

June 1994

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### Recommended Citation

Dana L. Romaniuk, *Regulating Public Monopolies in Furtherance of the EEC Free Competition Goal: Article 90 and the Two-Step Approach*, 69 Chi.-Kent L. Rev. 1025 (1994).

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REGULATING PUBLIC MONOPOLIES IN FURTHERANCE  
OF THE EEC FREE COMPETITION GOAL:  
ARTICLE 90 AND THE TWO-STEP APPROACH

DANA L. ROMANIUK\*

INTRODUCTION

The Treaty of Rome, establishing the European Economic Community, has as its principal goal the creation of a common market within the Community.<sup>1</sup> This common market is intended to be based on free market competition.<sup>2</sup> However, conflicts with the free competition regime were created when the Treaty reserved the power over property ownership systems to the Member States.<sup>3</sup> This power allowed the States to intervene in the economy by developing public monopolies.<sup>4</sup> The most prevalent form of economic intervention practiced by the States involves the granting of exclusive rights to enterprises. These exclusive rights create a conflict between the Community's goal of a common market driven by free market competition and the State's goal of promoting its economic policies through intervention in the market.

To eliminate the economic distortions created by States' grants of exclusive rights, the Commission<sup>5</sup> and the Court of Justice<sup>6</sup> have relied

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1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 2. Article 2 states:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

*Id.*

2. Aurelio Pappalardo, *State Measures and Public Undertakings: Article 90 of the EEC Treaty Revisited*, 12 EUR. COMPETITION L. REV. 29, 31 (1991).

3. EEC TREATY art. 222. This article states that "[t]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." *Id.* The Member States are as follows: France, Italy, United Kingdom, Spain, Germany, Denmark, Ireland, Greece, Portugal, Netherlands, Luxembourg and Belgium. GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 5-11 (1993).

4. The Member States were provided with the discretion to allow public ownership of business, nationalization of private enterprises, and the acquiring of shareholdings in private enterprises. Pappalardo, *supra* note 2, at 32.

5. BERMAN ET AL., *supra* note 3, at 57. The Commission is the executive body of the EEC and is appointed for four-year terms by the Member State governments. *Id.* The Commission's duties include: beginning the legislative process through drafting of legislation, forming a

on Article 90. Article 90 governs the relationship created when Member States grant exclusive rights to undertakings.<sup>7</sup> Due to recent economic and political pressures, the Commission has utilized Article 90 to eliminate the Member States' power to grant exclusive privileges. Part I of this Note will examine the Member States' granting of exclusive rights and the Article 90 response.

Debate has surfaced over whether the Commission has the authority under Article 90 to merge the existence and exercise of the rights into one analysis. Part II of this Note will analyze this debate and the changing approach of the Court of Justice. Under the current approach of both the Commission and the Court, the existence of the exclusive rights (i.e., the State's grant of them) is merged with the analysis of the undertaking's exercise of those rights under the Treaty. This approach is very different than one which first examines the existence of the rights under the applicable Treaty rules, and then examines the exercise of the rights under separate Treaty rules. By merging the analysis of the issues, the Court is allowing the Commission to overstep its regulatory authority and adopt a legislative role. Further, the States and undertakings are deprived of the procedural safeguards that are embodied in the infringement proceedings under the Treaty.

To solve these problems, the Court and the Commission should follow the two-step approach the Court advocated when first confronted with this issue. Part III of this Note will examine this solution. Under the two-step approach, the existence of the State's grant of the

legislative program, exercising powers delegated to it by the legislature, and overseeing compliance with the law. *Id.*

6. The Court of Justice is the judicial body of the EEC. *Id.* at 69. Judges serve for six years and Member States name their own judges after consulting with the other States. *Id.* The Court hears legal actions brought against the institutions and Member States for noncompliance with Community law. *Id.* The Court also issues preliminary rulings interpreting Community law at the request of Member States' courts. *Id.*

7. Article 90 provides:

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

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

EEC TREATY art. 90.

exclusive right to the undertaking is first analyzed to determine if it violates the applicable Treaty rules. If the right's existence does not violate the Treaty, the undertaking's exercise of the right is then analyzed under different Treaty rules. If, under either step, the right violates the Treaty, the Commission can bring infringement proceedings against the State and/or undertaking. The State or undertaking will then have the benefit of procedural safeguards to which they are entitled under the Treaty. Further, the Commission will not be abusing its authority by adopting a legislative role.

### I. THE GRANTING OF EXCLUSIVE RIGHTS BY MEMBER STATES AND THE ARTICLE 90 RESPONSE

The overall goal of the EEC was made apparent through the drafting of the Treaty. Several articles in the EEC Treaty refer to the goal of a common market based on free market competition. Article 2 provides for the establishment of a common market through the approximation of Member States' economic policies.<sup>8</sup> Article 3 provides for a system ensuring that competition is not distorted.<sup>9</sup> Further, the "four freedoms" provide a basic framework for competition and include the free movement of goods, persons, services and capital.<sup>10</sup> The Treaty also contains a section entitled "Rules on Competition."<sup>11</sup>

The Commission is one of the strongest supporters of the free market ideology in the Community.<sup>12</sup> Its support is most apparent in its competition policy. The foundation of its competition policy is based on the belief that free market competition offers the highest degree of freedom in economic decisions and the maximum degree of efficiency.<sup>13</sup> The Commission has stated:

[C]ompetition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making

8. *Id.* art. 2.

9. Article 3(f) provides that the activities of the Community shall include "the institution of a system ensuring that competition in the common market is not distorted." *Id.* art. 3(f).

10. BERMAN ET AL., *supra* note 3, at 628. The four freedoms are contained in Articles 9-84. EEC TREATY arts. 9-84. The basic goal behind these articles is to eliminate barriers to the free movement of goods, persons, services and capital within the Community. *See id.* Several of these rules will be set out later in the note. *See infra* notes 41, 42, 214, 224, 226.

11. *See* EEC TREATY arts. 85-94. Articles 85-90 are rules that apply to undertakings, Article 91 governs dumping, and Articles 92-94 govern state aid. *Id.*

12. Pappalardo, *supra* note 2, at 31.

13. *Id.*

machinery, competition enables enterprises continuously to improve their efficiency, which is the *sine qua non* for a steady improvement in living standards and employment prospects within the countries of the Community . . . [C]ompetition policy is an essential means for satisfying to a great extent the individual and collective needs of our society.<sup>14</sup>

Although the Community is based on free market competition, the Member States have a role to play. The Member States' role is to ensure that competition is not distorted and that the undertakings' and consumers' economic choices will be driven by competition.<sup>15</sup> Thus, this is how one of the founders of the Community described the Member States' role:

[A] free market economy is a basic principle of the Treaty of Rome. Such a liberal economic system . . . does not exclude State intervention. On the contrary, it presupposes that the State provides a framework for the operation of such a system; for only an appropriate framework allows each section of the economy to exercise its freedom of action, in fact compels it to exercise that freedom.<sup>16</sup>

Instead of providing a framework for a free market system, Member States have distorted this system by pursuing their own economic policies. To further these policies, Member States have granted exclusive rights<sup>17</sup> to public undertakings to conduct economic activities. These public undertakings are companies over which the State may exercise an influence directly or indirectly.<sup>18</sup> Due to this heavy influence, the State must take responsibility for the companies' actions.<sup>19</sup> These grants of power to public undertakings create risks which can distort the existence of a common market driven by free market competition.<sup>20</sup> The State may pursue general economic objectives which conflict with the Community's free market objectives.<sup>21</sup> State intervention may also affect, directly or indirectly, the most important sectors of the economy.<sup>22</sup> Further, as the States have a wide variety of

14. *Id.* (citing First Report on Competition Policy, Brussels-Luxembourg, 1972, at 11).

15. *Id.* at 31.

16. *Id.* (citing WALTER HALLSTEIN, *EUROPE IN THE MAKING* 110 (1972)).

17. Although the Court has never clearly defined exclusive rights, the rights are assumed to entail the Member States' reservation of a specific economic activity to one undertaking. Thus, one undertaking controls the whole economic activity in that area in the Member State. Marc Van der Woude, *Article 90: "Competing for Competence," Competition Law Checklist*, 1991 *EUR. L. REV.* 60, 61.

18. *Id.* at 61 n.3 (citing Commission Directive 80/723, art. 90(3), 1980 O.J. (L 195/35), on the transparency of financial relations between Member States and public undertakings).

19. *Id.* at 60, 61 n.2 (citing Case C-188-190/88, *France v. EC Comm'n*, 1982 E.C.R. 2545, 3 C.M.L.R. 144 (1982) (ground 12)).

20. Pappalardo, *supra* note 2, at 32.

21. *Id.*

22. *Id.*

legal means to pursue their economic policies, the Community is left with little control over the State intervention.<sup>23</sup>

In order to hinder the erosion of free market competition, the Commission has forged a campaign based on the use of Article 90. There are several reasons for the Commission's recent concern and strong campaign. One reason concerns the political pressures surrounding the Community's goal to complete the internal market by 1992.<sup>24</sup> Thus, exclusive rights and monopolies can continue to exist only if they further the goals of the Member States *and* the Community. Also, due to technological breakthroughs, natural monopolies are no longer justifiable.<sup>25</sup> Further, the sectors traditionally granted exclusive rights and monopolies are in need of funds that cannot be raised by the State acting as owner of the public enterprise.<sup>26</sup> For these reasons, the Commission has targeted economic areas which traditionally were controlled by monopolies and has attempted to liberalize them. Some of the key areas are telecommunications,<sup>27</sup> energy,<sup>28</sup> postal services,<sup>29</sup> and radio and television broadcasting.<sup>30</sup>

23. *Id.*

24. Claus-Dieter Ehlermann, *Managing Monopolies: The Role of the State in Controlling Market Dominance in the European Community*, 14 EUR. COMPETITION L. REV. 61, 67 (1993).

25. *Id.* at 67-68. The author gives an example of how satellite and cable have relieved the problem of shortage of frequencies which justified natural monopolies in the telecommunications market. *Id.*

26. *Id.* at 68. The author discusses the pressure on the State resources and the high level of tax and international competition, which leads to the reduction of taxes, as factors affecting the State's ability to raise funds. *Id.* If the sectors become privately owned, they can rely on private capital and operate on the financial markets. *Id.*

27. *See, e.g.*, Case C-202/88, *Re Telecommunications Terminals Equipment: France (Italy, Belgium, Germany and Greece intervening) v. EC Comm'n*, 1991 E.C.R. I-1223, 5 C.M.L.R. 522 (1992) [hereinafter *Telecommunications Terminals*]; Case C-18/88, *Régie des Télégraphes et des Téléphones v. GB-INNO-BM*, 1991 E.C.R. 13 (unpublished judgment, unofficial translation) [hereinafter *RTT*], cited in *Judgments of the Court of First Instance and the Court of Justice, Competition Law Checklist*, 1991 EUR. L. REV. 89, 92-94 [hereinafter *Competition Law Checklist*]. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979) [hereinafter *Cassis de Dijon*]; Case 311/84, *Centre Belge d'Études de Marché-Télémarketing (CBEM) SA v. Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux SA*, 1985 E.C.R. 3261, 2 C.M.L.R. 558 (1986) [hereinafter *Telemarketing*]; *EC Competition Head Opens Door for Users to Challenge Monopoly Status*, EC ENERGY MONTHLY, Mar. 18, 1993, available in LEXIS, Eurcom Library, ECNews File (discussing how telecommunications operators could be infringing Article 90 through the abuse of their monopoly status and the use of profits to acquire overseas telecommunications networks).

28. *See, e.g.*, Commission Decision 28/32, *Ijsselcentrale*, 1991 O.J. (L 28/32); *The "Obscure Clarity" of Article 90*, EC ENERGY MONTHLY, Apr. 8, 1993, available in LEXIS, Eurcom Library, ECNews File; *EC Delays Legal Action Over Import/Export Monopolies*, EC ENERGY MONTHLY, Aug. 4, 1993, available in LEXIS, Eurcom Library, ECNews File. These articles discuss the application of Article 90(1) and (2) in the energy sector.

