Is The Common Market A Free Market?

1. Does the EEC Treaty compel Member States to have a free market economy? Is "deregulation" required by Community law? Is a socialist economy compatible with membership of the Community?

I believe that this question is of great interest, especially in your country, and that it would therefore constitute an appropriate subject for the inaugural lecture to your Institute.

2. I will begin by describing the provisions of the Treaty which can provide some elements of the answer. Then I will examine the way in which these provisions have been interpreted over the years. We shall see that after an initial phase characterised by a degree of caution, the Community institutions, including the European Court of Justice, turned increasingly to the rules of the Treaty in order to impose respect for the principles of the free market on Member States. This development did not take place openly in the name of the principles of economic liberalism. In their approach, the institutions took care not to rely on partisan policy doctrines, but to base their solutions on the rules of the Treaty itself. Among others, they looked to those provisions relating to freedom of movement of goods and services, as well as those relating to free competition. Finally, in conclusion, I will consider if it is permissible to deduce from this perceived development, as people sometimes do, that the Treaty, without saying so expressly, nevertheless in fact prohibits the establishment of a socialist economic policy in the full sense of that term.

I. The Applicable Texts

3. A reading of the provisions of the Treaty reveals that its authors took care to declare its neutrality with regard to the economic policies of the Member States. It follows from Article 6, as well as from Articles 103 to 109, that economic policy is first and foremost the concern of the Member States, only consultation and coordination between them being foreseen to the extent necessary to guarantee the good operation of the Common Market. Article 222 expressly affirms that the Treaty "shall in no way prejudice the rules in Member States governing the system of property ownership", thus indicating clearly that it is not opposed to nationalisations. This conclusion is confirmed by Article 90(1), which not only foresees that Member States can maintain public enterprises but which even permits them to grant to these public

enterprises "special or exclusive" rights. Finally, Article 37 allows Member States to keep existing state monopolies of a commercial character, indeed even to create new ones, their only obligation being to "adjust" these monopolies in a way which ensures the exclusion of all discrimination between nationals regarding the conditions under which goods are procured and marketed.

4. Such caution is easily explained. Effectively, the signatory States had to convince their public opinion, notably the left-wing parties, that the European initiative was not a capitalist machine. To counter the charge that the European Community was a "Europe of the Vatican", it was necessary to convey clearly to the public that the fact that several "fathers" of Europe (1) were members of the Christian Democratic party did not mean that future economic policy would have to conform to certain pre-established models.

II. The First Stage: Caution Confirmed

5. During the first stage, which lasted until about 1975, the caution of the Community institutions with regard to national economic policy choices was confirmed.

6. Thus, the objections raised against the nationalisation by the Italian government of the production and distribution of electricity were rejected by the Court of Justice in its judgment *Costa v ENEL* of 15th July 1964 (2). The Court confirmed expressly that it was not contrary to the provisions relating to freedom of establishment to reserve to a public body control over the production of electricity in Italy, such a measure not being discriminatory as it excluded from the activity under consideration the nationals of other Member States to the same extent as it did Italian nationals (3).

7. In the same way, the measures adopted by France to meet the economic difficulties which followed the events of May 1968 were received with a good deal of understanding in Brussels (4) and only some peripheral aspects were contested (5).

8. In its *Sacchi* judgment of 30th April 1974, the Court explicitly confirmed that the Treaty did not contradict the practice whereby Member States, for considerations of public interest of a non-economic nature, shielded certain activities from the rules of competition by conferring the exclusive right to engage in these activities on one or more undertakings (6). It follows that Member States are not prohibited from creating

a monopoly for the benefit of one undertaking, nor even from extending the field covered by that monopoly to include activities conducted freely in the past.

9. Finally, during this first phase, the Commission, faithful to the rationale set out in Directive 70/50 on the abolition of measures having equivalent effect (7), did not attack as contrary to Article 30 of the Treaty national measures which, although they were capable of having a restrictive effect on imports, were, from a formalistic viewpoint, applicable to imported products and national products alike. This restrictive interpretation of Article 30 resulted in giving Member States extensive freedom to adopt measures governing the composition, manufacture, packaging, labelling and marketing of products (8).

10. The Commission was thus able to respond with a clear conscience to criticism expressed by certain MEPs with regard to "the very markedly liberal spirit which characterises the Treaty of Rome", that the framework established by the Treaty was "sufficiently wide to allow a greater or lesser degree of liberalism or intervention" (9).

