STATE MONOPOLIES OF A COMMERCIAL CHARACTER (ARTICLE 37 OF THE EEC TREATY) AND THEIR IMPORTANCE IN CONNECTION WITH PORTUGAL'S ACCESSION TO THE EUROPEAN COMMUNITIES1

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I. THE RULES GOVERNING STATE MONOPOLIES OF A COMMERCIAL CHARACTER UNDER INTERNATIONAL AGREEMENTS FOR THE LIBERALIZATION OF INTERNATIONAL TRADE

A. World Trade

The policy of progressively liberalizing world trade, pursued in several international organizations of which Portugal is a member, essentially is based on the concept of tariff dismantling—the reduction (if not the complete removal) of tariff barriers between States and the removal of quantitative restrictions on the import and export of goods. While tariff dismantling is a prerequisite for the liberalization of international trade, it is not sufficient in itself, as has been amply shown by the European experiment in which Portugal has been involved. It is not fortuitous that the resurgence of concern about non-tariff barriers to trade generally has coincided with the expiry of the transition periods scheduled for tariff dismantling.

The policy of removing quantitative restrictions on the import and export of goods would be incomplete if the law-making body in question concentrated merely on removing quotas laid down directly by law and failed to take action to stop quota restrictions from operating in other ways. The fact is that quota restrictions do operate sometimes and in certain cases in a much more discreet and efficient manner, through arrangements granting a firm or a group of firms the exclusive right to buy or sell abroad a given product. Such firms are in a position to determine directly or indirectly the quantities to be imported or exported, to set the price

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1 Research for this Article was made first during the Eighth Congress on European Law, held in Copenhagen from June 22-24, 1978. At the invitation of the International Federation for European Law, the author took part in the working committee on "Equal treatment of public and private enterprises." An earlier version was presented in the Third Associação Universitária de Estudos Europeus (AUROP) (University Association Studies) Seminar held in Coimbra on May 4-5, 1979.

at which the produce is bought or sold and ultimately to abuse their dominance. For these reasons, the liberalization of trade in a given area implies, in addition to the removal of customs duties and quantitative restrictions, a uniform legal status for all market participants.

Present economic experience in combating the protectionist policies of countries shows how far governments' imaginations can go in creating non-tariff barriers to trade which are a match, at the very least, for tariff dismantling measures. An example of this is State trading, the term being understood in the broadest sense and, therefore, including not only the commercial practice of socialist countries, but also that of countries with free-market economies, notably through the formation of public undertakings. Since the legal form and the size of the public sector vary from one country to another, it is quite possible that a State's intervention in the market in the exercise of its sovereignty may be used, through distortions of competition, to further a protectionist policy serving exclusively national interests. The following are the most important of these practices: the obligation to obtain prior authorization before embarking on industrial and commercial operations; the application of licensing arrangements to certain sectors; the requirement that firms set up consortia; the granting of tax exemptions or various social benefits; the allocation of credit guarantees or, quite simply, the charging of lower interest rates than those laid down for other undertakings for loans granted by State banks, or by private banks should they be required to apply such rates by government directive; and any other type of preferential treatment, such as the awarding of public works contracts on a non-competitive basis, the payment of an above-normal price for buying or selling a given product in public procurement; or the nationalization of specific sectors of the national economy.

These non-tariff barriers are not categorized in national legislation and international conventions, and vary with the country and the product; therefore, it is absurd to attempt to make an exhaustive list of them. It always has been accepted, however, that this fact should not be an excuse for failing to penalize such prac-

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2 "[A] non-tariff trade-distorting policy is any measure (public or private) that causes internationally traded goods and services to be allocated in such a way as to reduce potential real income." R. Baldwin, Non-Tariff Distortions of International Trade 5 (1970). See also Baldwin, Der Abbau der nichttariflichen Beschränkungen des Welthandels als Ziel der neuen GATT-Verhandlungen, in Europa-Archiv 555 (1974).
tices when they infringe the principle of non-discrimination and obstruct the establishment of conditions conducive to fair competition in a given area. Thus, it will come as no surprise that in international agreements on the liberalization of trade, special attention has been given to the rules governing public undertakings, since such undertakings can be one of the most effective means of obstructing the purposes of the agreements.

Article 29(1)(a) of the Havana Charter of 1948, for instance, expressly provides that:

Each Member undertakes that if it establishes or maintains a state enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases and sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Charter for governmental measures affecting imports or exports by private traders.4

The Havana Charter never entered into force because the United States feared discrimination against the dollar. Even so, its basic principles considerably influenced the General Agreement on Tariffs and Trade (GATT).5 In the General Agreement, there is also a specific provision on the conduct of State enterprises (Article XVII), precisely intended to rule out discriminatory practices by the latter in international trade.

The same philosophy can be found in the Organization of Economic Cooperation and Development's (OECD's) Code of Liberalization of Capital Movements of April 16, 1948. The April 24, 1959 revision expressly provides, with respect to imports by State monopolies, that "Member countries, to the fullest extent of their executive authority, shall ensure that import trade handled by monopolies under government control is conducted in accordance with the general principles laid down in Section D of Chapter IV of the Havana Charter"6 or, in other words, exactly the same part of the Charter as the provision quoted above. As has already been pointed out, however, GATT, the Havana Charter and the OECD Code contain only a general ban on discrimination with respect to State monopolies but do not question

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4 See also the provisions contained in the other subparagraphs of Arts. 29(1), 29(2) & 30.
6 See Arts. 4 & 12.
the monopolies themselves or place any other restriction on their operations.

B. The Stockholm Convention Establishing EFTA

It is in the framework of regional integration policy that the principle of equal treatment for the various transactors operating in the market takes on its full importance and it becomes clear that the removal of customs duties and quantitative restrictions, albeit the necessary precondition for the establishment of a free trade area, is not sufficient in itself. Perhaps because they had forgotten this important detail or because it had not been sufficiently demonstrated at the time, and because they were convinced that tariff dismantling, even when confined to a specific region, necessarily contributes to a liberalization of world trade, the authors of the General Agreement did not hesitate to allow, in Article XXIV, a major derogation from one of its fundamental principles, the principle of non-discrimination.7

Express consideration was given to State monopolies of a commercial character in Article 12(d) of the Stockholm Convention establishing the European Free Trade Association (EFTA),8 which provides that any Member State may adopt or enforce measures "necessary to secure compliance with laws or regulations relating to . . . the operation of monopolies by means of state enterprises or enterprises given exclusive or special privileges." However, as expressly stated in the Article itself, the State may do so only "provided that such measures are not used as a means of arbitrary or unjustifiable discrimination between Member States or as a disguised restriction on trade between Member States."9 The idea which is gained from reading Article 12(d) of the Stockholm Convention is that, contrary to the stipulations of the Treaty of Rome, which established the EEC, State monopolies of a commercial character are not necessarily prohibited, nor do they have to be "adjusted" in line with an overall harmonization policy.

It is true that in paragraph 11 of Article 10 of the Convention (this Article relates to quantitative import restrictions, contains a standstill clause and lays down a timetable for the elimination of

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7 See Robertson, supra note 2, at 80. On the interpretation of Article XXIV of the GATT and the ambiguity of this provision, see P. Lortie, Economic Integration and the Law of GATT 1-13 (1975).


9 Id. at Art. 12(D) (emphasis supplied).
these restrictions) it is specified that: "[f]or the purposes of this article: (a) 'quantitative restrictions' means prohibitions or restrictions on imports from the territory of other Member States whether made effective through quotas, import licenses or other measures with equivalent effect, including administrative measures and requirements restricting import." The fact remains, however, that the scope of the above provision in Article 12 was not spelled out or, rather, will depend chiefly on the interpretation which is given to the adjectives we have emphasized in the quotation from this article.

Certainly it was owing to the ambiguous interpretation of which that article is susceptible as regards the legal position of State monopolies of a commercial character that the EFTA Member States deemed it advisable to make it clear, in what is known as the Lisbon Agreement of 1966, that the monopolies referred to in Article 12(d) of the Convention should be administered in accordance with Article 14, i.e., in accordance with the provisions governing public undertakings. Contrary to the technique used in the Treaty of Rome, the Stockholm Convention refers in Article 14(1)(a) only to the "measures the effect of which is to afford protection to domestic production which would be inconsistent with the Convention if achieved by means of a duty or charge with equivalent effect, quantitative restriction of government aid," there being no reference to measures having equivalent effect of quantitative restrictions. While Article 10(11) of the Convention, which is quoted above, contains a sufficiently broad definition of "quantitative restrictions" to embrace measures having equivalent effect, it nevertheless must be pointed out that this provision defines its scope within the specific limits of that article.