29. *See, e.g.*, *Postal Service Monopoly Cannot Be Justified*, THE TIMES (London), July 21, 1993, at 21. This article discusses a recent case in which the Court of Justice held under Article 90(2) that the monopoly was justified as to certain services but other services could be performed by private companies. Van der Woude, *supra* note 17, at 72-73 (citing Case C-48/90,

Article 90 is the Commission's main weapon in the elimination of Member States' interference with free market competition. Article 90 consists of three paragraphs.<sup>31</sup> The first paragraph prohibits Member States from enacting measures that violate rules in the Treaty, especially the competition rules contained in Article 7 and Articles 85 to 94.<sup>32</sup> Thus, Article 90 applies to all Treaty rules, although special emphasis is given to the competition rules. This paragraph of the Article reinforces Article 5, which prohibits Member States from taking any measure which would hinder the attainment of the Treaty objectives.<sup>33</sup>

The second paragraph requires undertakings performing services of general economic interest or with the character of revenue-producing monopolies to follow the Treaty rules, especially the competition rules.<sup>34</sup> Paragraph two also contains an exemption from the Treaty rules for certain of the above undertakings. If the rule's application will obstruct the performance of an undertaking's tasks, the exemption applies.<sup>35</sup> Finally, the third paragraph provides that the Commission will ensure the Article's application, and if necessary for this end will issue directives or decisions to Member States.<sup>36</sup>

Article 90 is an internal regulation of the Member States.<sup>37</sup> It prohibits States from enacting measures pertaining to their undertakings that are contrary to other articles of the Treaty.<sup>38</sup> Thus, Article 90 can only be implicated if the Member States violate another Treaty rule through the enactment of measures directed at undertakings. Public undertakings cannot violate Article 90(1) on their own. However, undertakings' activities are limited by the rules on free circulation and the competition rules. Further, undertakings cannot violate Article 90(2).<sup>39</sup> This paragraph merely reinforces the rule that all un-

Netherlands v. EC Comm'n and Case C-66/90, *Koninklijke PTT Nederland v. EC Comm'n* (1992)(not yet published)).

30. See, e.g., Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis & Sotirios Kouvelas*, 1991 E.C.R. I-2925 [hereinafter *ERT*]; Case 155/73, *Sacchi v. Tela Biella*, 1974 E.C.R. 409, 2 C.M.L.R. 177 (1974) [hereinafter *Sacchi*].

31. EEC TREATY art. 90.

32. *Id.* art. 90(1).

33. Article 5 provides that Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." *Id.* art. 5. See also Pappalardo, *supra* note 2, at 34.

34. EEC TREATY art. 90(2).

35. *Id.*

36. *Id.* art. 90(3).

37. *Id.* art. 90(1).

38. Pappalardo, *supra* note 2, at 34. "A 'measure' is certainly any kind of positive action, whether general or specific, binding or non-binding." Ehlermann, *supra* note 24, at 65.

39. EEC TREATY art. 90(2).

dertakings, including public undertakings, are subject to the Treaty rules, especially the competition rules.

The Court and the Commission have utilized Article 90(1) when Member States issue measures directed toward their undertakings which violate the free circulation or competition rules. The rules on free circulation provide for the free movement of goods, persons, services, and capital within the Community.<sup>40</sup> The Court has held that Member States cannot violate the free movement rules<sup>41</sup> under Article 90(1), unless an exception applies.<sup>42</sup> One such exception which the Court has recognized concerns the States' issuance of restrictive regu-

40. Articles 9-37 provide for the free movement of goods; Articles 48-58 provide for the free movement of persons and right of establishment; Articles 59-66 provide for the free movement of services; Articles 67-73 provide for the free movement of capital. *Id.* arts. 9-37, 48-73.

41. The relevant free movement rules are Articles 30, 37(1), and 59. Article 30 states: "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." *Id.* art. 30.

Article 37 orders the adjustment of state monopolies to eliminate the discrimination which occurs when Member States favor their own goods, and provides:

1. [m]ember 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. The provisions of the 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.

*Id.* art. 37(1). This article only applies to goods and not services. Martin Coleman, *European Competition Law in the Telecommunications and Broadcasting Sectors*, 11 EUR. COMPETITION L. REV. 204, 205 (1990). There was some debate over what the term "adjustment" entailed, as the term determined the scope of Article 90(1). Pappalardo, *supra* note 2, at 32 n.24 (citing Aurelio Pappalardo, *Position des Monopoles Publics Par Rapport aux Monopoles Privés*, in REGULATING THE BEHAVIOR OF MONOPOLIES AND DOMINANT UNDERTAKINGS IN COMMUNITY LAW 538, 550 (Van Damme ed., 1977)). If the adjustment of monopolies were construed narrowly, the scope of Article 90(1) would be greatly reduced. However, if adjustment were construed as to require overhauls in monopolies, the Commission would have a large amount of power under Article 90(1).

Article 59 provides that restrictions on the free movement of services shall be progressively abolished, and states:

[w]ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

EEC TREATY art. 59(1). Thus, individuals should be able to provide services to another in a different Member State.

42. Article 36 provides:

[t]he provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

*Id.* art. 36.



lations. These regulations are needed due to "mandatory requirements," i.e., consumer and environmental protection and prevention of unfair competition.<sup>43</sup> The Court has also utilized the Treaty competition rules in combination with Article 90. The competition rules are addressed to undertakings whose activities can hinder or distort competition.<sup>44</sup>

43. Van der Woude, *supra* note 17, at 66-67 n.28 (citing Case 72/83, *Campus Oil Ltd. v. Minister for Indus. & Energy*, 1984 E.C.R. 2727, 3 C.M.L.R. 544 (1984); Case 279/80, *Strafverfahren gegen Alfred John Webb*, 1981 E.C.R. 3305, 1 C.M.L.R. 719 (1982)). These are justifications of a non-economic nature which are basic tasks of State governments. *Id.* at 63 (citing Case 95/81, *EC Commission v. Italy*, 1982 E.C.R. 2187).

44. Article 85 prohibits agreements or practices by undertakings which affect trade within the Community and distort competition. EEC TREATY art. 85. Article 85(1) provides:

1. [t]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*Id.* art. 85(1). This article also contains an exception which allows agreements or practices which further the economic progress of the Community, and provides:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:  
 -any agreement or category of agreements between undertakings;  
 -any decision or category of decisions by associations of undertakings;  
 -any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

*Id.* art. 85(3). Also, Article 86 prohibits an undertaking from abusing its dominant position if trade within the Community is affected. Article 86 provides:

[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*Id.* art. 86.

Due to the Commission's strong attack on exclusive rights, the Member States have begun to question the Commission's power under Article 90. The States want to restrict the Commission's power because they want to grant exclusive rights to further their individual economic policies. The States view the Commission's use of Article 90 as an encroachment on their freedom, instead of analyzing the benefits to the Community as a whole. Thus, scholars<sup>45</sup> and Member States<sup>46</sup> have advocated a very narrow view of Article 90, limiting its scope to that of Article 37. If Article 90 were limited to the scope of Article 37, the Commission could control the existence of monopolies covering only the importation and exportation of goods.<sup>47</sup> Thus, this narrow view restricts Article 90's power to prohibiting only monopolies already prohibited under Article 37, involving the exchange of goods between Member States. Monopolies in goods that remain within the Member State or monopolies in services and capital will not be affected by this narrow approach.

Also, under this narrow view, the existence of exclusive rights not falling under Article 37 is controlled by the free circulation articles alone, without the use of Article 90.<sup>48</sup> The undertaking's exercise of the rights is controlled only by the competition articles.<sup>49</sup> Advocates of this narrow view justify this approach by arguing that Article 90 presupposes the existence of exclusive rights.<sup>50</sup>

However, the Commission's view of Article 37 is that the monopolies need to be structurally changed so they can no longer engage in discrimination.<sup>51</sup> The Commission argues that Article 37 is not the only prohibition concerning the granting of exclusive rights. Under Article 90, all exclusive rights should be abolished unless there is a

45. Ehlermann, *supra* note 24, at 66. See also Van der Woude, *supra* note 17, at 68. Van der Woude discusses his belief that Article 90(1) does not control the existence of exclusive rights, but only the "assessment of ancillary restraints" which affect competition as a result of the existence of the rights. *Id.*

46. See, e.g., *Telecommunications Terminals*, 1991 E.C.R. at I-1229. At issue was a Commission directive eliminating exclusive rights in the importation, marketing, connection, bringing into service, and maintenance of telecommunications equipment. *Id.* France (with Italy, Belgium, Germany and Greece intervening) argued the Commission lacked competence to eliminate exclusive rights for telecommunications equipment in its directive, as Article 90(1) is based on their lawful existence. *Id.* France argued the granting of these exclusive rights under Article 37 was also lawful. *Id.*

47. EEC TREATY art. 37(1).

48. See *supra* note 46 and accompanying text.

49. *Id.* The competition rules are Articles 85 and 86. See EEC TREATY arts. 85, 86.

50. See *supra* note 46 and accompanying text.

51. Pappalardo, *supra* note 2, at 33.

non-economic public-interest justification.<sup>52</sup> Thus, the Commission's approach is to eliminate exclusive rights by using Article 90 unless the public-interest exception applies.<sup>53</sup>

The Court of Justice has been called upon to resolve this debate between the Commission and the Member States. When first confronted with the issue, the Court held that Article 37 did not require the elimination of state monopolies. However, the Court held that the Article does prevent the granting of exclusive rights for the import of goods from other States.<sup>54</sup> Thus, under the Court's approach, the Commission's power under Article 90(1) was narrowly construed to prohibit only monopolies for the import of goods.

## II. THE APPLICATION OF ARTICLE 90 BY THE COURT OF JUSTICE

The Court of Justice has played an important role in the Commission's campaign to limit exclusive rights. At first, the Court set out a clear test for determining if exclusive rights could exist. Later, as the cases became more complex, the Court merged issues, leading to confusion. This next section of the Note will detail and analyze the Court's changing approach.

### A. *The Court's Distinction Between the "Existence" and "Exercise" of Monopoly Rights*

At first, the Court of Justice distinguished between the existence and exercise of exclusive rights. The first major case in which the Court faced this issue was *Sacchi v. Tele Biella*.<sup>55</sup> In analyzing the case, the Court first considered the free circulation rules. The Court held the *existence* of a monopoly right for television advertisements did not by itself violate the rules on the free movement of goods,<sup>56</sup> stating:

Article 90(1) permits Member States *inter alia* to grant exclusive rights to undertakings. Nothing in the Treaty prevents Member

52. Ehlermann, *supra* note 24, at 67 n.17. The author discusses how, under the free movement rules, the Court has indicated in recent judgments, at the Commission's urging, that exclusive rights which are obstacles to these rules can only be upheld if there are non-economic public interest reasons for the rights. *Id.*

53. Pappalardo, *supra* note 2, at 33. The author stated that a structural modification of the monopolies logically leads to requiring the abolition of the exclusive rights. *Id.*

54. Case 59/75, *Publico Ministero v. Manghera*, 1976 E.C.R. 91, 101, 1 C.M.L.R. 557 (1976).

55. 1974 E.C.R. at 426-30. Penal proceedings had been brought against a private television station and the national court referred questions to the Court of Justice. *Id.* The case arose after the Italian Government granted the exclusive right to operate television advertisements to an undertaking. *Id.* at 425.

56. *Id.* at 426. Article 30 was the free movement rule involved. *See supra* note 41.

States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions, . . . from the field of competition by conferring one or more establishments an exclusive right to conduct them. However, for the performance of their tasks these establishments remain subject to the prohibition against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights.<sup>57</sup>

Thus, the Court held that Member States can grant exclusive rights or monopolies to further the public interest. As the Court upheld the existence of the rights, it found the monopoly to be in the public interest. However, the Court held that the undertakings, in exercising their rights, must comply with the rules against discrimination, i.e., the free movement articles and the competition rules referred to in Article 90. If, in exercising its rights, the monopoly were to discriminate in favor of national materials and products, the free movement of imports would be violated.<sup>58</sup>

The Court then analyzed the exercise of the rights under the competition articles. The Court held that the granting of exclusive rights, amounting to a monopoly for the undertaking, was not a violation of the competition articles<sup>59</sup> or Article 90.<sup>60</sup> This result also applied to an extension of exclusive rights by the undertaking after a new intervention by the Member State.<sup>61</sup> If the rights were extended for a non-economic, public interest reason, Article 90 would not be violated. However, the Court further held that the undertaking could be in violation of a competition article if it engaged in discrimination.<sup>62</sup> In addition, the Court held that the national court must determine whether the undertaking had abused its dominant position.<sup>63</sup> If the national court determined there was an abuse, the Commission would have to remedy the violation.<sup>64</sup>

Thus, the Court used a two-step approach in analyzing the granting and exercise of exclusive rights and monopolies by Member

57. *Sacchi*, 1974 E.C.R. at 428-29.

58. *Id.*

59. *Id.* The Court noted if the undertaking imposed unfair charges or conditions on users or discriminated between national operators and products and other Member States, the undertaking would be in violation of Article 86, abuse of a dominant position. *Id.*; see EEC TREATY art. 86.

60. *Sacchi*, 1974 E.C.R. at 428-29.

61. *Id.*

62. *Id.*; see *supra* note 59 and accompanying text.

63. *Sacchi*, 1974 E.C.R. at 428-29.