III. The Second Stage: The Constraints Resulting from The Opening up of The Markets

11. From 1976 onwards, the signs of a change of attitude among the Community institutions began to appear. The neutrality adopted with regard to national measures which did not directly impede imports or exports gave way to a more critical analysis, examining more closely the concrete effect of the measure on trade rather than its formal structure. The result of this approach was to lead to an increased liberalisation of the market. However, this liberalisation was not an objective in itself but a way of enabling the removal of barriers to trade.

12. Thus, the rules on freedom of movement of goods were invoked successfully to oppose the application of national regulations on prices, whether they were discriminatory (10) or equally applicable to national products and imported products (11), or whether they involved the imposition of minimum, maximum or fixed prices (12) (13), or a maximum profit margin (14), or the obligation to give a period of notice before every price increase (15).

Certainly the Court did not prohibit every measure of price control. Recognising that Member States pursue legitimate economic policy objectives in this area - an area not

yet "Europeanised" - it refused to consider every intervention by the State as forbidden. But when - as was often the case - a system of price control appeared by its very nature to favour national production by making the sale of imported products unappealing or less profitable than the sale of national products, it did not hesitate to intervene to ensure the precedence of the principle of free movement of goods (16). Therefore, even if this jurisprudence in theory preserved the power of Member States to control the development of prices, in practice it resulted in greatly reducing the effectiveness of national regulation in this area.

13. The ability of Member States to regulate the marketing of products was also seen to be greatly limited as a result of the broad interpretation given by the Court of Justice to the concept of "measures having equivalent effect to quantitive restrictions" in the well-known judgment *Cassis de Dijon* (17). The result of this case was that a national measure, even if it applied equally to national products and imported products, infringed Article 30 if it produced in practice a restrictive effect on imports and if it was not justified by a "mandatory requirement" of public interest (18).

This jurisprudence played a considerable part in freeing the market from a great many trivial regulations which had long since ceased to be useful and which, even if they had not always had a protectionist purpose, nevertheless had such an effect (19).

14. The approach adopted in the *Cassis de Dijon* judgment, which involved the adoption of a true "principle of equivalence" between national regulations, did not remain confined to the sale of goods, but was extended to the free provision of services. So, the judgments *Van Wesemael* (20) and *Webb* (21) forced Member States to accept the exercise on their territories of regulated activities by a national of another Member State who held in that second State a licence issued under conditions comparable to those required in the host country, when these activities were subjected to adequate supervision in the State of establishment, and in whatever Member State the activity was undertaken.

15. The power of Member States to maintain national import monopolies was seriously restricted by the judgment *Manghera* of 3rd February 1976 (22). Whereas the text of Article 37 only requires an "adjustment" to these monopolies, the Court of Justice considered that the objective of "eliminating all discrimination between nationals of Member States as regards the conditions under which goods are procured and marketed" required, to the extent trade between Member States was concerned, the total abolition of these monopolies' exclusive rights to import. According to the

Court, the non- discrimination objective would not be achieved if, in a Member State where a commercial monopoly existed, the free circulation of goods of other Member States of the same kind as those the subject of the national monopoly was not assured. It follows from this that even if national monopolies were not prohibited, their impact was greatly reduced since the exclusive right (which is the essential characteristic of any monopoly) could no longer be used to prevent import of products coming from other Member States.

IV. The Third Stage: The Constraints Imposed by The Obligation to Ensure Undistorted Competition

16. Since 1984, in addition to the liberalisation brought about by the demands of free trade, there has been a growing insistence on the part of the Community institutions on the need to ensure that, throughout the Community, a regime of undistorted competition be guaranteed. It is no longer solely a question of ensuring free movement *between* Member States, but of making sure that distortions of competition within a Member State do not undermine the objectives of the Treaty.

This development is illustrated in three ways.

First, by giving a broad interpretation to the concept of State aids, the Community institutions assert the power to control the acquisition by public authorities of shares in undertakings.

Secondly, the obligation imposed on Member States by the second paragraph of Article 5 - and confirmed by Article 90 (1) with regard to public undertakings - not to undermine the effectiveness of the competition rules, gives the Court of Justice the competence to exercise its control over the operation - and even in certain cases over the creation - of national monopolies, even in cases where Article 37 is inapplicable.