It may be inferred from the above that, even though the contracting States realized the importance which strict rules on the legal status of State monopolies could have, they did not want, from the very outset, to make a policy of tariff dismantling which was viable in the short term subject to the outcome of a policy of doubtful practicality in the short, medium and even long term. This is especially so in the context of an organization with intergovernmental features, as would have been the case of the policy of eliminating or at least adjusting existing State monopolies. What is more significant, however, than the insertion of precepts of the type quoted above in international treaties is the fact that in a regional organization such as EFTA, for example, only six years after its establishment, the Member States had
started to accord increasing importance to the interpretation of the competition rules in the Stockholm Convention and, first and foremost, to the provisions of Article 14 relating to public undertakings. When the Stockholm Convention was concluded in 1960, non-tariff barriers to the establishment of a free trade area "in conditions of fair competition" did not have in the practices of the States or of the undertakings in the area the increasing importance they took on as tariff dismantling progressed and as, concomitantly, the protectionism associated with it disappeared. Although the removal of these non-tariff barriers to trade has made itself felt to some degree in every quarter, in proportion to the extent of the tariff dismantling, it obviously becomes more important in a regional organization.

II. THE RULES GOVERNING STATE MONOPOLIES OF A COMMERCIAL CHARACTER UNDER THE EEC TREATY

Under the Treaty of Rome, the treatment of this matter took on another dimension, not only because the ultimate objectives of integration are more ambitious, but also because the machinery of supervision and enforcement at the Community institutions' disposal is substantially more effective. For obvious reasons, under Community legislation revenue-producing monopolies cease to be subject to the general rules of the Treaty of Rome and, in particular, to Article 85 et seq., wherever the application of such rules obstructs the performance, in law or in fact, of the particular tasks assigned to them—namely, to obtain revenue for the public treasury. Also, for obvious reasons, the Treaty contains safeguard clauses concerning the protection of national treasures or of national security which permit derogations from the Treaty rules. Accordingly, the adoption of the same approach to national monopolies of a commercial character, which are referred to in Article 37 of the Treaty, would hardly be appropriate.

Article 37(1) stipulates:

Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

11 Id. at Arts. 36 & 223(1)(b).
The provisions of this Article shall apply to any body 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(2) is a standstill clause, under the terms of which: "Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restrict the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States." The remaining paragraphs of the Article relate to the timetable for the measures referred to in paragraph 1, monopolies involved in disposing of, or obtaining the best return for, certain agricultural products, compatibility with existing international agreements and the power vested in the Commission to make recommendations to the Member States on the adjustment of their State monopolies.

However, until such time as the appropriate adjustments are made, there exists a derogation from the principle of equal treatment of undertakings through non-observance of Article 90(1) of the Treaty, which conflicts directly with that principle. Although the end of the transitional period was expressly laid down in Article 37 as the time limit for adjusting State monopolies of a commercial character, many situations which may be considered to be in this category continued, and are still continuing, far beyond December 31, 1969. This situation may be regarded as indicative of the difficulties raised by the interpretation of Article 37 and also, in particular, of the delicate political implications which have been involved at times in its application.

A. The Difficulties Raised by the Interpretation of Article 37

As far as we know, the French Council of State and the German Federal Finance Court are the only supreme courts in the

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13 For example, France only very recently took steps to adjust the monopoly in matches (Act of December 4, 1972) and the monopoly in manufactured tobacco (Act of May 24, 1976).
14 See the Decision of the Council of State of June 19, 1964, Société des Pétroles Shell-Berre et autres, Société "Les garages de France," Société Esso-Standard, Société Mobil Oil française, Société française des pétroles B.P., [1964] Recueil des décisions du Conseil d'état 347-48. This decision is, furthermore, one of the best examples of the application of the "acte clair" theory (an "acte clair" being a provision not requiring interpretation by the Court of Justice), which has been so precious to the French Council of State.
15 See the Decision of the Bundesfinanzhof (BFHE) of November 12, 1974 (VII R74/73),
Member States which have not had any doubts about declaring the wording of Article 37 of the Treaty of Rome to be "clear" and "unequivocal," thereby dispensing with the obligation laid down in the third paragraph of Article 177 to bring the matter before the Court of Justice for a preliminary ruling. Not only can we find differing theories in legal literature, but most authors have shown caution in investigating the scope of Article 37. This caution is fully justified if account is taken of the most recent rulings on this matter by the Court of Justice.

From the time when the Court of Justice was called upon to rule on the interpretation of this Article by the Giudice Conciliatore (magistrate) in the famous Costa v. ENEL case, which was brought about by the nationalization of Italy's electricity network, up to March 13, 1979, when the most recent judgments were handed down concerning Article 37, a long period elapsed. After 1964, with the exception of the Albatros case in 1965, there was a long interval before the Court directed its attention again to the interpretation of this Article—namely, in the Sacchi case in 1974. However, the judgments handed down in 1976, and more recently in February and March of 1980, referred to below, cert-
tainly can be considered landmarks not only for throwing light on the terms of Article 37 itself but also for determining the Article's scope within the context of a systematic interpretation of the Treaty. It is in this light that we now shall examine briefly the terms of Article 37 of the Treaty and determine its specific purposes.

1. The Meaning of the Expression "State Monopoly of a Commercial Character"

   a. The Expression "State Monopoly"

   The Treaty of Rome's provisions, notably those on competition policy, do not outlaw monopolies. The Treaty merely prohibits what it terms the abuse of a dominant position. In this it differs somewhat from the Treaty of Paris, which set up the European Coal and Steel Community (ECSC) and from United States antitrust legislation. Hence, Article 86 of the Treaty of Rome does not cover monopoly situations where firms have not acquired a dominant position in the market. Conversely, cases that do not involve a monopoly situation may well fall within its scope. For the purposes of Article 86, then, it is not so much the structure of the market that counts as the power of a given operator to exert an economic influence in the market.

   It seems, however, that Article 37 in using the adjective "State" to describe "monopoly", refers not to a monopoly in the economic sense of the word but to the granting of exclusive rights by means of acts issued by a public authority. This is the general view held by academic writers on the subject. Confirmation of this view can be found in the authentic German version of the Treaty, which employs the word "staatlich" where the French version uses "national." We must, however, agree with Pappalardo when he says that, in the light of the 1976 judgments of the European Court of Justice, the dividing line between the "economic" and "legal" meanings of the term becomes more and more blurred as Article 37 comes to be regarded as a rule of conduct. But it should be stressed that there is much more to the adjective "national" or "state," depending on which version we take, than might be sup-

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posed at first. In practice, Article 37 does not cover only monopolies set up by central governments. Given the differences among the Member States in legal and administrative organization, to support this viewpoint would have disastrous consequences, calling into question the free movement of goods, distorting competition and, in the final resort, failing to respect the principle of equal treatment.\textsuperscript{24}

It was precisely because they foresaw the difficulties involved in determining \textit{in concreto} the situations covered by the first subparagraph of Article 37(1) that the authors of the Treaty sought to throw further light on its meaning in the second subparagraph. Although the wording of this Article can be criticized for its lack of legal precision, the fact is that it is wholly justified in view of the very wide spectrum of situations covered or even concealed by the legislation of the various Member States and given the need to embrace all such legislation.\textsuperscript{25} What is more, a parallel course was followed very recently in a European Community (EC) Commission working paper preparing the way for a proposal for a directive.\textsuperscript{26} In this paper, a public undertaking is defined as being "any undertaking, whatever its legal form, whose behaviour is capable of being determined by the public authorities, by virtue of their direct or indirect financial involvement, or of the acts governing it."

\textit{b. The Adjective "Commercial" in Association with the Expression "State Monopoly." Questions Raised in Connection with Service Monopolies.}

Where the pursuit of a given business activity under a system conferring exclusive rights relates only to the production stage, the granting of such exclusive rights in an open international market situation does not necessarily entail taking the firm out of the international competition arena, although it is difficult to im-


\textsuperscript{26} European Community Commission, Working paper IV/255/78, Main provisions of a preliminary draft directive of the Commission of the European Communities, to be issued pursuant to Article 90(3) of the EEC treaty, on financial relations between the public authorities of the Member States and public undertakings. \textit{See also} Stockholm Convention, \textit{supra} note 8, at Art. 14(6).
agine a monopoly confined exclusively to production. The same does not apply when these exclusive rights are extended to the stage of marketing the goods. However, the term "commercial" (or rather, "of a commercial character") used in connection with the expression "State monopoly" poses delicate problems of interpretation. In its judgment in 

Costa v. ENEL, the Court of Justice had this to say:

In so far as the question put to the Court is concerned, it prohibits the introduction of any new measure contrary to the principles of Article 37(1), that is, any measure having as its object or effect a new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade.

