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European Community Competition Law and Member State Action

*John Temple Lang**

Article 90 of the European Economic Community Treaty ("Treaty") prohibits member states from authorizing or ordering behavior infringing upon European Economic Community ("Community") antitrust law, even in the case of state enterprises. Indeed, Community law does not include a state action doctrine. However, it is not yet clear to what degree this prohibition prevents member state measures having competition-restricting effects. This article considers that question.

I. COMMUNITY CASE LAW ON STATE ACTION

Initially in the *GB-Inno-BM*¹ case in 1977, and in a series of cases recently, the European Court of Justice ("Court") has been faced with the question whether Articles 85 and 86 of the Treaty, which prohibit anticompetitive agreements and abuse of monopoly or dominant power by enterprises, also prevent member states from encouraging or approving such behavior. While Articles 85 and 86 apply expressly only to enterprises, Article 5 requires member states to abstain from any activities that could jeopardize the attainment of the Treaty's objectives.² Article 90 provides that, even in the case of public enterprises, member states must not enact or maintain in force measures that are contrary to any of the rules of the Treaty, including Articles 85 and 86. Thus, as illustrated by Article 90, Articles 85 and 86 do impact the measures taken by member states.

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¹ *GB-INNO-BM v. ATAB*, 1977 E. Comm. Ct. J. Rep. 2115, 21 Comm. Mkt. L.R. 283 (1977). See also *Openbaar Ministerie v. Van Tiggele*, 1978 E. Comm. Ct. J. Rep. 25, 47-48.

² Temple Lang, *Article 5 of the EEC Treaty: the Emergence of Constitutional Principles in the Case Law of the Court of Justice*, 10 FORDHAM INT'L L.J. 503 (1987).

In *GB-Inno-BM v. ATAB*, the Court made a number of statements it has confirmed over the last twelve years. First, the Court stated that Article 5 prohibits member states from adopting measures depriving Article 85 of its effectiveness, or enabling enterprises to escape from the constraints imposed by Articles 85 through 94. Article 90 is an example of the principle stated in Article 5. The Court also stated that legislation facilitating an abuse of a dominant position generally would be inconsistent with other articles of the Treaty, and that an abuse was unlawful even if encouraged by national legislation.

In *Cullet v. Centre Leclerc Toulouse*,³ the Court reasserted that although Articles 85 and 86 are concerned with the behavior of enterprises, Article 5 obliges member states not to maintain in force any measures that may render ineffective the competition rules applicable to enterprises. However, the measures before the Court in *Cullet* did not compel firms to enter into restrictive agreements, but instead gave responsibility for price fixing to the public authorities. According to the Court, the mere fact that the price fixed by a supplier is one of the factors taken into account by the authorities in fixing the retail price does not prevent the measures from being state measures, and such action by the member state "is not capable of depriving the rules on competition of their effectiveness." The Court held that Article 5 does not prohibit member states from enacting legislation of the kind in question in *Cullet*, and also concluded more broadly that Article 5 does not prohibit national authorities from providing national rules fixing a minimum price for retail fuel sales. The legislation at issue in *Cullet* was inconsistent, however, with Article 30. This perhaps explains the brevity of the Court's judgment on the competition issue. The judgment does not explain its reasoning in comparison with the reasoning in *Leclerc v. Au Ble Vert*,⁴ which was decided a few weeks earlier.

Clarification of the law depends heavily on the correct interpretation of the *Leclerc* case, which concerned a French law obliging book retailers to substantially charge the price fixed by the publisher or importer. The national court asked whether Articles 3(f) and 5 prohibited such legislation. The Court began its opinion by reasserting that member states may not detract from the uniform application of Community law or from the effectiveness of Articles 85 and 86 or measures implementing them. The legislation in question did not impose an obligation to enter into restric-

³ *Cullet v. Centre Leclerc Toulouse*, 1985 E. Comm. Ct. J. Rep. 305. The Court simply referred to this judgment in a series of cases later in 1985.

⁴ *Leclerc v. Au Ble Vert*, 1985 E. Comm. Ct. J. Rep. 1. See also *Syndicat Des Libraires De Normandie v. Societe L'Aigle Distribution*, Case 254/87 (July 14, 1988).

tive agreements, but made them unnecessary by placing responsibility for freely fixing binding retail prices on publishers and importers. The Court said that since purely national price-fixing systems in the book trade had not yet been made subject to a Community competition policy with which member states would be obliged to comply, member states' obligations under Article 5 were not specific enough to prevent them from enacting legislation of the kind in question, provided that the legislation was consistent with other Treaty rules.

This implies that if a clear Community competition policy on the controversial question of book price-fixing agreements were adopted by the Community institutions, member states would not be free to enact legislation obliging retailers to follow prices fixed by publishers and importers. Member states cannot be obliged to comply with obligations under Article 5 unless it is clear what those obligations are in the particular context of the industry in question. As soon as those obligations are clear enough, though, they prohibit not only encouragement and confirmation of restrictive agreements, but also legislation with effects so similar as to make the restrictive agreements unnecessary.

If this were not the correct interpretation of *Leclerc*, and if the principle really intended by the Court prohibited official measures encouraging or confirming restrictive agreements and permitted official measures directly causing identical economic effects, the key section of the decision in which the Court outlines the absence of any clear policy or price fixing for books would be unnecessary, irrelevant and misleading. The Court concluded that member states' obligations are not specific enough, because purely national book trade practices have "not yet" been made subject to a Community competition policy. The clear implication from this language is that states' obligations would be clear and more stringent if a competition policy for books were adopted. Although this interpretation of the *Leclerc* opinion seems clear, the Court did not find it necessary to pursue the same logic in *Cullet*, deciding the case instead under Article 30 only.