Finally, by dispensing with any requirement of discrimination, either formal or material, as a condition for the application of Article 30, the Court of Justice exercises its control over every national measure which is capable of affecting imports, even though such measure be devoid of any protective effect either in law or in fact. In doing so, the Court applies the standard of "mandatory requirements" which it alone has the competence to define.

a. The concept of State aids

17. Article 92 of the Treaty gives the Commission authority to control all aid granted by Member States or through State resources, in whatever form, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. In its judgment *Intermills* of 14th November 1984 (23), the Court of Justice approved the Commission's argument that a State aid can take the form of the acquisition by the State or by a public authority of a stake in the share capital of an undertaking.

In *Meurat*, the Court added that, in order to establish whether the acquisition of such a shareholding did constitute aid, it was appropriate to examine the extent to which the enterprise could obtain the sums in question on the private capital markets. In the case of an undertaking whose capital was held by public authorities, it was advisable to assess in particular "whether, in similar circumstances, a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question" (24). In this respect, the Court distinguished the case of an "undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation" from the case where "at the time when the capital was subscribed the undertaking in question had for several years been making very substantial losses relative to its turnover [and whose] survival had already necessitated the reconstitution of its capital by the public authorities on several occasions after it had been completely exhausted, and whose products had to be sold on a market in which there was excess capacity".
(*Meurat* paras 14 & 15)

In the recent judgments *ENI-Lanerossi* and *Alfa Romeo*, the Court clarified that the private investor with whom the public authorities' conduct had to be compared must be of a size comparable to that of the public bodies involved, since the behaviour of such an investor could be influenced by considerations that are different from those of an ordinary investor such as, for example, the concern to maintain the group's image or to restructure its activities. The Court nevertheless concluded that, in the case in point, the acquisition of shares by the public investor had not been determined by considerations analagous to those which would have influenced a private group of comparable size (25).

Encouraged by this support, the Commission set about defining the situations in which

the acquisition of shares by the State could be presumed to amount to aid (26). In particular it considered that there was "a presumption of aid" whenever shares were acquired in a sector faced with particular difficulties, even if it was made in circumstances acceptable to a private investor. The Commission justified this rigorous approach by the need to exercise total supervision over the acquisition of shares in sectors suffering from structural over-capacity, even when the measures in question had been taken in circumstances which would not normally imply an element of aid.

One cannot deny that this attitude gives rise to a degree of discrimination against public investors (27). In effect, their investments in sectors affected by over-capacity, even when they are made subject to market conditions, would have to be notified to the Commission and would be "presumed" to constitute an aid, when the same investment could be freely made by a private enterprise.

In the exercise of its control over the State acquisition of shares, the Commission does not confine itself to financial aspects. It sometimes makes its authorisation conditional on the acceptance of fundamental structural modifications by the State and the undertaking concerned. So, in its *SABENA* decision of 24th July 1991 (28), the Commission made its authorisation to recapitalise the company SABENA subject to the condition that Belgium undertook to base the new company statutes on private commercial law, excluding any possibility of intervention in the affairs of the company for non- commercial reasons, and that it agreed not to subscribe to future increases in share capital without an "industrial partner" subscribing to a "significant" proportion of that increase.

One can see in this development a certain bias in favour of the market economy. Public investments are not inevitably forbidden, but they must take place in conditions which ensure that competition with private undertakings is not distorted. As a result, a large part of the arsenal of State intervention is reduced to ineffectiveness.

b. New monopolies

18. The *Leclerc* judgment of 10th January 1985 (29) clearly established the principle that the combination of Article 3 (f) and Article 5, paragraph 2 with Articles 85 and 86 of the Treaty led to Member States being forbidden to use their powers of intervention in economic matters in such a way as to undermine the effectiveness of the competition rules.

Originally limited to Article 85, the application of this jurisprudence has recently been extended to Article 86. Furthermore, with Article 90 (1) setting out more explicitly the obligations which flow from Article 5, paragraph 2, the Commission and the Court of Justice have been able to apply the reasoning behind the *Leclerc* judgment to cases involving public undertakings and undertakings endowed with special or exclusive rights.

