FREE TRADE AND COMPETITION IN THE EEC

Law, Policy and Practice

H. Papaconstantinou

FREE TRADE AND COMPETITION IN THE EEC
Law, Policy and Practice

HELEN PAPACONSTANTINOU

ROUTLEDGE
London and New York

First Published 1988
by Routledge
11 New Fetter Lane, London EC4P 4EE
29 West 35th Street, New York, NY 10001

Printed and bound in Great Britain by
Biddles Ltd, Guildford and King's Lynn

British Library Cataloguing in Publication Data

Papaconstantinou, Helen
Free trade and competition in the E.E.C. : law, policy and practice.
1. European Community countries. Economic policies. Implications of European Community law.
I. Title
341'.7'5'0614

ISBN 0-415-00110-2

Library of Congress Cataloging-in-Publication Data

ISBN 0-415-00110-2

FREE TRADE AND COMPETITION IN THE EEC: Law, Policy and Practice

To what extent are Member States of the EEC bound to operate under principles of free trade and undistorted competition? How much of a free market really is the EEC in so far as the States themselves are concerned?

This book examines these issues and attempts to establish the conditions under which a State may operate in the market through the medium of the undertakings which it controls and the Member State's responsibility for these undertakings.

It looks at the extent to which Member States may intervene and regulate this market through general measures and tamper with free market forces without infringing the principle of free competition and whether state liability can be established. In the context of the above, the book also assesses the separate liability of both public and private undertakings which operate under the direction of the State or in a so heavily regulated environment that a certain anti-competitive behaviour is made possible or virtually imposed by the State.

The book concludes that the system as it operates is not as successful as it might be as the Treaty leaves a lot of room for conflicting interpretation influenced by political considerations. In the light of the above the view adopted is that the matter should be solved at the Community level by the Council of Ministers and the Commission elaborating guidelines in order to avoid national policies jeopardising Common Market objectives. On the judicial level the book recommends the use of a rule of reason within the context of the articles of competition.

LIST OF ABBREVIATIONS

INSTITUTIONS AND ORGANIZATIONS

A.G.	Advocate General at the Court of Justice of the European Communities
BGH	Bundesgerichtshof
CECA	Communauté Européenne du Charbon et de l'Acier
CE	Communautés européennes
CEE	Communauté économique européenne
CEEP	Centre Européen de l'Entreprise Publique
Community	European Economic Community
Court of Justice	Court of Justice of the European Communities
EAEC	European Atomic Energy Community (Euratom)
EC	European Communities
ECJ	European Court of Justice (Court of Justice of the European Communities)
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
EP	European Parliament
Euratom	European Atomic Energy Community (EAEC)
EWG	Europäische Wirtschaftsgemeinschaft
FIDE	Fédération International de Droit Européen
GATT	General Agreement on Tariffs and Trade
IBA	International Bar Association
M.E.P.	Member of European Parliament
Treaty	Treaty of Rome instituting the EEC

ULB	Université Libre de Bruxelles
UN	United Nations
UNICE	Union des Industries de la CE

PUBLICATIONS

Ann. Fac. Droit Liège	Annales de la Faculté de Droit de Liège
BGHZ	Bundesgerichtshof, Zivilsachen
C.M.L. Rev.	Common Market Law Review
ECLR	European Competition Law Review
ECR	European Court Reports (Recueil de la Jurisprudence)
E.L. Rev.	European Law Review
EuR	Europarecht
J.O.	Journal Officiel des CE (Official Journal of the EC (C - Information and Notice; L - Legislation)
N.J.W.	Neue Juristische Wochenschrift
O.J.	Official Journal of the EC (Journal officiel)
Recueil (Rec.)	Recueil de la Cour de Justice de CE
R.M.C.	Revue du Marché Commun
Rev. Trim. Dr. Eur.	Revue Trimestrielle de Droit Européen
Riv. Dir. Ind.	Rivista di Diritto Industriale
WuW	Wirtschaft und Wettbewerb
WuW/BGH	Wirtschaft und Wettbewerb/Bundesgerichtshof
WuW/EBGH	Wirtschaft und Wettbewerb/Entscheidungen des Bundesgerichtshof