64. *Id.*

States.<sup>65</sup> The first step involves analyzing the granting of the exclusive rights by the Member States. The second step focuses on the exercise of the exclusive rights by the undertaking. In the first step, the Commission determines whether the existence of the exclusive rights violates the free circulation rules.<sup>66</sup> Exclusive rights are justified if they are granted for a non-economic, public interest reason.<sup>67</sup> Other justifications for exclusive rights are found in exceptions to the free circulation rules.<sup>68</sup> Further, the Court of Justice has held that "mandatory requirements," regulations like consumer and environmental protection, also justify the granting of exclusive rights or monopolies.<sup>69</sup>

If, in the first step, the Commission determines that the monopoly is not justified, it can begin infringement proceedings against the Member State.<sup>70</sup> Under these proceedings, the Court must first give the State informal notice of the violation and allow a right of reply.<sup>71</sup> If the Commission maintains its view that a violation exists, the Com-

65. Van der Woude, *supra* note 17, at 66-67.

66. *Id.* at 66. See *Sacchi*, 1974 E.C.R. at 428, where the Court first analyzes the granting of the exclusive rights under the free circulation rules to determine if there is a non-economic, public interest justification. "Nothing in the Treaty prevents Member States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions . . . from the field of competition by conferring on one or more establishments an exclusive right to conduct them." *Id.* at 429.

67. *Id.*

68. EEC TREATY arts. 36, 48(3), 56(1). For the text of Article 36, see *supra* note 42. Article 48(3) is located in the free movement of workers provisions and states:

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

*Id.* art. 48(3).

Article 56(1) is located within the right of establishment and provides:

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

*Id.* art. 56(1)

69. Van der Woude, *supra* note 17, at 63.

70. *Id.* at 67. Article 169 provides:

If the Commission considers that a Member State has failed to fulfil[] an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

EEC TREATY art. 169.

71. *Id.*

mission issues a reasoned opinion to the Member State.<sup>72</sup> The opinion must give the Commission's reasons for its view and must also ask the State to take corrective action within a time period.<sup>73</sup> If the Member State does not comply with the Commission's opinion within that time period, the Commission can bring the dispute before the Court of Justice.<sup>74</sup>

However, if the Commission determines that the monopoly is justified under the free circulation rules, it will further examine the exercise of the exclusive rights in the second step of the test.<sup>75</sup> The Commission determines whether the undertaking's exercise of its rights violates the free circulation and competition rules.<sup>76</sup> If the exercise of the rights violates any Treaty rules, the Commission next determines if an Article 90(2) exception allows the undertaking to violate Article 90.<sup>77</sup>

In order for the Article 90(2) exception to apply, two requirements must be fulfilled. First, a public authority must have entrusted the undertaking with the service of general economic interest.<sup>78</sup> Second, the application of the Treaty rules must obstruct the undertaking's performance of its task.<sup>79</sup> If the exception applies, then the exclusive rights are justified and the free circulation and competition rules do not apply to the undertaking.<sup>80</sup>

If the exception does not apply, the Commission will find that the undertaking has violated the free movement or competition rules. The Commission can then bring enforcement proceedings against the undertaking.<sup>81</sup> Since the second step examines the undertaking's ex-

72. *Id.*

73. *Id.*

74. *Id.*

75. Van der Woude, *supra* note 17, at 68. See *Sacchi*, 1974 E.C.R. at 428, where the Court permits the granting of a monopoly or exclusive rights when there is a non-economic, public interest justification. Then the Court examines the undertaking's exercise of the rights under the free circulation and discrimination rules, and explains:

for the performance of their tasks these . . . [public undertakings] remain subject to the prohibitions against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights.

*Id.* at 429.

76. Van der Woude, *supra* note 17, at 68.

77. *Id.*

78. Leigh Hancher and Piet Jan Slot, *Article 90*, 11 EUR. COMPETITION L. REV. 35, 36 n.16 (1990) (citing Case 7-82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. EC Comm'n*, 1983 E.C.R. 483, 3 C.M.L.R. 645 (1983)).

79. EEC TREATY art. 90(2).

80. *Id.*

81. Infringement proceedings are brought under Article 169. See *supra* note 70.

ercise of the rights, Article 90 does not apply. Article 90 only prohibits Member States' measures and is not addressed to undertakings themselves.<sup>82</sup> Thus, Article 90(1) and (3) do not come into play under either step of the approach.

In the next two cases, the Court utilized the second phase of the two-step approach, regulating the exercise of exclusive rights. In *Centre Belge d'Études de Marché-Télémarketing SA v. Compagnie Luxembourgeoise de Télédiffusion SA*,<sup>83</sup> the Court utilized a competition article to analyze the public undertaking's exercise of its exclusive right.<sup>84</sup> The Court first held that the undertaking was subject to the competition articles even though the dominant position was created by law.<sup>85</sup>

The Court then examined the undertaking's exercise of its dominant position and held that it violated a competition article.<sup>86</sup> The undertaking had expanded its exclusive right, without an objective reason, into areas where other companies could provide the services.<sup>87</sup> In *Sacchi*, the Court held that an undertaking's expansion of exclusive rights after a new intervention by the State did not violate a competition article in combination with Article 90.<sup>88</sup> However, in *Centre Belge*, the undertaking had used its dominant position to expand into an ancillary activity without a new intervention by the State.<sup>89</sup> Thus, undertakings on their own can only expand their exclusive rights into other areas for non-economic, public policy reasons related to their original grant of exclusive rights.<sup>90</sup> This is the same standard applied

82. EEC TREATY art 90(1).

83. 1985 E.C.R. 3261.

84. Due to treaties and laws, an undertaking had a statutory monopoly in the television market. *Id.* at 3272. The undertaking expanded its exclusive right into telemarketing by restricting access to its advertisements to companies who would use its telemarketing operations. *Id.*

85. *Id.* at 3276. The Court referred to Article 86, which deals with the abuse of a dominant position. *Id.*; see EEC TREATY art. 86.

86. The competition rule was Article 86. See EEC TREATY art. 86.

87. *Telemarketing*, 1985 E.C.R. at 3278. The Court held:

an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities, . . . with the possibility of eliminating all competition from such undertaking.

*Id.*

88. *Sacchi*, 1974 E.C.R. at 429.

89. *Telemarketing*, 1985 E.C.R. at 3276.

90. *Id.* at 3278. The Court discussed how the undertaking's refusal to allow telemarketing activities unless its telephone number was used was not justified by technical or commercial requirements relating to the nature of television. *Id.*

in the *Sacchi* case to the granting of exclusive rights originally.<sup>91</sup> In *Sacchi*, the Court held that Member States can grant exclusive rights to undertakings for non-economic, public policy reasons.<sup>92</sup> Thus, the standard applied to the State's original grant of exclusive rights to undertakings is the same as the standard applied to undertakings' own expansion of their exclusive rights.

In *Ahmed Saeed Flugreisen & Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*,<sup>93</sup> the Court also analyzed the undertakings' exercise of their exclusive rights under the competition articles.<sup>94</sup> The Court first held that agreements on airline tariffs were void under a competition article, unless the undertakings had been granted an exemption under the article.<sup>95</sup> The Court held that the undertakings' dominant position could be abused if excessively low or high tariffs were charged.<sup>96</sup>

The Court then analyzed the Member State's involvement in encouraging the undertakings' violation of the competition rules.<sup>97</sup> The Court held Articles 5(2) and 90 must be read together, as both prohibit State governments from favoring agreements that infringe the competition articles.<sup>98</sup> Thus, States are prohibited from encouraging undertakings to enter agreements on tariffs or approving of them unless there is an exemption under Article 90(2).<sup>99</sup>

Thus, the Court held Article 90(1) can be utilized when analyzing the exercise of the exclusive rights. In *Sacchi*, the Court did not apply Article 90.<sup>100</sup> But, after *Ahmed Saeed*, Article 90(1) applies to the exercise of the rights if the State encourages the undertakings to take actions in violation of the Treaty.<sup>101</sup> Thus, the two-step approach was

91. *Sacchi*, 1974 E.C.R. at 429. In *Sacchi*, the Court held Member States could only grant exclusive rights to undertakings for non-economic, public policy reasons. *Id.*

92. *Id.*

93. Case 66/86, 1989 E.C.R. 838, 4 C.M.L.R. 102 (1989) [hereinafter *Ahmed Saeed*].

94. The competition articles are Article 85, prohibiting anti-competitive agreements, and Article 86, prohibiting abuse of a dominant position. See EEC TREATY arts. 85, 86.

95. *Ahmed Saeed*, 1989 E.C.R. at 846. The airline tariffs were only for flights within the Community. *Id.* The competition rule was Article 85(2) and the exception was Article 85(3). See EEC TREATY arts. 85(2), 85(3).

96. *Ahmed Saeed*, 1989 E.C.R. at 850.

97. *Id.* at 851. For relevant competition rules, see *supra* note 94.

98. *Ahmed Saeed*, 1989 E.C.R. at 851. Article 5(2) prohibits Member States from enacting measures which could jeopardize the Treaty objectives. EEC TREATY art. 5(2).

99. *Ahmed Saeed*, 1989 E.C.R. at 852-53.

100. *Sacchi*, 1974 E.C.R. at 429-30.

101. *Ahmed Saeed*, 1989 E.C.R. at 853.



expanded to include Article 90 in analyzing the exercise of the exclusive rights.<sup>102</sup>

Further, the Court set out a process for determining whether an Article 90(2) exception applies. The Court held that national authorities and courts must first establish if the airline was entrusted with a service of general economic interest by an act of the public authority.<sup>103</sup> The national authorities and courts must then determine the needs of the undertakings and their influence on the airline tariffs.<sup>104</sup> Thus, the Court relinquished some of the Commission's power and allowed national authorities and courts to determine if an Article 90(2) exception applied. Before this case, the Commission had been viewed as the only authority allowed to approve Article 90(2) exceptions.<sup>105</sup>

### *B. The Merger of the "Existence" and "Exercise" of Exclusive Rights Under Article 90*

The Court radically changed its approach to analyzing the existence and exercise of exclusive rights in *Re Telecommunications Terminals Equipment: France v. EC Commission*.<sup>106</sup> The Commission issued a directive under Article 90(3) to liberalize the telecommunication terminal equipment market.<sup>107</sup> The directive prohibited exclusive rights concerning importation, marketing, connection, bringing into service, and maintenance rights in the telecommunications equipment industry.<sup>108</sup>

France, joined by several other Member States, challenged the directive.<sup>109</sup> First, France argued that the Commission could not elim-

102. EEC TREATY art. 90(1). The language of Article 90(1) states that it only applies to measures taken by Member States. *See id.* It would seem that the mere encouragement of action by the Member State would not amount to a "measure." However, a "measure" has been defined as any kind of positive action, whether general or specific, binding or non-binding. Ehlermann, *supra* note 24, at 65.

103. *Ahmed Saeed*, 1989 E.C.R. at 852.

104. *Id.*

105. *Van der Woude*, *supra* note 17, at 78.

106. 1991 E.C.R. I-1223.

107. *Id.* at I-1240. The Commission took this action due to technological developments and the role of information technology in the telecommunications industry. *Id.* The directive also prohibited undertakings competing in the telecommunications market from drawing up and monitoring the application of specifications for the equipment. *Id.*

108. *Id.* at I-1226.

109. *Id.* at I-1227. Article 173 provides:

[t]he Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

inate exclusive rights under Article 90(1), as the Article presupposed their existence.<sup>110</sup> France argued that the Commission should only have assessed whether the exercise of the right was within the Treaty rules.<sup>111</sup> However, the Commission argued in reply that some exclusive rights cannot be separated from their exercise.<sup>112</sup> Thus, the very existence of some exclusive rights must be eliminated because the discrimination from the exercise of the rights arises from their actual existence.

France also argued that the Commission abused its power by adopting a directive under Article 90(3) instead of bringing an infringement proceeding.<sup>113</sup> The Member State argued that an infringement proceeding would involve determining case by case if the grant of exclusive rights results in discrimination.<sup>114</sup> However, the Commission passed general legislation under Article 90 without making a case by case determination. Thus, France argued that the Commission assumed a legislative role and encroached on the Council's authority.<sup>115</sup>

Any natural or legal person, may under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

EEC TREATY art. 173. Article 174 provides:

[i]f the action is well founded, the Court of Justice shall declare the act concerned to be void. In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

*Id.* art. 174.

110. *Telecommunications Terminals*, 1991 E.C.R. at I-1229. This covered the exclusive importing and marketing rights. *Id.*

111. *Id.* France argued Article 37 was the only restraint on the existence (i.e., the granting) of exclusive rights. *Id.* France further argued that Article 37 did not apply to the exclusive rights of connection, service and maintenance, as the transmission of messages is a service and does not involve goods. *Id.*; see EEC TREATY art. 37. As Article 37 does not apply here, the existence of the rights cannot be prohibited under Article 90. *Telecommunications Terminals*, 1991 E.C.R. at I-1229; see EEC TREATY art. 90. Therefore, only the exercise of the rights can be evaluated under Article 90.

112. *Telecommunications Terminals*, 1991 E.C.R. at I-1223.

113. *Id.* at I-1230. Infringement proceedings are brought under Article 169. See EEC TREATY art. 169.

114. *Telecommunications Terminals*, 1991 E.C.R. at I-1229.