19. The first sign of this development is given by the judgment *Bodson v Pompes Funèbres* (30), where the Court rejected the argument that the high prices which enterprises holding public concessions were charging to their customers could not be considered abusive under Article 86 as they were fixed by the terms and conditions forming a part of the concession agreements. The Court began by noting that the agreements in question, although made with public authorities, were contracts, which implied that the price level was attributable to the undertakings. It added that Article 90 (1) obliged the public authorities neither to enact nor to maintain "measures" contrary to the rules of the Treaty, and in particular Article 86, and that they were thus forbidden to "assist undertakings holding concessions to charge unfair prices by imposing such prices as a condition for concluding a contract for a concession".

The *Bodson* judgment does not call into question the existence of the monopoly but the manner in which it is exercised. It is nevertheless important in so far as it clearly establishes the obligation on public authorities not to influence the behaviour of their undertakings in a manner contrary to Article 86.

20. Subsequently, whilst taking care to confirm that the mere creation of a dominant position by granting an exclusive right is not, as such, incompatible with the Treaty, the Court applied on several occasions the combined provisions of Article 90 (1) and Article 86 in such a manner that the very existence of the monopoly, or its extension to activities formerly not covered, came to be called into question.

21. Thus, in the *Telecom* judgment of 19th March 1991, the Court emphasised that, even if Article 90 presupposes the existence of undertakings endowed with special or exclusive rights, it does not follow from this that all special and exclusive rights are necessarily compatible with the Treaty (31).

In this case, the Court declared that the exclusive rights to import, market, connect and bring telecommunication terminal apparatus into service and to maintain such

apparatus were contrary to the Treaty.

With regard to the exclusive rights of importation and marketing, the Court noted that their existence deprived economic operators of the opportunity to have their products purchased by consumers. Indeed, considering the diversity and technical complexity of these products, it was not certain that the holder of the monopoly would be in a position to offer the complete range of existing models on the market, to inform customers about the state and the operation of all the terminals and to guarantee their quality (32).

Concerning the exclusive rights of connection, bringing into service and maintenance, the Court considered that, in a market where goods circulate freely in conditions of undistorted competition, the maintenance of such rights would not be justified once the exclusive right to market was abolished (33).

Finally, the Court relied upon the objective of undistorted competition to infer that Member States have the obligation to entrust the task of drawing up the specifications for terminal equipment, supervising their implementation and approving the equipment to a body independent of the competitors on the market. To entrust an enterprise which itself marketed terminal apparatus with such responsibility would result in "conferring on it the power to determine at its own discretion the terminal equipment which could be connected to the public network thereby giving it an obvious advantage over its competitors" (34).

22. In its judgment *Elliniki Radiofonia Tileorassi* of 18th June 1991 (35), the Court was motivated by similar considerations, but applied them to the free provision of services. It confirmed that for a Member State to grant an exclusive right of retransmission of television programmes to an undertaking which had an exclusive right to broadcast them was contrary to Article 90 (1) of the Treaty "where those rights are liable to create a situation in which that undertaking is encouraged to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy in favour of its own programmes" (36). It is therefore not the manner in which the right of retransmission is exercised which leads to the infringement of the Treaty, but its very existence, and this because of the "situation" thus created, which could "induce" the television undertaking to infringe Article 86.

24. The *RTT* judgment (37) is based on the *CBEM* case decided in 1985 (38). In that case the Court held that an abuse in the sense of Article 86 occurs "where, without

any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market". In the *RTT* case, the Court concluded that when the extension of the dominant position results from a state measure, such a measure constitutes an infringement of Article 90 combined with Article 86, unless the resulting restriction on competition may "be regarded as justified by the provision of a public service of general economic interest" (39). According to the judgment, Article 90 (1) forbids Member States to place public enterprises and those to which they grant special or exclusive rights in a position where they "could not place themselves if they were acting autonomously without violating the provisions of Article 86" (40). It is thus the extension of the exclusivity as such which infringes the Treaty and not the manner in which this exclusivity is exercised.

25. The *Höfner* case challenges, by somewhat different reasoning, the very existence of the exclusive right. According to this judgment, where a State grants an exclusive right to an undertaking which is obviously not in a position to satisfy market demand, and where the effective exercise of those activities by private companies is rendered legally impossible, the result is an infringement of Article 90 (1) in so far as, by so doing, the State creates a situation in which the holder of the right is "compelled to infringe the terms of Article 86" and in particular paragraph (b) of that provision (41).

