Vanderbilt Law Review

Volume 20
Issue 2 *Issue 2 - A Symposium on State Trading*

Article 5

3-1967

State Trading Monopolies in the European Economic Community

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I. Nature and Scope of the Problem

A. *The Legal Framework*

Governments have long recognized state trading monopolies as convenient devices to achieve political and commercial objectives concurrently, using the leverage of their economic power to political ends and vice versa. The effectiveness of the Boston Tea Party, and its aftermath, in adjusting state trading monopolies to the requirements of free trade settled the problem for the United States only. Thus, when the parties to the Treaty of Rome[1] agreed to divest themselves of their control over intra-Community trade by the establishment of a customs union, they were faced with the problems posed by their trading monopolies as well.

The state trading monopolies are business enterprises. As such they are expected to take advantage of the abolition of trade barriers and to enter new markets. For their competitors, however, there remains but one entry to the monopoly's own market, that being through the monopoly itself. In thus channeling export and import trade, the monopoly is in a position to exercise both that freedom of trade the treaty guarantees and that national control of intra-Community trade the treaty proscribes.

The abolition of trade barriers is to be implemented by "the establishment of a system ensuring that competition in the Common Market is not distorted" (article 3(f)). To this end rules of competition (articles 85 to 94) govern the conduct of enterprises in trade among member states. This "order of competition," according to the Court of Justice, "has been designed because the Treaty cannot permit enterprises to create barriers in the trade among Member-States of a type the Treaty aims to eliminate according to its

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The views expressed herein are those of the author and should not be taken to reflect those of the Commission.

1. Treaty Establishing the European Economic Community, signed March 25, 1957. Reprinted in 298 U.N.T.S. 11 (1958). All references to the provisions of the Rome Treaty are to the unofficial translation of Her Majesty's Stationery Office, London.

preamble and its other provisions establishing a Common Market."[2] Again, state trading monopolies resist a simple application of these rules.

The Rome Treaty deals with state trading monopolies in article 37,[3] this provision being part of the chapter concerned with the elimination of quantitative restrictions. Article 90 paragraph 1, however, imposes an affirmative duty upon the member states in respect of public enterprises and enterprises to which they grant special or exclusive rights to "neither introduce nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in article 7 and articles 85 to 94 inclusive."[4]

2. Verbundene Rechtssachen 56/64 & 58/64, Consten GmbH & Grundig Verkaufs-GmbH v. Kommission der EWG, July 13, 1966, XII Sammlung der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschäften 322, 388, 394 (1966) [hereinafter cited as Sammlung]; CCH COM. MKT. REP. ¶ 8046, at 7651, 7654 (1966).

3. Article 37 reads:

1. Member States shall gradually adjust any State trading monopolies so as to ensure that, when the transitional period expires, no discrimination exists between the nationals of Member States as regards the supply or marketing of goods.

The provisions of this Article shall apply to any organisation through which a Member State, *de jure* or *de facto*, either directly or indirectly controls, supervises or appreciably influences imports or exports as between Member States. These provisions shall likewise apply to monopolies delegated by the State to other legal entities.

2. Member States shall abstain from introducing any new measure which is contrary to the principles laid down in paragraph 1 of this Article or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States.

3. The timetable for the measures referred to in paragraph 1 shall be harmonised with the abolition of the quantitative restrictions on the same products, as provided for in Articles 30 to 34 inclusive.

If a product is subject to a State trading monopoly in only one or some Member States, the Commission may authorize the other Member States to impose protective measures until the adjustment provided for in paragraph 1 of this Article has been effected; the Commission shall decide upon the conditions governing such measures and determine the manner in which effect shall be given to them.

4. If a State trading monopoly has rules which are designed to facilitate the distribution or marketing of agricultural products, the rules contained in this Article shall be given effect to in such manner that equivalent guarantees are provided, in respect of the employment and standard of living of the producers concerned; account shall be taken of possible adjustments and of necessary specialisations.

5. The obligations on Member States shall be binding only in so far as they are consistent with existing international agreements.

6. At the beginning of the first stage the Commission shall make recommendations as to the manner of effecting the adjustment provided for in this Article and the timetable which shall govern it.

4. Article 90 reads:

1. In the case of public undertakings and undertakings to which they grant special or exclusive rights, Member States shall neither introduce nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94 inclusive.

2. Any concern entrusted with the management of services of general economic

Taken together, articles 37 and 90 point to the close interrelation between the establishment of a customs union and the establishment of a system of undistorted competition—an interrelationship which characterizes the Common Market, which distinguishes the Rome Treaty from other schemes of regulating state trading in commercial treaties, and which will of necessity serve as the single most important guide to its interpretation and application. Of course, the systematic position of these provisions coincides with differences in the substance of their regulation. In putting state trading into the perspective of comparable issues in international trade in general, this special aspect of the Rome Treaty emerges with a singular clarity. As a matter of history, of economic relevance and of legal technique, state trading lends itself to analysis in the separate contexts of (1) tariffs and quantitative restrictions and (2) a policy of competition.

1. *State Trading and Trade Barriers.*—Bilateral and multilateral commercial treaties concerning the reduction of tariffs, the regulation of quotas, and the application of most-favoured-nation clauses have to take into account the divergent effects of such agreements when applied to an economy, or a sector of an economy, characterized by state trading. Those effects of liberalizing trade, which automatically follow from the removal of trade barriers in a private enterprise system, do not necessarily ensue if one of the states concerned is itself engaged in trade.

Since no commercial treaty can make it obligatory for enterprises to take advantage of trading possibilities, such a state, for reasons of its own, may refuse to avail itself of the trading possibilities afforded by the treaty without thereby violating the letter of its obligations. This discretion, enjoyed as a matter of course by private enterprises, leaves the state as an entrepreneur virtually with that very freedom of action—a freedom to restrict trade—which the treaty was intended to regulate.

The Havana Charter for an International Trade Organization[5] for the first time undertook to integrate state trading into a general

interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to the rules of competition, in so far as the application of such rules does not obstruct the *de jure* or *de facto* fulfilment of the specific tasks entrusted to such concerns. The development of trade shall not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall see that effect is given to the provisions of this Article and shall, where necessary, issue appropriate directives or decisions to the Member States.

5. United Nations Conference on Trade and Employment, held at Havana, Cuba, from Nov. 21, 1947, to March 24, 1948. Final Act and related documents, Chapter IV, section D (State Trading and Related Matters), arts. 29-32 (Mar. 1948) [hereinafter cited as Havana Charter].

system of free trade. Although it has remained in draft form, it has substantially influenced later treaties, including the Treaty of Rome.[6] The General Agreement on Tariffs and Trade (GATT),[7] having adopted the outlines of the Havana Charter, considers state trading in the context of tariffs and quantitative restrictions. Import monopolies are proscribed from operating so as to afford protection in excess of the amount of protection afforded by tariffs in general.[8] The protection afforded domestic producers is to be determined by comparing the "landed cost" of a product (including tariffs) with a defined "import mark-up."[9] In addition, all provisions relating to quantitative restrictions are applicable to restrictions effected by state-trading operations.[10]

The rule of non-discrimination, as specified by the rule of general most-favored-nation treatment[11] and by the non-discriminatory administration of quantitative restrictions[12] has been adapted to the special problems of state trading. State enterprises and enterprises to which a contracting party grants, formally or in fact, exclusive or special privileges are required to follow a policy in accordance with commercial considerations and, furthermore, to afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.[13] However, the implementation of these rules is limited to a formal recognition that state enterprise might be operated so as to create serious obstacles to trade. "[T]hus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade."[14] Information about the operation of article 17 enterprises may be requested whenever a contracting party has reason to believe that its interests are thereby adversely affected.[15]

Commentators apparently agree that these and other attempts to equalize the effects of commercial treaties as between states with

6. *Compare* Havana Charter arts. 29, 31, *with* Rome Treaty arts. 37, 90.

7. The official text of the general agreement is contained in CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 3 BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1958) [hereinafter cited as GATT]. All references to the provisions of the agreement are taken from this text.

8. GATT art. II, para. 4.

9. *Compare* GATT art. II, para. 4 (as amended by Annex I ad art. II, para. 4), *with* art. XVII, para. 4 (b) (as amended by Annex I ad art. XVII, para. 4).

10. GATT, Annex I ad arts. XI-XIV, XVIII: "Throughout Articles XI, XII, XIII, XIV and XVII the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations."

11. GATT art. I.

12. GATT art. XII.

13. GATT art. XVII, para. 1.

14. GATT art. XVII, para. 3.

15. GATT art. XVII, para. 4 (c).

and without state trading have proved rather ineffective.[16] An initial comparison of article 37 with the regulation of state trading monopolies in GATT shows significant differences. Article 37 provides not rules of conduct, but an *adjustment* of state trading monopolies "so as to ensure that, when the transitional period expires, no discrimination exists between the nationals of Member States as regards the supply or marketing of goods."[17] Contrary to the anti-discrimination provision of GATT, article 7 prohibits not only discrimination as between foreigners, but rather all discriminations on the grounds of nationality. The general prohibition of article 7 applies without prejudice to more particular provisions such as article 37. The scope of article 37 goes beyond discrimination on the grounds of nationality since all discrimination is to be eliminated "between the nationals of Member States as regards the supply or marketing of goods."[18] Furthermore, discrimination may be found irrespective of any arbitrary or wilful conduct, for those market conditions are decisive which may lead to the discrimination specified. Article 37 views state trading monopolies as instruments of quantitative restrictions, to be adjusted by the termination of the transitional period and thereafter subject to the general rules of the Treaty, particularly to the rules of competition. Thus is the crucial question posed: Do there exist characteristics of state trading monopolies, which by their very nature prove to be discriminatory, and must, therefore, be "adjusted"? If so, the exclusive right of import or export will be incompatible with the Treaty.