In the second *Bureau National du Cognac* case,⁵ a governmental measure had extended the effect of an agreement contrary to Article 85 to all the members of an officially established trade association. The Court ruled in a brief opinion that to reinforce an agreement by extending its effects was not permissible. In *Ministere Public v. Asjes*,⁶ a compulsory official approval procedure for airline fares with penalties for

⁵ *Bureau National Interprofessionnel de Cognac v. Aubert*, Comm. Mkt. L.R. Antitrust Supp. (Oct., 1988), at 331.

⁶ *Ministere Public v. Asjes*, 1986 E. Comm. Ct. J. Rep. 1425.

non-compliance was in effect, although the fares were fixed by agreements between competitors contrary to Article 85. The Court stated that Articles 85 and 86 would be deprived of their effectiveness by measures approving unlawful agreements or reinforcing their effects.

In *Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke*,⁷ national legislation obliged travel agencies to charge the prices fixed by an agreement between certain tour operators, which prohibited them from sharing commissions with or granting rebates to their clients. The agreement clearly infringed Article 85. The legislation effectively made it impossible for the parties to bring the agreement and its effects to an end, imposed obligations on companies which were not parties to the agreements, and created an effective sanction for breach of the agreement by providing for withdrawal of the license of a travel agency infringing the rules. The Court repeated the relevant rules, and not surprisingly, decided that it was contrary to Articles 3(f), 5 and 85 for a member state to reinforce the effects of an agreement which violated Article 85 in this manner.

In *CBEM-Telemarketing v. CLT & IBP*,⁸ the court confirmed that Article 86 applies to the behavior of an enterprise in a dominant position, even when its position is due to legislation creating a situation in which there is little or no competition. The Court did not need to consider whether the legislation itself was inconsistent with the duties of the member state under Community law since it did not order the commission of the abuse.

A more far-reaching question arose in *Van Eycke v. ASPA*,⁹ a 1988 case involving a Belgian tax exemption for interest on deposits. In *Van Eycke*, the legislation in question gave an income tax exemption only for deposits carrying less than a specified maximum interest rate and less than certain maximum premiums for long duration deposits. The plaintiff argued that this legislation discouraged competition between the deposit-taking institutions. The Court summarized its previous decisions, saying that although Articles 85 and 86 concern only the behavior of enterprises, member states are obliged by Article 5 not to maintain in force legislation that is likely to eliminate the useful effects of those Articles. Accordingly, a member state may not order or approve the making of restrictive agreements or reinforce the effects of such agreements. In

⁷ *Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke*, Case 311/85 (Oct. 1, 1987).

⁸ *CBEM-Telemarketing v. CLT & IBP*, 1985 E. Comm. Ct. J. Rep. 3261.

⁹ *Van Eycke v. ASPA*, Case 267/86 (Sept. 21, 1988). See also *Bodson v. Pompes Funebres*, Case 30/87 (May 4, 1988).

addition, a state may not delegate to companies its powers to take economic measures.

There was no evidence in *Van Eycke*, however, to show that the legislation in question did any of these things since it did not take over the essence of a pre-existing agreement or oblige or encourage companies to comply with it. Moreover, the legislation did not ratify or confirm the method of limiting the interest rates paid or the interest rates adopted by previous agreements. It was the legislation, not the financial institutions, which fixed the interest rates which were eligible for the tax exemption. The fact that the authorities had discussed these rates with the financial institutions did not make the legislation contrary to Community law.

II. ARTICLE 86

The Court has not yet had an opportunity to clarify the implications of the caselaw for Article 86, or to explore fully the implications of the principle that a member state cannot confer on enterprises its powers to regulate economic activity. One would expect the rules applicable to Article 86 to be the same, *mutatis mutandis*, as those applicable to Article 85. Abuses are more varied in nature than restrictive agreements and practices, and they are objectionable for a wider variety of reasons. Therefore, the law under Article 86 is not as clear or as well-developed as under Article 85.

Member states are not free to enact or maintain in force measures that are likely to frustrate the purposes of Article 86, either by requiring or approving behavior which constitutes an abuse, or by confirming or reinforcing the effects of an abuse that has already been committed. Similarly, member states may not encourage or assist the commission of an abuse by any enterprise in a dominant position. However, Article 86 is normally concerned with the behavior itself, and not with the process by which the behavior is decided. To the contrary, Article 85 is concerned with the existence of an agreement, decision, or concerted practice. It follows that a member state might infringe its obligations in relation to Article 85 by encouraging companies to agree on restrictions of competition, irrespective of the precise restraint resulting. With Article 86, the only questions to be looked at would be whether the behavior was an abuse and whether the state action had required, encouraged, approved, or reinforced it. Further, in relation to Article 86, it is hard to imagine circumstances in which a regime arranged in violation of the Article would be extended by state action to companies not previously affected by it.

It is true that if an enterprise in a dominant position commits an

abuse, action can be taken against it, whether or not it is acting on the state's instructions. In practice, however, an enterprise in this situation would simply refer to the instructions or encouragement it had received from the state and would certainly argue that it should not be fined. If the member state is primarily responsible for the nature of the behavior in question, the primary defendant could be the state and not the enterprise. If one or more enterprises were found to have infringed Articles 85 and 86, and the state measure was unchallenged by the Commission, the enterprises would be in an unsatisfactory position, especially if the measure purported to be legally binding. Since Articles 85, 86 and 90 are directly applicable, it may well be that a plaintiff injured by behavior contrary to those Articles could recover damages from the state, as well as from the dominant enterprise, if the state were primarily responsible for the behavior in question.