26. A further variation on this theme is provided by the *Porto di Genova* judgment (42). The case concerned the compatibility with the Treaty of an Italian law granting to an undertaking a monopoly over the harbour operations in the port of Genoa. The application of this law had prevented, because of strikes by workers in the dock company, the unloading of merchandise imported from the Federal Republic of Germany, although immediate unloading could have been carried out by the vessel's crew. The Court noted that it appeared from the circumstances that the Italian law caused the dock companies "to demand payment for services which had not been requested, to charge disproportionate prices, to refuse to use modern technology, to grant discounts to certain users, compensating for these discounts by increasing the prices charged to other users" (43), thus infringing Article 86, paragraphs (a), (b) and (c). In these circumstances, the Court concluded that by adopting the law in question, Italy "created a situation contrary to Article 86, and consequently infringed Article 90 of the Treaty" (44).

27. The same trend is reflected in the judgments *Delattre* and *Monteil* relating to pharmacies' retail monopoly (45), although these judgments were not based on Article 90 but on Article 30 of the Treaty. The Court, drawing on its earlier jurisprudence (46), held "that a monopoly, granted to dispensing chemists for the marketing of medicinal or other products, by virtue of the fact that it channels sales, is capable of affecting marketing opportunities for imported products". Such a monopoly is forbidden by Article 30 of the Treaty if it cannot be justified by one of the mandatory requirements mentioned in Article 36 or by the need to protect consumers(47).

28. The judgment *Nederlandse Omroepproduktie Bedrijf* (48) also merits attention in this context. The case concerned the compatibility with the Treaty of the obligation imposed on Dutch radio and television broadcasting organisations to obtain their technical support from the NOB (a Dutch public undertaking which had recently been privatised) for the production of their television and radio programmes.

The Dutch government asserted that the restrictive effects of this preferential regime were felt to the same degree by undertakings established in the Netherlands (other than the NOB) and undertakings established in other Member States. The Court considered that this argument was not capable of excluding the preferential regime benefiting the NOB from the application of Article 59 of the Treaty. In fact, "it is not necessary [for Article 59 to apply] that all the undertakings in a Member State be given an advantage over foreign undertakings. It is sufficient that the preferential regime which was set up benefits one national supplier of services" (49).

This judgment appears to indicate a reversal of the *Costa v ENEL* judgment, even if it is true to say that the latter concerned Article 52 and not Article 59 (50). In effect, the fact that the existence of the monopoly prevents the exercise of the activity under consideration by a particular State's nationals (other than the holder of the monopoly) and nationals of other Member States to the same extent is not sufficient to deprive the monopoly of its discriminatory character, since that monopoly is conferred on a national undertaking. Moreover this judgment challenges the compatibility with the Treaty of monopolies for the supply of services, thus overcoming the hesitations which had characterised the Court's jurisprudence over the previous years (51). 29. It would be unwise to draw from this jurisprudence a general condemnation of national monopolies for the production of goods or the provision of services. The *Höfner* judgment takes care not to condemn the creation of the monopoly in itself, but the inability of the monopoly to face up to the demands of the market. At the same time, the *Porto di Genova* judgment condemns the different abuses practised by the dock

company, but not the existence of the exclusive right which it held.

However, one should not minimise the importance of these judgments. In effect, in many sectors of the economy, a competitive regime appears in a better position to permit the satisfaction of demand than a monopoly. The *Höfner* judgment testifies to this - since in that case the holder of the monopoly itself had recognised its deficiencies and tolerated competitive activity - as does the *Porto di Genova* judgment - where the owner of the vessel had been forbidden to have his vessel unloaded by his own crew while the dock company's workers were on strike. In these cases, the existence .itself of the monopoly appeared capable of "inducing" the enterprise in question "by the simple exercise of the exclusive right which it possessed, to exploit its dominant position in an abusive manner" or to "create a situation in which that undertaking is induced to commit such an abuse", to borrow the terms used in the judgments *Höfner* (52), *Elliniki Radiophonia Tileorassi* (53) and *Porto di Genova* (54). It could thus be challenged under Article 90.

c. The abolition of any requirement of discrimination in the context of Article 30 of the Treaty

30. It was possible to consider that the jurisprudence following *Cassis de Dijon* was based on the concept of "material discrimination", in so far as the State rules in question in these cases, although they were applicable equally to national products and imported products, prevented imports or made them more difficult (55). However, certain recent judgments indicate that the Court no longer requires there to be any discrimination before Article 30 is applied, even giving the word its broadest possible meaning. Recently, in fact, the Court has considered that any measures which hinder trade between Member States are forbidden, except if they are justified by a mandatory requirement compatible with Community law. This is so even if the measure produces an exactly identical effect on internal trade.