Monopolies relating to activities which do not concern goods which might be the subject of competition in the market would be excluded—for example, the production and distribution of electricity in Italy.

It is not so easy to reach the same conclusion with regard to certain public service monopolies, such as television. The question was raised in concrete terms in Italy not very long ago, and it would be worthwhile to recall the case. In 1972, a Mr. Sacchi had set up an undertaking called "Tele-Biella," whose object was to transmit television programs via coaxial cable. These programs included commercial advertising. Under Italian law, television is a monopoly conferred by the State on the RAI, which has exclusive rights over commercial television advertising. Under the same law, no one may receive, for purposes of retransmission, domestic or foreign audio-visual signals. Sacchi maintained that if these same rules were applied to cable television they would infringe

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27 See Franck, Les entreprises visées aux articles 90 et 37 du Traité CEE, L'ENTREPRISE PUBLIQUE ET LA CONCURRENCE, supra note 14, at 52. The Commission of the European Communities also would seem to be arguing along these lines in the observations made before the Court of Justice in the SAIL case. [1972] ECR 119, 131.


29 In addition to the conclusions put forward by Mr. Advocate-General Maurice Lagrange in Costa v. ENEL, [1964] ECR 585, 600, see also Virole, Questions posées par l'interprétation du traité de 25 mars 1957 instituant la Communauté Economique Européenne à propos de la nationalisation de l'électricité en Italie, [1965] RTDE 369.

Community law. He based his arguments on provisions such as Article 37 of the Treaty of Rome and refused to pay the radio and television license fee. Criminal proceedings consequently were brought against him.

The specific problem that arises with regard to Article 37 of the Treaty of Rome is that of delimiting the scope of the adjective "commercial" used in this Article. In other words, we have to decide whether in this case to opt for a wide interpretation, as the European Court of Justice has already done in other cases, or whether a narrow interpretation should be placed on this Article. As Mr. Advocate-General Reischl put it:

On this it must certainly be said that there are good grounds in favour of a wide interpretation, as is occasionally used in the literature on the subject. Reference may be made—the Commission has done so in an objective way—to the wide interpretation of the term "goods" in Article 83(3); further, to the increasing significance that services have in economic life, or to the necessity to apply the same rules to cases which have the same economic effects on the movement of goods and of services. This may support the view that "goods" means everything which can be the subject of a commercial transaction.

Reischl felt, however, that he should pay attention above all to the place occupied by the principle contained in Article 37 within the framework of provisions on the elimination of quantitative restrictions, notably invoking the authority of the Court's judgment in Costa v. ENEL. Mr. Advocate-General Dutheillet de Lamothe had expressed a similar view three years previously in the well-known Port de Martert case. It will be noted in this context, however, that the relevance of the application of Article 37 to the case in point was raised by the latter, since neither of the parties involved had invoked the Article, in terms that are clearly significant and that were not dealt with further merely because the Court was required to do no more than give judgment on questions raised by the national court.

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31 Under the terms of Article 195 of Italy's Presidential Decree No. 156 of March 29, 1973, television companies, even if they broadcast by coaxial cable, for legal purpose must be considered to be broadcasting establishments.


33 As pointed out by Dutheillet de Lamonthe, it might be asked whether the Société du Port de Mertert in practice does not play a role equivalent to the measures referred to in
2. Adjustment or Abolition of State Monopolies of a Commercial Character?

Another matter that could be raised here is the question to what extent Article 37 contains an imperative to abolish all State monopolies or whether the expression "adjustment" lends itself to a different interpretation, namely to eliminate the discriminatory effects it has on the market. It is the latter view that is taken by most authorities on the subject. Colliard, in particular, thinks that the fact that the authors of the Treaty of Rome did not use in this case the word "abolition," which is encountered frequently in the Treaty, is a decisive factor in favor of this interpretation. This was also the argument that won the day when the Court of Justice ruled: "Without requiring the abolition of the said monopolies, this provision prescribes in mandatory terms that they must be adjusted in such a way as to ensure that when the transitional period has ended such discrimination shall cease to exist."

This does not mean that State monopolies cannot or should not be abolished in the national interest. Obviously it will depend on whether the domestic legislature finds such a course politically and economically expedient. As Megret emphasizes, without arguing purely and simply for the necessity of abolishing state monopolies, "l'intérêt public national exige, puisque tout monopole ayant un caractère commercial doit être aménagé, que lors de cet aménagement, l'administration procède à une réévaluation rigoureuse de l'intérêt de ce monopole en droit et en fait et en tire les conséquences." Irrespective of the various positions taken by writers on the subject, it should be pointed out that the attitude of the Commission of the European Communities regarding this problem has wavered between recommending complete abolition and merely recommending adjustment. Although this approach is not conspicuous for its clarity, it is indicative of the political and

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35 Colliard, supra note 15, at 264.

36 Pubblico Ministero v. Glavio Manghera and Others, [1976] ECR 91, at 100 (Ground of Judgment 5).

technical complexity that undeniably surrounds this question. At any rate, there should not be any doubt about accepting the opinion of those who say that Article 37(2) rules out the formation of new State monopolies where these monopolies infringe other articles of this Treaty.

We can be sure of one thing, however, amid all the doubts and uncertainties to which the interpretation of Article 37 of the Treaty of Rome has given rise: the arrangements provided for in this Article for "adjustment" are exceptional, for two reasons. First of all, there is the limitation in time—in the form of the transitional period—of the discriminatory effects resulting from the monopoly position that certain undertakings occupy in the market. But there seems to be no reason why a commercial monopoly, even if it is a State monopoly, should not comply from the beginning of the transitional period with the existing rules governing gradual abolition of customs duties (Article 12 et seq.) or in the field of taxation (Article 95), for instance. Second, there is an aspect to this exceptional nature that offsets, so to speak, the withdrawing from the Member State this economic policy instrument, i.e., the freedom to create State monopolies. This aspect is that, in contrast to the other measures having equivalent effect to quantitative restrictions, the abolition of which is directly required by directives issued by the Commission, the Member States enjoy complete freedom as to how they go about adjusting State monopolies. The Commission of the European Communities can do no more than formulate recommendations of a non-binding nature pursuant to Article 37(6).

However, Article 37 must be seen in the light of the exception contained in Article 90(2) of the Treaty to the general requirement...
of Article 90(1). In this respect, it should be stressed that, in
general, writers on the subject⁴³ think that Article 37 should be
applied even to revenue-producing monopolies provided this does
not call into question the specific objects for which they were set
up. In all matters in which these objects are not served, then, it
must be understood that the revenue-producing monopolies to
which Article 90(2) refers are subject to the general arrangements
set out in Article 37. Thus, it will be possible for them to charge
prices higher than those determined by the interaction of supply
and demand, but they no longer would be able to discriminate be-
tween their suppliers and give preference, for example, to na-
tional suppliers over suppliers from another Member State.⁴⁴ Arti-
cle 37 is, therefore, a special rule under Article 90(1),⁴⁵ but this
does not mean that the authors of the Treaty had lost sight at any
time of its basic objectives,⁴⁶ notably the principle of non-
discrimination.

3. The Direct Applicability of Article 37

An important technical detail that should be emphasized is the
direct applicability of this Article. For some time, the Court of
Justice has affirmed the self-executing nature of certain provi-
sions of the Treaty. Being directly applicable, these provisions
confer upon private individuals subjective rights on which they
can rely in the various national courts and which these courts
must guarantee and safeguard. This has already happened in the
case of Article 37. In fact, the Court of Justice first recognized the
direct applicability of Article 37(2) in Costa v. ENEL, to which we
have already referred.⁴⁷ The Commission had already defended

⁴³ See, e.g., Deringer, General Report, in EQUAL TREATMENT OF PUBLIC AND PRIVATE
ENTERPRISES, 2 RAPPORTS DU ŒME CONGRÈS 126 (1978) (Fédération International Pour Le
Droit Européen). But see most French legal literature, e.g., Chevallier, Le pouvoir de
monopole et le droit administratif français, [1974] Revue du Droit Public et de la Science
Politique en France et à l’Étranger (RDP) 96.