2. *State Trading and the System of Undistorted Competition.*— The interdependence of the customs union and the system of undistorted competition within the Community has come to be taken for granted. But it is in this respect that the Community is the most progressive, even revolutionary, system of regulating and preserving competition in international trade. The more ambitious the policy of maintaining competition, the more crucial the position of public enterprise becomes. Conversely, as long as international cartels and similar arrangements were envisioned as instruments of market organization by the governments concerned, the tasks and functions of

16. HUTH, DIE SONDERSTELLUNG DER OFFENTLICHEN HAND IN DEN EUROPAISCHEN GEMEINSCHAFTEN 202-05 (1965); SEYID MUHAMMAD, THE LEGAL FRAMEWORK OF WORLD TRADE 231 (1958); Fawcett, *State Trading and International Organization*, 24 LAW & CONTEMP. PROB. 341, 344 (1959).

17. The text of the Treaty in all four authentic languages allows of no doubts in this respect; *e.g.*, the French text: ". . . soit assuré l'exclusion de toute discrimination . . . ." and the German: ". . . dass jede Diskriminierung ausgeschlossen ist . . . ." The duration of the transitional period is determined by article 8.

18. The relationship of the discrimination prohibitions is discussed in detail in the text following note 76 *infra*.

public enterprises were interpreted accordingly and posed no specific problems of policy. The contrast between the Treaty of Rome and earlier projects for a customs union in Europe reveals the economic and legal significance of the establishment of a system of undistorted competition.

(a.) *A Note of History.*—In 1927, when the League of Nations held a World Economic Conference to deal with the difficulties arising out of the economic and political disunion in Europe, the lowering of tariffs and the functioning, promotion, and control of international cartels were foremost on the agenda.[19] National cartel regulation was unanimously accepted as the basis of control.[20] The possibility of international control, based upon international jurisdiction and enforced by delegations representing governments which for the moment renounced their rights, was considered to be so extreme that "no sensible men at this conference or anywhere else" would agree to such a suggestion.[21] It will be difficult to find a comparable case of inadvertent prophecy in forecasting the rules of competition of the Rome Treaty.[22]

The World Economic Conference was followed in 1930 by the "preliminary conference with a view to concerted action."[23] This preliminary conference was concerned with negotiations for a tariffs truce to improve the economic relations of the states concerned and to contribute toward the economic union of Europe, the addresses by Briand and Stresemann in the Assembly of the League of Nations in 1929 having inspired the idea of a "United States of Europe" in the context of economic integration.[24] The aim of the negotiations planned by the preliminary conference was twofold: (1) to secure concerted action with a view to closer cooperation, the improvement of the regime of production and trade, and the enlargement of markets, and (2) to facilitate the relations of the European markets among themselves and with overseas markets, so as to consoli-

19. LEAGUE OF NATIONS, REPORT, *Proceedings of the World Economic Conference,* held at Geneva, May 4, 1927, vol. 2, Doc. No. C.356.M.129-1927.II, at 125-70 (1927).

20. The reporter of the pertinent committee stated:

> First and foremost—and it cannot be repeated too often—these international cartels must come under the jurisdiction of the court of the state in whose territory they are operating, whether this happens to be in their own country or elsewhere, and even when they have contracts with nationals of other countries. Hence they are subject to drastic supervision, being subordinate to the judicial authorities and the law. *Id.* vol. 1, at 152.

21. *Ibid.*

22. For a summary of the position at the Conference in respect of international cartels see LEAGUE OF NATIONS, THE WORLD ECONOMIC CONFERENCE, Geneva, May 1927, FINAL REPORT, Doc. No. C.E. I.43, at 41, 43-44 (1927).

23. LEAGUE OF NATIONS, Doc. No. C.222. M. 109 (1930).

24. As to the political background, see generally ALBONETTI, VORGESCHICHTE DER VEREINIGTEN STAATEN VON EUROPA (1961).

date economic peace among nations.[25] The participating states submitted proposals in furtherance of these aims,[26] containing among other suggestions the reduction of tariffs, the establishment of a customs union, and the regulation of markets by international cartels. In particular, the Belgian Government proposed the distribution and localization of the production and trade by international cartels for such mass products as crude and simply rolled metals, plate glass and cement.[27] The German Government, wishing to enlarge markets by reducing tariffs and establishing customs unions, suggested that "[a]part . . . from official measures, agreements between industries or agricultural associations in various countries might also help to widen the markets and to improve international trade."[28]

The French delegation developed these ideas into a comprehensive proposal submitted to the "Commission of Inquiry for European Union" which was held under the auspices of the League of Nations.[29] One of the causes of the depression was said to be disturbance of the equilibrium between the production of raw materials and the production of manufactured articles—a disturbance caused in turn by over-rapid technological progress and an over-accentuated rhythm of rationalization during the preceding few years. Harmony between the main centers and elements of production was said to have been lacking, and the defective market allocation was attributed to the use of machinery ill-adapted to secure optimal product distribution. The proposed remedy was to correct the operation of the machinery of production and distribution and to impose greater discipline in the matter of production and sales; this to be achieved by agreements and cartels in conjunction with a customs union.[30] These agreements and cartels were to be concluded under the auspices of the participating governments on the basis of plans initiated by the various industrial interests. In this way, it was thought possible to reduce tariffs in

25. LEAGUE OF NATIONS, *op. cit. supra* note 23, at 35.

26. LEAGUE OF NATIONS, PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE WITH A VIEW TO CONCERTED ECONOMIC ACTION, Geneva, Nov. 17-28, 1930, Dec. No. C.149.M.48. 1931, II. B. Fourth Part, Annexes.

27. *Id.* at 127-28.

28. *Id.* at 120.

29. LEAGUE OF NATIONS, COMMISSION OF ENQUIRY FOR EUROPEAN UNION, MINUTES OF THE THIRD SESSION OF THE COMMISSION, held at Geneva, May 15-21, 1931, Doc. No. C.395.M.158. 1931, VII; at 20 (1931); PROPOSALS FOR REMEDYING THE PRESENT EUROPEAN CRISIS, MEMORANDUM FROM THE FRENCH GOVERNMENT, LEAGUE OF NATIONS, *op. cit. supra*, Annex at 79-88.

30. The French Government proposed that, since a general action to bring about the immediate and simultaneous lowering of customs duties had not succeeded, the economic life of the nations, each material and product dealt with in turn, should be organized at an accelerated rate, by developing the system of combines and cartels, regardless of political frontiers, in the certainty that in this way and in no other way customs barriers will gradually be eliminated smoothly and without disturbance. *Id.* at 85.

any way interfering with the interests of producers and consumers and without disturbing the individual national economies.

These proposals illustrate how the reduction of tariffs and the protection of national markets may be simultaneously propounded. Their economic foundation is to be found in the attempt to combine the trade-diverting effects of a customs union with the exclusion of that competition within the union created by the abolition of tariffs.[31] The protection of the home industries was to be thereby strengthened and the terms of trade vis-à-vis third countries improved without at the same time allowing competition to develop. The status quo was to be secured by territorial allocation of markets on the basis of nationality, while quotas and prices were to be agreed upon with respect to joint markets. Agreements to specialize production appeared as a dynamic achievement and as the only rational way of organizing markets.

It would probably be too optimistic to assume that in Europe today these ideas have been relegated to the past. But that the Rome Treaty does in fact so relegate them ought to be manifestly clear.

(b.) *The Rules of the Rome Treaty in Perspective.*—The Rome Treaty aims to secure all possibilities of free trade arising from the abolition of tariffs and quantitative restrictions. It is for this purpose that all measures having the equivalent effects of customs duties or quantitative restrictions are meticulously proscribed (article 9, paragraphs 1 and 30), as are the introduction of new customs duties, quantitative restrictions and measures having equivalent effects (articles 12 and 31).

The unconditional obligation of the member states to refrain from interfering with the free movement of goods gives rise to equivalent individual rights to make use of these possibilities of trade between member states.[32] The customs union cannot be looked upon merely as a device to facilitate negotiations with respect to the acceptable degree of trade among the member states or as an instrument to avoid the technical and political defects involved in negotiating tariff concessions. Rather, the *functioning* of the common market consists in the exercise by the individual enterprises of that right of free trade which is concomitant with the abolition of customs duties. Moreover, this potential competition is protected as a matter of law, for the Treaty implements the principle of free entry to the national markets by rules of competition which regulate the behavior of enterprises

31. See VINER, THE CUSTOMS UNION ISSUE 75 (1950).

32. Rechtssache 26/62. N.V. Allgemene Transport- en Expedite Onderneming van Gend & Loos v. Niederländische Finanzverwaltung, IX Sammlung 1 (1963), 2 CCH COM. MKT. REP. ¶ 8008 (1963).

within a system of undistorted competition. And as clearly articulated by article 90 paragraph 1, these same principles are binding upon the member states in their capacity as entreprenuers. The direct relation of these rules of competition to the customs union highlights the transition from a customs union to an economic union—from the abolition of trade barriers to the development of the Common Market as an institution.

Article 90 paragraph 1, it should be noted, is not necessary to subject public enterprises to the rules of competition. Commentators agree that the term "enterprise" in articles 85 and 86 includes enterprises of all kinds (public as well as private) and that state agencies and state-owned-or-controlled enterprises are within its ambit. Article 90 paragraph 1 is more significantly directed towards the member states, proscribing measures which as such would not be covered by the rules of competition.[33] The specific reference to article 7 and articles 85 to 94 underlines the fact that the market effects of state measures are brought about by the conduct of enterprises. The highly important, special function of article 90 paragraph 1 is to prevent the member states from interfering with competition by exercising their special prerogatives vis-à-vis public enterprises, thus acting contrary to the spirit of the rules of competition without, however, violating the letter of the Treaty.[34]

A comparison with GATT and the Havana Charter indicates the extent to which article 90 extends the previous rules governing public enterprises. Although the Havana Charter provided in chapter V for measures against restrictive practices engaged in or effected by "public commercial enterprises,"[35] the measures were to apply only upon a declaration by the member state that it assumed responsibility for the enterprises.[36] Article 90, like all other provisions of the Rome Treaty, applies irrespective of either a national initiative or the position an enterprise may hold under national law. Thus, an enterprise may come within the scope of article 90 even though it is not considered a public enterprise under the law of the respective member state. Similarly, although article 90 paragraph 1 reflects the language of GATT (which speaks of enterprises to which a member state "grants . . . formally or in effect, exclusive or special privi-

33. See MESTMACKER, *Offene Markete im System unverfalschten Wettbewerbs*, in WIRTSCHAFTSORDNUNG UND RECHTSORDNUNG, FESTSCHRIFT FUR FRANZ BOHM 345, 384 (1965).