115. *Id.* Under Article 100a(1), the Council is delegated the power to legislate. Article 100a(1) provides:

1. [b]y way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

The Commission replied that the purpose of the directive was regulatory and was thus within its authority.<sup>116</sup> The directive's purpose was to set out the States' obligations, remedy infringements and prevent future infringements.<sup>117</sup> Thus, the Commission argued that the directive took account of the telecommunications structure in the States and adopted measures allowing the States to comply with the Treaty.<sup>118</sup>

The Court upheld the Commission's authority to issue the directive.<sup>119</sup> Under Article 90(3), the Commission can specify in general terms the States' obligations under Article 90(1) by issuing directives.<sup>120</sup> However, this authority is not extended to determining whether a State has fulfilled its obligations.<sup>121</sup> The Court also stated that the directive set out the States' obligations in relation to the tele-

EEC TREATY art. 100a(1). Article 145 also addresses the Council's power to legislate, providing:

To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty:

-ensure coordination of the general economic policies of the Member States;

-have power to take decisions;

-confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down.

The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.

*Id.* art. 145.

Sir Guiseppe Tesauro, the Advocate General, also questioned the Commission's authority to eliminate exclusive rights. See *Telecommunications Terminals*, 1991 E.C.R. at I-1253-58. Tesauro argued the Commission took a legislative role, outside its competence, by issuing general rules that regulated the direction of the broadcasting sector. *Id.* at I-1254. Sir Tesauro stated that the telecommunications sector should be regulated on a perceptive basis, requiring the Commission to propose legislation to the Council and the latter finalizing it after the Parliament contributes its opinion. *Id.* at I-1258.

The Advocate General compared the Commission's authority under Article 90(3) with the Council's authority under Article 94 and argued that the Commission is only authorized to issue directives and decisions if they are *necessary* for the performance of its supervisory duty. *Id.* at I-1256. However, under Article 94, the Council has authority to adopt all *appropriate* measures. *Id.* Thus, the Commission's directive was a legislative measure outside of its competence, as it was not *necessary* for the performance of its duty. *Id.* at I-1256-57; see EEC TREATY art. 90(3). Article 94 provides:

The Council may, acting by a qualified majority on a proposal from the Commission, make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure.

EEC TREATY art. 94.

116. *Telecommunications Terminals*, 1991 E.C.R. at I-1234.

117. *Id.*

118. *Id.* at I-1238.

119. *Id.* at I-1264.

120. *Id.*

121. *Id.*

communications equipment sector.<sup>122</sup> This was not an infringement proceeding.<sup>123</sup> The difference between the Council's legislative authority and the Commission's regulatory authority was also explained by the Court.<sup>124</sup> The opinion further held that Article 90(3) could be used where necessary to carry out the Commission's supervisory duty.<sup>125</sup>

The validity of the Commission's directive was then analyzed by the Court. First, it was noted that the free movement rules apply to all trading rules which could affect trade within the Community.<sup>126</sup> The Court acknowledged that exclusive importing and marketing rights deprived traders of the opportunity to sell their products.<sup>127</sup> Further, because the telecommunications sector was so diverse, there was a lack of certainty that the undertaking could provide all the models available.<sup>128</sup> Thus, the rights were capable of hindering trade in the Community, as consumers' equipment choices would be restricted to what was provided by the undertakings. The Court concluded that the Commission was justified in eliminating the exclusive rights based on a free movement rule in connection with Article 90.<sup>129</sup>

122. *Id.*

123. *Id.*

124. *Id.* The difference between the Council's legislative duties under Article 100a and the Commission's regulatory duties under Article 90(3) was explained in the Court's opinion. *Id.* at I-1265-66. Under the former, the Council can adopt measures to further the approximation of the Member States' laws dealing with the internal market. *Id.* However, under Article 90 the Commission is only authorized to regulate Member States' measures pertaining to their undertakings. *Id.*

125. *Id.* The Court concluded that the Commission's power under Article 90(3) is more specific than the Council's power under Article 100a. *Id.*

126. *Id.* at I-1267. The Court stated Article 30 applies to all rules having any effect on trade within the Community, direct or indirect, actual or potential. *Id.* Article 30 is the rule on the free movement of imports. See EEC TREATY art. 30.

127. *Telecommunications Terminals*, 1991 E.C.R. at I-1268.

128. *Id.* Further, the Court held that the elimination of the exclusive importing and marketing rights was also justified as competitors must be able to connect, bring into service, and maintain equipment. *Id.* at I-1269. The Court also noted when issuing the directive that the Commission took into account requirements which would qualify the undertakings involved for an Article 90(2) exception. *Id.* at I-1263. Thus, Article 90(2) could not be relied on by the undertakings involved. *Id.*

129. *Id.* The Court noted that the public undertaking could not guarantee the reliability of services for every type of equipment. *Id.* Thus, consumers' choices were again restricted. The Court also noted when the exclusive importing and marketing rights were eliminated that an economic agent must be able to connect, service and maintain equipment. *Id.* The Court held that the directive's requirement that an independent entity draw-up and apply technical specifications to the equipment was justified. *Id.* at I-1271. The Court found the possibility of abuse was so great that it was inconsistent with a fair competition system. *Id.* Article 30, providing for the free movement of imports, was the free movement rule the Court used. See EEC TREATY art. 30.

By eliminating the exclusive rights of these undertakings by the use of Article 90 in connection with a free circulation article, the Court abandoned the distinction between the existence and the exercise of the rights. Before, the rights' existence was evaluated under the free circulation articles alone. The exercise of the rights was then evaluated under the competition and free circulation articles. Article 90 was also utilized if the Member State encouraged the undertaking to violate the competition rules. If the Court ordered the Commission to follow the two-step approach in evaluating both aspects of the rights, Article 90 would not have been used with the free import rule.<sup>130</sup> The elimination of the exclusive rights and the outcome of this case could have been decided under the free import rule alone.<sup>131</sup>

Under the *Telecommunications* approach, the Commission can combine the two-step process into one step by evaluating the existence and exercise of exclusive rights under Article 90. Under Article 90(3), the Commission can issue directives to all Member States describing their Treaty obligations.<sup>132</sup> These directives can also guide States in deciding what actions to take to ensure that their conduct meets the obligations.<sup>133</sup> Then, if a State does not comply with the directive, the Commission can bring an infringement proceeding.<sup>134</sup> Thus, the procedure is the same as if the Commission had brought an infringement proceeding against the State for a violation of the free circulation rules.<sup>135</sup>

There is a different outcome, however, if the State complies with the directive. The Member State is then deprived of the procedural safeguards ensured in an infringement proceeding.<sup>136</sup> Under an in-

130. The rule on the free movement of imports is Article 30. See EEC TREATY art. 30.

131. The Court could have followed the two-step approach and analyzed the exclusive rights under Article 30 alone, as the Court did in *Sacchi*, 1974 E.C.R. at 429. It also appears that the Court could have utilized Article 37, as the exclusive rights pertained to the importing and marketing of goods. EEC TREATY art. 37. Thus, the Commission could have brought enforcement proceedings under Article 169 against France for the violation of Articles 30 and 37. See *id.* art. 169. Then the Court would not have to reach the second part of the two-step test by utilizing Article 90. *Id.* art. 90. Article 90 would only be used if France adopted a measure which led the undertaking to violate the Treaty rules through the exercise of its exclusive rights.

132. *Telecommunications Terminals*, 1991 E.C.R. at I-1264.

133. *Id.*

134. Van der Woude, *supra* note 17, at 70 n.37 (citing Case 118/45, EC Commission v. Italian Republic, 1987 E.C.R. 2599, 3 C.M.L.R. 255 (1987); Case 226/87, EC Commission v. Hellenic Republic, 1988 E.C.R. 3611, 3 C.M.L.R. 569 (1987)). Infringement proceedings are brought under Article 169. See EEC TREATY art. 169.

135. *Id.*

136. *Telecommunications Terminals*, 1991 E.C.R. at I-1249. Mr. Advocate General Tesauro argues Article 90(3) does not expressly provide any procedural safeguards, in contrast to Article 169, which provides for and governs infringement proceedings. *Id.*; EEC TREATY arts. 90(3), 169.

fringement proceeding, the State has a right to reply before the Commission makes a formal decision.<sup>137</sup> However, under Article 90(3), the Commission can issue a directive and then directly bring enforcement proceedings against the States not in compliance. This occurs because the directive takes effect as soon as the Member States are notified.<sup>138</sup> States and undertakings do not have the opportunity to be heard before the Commission's formal issuance of a directive. Thus, the State and undertaking are deprived of an early opportunity to argue the application of the 90(2) exception, due to mandatory requirements or express Treaty exceptions.

Further, an infringement procedure requires the Commission to state the reasons for its action.<sup>139</sup> If the Commission's reasons are insufficient, the State can challenge the proceeding in the Court.<sup>140</sup> However, under Article 90(3), the Commission does not have to state reasons for the directive. The directive only defines the States' obligations under the Treaty.<sup>141</sup>

Even under an Article 90 proceeding, it can be argued that the State governments have the opportunity to be heard through their Commission delegates.<sup>142</sup> Their delegates in the Commission can protect the States' interests. If the States do not agree with their delegates' views, the State governments can appoint new delegates. However, Commission members are required to act independently of their host States.<sup>143</sup> In addition, the members will advance agendas that are in the best interests of the Community, not their States.

Further, under an infringement proceeding, the Commission does not have the final authority to determine that an infringement has occurred.<sup>144</sup> The Commission can only issue a reasoned opinion if it believes that a Treaty rule has been infringed.<sup>145</sup> If the Member State does not comply with the Commission's opinion, the case comes before the Court.<sup>146</sup> Then, the Court determines if an infringement

137. See *supra* note 71 and accompanying text.

138. BERMANN ET AL., *supra* note 3, at 75.

139. *Id.* at 293.

140. *Id.*

141. *Telecommunications Terminals*, 1991 E.C.R. at I-1264.

142. BERMANN ET AL., *supra* note 3, at 57. The author explains how members of the Commission are appointed for four-year renewable terms by the Member State governments acting in common accord. *Id.* The five largest states nominate two members each and the smaller states nominate one each, for a total of 17. *Id.*

143. *Id.* at 57 n.2.

144. Infringement proceedings are brought under Article 169. See EEC TREATY art. 169.

145. *Id.*

146. *Id.*

has occurred through interpreting the Treaty and precedent.<sup>147</sup> Thus, the Commission lacks the final authority to determine that an infringement has occurred and must defer to the Court's judgment.

Under the Article 90(3) procedure, however, the Commission has more power. Under Article 90(3)'s authority, the Commission can issue a directive or decision that is binding on the Member State.<sup>148</sup> The directive is the Commission's view of the State's Article 90 obligations, and a decision is the Commission's idea of what constitutes an Article 90(1) violation. Thus, the Commission's definition of an infringement is not limited to the Court's view, as it is under an infringement proceeding. Therefore, the Commission can actually legislate under its Article 90 approach. This is an abuse of its regulatory authority.

The two-step approach is also preferable because it furthers the Community's free competition goal. First, the free circulation articles are applied to the Member State's granting of the rights.<sup>149</sup> One purpose of the free circulation rules is to ensure that the free flow of goods, services, capital and persons is not impeded by State-created obstacles.<sup>150</sup> Thus, if the granting of the exclusive rights creates obstacles to free circulation, the rights must be struck down. Next, the competition rules are applied to the exercise of the rights.<sup>151</sup> The main purpose of these rules is to ensure that undertakings do not hinder competition through their practices.<sup>152</sup> If an undertaking's exercise of the right violates the competition rules, the undertaking must cease the violation or relinquish the right. Article 90 is not needed in either situation.

When Article 90 is used in place of the two-step approach, the Commission enacts a directive eliminating exclusive rights in a particular sector. This method lacks the two-part analysis which first applies the free circulation articles and next applies the competition rules. The Treaty founders set forth these rules as protections to ensure that the free competition goal is upheld.<sup>153</sup> When the Commission enacts a general directive in areas where it believes competition is harmed, it

147. *Id.*

148. *Id.* art. 90(3).

149. *See supra* note 66 and accompanying text.

150. BERMANN ET AL., *supra* note 3, at 317.

151. *See supra* notes 75-76 and accompanying text.

152. BERMANN ET AL., *supra* note 3, at 628.

153. *Id.* Bermann also notes that the Treaty provides additional means for carrying out competition policy: Article 90 subjects public undertakings to the competition rules; Articles 92-94 govern state subsidies; and other articles impose further obligations on Member States. *Id.*

uses its own method for upholding the free competition goal. The Commission ignores the Treaty protections and chooses instead to rely on Article 90, as Article 90 allows the Commission great power to further its ends. As will be discussed below, there is one situation where Article 90 can be utilized in connection with the free competition goal.