⁴⁴ See, e.g., A. FRIGNANI & M. WAELBROECK, DISCIPLINA DELLA CONCORRENZA NELLA CEE
120 (1976).

⁴⁵ See Scherer, DIE WIRTSCHAFTSVERFASSUNG DER EWG 145 (1969) and G. Burghardt,
DIE EIGENUMSORDNUNGEN IN DEN MITGLIEDSTAATEN UND DER EWG-VERTRAG 95 (1969) Both
authors follow Deringer’s authorized opinion, expressed in Les articles 90 et 37 dans leurs
relations avec un régime de concurrence non falsifiée. Les incidences des règles de concur-
rence et de l’article 222 sur les possibilités de nouvelles nationalisations ou socialisations
de secteurs économiques, in L’ENTREPRISE PUBLIQUE ET LA CONCURRENCE, supra note 14, at
401.

⁴⁷ See Bastiaan van der Each, French Oil Legislation and the EEC Treaty, [1970] COMM.
MKT. L. REV. 45.

Article 37(1) in the SAIL case, but it was only more recently that the Court of Justice upheld this view, expressly stating that "The fact that at the end of the transitional period no discrimination regarding the conditions under which goods are procured and marketed must exist between nations of Member States constitutes an obligation with a very precise objective subject to a clause postponing its operation." The Court went on to say that

Upon the expiry of the transitional period this obligation is no longer subject to any condition nor contingent, in its execution or in its effects, upon the introduction of any measure, either by the Community or by the Member States, and by its nature is capable of being relied on by nationals of Member States before national courts.

The fact that meanwhile Member States have not repealed the provisions of their own national laws that are inconsistent with Community law is, therefore, not important. As Jean-François Picard points out, the Commission did not fail to use this "Community machinery" successfully in order to pressure the French government into reviewing its policy on State monopolies of a commercial character.

4. Article 37 and the Application of Safeguard Clauses

Although it can be said that the Member States are now beginning to accept adjustment of their State monopolies where these pose a threat to intra-Community relations, the question has lost none of its original political sensitivity. This is particularly so with respect to goods that do not come from any of the Member States but are nevertheless in free circulation in the territory of one of them and to which the provisions on the abolition of quantitative restrictions and measure having equivalent effect should be ap-

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48 [1972] ECT 119, at 132. Thereafter, the Bundesfinanzhof expressed its doubts, but nevertheless it failed to refer the matter to the Court of Justice, as it ought to have done, for a preliminary ruling (see BFHE decision of August 8, 1972 (VII B 21/71), [1972] AWD 532.


51 See EEC Treaty, supra note 10, at Art. 10(1), for a definition of goods in free circulation.
plied pursuant to Article 9(2) of the Treaty. In practice, in the absence of a common commercial policy, which incidentally is provided for in the Treaty, the Member States are free to continue operating, or even to create, new State monopolies for other than exclusively revenue-producing purposes that, subject to conditions, enter into the respective national territories of goods originating in third countries, i.e., countries that are not members of the Community. However, this obstacle can be circumvented through a deflection of trade by means of which these goods are released for free circulation on the market of a Member State which pursues a more liberal policy in this sector. They subsequently are admitted to the market of the State that had refused them entry. The same objective can be achieved by resorting to processing arrangements, i.e., by subjecting the product in question to the minimum amount of processing necessary for it to be treated, for the purposes of circulation on Community territory, as a Community product.

To avoid such situations, the Treaty (in Article 115) provides for the possibility of applying protective measures in these cases. The application of protective measures is also provided for in the second subparagraph of Article 37(3) for cases in which, given an exceptional situation within the context of the Treaty, such as the existence of a State monopoly of a commercial nature existing in a given Member State, the application of exceptional countermeasures is justified on the part of another Member State as the only way of affording, as far as possible, equal treatment in intra-Community trade relations that cannot be guaranteed by means of competition.

This safeguard clause did not expire, as might be assumed (as did most of the safeguard clauses provided in the Treaty), when the transitional period ran out and Article 37(1) consequently became directly applicable. In fact, the Deutsche Zündwaren Monopolgesellschaft collects a special tax designed to pay a loan contracted by the German State with a Swedish match company under the terms of 1929 agreement, which afterwards was confirmed by the 1953 London Convention on German war debts. This measure, however, does come within the scope of Article 37(5). It was bearing this situation in mind that the EC Commis-
sion, which has responsibility for administering the application of the safeguard clauses, allowed France to make use of this clause in relation to imports of matches from the Federal Republic of Germany, since French import arrangements for matches in relation to the other Member States had been brought into line with Article 37.

B. The Place of Article 37 in the Treaty of Rome. Scope of the Principle of Non-Discrimination

In two judgments given in February 1976, the Court of Justice clarified for the first time the insertion of the principle of Article 37 into the general framework of the Treaty of Rome. As was already being argued in this connection, it would not make sense in the context of a systematic interpretation to set off Article 37 against the remaining provisions of the chapter of which it forms part of the provisions on the abolition of quantitative restrictions or Article 90 of the Treaty, which has the same origins as Article 37. It was only in the Manghera case, however, that the Court felt it had to put it in precise terms by stating that "this article comes under the title on the free movement of goods and in particular under Chapter II on the abolition of quantitative restrictions between Member States."

The stance taken by the Court a few days later in judgments given in the Rewe and Miritz proceedings was, however, more important politically in the Community context. The Court stated explicitly

that Article 37(1) is not concerned exclusively with quantitative restrictions but prohibits any discrimination, when the transitional period has ended, regarding the conditions under which goods are procured and marketed, between nationals of Member States. It follows that its application is not limited to imports or exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products, whether or not subject to the monopoly, and thus covers charges which would result in discrimination against imported products as

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54 The Commission of the European Communities in 1969 sent various recommendations to the Member States regarding the adjustment of their State monopolies.
55 In fact, the substance of the two articles was contained in Article 28 of the initial draft of the Treaty.
compared with national products coming under the monopoly. What is more, the Court felt it should stress with regard to the collection of what is known as the "Monopolausgleich" on vermouth imported by the Federal Republic of Germany from Italy that "the fact that a national measure complies with the requirements of Article 95 does not imply that it is valid in relation to other provisions of the Treaty, such as Article 37."

Recently, the Court of Justice had the occasion to confirm this ruling. It had to decide whether the tax treatment of alcohol imported by the Federal Republic of Germany, as provided for in the law in force since May 2, 1976 introducing changes in the German monopoly rules on alcohol, was consistent with Article 37 of the Treaty of Rome. Although strictly from the taxation point of view there was no discrimination between the tax levied on the imported alcohol and that on alcohol manufactured in Germany and, therefore, no infringement of Article 95 of the Treaty, the fact is that this tax was designed ultimately to obtain revenue to be applied as subsidies to the production of local alcohol. The Court of Justice stated categorically that:

> Article 37 of the EEC Treaty constitutes in relation to Articles 92 and 93 of that Treaty a *lex specialis* in the sense that State measures, inherent in the exercise by a State Monopoly of a commercial character of its exclusive right, must, even where they are linked to the grant of an aid to producers subject to the monopoly, be considered in the light of the requirements of Article 37.

The Court also affirmed that:

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57 Grounds of Judgment 26 and 8 of the rulings in Rewe, [1976] ECR 181, at 198, and Miritz, [1976] ECR 217, at 230, respectively. In this way, the Court of Justice, called upon to rule on the interpretation of Articles 37 and 95 and the EEC Treaty by the Finance Court of Rheinland-Pfalz, expressed a point of view that differed considerably from that held by the Federal Finance Court in an almost identical matter in the already cited judgment of November 12, 1974 (VII R 74/73), [1975] RIW/AWD 160, as the latter had limited the interpretation of Article 37 to the much narrower scope of quantitative restrictions. As regards the effects of the above-mentioned judgments of the Court of Justice on German legal thinking, see Federal Finance Court Decision of September 27, 1977 (VII K 1/76), [1978] RIW/AWD 72.


59 Hansen, [1979] ECR 935, (Case 91/78). See also the decision of the Hamburg Finance Court of March 22, 1978 [IV 13/77], (1978) RIW/AWD 403. The Court of Justice put an end to some of the doubts that had arisen during the discussion of the subject at the last FIDE Congress in Copenhagen in June 1978. See, e.g., Deringer, Gleichbehandlung öffentlicher und privater Unternehmen-Zusammenfassung der Diskussion (unpublished paper) cited by Court of Justice in Hansen, at 958.
Any practice by a State monopoly which consists in marketing a product such as spirits with the aid of public funds at an abnormally low resale price compared with the price, before tax, of spirits of comparable quality imported from another member-State is incompatible with Article 37(1) of the EEC Treaty. Now supported by the Court, this view emerged some time ago in the literature on the subject.