34. REGIERUNGSAUSSCHUSS, EINGESETZT VON DER KONFERENZ VON MESSINA, BERICHT DER DELEGATIONSLETTER AN DIE AUSSENMINISTER, April 4, 1956, at 61 [hereinafter cited as SPAAK REPORT].

35. Havana Charter art. 46, para. 2 (b).

36. Havana Charter art. 54, para. 2 (b)(ii).

leges . . . ."),[37] in substance, the commercial considerations clause[38] of GATT cannot be compared with article 90. GATT, of course, contains no rules against restrictive business practices, and a substantially less comprehensive principle of non-discrimination than that incorporated into article 90 by reference to article 7.

The Spaak Report, in outlining the characteristics of the future Common Market, referred to what was ultimately to become article 90 paragraph 1 in terms of discrimination: "The most flagrant discriminations by sellers are caused, or assisted in, by states. The application of the rules of competition to enterprises will, therefore, be simplified or even will be displaced by rules of competition by the member states."[39] It is highly significant that, as early as in this report, the elimination of discrimination by state enterprises was assumed to be the function of the rules of competition.

Article 90 paragraph 2 contains an exemptive provision for enterprises "entrusted with the management of services of general economic interest or having the character of a fiscal monopoly." These enterprises are *ipso jure* exempted from the Treaty as a whole, including the rules of competition, but only insofar as the fulfillment of the specific tasks entrusted to them would be obstructed by the application of these rules. This exemption does not automatically apply to the enterprises referred to in article 90 paragraph 1. Moreover, article 90 paragraph 2, contrary to article 90 paragraph 1, is directed toward the enterprises as such, rather than toward the member states. Insofar as the exemption operates, however, it obviously exempts the member states from otherwise proscribed measures taken with respect to such enterprises.

II. STATE TRADING MONOPOLIES UNDER ARTICLE 37

A. *The Policy of the Commission During the Transitional Period*

1. *Survey of State Trading Monopolies in the EEC.*—In compliance with a request of the Commission, the member states gave notification of the products they considered to be subject to a state trading monopoly within the meaning of article 37.[40] The organization, scope,

37. GATT art. XVII, para. 1 (a).

38. GATT art. XVII, para. 1 (b).

39. SPAAK REPORT 14 (author's transl.).

40. The Commission has reported on the notified monopolies, see 3 GESAMTBERICHT UBER DIE TATIGKEIT DER GEMEINSCHAFT 95 (No. 105 (1960)) [hereinafter cited as GESAMTBERICHT]; 7 GESAMTBERICHT 39 (No. 21) (1964); Response to the Commission to Inquiry No. 51 in the European Parliament, July 24, 1964, AMTSBLATT DER EUROPAISCHEN GEMEINSCHAFTEN 390 (1965) [hereinafter cited as Response to Inquiry No. 51]. There are the following state trading monopolies in the member states: France: tobacco, matches, potash, newsprint, explosives, alcohol, mineral oil; Germany: matches, alcohol; Italy: tobacco, cigarette paper, matches, phosphor, firelighters and flints, salt, sulfur, quinine, saccharine, bananas.

activities, and functions of these monopolies are vastly different. They may cover production, marketing, export and import of the monopolized goods. They may monopolize the distributive organization, or they may sell to all comers. The purposes are as manifold as the aims of state interventions: national autonomy, because of the strategic importance of the goods; protection of native producers; state revenues; the provision for veterans, as in the case of the French tobacco monopoly.

The monopolies may be organized as branches of the government, as public corporations, or as private corporations subject to a regime that in effect creates a state monopoly. The latter case gives rise to the question whether article 37 paragraph 1, subparagraph 2 requires a certain kind of organization besides the monopolizing of a market.[41] The scope of the monopoly is relevant under article 37 only insofar as it appreciably influences, directly or indirectly, imports or exports between member states. The monopolization of production as such is not covered, although it will probably influence the monopoly's buying or selling policy as well.

2. *The Elimination of Quantitative Restrictions.*—Quantitative restrictions in general are to be abolished gradually (articles 30 to 36); article 33 specifies the conditions and the timetable to be observed. State trading monopolies are to be adjusted in harmony with the timetable applicable to the abolition of quantitative restrictions on the same products (article 37 paragraph 3). Consequently, in some cases the member states established global quotas (article 33 paragraph 1) for the import of monopolized goods as a first step in the direction of an adjustment.[42] Italy abolished all quantitative restrictions for the import of tobacco.[43] Germany has undertaken to abolish gradually certain quantitative restrictions for spirits and to introduce a system whereby import licenses will be granted automatically.[44] Italy substituted for her banana monopoly an import regulation aiming at a complete liberalization of trade.[45] The effects of these measures on the importation of monopolized goods have varied considerably. As was to be expected, the increase of global quotas—or even their abolishment—did not always lead to proportional increases in the importation of such goods, for as long as the importation de-

41. See text accompanying and following notes 64-66 *infra*.

42. *E.g.*, the Italian salt monopoly, 7 GESAMTBERICHT 42 (No. 27) (1964); 5 GESAMTBERICHT 47 (No. 17) (1962); the Italian cigarette paper monopoly, 5 GESAMTBERICHT 47 (No. 17) (1962).

43. Europäische Wirtschaftsgemeinschaft, Kommission, Die 1. Stufe des Gemeinsamen Marktes, Bericht über die Durchführung des Vertages (Jan. 1958 to Jan. 1962) 26.

44. 8 GESAMTBERICHT 46 (No. 30) (1965).

45. 9 GESAMTBERICHT 50 (No. 34) (1966).

pends upon the discretion of the monopoly, the abolition of quantitative restrictions may be but a token measure of compliance.

3. *The Recommendations of the Commisison Under Article 37 Paragraph 6.*—The Treaty directs the Commission to make "recommendations as to the manner of effecting the adjustment provided for in . . . [article 37] and the timetable which shall govern it" (article 37 paragraph 6). As recommendations of the Commission have no binding force (article 189), the member states are free to effect the requisite adjustment in ways other than those recommended. However, the position of the Commisison has considerable weight with respect to the interpretation of article 37; and, although the recommendations as such are not binding, the rules of article 37 are definitely binding. The recommendations thus serve to facilitate compliance by the member states and to assure a balanced adjustment with similar effects in all member states concerned.

In compliance with the mandate of article 37, the Commission issued recommendations to the member states with respect to the adjustment of their monopolies.[46] In these recommendations the Commission pointed out that article 37 paragraph 1 dictates the purpose of the adjustment without regulating the methods by which it is to be achieved. However, as long as the monopolies were the sole importers of the monopolized goods, it was necessary, according to the Commission, to eliminate at least the following kinds of discriminations:[47] (a) discrimimations flowing from a restriction of imports, as compared with the potential sales on the market in the member states' territory (the potential sales to be ascertained by taking into account the elimination of the following discriminations as well); (b) discriminations created by the application of different mark-ups between delivered prices and sales prices to imported products on the one side and domestic products on the other side, whereby a

46. Recommendation to the Italian Government, Feb. 2, 1962 (bananas), AMTSBLATT 342 (1962); recommendation to the French Government, April 6, 1962 (tobacco), AMTSBLATT 1500 (1962); recommendation to the French Government, April 11, 1962 (matches), AMTSBLATT 1502 (1962); recommendation to the Italian Government, April 11, 1962 (matches), AMTSBLATT 1505 (1962); recommendation to the French Government, April 12, 1962 (potash), AMTSBLATT 1506 (1962); recommendations to the Italian Government, July 4, 1963 (bananas), AMTSBLATT 2150 (1963); recommendation to the French Government, July 24, 1963 (mineral oil), AMTSBLATT 2271 (1963); recommendation to the German Government, Nov. 26, 1963 (alcohol), AMTSBLATT 2857 (1963); recommendation to the French Government, Nov. 26, 1963 (alcohol), AMTSBLATT 2858 (1963). The recommendations to the Italian Government of March 28, 1960 (tobacco) and that to the French Government of April 12, 1962 (crude oil) have not been published. See Response to Inquiry No. 51, *supra* note 40.

47. See recommendations of April 6, 1962 (French tobacco), April 11, 1962 (French matches), April 11, 1962 (Italian matches), April 12, 1962 (French potash), as cited *supra* note 46. To the same effect, 5 GESAMTBERICHT 48 (No. 18) (1962); 6 GESAMTBERICHT 44 (No. 17) (1963).

higher charge is allocated to the imported goods; and (c) discriminations in the distribution of imported goods, particularly in selling to retailers, in opening up new markets, and in advertising. The effects of these recommendations on the conduct and the organization of the monopolies, particularly on the importation of the goods concerned, and on the competitive position of third country sellers are not readily apparent. This is true as to the immediate effects as well as to the adjustments of the monopolies to a free market.