31. This new approach is seen for the first time in the *Cinéthèque* judgment of 11th July 1985 (56). In this case, the Court considered, contrary to the conclusions of the Advocate General, that a French law restricting the period during which the sale of video cassettes was allowed involved a barrier to intra-Community trade within the meaning of Article 30 because of the disparities that existed between the applicable regimes in the different Member States. This conclusion was reached even though the law applied equally to national video cassettes and imported video cassettes and did not have the effect of favouring national production over the production of other

Member States. The Court only accepted the compatibility of the law because it did not go beyond what was necessary to achieve the objective (which was compatible with Community law) of encouraging the creation of cinematographic works.

32. This trend was confirmed by the judgment of 23rd February 1988 in the case of *Substitutes for Milk Powder and Concentrated Milk* (57). The Commission had initiated proceedings against France seeking a declaration that by forbidding the importation and sale of substitutes for powdered milk and concentrated milk, under whatever description, France had failed to observe its obligations in relation to the free movement of goods. The Court considered whether this prohibition could be justified by mandatory requirements of consumer protection or protection of public health, or because it was compatible with the objectives of the common agricultural policy. Having reached a negative conclusion, it declared the French legislation to be contrary to the Treaty. However, the French measure had neither the object nor the effect of protecting a particular national production: it protected milk as such, ie a commodity produced throughout the Community. As regards its substitutes, the sale of which was forbidden in France, these products could be produced by French industry just as well as the industries of the other Member States (58).

33. The *Warner Brothers* judgment confirms the above-described trend (59). This case tested the "mandatory requirements" of a Danish law which had no connection with imports but which simply required the author's permission before video cassettes could be hired out, whatever their origin.

34. The consequences of this jurisprudence are considerable. In effect, practically all national legislation capable of producing an effect of some kind on imports, even when it produces exactly the same effect on the sale of national products, is only compatible with Article 30 of the Treaty if it complies with the conditions of Article 36 or with mandatory requirements as the Court defines them. The powers of Member States to regulate trade are thus subjected to Community supervision on the sole ground that they are capable of having some bearing on products or services which originate from other Member States.

35. This reasoning was pushed to its extreme in the case *Torfaen Borough Council v B & Q plc*, which called into question the compatibility with Article 30 of a law forbidding Sunday trading in the United Kingdom (60).

The Court noted that the law in question was equally applicable to imported and

national products and that it did not make marketing of products imported from other Member States more difficult than marketing of national products. It recalled that, according to the *Cinéthèque* judgment, such a prohibition is only compatible with the principle of free movement of goods on condition that the possible barriers it creates to intra-State trade do not go beyond what is necessary to ensure the attainment of the objective in view, and that objective is justified with regard to Community law. Then the Court proceeded to consider if the law pursued an aim which was justified with regard to Community law. Having reached an affirmative answer on this question, it confirmed that the task of deciding whether the effects of the law did not go beyond what was necessary to achieve the object in view was a question of fact to be determined by the national court (61).

The extremely broad scope given by this judgment to Article 30, as well as the indeterminate nature of the mandate conferred on national courts, caused, as one can well imagine, considerable concern in the United Kingdom.

36. Undoubtedly sensitive to its critics, the Court slightly modified its stance in two later judgments concerning the compatibility with the Treaty of Belgian and French laws forbidding salaried workers from working in retail outlets on Sunday. The Court did not, however, modify its approach in principle. It began by assessing whether the measure was justified by a legitimate objective. However, having reached a positive conclusion on this point, it did not remit the question of the assessment of the "necessary" character of the barrier to the national courts, but itself stated that the "restrictive effects which can possibly flow from such a law do not appear excessive with regard to the aim in view." (62)

V. CONCLUSION

37. It appears from the above that, in a number of ways, the provisions of the Treaty of Rome, as interpreted by the Commission and the Court of Justice, exert a "liberating" effect on the economy. Member States no longer have unfettered discretion to resort to the many classic instruments of economic intervention, such as State aids and the acquisition of shares in companies. The exclusive rights held by national monopolies are being submitted to the control of the Community, and even their very existence is being called into question. The application of national regulation of trade and of price control measures is increasingly being challenged with success.