In this field, however, the imaginations of national lawmakers have known no limits. In another case decided by the Court of Justice in February 1980, the Court ruled on the compatibility of German regulations, requiring alcoholic drinks to have a minimum alcohol content before they could circulate within the Federal Republic of Germany, with Article 37 of the Treaty of Rome. The German authorities put forward a two-pronged argument before the Court:

(a) The low alcohol content of the spirits might endanger public health in that through easy access to these spirits the public might become accustomed to drinks of a much higher alcohol content;

(b) A minimum rate of alcohol content was an essential guarantee of fair trade.

These arguments failed to convince the Community judges. Giving judgment on February 20, 1979 they stated that

the concept of 'measures having an effect equivalent to quantitative restrictions on imports' contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

In view of the Court of Justice's interpretation of Article 37, then, it seems that the way is open for a reconsideration of the position of service monopolies by the Court, which in 1974 ruled in the Sacchi case that "Article 37 of the Treaty refers to trade in

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60 Hansen, [1979] ECR 935, (Case 91/78).
goods and cannot relate to a monopoly in the provision of services.\textsuperscript{3} For this reason, taking due consideration of the observations made by the Italian and German governments at the time of the Sacchi case, we believe that for a correct interpretation of the Treaty it should be remembered that the activities of service monopolies, notably television, must be regarded as measures having equivalent effect to quantitative restrictions wherever they exceed the limits of their role as a service in the public interest, giving rise to distortions of competition through favoring certain commercial operators.\textsuperscript{4}

However, the assertion that protection of the normal functioning of competition by State action underlies the provisions of Article 37 was already to be found in the Court of Justice's Grounds of Judgment in the IGAV case, decided before its ruling in 1976. That Court said at the time that

\begin{quote}
this in particular is the purpose of Article 90 to the extent to which it lays down a particular system in favour of undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, of Articles 92 to 94, on the system of public aid, of Articles 101 and 102 on distorting competitive conditions on the common market as well as Article 37 on State monopolies of a commercial character.\textsuperscript{5}
\end{quote}

Furthermore, in the judgment of April 30, 1974 the Court had already recognized that

\begin{quote}
the fact that an undertaking of a Member State has the exclusive right to transmit advertisements by television is not as such incompatible with the free movement of products, the marketing of which such advertisements are intended to promote. It would however be different if the exclusive rights were used to favour, within the Community, particular trade channels or particular commercial operators in relation to others.\textsuperscript{6}
\end{quote}

The Court of Justice thus has become a guarantor of the effectiveness of the principle of equal treatment of undertakings (be they public or private). Although this principle is not expressly

\begin{itemize}
\item \textsuperscript{3} \cite{1974} ECR 409, at 432.
\item \textsuperscript{4} Pappalardo, in his commentary on the Manghera case, underlines the importance of the judgment of the delimitation of the principle set out in Sacchi. \textit{Supra} note 21, at 556-57.
\item \textsuperscript{5} Industria Gomma Articoli Vari, IGAV v. Ente nazionale per la cellulosa e per la carta, ENCC, \cite{1975} ECR 699, 714, (Case 94/74, judgment of 18 June 1975).
\item \textsuperscript{6} \cite{1974} ECR 409, at 432.
\end{itemize}
stated in the text of the Treaty setting up the EEC, it underlies all of its provisions, in particular those of Article 90(1).

The principle of equal treatment is merely one of the many manifestations of the more general principle of non-discrimination. It was with the latest judgements of the Court of Justice in this field in mind (more precisely those of 1976) that Mr. Advocate-General Francesco Capotorti stated that

in the light of this case-law, then, it may be deduced that the principal objective pursued in Article 37(1) is not to require the Member States progressively to adjust any monopolies of a commercial character but rather to eliminate any discrimination connected with the existence of monopolies (the former objective being in fact an aspect of the latter).67

In its judgment of March 13, 1979 the Court of Justice gave its full support to this view:

It is clear both from the wording of that provision and from its place in the framework of the Treaty that Article 37 is intended to promote the free movement of goods within the Community and to maintain normal conditions of competition between the economies of Member-States where in one or other of those States a specific product is subject to a State monopoly of a commercial character.68

C. Correlation of the Case Law of the Court of Justice and Article 222 of the Treaty of Rome

In order to conclude this second part, we still have to examine the compatibility of the case law of the Court of Justice with Article 222 of the Treaty. In its General and Final Provisions the Treaty establishes that it "shall in no way prejudice the rules in Member States governing the system of property ownership." In order to interpret correctly the scope of this principle of the inviolability of the system of property ownership which seems to result from the wording of Article 222, the text of the corresponding clause of the Treaty of Paris, which set up the ECSC, should be borne in mind. Article 83 of that Treaty states that "The establishment of the Community shall in no way prejudice the system of ownership of

67 H. Hansen jun. & O.C. Balle GmbH & Co. v. Hauptzollamt Flensburg, [1978] ECR 1787, 1815, (Case 148/77, judgment of 10 October 1978) (Opinion of the Advocate-General). The Court's judgments of February and March of that year confirm, so to speak, the view held by Capotorti, since the Court preferred to examine the case in question in the context of Article 95 and not in the context of Article 37. [1978] ECR 1787, at 1806.
the undertakings to which this Treaty applies." The inclusion of such a provision in the Treaty of Paris, which dates back to 1951, was justified at that time by the fact that following the nationalization of industries just after the war in most founder States, the coal and steel industries were virtually under the control of public undertakings.

This was not the situation in 1957, the date of the conclusion of the Treaty of Rome establishing the EEC, as regards the general run of undertakings. Nor does the Treaty of Rome apply only to a specific sector; indeed, it is a framework treaty *par excellence*. Because of all this, we might be inclined to draw the somewhat hasty conclusion that the inclusion of the provision embodied in Article 222, of the Treaty of Rome had precisely the opposite aim to that contained in Article 83 of the Treaty of Paris. This will not, however, be the conclusion reached after a careful analysis of the rulings of the Court of Justice, notably the celebrated judgment in *Costa v. ENEL*. What the earlier practice may reflect is the political advisability of leaving the Member States a degree of freedom in areas considered vital for the survival of the State. This would explain the insertion in the Treaty among the General and Final Provisions, not only of Article 222, but also of the safeguard clauses in the form of Articles 223 (in the matter of national security and production of or trade in armaments) and 224 (in the matter of internal disturbances, war or serious international tension). It also would explain the limits set in the rules on the elimination of quantitative restrictions for reasons of "the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property" (Article 36), and even the relative margin of freedom left to the States in the matter of social policy as expressed in Articles 117 and 118 through the reference to no more than "cooperation between Member States."

But this nevertheless presumes, in the context of a regional integration plan, the existence among the Member States of a prior political consensus on basic principles justifying the plan itself, notably in the matter of freedom of movement, so that whatever policy is pursued by them in the fields concerned, that policy could not prejudice those principles. By extension along the same lines, the third paragraph of Article 234 would be applicable in this context. As Sasse says,

> the most important feature of Community authority then is its unity and equal enforcement in all Member States. For the
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Member States, which have conceded limitation of their sovereign rights in such important areas, this is the only guarantee that their sacrifice has not been in vain. If any express proof of this contention were required, one would need only to refer to Article 234(3) of the EEC Treaty.69

Other Treaty clauses also bear this out, for example Article 90(1). This is corroborated by the fact that paragraph 2 of that article appears, as already mentioned, as an exception to paragraph 1. Indeed, on the one hand Article 90, in referring generally to undertakings entrusted with the operation of services of general economic interest, embraces public undertakings as such. On the other hand, it does not exclude the possibility of the existence of public undertakings not directly involved in the operation of services of general economic interest. It is in this context that we feel Article 37 must be interpreted; in relation to this Article reference already has been made to the manner in which, in our view, it must be linked to the Article 90(2).

