 20 juillet 1961, l'avis de la Cour sur un projet de modification du Traité, destiné à parer aux effets d'un changement fondamental et persistant des conditions d'écoulement dans les industries du charbon et de l'acier;

que la Cour a marqué dans son avis 1/61 du 13 décembre 1961:⁵⁶ "qu'en principe l'article 95 ne fait pas obstacle à une adaptation des règles relatives aux pouvoirs que l'article 65 confère à la Haute Autorité par une modification du paragraphe 2 de cet article, visant à permettre à la Haute Autorité d'autoriser soit des accords d'une autre nature que ceux prévus par le texte actuel, mais poursuivant le même but, soit des accords de même nature que ceux prévus par le texte en vigueur, mais poursuivant un autre but, soit enfin des accords d'une autre nature et poursuivant d'autres buts";

que la Cour a ensuite affirmé "que des modifications tant de la première partie du 1^{er} alinéa du paragraphe 2, permettant d'autoriser d'autres catégories d'ententes non prévues par le texte en vigueur, que du littéra *a* du même paragraphe, visant les buts des accords susceptibles d'être autorisés, peuvent constituer une adaptation des règles relatives à l'exercice des pouvoirs d'autorisation attribués à la Haute Autorité; mais que, par contre, la suppression du littéra *c* dépasse le cadre d'une adaptation . . .";

a substantial part of the products in question within the common market;

and whereas the Treaty has gone even further than article 65 in the desire not to place any obstacle in the way of indispensable evolutions, since it has gone so far to recognize, in article 95, that "a profound change in economic or technical conditions" might "make necessary an adaptation of the rules concerning the exercise by the High Authority of the powers which are conferred upon it";

and whereas the High Authority and the Special Council of Ministers of the European Coal and Steel Community have on July 20, 1961, pursuant to article 95, asked for the Court's opinion on a plan to modify the Treaty with a view to counteracting the effects of a fundamental and persistent change in marketing conditions in the coal and steel industries;

and whereas the Court has indicated in its Opinion 1-61 of December 13, 1961:⁵⁶ "that in principle article 95 does not constitute an obstacle to an adaptation of the rules relating to the powers that article 65 confers on the High Authority, by modifying paragraph 2 of that article in such a way as to permit the High Authority to authorize either agreements of a different nature from those referred to in the present text but pursuing the same object, or agreements of the same nature as those referred to in the present text but pursuing a different object, or finally agreements of a different nature and pursuing different objects";

and whereas the Court then affirmed "that modifications, either of the opening words of paragraph 2, enabling categories of agreements to be authorized other than those provided for in the present text, or of letter (a) of the same paragraph, referring to the objects of agreements likely to be authorized, may constitute an adaptation of the rules relating to the exercise of the powers of authorization conferred on the High Authority, but that on the other hand the suppression of letter (c) would go beyond the scope of an adaptation . . .";

56. 7 Rec. de la jurisprudence de la Cour at 514.

qu'ainsi la Cour a montré qu'elle entend, comme le souhaitent les requérantes, "interpréter et appliquer les règles de droit en tenant compte de la nouvelle situation économique" et "des nouvelles tâches que pose le dynamisme de la vie économique" . . .

attendu que la Haute Autorité a estimé que cette dose de concurrence indispensable était sauvegardée par les trois comptoirs de vente en commun qu'elle a autorisés dans ses décisions Nos 5-56, 6-56 et 7-56 du 15 février 1956, mais qu'elle ne le serait pas par la survivance des mécanismes communs autorisés par la décision N° 8-56 du 15 février 1956 et de l'organisation de vente en commun interdite par la décision N° 16-60 du 22 juin 1960;

que la Cour ne voit aucune raison d'admettre qu'en imposant le maintien d'une dose minimum de concurrence à l'intérieur du bassin de la Ruhr, la Haute Autorité n'a pas respecté la lettre et l'esprit du traité et notamment les obligations que lui imposent les articles 2, 3, 4 et 5.⁵⁷

and whereas the Court has shown that it intends, as the petitioners desire "to interpret and apply the rules of law while taking account of the new economic situation" and "of the new tasks imposed by the dynamism of economic life . . .";

and whereas the High Authority has considered that this indispensable amount of competition was safeguarded by the three joint marketing agencies that it authorized in its decisions 5-56, 6-56 and 7-56 of February 15, 1956, but that it would not be safeguarded by the continued existence of the joint mechanisms authorized by decision 8-56 of February 15, 1956, and by the joint marketing organization prohibited by decision 16-60 of June 22, 1960;

and whereas the Court sees no reason for holding that by imposing the maintenance of a minimum amount of competition within the Ruhr basin the High Authority has not respected the letter and the spirit of the Treaty, and in particular the obligations imposed on it by articles 2, 3, 4 and 5.⁵⁷

VI. CONCLUSION

A. *The Function of Article 85 in the Treaty as a Whole*

In order to evaluate the meaning of article 85, it is essential to see it in relation to the Treaty as a whole, and in particular to the fundamental objectives of the Community as enumerated in article 2 of the Treaty.

In the conception of the authors of the Treaty, the fusion of the separate markets—or, in other words, the establishment of a common market—is one of the two essential conditions for realizing the objects of the Community, while undistorted competition is a fundamental condition for the success of such a common market. The rules which have to ensure that the free play of competition within the common market is not distorted fulfil a derivative, protective function, consisting in preventing the Community's objectives from being frustrated by disturbances in the functioning of the common market caused by distortions of competition.

57. 8 Rec. de la jurisprudence de la Cour at 212-14.

B. *The Interpretation of the Words "prevent, restrict or distort competition"*

In elaborating the basic rule contained in article 3(f), article 85(1) is aimed only at protecting the functioning of the common market from distorted competition. The complete or partial limitation of competition expressed by the words "prevent" and "restrict" is already comprised within the notion "distort," so that these two terms added to the word "distort" have no meaning of their own but merely constitute examples of ways in which competition can be distorted.

The concept "distort competition" refers to agreements prejudicial to the functioning of the common market as a fusion of the separate markets. It follows that article 85 does not apply to *any* obstacle to competition, but only to those obstacles which are incompatible with the conception of a common market.

C. *Meaning of the Word "affect"*

The notion "affect trade between Member States" delimits the sphere of application of the rule that competition within the common market must not be distorted, and consequently it forms a qualifying element of that rule. It does not, therefore, constitute an autonomous element in article 85, but indicates what forms of distortion of competition are envisaged as being incompatible with the common market.

Though there is little point in going into the question of whether a neutral or a pejorative meaning should be attributed to the word "affect," it seems obvious—having regard, on the one hand, to the position of the term "affect" in relation to the preponderating notion of "distort" and, on the other, to the way in which the term "affect" is used in other articles of the Treaty—that a pejorative meaning should be attributed to this term.

D. *Significance of Article 85(3)*

Article 85(3) entrusts the Commission with the task of applying the Treaty, as regards competition, in its entirety, and of deciding, in specific cases, whether the objectives of the Community would be better served by maintaining the unencumbered mechanism of the common market, or whether those objectives call for this protection of the functioning of the common market to be set aside.

The exception to the protective rule of article 85(1), or, in other words, the applicability of article 85(3), therefore concerns only agreements which are so useful for the attainment of the objectives of the

Treaty that, though they must be judged incompatible with the proper functioning of the common market, it would be contrary to the fundamental objectives of the Community to prohibit them. Viewed against the background of the Treaty as a whole, the function of article 85(3) emphasizes the derivative function of article 85(1) as that of protecting the functioning of the common market, which, in itself, is only a means of attaining the objects of the Community.