CONTENTS

Chapter One

INTRODUCTION

State intervention in the economy has become a common feature of contemporary societies independently of their political system. The creation of the welfare state, the development of international trade which led to great interdependence as well as competition between States, and, more recently, the economic crisis have made a certain degree of economic regulation and coordination inevitable. Even the most fervent supporters of a laissez-faire, free market ideology may find it necessary - at least in exceptional circumstances - to save failing industries, encourage and support new investment, adopt incentives for the development of backward regions and take measures for the protection of the environment.

1. FORMS OF STATE INTERVENTION IN THE ECONOMY

State intervention in the economy may actually take two forms: on the one hand the State may coordinate and regulate the economic process by issuing guidelines and setting the rules within which the market must operate without actively participating in it.

On the other hand the State may directly participate in the economy through the establishment of public undertakings or the taking of control of private ones. State participation is not, as such, inconsistent with the Treaty. Article 222 actually provides that the establishment of the Common Market cannot affect the system of property of each Member State.

However, notwithstanding the fact that neither form of

state intervention is, as such, inconsistent with the Treaty it is not left totally uncontrolled by it, but must, instead, be exercised within its framework and in the light of the Treaty objectives. As may be derived from articles 2 and 3 of the Treaty the fundamental objectives of the Treaty are the creation of a Common Market where goods, services, persons and capital circulate freely and competition remains undistorted. In view of the fact that any kind of state intervention in the economy is likely, somehow, to affect the market mechanism the purpose of this book will be to examine the extent to which the State may intervene in the market without violating the Treaty rules. In doing so it is important to note that the Treaty contains no specific provision addressed to Member States prohibiting them, in general, from adopting measures which may have as their object or effect to distort competition. Instead, it contains provisions preventing only specific anticompetitive activities of the State. Thus, articles 92-94 only allow the Commission to prohibit certain categories of state aids and article 90 only prohibits state measures with respect to undertakings which Member States control.

The above, however, must not be interpreted to mean that the State is only bound by the principle of free competition when it actually participates in the market as entrepreneur through the medium of undertakings which it controls or when it grants subsidies favouring certain undertakings or the production of certain goods. In addition to the fact that the frontier between state regulation and participation may be blurred, since extensive regulation of a certain sector may amount to virtual nationalization thereof, to exempt the State's regulatory activities from the competition rules would frustrate the Treaty objectives. Although it is true that the establishment of liability under the competition rules for the State's regulatory activities requires a broad teleological interpretation of the Treaty which may involve conflicting ideological aspects, in this thesis we shall try to delimit the extent to which the Member States may intervene in the market without tampering with the principle of free competition and without frustrating the Treaty objectives and the establishment of the Common Market.

In doing so it must be kept in mind that a certain degree of economic regulation and coordination is also required by the Treaty of Rome particularly if one of the basic objectives of the Community, the approximation of

the economic policies of the Member States, is to be achieved. This is further made specific in Title II of the Treaty, titled Economic Policy, and in particular article 103 which provides that Member States shall regard their conjunctural policies as a matter of common concern and article 105 which imposes an obligation on Member States to take common action in order to ensure a high level of employment and a stable level of prices. The implementation of such common Community action necessarily requires the adoption of state regulations and measures.

In the light of the above the purpose of this book shall be: first, to establish the conditions under which a State may operate in the market through the medium of the undertakings which it controls and the Member State's responsibility for the behaviour of the latter. This involves an analysis of article 90 para 1 which actually extends state responsibility beyond the competition rules by making Member States liable in the case of public undertakings for state measures which are contrary to any of the rules of the Treaty. Article 90 para 2, which exempts certain undertakings entrusted with the operation of services of general economic interest from the rules of competition, and article 90 para 3, which grants the Commission special power to issue directives or decisions to Member States contravening article 90, shall also be examined in this connection.