Hence our position regarding the problem of the relationship of Article 37 to Article 222 is bound to be that resulting from a restrictive interpretation of the two provisions as they reciprocally affect each other. From this viewpoint, and giving Article 37 the meaning and function which the latest ruling by the Court of Justice has confirmed, we may say that "une nationalization de secteurs entiers de l'économie est contraire à l'article 37 § 2 du Traité pour autant qu'une part relativement importante du commerce interétatique en est touchée."70 This is also Burghardt's opinion: "die Abwägung beider Vorschriften führt mithin zu dem Ergebnis, dass einerseits Art. 37 Abs. 1 wegen Art. 222 nicht die Verpflichtung zur Abschaffung der Handelsmonopole enthält, d.h. die Aufrechterhaltung der Peschränkungen im Warenverkehr gedeckt ist."71 Moreover, we believe that if an "EG-Verfassungskonform Auslegung" triumphs, as may be inferred legitimately from the most recent Court of Justice judgments, for

70 Deringer, supra note 45, at 402. And as he adds, "cela est valable non seulement pour les entreprises de commerce elles-même, mais aussi pour les secteurs industriels qui couvrent une partie considérable de leurs besoins de matières premières dans d'autres États membres, ou bien qui y vendent une partie considérable de leurs produits." Id.
71 BURGHARDT, supra note 45, at 98. This does not mean, however, that we share this author's point of view when he affirms in referring to Article 222 that "die Vorschrift ist deshalb nicht Bestandteil eines Grundrechtskataloges übernationalen Charakters" (Id. at 71), which was, moreover, refuted later by a ruling of the Court of Justice.
instance in the matter of fundamental rights, what has been said above shortly may be expressly stated by the Court when the proper occasion arises.

In practice, the Court of Justice seems to have freed itself at last from the political straight-jacket which certainly must have influenced its first two decisions. In *Costa v. ENEL*, it was faced with a *fait accompli* in the shape of the judgment of the Italian constitutional court, which was given four months before its own. In the *Albatros* case, it inevitably was embarrassing to be required to decide on the interpretation of a Treaty provision at the request of an Italian lower court—the Rome civil court—in a case concerning a French monopoly, when the French Council of State not only had not requested any preliminary ruling on the subject, but indeed had stated that the rule contained in Article 37 was a "clear" one! At a time when attempts are being made to relaunch the idea of economic and monetary union and when the first elections for the European Parliament by direct universal suffrage has been held, the political significance of the case law on Article 37—one of the most complex and most delicate in the entire Treaty—cannot escape notice.

III. SOME ASPECTS OF STATE IMPORT AND EXPORT MONOPOLIES IN PORTUGAL

The "progressive adjustment" of State monopolies of a commercial character is of vital importance in the administration of agreements which have as their object the establishment of a free trade area. It therefore will come as no surprise that this subject was touched upon in the opinion presented by the Commission of the European Communities to the Council on Portugal's application for membership. The Commission made particular reference to the import monopoly for alcohol for industrial use.² Strangely enough, however, the Commission's opinion did not consider other sectors in which the Portuguese State acts in such a way that its action produces effects equivalent to quantitative import and export restrictions; nor did it refer to the constitutional framework in which foreign trade policy operates and which can be invoked to diminish the "acquis" already established in the context of international organizations to which Portugal belongs and with which it undertook to comply. We shall not dwell, however, on an

appreciation of all the "State monopolies of a commercial character," in the sense that the term is given in the context of Community law, that exist in Portugal and that in our eyes can be submitted to Article 37 for the purpose of their adjustment or abolition. An analysis thereof, by comparison with other provisions of the Treaty and of Community secondary legislation, would exceed the bounds of this Article. Nevertheless we must stress the political and economic importance that clarification of this matter could have in the specific case of Portugal.73

A. Constitutional Setting of Foreign Trade Policy

Foreign trade policy is reserved an important place in the 1976 Constitution. Article 110 of the Constitution says that "in order to develop and diversify foreign trade relations and safeguard national independence the State must: (a) promote the control of foreign trade operations, notably by setting up public and other undertakings; (b) regulate and supervise the quality and prices of goods imported and exported." This is not the place to examine this provision in detail, but we cannot omit to refer to the aim which may be pursued under its cover and which comes to light, in the words of Vital Moreira, a communist member of the Constituent Assembly:

[any policy which results in leaving any sector of the economy in foreign hands is incompatible with the Constitution . . . . In particular any policy of commercial or economic integration will not be compatible with the Constitution if it brings into question the Constitutional principles of national independence, the regulation of foreign investments or the control of foreign trade.]74

A clear sign of the care and interest with which the Constituent Assembly weighed the implications and obligations inherent in

73 The question could interest other States, too. See Loh, Feuerversicherungsmonopole und Europäisches Gemeinschaftsrecht, [1977] RIW/AWD 263.

74 Moreira, A Constituição, o sistema económico e a política económica, in ECONOMIA at 21-22 (June-July 1976). See also the remarks made by Vital Moreira on the text of Article 110 in the Constituent Assembly, in DIÁRIO DA ASSEMBLEIA CONSTITUINTE (D. Ass. Const.) No. 80 of 13 November 1975, at 2685-86; and his and Gomes Canotilho's commentary on Article 110 in CONSTITUIÇAO DA REPÚBLICA PORTUGUESA ANOTADA at 247 (1978). See also Braga de Macedo, Princípios gerais de organização económica, in ESTUDOS SOBRE A CONSTITUIÇÃO at 197 (1977). The latter author does not fail to draw attention to the way in which the postulate of national independence links up with the theory of external dependence; in other words, the theory of the capitalist mode of production, in the text of the Constitution.
the future accession of Portugal to the European Communities is the fact that the Assembly rejected by a majority vote an alternative proposal which aimed at safeguarding international obligations taken "in the context of European economic integration and of movements for international trade liberalization." 75

B. Some Aspects of Legal Regulation of Imports of Petroleum Products and of Alcohol

As the title of this section indicates, the analysis will be confined to traditional State import and export monopolies. In Portugal, they are particularly numerous in the commodity sector and have come to be operated essentially by economic coordination agencies acting under the Ministries of Agriculture and Fisheries and of Trade and Tourism. There also are cases in which they are run by public undertakings, understood in the sense in which this term is used in Portuguese domestic legal terminology. Among closely regulated markets with compulsory distribution networks, the following examples must be singled out: the National Fishery Products Board, the National Fruit Board, the Olive Oil and Oleaginous Products Board, the Cod Fish Trade Board, and the former Cereals Board, later to become the Cereal Board, later to become the Cereals Supply Agency (EPAC). Each of them holds in its sector the exclusive right to import certain products. 76

We shall not, however, dwell on an analysis of such monopolies for essentially the following reason: they concern agricultural products, which under the Treaty of Rome are covered by a special system embodied in Articles 38 et seq., 77 by which the various national market organizations are converted into Community market organizations. The special feature of this system arises from Article 38(2), which states that: "Save as otherwise in Articles 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products." 78 Consequently, the agricultural policy provisions must take precedence over other provisions. The rule that the agricultural policy provisions must take precedence over other provisions seems to have been accepted by the Court of Justice in the SAIL case, although on that occasion it confined itself to repeating the allegations made by the Italian Government and the Commission in the grounds of judgment. [1972] ECR 119, at 137.

75 See proposal put forward by the CDS deputies Basílio Horta and Sá Machado, in D. Ass. Const. No. 80, at 2682.
76 For an overall view of the monopolies in the sector, see GRUPO DE TRABALHO No. 3 CIRCUITOS DE DISTRIBUIÇÃO, MINISTÉRIO DO PLANO E COORDENAÇÃO ECONÔMICA, PLANO 77-80. DIAGNÓSTICO DE SITUAÇÃO E ESTRATÉGIAS DE POLÍTICA NO DOMÍNIO DE DISTRIBUIÇÃO at 13-204 (March 1977).
77 The rule that the agricultural policy provisions must take precedence over other provisions seems to have been accepted by the Court of Justice in the SAIL case, although on that occasion it confined itself to repeating the allegations made by the Italian Government and the Commission in the grounds of judgment. [1972] ECR 119, at 137.
78 Article 38(1) of the Treaty says: "'Agricultural products' means the products of the
quently these cases normally will not be covered by Article 37, as can be inferred from paragraph 4 of that Article.

It must be recalled that to date the following national monopolies have been the subject of Commission recommendations on the basis of Article 37(6): in France, the monopolies for tobacco, gunpowder and explosives, potash, petroleum product imports, matches, alcohol and basic slag; in Italy, the monopolies for tobacco, cigarette paper, salt, bananas, matches, lighters and lighter flints; and in the Federal Republic of Germany, the alcohol monopoly. Of all these monopolies, those having the greatest implications for the working of the common market are, for obvious reasons, the French monopoly for petroleum product import and the French and German alcohol monopolies. For this reason they have been the subject of lively concern on the part of the Community authorities and heated discussion among the parties involved. It happens that in Portugal there already exists or there may come about a situation in these two sectors which is very similar to that of the two monopolies referred to above. Therefore, it is important to analyze this situation from the angle which concerns us here.