The Court's statement in *Van Eycke*, that member states are not free to delegate to enterprises the state's power to take economic measures, primarily concerned cases arising under Article 85. The issue before the Court was whether a state, wishing to see the price of a given product or service stabilized, could invite the suppliers to agree on prices rather than fixing the price itself. That is clearly a violation of Community law by the state, as well as by the companies, because the *process* by which the prices would be fixed is contrary to Article 85.

The situation is rather different when the possible abuse is committed by a dominant enterprise acting alone. A dominant firm must fix the price of the products or services it provides and the terms on which it provides them. As long as there is no state measure or consultation with competitors, the *process* by which the firm arrives at that result is not a regulatory or a governmental process and does not infringe competition law. If the member state orders a dominant enterprise to charge a price which is so high as to be "unfair" or so low as to be "predatory," or directs an enterprise to impose terms that are onerous or otherwise unlawful, it is clear that the state, as well as the enterprise, is acting illegally. In this situation, the state has not delegated any power to take regulatory economic measures or altered the nature of the measures it has taken. However, member states do sometimes give regulatory powers to state bodies of various kinds, thereby enabling them to combine entrepreneurial and regulatory activities. The words of the Court, "*opérateurs privés*," do not apply to state enterprises and thus do not entirely prevent member states from doing this. However, these words do not fully clarify the legal position which will arise when this is done.

At first sight, Community law does not prevent member states from

delegating governmental powers even to private bodies, provided that they do not do so for the purpose of avoiding their own obligations under Community law, or do so in such a way so as to invite or enable private firms to infringe rules applying to them. On the other hand, Article 85 prohibits private firms from agreeing on prices in their own interests. In addition, agreements between private firms, if permitted, are not known to the public and are not subject to either democratic control or judicial review. Therefore, there are arguments for saying that member states, by analogy, should not give regulatory powers to dominant enterprises when those enterprises would be likely to exercise them in their own interests rather than objectively in the interests of the public. It is not yet clear whether the Court would go so far as to say that member states are prohibited from conferring regulatory powers on a state body merely because the body in question also has profit-making functions, even when it has a dominant position.¹⁰ If the Court in due course does not go as far as this, a more complex rule will have to be devised. The question may be decided by the Court in the pending *French Telecommunications* case.¹¹

It is clear that a member state cannot, by delegating regulatory or other governmental powers, enable a state body to adopt measures which it normally would be prohibited from adopting by Article 90 or otherwise. Therefore, insofar as a state enterprise, or even an enterprise with exclusive or special rights, may be given governmental or regulatory powers lawfully, that enterprise is bound by Article 90. This is true even in instances where a state enterprise regulates its own behavior, as distinct from merely deciding what it should do for commercial purposes. In practice, such regulatory measures would violate Article 90 if they applied to other enterprises, and if the state enterprise were the only enterprise in its industry, its behavior would be governed by Article 86. Certainly it would be preferable if regulatory and entrepreneurial functions were always separated. Conflicts of interest are unavoidable if these functions overlap, as the Commission pointed out in its Directive on Telecommunications Terminals.¹²

¹⁰ In *Italy v. Commission*, 1985 E. Comm. Ct. J. Rep. 873, 886, the Court noted without objection the power of British Telecommunications to adopt "schemes" for users of equipment made available by it. Article 86 applied because the schemes were "an integral part of BT's business activity".

¹¹ *Commission v. France*, Case 202/88 (not yet decided).

¹² *Directive on Competition in the Markets in Telecommunications Terminal Equipment*, 31 O. J. EUR. COMM. (No. L 131) 73 (1988)[hereinafter *Telecommunications Directive*].

The corresponding problems concerning joint dominant positions¹³ are less complex than one might suppose. A joint dominant position can be abused by concerted action between the jointly dominant companies. In such a situation, Article 85 is also infringed, and if this occurs as a result of member state action, the caselaw of the Court provides the applicable principles. If member state action causes one or all of the jointly dominant enterprises to abuse their position, it clearly infringes Article 90 or Article 5. If regulatory powers¹⁴ or powers controlling entry into the market were given to the jointly dominant firms collectively, they could be exercised only by action governed by Article 85.

III. OFFICIAL MEASURES RESTRICTING COMPETITION

Abuses of dominant positions, whether held jointly or singly, may be either exploitative (*e.g.*, charging monopoly prices) or anticompetitive (*e.g.*, restricting competition by acquiring a competitor).¹⁵ If it is contrary to Community law for a member state to order one or more dominant enterprises to behave in such a way, the question arises whether it is unlawful for a state to bring about the same economic result by legislation or other official measures. The answer to this question appears to be yes based upon the *GB-INNO-BM*, *Cullet*, and *Leclerc* cases, although the precise terms of the rule are not yet completely clear. At least as far as it concerns anticompetitive behavior, this question is part of a larger question, namely to what extent Community law limits the powers of member states to take measures restricting competition and establishing monopolies. The Court's probable response to this question is also already visible, although not yet certain.

Community law prohibits member states from restricting competition in a variety of protectionist ways. For example, Community law prohibits protectionist taxes and measures with effects equivalent to quantitative restrictions, including price control legislation if it has effects equivalent to quantitative restrictions on imports.¹⁶ In addition, Community law prohibits *all* restrictions on the free movement of goods

¹³ Temple Lang, *Trade Associations and Self-Regulation under EEC Antitrust Law*, 1984 FORDHAM CORPORATE L. INST. 605 (1985).