The Commission itself did not decide whether compliance with its recommendations would be sufficient to fulfill the obligations under article 37 paragraph 1, but rather adopted the position that only experience would show whether the recommended measures were satisfactory:

> If the realization of the principles outlined does not effect a true liberalization of the trade in monopolized goods which is comparable with that liberalization which follows from the elimination of tariffs and quantitative restrictions for all other goods, then the preservation of the exclusive rights of these monopolies to import the monopolized goods would be contrary to the aims of article 37, contrary to the principle of reciprocity in opening up national markets, and contrary to the universality of the Common Market, which according to article 9 paragraph 2 shall apply to all products.[48]

Thus, the Commission points to what was previously denominated the most important single issue under article 37 paragraph 1: whether the maintenance of the exclusive right to import the monopolized goods is compatible with the mandate to eliminate the possibilities of all discrimination at the end of the transitional period. In relying on future experience, the Commission avoids answering this question as a matter of law.

In response to an inquiry in the European Parliament in 1965,[49] the Commission reported that the member states had agreed "in principle" with its recommendations and were taking measures in accordance therewith to adjust their monopolies. However, the French Government has introduced a pricing system for tobacco which is different from that proffered by the Commission. And there are negotiations with respect to the recommendations concerning the French matches monopoly and the Italian alcohol monopoly.

There remain important issues under article 37, the relevance of which extends beyond the expiration of the transitional period. They concern the nature of the organization covered by article 37 paragraph 1, subparagraph 2 (under section B *infra* p. 334), the meaning of

48. *Ibid.* (author's transl.).
49. Response to Inquiry No. 51, *supra* note 40.

the prescribed "adjustment" of the monopolies under article 37 paragraph 1 (under section C *infra* p. 338), the meaning of the "stand-still" clause of article 37 paragraph 2 (under section D *infra* p. 344), and the relation of article 37 to other provisions of the Treaty (under section E *infra* p. 346).

B. *Which Organizations Are Covered by Article 37 Paragraph 1?*

1. *Opinions of the Court of Justice.*—The paramount importance of determining which organizations constitute state trading monopolies or similar organizations within the meaning of article 37 paragraph 1 became fully apparent in connection with the administrative, judicial, and scholarly controversy surrounding the French petroleum system. The underlying reason for this controversy is obvious: compliance with article 37 appears to be more advantageous to the member states than compliance with the general provisions of the Treaty, *if* article 37 is considered a special provision taking precedence over all others.[50]

Articles 30 to 36 decree an automatic liberalization of quantitative restrictions while article 37 provides for a gradual adjustment of monopolies only, leaving the details to the discretion of the member states. Under articles 30 to 36, all quantitative restrictions are to be abolished at the end of the transitional period, while under article 37 only discriminations must be eliminated. If article 37 should permit the maintenance of an exclusive right of importation, such an arrangement would leave considerably more leeway to the member states than do the quantitative restriction provisions. Moreover, if article 37 is also considered a special provision with respect to the rules of competition, that would provide the member states with an additional incentive to broaden its scope, as the rules of competition are applicable in full without any period of grace. The delineation of article 37, therefore, has implications far beyond the adjustment of those monopolies which are presently notified with the Commission.[51]

The Court of Justice barely touched upon the problem in the *Costa* case.[52] There the court settled a preliminary issue with respect to the nationalization[53] by the Italian Government of the production and

50. To this effect see Van Hecke, *Government Enterprises and National Monopolies under the E.E.C. Treaty*, 3 COMMON MKT. L. REV. 450, 454 (1966).

51. The Commission has already announced that it is investigating other branches of industry in order to ascertain their standing under art. 37. Response to Inquiry No. 51, *supra* note 40.

52. Rechtssache 6/64, Costa v. E.N.E.L. (Ente nazionale Energia elettrica impresa già della Edison Volta), X Sammlung 1254 (1964); 2 CCH COM. MKT. REP. ¶ 8023 (1964) (with Conclusions of Advocate General Lagrange of June 25, 1964).

53. Law of Dec. 6, 1962, No. 1643, Gaz.uff. No. 316, Dec. 12, 1962, Leggi e decreti 1962, No. 1643, at 5523, and subsequent decrees.

distribution of electrical energy by rejecting (in accordance with the conclusions of Advocate General Lagrange)[54] the view of the Italian Government that article 37 was inapplicable because the production and supply of electrical energy constituted a public service.[55] The prerequisites of a state trading monopoly within the meaning of article 37 were referred to in the following terms:

> This article prohibits the introduction not of all state monopolies but of 'trading' monopolies, in so far as they tend to introduce the above-mentioned . . . [article 37 paragraph 1] discriminations. In order to come within the prohibition of this provision, the State monopolies and the organizations in question, must on the one hand, have as their purpose transactions in a commercial product that is likely to be the object of competition and of trade between the Member States and, on the other hand, play an active part in such trade.[56]

More controversial were the issues growing out of the French petroleum system with which the Court was faced in the *Sopeco* case.[57] The French petroleum system is basically a system of governmental market regulation resulting from the statutory enactment[58] of a comprehensive cartel arrangement previously created by French producers of petroleum and petroleum derivatives. Under the present system, these products may be imported into France only by firms authorized by special decree, which decrees fix sales quotas with respect to the products derived from the imported petroleum. There are no quotas for the sale of products derived from French crude oil (including oil from the Sahara region). Since the eight authorized importers of crude oil must obtain at least 90 per cent of their total sales from French refineries, the authorized importers, being the major refiners themselves, are obliged to refine the imported products in their own refineries or affiliated refineries. Thus, the control of imports is integrated into the general allocation of the French market.

54. Conclusions of Advocate General Lagrange, *supra* note 52, at 1300-03, 2 GCH COM. MKT. REP. at 7402-03 (1964).

55. The concept of "service publique" is known in Belgian, French and Italian law. The applicability of the concept and the substance of the special objectives are different in the three countries. The concept is known to neither the law of Germany nor that of the Netherlands. This was pointed out by Advocate General Lagrange, *supra* note 52, in arguing against the concept's incorporation into Community law. It is for the same reason that art. 90 para. 2 referring to "any concern entrusted with services of general economic interest" is a concept of Community law and must be interpreted as such.

56. Conclusions of Advocate General Lagrange, *supra* note 52, at 1276, 2 CCH COM. MKT. REP. at 7393 (1964).

57. Rechtssache 20/64, S.A.R.L. Albatros v. SOPECO (Société des Pétroles et des Combustibles liquides), XI-3, Sammlung (1965); 2 CCH COM. MKT. REP. ¶ 8029 (1965) (with Conclusions of Advocate General Gand of Dec. 2, 1964).

58. Law of March 30, 1928 (as amended by numerous decrees and ordinances).

The importation of derivatives, which was involved in the *Sopeco* case, is subject to authorization by decree as well. Again, the authorized importers are generally the companies which are simultaneously engaged in the distribution of French competitive products. Moreover, the French petroleum system is not limited to import restrictions. All operations from the refining level to the different uses of derivatives and to the retail level are subject to close governmental supervision and regulation.

Albatros, an Italian firm, had agreed on March 9, 1959, to supply Sopeco, the French firm, with 6000 metric tons of gasoline. In April of 1959, Sopeco informed Albatros that the French authorities had refused an import license. When sued for breach of contract in an Italian court, the defendant claimed that the refusal of the French authorities to authorize the importation was *force majeure* and relieved it of its contractual obligations. On the request of the parties, the Italian court referred the case to the Court of Justice asking for a preliminary ruling in accordance with article 177.

The Court did not rule on the validity of the French law per se for that is not its function under article 177. Rather it "sifted out" from among the questions actually certified to it by the Italian court those properly addressed to Treaty interpretation. The Court interpreted the "sifted out" questions extremely narrowly, finding no reason to examine whether the French system constituted a monopoly within the meaning of article 37. This the Court was able to do by restricting its ruling to the question whether, at the time the contract was made, the Treaty called for the abolition *ipso jure* of those laws referred to in any of the provisions of the chapter concerning quantitative restrictions. Finding that all of the provisions on quantitative restrictions, including article 37, called for a gradual abolition of restrictions, that question obviously had to be answered in the negative. On the basis of the finding, the Court was able to defer a ruling on the relation of article 37 to other provisions of the Treaty. In effect, the case leaves almost everything undecided.

However, both the Commission and Advocate General Gand found it apposite to examine whether the French petroleum system was a state trading monopoly, and advised the Court that their answer was positive. The Commission relied upon its opinion in the recommendation to the French Government to adjust the petroleum system.[59] Advocate General Gand referred to this opinion of the Commission and to the history of article 37: "In spite of the small amount of information available . . . it appears impossible to deny the fact that the French system was considered at the time as belonging within the

59. AMTSBLATT 2271 (1963).

framework of article 37."[60] He further indicated that he thought the system of imports could not be described as a state monopoly either retained by the state or delegated, but that it constituted "one of the types of import controls that are referred to in Article 37 paragraph (1) . . . [subparagraph 2] of the Treaty."[61]

2. *The Outlines of a Definition.*—The French Conseil d'État in an earlier case[62] found the French petroleum system so clearly within the ambit of article 37 that it did not deem it necessary to refer the issue to the Court of Justice under article 177, although it decided as a "domestic court of a Member State, from whose decisions there is no possibility of appeal under domestic law," and was therefore bound to refer questions concerning the interpretation of the Treaty to the Court of Justice.

It will be difficult to find an administrative or judicial decision, proclaimed to be so clear as to be unquestionable, which has a rationale less clear than that of this case.[63] While it would be beyond the scope of this paper to evaluate the French petroleum system as such, the case serves to illustrate with abundant clarity the importance of the alternative interpretations of article 37. Those legal writers who favor the application of article 37 to the French petroleum system generally stress the monopolistic influence of a member state on imports or exports as the decisive criterion in finding an organization under article 37 paragraph 1.[64] Contrary to the prevailing opinion, Würdinger expressly denies that article 37 paragraph 1, subparagraph 2 defines state trading monopolies.[65] But article 37 speaks of an

60. Conclusions of Advocate General Gand, *supra* note 57, at 22, 2 CCH COM. MKT. REP. at 7448 (1965).

61. *Ibid.*

62. Société des pétroles Shell-Berre, Conseil d'Etat, June 19, 1964, REVUE DU DROIT PUBLIC 1034 (1964); see also 2 COMMON MKT. L. REV. 221 (1964). A review of the criticism of this case by French legal writers is given by Chevalier, 3 COMMON MKT. L. REV. 100 (1965).