1. The Petroleum Products Import System

According to the Medium-Term Plan for 1977-80, "The State controls, through direct ownership, half the basic chemicals industry, the whole of the oil-refining industry and 80% of petroleum products distribution." It is in this context that the Portuguese Petroleum Agency (Petrogal) has a majority holding as a result of nationalization operations. As the Commission of the European Communities pointed out in the SAIL case: "A monopoly which combines production and trade intrinsically constitutes a preferential system in favour of national production. It is therefore intrinsically discriminatory." We shall not analyse the whole range of the problem, but refer only to what is happening in the sector of petroleum product imports proper.

By virtue of Act No. 1947 of February 12, 1937 imports of petroleum by-products and residual products of crude oil processing are subject to prior authorization (Base II, No. 2), while the

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soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products." EEC Treaty, supra note 10.

79 See, e.g., the General Reports on the Activities of the European Communities.

government may modify temporarily or permanently the limits on importation and may temporarily exempt some products from prior authorization (Base IV, No. 2). It can be argued that this case does not constitute a system based on exclusive rights. But the facts remain that an exclusive situation is maintained and that the government has the power to subject the exercise of an activity to a system of prior authorization and of quotas. In this connection it must be pointed out that in France the existence of a number of oil importers did not prevent the Commission of the European Communities, and even the highest French administrative body, from considering that the French system fell within Article 37 of the Treaty of Rome. Thus, there is little point in discussing whether in this case a State monopoly proper or a delegated monopoly is concerned.

In the context of Portugal's entry into the common market, the French experience regarding the "adjustment" of this monopoly must not be lost sight of. As in Portugal, this monopoly is governed in France by a long-standing law, dating from March 30, 1928, enacted as the successor to a statute of April 4, 1926, on which it was based, and later amended in 1935 and 1936. After protracted negotiations with the Commission of the European Communities, the French government finally assented to its requirements as set out in the celebrated recommendation of December 22, 1969. However, France's assent was only apparent. In reality, this recommendation was followed by a decision implementing Article 115, to which reference already has been made. The decision was extended later and authorized for two years the imposition of quotas on products in free circulation in

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81 See Recommendation of 24 July 1963, O.J. 1963, 2271. This second recommendation directed to the French Government is a good example, since the Commission's position was not clear in the first recommendation (which also was unpublished).

82 See the Council of State's decision in the Shell-Berre case, where it says:

Considérant d'une part qu'il resulte clairasant de cette clause [Article 37(1) and (2) of the EEC Treaty] que son champ d'application comprend les régimes tels que celui auquel, en vertu des prescriptions de la législation interne française ci-dessus rappelées sont soumises les entreprises titulaires d'autorisations spéciales d'importation de produits pétroliers.

Supra note 13, at 345. As for the further implications of these arrangements, the Council of State has either denied them or simply avoids taking a stance on them. Besides this decision, see the more recent one of November 3, 1976: Aufaure, [1976] Rec. Lebon 465 (Collection Lebon, Panhard, Chalvon-Demersay).

83 Colliard's opinion inclines to the latter. He points out that a system of authorizations lends itself to offenses against the principle of free competition and this principle underlies Article 37 of the Treaty. Supra note 15, at 269.

the other Member States. This decision can be explained only by the fact that petroleum products are not subject, as regards the rules of origin, to the principle of last substantial processing, and equally by the circumstance that at that time none of the Member States was an oil producer. At the same time it must not be forgotten that it is the Commission, not the Member States, which has the job of managing the safeguard clauses, although it may be believed that the definitive solution to this problem depends on decisions to be taken in the sphere of a Community common commercial policy for the oil sector and a common energy policy associated with it. This fact is confirmed by the provisions inserted in the various free trade agreements concluded in 1972 and 1973 between the EEC and the EFTA countries which did not join the Community.

In the free trade agreement with Portugal, for example, two provisions which relate directly to the legal arrangements governing the import of petroleum products can be singled out: Article 15(2), which refers to Protocol No. 7 establishing the arrangements for the importation into Portugal of certain steel and petroleum products; and Article 16. The sole Article of Protocol No. 7 states that "Notwithstanding Article 14 of the Agreement... (b) Portugal shall remove quantitative restrictions or measures having equivalent effect that are applicable to imports of the petroleum products specified in Article 16 of the Agreement not later than 1 January 1985." Article 16(1) specifies that

The Community reserves the right to modify the arrangements applicable to the petroleum products falling within headings Nos. 27.10, 27.11, 27.12, ex. 27.13 (paraffin wax, micro-crystalline wax, or bituminous shale and other mineral waxes) and 27.14 of the Brussels Nomenclature upon adoption of a common definition of origin for petroleum products, upon adoption of decisions under the common commercial policy for the products in question or upon establishment of a common energy policy.

Article 16(2) states that Portugal can act likewise if comparable situations arise. Article 16(3), however, is more difficult to interpret: "Subject to paragraphs 1 and 2 and Protocol No. 7, the Agreement shall not prejudice the non-tariff rules applied to imports of petroleum products."

While the arrangements applicable to the products expressly mentioned in Article 16(1) seem to be clear in that it can be said that the purpose underlying this provision unequivocally is to enable the contracting parties to use those mechanisms, the same
cannot be said of the arrangements by which all the other petroleum products have to be governed. The difficulty arises from the fact that Protocol No. 7 to the EEC-Portugal Agreement, referred to in Article 15(2)—a clause without a corresponding provision in the agreements concluded at the same time or shortly thereafter with Austria, Norway, Sweden, Switzerland and Iceland—is seen as a derogation from the general arrangements under Article 14 of that Agreement, the latter being a provision that must be considered self-executing. Thus, it would seem that the importation of petroleum products not referred to in Article 16(1) are subject to the general arrangements involving the elimination of quantitative restrictions and measures having equivalent effect, contrary to what a prima facie reading of Article 16(3) suggests.

For the first of the interpretations advanced to be viable, a meaningful explanation must be found for the above mentioned provision in Article 16(3). We believe that this can be done by relating this provision to Article 26 of the Agreement which contains rules on competition. It is a fact that this Article, unlike the provisions in the Treaty of Rome and the Stockholm Convention dealing with competition law, does not contain a direct reference to public undertakings, notably with the meaning associated with that term in the economy of those treaties. However, there is nothing to prevent that provision from embracing such undertakings. If Article 26 of the Agreement is compared with what is laid down in the same Agreement on the subject of imports of petroleum products, we may conclude the following. First, from the text of Protocol No. 7 and from that of Article 16(1) and (2), it can be seen that the importation of petroleum products to which Article 16(1) refers is subject to special arrangements, under the terms of which the degree of freedom left to the national and Com-

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85 See generally Choffat, L'APPLICABILITÉ DIRECTE DE L'ACCORD DE LIBREÉCHANGE DU 22 JUILLET 1972 ENTRE LA CEE ET LA CONFÉDÉRATION SUISSE (1977). It must be noted that Choffat refers to Article 14 of the EEC-Switzerland Agreement, which corresponds to Article 16 of the EEC-Portugal Agreement.

86 On the views of EFTA and the European Communities concerning this matter, see H. Binswanger & H. Mayrriedt, EUROPAPOLITIK DER REST-EFTA-STAATEN. PERSPEKTIVEN FÜR DIE ZEHNJÄHRE 1966-69 (1972).

87 Given the nature of the Agreement, however, such applicability is not direct. See Ficker, Die Rechtsentwicklung innerhalb der Europäischen Gemeinschaften und ihre Auswirkungen auf die EFTA Staaten, [1973] ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 169, 170.
munity authorities in the matter of making rules for the sector is, in practice, unlimited. Second, from the provisions referred to above, it can be inferred that any other petroleum products are subject to the import arrangements agreed upon in Article 14. And third, Article 16(3) seems to permit the lifting of the application, in this specific sector, of Article 26 of the Agreement, provided that the situations specified in it do not infringe the legal order of any of the contracting parties.

Having found a "meaningful explanation" of Article 16(3), we must further delimit the scope of that provision. In other words, should we take it that the rules under Article 26 of the Agreement exclude import arrangements for all petroleum products or only the import arrangements for the products referred to in Article 16? If the latter view is held, we nevertheless must take into account, in relation to the import arrangements for petroleum products not referred to in Article 16(1), the fact that the EEC, in the declaration annexed to the Final Act of the Agreement, stated that it would assess any practices contrary to Article 26 of the Agreement on the basis of criteria arising from the application of the rules of Articles 85, 86, 90 and 92 of the Treaty of Rome. This can be especially important from the standpoint of the extraterritorial effects of this competition policy.