*C. The Court's Utilization of the Competition Rules in the  
"Automatic Abuse" Test*

The Court next turned to an approach that analyzed the existence of exclusive rights using the competition articles together with Article 90. This approach contrasts with previous ones where the existence of the rights was examined through the free circulation articles alone or in combination with Article 90. The first case in which the Court implemented this new approach was *Höfner & Elser v. Macrotron GmbH*.<sup>154</sup> The Court held that the granting of a dominant position violated a competition article and 90(1).<sup>155</sup> The public monopoly could not satisfy the demand for executive services and the private companies were prohibited by law from providing them.<sup>156</sup> Thus, the grant of the right violated Article 90(1) because the undertaking could not exercise the right without infringing a competition article.<sup>157</sup>

In *Höfner*, the Court could not analyze the monopoly's existence under the free circulation articles, as the facts were national.<sup>158</sup> The free circulation articles do not apply to activities conducted entirely within the State.<sup>159</sup> However, the competition articles can be applied

154. Case C-41/90, 1991 E.C.R. I-1979, 4 C.M.L.R. 306 (1993) [hereinafter *Höfner*]. The German government had created a public monopoly for the provision of employment services. *Id.* at I-2012. Several private undertakings entered the market by providing executive recruitment services. *Id.* In reaction to private undertakings entering the market, the public monopoly issued a circular which demonstrated its willingness to allow private undertakings to engage in executive recruitment. *Id.* at I-2013. However, a private undertaking tried to enforce an executive recruitment contract in the German courts and the court believed the contract could not be enforced because it infringed on the public monopoly of employment services. *Id.* The national court referred the case to the Court of Justice. *Id.*

155. *Id.* at I-2019. The competition article was 86(b) dealing with the abuse of a dominant position through "limiting production, markets or technical development to the prejudice of consumers." EEC TREATY art. 86(b).

156. *Höfner*, 1991 E.C.R. at I-2019. The Court also analyzed the Article 90(2) exception and concluded that, because the monopoly could not satisfy the demand and had tolerated private services, the application of Article 86 to the monopoly would not obstruct the performance of its tasks. *Id.* at I-2017; see EEC TREATY arts. 86, 90(2).

157. The competition article was Article 86 (abuse of a dominant position). See EEC TREATY art. 86.

158. *Höfner*, 1991 E.C.R. at I-2020.

159. *Id.* Thus, the Court could not analyze the existence of the exclusive rights under Article 59 (free movement of services). See EEC TREATY art. 59.



to these internal activities.<sup>160</sup> Thus, under the two-step approach, the Commission could not apply the first step, involving the free circulation articles. Only the exercise of the right, not the existence, could be evaluated under this approach. The grant of the right by the Member State could not be reached but it was the grant that created the problem. Thus, the Court had to utilize the competition articles.<sup>161</sup>

This new approach has become known as the "automatic abuse" test.<sup>162</sup> The automatic abuse test is used when the State's grant of a monopoly or exclusive right causes the undertaking to violate a competition rule. The Member State is held in violation of Article 90(1) and the undertaking in violation of the competition rule. The first step of the two-step approach is eliminated and the existence and exercise of exclusive rights are analyzed under Article 90.

The Court continued to utilize the automatic abuse test in *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis & Sotirios Kouvelas* ("ERT").<sup>163</sup> However, the Court also utilized the free competition articles.<sup>164</sup> The Court, quoting *Sacchi*, held that the grant of a monopoly for a non-economic public interest reason was not prohibited.<sup>165</sup> However, the rules on free circulation and competition must be followed in the monopoly's organization and exercise.<sup>166</sup> The Court held that a free movement rule *would be* violated if a monopoly had broadcasting and retransmission rights and then discriminated against other States' broadcasts.<sup>167</sup>

Next, the Court analyzed the existence of the exclusive rights under the competition rules. The Court held that Article 90(1) prohibits the grant of these rights where the undertaking would be led to

160. *Höfner*, 1991 E.C.R. at I-2015.

161. *Id.* at I-2019.

162. Van der Woude, *supra* note 17, at 74.

163. 1991 E.C.R. at I-2925.

164. *Id.* This case involved the grant of an exclusive retransmitting right to a company already granted an exclusive broadcasting right. *Id.* at I-2953.

165. *Id.* at I-2957.

166. *Id.*

167. *Id.* at I-2959. The free movement of services rule is Article 59. *See* EEC TREATY art. 59. The Court also held that Article 30 was not violated as long as the exercise of the rights did not involve discrimination. *ERT*, 1991 E.C.R. at I-2958; *see* EEC TREATY art. 30. The Court also recognized that there might be public interest reasons under Article 56 to justify the discriminatory effects of the exclusive rights to broadcast and retransmit other Member States' broadcasts. *ERT*, 1991 E.C.R. at I-2960. However, the Court held that the sole objective of the granting of the exclusive rights was to avoid disturbances due to the limited channels. *Id.* The Court found that this was not a legitimate objective under Article 56 because the undertaking utilized a small number of the available channels. *Id.* The Court held that the national court would have to determine if Article 30 or Article 59 had been violated and whether there was a legitimate justification under Article 56. *Id.*

violate a competition article.<sup>168</sup> Unless the competition article would obstruct the undertaking's performance of its task, constituting an Article 90(2) exception, the exclusive rights were prohibited.<sup>169</sup> Further, the Court expressly authorized the national judge to determine whether the undertaking's practices could be justified under Article 90(2).<sup>170</sup>

Again, the Court abandoned its two-step approach in examining the existence of exclusive rights by relying on Article 90 instead of the free circulation articles. In *Telecommunications Terminals*, the Court examined the existence of the exclusive rights under an approach which merged the free circulation articles and Article 90.<sup>171</sup> In contrast, the Court in *ERT* examined the existence of the rights under an approach which merged a competition article with Article 90.<sup>172</sup>

The Court could have eliminated the exclusive rights by relying merely on the free circulation articles, and not Article 90. The grant of the exclusive rights violated the free circulation articles.<sup>173</sup> The violation could have occurred under a theory that the exclusive rights created a possibility of discrimination.<sup>174</sup> While the application of the competition articles requires a market analysis, the free circulation

168. *Id.* at I-2962. The competition article was Article 86, abuse of a dominant position. See EEC TREATY art. 86. This article would be violated if the rights led the undertaking to engage in discrimination against other States' broadcasts. *ERT*, 1991 E.C.R. at I-2962.

169. *ERT*, 1991 E.C.R. at I-2962.

170. Van der Woude, *supra* note 17, at 78. Although the Court held in *Sacchi* that national authorities and courts could determine that the competition rules do not apply to undertakings, 1974 E.C.R. at 429, the Court in *ERT* expressly entrusted the national judge with this authority. See *ERT*, 1991 E.C.R. at I-2962; see also Van der Woude, *supra* note 17, at 78. Under this approach, the national judge could find the Article 90(2) exception applies after the Court found the Article 56 exception did not apply. Van der Woude, *supra* note 17, at 75-76. This raises the question of what the relationship would be between the Court's denying an Article 56 exception but, then the national court allowing an Article 90(2) exception. *Id.*; see EEC TREATY arts. 56, 90(2).

171. *Telecommunications Terminals*, 1991 E.C.R. at I-1267-70.

172. *ERT*, 1991 E.C.R. at I-2962. Under this approach, the Court eliminates the need to examine the exclusive rights twice for justifications. If the Court were first to analyze the existence of the rights under the free circulation rules, the Court would determine whether the rights are justified under one of the public interest exceptions or mandatory requirements. Then, if the rights were justified, the Court would determine if there was an Article 90(2) exemption, allowing the undertaking's deviation from the rules in the exercise of its right. The automatic abuse test eliminates the need to analyze the existence of the exclusive rights by relying on the competition rules in connection with Article 90. Van der Woude, *supra* note 17, at 75.

173. The Court could have relied on Articles 30 and 59. Article 30 prohibits restrictions on the imports of goods and Article 59 prohibits restrictions on the free movement of services. EEC TREATY arts. 30, 59.

174. See *supra* note 129 and accompanying text. In *Telecommunications Terminals*, the Court held that, because of the possibility of abuse, the Commission was justified in dividing the regulatory and operating functions of the undertakings. 1991 E.C.R. at I-1271.

rules do not.<sup>175</sup> Thus, under the free circulation rules, only a possibility of discrimination affecting trade between States must be shown.<sup>176</sup> However, under the competition rules, the undertaking's practices must be shown to actually affect competition negatively.<sup>177</sup>

Although in *ERT* the Court expressly entrusted the national judge with the power to determine if an Article 90(2) exception applies, the power is insubstantial. The Commission still has the power to question the judge's decision if it believes an exception is not justified.<sup>178</sup> Although consumers and private undertakings can challenge the exclusive rights before a national court,<sup>179</sup> the court might refer questions about Article 90(2)'s application to the Court of Justice. This would occur if the national court is unsure of how to apply the Article 90(2) exception and wants direction from the Court of Justice.<sup>180</sup> Thus, the national court's authority to apply the exception is not vast, as the Commission or the Court will often make the final decision.

The automatic abuse test was also utilized by the Court in *Régie des Télégraphes et des Téléphones v. GB-INNO-BM SA* ("RTT").<sup>181</sup>

175. Van der Woude, *supra* note 17, at 75.

176. EEC TREATY arts. 30, 37, 59.

177. *Id.* arts. 85, 86.

178. Van der Woude, *supra* note 17, at 79.

179. *Id.* The private undertakings challenging the exclusive rights will often be in competition with the public undertaking. *Id.* at 80.

180. The national court can ask the Court of Justice to give a preliminary ruling on the application of the Article 90(2) exception. Article 177 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EEC TREATY art. 177.

181. *Competition Law Checklist*, *supra* note 27, at 92-94. The Belgian government had granted a telecommunications network monopoly, RTT. *Id.* at 92. Telephone connections to the network could only be obtained after authorization by RTT. *Id.* at 93. Thus, all telephones connected to the network had to be provided by RTT or approved by it. *Id.* To carry out its exclusive rights, RTT was authorized to draw up equipment requirements and to determine if third party equipment met the requirements. Luc Gyselen, Comment, 29 COMMON MKT. L. REV. 1229, 1229 n.2 (1992). Thus, RTT could prevent third parties from selling equipment to be connected to the network by determining that third party equipment did not meet its requirements or setting the requirements so that third parties could not meet them efficiently. *Id.* RTT had also extended its monopoly to the right to import, service, commercialize and maintain telephone equipment. *Competition Law Checklist*, *supra* note 27, at 93.

The Court began its opinion by stating that the monopoly provided a service of "general economic interest" under Article 90(2).<sup>182</sup> However, the Court rejected an Article 90(2) exception, as the production and sale of telephones must be available to all undertakings.<sup>183</sup> The Court then analyzed RTT's extension of its exclusive right. The Court held that RTT had violated a competition article by extending its exclusive right to another market without an objective reason.<sup>184</sup>

The Court then discussed why Article 90(1) would not apply in connection with RTT's violation of the competition article.<sup>185</sup> The competition articles apply to undertakings which engage in anticompetitive behavior on their own.<sup>186</sup> However, Article 90(1) applies when Member State measures are involved.<sup>187</sup> Thus, if RTT's extension of its exclusive rights resulted from a State measure, i.e., the granting of the rights, Belgium would be in violation of Article 90(1).<sup>188</sup> In this case, RTT had extended its monopoly on its own initiative, rather than by a measure issued by Belgium.

The Court held Belgium had violated Article 90(1) and a competition article when it granted RTT the power to determine standards and verify competitors' compliance with them.<sup>189</sup> The Court noted the need to protect essential requirements like user and employee safety, and protection of the network.<sup>190</sup> However, the Court also stated that these requirements could be satisfied by an independent entity that formulates and applies technical standards.<sup>191</sup>

The Court also briefly mentioned a violation of the article concerning the free movement of imports.<sup>192</sup> RTT had the authority to approve telephones connected to its network but which were not supplied by it without being subject to judicial review.<sup>193</sup> Further, the Court applied Article 30, a free circulation rule, without proof of dis-

182. *Competition Law Checklist*, *supra* note 27, at 93.

183. *Id.* at 94.

184. *Id.* at 93. The right was extended to the market for telephone equipment to be connected to the network and included import, service, commercialization, and maintenance rights. *Id.* The competition article was Article 86 (abuse of a dominant position). See EEC TREATY art. 86.

185. *Competition Law Checklist*, *supra* note 27, at 94.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. See *id.* at 93 n.66. Article 30 is the rule on the free movement of imports. See EEC TREATY art. 30.