63. See the excellent article by Colliard, *L'obscure clarté de l'article 37 du Traité de Communauté économique européenne*, RECUEIL DALLOZ (CHRONIQUES) 263 (1964).

64. See CATALANO, MANUEL DE DROIT DES COMMUNAUTES EUROPÉENES 340 (1965); Schilling, *Der Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft und die staalichen Handelsmonopole*, in SOCIALECONOMISCHE WETGEVING EUROPA 241 (1960); Würdinger, *Probleme der Auslegung des Artikel 37 EWG-Vertrag betreffend die Handelsmonopole, dargelegt an dem Beispiel der französischen Mineralölwirtschaft*, 15 WIRTSCHATT UND WETTBEWERB 265 (1965); Huth, *Staatliche Handelsmonopole und EWG-Vertrag*, WETTBEWERB IN RECHT UND PRAXIS 428 (1965). Huth stresses the functional unity of a number of restrictive measures characteristic of art. 37 para. 1 (2) which he wishes to differentiate from the monopolies proper. He assumes for the former organization only that they are to be eliminated as such at the end of the transitional period.

65. *Compare* Würdinger, *supra* note 64, *with* conclusions of Advocate General Lagrange, *supra* note 52, at 1301, 2 CCH COM. MKT. REP. at 7402; ESTNER in VON DER GROEBEN & VON BOECKH, KOMMENTAR ZUM EWG-VERTRAG 104 (Art. 37 Anm. 6á)

"organisation through which a member state, *de jure or de facto,* either directly or indirectly controls, supervises or appreciably influences imports or exports by Member States." This wording leaves no doubt that an *organisme* or *Einrichtung* (the instrument *through* which imports or exports are controlled) is required. Colliard is correct in stressing this *organic* element of article 37 in addition to the *functional* element of controlling the export and import trade.[66] This interpretation finds decisive support in the *raison d'être* of article 37. Because commercial considerations and considerations of national policy are inseparably interwoven in the case of a state monopoly proper, application of the general rules on quantitative restrictions is insufficient. Only insofar as a comparable situation exists because of an "organisation through which a Member State" controls imports and exports, is there a justification for applying article 37. This provision not only allows, it demands such an interpretation.

C. *The "Adjustment" of State Trading Monopolies*

1. *The Purpose and the Effect of the Adjustment.*—The purpose of article 37 paragraph 1 is the elimination of every discrimination "between the nationals of Member States as regards the supply or marketing of goods." The monopolies are to be adjusted by the end of the transitional period. The Court of Justice, faced in the *Costa* case primarily with the interpretation of the "stand-still" clause of article 37 paragraph 2, was, of necessity, likewise confronted with the scope of the prohibition of discrimination in article 37 paragraph 1. But in referring the question whether there had been a discrimination back to the national judge, the Court was content to repeat the Words of the Treaty. A member of the Court recently suggested that the Court might appropriately reconsider its position because it "leaves too much to the decision of the national judge."[67] As has been noted previously, the Commission has also reserved its final position as to the mandate of article 37 paragraph 1. However, the issue under article 37 paragraph 1 of whether state trading

(1958); GLAESNER in WOHLFAHRT, EVERLING, GLAESNER & SPRUNG, DIE EUROPAISCHE WIRTSCHAFTSGEMEINSCHAFT 101-02 (Art. 37 Anm. 2) (1960); Schilling, *Der Vertrag zur Gründung der EWG und die staatlichen Handelsmonopole,* DER BETRIEB 697 (1961).

66. Colliard, *supra* note 63, at 266-67. *Accord,* Chevalier, *supra* note 62, at 102-03, Van Hecke observes that the French word "organisme" and the German word "Einrichtung" are perhaps clearer than the English word "organisation" in pointing to an entity as opposed to a method. Van Hecke, *supra* note 50, at 458.

67. Strauss, *Zölle und mengenmässige Beschränkungen in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschäften zum Rechte der Europäischen Wirtschaftsgemeinschaft,* in PROBLEME DES EUROPAISCHEN RECHTS, FESTSCHRIFT FUR WALTER HALLSTEIN 515, 532 (1966).

monopolies are by their very nature discriminatory remains. An affirmative finding would obligate each member state to abolish its monopolies vis-à-vis the other member states. A negative finding would lead to rules of conduct which ensure the gradual elimination of discrimination.

A literal interpretation of the term "adjust" fails to resolve the controversy. To "adjust" in the four equally authentic treaty languages simply refers to a change with respect to a given purpose.[68] But if a literal interpretation of article 37 paragraph 1 does not proscribe state trading monopolies by the end of the transitional period, neither does it guarantee their continued existence with respect to intra-Community trade. The use of the term "State trading monopolies" designates the organization which is subjected to an adjustment without indicating the character which that organization will have subsequent to the adjustment. The reference to import monopolies in the Spaak Report, though posing the problem succinctly, contributes little to the interpretation of article 37.[69] Historically, the drafting appears to reflect a compromise purposely avoiding resolution of the controversy.

2. *The Discriminations Proscribed.*—(a.) *Different Concepts of Discrimination.*—In determining the nature of the adjustment, certain legal writers engage in an ingenious, but ultimately misleading, linguistic analysis. They find in the concept of discrimination three requisite participants—a trinity consisting of the discriminating member state and at least two member state nationals, one of whom is discriminated against.[70] In arguing on the basis of a supposedly self-evident concept of discrimination, however, questions of substance have in fact been answered.

A state trading monopoly is characterized by the identity of the

68. See Colliard, *supra* note 63, at 264; HUTH, DIE SONNDERSTELLUNG DER OFFENTLICHEN HAND IN DEN EUROPAISCHEN GEMEINSCHAFTEN 271 (1965).

69. The pertinent part of the report reads:

> A special problem is posed if imports are controlled directly, not by quantitative restrictions, but through the establishment of state import monopolies or through private import monopolies licensed by the state.
>
> In this case the institution that restricts imports is identical with the buyer. An automatic increase of quotas is not feasible because this would lead to ferced buying.
>
> In finding a solution it is importaut that after the expiration of the transitional period state organizations for buying or importing are either abolished or adjusted to the Common Market, or, if necessary, are merged into a common organization . . . . The European Commission has to submit proposals for this development of the exchange of products and for the adjustment of the existing organizations, in order to gradually eliminate a discrimination among the sellers in the Common Market. SPAAK REPORT at 41, 42. (author's transl.).

70. See HUTH, *op. cit. supra* note 68, at 272; Huth, *supra* note 64, at 428.

member state as sovereign and as trader. Consequently, in selecting a buying or selling policy with respect to the monopolized goods, the member state is in a position to pursue both commercial purposes and, without benefit of specific legislative or administrative measures, a policy of controlling interstate trade in the national interest. This a member state might do, supposedly without running afoul of article 37, by monopolizing the distribution of its goods impartially, that is, by excluding domestic buyers as well as nationals of other member states. Such a concept of discrimination would enable a member state to define the acceptable degree of discrimination in interstate trade by restricting domestic trade accordingly. Thus, a system that restricted imports to selected domestic producers allegedly would not be discriminatory, since the remaining domestic firms would be in the same position as firms of other member states.

Even a literal interpretation of article 37 shows that those discriminations which relate to "the supply or marketing of goods" are covered. Consequently, discriminations on the basis of the origin of the products must be covered. But while this appears to be the predominant view among the commentators,[71] agreement in this respect does not preclude disagreement as to the consequence of the requisite adjustment. Colliard argues that non-discrimination does not mean wholly free market entry;

> rather it means the possibility of entry under equal conditions. These conditions are not satisfied, if the licensing may be determined by discretion; but they may be satisfied if this element of discretion be eliminated. The measure is no longer discriminatory if the procedure assures equal conditions for all competitors, *e.g.*, a procedure of competitive bidding supervised by a neutral institution and review by a court of arbitration being provided for. [72]

Such rules of conduct do not include the monopoly itself among the enterprises to be accorded equal treatment. In effect the requirement of discrimination between nationals of member states remains decisive. Würdinger, however, identifies discrimination on the basis of product origin with discrimination on the basis of nationality, and deduces that the mandate of article 37 is to eliminate the exclusive rights of imports or exports as they relate to trade among the member states.[73] Other writers have referred to the incompatibility

71. GLAESNER, *op. cit. supra* note 65, at 102-03 (Art. 37 Ann. 4); STEINDORFF, DER GLEICHHEITSSATZ IM WIRTSCHAFTSRECHT DES GEMEINSAMEN MARKTES, 31 (1965) (Steindorf argues on the basis of art. 37 that the general provision of art. 7 should be so interpreted as to cover all international discriminations including those based upon the origin of products); Van Hecke, *supra* note 50, at 460; Colliard, *supra* note 63, at 269; Würdinger, *supra* note 64, at 273-74.

72. Colliard, *supra* note 63, at 271. (author's transl.).

73. Würdinger, *supra* note 64, at 273.

of the very functions of state trading monopolies with those of the Common Market,[74] or to the expectation that supervision of the monopoly is not likely to lead to the complete elimination of all forms of national discrimination.[75]

(b.) *Discrimination Defined.*—It has been suggested that article 37 paragraph 1 be interpreted by taking into account its systematic context, its function in realizing free trade, and the position of public enterprise in a system of undistorted competition.[76] Article 37 serves to create conditions in the market of state trading monopolies comparable to those in markets where quantitative restrictions have been removed. Only under these conditions is it feasible that the exchange of goods may develop free from discrimination among nationals of the member states.