Second, we shall establish the extent to which Member States may intervene and regulate the market through general measures and tamper with the free market forces without infringing the principle of free competition. In the absence of a specific provision addressed to Member States, we shall examine whether state liability can be established under the combined effects of the general principles and the particular rules of competition applicable to undertakings. In this connection account must be taken of the fact that to absolve Member States from liability for distorting competition would greatly frustrate the Treaty objectives.

Third, in the above context and in order to give a complete picture of the effects of state intervention in the market under the Treaty we shall also examine the separate liability of both private and public undertakings which operate either under the direction of the State or in a so heavily regulated environment that a certain anticompetitive behaviour is made possible or virtually

imposed by the State.

2. IS NATIONALIZATION CONSISTENT WITH THE TREATY?

One drastic form of state intervention in the economy is the nationalization or socialization of a certain industry or sector of the economy. For the purposes of this book and in order to examine the effects that the above form of state intervention may have upon the Community system it is not necessary to distinguish between the two or try to establish that nationalization is only one aspect of socialization. Whether a certain activity is reserved for the State or a public body does not matter: what is important is that this activity is excluded from private initiative. (1)

Nationalizations, as such, are not prohibited by the Treaty. According to article 222 of the Treaty of Rome 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. (2) The same principle has been adopted in the Treaty for the establishment of the European Coal and Steel Community which also provides that 'the establishment of the Community shall in no way prejudice the system of property of the undertakings to which this Treaty applies' (Article 83 of ECSC Treaty) as well as in article 91 of the Euratom Treaty according to which 'The system of ownership applicable to all objects, materials and assets which are not vested in the Community under this chapter shall be determined by the law of each Member State'.

The above articles were not included in the Treaties only in order to satisfy the different ideologies of the contracting States and to guarantee the acceptance of the Communities by most of the political parties. The economic structure of the Member States was not necessarily the result of a conscious ideological development. The creation of the public sector was due to circumstances and needs particular in each Member State and very different from any political doctrine favouring it. (3) It was therefore also the difference between the economic structures of the original Member States and the existence of a more or less extended public sector in all of them that made the adoption of those provisions necessary.

The view that private initiative may be curtailed for the general interest and that certain activities may be

exercised by the State is also to be found in the liberal-democratic constitutions of the Member States. Thus, article 15 of the Grundgesetz provides that land and buildings, natural resources and means of production may, for the purpose of their socialization, be transferred to joint ownership or any other form of social organization by law providing the way and level of compensation. The German Supreme Court has itself stated that the Constitution does not imply a constitutional preference for a certain economic system. The French Constitution has reserved for the legislature 'the nationalization of undertakings' and the 'fundamental principles of the system of property' (article 34). The Italian Constitution while mentioning in article 42 that 'property may be either public or private and that the economic goods belong either to the State or to legal or natural persons' allows, through article 43, the acquisition by the State of certain undertakings or categories of undertakings.

The above national clauses, which are given by way of example, therefore allow the legislator to reserve for the public authorities the exploitation of a certain sector of the economy. At the same time, in the Italian and German Constitutions the extent of those sectors is limited by those same clauses.

As early as 1962 the EEC Commission in its answer to a parliamentary question of Philipp, M.E.P. stated that the nationalization of electric energy in Italy was not contrary to the Treaty. (4) That approach, which was further strengthened by the decision of the European Court of Justice in Costa v ENEL, (5) has been reaffirmed thereafter. Therefore, the arguments put forward by Stendardi (6) and based on the Italian text, that article 222 concerns only the preexisting system of property and that new nationalizations are not permitted, find no support in the jurisprudence and the caselaw of the ECJ.