¹⁴ See *Commission v. Italy*, Case 118/85 (June 16, 1987) (regulatory powers given to a state enterprise).

¹⁵ Temple Lang, *Abuse of Dominant Positions in European Community Law, Present and Future: Some Aspects*, FIFTH FORDHAM CORPORATE L. INST. 25, 41-47 (1979).

¹⁶ See, *e.g.*, *Tasca*, 1976 E. Comm. Ct. J. Rep. 291, 308; *Openbaar Ministerie v. Van Tiggele*, 1978 E. Comm. Ct. J. Rep. 25, 39; *Commission v. Italy*, 1983 E. Comm. Ct. J. Rep. 1955, 1969; *Roussel Laboratoria v. Netherlands*, 1983 E. Comm. Ct. J. Rep. 3849; *Nederlandse Bakkerij v. Edah BV*, Cases 80/85, 159/85, (Nov. 13, 1986).

which are stricter than is essential to achieve legitimate aims.¹⁷

These rules of Community law prohibit even general measures adopted by member states in the public interest and the granting of some specific rights. For example, the Court held in *Pubblico Ministero v. Manghera* that no exclusive right to import goods from other member states is permissible.¹⁸ Therefore, as the Commission stated in the *French Telecommunications* case,¹⁹ it is incorrect to say that Article 90 presupposes the maintenance of all special or exclusive rights. The main point of Article 90 is to insist that Treaty rules be obeyed even when exclusive rights are given, and to provide an especially effective procedure to deal with infringements. By implication, Community law also limits the exclusive rights which can be given.

One exception to the general principle in Article 90 is that enterprises may be entrusted with the operation of services of general economic interest or made into revenue-producing monopolies. Under Article 90(2), such enterprises would still be subject to all Treaty rules, including the rules on competition, "insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." Therefore, although "special or exclusive rights" may be given, all the rules of the Treaty apply, even when they are given to enterprises specifically responsible for services of general economic interest, except insofar as the rules obstruct the particular task given. Only if the "particular task" inherently necessitates a monopoly, as in the case of a central bank or an air traffic control authority, is there a partial dispensation from the Treaty rules. At first sight, it is not easy to reconcile the fact that Article 90 allows for exclusive rights to be given, with the principle that the competition rules apply fully, because such a wide variety of situations are covered by these two principles.

There are, broadly, two views as to the correct application of the Treaty rules. The first view is that, subject to the rules already outlined, member states are free to establish monopolies, either overtly or indirectly by setting up licensing systems and granting licenses only to one company, thereby enlarging or strengthening the licensee. According to this narrow view, Articles 5 and 90 merely state that member states may not associate themselves with infringements of competition law by companies, but are free to achieve the same results by state measures if no infringement has been committed by companies. This view, while not yet

¹⁷ See *Commission v. Denmark*, Case 302/86 (Sept. 20, 1988) (returnable bottles case); *Commission v. Greece*, Case 124/85, para. 13 (Dec. 16, 1986).

¹⁸ *Pubblico Ministero v. Manghera*, 1976 E. Comm. Ct. J. Rep. 91.

¹⁹ *Commission v. France*, MDSU/Case 202/88 (not yet decided).

expressly rejected by the Court, is not reconcilable with the *GB-INNO-BM*, *Cullet* and *Leclerc* cases.

The second view,²⁰ essentially adopted by the Commission, states that under Article 5, member states must abstain from jeopardizing the objectives of the Treaty, and that undistorted competition is one of those objectives under Articles 3(f), 101 and 102. *A fortiori*, member states may not exclude competition by setting up monopolies,²¹ unless such measures are actually and objectively necessary for a permissible purpose under Community law. Under this view, the caselaw that addresses state measures which encourage restrictive agreements by companies exemplifies the broader principle that limits the powers of member states to restrict competition and prevents them from limiting the effects of the competition rules.

In accordance with this second view, member states are not free to adopt measures that produce the same results as infringements of the competition rules binding companies, either because such measures do not have a permissible purpose or effect or because such measures are contrary to a very precise rule of Community law. Moreover, member states are not free to restrain or eliminate competition even for a permissible purpose, unless the competition is no more restricted than is essential to achieve the purpose desired, and unless that purpose is important enough to justify the interference with the competition in question. The question remaining, therefore, is whether the Court will ultimately syn-

²⁰ The *Telecommunications Directive*, *supra* note 12, at 75, para. 13, provides, "... such special or exclusive rights in regard to the terminal equipment market give rise to a situation which is contrary to the objective of Article 3(f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member states have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including Article 3(f). The exclusive rights to import and market terminal equipment must therefore be regarded as incompatible with Article 86 in conjunction with Article 3, and the grant or maintenance of such rights by a member state is prohibited under Article 90(1)."

See two particularly important studies: Pescatore, *Public and private aspects of Community Competition Law*, 1986 FORDHAM CORPORATE L. INST. 381-430 (1987); Verstrynge, *The Obligations of Member States as Regards Competition in the EEC Treaty*, 1988 FORDHAM CORPORATE L. INST. (forthcoming). See also Verstrynge, *Competition Policy in the Air Transport Sector*, PROCEEDINGS OF THE CONFERENCE OF THE FEDERATION INTERNATIONALE DE DROIT EUROPEEN (Saloniki, 1988) (forthcoming); Temple Lang, *Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty*, 1984 FORDHAM CORPORATE L. INST. 543, 565-573 (1985). The contrary view expressed by Marengo in *Le traite CEE interdit-il aux Etats Membres de restreindre la concurrence*, 1986 CAHIERS DE DROIT EUROPEEN 285, was rejected by Judge Joliet, *National Anti-competitive Legislation and Community Law*, 1988 FORDHAM CORPORATE L. INST. (1989), and by Pescatore, *European Community Competition Law - A Rejoinder by Judge Pescatore*, 10 FORDHAM INT'L L.J. 444-445 (1987).