193. Gyselen, *supra* note 181, at 1233.

criminy behavior. There was no proof RTT had engaged in discrimination.<sup>194</sup> This reinforces the argument made earlier that in the *ERT* case, the Court could have utilized the free circulation rules alone to eliminate the exclusive rights.<sup>195</sup> As in *ERT*, the Court could have relied on the theory that a possibility of discrimination existed without actual proof of discrimination.<sup>196</sup> The Court could then use the first step of the two-step approach and eliminate the exclusive rights through the free circulation rules alone.<sup>197</sup>

The two-step approach is preferable to Article 90, because as discussed earlier, it provides procedural protections and furthers the Community's free competition goal.<sup>198</sup> Under the two-step approach, if a Treaty violation is found, the Commission must bring infringement proceedings against the undertaking or Member State.<sup>199</sup> The infringement proceeding offers procedural protections that are lacking when the Commission eliminates exclusive rights through Article 90(3).<sup>200</sup> The two-step approach also furthers the free competition goal by analyzing the existence of the exclusive rights under the free circulation rules and then examining the exercise of the rights under the competition and free circulation rules.<sup>201</sup> This approach complies with the Treaty's framework for dealing with exclusive rights.<sup>202</sup>

In *RTT*, the Court applied the automatic abuse test, as the grant of the exclusive right led RTT to abuse its dominant position.<sup>203</sup> However, the Court could have analyzed RTT's power to set the technical norms under the free import rule, as it was a potential restriction of trade in goods.<sup>204</sup> Upon striking down the exclusive rights under a free circulation article, the Court would not have to apply a competi-

194. *Id.* at 1241. However, later in the opinion, the Court changed its solution. *Id.* RTT would retain its exclusive approval right, but its decisions would be subject to judicial review. *Id.* The Court relied on the free movement of imports rule, Article 30, for this solution by describing the danger of RTT discriminating against imported equipment. *Id.*; see EEC TREATY art. 30.

195. *See supra* notes 173-77 and accompanying text.

196. *Id.*

197. *Id.*

198. *See supra* notes 136-53 and accompanying text.

199. *See supra* notes 70, 81 and accompanying text.

200. *See supra* notes 136-48 and accompanying text.

201. *See supra* notes 149-53 and accompanying text.

202. *Id.*

203. *Competition Law Checklist, supra* note 27, at 94.

204. The Court alluded to this when it relied on the free import rule for its alternative solution. *See supra* note 194 and accompanying text.

tion article along with Article 90 to the undertaking's exercise of the right.<sup>205</sup>

In *RTT*, the Court's justifications for an Article 90(2) exception are the same as the Court's past justifications for exceptions to the free circulation articles.<sup>206</sup> Thus, Article 90(2) covers all the non-economic interests advanced in the *Sacchi* case justifying the existence of monopolies under the free circulation articles.<sup>207</sup> Therefore, Article 90(2) is the new standard for determining if the existence of exclusive rights is justified, as the same justifications are utilized as under the free circulation rules.<sup>208</sup> If exclusive rights are not covered under the Article 90(2) exception, the rights must infringe a competition article and Article 90 under the automatic abuse test,<sup>209</sup> or must violate the free circulation rules.<sup>210</sup> Either way, the exclusive rights must be eliminated.

In *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*,<sup>211</sup> the Court further refined its use of the automatic abuse test, involving the competition articles and Article 90.<sup>212</sup> First, the Court examined the undertaking's behavior to determine if it had violated Treaty rules. The Court held that the company had violated a competition article by abusing its dominant position, which was docu-

205. Article 30 is the free circulation rule that could have been used. See EEC TREATY art. 30. The competition articles are Article 85, prohibiting anti-competitive agreements, and Article 86, prohibiting abuse of a dominant position. *Id.* arts. 85, 86.

206. Van der Woude, *supra* note 17, at 77. If the rights do not fall under the Article 90(2) exception, the rights are not covered under the exceptions to the free circulation rules. *Id.*

207. *Sacchi*, 1974 E.C.R. at 429.

208. Van der Woude, *supra* note 17, at 77.

209. *Id.*

210. *Id.* I would argue that the Commission should first analyze the exclusive rights under the free circulation rules and the exceptions to the rules. This is where the non-economic public interests should come into play. If there are justifications for the exclusive rights, then the rights may exist. Thus, under this approach, the Commission would not have to analyze the existence of the exclusive rights under Article 90(1) and look for exceptions under Article 90(2). I would argue that Article 90 should only be utilized when a Member State and undertaking have violated Article 90(1) and a competition article under the automatic abuse test, when the facts are national and the free circulation articles cannot be utilized.

211. Case C-192/90 (1991) (not yet reported), *cited in* Van der Woude, *supra* note 17, at 72.

212. The Court used Article 86, the competition article dealing with abuse of a dominant position. *Id.*; see EEC TREATY art. 86. The Italian government had granted a monopoly on dock facilities, requiring all loading and unloading of ships to be done by an Italian company. Van der Woude, *supra* note 17, at 72. The Italian company could only hire Italian nationals. *Id.* Further, there was evidence of monopoly abuse: the company had claimed payments for services not rendered, charged disproportionate prices and discriminated between customers. Gyselen, *supra* note 181, at 1238 (discussing *Merci*). The company also refused to use modern technology, which led to increased costs and delays. *Id.*; Van der Woude, *supra* note 17, at 72.

mented by evidence.<sup>213</sup> The Court also held that the undertaking had violated the free import article, as imports were more expensive due to the monopoly's abuse.<sup>214</sup> The Court then examined Italy's role in the undertaking's abuse of the Treaty rules. The Court concluded that Italy had violated Article 90(1) by granting the monopoly which led the undertaking to violate the free circulation and competition articles.<sup>215</sup>

In *Merci*, the Court had evidence of actual discrimination and abuse by the undertaking.<sup>216</sup> However, in *ERT*<sup>217</sup> and *RTT*<sup>218</sup> only the possibility of abuse and discrimination existed through the exercise of the right.<sup>219</sup> Although in *Merci* the undertaking's conduct infringed its dominant position,<sup>220</sup> it did not follow that the grant of the exclusive right caused the undertaking to abuse its position. The existence of the exclusive right might have been legitimate under the free circulation rules if the undertaking had not abused its position.

In *Merci*, the Court utilized the automatic abuse test.<sup>221</sup> However, the Court should have utilized the two-step approach. The automatic abuse test is only necessary when the free circulation rules cannot be

213. Gyselen, *supra* note 181, at 1238. Article 86 is the competition article prohibiting the abuse of a dominant position. See EEC TREATY art. 86. For the evidence of monopoly abuse, see *supra* note 212.

214. The free import article is Article 30. See EEC TREATY art. 30. Imported goods which are unloaded inefficiently and at great cost make goods more expensive in relation to national goods. Van der Woude, *supra* note 17, at 74. The restriction on hiring only Italian workers violated Article 48, the free movement of workers. *Id.* at 72. Article 48(1) provides: "Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest." EEC TREATY art. 48(1).

215. Van der Woude, *supra* note 17, at 74. The Court also held the monopoly did not provide a service of general economic interest under the Article 90(2) exception. *Id.*

216. Gyselen, *supra* note 181, at 1238.

217. See *supra* notes 173-77 and accompanying text. I argued that the Court could have relied on the free circulation rules to eliminate the exclusive rights under the theory that the rights provided the possibility of discrimination. *Id.*

218. See *supra* notes 194-97 and accompanying text.

219. In both cases, the form of the right granted by the Member State led to the problem with the undertaking's exercise of the right. In *ERT*, the State approved the undertaking's discrimination through the form of the right granted. See *supra* note 164 and accompanying text. The right to transmit and retransmit broadcasts from other States gave the undertaking the opportunity to discriminate against broadcasts from other Member States. *Id.* In *RTT*, the State also gave its approval to the undertaking to discriminate by the form of the right granted. See *supra* note 181 and accompanying text. The right to draw up technical standards, and then determine if the competitor's equipment meets the standards, encouraged and gave the undertaking the opportunity to discriminate. *Id.* However, I would argue the form of the rights granted in *Merci* did not encourage or provide opportunities to discriminate or abuse a dominant position. The undertaking abused its position on its own without approval or encouragement by the Member State in the form of the right granted. Gyselen, *supra* note 181, at 1239-40.

220. *Id.* at 1238.

221. Van der Woude, *supra* note 17, at 74.

utilized,<sup>222</sup> as the facts are only national.<sup>223</sup> In *Merci*, the facts were not national, as the monopoly's practices affected other Member States. Thus, the free circulation rules could be utilized. Under the two-step approach, the first step would involve determining whether the grant of the right was justified under the free circulation rules. There are several free movement articles the Court could have relied on to eliminate the exclusive rights.<sup>224</sup> Thus, the Court could have held that the existence of the rights violated the free circulation rules, eliminating the need to use Article 90(1).

#### D. *The Court's Recent Return to the Two-Step Approach*

More recently, the Commission has begun to attack exclusive rights in the energy sector.<sup>225</sup> The Commission argues that the exclusive import/export rights violate the free circulation rules.<sup>226</sup> Thus,

222. See *supra* notes 158-62 and accompanying text.

223. See *supra* note 158 and accompanying text.

224. Besides Articles 30 and 48(2) (the free movement articles), Article 37 could also have been utilized against the undertaking. For text of Article 30, see *supra* note 41. Article 48(2) provides that "[s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." EEC TREATY art. 48(2).

Article 37 could have been utilized as discrimination existed between the imported goods and national goods due to the higher prices caused by the monopoly's abuses. See Van der Woude, *supra* note 17, at 74; EEC TREATY art. 37. The Court could also have relied on Articles 59 and 52, the free circulation articles, to eliminate the exclusive rights. Van der Woude, *supra* note 17, at 72-73. Van der Woude believes Article 59 was the better provision for the Court to utilize, as the monopoly made it impossible for ships from other Member States to provide their own services. *Id.*; EEC TREATY art. 59.

Article 52 was also violated as companies from other Member States could not establish themselves in that port. Van der Woude, *supra* note 17, at 73-74. Article 52 provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

EEC TREATY art. 52.

225. *EC Delays Legal Action Over Import/Export Monopolies*, *supra* note 28.

226. *Id.* Enforcement proceedings under Article 169 and reasoned opinions were brought by the Commission against several Member States. *Id.* The reasoned opinions were issued in 1992. *Id.* The Commission also announced that it would bring the case to the Court against France, Italy, the Netherlands, Ireland and Spain in the electricity sector. *Id.* Proceedings will also be brought against France and Denmark in the gas sector. *Id.* However, the Commission delayed taking action after France and the Netherlands stated they were willing to review their legislation. *Id.* The free circulation rules that the Commission claimed were violated are Articles 30, 34, and 37. Article 34(1) provides: "Quantitative restrictions on exports, and all measures having



the Commission is following the two-step approach by first analyzing the exclusive rights under the free circulation articles alone.<sup>227</sup> If the rights violate the free circulation rules, the Commission should instigate infringement proceedings against the Member States.<sup>228</sup> If the existence of the rights is legitimate, the Commission should then analyze the undertaking's exercise of the rights.<sup>229</sup>

The energy sector's importance in the economy might justify an Article 90(2) exemption or at least special treatment.<sup>230</sup> However, the Commission has been unwilling to grant Article 90(2) exceptions based only on public service obligations.<sup>231</sup> The Commission has emphasized that under the exception, the development of trade must not be affected to an extent contrary to the Community's interests.<sup>232</sup> Thus, even if the rules' application obstructs the undertaking's performance of its task, the rules must be applied to ensure that trade is not affected contrary to the Community's interests.

In the postal services sector, the Court has ruled that even though the Article 90(2) exception applies, it might not cover all services provided.<sup>233</sup> In Belgium, an undertaking was granted an exclusive right for postal services throughout the State.<sup>234</sup> Criminal proceedings were brought against a private individual who had provided certain postal services.<sup>235</sup> The Court held that the exclusive right to perform services of general economic interest was justified under Article 90(2).<sup>236</sup> If private companies could enter the market, they could concentrate on profitable services. The private companies would ignore the unprofitable services which the public undertaking was required to pro-

equivalent effect, shall be prohibited between Member States." EEC TREATY art. 34(1). Article 30 prohibits restrictions on imports, and Article 37 provides for the free movement of services. *Id.* arts. 30 and 37.

227. See *supra* note 66 and accompanying text.

228. See *supra* notes 70, 226 and accompanying text.

229. See *supra* note 75 and accompanying text.

230. The "Obscure Clarity" of Article 90, *supra* note 28. The new Energy Commissioner, Abel Matutes, suggests asking the Court: (1) does energy supply involve a public service excluded under Article 90(2); or (2) is energy supply subject to the Treaty rules but with special aspects? *Id.*

231. *EC Delays Legal Action Over Import/Export Monopolies*, *supra* note 28.

232. The "Obscure Clarity" of Article 90, *supra* note 28.

233. *Postal Service Monopoly Cannot Be Justified*, *supra* note 29, at 21. In May 1992, the Commission adopted a green paper advocating limitations on exclusive rights in the postal sector. Ehlermann, *supra* note 24, at 68.