Initially, the relation of the prohibition of discrimination in article 37 to that of article 7 must be clarified. Article 7 discriminations consist in the application of aliens' restrictions by the state as sovereign to the nationals of other member states. In article 37, however, the state acts as an enterprise. Discriminations directed against nationals of member states may be effected by maintaining discriminatory conditions in the market through the exercise of monopoly power over interstate trade. The state does not create discriminatory conditions by legislative or administrative measures; rather, imports or exports of the monopolized goods are determined on the basis of national interest. The state trading monopoly, however, is in a position to enter the markets of its competitors freely and to sell and buy at its discretion. If equal conditions in the supply or marketing of goods for the nationals of member states are to obtain, then the competitors of the state trading monopoly must enjoy in the domestic market the same degree of freedom that is enjoyed by the monopoly in the market of its competitors.

The text of article 37 paragraph 1 does not simply subject state trading monopolies to a prohibition of discriminatory conduct in individual cases, as do article 85 paragraph 1(d) and article 86(c). Rather, the *possibility* of every discrimination is to be excluded by

74. Schilling, *supra* note 65, at 697.

75. Van Hecke, *supra* note 50, at 460; Pappalardo in QUADRI, MONACO & TRABUCCHI, 1 COMMENTARIO CEE 221 (Art. 37 No. 5) (1965) is most explicit on this point, stating that it is the possibility of discriminating as such which is to be eliminated. He affirms that this view which might, at a first glance, seem to strengthen art. 37 beyond its text, is fully justified and that if the completed adjustment of the state trading monopolies permits continuation of the proscribed art. 37 discriminations beyond the transitional period, the provision would be thereby violated.

76. See generally MESTMACKER, *op. cit. supra* note 33, at 356-63.

the prescribed adjustment.[77] Market dominating enterprises may interfere with the competitive freedom of their customers by discriminating among them; they may, for example, exclude potential competitors from their markets by vertical restraints of competition or by inducing their customers to interfere with a competitor's business by granting discriminatory rebates or price advantages. The prohibition of such discrimination prevents abuses of market power in individual cases; its application to state trading monopolies would be meaningless, however, for they are guaranteed the exclusive distribution of the monopolized goods by law, and they are protected from competition by law. The state trading monopoly itself determines, by its policy of buying and selling, whether and to what extent the goods of competitors may enter the market. The discrimination inherent in this structure of monopolies is to be excluded by their adjustment.

This differentiation of articles 37 and 86 further defines the role of the former. State trading monopolies are enterprises and would be subject to the rules of competition, particularly to articles 85, 86, and 90, if article 37 did not grant a temporary exemption. The prohibition of article 37 would be unnecessary to prohibit discriminatory behavior in individual cases because such a prohibition applies by force of article 90 paragraph 1 and article 86(c) in any case. Furthermore, article 90 paragraph 3 empowers the Commission to take action against article 90 violations by directive or decision addressed to the member states, and this power exists irrespective of the expiration of the transitional period. It is, therefore, the special function of article 37 to ensure that, at the end of the transitional period, market conditions prevail that admit of integrating state trading monopolies into the Common Market by the application of articles 85, 86, and article 90 paragraph 1.

The standard to be applied in establishing an article 37 discrimination cannot be derived from the monopoly's own purchase and sales policy. Rather, this standard must be found in the prevailing conditions of supply or marketing in markets free from quantitative restrictions. Will the realization of the recommendations of the Commission lead to such a free market?[78] Although the Commission deferred the question, it had to proceed provisionally from certain standards whereby discriminations could be determined. One of the standards used is the average cost of production of the monopoly; yet these costs are no objective standard. They are to a large degree functionally related to price policy which is in turn a matter of

77. The French text appears to support this view: "qu'à l'expiration de la période de transition soit *assuré* . . . ." (Emphasis added.).

78. See notes 46-48 *supra* and accompanying text.

discretion, as is necessarily the allocation of overhead and joint costs to specific phases of production or distribution. All of these costs will be allocated in harmony with a general market strategy.[79] Furthermore, the supervision of sales prices, which the Commission has set up for the purpose of preventing unreasonably low prices in relation to production costs, would call for a permanent supervision of business policy. The very fact that such a supervision would be necessary illustrates that state trading monopolies would remain removed from conditions of undistorted competition.

Another standard provisionally applied by the Commission is "market saturation." Comparable objections apply since the saturation of the market is related to sales and price policy. The price policy may determine the quantity of sales just as the quantity sold may determine prices. Consequently, the price policy may be used to manipulate the volume of sales as effectively as direct quantitative restrictions. Every firm must take into account this interdependence of price policy and sales volume. What has been said with respect to prices applies to all other elements of sales policy; the classification of goods into price groups, the delineation of sub-markets, advertising policy, the geographical diversification of distribution, and the methods of introducing new products are necessarily determined by overall market strategy. As long as a state trading monopoly exercises an exclusive right of import and export, it must take into account the effects of its sales policy on the market position of competitive goods. The possibility of abuse is inherent in such a sales policy which has effects on both domestic and foreign competitive products. The monopoly necessarily maintains control over the entry of competitors into its market. The exercise of this control leads to inherent discrimination if compared with those market conditions which would prevail in the absence of all quantitative restrictions. Free entry to all markets in interstate trade, as guaranteed by the Treaty's policy of open markets, will prevail only if the state trading monopoly's competitors are in a position to determine their own sales policy in the market of that monopoly.

This interpretation of article 37 paragraph 1 gains support from article 37 paragraph 3, subparagraphed 2. There it is provided that, until the adjustments provided for in article 37 paragraph 1 have been effected, the Commission may authorize the remaining member states to impose protective measures with respect to products subject to state trading monopolies. The provision leaves no doubt that conditions of "supply and marketing" as regards the nationals of member states call for a comparison of the monopolized market with

79. The cases where prices are lowered below direct costs of production are so rare that they may be disregarded.

the market for the monopolized goods in the other member states. This is so because protective measures against the monopoly may be imposed by the member states in their national markets. Thus, the Treaty excludes the state trading monopoly's own distributive organization as the standard by which to determine whether conditions of supply or marketing are discriminatory. The fact that a state trading monopoly deals with selected distributors only, and that, consequently, domestic distributors do not enjoy free access to the monopolized goods, does not justify the exclusion of nationals of other member states. Such an interpretation, as noted, would confer upon the member states the power to exclude nationals of other member states from entry into the market by establishing a restrictive distributive organization in the market of the monopoly.

Article 37 paragraph 3, subparagraphed 2 assumes that the adjustment of state trading monopolies will render unnecessary protective measures by the member states at the end of the transitional period. At that time the Commission and the member states are to rely solely upon the rules of competition to prevent competitive distortions. This is feasible, however, only if the adjustment leads to the abolition of the exclusive right of import or export vis-à-vis the other member states.

D. *Article 37 Paragraph 2: The "Stand-Still Clause"*

In accordance with the general policy of the Treaty to freeze all restrictions of interstate trade as of the effective date of the Treaty to prevent the erection of new trade barriers, article 37 paragraph 2 contains a special "stand-still clause" prohibiting member states from introducing "any new measure which is contrary to the principles laid down in paragraph 1 of this Article or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States." In the *Costa* case,[80] interpretative problems concerning the "stand-still clause" were presented in the context of the Italian nationalization of the production and distribution of electrical energy. Since the issue was raised before an Italian court by the defendant in a civil action, the threshold inquiry was whether article 37 paragraph 2 gives rise to individual rights that must be safeguarded by the domestic courts.

1. *The Direct Effect of the Provision.*—In the now famous *Tarifcommissie* case,[81] it was settled that the Treaty may create individual rights with respect to provisions addressed to the member states. The court there based its ruling on the legal character of the Community as a "new legal order in international law for the benefit of which

80. Havana Charter, Chapter IV, Section D, Arts. 29-32.
81. See text accompanying note 32 *supra*.

the Member States have, albeit to a limited extent, surrendered their sovereign rights, and whose subjects are not only the Member States but individuals as well."[82] Article 12 was held to give rise to such individual rights:[83] "The text of Article 12 lays down a clear and unconditional prohibition which involves a negative rather than a positive duty. In any case, such obligation does not carry with it the reservation that the States may subordinate its functioning to a positive act of internal law."[84] On this basis the Court held that the article 12 prohibition "lends itself perfectly to producing direct effects in legal relations between the Member States and persons under their jurisdiction."[85]

In this context the question as to direct effects of article 37 paragraph 2 had to be answered. Advocate General Lagrange suggested a differentiation between the first and second clauses of article 37 paragraph 2. He thought article 37 paragraph 2, in referring to new measures contrary to the principles laid down in paragraph 1, too uncertain a prohibition to give rise to individual rights. As to new measures restricting the scope of the articles dealing with the abolition of customs duties and quantitative restrictions, he arrived at the contrary conclusion, stressing the direct analogy with articles 12 and 31 and the *Tarifcommissie* case.[86] The Court of Justice did not accept this differentiation, but ruled article 37 paragraph 2 as a whole productive of individual rights.[87]

2. *The Scope of the Provision.*—As to the substance of this duty imposed upon the member states, the Court differentiates the purpose of the stand-still obligation and the means to thwart that purpose. The purpose is to prevent new discriminations within the meaning of article 37 paragraph 1. The means to discriminate are article 37 organizations. All new organizations are therefore prohibited because they would tend to introduce new discriminations.

82. *Id.* at 25, 2 CCH COM. MKT. REP. at 7214.

83. Art. 12 reads: "Member States shall refrain from introducing, as between themselves, any new customs duties on imports or exports or any changes having equivalent effect, and from increasing those which they already levy on their trade with each other."

84. Rechtssache 26/62. N. V. Allegemene Transport —en Expedite Onderneming van Gend & Loos v. Niederländische Finanzverwaltung, IX Sammlung 1, 25 (1963) 2 CCH COM. MKT. REP. ¶ 8008, at 7214-15.

85. *Id.* at 25-26, 2 CCH COM. MKT. REP. at 7215.