²¹ *Europemballage & Continental Can v. Commission*, 1973 E. Comm. Ct. J. Rep. 215, 12 Comm. Mkt. L.R. 199 (1979).

thesize the undoubted restrictions on member states' freedom to restrict competition into a single comprehensive principle or will treat the restrictions as a number of specific uncoordinated restraints on otherwise unrestricted powers.

It should be pointed out that there is no provision in the Treaty which guarantees member states any residual zone of unrestricted economic sovereignty, and Community law contains no clauses listing or defining federal or state powers.²² Thus, statements about state sovereignty have no express basis in the Treaty.

It would be odd, if not absurd, if member states were prohibited from ordering or authorizing companies to bring about a particular result, but were entirely free to achieve the same result themselves directly. Anomalies and irrational results certainly would occur if the above cited case law were based only on the objections to delegating governmental powers to enterprises. It would be uncharacteristic of Community law to be concerned with the means rather than the result, the form rather than the substance. Such an interpretation would be an invitation to lobby member states, since firms could bring about by national legislation that which they could not achieve by agreement or behavior. It would also be odd to have a stricter rule for companies than for member states, when member states have greater opportunities to interfere with the operation of the Community.

The Court has interpreted Article 5 as creating a wide variety of far-reaching obligations on member states.²³ It would be consistent with the manner in which Article 5 has been interpreted to state that Article 5 limits member states' freedom to restrict competition by any means, and not merely by encouraging or reinforcing private restrictions on competition. The Court stated in *GB-INNO-BM v. ATAB* that Article 90 is only a particular example of a general principle derived from Article 5. It follows that Article 90 may be used to clarify the concrete application of the more general article. If, as the second view holds, there is a general obligation not to interfere unjustifiably with competition, and a series of stricter obligations exist when Community rules are more precisely defined in specific areas, it is entirely reasonable to use the Court's rulings in specific situations to clarify the general principle. The Court's practice is to state very broad principles of law and to try to unify the whole of Community law, when it sees a way to do so clearly.

The view that the Treaty rules should be interpreted as broadly lim-

²² Temple Lang, *European Community Constitutional Law: the Division of Powers between the Community and Member States*, 39 N. IR. LEGAL Q. 209 (1988).

²³ Temple Lang, *supra* note 15.

iting the powers of member states to restrict or eliminate competition, if valid, is a comprehensive, across-the-board, and far-reaching principle. It therefore needs to be argued on the basis of similarly comprehensive and far-reaching arguments, even if the cases already decided by the Court deal with narrower questions, and the broad principle needs to be induced from them. There are three relevant principles of Community law which constitute arguments supporting this view. The first argument is based on Article 5 and has already been outlined. The second argument is based on the principle of proportionality, and the third is based on the principle of non-interference.

When the Treaty permits member states to create exceptions to general principles of Community law, notably as it does under Article 36, member states are obliged to go no further than is necessary to achieve the objectives permitted.²⁴ This is a specific application of the principle of proportionality, which states that no measure may be adopted either by Community or national authorities in the sphere of Community law which imposes costs, restrictions, or inconveniences that are unnecessary or out of proportion to the aims to be achieved, even when those aims are lawful. This is such a fundamental general principle of Community law that one would expect it to limit the powers of member states to restrict or eliminate competition, even for legitimate general economic purposes. If it does apply, as has been suggested by several authors,²⁵ the effect would be that member states adopting measures restricting or eliminating competition would have to show that there was no other less restrictive way of achieving the legitimate aim sought, even if the measures could not be regarded as primarily benefiting existing companies. The member states could not say that Community law imposed no restrictions on their powers of establishing monopolies or restricting competitors other than those expressly imposed by the Treaty.

The principle of proportionality would have to be applied on the basis of the circumstances of the industry or sector concerned, and upon any relevant provisions of Community law. Where, as in air transport, there is a clear Community policy in favor of progressively increasing competition, national measures creating or maintaining a monopoly would be correspondingly harder to justify. The *Leclerc* judgment illustrates this principle. In fact, it is only in a few areas, such as a central bank or an air traffic control authority, that a monopoly is inherently

²⁴ See *supra* note 17.

²⁵ The principle of proportionality as a limit on the power of member states to restrict competition by even general legislative measures is mentioned by several of the authors cited at *supra* note 20. See also Casati, 1981 E. Comm. Ct. J. Rep. 2595, paras. 27-28.

necessary for effectiveness, as distinct from being merely desirable to achieve economies of scale or to avoid duplication of costs of infrastructure.

It will be seen that the proportionality principle is both an argument for limiting the powers of member states to restrict competition and to establish monopolies, and also a moderating influence on that principle. The principle does not prohibit member states from restricting or eliminating competition, but merely states that they must go no further than is necessary to achieve an otherwise legitimate aim in the public interest. The greater the restriction on competition, the harder it is to justify.

The Court has already held in a number of cases²⁶ that the principle of proportionality applies to member states' measures in certain areas of Community law. The argument suggested here is that those areas must also include the general objectives of the Treaty and specific objectives adopted in relation to specific sectors. Seen in this way, there is nothing very remarkable about the conclusion that the principle of proportionality limits the powers of member states to restrict competition and establish monopolies. Indeed, since the principle applies in relatively unimportant issues such as the maximum penalties appropriate to specific breaches of Community rules, *a fortiori*, one would expect it to apply to major national measures.