38. Must we conclude that the maintenance of a free market is a principle having constitutional value and that the Treaty requires Member States as well as the institutions to respect it? That would be going too far.

In my opinion, if the measures adopted by the Member States have been condemned in the cases we have discussed, it is not because the Court objects to all forms of intervention, but rather because when interventions are effected in a random manner and without coordination, this can only have a negative effect on the operation of the single market. That is the reason why so many national laws and measures have been declared contrary to the Treaty. However, that does not mean that the Court would adopt the same attitude with regard to measures pursuing the same objectives if they were adopted by the Community itself and were applicable throughout its territory.

39. In 1969, Dr. Hans von der Groeben, then Vice-President of the Commission, wrote that the fact that the Treaty relies essentially on competition and the international division of labour as means of achieving the objectives envisaged does not eliminate the need for coordination of State intervention by the Community in order to enhance its effectiveness and to avoid distortions of competition (63).

Twenty years later, these words remain true. However, as it appears, the coordinating activities of the Community have remained limited, largely due to the resistance of Member States. Consequently, national measures are challenged more and more often, without measures to replace them being adopted at the Community level.

The "neo-liberalism" which appears in the decisions of the Commission and the Court is therefore not dogmatic in character but merely reflects an awareness of the incompatibility of the existing situation with the demands of a single market. It does not follow that, if one day Member States renounce the desire to regulate their economies on an individual basis and accept that they must grant the Community sufficient means to allow it to achieve a true common policy, such a policy will necessarily have to reflect neo-liberal economic conceptions.

27th April 1992
M Waelbroeck

FOOTNOTES

1.In particular, one thinks of Alcide de Gasperi and Konrad Adenauer.
2.Case 6/64, [1964] ECR 1141.
3.The Court also rejected the criticisms based on Article 37, Article 93 and Article 102 of the Treaty.
4.See Council Decision of 20th July 1968 granting France mutual assistance pursuant to Article 108 of the Treaty, OJ [1968] L 189.
5.See the Decisions adopted by the Commission forbidding grant of preferential export credits, which are the subject of the judgment of 10th December 1969, Joined Cases 6 and 11/69, *Commission v France*, [1969] ECR 523.
6.Case 155/73, ECR [1974] 409, para 14.
7.Commission Directive 70/50 of 22nd December 1969, OJ [1970] L 13/29.
8.M Waelbroeck, *Les réglementations nationales de prix et le droit communautaire*, Brussels 1975.
9.See answer to written question no. 191/69 by Mr Glinne, OJ [1969] C 132/5.
10.See Commission Directive 70/50 Article 2(3); see also Case 188/82, *Roussel* [1983] ECR 3849; Case 229/85, *Leclerc v Au Blé Vert* [1985] ECR 2.
11. Cases 65/75, *Tasca* [1976] ECR 29; Joined Cases 88 to 90/75, *SADAM* [1976] ECR 323.
12. Case 82/77 *Van Tiggele* [1978] ECR 25; Case 231/83, *Cullet v Centre Leclerc* [1985] ECR 306.
13. Case 116/84, *Roelstraete* [1985] ECR 1706. But see Case 78/72 *Commission v Italy* [1983] ECR 1955.
14.Other than the judgments *Tasca* and *SADAM* cited above, see Case 5/79, *Buys* [1979] ECR 3203 and Joined Cases 16 to 20/79, *Danis* [1979] ECR 3327; *Revue Critique de Jurisprudence Belge*, 1981 p.5 and note by M Waelbroeck.
15.Op.cit. Joined Cases 16 to 20/79, *Danis*.
16.See generally on this subject: M Waelbroeck, "Réglementations nationales des prix et droit communautaire", *Revista Juridica de Catalunia*, 1987, No. 3, p.43.
17.Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
18.See generally on this jurisprudence: P Oliver, *Free Movement of Goods in the EEC*, London, 1982; M Waelbroeck, "Mésures d'effet équivalent, discrimination formelle et matérielle dans la jurisprudence de la Cour de Justice", *Liber Amicorum Frédéric Dumon*, Antwerp, 1983 Vol. II, p.1329; G Marenco, "Pour une interprétation traditionelle de la notion de mesures d'effet équivalant à une

restriction quantitative", *Cahiers Droit Européen*, 1984, p.291; L Defalque and G Vandersanden, "La notion de mesure d'effet équivalant à une restriction quantitative " (Article 30 of the EC Treaty), *J.T.*, 1984, p.489; M Waelbroeck "Le rôle de la Cour de Justice dans la mise en oeuvre de l'Acte Unique Européen", *Cahiers Droit Européen*, 1989, p.41, 47 to 52; M Lopez Escudero, *Los obstaculos técnicos al comercio en la Comunidad economica europea*, Granada, 1991.