86. Conclusions of Advocate General Lagrange, *supra* note 52, at 1303-05; 2 CCH COM. MKT. REP. 7403-04.

87. "A prohibition so clearly expressed, that has come into force with the Treaty throughout the entire Community and has therefore been incorporated into the legal systems of the Member States, is the very law of these States and is of direct concern to their nationals, for whose benefit it entails individual rights which the national courts must safeguard." Costa v. E.N.E.L., *supra* note 52, at 1275, 2 CCH COM. MKT. REP. at 7392.

It is apparent that the concept of discrimination once again determines the scope of the prohibition. That the Court did not rule on this interpretation has been previously noted. The Commission, however, submitting its views to the Court, was more specific in its interpretation of article 37 than in its recommendations. It agreed that, although article 222 might sanction nationalization, "the creation of a new monopoly is not permitted . . . ."[88] This opinion suggests that an organization under article 37 paragraph 1 will create discriminatory conditions which are incompatible with the Treaty.

The Court did not interpret the second part of article 37 paragraph 2, relating to the abolition of customs duties and quantitative restrictions. It did point out, however, that article 37 was to be interpreted within the framework of the chapter on " 'elimination of quantitative restrictions between the Member States.' "[89]

Administrative experience with article 37 paragraph 2 is limited. The Commission, in answer to an inquiry in the European Parliament, reported that there was the question of a violation of article 37 paragraph 2 in several cases but that it had not to date initiated proceedings. It also reported that the case of the French petroleum system, the validity of which had been extended beyond the end of the transitional period, would be considered together with the basic issues of interpretation under article 37.[90]

E. *The Relation of Article 37 to Other Rules of the Treaty*

Effects of state trading monopolies are so widespread that issues under article 37 relate to various other provisions of the Treaty. It is appropriate, therefore, to deal with these questions as such and to place the scheme of article 37 into the wider perspective of the Common Market as a whole. As is readily apparent, article 37 provisions concerning state trading monopolies may take precedence over general treaty provisions. However, the extent of this precedence allows of considerable controversy.

1. *Free Movement of Goods (Part Two, Title I).*—As has been shown in detail,[91] article 37 covers discriminations on the basis of product origin, whereas article 9 paragraph 2 defines the scope of the customs union: "The provisions of Chapter I Section 1 and of

88. *Supra* note 52, at 1267, 2 CCH COM. MKT. REP. at 7389. It is not readily apparent whether the Commission has reversed its position in suggesting at the same time that a finding as to whether the creation of a trading monopoly was contrary to art. 37 para. 2 might be dispensed with, if imports or exports did not depend upon the discretionary power of the state organization. See also, Pappalardo, *supra* note 75, at 223-26 (Art. 37 No. 6).

89. Costa v. E.N.E.L., *supra* note 52, at 1275, 2 CCH COM. MKT. REP. at 7392.

90. Response to Inquiry No. 51, *supra* note 40.

91. See text, pp. 340-41.

Chapter 2 of this Title . . . [Part Two, Title I] shall apply to products originating in Member States and to products which come from third countries and which are entitled to free circulation in Member States." The operative provision is article 10.[92] Since article 37 is to be found in that part of the Treaty referred to in article 9 paragraph 2, the provisions of article 10 appear applicable to products covered by a state trading monopoly. Although reserving its final position on this point, the Commission apparently considers article 37 obligations with respect to the free circulation of products originating in third countries deferred until the establishment of the common commercial policy (articles 110-16).[93]

It has been found "surprising" that the Commission failed to take issue with the "unwarranted" position of the French Government denying the applicability of articles 9 and 10 in the context of article 37.[94] There is indeed no provision conditioning applicability of the customs union provisions upon the establishment of a common commercial policy towards third countries. Neither does the purpose of article 37 demand an exemption. State trading monopolies are accorded special treatment not because of the member states' interest in limiting competition from products originating in third countries, but in order to facilitate the adjustment of these organizations to the the requirements of the free movement of goods within the Common Market—including all products "entitled to free circulation" in a member state. Within this framework repercussions on the functions of state trading monopolies vis-à-vis third countries are clearly accepted by the Treaty.

2. *The Elimination of Quantitative Restrictions (Part Two, Chapter II).*—The systematic position of article 37 poses the question of its relation to the more general provisions of chapter 2. The Court of Justice in the *Sopeco* case found "no reason . . . to settle the question

92. Art. 10 para. 1 reads:
Products which come from a third country shall be deemed to be entitled to free circulation in a Member State if the necessary import formalities have been complied with and the appropriate customs duties or charges having equivalent effect have been levied in that Member State and if such products have not benefited from a total or partial drawback of such duties or charges.

93. Response to Inquiry No. 51, *supra* note 40.

94. Van Hecke, *supra* note 50, at 460-61. In accord with the view that arts. 9 and 10 apply to products covered by art. 37 organizations see Colliard, *supra* note 63, at 269; Würdinger, *supra* note 64, at 276. Each of the above writers discusses the French petroleum system and deals with the question whether crude oil imported from third countries into a member state after having been refiued there or admitted to "free circulation" is entitled to the protection of the anti-discrimination rule of art. 37.

of whether the application of article 37 to national monopolies does or does not preclude the application of any other provision of the chapter concerning the abolition of quantitative restrictions . . . ."[95] There, Advocate General Gand argued that "[A]rticle 37 alone is applicable *ipso jure*. . . . [T]he preceding provisions of the same chapter are applicable only in so far as Article 37 refers to them . . . ."[96] The views of the Advocate General thus accord with those submitted to the Court by the Commission and the French Government—views which reflect the prevalent opinion among legal writers.[97] The Government of the Netherlands, however, insisted that articles 30 to 37 were a unity directed to the elimination of quantitative restrictions and that there were no functional distinctions among (1) quantitative restrictions, (2) measures of equivalent effect and (3) measures concerning state trading.[98] Schilling holds articles 33 and 37 applicable concurrently in the event of a quota for monopolized products.[99] Mr. Justice Strauss observes that, according to the jurisprudence of the Court of Justice, all measures having effects equivalent to quantitative restrictions are in essence discriminatory and are, therefore, of the same nature as the measures covered by article 37. He therefore does not think it useful to distinguish these concepts:

> They are related to the same kind of measures; the different phrasing may be due to the fact that in one case measures of the state as such are concerned, while in the other case (typically) the measures are to be attributed to an institution which, though it pertains to the state, acts as an enterprise at the same time.[100]

This opinion indicates the criteria upon which a decision of the issue must be based. The purpose of article 37 is not to grant state trading monopolies a preferential treatment. Rather, the elimination of quantitative restrictions is to be effected by taking into account the special character of state trading monopolies. This is particularly apparent from article 37 paragraph 2 which, while reiterating the stand-still

95. S.A.R.L. Albatros v. SOPECO, *supra* note 57, at 10, 2 CCH COM. MKT. REP. at 7442.

96. Conclusions of Advocate General Gand, *supra* note 52, at 24, 2 CCH COM. MKT. REP. at 7449-50.

97. CATALANO, *op. cit. supra* note 64, at 340; Fourré & Wenner, *Der EWG-Vertrag in der Gerichtspraxis (Artikel 37 und 177)*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBSBERATERS 149 (1965); GLAESNER, *op. cit. supra* note 65, at 101 (Art. 37 Anm. 1); Würdinger, *supra* note 64, at 274; as to the Commission's view see Response to Inquiry No. 51, *supra* note 40; Van Hecke, *supra* note 50, at 454.

98. S.A.R.L. Albatros v. SOPECO, *supra* note 57, at 5; 2 CCH COM. MKT. REP. at 7439.

99. Schilling, *supra* note 65, at 698.

100. Strauss, *supra* note 67, at 531-32 (author's transl.).

clauses of articles 12 and 31, adds that the "scope" of these latter articles must not be restricted. The allowance for a "certain margin of assessment,"[101] if compared with articles 12 and 31, is certainly not due to a less strict prohibition. It takes into account only the amalgamation of commercial and political considerations typical of state trading monopolies. The general rules on quantitative restrictions should therefore obtain, except insofar as the nature of article 37 organizations demands the special treatment provided. Wherever there are quantitative restrictions or new measures of equivalent effect recognizable as such under the general rules, these rules are applicable. This interpretation does not create a collision between article 37 and article 33 (as suggested by Advocate General Gant in the *Sopeco* case). Article 37 takes precedence whenever, but only insofar as, effects equivalent to quantitative restrictions are inseparably interwoven with the monopoly's market conduct.

3. *Special Rules Modifying Article 37.*—Special rules of the Treaty may modify or take precedence over article 37. In respect of state trading monopolies designed to facilitate the distribution of agricultural products, article 37 paragraph 4 calls for the concurrent consideration of the aims of the Community agricultural policy; more particularly, equivalent guarantees for the employment and the standard of living of the producers concerned are to be provided. The Commission deduced from the words "the rules in this article shall be given effect . . ." that article 37 paragraph 4 did not exclude the applicability of article 37 as such; the only exemption, according to the Commission, concerns tobacco products made of French tobacco leaves, and the only allowance is for a different time table and for different methods of adjustment.[102] In its 1966 general report, the Commission refers to the necessity of relating the adjustment of the tobacco monopolies in France and Italy to the establishment of a common marketing organization for tobacco leaf in the context of the agricultural policy.[103]

In this report the Commission points to other policies as well, such as the energy policy, which is to be considered, even without a qualifying Treaty rule, in the context of article 37.[104] More particularly, in the adjustment of the French petroleum import regulation, the objectives of a common energy policy, to be determined in the

101. Conclusions of Advocate General Lagrange, *supra* note 52, at 1304, 2 CCH COM. MKT. REP. at 7404.

102. Recommendation to the French Government (tobacco), April 6, 1962, AMTSBLATT 1500 (1962). Recommendations to the French and German Governments (alcohol) Nov. 26, 1963, AMTSBLATT 2857 (1963).

103. 9 GESAMTBERICHT 50 (No. 34) (1966).