The proportionality principle is primarily a rule limiting governmental intervention in economic activity. However, this principle or another similar principle also governs situations in which conflicting legitimate objectives must be reconciled. The Court has applied this principle in Community measures cases.²⁷ Therefore, it is suitable for reconciling national measures taken to promote one legitimate objective with Community measures, including Treaty provisions, which pursue another objective.

²⁶ See, e.g., *Rewe-Zentrale v. Bundesmonopol verwaltung fur Brantwein*, 1979 E. Comm. Ct. J. Rep. 649 (Cassis de Dijon case); *Commission v. Greece*, Case 176/84 (Mar. 12, 1987); *Brugnoni & Ruffinengo*, Case 157/85 (June 24, 1986) (member states may require deposit of securities with an approved bank only if it is indispensable to monitor compliance with national legislation compatible with Community directives on capital movements); *Adverteerders*, Case 352/85, para. 36 (April 26, 1988). See also Weiler, *The European Court at the Crossroads: Community Human Rights and Member State Action*, *Liber Amicorum Pierre Pescatore*; Temple Lang, *The Duties of National Courts under the Constitutional Law of the Community*, 1987 Dominik Lasok Lecture (Exeter, 1987).

²⁷ *Beus v. Hauptzollamt Munchen*, 1968 E. Comm. Ct. J. Rep. 83, 98 (the Court speaks of "balancing" interests which cannot be simultaneously and fully attained); *International Fruit Co. v. Commission*, 1971 E. Comm. Ct. J. Rep. 411, para. 64; *Balkan v. Hauptzollamt Berlin-Packhof*, 1973 E. Comm. Ct. J. Rep. 1091, 1110-12; *Roquette v. France*, 1977 E. Comm. Ct. J. Rep. 1835, 1844; *Ludwigshafener Walzmuhle v. France*, 1981 E. Comm. Ct. J. Rep. 3211, 3252; *Biovilac v. EEC*, 1984 E. Comm. Ct. J. Rep. 4057, 4077-78; *Rau*, Joined Cases 279-280/84, para. 21 (Mar. 11, 1987).

The most important example of this use of the principle concerns the national objectives recognized by Article 36 of the Treaty as legitimate exceptions to the general Community principle of free movement of goods.²⁸ This is not merely an example of the rule that exceptions must be interpreted narrowly. *A fortiori*, one would expect the principle to limit the powers of member states to pursue objectives not specifically recognized by the Treaty as legitimate exceptions to Community rules. The area of concurrent jurisdiction of Community and national authorities is so great that it must be a fundamental principle of the Community system that national and Community authorities should respect one another's objectives and spheres of activity. In the Community, the relationship between Community and national authorities is one of cooperation and symbiosis, not one based on more or less mutually exclusive spheres of jurisdiction.²⁹ This cooperation explains, and indeed necessitates, the fact that many substantive rules of Community law apply equally to Community and national measures.³⁰

The third supporting argument referred to above is based on the long-established principle of non-interference, which states that member states may not adopt measures that interfere with the operation of Community law,³¹ even if the national measures do not conflict directly or

²⁸ Freedom of competition, free movement of goods, and freedom of trade as a fundamental right are all general principles of Community law. See *Procureur de la Republique v. Adhu*, 1985 E. Comm. Ct. J. Rep. 538, paras. 9,13; *Staatsanwalt Freiburg v. Franz Keller*, Case 234/85 (Oct. 8, 1986); *Pescatore, Les principes generaux du droit en tant que source du droit communautaire*, RAPPORTS DU 12E CONGRES, FEDERATION INTERNATIONALE DE DROIT EUROPEEN, 17, 23-25 (Paris, 1986).

²⁹ Temple Lang, *European Community Constitutional Law: the Division of Powers Between the Community and Member States*, 39 N. IR. LEGAL Q. 209 (1988).

³⁰ See Klensch, *Joined Cases 201-202/85* (November 25, 1986); Temple Lang, *supra* note 26, at 19-22; Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229, 243 (1986).

³¹ The Court has used several phrases to embody the rule described in the text as "non-interference." See, e.g., *Procureur du Roi v. Kefer & Delmelle*, 1980 E. Comm. Ct. J. Rep. 103, 113 and cases cited therein; *Grosoli*, 1979 E. Comm. Ct. J. Rep. 2621, 2631-32, 2635, and conclusions of Capotorti AG at 2640; *Pigs and Bacon Commission v. McCarren*, 1979 E. Comm. Ct. J. Rep. 2161, 2188; *Commission v Council (ERTA)*, 1971 E. Comm. Ct. J. Rep. 263; *Procureur du Roi v. Dechman*, 1978 E. Comm. Ct. J. Rep. 1573; *Pigs Marketing Board v. Redmond*, 1978 E. Comm. Ct. J. Rep. 2347, 2371; *Frans Nederlandse Maatschappij voor Biologische Producten BV*, 1981 E. Comm. Ct. J. Rep. 3277, para. 14; *Irish Creamery Milk Suppliers Association v. Government of Ireland and Doyle v. Taoiseach*, 1981 E. Comm. Ct. J. Rep. 735. In the international field, see *Commission v. Ireland*, 1977 E. Comm. Ct. J. Rep. 937, paras. 26, 28; *Kramer*, 1976 E. Comm. Ct. J. Rep. 1279, paras. 44-45, 49-51; *Commission v. United Kingdom*, 1980 E. Comm. Ct. J. Rep. 2403, 2468, 2478; *Ruling pursuant to Article 103 of the EAEC Treaty on the Physical Protection of Nuclear Materials*, 1978 E. Comm. Ct. J. Rep. 2151, paras. 12, 14, 18, 22-3; *Groothandel Wulro v. Disciplinary Board of the Foundation for the Control of Free-Range Eggs*, Case 130/85 (June 25, 1986); *Direction General des Impors v. Marie-Louise Forest*, Case 148/85 (Nov. 25, 1986) (the latter two cases use the formula that national measures may not "undermine or create exceptions to")