19. In particular consider the law relating to the shape of packaging margarine in issue in the *Rau* case, Case 261/81, [1982] ECR 3961; or that relating to the minimum quantity of dry matter content of bread in issue in the *Kelderman* case, Case 130/80, [1981] ECR 527.
20. Joined cases 110 and 111/78, *Van Wesemael* [1979] ECR 35.
21. Case 279/80 *Webb* [1981] ECR 3305.
22. Case 59/75, [1976] ECR 91.
23. Case 323/82, [1984] ECR 3809; *Cahiers Droit Européen*, 1986, p.161, note by M Dony.
24. Case 234/84, [1986] ECR 2263.
25. Case C-303/88, [1991] ECR 1433 and Case C-305/89, [1991] ECR 1603.
26. *EC Bulletin*, 9/84 No.3.5.1 and following. See also Commission Communication relating to the application of Articles 92 and 93 of the Treaty and of Article 5 of Commission Directive 80/723 to public enterprises in the manufacturing sector, OJ [1991] C 273/2.
27. See in particular the criticisms voiced on this issue by the European Centre of Public Enterprise, *Europe*, 14th November 1990, p.13 and the arguments of the Italian and Spanish governments in Cases C-303/88 and C-305/89, *ENI/Lanerossi* and *Alfa Romeo* op.cit.
28. OJ [1991] L 300/48.
29. Op.cit. This principle had already been established in the judgment of 16th November 1977, *GB-Inno-BM*, Case 13/77, [1977] ECR 2115, paras 31 and 32, but the Court had not appreciated all the consequences at that time.
30. Case 30/87, [1988] ECR 2479, paras 32 to 34.
31. Case C-202/88, *French Republic v Commission*, [1991] ECR 1223, para 22.
32. Paras 33 to 35.
33. Paras 41 to 43.
34. Para 51, unofficial translation.
35. Case C-260/89, unreported.
36. Para 37, unofficial translation.
37. Case C-18/88, unreported.

38.Case 311/84, *CBEM*, [1985] ECR 3261, para 27.
39.Paras 21 and 22, unofficial translation.
40.Para 20, unofficial translation.
41.Case C-41/90, *Höfner and Elser v Macrotron*, unreported, paras 30 to 34, unofficial translation.
42.Case C-179/90, *Merci Conventionali Porto di Genova*, unreported.
43.Para 19, unofficial translation.
44. Paras 20 and 23, unofficial translation.
45.Case C-369/88, *Delattre*, [1991] ECR 1487, and Case C-60/89, *Monteil*, [1991] ECR 1547.
46.Case 286/81, *Oosthoek*, [1982] ECR 4575 and Case 382/87 *Buet*, [1989] ECR 1235.
47.Paras 38 and 39, unofficial translation.
48.Case C-353/89, *Commission v the Netherlands*, unreported.
49.Para 25, unofficial translation.
50.See note 6 above.
51.Case 271/81, *Coopérative du Béarn*, [1983] ECR 2057.
52.Para 29, unofficial translation.
53.Para 37, unofficial translation.
54.Para 14, unofficial translation.
55.See G Marenco, op.cit.; M Waelbroeck, op.cit., in *Liber Amicorum Frederic Dumon*, p.1329.
56.Joined Cases 60 and 61/84, [1985] ECR 2605.
57.Case 216/84, *Commission v French Republic*, [1988] ECR 793.
58.See along the same lines as case 216/84, case 298/87, *Smanor*, [1988] ECR 4489 and case C-76/86, *Commission v Federal Republic of Germany*, [1989] ECR 1021.
59.Case 158/86, *Warner Brothers*, [1988] ECR 2605.
60.Case 145/88, [1989] ECR 3851.
61.Paras 11 to 16.
62.Case C-312/89, *Conforama*, [1991] ECR 997 and Case C-332/89, *Marchandise*, [1991] ECR 1027, unofficial translation.
63.*Hans von der Groeben*, in *Droit des Communautés européennes, Les Nouvelles*, Brussels, 1969 No.1997.

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