104. *Ibid.*

future, should be taken into account.[105] This modifies the Commission's 1963 recommendation where it had been emphasized that the application of article 37 could be conditioned neither upon the realization of other Treaty objectives nor upon the establishment of a common energy policy.[106] The implications of the Commission's policy will be clarified as soon as the announced new article 37 recommendations are issued.

Of general importance is the exemption of article 90 paragraph 2. It may cover all enterprises irrespective of the applicability of articles 37 or 90 paragraph 1. We are concerned with its relevance concerning article 37 only. In this context, the exemption of fiscal monopolies is particularily important since trading monopolies frequently do serve as fiscal monopolies as well. The rules of the Treaty are applicable only insofar "as the application of such rules does not obstruct the *de jure* or *de facto* fulfillment of the specific tasks entrusted to such concerns." In order to establish the scope of the exemption, it is necessary to ascertain to what extent the application of the rules of the Treaty would prejudice the special functions of these enterprises; there is no blanket exemption. The Commission has taken the view that a fiscal monopoly is privileged only with respect to its task of securing revenues. This task, according to the Commission, is not obstructed by the application of article 37: "In order to provide for equal state revenues it is sufficient to unify the mark-up between costs of production and sales price with respect to domestic and imported products in such a way that the new mark-up corresponds to the weighted average of the former mark-ups."[107] The position taken by the Italian government and by ENEL in the *Costa* case that the rules on free movement of goods in general, and article 37 and the rules of competition in particular, are inapplicable to the operation of a nationalized public service was, by implication, rejected by the court.[108] Advocate General Lagrange, however, referred to article 90 paragraph 2 to show that a public service is not as such excluded from article 37.[109]

4. *The Rules of Competition (Articles 85 to 90 Paragraph 1).*—There has been as yet no pronouncement by the Court of Justice or by the

105. *Ibid.*

106. Recommendation to the French Government July 24, 1963, (mineral oil), AMTSBLATT 2271 (1963).

107. Recommendation to the French Government April 6, 1962, (tobacco), AMTSBLATT 1500 (1962) (author's transl.).

108. Rechtssache 6/64, Costa v. E.N.E.L., X Sammlung 1254, 1276 (1964), 2 CCH COM. MKT. REP. ¶ 8023, at 7393 (1964). See Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case,* 63 MICH. L. REV. 491 (1965).

109. Conclusions of Advocate General Lagrange, *supra* note 108, at 1303; 2 CCH COM. MKT. REP. at 7403.

Commission with respect to the applicability of the rules of competition to article 37 organizations. In the absence of article 37, the conduct of state trading monopolies as such would be governed by the rules of competition, while the member states would be subject to article 90 paragraph 1. The rules of competition are of course fully applicable during the transitional period, at least since the promulgation of regulation No. 17 implementing these provisions in accordance with article 87.[110] In this respect article 37 confers a privilege upon the member states, the gradual adjustment constituting an exemption during the transitional period.[111] At the end of the transitional period, however, the functions of article 37 devolve upon the rules of competition. This follows, at any rate, from the author's interpretation of the basic rule of nondiscrimination in article 37 paragraph 1.

The opinion of the Commission that the introduction of new restrictive measures after the expiration of the transitional period would violate article 37[112] is not at odds with that of the author. As long as monopolies exist as organizations and function with respect to third countries, it is conceivable that new restrictive measures will be introduced in spite of their adjustment. In such a case article 37 paragraph 2 may be applicable, together with the rules of competition. But a policy of non-discrimination will then no longer suffice to comply with the rules of the Treaty. All commercial activities of the member states are to be integrated into the system of undistorted competition. In this way the policy of the Community toward article 37 state trading monopolies merges into the general policy of competition as it concerns those enterprises specified in article 90 paragraphs 1 and 2.

It is beyond the scope of this paper to develop even the outlines of such a policy. So far neither the Court of Justice nor the Commission has had the opportunity to apply article 90 paragraph 1. However, Commissioner von der Groeben, addressing the European Parliament, has stressed the importance of regulating public enterprises in the framework of a system of undistorted competition.[113] The further the customs union progresses, the greater will be the tendency to resort to public enterprises as instruments of influencing intra-Community

110. See Rechtssache 13/61 Kleding-Verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH, VIII Sammlung 105, (1962), 2 CCH COM. MKT. REP. ¶ 8003 (1962).

111. See CATALANO, *op. cit. supra* note 64, at 340-41; MESTMACKER, *Offene Märkte im System Unverfälschten Wettbewerbs*, in WIRTSCHAFTSORDNUNG UND RECHTSORDNUNG, FESTSCHRIFT FUR FRANZ BOHM 359 (1965).

112. Response to Inquiry No. 51, *supra* note 40.

113. Address by Commissioner von der Groeben, European Parliament in Strasbourg, June 16, 1965 (publication of the Commission).

trade. This is by no means the only reason why public enterprises are of utmost importance in the Common Market. There are divergent and partly conflicting views concerning the role of public enterprises within the national economy—views which are influenced by national economic policy in general, by concepts of governmental functions in the economy, by the tradition of using public enterprises as instruments of public policy, by the quantitative extent of the public sector, and by a variety of other considerations of national policy (and politics).[114] To the extent that these policies are "liable to affect trade between member states" (article 85 paragraph 1), they are a matter of Community concern. The development of a common policy in this sector will be determined by the future transformation of the Common Market from a customs union to an economic union. The task of regulating public enterprises within a competitive system, and, indeed, through competition, leads to largely unmapped fields of economic policy. This is especially true of the regulation of the public sector within the Common Market.

The legal institutions governing public enterprises in the member states are different in technique and philosophy; nevertheless, the rules of the Treaty must be applied to all comparable organizations with equivalent effect on the basis of an autonomous interpretation. The economic policies of the member states recognize a relation of competition and public enterprise in varying degrees, and they ascribe quite different roles to competition in general. Nevertheless, the system of undistorted competition must be devised and implemented so as to establish equal competitive conditions in intra-Community trade. And this task must be accomplished under circumstances where private and public enterprises of various member states are increasingly competing in the same markets. The Treaty provides the legal tools to develop a common policy and rules of competition tailored to the requirements of these markets. And there is a growing awareness of the central role these issues are going to play.[115] The

114. For an excellent survey of the current problems of economic policy in the public sector from the point of view of a French economist, but not limited to the French economy, compare HOUSSIAUX, THE COHERENCE OF ACTIONS: THE COMPATIBILITY OF DECISION-TAKING BY PRIVATE AND PUBLIC ENTERPRISES, REP'T TO THE INT'L CONF. OF THE INT'L ECON. ASS'N, Biarritz, Sept. 2-9, 1966.

115. See colloquium organized by the International League against Unfair Competition in Brussels, March 1963, "Competition between Public and Private Enterprises Within the Framework of Article 90 of the Rome Treaty" (unpublished); BORNER, *Rechtsfragen zu Artikel 90 EWG-Vertrag*, in *Veröffentlichungen des Instituts für Energierecht an der Universität zu Köln* (Heft 12/13, WEGERECHT UND EUROPAISCHES WETTBEWERBSRECHT) (1966); HACK, ZUR AUSLEGUNG DES ARTIKEL 90 (2) EWG-VERTRAG UND DESSEN BEDEUTUNG FUR DIE ELEKTRIZITATSWIRTSCHAFTS, (DISSERTATION, MAINZ 1966); HUTH, *op. cit. supra* note 68; MESTMACKER, *op. cit. supra* note 111; Deringer, *The Interpretation of Article 90 (2) of the E.E.C. Treaty*, 2 COM. MKT. L. REV. 129 (1964).

close interdependence of the policy of open markets in the customs union and the establishment of a system of undistorted competition determines the outlines of this policy. Not only do the rules of competition limit and circumscribe the conduct of private enterprises, they emerge as standards for the member states acting through enterprises as well.

It has been suggested that the relevance of article 90 paragraph 1 cannot be found in its substantive meaning, but rather in the remedies provided in article 90 paragraph 3.[116] The member states, it is argued, must in accordance with article 5 paragraph 1 abstain from any measures which could jeopardize the attainment of the objectives of the Treaty. This argument does not take into account the systematic position of article 90. The Treaty distinguishes between the Treaty objectives as spelled out in article 2 and the instruments by which these objectives are to be attained. That the system of undistorted competition is one of the instruments by which the objectives of the Treaty are to be realized admits of no controversy. The prohibition of article 90 paragraph 1 goes beyond the obligation of the member states not to jeopardize the general objectives of the Community. Article 90 paragraph 1 thus precludes the argument that the objectives of the Treaty might be more effectively attained by public enterprises operating outside the ambit of the rules of competition. This is without prejudice to the limited exemption of article 90 paragraph 2.

The duty and the right of the Commission to give effect to article 90 paragraph 1 by issuing appropriate directives or decisions to the member states (article 90 paragraph 3) confirms the relevance of article 90 as a matter of substantive law. The task thereby imposed goes beyond that of article 169 to such a degree as to indicate a difference in the substance of the Commission's jurisdiction.

The adjustment of state trading monopolies under article 37 thus proves to be the prologue to a more fundamental task of the Community—to develop a unified system of undistorted competition for both private and public enterprises. Alexander Hamilton's counsel in commenting upon the effects of a commercial policy peculiar to each state, occasioning "distinctions, preferences, and exclusions," perfectly summarizes the foundation and the implication of this part of the Community's policy of competition: "We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest."[117]

116. See Deringer, *Das Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft* (WIRTSCHAFT UND WETTBEWERB) Art. 90 Anm. 24; Art. 90 Anm. 47 n.34; Van Hecke, *Government Enterprises and National Monopolies under the E.E.C. Treaty*, 3 COMMON MKT. L. REV. 450, 452 (1966). *Contra* MESTMACKER, *op. cit. supra* note 111, at 383.

117. THE FEDERALIST No. 7, at 37 (Modern Library ed. 1941) (Hamilton).