explicitly with a Community rule. This principle was developed primarily in case law concerned with the Common Agricultural Policy, but it is equally applicable to any other rule or policy of the Community that is precise enough for interference with it to be clearly identifiable. This principle is especially important in the case of Community rules or policies that are intended to operate without the constant involvement of Community institutions. Competition is perhaps the best example of this. It follows from this principle that member states must not interfere at all with the operation of precisely defined rules of Community competition policy, and they must not interfere with less precisely defined rules to an extent great enough to defeat their purposes. It may well be that this argument is essentially the same as that based on Article 5, but as the principle of non-interference has developed in the caselaw without express reference to Article 5, it seems preferable to discuss it separately. In any event, the caselaw discussing the principle of non-interference clearly confirms and reinforces the argument based on Article 5 outlined above.

IV. ANALYSIS OF THE TWO VIEWS

In order to discuss the implications of the two differing views as to the correct interpretation of the Treaty rules, and the arguments supporting them, it is necessary to review particular cases and specific issues. The Court confirmed in the *Telemarketing* case in 1985, that "it is not incompatible with Article 86 for an undertaking to which a member state has granted exclusive rights within the meaning of Article 90 of the Treaty to enjoy a monopoly." However, the Court went on to rule that a dominant enterprise infringes Article 86 if, without any objective necessity, it reserves to itself an ancillary activity in a neighboring but separate market, with the possibility of eliminating all competition from that market. It follows from this and from other case law that a member state could not encourage or ratify such behavior by a dominant enterprise if it thereby eliminates competition, that is, if it establishes a monopoly. The issue is whether the member state itself could adopt a measure having the same result, "without any objective necessity."³²

Whatever the exact implications of *Leclerc* may be, it is clear that member states are not free to adopt measures having the principal pur-

Community rules); *Commission v. Italy*, Case 48/85 (Sept. 18, 1986); UNILEC, Case 212/87, (Sept. 22, 1988). See generally, Waelbroeck, *The Emerging Doctrine of Community Pre-emption - consent and redelegation*, COURTS AND FREE MARKETS 548 (Sandalow and Stein eds. 1982).

³² A member state could do this if it had a valid reason. *Sacchi*, 1974 E. Comm. Ct. J. Rep. 409, 430. See also *Italy v. Commission*, 1985 E. Comm. Ct. J. Rep. 873, 886.

pose or effect of limiting competition for the benefit of existing competitors. Nor are they free to adopt measures that bring about a situation which would be unlawful under Article 86 if it resulted from the action of a dominant position.³³ In other words, states may not take measures that are substitutes for behavior by enterprises which would infringe those Articles. This is the *minimum* conclusion that can be drawn from Article 90 and from the case law. To reject even this conclusion would be to deprive the Court's repeated statements of all meaning. For the purposes of applying this rule, the principal effect of the national measure must be assessed objectively. Statements by national authorities that a measure was intended to benefit only the public interest would not be conclusive. The rule is a rule of Community law and must be uniformly applied throughout the Community.

If this were a complete statement of the law, it would necessitate distinguishing between general measures benefiting primarily the public interest and specific measures benefiting primarily a limited number of identifiable enterprises. Since the Treaty clearly makes free competition an important element in Community policy, there would be a strong presumption that any measure that restricted competition and substantially benefited a limited number of enterprises would not be objectively in the public interest. The Court has already pointed out that legislation facilitating a breach of a dominant position is generally inconsistent with other Treaty rules. Therefore, there is not as much difference as might at first appear between the minimum practical conclusion to be drawn from the case law and the broader view of the Treaty rules discussed above.

The same comment solves the issue of "exploitative" abuses promoted by state measures, as distinct from "anticompetitive" abuses. In practice, a state measure having effects equivalent to an exploitative abuse necessarily would be primarily for the benefit of an identifiable category of companies. If a measure imposed very high minimum prices for a given product or imposed very onerous conditions on those who bought the product, it would not necessarily be an abuse if the dominant companies imposed them. It is perhaps not easy to imagine a convincing example. However, a state might impose an extremely high minimum price to discourage unnecessary use of a strategically important material or impose onerous conditions on buyers of a highly toxic or dangerous pollutant. Such prices or conditions, if imposed for the same reasons by a dominant enterprise, also would not be unlawful. However, a sharp dis-

³³ In GB-INNO-BM, 1977 E. Comm. Ct. J. Rep. at 2167, Advocate General Reischl stated, "Member States are obliged . . . not to create by State measures positions which undertakings are prohibited from creating under Article 86."

inction between measures in the public interest and measures primarily benefiting specific companies does not need to be drawn if the view favoring the interpretation of the Treaty rules as broadly limiting the powers of member states to take measures restricting competition is correct.