Stendardi's view, although extreme, did not stand all alone at the time of the establishment of the Common Market. In the beginning, notwithstanding the existence of article 222, many writers put forward the view that public undertakings were not consistent with the fundamental principles of the Treaty. As Colliard noted (7), the expression 'Common Market' naturally evokes a market economy and one could be led to think that the economic system of the EEC is that of a market economy. Furthermore, the relevant provisions are rare and incidental

(articles 222, 37 and 90), imprecise (they contain numerous terms which are not defined, the reason being the variety which existed in Member States) and of exceptional character. Such a view may also be supported by the fact that nationalizations are mostly associated with a political ideology which disapproves of such free market system. Nevertheless, despite the above, the author himself concluded that, as caselaw and practice have shown, public undertakings are there to stay and also destined to play an important role in the formulation of economic policy. (8) However, public undertakings must operate within the Community system and obey its principles, among which are those of free and fair competition and non-discrimination.

Taking, therefore, the existence of a public sector within the Community for granted the next step is to determine which are the limitations to nationalization or other forms of state intervention set either by the general or particular provisions of the Treaty or, possibly, by its general scheme.

First, even if nationalization, as such, is not contrary to the Treaty, the particular measures taken may be illegal if they are contrary to the basic principles of free competition (article 3f) and non-discrimination (article 7). As the Heads of the Delegations had already made clear in their report of 1956 which formed the basis of the EEC Treaty, among the basic conditions for the creation of a Common Market and a necessary element for the institution of a system of free competition was the establishment of rules and procedures to redress the effects of state intervention and monopolies. (9)

Article 3(f) is made specific in Chapter I of Title I of Part III of the Treaty (articles 85-94) which contains the rules on competition. These articles act as an important obstacle to state intervention since, not only do they subject both private and public undertakings to the obligations to observe the rules of free competition (articles 85-96) but, in addition, through article 90, impose an obligation upon the States to obey the rules of the Treaty by safeguarding that public undertakings or undertakings with special or exclusive rights do the same. If such equality between private and public undertakings did not exist Member States would be able to jeopardise the objectives of the Treaty by nationalizing a certain industry or group of industries and thus taking it out of the realm of competition.

At the same time, however, in the eyes of the

Commission article 90 does not limit the principle contained in article 222. As the Commission stated in its 6th Report on Competition Policy, Member States remain completely free to determine the extent, composition and internal organization of their public sector and to introduce whatever reforms they believe necessary in their rules governing property ownership. (10)

In the light of the above we must therefore consider whether there are any other limitations to the continuous expansion of the public sector which are inherent in the Treaty or whether the Common Market, as conceived by its founders, could also function within a socialistic and state-controlled framework.

Except for article 37 which has been interpreted as requiring the abolition of state or state-controlled trading monopolies and prohibiting the creation of new ones (11) no other form of state monopoly (such as service or production monopoly) has been, as yet, held inconsistent with the Treaty. The standstill clauses prohibiting the introduction of any new restriction on the right of establishment, the freedom to provide services and the movement of capital (articles 53, 62, 71 of the Treaty of Rome) are not considered as posing any obstacle to nationalization in so far as the prohibition to exercise nationalized activities is equally applicable to nationals and foreigners.

Although the above view has received the support of the ECJ (12) it must be observed that the mere fact that a law or prohibition applies to both nationals and inhabitants of the Member States does not ensure compliance with the Treaty if this law or prohibition is in fact discriminatory in the sense of article 7. In this context an analogy may be drawn from the decisions of the ECJ regarding the application of article 95. (13) In those cases the Court held incompatible with the Treaty a certain tax which, although imposed on both imported and domestic products of the same category, had the effect of protecting other domestic products which were also potentially in competition with those subject to the tax. Similar considerations may also be of relevance in the case of nationalization.

Furthermore, on a more theoretical level, the theory that the nationalization of an entire sector is contrary to the spirit of the Treaty, even if article 37 para 2 is not affected, is not without value. The Treaty is to a great extent based on a system of liberal economy restricted only in certain particular sectors, those of agriculture and