The Portuguese authorities must pay greater attention in the future to the legal provisions governing this sector, especially since, apart from our accession to the European Communities, the matter already is important in the context of Portugal's international obligations. However, it will not escape notice that while the problem was not touched upon expressly by the Commission of the European Communities in its opinion on Portugal's application for accession, perhaps because of insufficient information on the part of the Commission, this was not so in the opinion on Spain's application for membership, which shows that the Community authorities will not fail to be watchful in this matter.

88 What is certain is that, since this declaration is a unilateral one, it can be binding only on the party that made it. It is a fact, however, that whenever it is opportune the EEC will not fail to advance that viewpoint in the Joint Committee responsible for administering the Agreement. In any case, what has just been said does not prejudice any extraterritorial effect of the Community's competition policy, as some Community rulings already demonstrate.

2. New Statute of the Public Undertaking—General Administration for Sugar and Alcohol (AGA)

The complexity of the problems raised at Community level in connection with the regulation of the alcohol market is demonstrated clearly by the range and importance of the Court of Justice case law on this subject. The difficulties are bound to continue to grow with the future entry of Greece, Portugal and Spain. While the import arrangements for petroleum products have existed for a long time in Portugal, as in France, the same cannot be said of the arrangements for the importation of alcohol.

The public undertaking known as the General Administration for Sugar and Alcohol was set up under the name of General Administration for Alcohol by Decree Law No. 47338 of November 24, 1966, with exclusive right to manufacture and distribute alcohol. Its functions were broadened by Decree Law No. 425/72 of October 31, 1972, which gave it the additional responsibility of guiding, coordinating and supervising sugar production and trade. These powers were reinforced by Decree Law No. 7/74 of January 12, 1974. Decree Law No. 329-D/74 of July 10, 1974 made no substantial change; it simply transferred to another authority, the Directorate-General for Economic Inspection, part of the duties hitherto performed in that sector by the AGA. Very recently, Decree Law No. 33/78 of February 14, 1978 introduced changes in the statute of the General Administration for Sugar and Alcohol, which will not be the subject of our attention.

As has been pointed out, the Commission's opinion on Portugal's application for membership makes specific reference to the alcohol monopoly. In our view, however, the reference is made in terms that reflect unjustified optimism towards the content of the AGA statute, which is annexed to Decree Law No. 33/78, despite the fact that in Article 3(1)(b) it is stated that the AGA's main purpose is to "undertake general import and export operations in competition conditions." The Commission's opinion says: "The production and the importation of industrial alcohol are also controlled by a monopoly; this does not, however, affect either the production or the marketing of alcoholic beverages." This, indeed, seems to follow from Article 4(1)(a) and (b) of the AGA's statute, which states that

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91 Supra note 72, at 23.
in order to carry out its task the AGA shall in particular: (a) have the exclusive right to import raw sugar in order to process it and produce refined sugar for the domestic market; (b) have the exclusive right to produce, import and export ethyl alcohol, to import and purchase on the domestic market raw materials legally intended for its production, and to distribute ethyl alcohol, with the exception of ethyl alcohol produced from wine and intended for the treatment and fortification of wine and the addition of alcohol to other wine-based beverages.

Article 4(2), however, specifies that

the Council of Ministers may resolve to vest in the AGA the exclusive right to engage in one or more of the foreign trade operations referred to in Article 4(1)(c); such operations will in practice be import or export operations involving other types of sugar, alcohol other than ethyl alcohol, molasses, liqueurs and other spirituous beverages of non-wine origin.

In addition to the monopolies referred to above, Article 3(3) of the same decree law opens the door to the establishment of further monopolies: "Furthermore the AGA may undertake, with exclusive rights or in conditions of competition, the operations of producing, importing, exporting, purchasing on the foreign market or distributing other products for the supply of which it has been made responsible by resolution of the Council of Ministers."

Without going into the (un)constitutional implications of the two provisions referred to,92 it is important to situate them in the subject under discussion. And in this connection there only can be surprise at the fact that Portugal continues to adopt legislation—after applying for membership in the European Communities—in ignorance of or forgetting the requirements arising from the "acquis communautaire."

As mentioned earlier, the Treaty of Rome contains special provisions applicable to agricultural products, which are listed in Annex II, to which Article 38(3) refers. In that annex, however, there

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92 See, e.g., Article 167(p) of the Constitution. The Council of Revolution has confirmed this interpretation when it made a generally binding declaration, at the request of the President of the Assembly of the Republic and under the opinion of the Constitutional Commission, that Article 4(2) of the AGA's statute, which is annexed to the Decree Law No. 33/78, infringed Articles 167(p) and 201(1)(b) of the Constitution and was, therefore, unconstitutional. Resolution No. 41/79, of March 31, 1979, in Diário da República No. 35, 1st series, of February 10, 1979. For that very reason we also shall consider unconstitutional Article 3(3) of the same statute.
is reference, in connection with the sector in question only to: ethyl alcohol or neutral spirits, whether or not denatured, of any strength, obtained for agricultural products listed in Annex II to the Treaty, excluding liqueurs and other spirituous beverages and compound alcoholic preparations (known as “concentrated extracts”) for the manufacture of beverages. It is certain that the latter group of products, given the interrelation between the market organization for ethyl alcohol of agricultural origin and that for industrial alcohol, can be said to be covered by Article 37(4), which says,

If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialization that will be needed with the passage of time.

But as the Court of Justice declared in Miritz, “the provisions of Article 37(4) do not derogate from the other provisions of the article.” In that case, the reference was to the application by the German tax authorities of a special price equalizing charge (Preisausgleich) on imports of alcohol and products containing alcohol intended for the manufacture of alcohol for consumption, where such imports are not subject to a customs charge under the CCT. The Federal Republic of Germany had argued that the levying of the charge was to offset the higher costs of the raw materials and of the manufacture of German alcohol. However, the Court of Justice considered that this plea could not be accepted because of the non-discrimination principle underlying the Treaty.

IV. CONCLUSION

These aspects of the problem and others which cannot be addressed in this Article must be considered now by the Portuguese legislature, especially as it is not to be expected that the transitional period which is negotiated between Portugal and the European Communities for the adjustment of its State monopolies will

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94 [1976] ECR 217, at 232. See also text supra, at Section II(B).
be significantly different from that set for the other applicant countries. In Article 44 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, annexed to the Treaties of Accession between the founder States and Denmark, Ireland and the United Kingdom, it was stipulated that

The new Member States shall progressively adjust State monopolies of a commercial character within the meaning of Article 37(1) of the EEC Treaty so as to ensure that by 31 December 1977 no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The original Member States shall have equivalent obligations in relation to the new Member States.95

In the case of the southward enlargement of the European Communities, the accession of the three new applicants—Greece, Portugal and Spain—will not come about at the same time. Apart from the question of when the transitional period will start in the case of each of these states, it is to be hoped regarding the periods' duration that the different economic development of each will also mean that different timetables for the transition will be fixed.96 But it is inevitable that attention will focus on the importance for the various parties concerned, and for the business world in general, of correct timing for the various periods of transition, where this proves possible or desirable on a sectoral basis. It will be no wonder if pressures are felt in this direction.

In this sphere, Spain seems to be grappling with problems similar to those of Portugal. But in the Spanish case, as is borne out by the Commission's opinion on Spain's application for membership, these monopolies would concern leaf and manufactured tobacco and crude oil and petroleum products. As the opinion on Spain says, "Appropriate transitional measures will have to be laid down for adjusting monopolies in Spain and those in other Member States with which it has reciprocal arrangements."97 In the Commission's opinion on the application for Portugal's acces-

95 Accession Treaty, supra note 40.
96 The difference between the economic situations of the three applicant States—not only is the Portuguese case qualitatively different, but also it is of another order of magnitude—is expressly recognized in Community circles. See Jenkins, Die Integration der Europäischen Gemeinschaft angesichts der Erweiterung, [1978] EUROPA-ARCHIV 1. See also Duchateau, L'Elargissement de la Communauté Economique Européenne aux trois pays candidats (Espagne-Portugal-Grèce), [1977] POLITIQUE ÉTRANGÈRE 477.
97 Supra note 89, at 40.
sion, there is nothing on this topic, but the fact remains that the Portuguese authorities certainly will not fail to be questioned about the matter in the future.