234. *Postal Service Monopoly Cannot Be Justified*, *supra* note 29, at 21. The exclusive rights involved the collection, transportation and distribution of correspondence. *Id.*

235. *Id.*

236. *Id.*

vide.<sup>237</sup> Thus, due to the competition, the public undertaking could not offset the costs of the unprofitable services.<sup>238</sup>

However, the Court held that certain services could be provided by the private individual, as they could be separated from the services of general economic interest.<sup>239</sup> If the economic equilibrium of the public undertaking's performance of general interest services was not upset, the private undertaking could provide the services.<sup>240</sup> Thus, the State had violated Article 90(1) by granting the undertaking an exclusive right over services, some of which were unjustifiably excluded from competition.<sup>241</sup>

### III. THE SOLUTION: ELIMINATING THE COMMISSION'S ABUSES WHILE FURTHERING THE COMMUNITY'S FREE MARKET COMPETITION GOAL

In the future, the Commission will continue its campaign to liberalize the Member States' economies in the name of free market competition. Many sectors traditionally dominated by monopolies and public undertakings will come under the Commission's attack. Further, the privatization of companies, like utilities, will still be subject to Article 90 if they continue to enjoy special or exclusive rights.<sup>242</sup>

To reach a workable solution, the Commission and the Member States must both compromise their goals. The Commission will have to follow the established Treaty rules for dealing with monopolies, weakening its enormous Article 90(3) power. In return, the Member States must cooperate with the Commission when the Commission carries out its duty of regulating the Member States' monopolies. When the Commission follows the established framework and does not rely on Article 90(3), the States should have no excuse for not cooperating.

#### A. *The Two-Step Approach: Retaining the Distinction Between the "Existence" and the "Exercise" of Monopoly Rights*

To relinquish its Article 90(3) power, the Commission should follow the two-step approach in analyzing the existence and exercise of

237. *Id.*

238. *Id.* The services provided by the private individual required additional services which the postal service monopoly did not offer. *Id.*

239. *Id.*

240. *Id.* The private companies could then satisfy the demand for those services. *Id.*

241. *Id.*

242. Hancher & Slot, *supra* note 78, at 36.

exclusive rights granted by Member States. Further, the Court of Justice should uphold this approach. The Commission should issue decisions under Article 90(3) only when using the automatic abuse test. This test is utilized only when the exclusive rights may not be eliminated through the free circulation rules. Further, directives should only be utilized under Article 90(3) to give the States guidance on how to comply with the Treaty rules. Directives should not be used as a legislative measure.

Under the two-step approach, the rights are first examined under the free circulation rules.<sup>243</sup> Exclusive rights are justified only if there is a non-economic public interest reason for their existence.<sup>244</sup> These reasons include mandatory requirements and exceptions to the free circulation rules.<sup>245</sup> If the Commission determines the free circulation rules are violated by the granting of the powers, they will begin infringement proceedings against the State.<sup>246</sup>

Under an infringement proceeding, the State and the undertaking have the benefit of procedural safeguards.<sup>247</sup> The Commission must inform the State of the problem and give the State an opportunity to be heard.<sup>248</sup> The undertaking should also have this opportunity, as it is also being affected. The State and/or the undertaking can then give a justification for the exclusive rights or claim an Article 90(2) exception. For example, in the postal services sector, the undertaking showed that without the exclusive right it could not operate efficiently.<sup>249</sup> The State also has the opportunity to clarify what the conferred grant of rights actually includes.

Further, the State can show that, while the granting of the right was legitimate, the undertaking's exercise of the right is in violation of the Treaty. An example of this occurred in *Merci* where the undertaking was abusing its monopoly position. However, the Member State's granting of the right by itself might not have violated the free circulation rules.<sup>250</sup>

243. See *supra* note 66 and accompanying text.

244. See *supra* note 67 and accompanying text.

245. See *supra* notes 68-69 and accompanying text.

246. See *supra* note 70 and accompanying text.

247. See *supra* notes 136-41 and accompanying text.

248. See *supra* note 137 and accompanying text.

249. See *supra* notes 237-38 and accompanying text.

250. See *supra* notes 219-20. Although the grant of the exclusive rights did violate the free circulation rules, the Court used the automatic abuse test to eliminate the rights. The Court should have eliminated the rights under the free circulation articles alone. In some cases, the grant of the rights might not infringe the free circulation rules. See *supra* notes 213-24 and accompanying text.

After taking into account the State's and undertaking's views, the Commission can issue a reasoned opinion to the State. The opinion must state the reasons for the Commission's actions.<sup>251</sup> If the State does not comply with the opinion by the deadline, the Commission can then bring the case before the Court of Justice.<sup>252</sup> Thus, due to the procedural safeguards, the two-step approach limits the Commission's power as compared to the use of Article 90(3).

When the Commission utilizes Article 90(3) instead of the two-step approach, Member States and undertakings are deprived of the above mentioned procedural safeguards. Under the Article 90(3) approach used in *Telecommunications Terminals*,<sup>253</sup> the Commission can issue a directive to the Member State calling for the elimination of the exclusive rights.<sup>254</sup> The Commission can also issue a decision to the Member State.<sup>255</sup> The State must follow the directive or decision or apply for its annulment.<sup>256</sup> If the decision or directive is not annulled and the State chooses to ignore it, the Commission can bring the State before the Court through an infringement proceeding.<sup>257</sup> The procedure is then the same as discussed above under the two-step approach.

However, the Article 90(3) procedure can lead to abuse if Member States comply with the Commission's directive or decision. The Commission is not constrained by procedural safeguards, which are present in infringement proceedings.<sup>258</sup> The Commission has a vast amount of power to issue directives to Member States eliminating exclusive rights. The Commission is not required to inform the State of the violation and then allow the State the right to be heard.<sup>259</sup> Further, when the Commission enacts a directive, the Member State does not have a voice in the process.<sup>260</sup> The State's only source of input is its Commission appointee. However, the appointee is required to act independently of the State.<sup>261</sup> Also, the appointee must vote to enact

251. See *supra* notes 72-73 and accompanying text.

252. See *supra* note 74 and accompanying text.

253. 1991 E.C.R. at I-1240.

254. EEC TREATY art. 90(3).

255. *Id.*

256. See *supra* note 109 and accompanying text. The undertaking may also challenge the directive. *Id.*

257. See *supra* note 134 and accompanying text.

258. See *supra* notes 136-41 and accompanying text. Infringement proceedings are brought under Article 169. See EEC TREATY art. 169.

259. See *supra* notes 137-38. This also applies to the undertaking which was granted the exclusive right or monopoly.

260. See *infra* text accompanying note 138.

261. See *supra* note 143 and accompanying text.

directives that further the Community's goals, not merely the State's goals.

Another procedural safeguard lacking under an Article 90(3) decision or directive is a statement of the Commission's reasons for its actions. Under Article 90(3), the Commission has to give some basis for its directive. However, the basis is not required to be as extensive as the reasons required for the infringement of a free circulation rule under Article 169.<sup>262</sup> The Court has held that under Article 90(3) the Commission can define the Member States' obligations, which must be met for compliance with Article 90.<sup>263</sup> Defining obligations only requires setting out commands and prohibited actions. This is not as extensive as stating reasons for the finding of an infringement. Further, under an infringement proceeding, if the State feels that the statement of reasons is inadequate it can appeal the decision to the Court.<sup>264</sup> The Court will then have to review the statement of reasons. However, the mere defining of obligations leaves little substance for the Court to review.

The two-step approach is also advantageous because it furthers the Community's free competition goal.<sup>265</sup> Under this approach, the free circulation articles are first applied to the Member State's granting of the rights.<sup>266</sup> Then, the competition rules are applied to the exercise of the rights.<sup>267</sup> The Treaty founders set forth these two sets of rules as protections, to ensure the upholding of the free competition goal.<sup>268</sup> When Article 90(3) is used in place of the two-step approach, the Commission enacts a directive eliminating exclusive rights in a particular sector. This method lacks the two-part analysis discussed above. Thus, the Commission uses its own method to uphold the free competition goal, Article 90(3), instead of following the two sets of Treaty rules. The Commission prefers Article 90(3) because the Article enables it to assume a legislative role, as discussed below.

Under Article 90(3), the Commission can exceed its regulatory role by legislating.<sup>269</sup> This can occur when the Commission issues directives under Article 90(3). Through these directives, the Commission can eliminate exclusive rights that it believes will violate the

262. See *supra* notes 139-40 and accompanying text.

263. *Telecommunications Terminals*, 1991 E.C.R. at I-1264.

264. See *supra* note 140 and accompanying text; see also EEC TREATY art. 169.

265. See *supra* notes 149-53 and accompanying text.

266. See *supra* note 66 and accompanying text.

267. See *supra* note 75 and accompanying text.

268. See *supra* note 153 and accompanying text.

269. See *infra* text accompanying note 148.

Treaty.<sup>270</sup> Instead of applying the free circulation rules and finding an infringement (a regulatory role), the Commission is making law by utilizing Article 90(3). Through Article 90(3) the Commission can make policy choices. It can decide in which sectors exclusive rights must be eliminated in the name of the free market competition goal.<sup>271</sup> However, the Commission's role as defined in Article 90 is a regulatory role.<sup>272</sup> Article 90(3) gives the Commission the authority to adopt only *necessary* measures to ensure that Member States comply with the Article.<sup>273</sup> The measures under Article 90(3) are not necessary, as the free circulation rules can be utilized to eliminate the exclusive rights.

An example of this legislative role occurred in *Telecommunications Terminals*.<sup>274</sup> The Commission used a directive to bring an enforcement proceeding against States which were not in compliance with Article 90.<sup>275</sup> However, enforcement proceedings against Member States must be brought under the infringement proceeding article with the attendant procedural safeguards.<sup>276</sup> Thus, the Commission abused its regulatory authority by misusing the Article 90(3) directive procedure.<sup>277</sup> Therefore, the Commission should not issue directives in place of infringement proceedings. When issuing directives under Article 90(3), the Commission should define only the obligations of the States in order to give them direction for compliance with the Article. This is consistent with the Court's definition of the Commission's power under Article 90(3) discussed in *Telecommunications Terminals*.<sup>278</sup>

270. See, e.g., *Telecommunications Terminals*, 1991 E.C.R. at I-1223.

271. See *supra* note 115, noting that the Advocate General in *Telecommunications Terminals* argues that the Commission took a legislative role not within its competence when it issued the directive. The directive also was not necessary for the Commission's performance of its duties under Article 90, as an infringement proceeding under the free circulation rules could have been brought to eliminate the exclusive rights.

272. *Id.* art. 90(3).

273. See *supra* note 115 and accompanying text.

274. 1991 E.C.R. at I-1234.

275. *Id.* The Commission even admitted this was the purpose of the directive. *Id.* However, the Court could have eliminated the exclusive rights through the free circulation rules and an infringement proceeding. See *supra* notes 130-31 and accompanying text.

276. Infringement proceedings are brought under Article 169. See EEC TREATY art. 169. For the procedural safeguards, see *supra* notes 136-41 and accompanying text.

277. *Telecommunications Terminals*, 1991 E.C.R. at I-1264. The Court held Article 90 could not be used in place of Article 169 for infringement proceedings. *Id.* However, the Court held that the Directive merely set out the Member States' obligations under Article 90. *Id.* The Court ignored the fact that the Commission stated that the Directive was a means of correcting present infringements and preventing future ones. *Id.* at I-1234.

278. *Id.* at I-1264. This is consistent with the Court's definition, although the Court chose to ignore the Commission's stated reason for the Directive, which was to correct present infringe-

Further, the Member States lack the power to curtail the Commission's adoption of a regulatory role. Although the States can elect new Commission members, the members are admonished to act independently of their States<sup>279</sup> and must take the entire Community's needs into account when acting. Thus, in the name of the Community, the Commission might have an incentive to abuse its power in order to bring about further liberalization. The Commission's incentive is also strengthened by political bargaining in the Council of Ministers. This bargaining retards the legislative process and waters down the legislation.<sup>280</sup> For these reasons, the Commission's incentive to regulate must be checked. Thus, under Article 90(3) the Commission should only have the power to issue directives to define States' obligations under Article 90. The States will then have notice about how to comply with the Article and the Commission will not overstep its regulatory role.

The Commission and the Court should only resort to Article 90(3) decisions when they cannot regulate the existence of exclusive rights under the free circulation rules. This is the automatic abuse test. The Commission should limit its Article 90(3) decisions in this situation because it is assuming a legislative role. By deciding a case, the Commission determines what constitutes an infringement of Article 90(1). However, if the existence of the rights can be regulated under the free circulation rules, an infringement proceeding<sup>281</sup> should be brought instead of an Article 90(3) decision.

If the free circulation rules cannot be utilized, the Commission and the Court will have to issue an Article 90(3) decision because of the Article 90(1) violation. In the *Höfner* case, this situation occurred. The free circulation rules could not be applied to the existence of the exclusive right because the case involved national facts.<sup>282</sup> Thus, the only way to eliminate the existence of the exclusive right was through an Article 90(3) decision, applying Article 90 with a competition article.

ments and prevent future ones, and the Court upheld the use of Article 90 combined with the free circulation rules. *Id.* at I-1234, I-1268.