V. CONCLUSION

The following should be borne in mind. The principle of proportionality is not an invention of Community law which is alien to national legal systems. It is derived from member state national laws. Article 90(2) reasonably can be regarded as a special rule applying the principle of proportionality. In fact, it makes much more sense viewed in this way than as an apparent exception to all the other rules of the Treaty. This suggests that even in this respect, Article 90 is a specific instance of a more general principle based on Article 5, as the Court stated in *GB-INNO-BM*.

The Court, which likes to visualize Community law as a single consistent whole, seems likely to be attracted to this argument. A national monopoly, especially if state-owned, automatically excludes non-citizens from access to the industry in question. Although not in itself contrary to Community law, such a *de facto* exclusion needs a significant justification. The aim of the Community is an open market. Further, free competition in the Community is not merely an antitrust law objective, but "the best way of uniting Europe."³⁴ National monopolies hinder economic integration, the overriding aim of the entire Community. It is hardly conceivable that Community law, having so thoroughly, strictly, and comprehensively restricted national powers in other respects, would place no comprehensive limits on national powers with the potential for frustrating so important and fundamental a purpose and method of the Community.

The *Leclerc* case confirms the interpretation of the Treaty rules as broadly limiting the power of member states to restrict competition in another way, by showing that member states have more extensive and stricter obligations where the Community law is specific than where it is general. This is wholly consistent with the view that there is a broad general obligation not to interfere with competition without adequate reason, and specific obligations not to interfere with competition at all where the Community law is sufficiently specific. There are degrees of specificity. For example, Articles 85 and 86 are more specific than Arti-

³⁴ POLITICAL AND ECONOMIC PLANNING, CARTEL POLICY IN THE COMMON MARKET 202 (1962).

cle 3(f), and a Community policy on retail price maintenance for books, or a Commission decision in a particular case, would be more specific and would imply stricter obligations than the Articles.

In the *Sacchi* case,³⁵ which concerns an Italian television monopoly, the Court stated that “measures governing the marketing of products where the restrictive effect exceeds the effects intrinsic to trade rules are capable of constituting measures having an effect equivalent to quantitative restrictions. Such is the case, in particular, where the restrictive effects are out of proportion to their purpose, in the present case the organisation, according to the law of a member state, of television as a service in the public interest.” This is a clear statement of the principle of proportionality. In *Sacchi*, the Advocate General rejected the argument that television was a natural monopoly, implying that if it had been, member states might have been free to take measures that they would not have been free to adopt otherwise. This argument is entirely consistent with the proportionality principle.

Article 37 of the Treaty deals with state monopolies of a commercial character. The scope of Article 37 is extremely wide, requiring the ending of all discrimination against imported products by all bodies “through which a member state, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between member states. These provisions shall likewise apply to monopolies delegated by the state to others.” Article 37 prohibits exclusive rights to import from other member states.³⁶ Article 37 does not apply to services,³⁷ but it is so wide and far-reaching in its effects that it would be irrational if other monopolies could be established without any limitation. In *Italy v. Commission*,³⁸ the Court rejected as unsupported by evidence the argument that restrictions by British Telecommunications on the use of its equipment by private message forwarding agencies were justified by “abuses” committed by the agencies. The implication that genuinely undesirable behavior might justify a restriction on competition is the result one would expect if the principle of proportionality applied.

It can be seen that the distinction between measures in the general interest and measures primarily benefiting particular companies is still relevant under the principle of proportionality, but as a spectrum rather than as a clear dichotomy. The less the public benefit and the greater the

³⁵ *Sacchi*, 1974 E. Comm. Ct. J. Rep. 409.

³⁶ *Pubblico Ministero v. Manghera*, 1976 E. Comm. Ct. J. Rep. 91. See also *Bodson v. Pompes Funebres*, Case 30/87 (May 4, 1988).

³⁷ *Amelioration de l'Eleveage v. Mialocq*, 1983 E. Comm. Ct. J. Rep. 2057.

³⁸ *Italy v. Commission*, 1985 E. Comm. Ct. Rep. 873, 887, 890.

benefit to the companies, the more difficult it is to justify the measure. The reasons for drawing the distinction are valid, but to regard it as a spectrum rather than a clear distinction to be drawn at an identifiable point corresponds much more closely to the realities of economic life.

In conclusion, member states' powers to take measures restricting competition are limited across the board by Article 5 and by the principle of proportionality. If that view is ultimately adopted explicitly by the Court, the implications are of the greatest importance, both in the economic law and the constitutional law of the Community. It is perhaps a recognition of the importance of the basic question discussed in this article that the Court has so far adopted a series of cautious and relatively narrow judgments rather than stating the question in the broad terms in which it is discussed here. One should not assume that the Court will not accept the broad principle merely because it has chosen so far to avoid unnecessary controversy and to make statements which are no wider than has been necessary in particular cases. No case has yet been argued before the Court on the broad lines stated here, and the Court could hardly be expected to decide an issue of such importance without hearing a very full argument. Nevertheless, there is now enough case law to show the direction in which the Court is heading.

If the conclusion that the Treaty and the principle of proportionality severely limit the powers of member states to restrict competition is correct, it has several important practical results. First, member states' measures to establish monopolies, *de jure* and *de facto*, will need to be justified by some clear purpose and will not be permissible if the same objective could be achieved by less restrictive means. Second, the conclusion confirms and creates a broader intellectual basis for the existing case law which says that governmental measures protecting state enterprises and other privileged companies from competition, and governmental measures requiring actions companies themselves would not be free to undertake, are not permitted. In theory, the conclusion implies that all measures restricting competition would require justification, but it seems likely that, in practice, general measures not resulting in monopolies and not protecting individual companies from competition will always be justified by their objectives.