279. See *supra* notes 142-43 and accompanying text.

280. Coleman, *supra* note 41, at 207. The author discusses how, when measures are decided on in the Council, there is political bargaining between Member States, slowing down the liberalization process. *Id.*

281. EEC TREATY art. 169.

282. *Höfner*, 1991 E.C.R. at I-2020. The free movement articles apply only when trade is affected between the Member States, not when activities occur within a single Member State. See *supra* note 159 and accompanying text.

However, the automatic abuse test should only be utilized when the free circulation articles alone cannot eliminate the existence of exclusive rights. In *Höfner* the Court used the automatic abuse test, as the free circulation rules were inappropriate.<sup>283</sup> The automatic abuse test was also used in the *ERT* and *RTT* cases, although there were violations under the free circulation articles.<sup>284</sup> The automatic abuse test should not have been utilized, as the rights could have been eliminated by the free circulation violation alone.

If Article 90(1) could not be utilized in the automatic abuse situation, the Article would have no meaning or effect.<sup>285</sup> Article 90(1) applies only to measures enacted by Member States, not to actions taken by public undertakings.<sup>286</sup> As the exercise of the rights resides with the public undertakings and they cannot be regulated under Article 90, the Article must regulate more than the mere exercise of the rights. Further, if the existence alone of exclusive rights cannot be regulated under Article 90(1), the automatic abuse approach is the only way this article can be applied. Under this approach, Article 90(1) applies to Member States. It also applies to the existence of the exclusive rights only when the free circulation rules cannot be utilized and the exercise of the rights will infringe the Treaty.

If the undertaking's exercise of the rights violates the Treaty and the grant of the rights did not lead to this abuse, the competition and free circulation rules should be applied to the undertaking. Article 90 should not be utilized, as the Member States' grant of the right does not violate the Treaty. This is what occurred in *Merici*.<sup>287</sup> The Court should not have utilized Article 90(1) since the granting of the exclusive right did not require the undertaking to abuse its dominant posi-

283. See *supra* notes 158-62 and accompanying text.

284. In both *ERT* and *RTT*, the exclusive rights could have been held to violate the free movement articles alone. See *infra* notes 163-97 and accompanying text. Thus, Article 90 in conjunction with a competition article was not needed. The free circulation rules would be more appropriate as the Court did not have evidence of discrimination by the public undertaking. Under the free circulation rules, only a possibility of discrimination affecting trade between States must be shown. See Van der Woude, *supra* note 17, at 75. The author discusses how the free circulation rules approach would not entail the burdens of market analysis required under Article 86. *Id.*; see also EEC TREATY arts. 30, 37, 59. However, under the competition rules, the undertakings' practices must be shown to negatively affect competition. Van der Woude, *supra* note 17, at 75; see EEC TREATY arts. 85, 86.

285. The automatic abuse test is used when the free circulation articles cannot be used to analyze exclusive rights. See *supra* notes 158-62 and accompanying text.

286. See EEC TREATY art. 90(1); see also *supra* note 38 and accompanying text.

287. See *supra* notes 213-24, 250 and accompanying text.



tion. The Court should have used the free circulation rules to strike down the existence of the exclusive right.<sup>288</sup>

Thus, for all the above mentioned reasons, the Commission and the Court should use the two-step approach for analyzing the existence and exercise of exclusive rights. First, the existence of the rights should be analyzed under the free circulation rules alone, instead of merging them with Article 90.<sup>289</sup> However, decisions can be issued under Article 90(3) under the automatic abuse test, although the automatic abuse test should only be utilized when the exclusive rights cannot be eliminated under the free circulation articles.

The second step involves analyzing the undertaking's exercise of the rights under the Treaty.<sup>290</sup> Again, Article 90 is not involved, as Article 90(1) applies to measures enacted by Member States.<sup>291</sup> Further, directives under Article 90(3) should only be issued to clarify States' Treaty obligations in relation with their undertakings.<sup>292</sup>

In applying the Article 90(2) exception, the Commission and the Court should not follow the approach used for exceptions under the free circulation rules. In *RTT*, the Court gave the same justifications for the Article 90(2) exception as it earlier gave for exceptions under the free circulation rules.<sup>293</sup> Thus, if exclusive rights survive the first step of the test, the rights must qualify under the Article 90(2) exception.<sup>294</sup> Then all undertakings granted exclusive rights would be exempted from the Treaty rules in the exercise of their rights because of the exception.

The Court should establish a different standard for applying the Article 90(2) exception. The standard should allow national courts and the Court to determine first whether an undertaking is providing a service in the general interest. Then the courts can determine if the undertaking will be unable to provide the service if compliance with the Treaty is required. The determination must also consider if the exception will affect the development of Community trade.<sup>295</sup>

288. See *supra* notes 221-24, 250 and accompanying text.

289. See *supra* notes 66-69 and accompanying text.

290. See *supra* notes 75-80 and accompanying text.

291. See EEC TREATY art. 90; see *supra* note 38 and accompanying text.

292. See *supra* notes 269-78 and accompanying text.

293. See *supra* note 206 and accompanying text.

294. See *supra* notes 207-10 and accompanying text.

295. EEC TREATY art. 90(2). Article 90(2) provides in the last sentence: "The development of trade must not be affected to such an extent as would be contrary to the interests of the Community." *Id.*; see also *supra* note 232. The Commission gave great weight to this factor in deciding if the Article 90(2) exception applied to the energy sector. See *supra* note 232 and accompanying text.

Further, the Article 90(2) exception might not apply to all the services provided under the exclusive right.<sup>296</sup> The Commission and the Court should determine if all services are justified under the exception. If services can be operated by private undertakings without disturbing the monopoly's operations, then those services should not be granted exclusive rights. The sectors which must be operated as monopolies will remain, but more services will become open to private undertakings and competition.

The Court should also provide a more systematic way for an undertaking to apply for an Article 90(2) exception. At present, an undertaking can obtain an exemption if its national government requests a Commission decision under Article 90(3).<sup>297</sup> Otherwise, the undertaking must seek a declaration in national court.<sup>298</sup> Under the first approach, the undertaking must rely on its national government to request a decision. Under the second approach, the possibility exists that the Commission will overrule the exemption.<sup>299</sup> Thus, this second option does not provide the undertaking with legal certainty.<sup>300</sup> The Commission should adopt a system that allows the undertaking to apply directly to the Commission, after which the Commission would issue a decision, before the undertaking engages in the activity, on whether the exception applies.<sup>301</sup>

### *B. The Explanation for the Court's Failure to Adopt the Two-Step Approach*

The Court has failed to adopt the two-step solution because of political factors. The Court allows the Commission a broad legislative power under Article 90 because it supports the Commission's liberalization goal. The Court agrees with the Commission's reasoning that monopolies must be eliminated to further the Community's free market competition goal. Further, the Court does not want to hinder the Commission's campaign and thus allows the Commission to assume a legislative role beyond its authority.

Furthermore, if the Court curtails the Commission's authority under Article 90, the liberalization process will be left to the Council of Ministers. Legislative measures are subject to political bargaining

296. See, e.g., *supra* notes 239-40 and accompanying text.

297. Hancher & Slot, *supra* note 78, at 39.

298. *Id.* This option was made available after *ERT*, 1991 E.C.R. at I-2962.

299. Hancher & Slot, *supra* note 78, at 38.

300. *Id.* at 39.

301. *Id.*

in the Council<sup>302</sup> and legislation loses its effectiveness through compromise. Therefore, the exclusive rights will not be as quickly and effectively eliminated if the process is left to the Council.

The use of Article 90 offers a swift and simple solution, in contrast to an infringement procedure under the free circulation articles.<sup>303</sup> Article 90(3) directives and decisions can be directly applied to the States and undertakings without the procedural safeguards of an infringement procedure.<sup>304</sup> Procedural safeguards retard the liberalization process and can effectively curtail it if the safeguards are not followed.

Although Article 90 offers a quick and simple solution to exclusive rights, the Court should not allow the Commission to abuse Article 90 by assuming a legislative role. The European Economic Community was formed with a division of power and duties between the institutions.<sup>305</sup> However, if the Court allows the Commission to enact legislation, which is a Council duty,<sup>306</sup> the balance between the different institutions will be upset. Further, each institution has different requirements and procedures that must be followed based on its duties in the Community.<sup>307</sup> These procedures ensure that the institution's power will not be abused. However, as the Commission does not have the requirements and procedures required of an institution with a legislative role, it should not assume this role under Article 90.<sup>308</sup>

Due to its legislative power, the Council's organization and procedures differ from the Commission's.<sup>309</sup> The Council's duties include ensuring coordination of the general economic policies of the Member States, enacting decisions to ensure the Treaty objectives are obtained, and adopting acts.<sup>310</sup> The Council is composed of ministers from each Member State, usually the Minister of Foreign Affairs.<sup>311</sup> The members' voting power is controlled by a democratic system, as it is depen-

302. See *supra* note 280 and accompanying text.

303. See *infra* text accompanying notes 136-47.

304. *Id.*

305. Articles 137-44 govern the European Parliament; Articles 145-54 govern the Council; Articles 155-63 govern the Commission; Articles 164-88 govern the Court of Justice. EEC TREATY arts. 137-88.

306. See *supra* note 115 and accompanying text.

307. See *supra* note 305.

308. *Id.*

309. EEC TREATY arts. 145-63.

310. *Id.* art. 145.

311. BERMANN ET AL., *supra* note 3, at 51. If a meeting involves a special subject, like agriculture, those relevant ministers will compose the Council. *Id.*

dent on the relative population size of the State.<sup>312</sup> Although qualified majority voting is usually required,<sup>313</sup> unanimous voting is required for some measures.<sup>314</sup> A simple majority vote is rare.<sup>315</sup> This voting system serves as a safeguard ensuring that all or most Member States agree with the legislation. Council members are also authorized to bind their governments.<sup>316</sup> Thus, the members are representing their States and will take their States' views into account when voting. This organization and these procedures ensure that the legislative process is a democratic one and that every Member State has a voice in the process.

In contrast, the Commission has a different organization and different procedures based on its duties.<sup>317</sup> The Commission's duties include ensuring compliance with Treaty law and initiating legislation.<sup>318</sup>

312. *Id.*

313. *Id.* Article 148 of the Treaty explains the qualified majority voting procedure. See EEC TREATY art. 148. Article 148 provides:

1. Save as otherwise provided in this Treaty, the Council shall act by a majority of its members.

2. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as follows:

Belgium	5
Denmark	3
Germany	10
Greece	5
Spain	8
France	10
Ireland	3
Italy	10
Luxembourg	2
Netherlands	5
Portugal	5
United Kingdom	10

For their adoption, acts of the Council shall require at least:

-54 votes in favour where this Treaty requires them to be adopted on a proposal from the Commission,

-54 votes in favour, cast by at least 8 members, in other cases.

3. Abstentions by members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

*Id.*

Each state's votes are given a different weight depending on its size. See *id.* When the Treaty requires the Council to adopt acts on a proposal from the Commission, 54 votes in favor are needed. See *id.* In other cases, 54 votes in favor must be cast by at least eight members. *Id.* All of a State's votes must be cast as a bloc. BERMANN ET AL., *supra* note 3, at 53. *Id.* The purpose of the 54 rule is to prevent the large or small states as a group from controlling the defeat or passage of acts. *Id.* The 54 rule allows three large states to defeat an act, but requires the vote of two small states to pass an act. *Id.*

314. *Id.* at 52. Unanimity is required for accession of new members or the harmonization of tax legislation. *Id.*

315. *Id.*

316. *Id.* at 51.

317. See EEC TREATY arts. 155-63.

318. Article 155 provides:

Commission members are appointed by their Member State governments, and are not required to be ministers.<sup>319</sup> Further, voting power is disbursed through one vote for the smaller States and two votes for the five larger States.<sup>320</sup> This is in contrast to the Council's voting power, which is based on population size.<sup>321</sup> Instead of unanimity or qualified majority voting, a simple majority is required.<sup>322</sup>

Commission members are also required to act independently of their Member States.<sup>323</sup> The members must act in furtherance of the Community and not just their respective States. Thus, the Commission does not represent its Member States when carrying out its duties. The Commission's organization and procedures are not as democratic and representative of the Member States as are the Council's organization and procedures. Therefore, the Commission should not be allowed to enact legislation under Article 90.

#### CONCLUSION

If the two-step approach combined with the automatic abuse test is utilized by the Court and the Commission, the Community's goal of free market competition will be furthered. The Member States and undertakings will offer less resistance to liberalization for several reasons. First, the States and undertakings will have opportunities to present their views through the procedural safeguards contained in infringement proceedings. Directives issued under Article 90(3) will provide Member States with notice on how to comply with the Treaty. Also, these directives will no longer be utilized as legislative measures, which is an abuse of the Commission's power. Further, compliance by Member States will occur if the Article 90(2) exception is clarified. Undertakings will also be able to apply for the exception directly to

In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

*Id.* art. 155.

319. BERMANN ET AL., *supra* note 3, at 57.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 57 n.2.

the Commission. By following the two-step approach, the Community can further its free competition goal and the Member States can pursue their individual economic policies, all within the established Treaty framework.

