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NATURAL GAS IN THE EUROPEAN INTERNAL MARKET: A COMPARATIVE ANALYSIS OF COMMON CARRIAGE AND PRICE TRANSPARENCY

*Ernst-Joachim Mestmäcker**

INTRODUCTION

“Europe 1992” has served as an all-encompassing mantra for those promoting the harmonization of European trade laws and the dismantling of remaining trade barriers between Member States. With respect to the natural gas industry, the Commission has called for the development of both a common carriage system and a price transparency doctrine to promote gas to gas competition.

After reviewing the general goals of a common energy policy, this paper provides a comprehensive comparative study analyzing the potential effects of common carriage and price transparency in the Community’s natural gas market. Direct comparisons are made between market structures and regulatory policies in the United States, Great Britain, and the Federal Republic of Germany. After extensive analysis, the author concludes that the plans laid out by the Commission reveal conflicting objectives, require extensive new regulation, and are incompatible with the system of undistorted competition guaranteed by the EEC Treaty.

PART ONE: THE EEC POLICY ON NATURAL GAS

I. INTERNAL ENERGY MARKET

The Single European Act of 1985 is designed to bring about the creation of the internal market by December 31, 1992. The obstacles to the completion of the internal market were defined in the Commission White Paper, *Completing the Internal Market*¹ and the measures required to remove them were proposed. However, no account was taken of the special characteristics of the energy market. In the “new EEC energy objectives”² adopted by the Council in September, 1986,

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1. *Completing the Internal Market*, White Paper from the Commission to the European Council, COM(85) 310 final, Milan (1985).

2. 29 O.J. Eur. Comm. (No. C 241) 1 (1986).

reference is made to the need to remove the barriers to trade in the energy market, to make the market better integrated, and thereby to facilitate attainment of the following: improved security of supply, lower costs, and increased economic competitiveness.

In the Commission's February 5, 1988 communication to the Council entitled *The Internal Energy Market*,³ the Commission considered the general problem of the inclusion of energy in the internal market and highlighted the possible obstacles to the completion of the internal market in the individual energy sectors. In connection with the White Paper on the completion of the internal market, the Commission referred to the provisions laid down in Community law which could be applied to help create the internal energy market. These relate to the guaranteed unrestricted movement of goods (articles 30-36), the adjustment of State monopolies of a commercial character (article 37), the freedom to provide services (article 59), the rules on competition (articles 85-90) and the approximation of laws (article 100a). With regard to State trading monopolies, particular reference is made to exclusive transport and distribution rights. The actual words in the case of the electricity and gas sectors are found in paragraph 61 of the report:

For certain energy products, such as electricity and gas for example, the States or the regional entities give exclusive right of transport and distribution to public and private enterprises. It is appropriate to make an inventory and examine in what sense these exclusive rights prevent or make more difficult exchanges between Member states. It is accordingly appropriate to examine if such a situation is compatible with the rules of the Treaty and more particularly articles 30 and 37. More specifically in the *transport* domain and in regard to the *distribution of electricity and gas* (even if these two sectors have characteristics which set them apart) two essential economic problems seem to dominate:

- how to encourage the *free transit* of natural gas and electricity inside the Community while having a high level of security of supply and having the conditions of transport on an economic basis. This would permit a transport or distribution company to have direct access to a resource.
- under what possible conditions could *direct access* to a resource be extended to a large industrial consumer. Both these options imply that third parties could have the possibility to have access, on payment of a reasonable tariff, to existing transport networks (i.e., "*common carriage*" — common transport for third parties).⁴

3. *The Internal Energy Market*, Commission of the European Communities Working Document, COM(88) 238 final, 1988 [hereinafter *Internal Energy Market*].

4. *Id.* at 21 (emphasis in original). Note that the German translation of "common carriage" as "gemeinsamer Transport für Rechnung Dritter" is incorrect. What is actually meant is the requirement for interregional gas supply companies, which may need to be justified, to make

Elsewhere in the report, the Commission points out the following obstacles to a better integrated energy market, relating specifically to energy: 1) differences in cost structures in the various Member States; 2) the lack of transparency in pricing (in particular in the case of large energy users); 3) apparent inconsistencies between the respective price and tariff structures for the various fuels (in particular in the case of gas and electricity) and between the price levels in different Member States; and 4) differences in the approach taken between industrial and domestic users and between various industrial sectors.⁵

With regard to infrastructures for the reception, storage and transmission and distribution of gas and electricity in particular, the Commission feels that the European gas pipeline network must be further integrated. It says:

[T]he process of integration of the European gas pipeline network must be continued in order to establish a genuine common market in natural gas. This is a matter which concerns the countries which are not yet linked up to the European network, namely, the United Kingdom, Ireland, Spain, Portugal and Greece. The Community's natural gas industry could, for example, also set up a flexible joint body to deal with carriage and the administration of the European gas pipeline network access which would be open to all transport companies in the Community.⁶

With a view to Europeanizing the existing networks, the Commission wishes to ascertain whether open participation of the various parties interested in energy transport might be possible with the help of the European Economic Interest Grouping.⁷

The Commission is anxious to integrate the natural gas sector by taking the following measures: 1) establishing price transparency in the case of off-tariff sales of natural gas to industrial consumers, particularly in the UK and FRG,⁸ and 2) decompartmentalizing the natural gas markets with the help of "common carriage." The quotation on decompartmentalization is as follows:

- a) The exclusive transmission concessions must be checked to see how to facilitate the free movement of natural gas whilst maintaining a high level of security of supply and economic transmission conditions. Transmission or distribution undertakings could be allowed direct access to the resources in question.

their own network for gas transmission available to third parties in return for payment. See *infra* Part Two for further details.

5. *Id.* 26-27.

6. *Id.* at 28.

7. *Id.* at 29.

8. See *The Internal Energy Market*, Commission of the European Communities Working Document, Annex III, para. 8, COM(88) 238 final (1988) [hereinafter *Natural gas annex*].

- b) The prospect of extending direct access to resources to large industrial consumers should be considered in the light of the results obtained in connection with point a).

The above two points both hold out the possibility of giving third parties access to the grid as against payment of a reasonable charge (the "common carrier" system).⁹

These points are again raised in the Transit Communication of September 6, 1989¹⁰ and supplemented in the draft Transit Directive.¹¹ They are justified in the document's Summary and Conclusions as follows:

In order to improve the efficiency of the gas supply system and create "gas to gas" competition to the benefit of the consumer, the Commission proposes the following "step-by-step" approach:

- a) The setting up (Directive article 100a EEC) of modalities for the application of transit rights between gas companies of the Community in the high-pressure grid of the EC;
- b) The setting up of an organization of representatives of the entities responsible for the high-pressure gas pipeline systems. This organization will be required, upon request by the Commission, to help with the modalities for claims to transit rights and, when necessary, to seek reconciliation between the parties in case of difficulty and to produce an annual report on its activities;
- c) The setting up, by the Commission, of a consultation process by establishing two consultative committees — the first with the Member States; the second with the sectorial interests involved — in order to discuss if third-party access to a European transport system needs to be organized and, when necessary, under what conditions, in order to ensure an implementation which will guarantee the preservation of the quality of service to the consumer and the security of supply.¹²

Initially, the proposed Transit Directive is to require only the interregional gas supply companies listed in the annex to the Directive to allow transit. It is not clear from the Directive whether this obligation relates solely to the said companies *inter se* or whether they can also supply to third parties on their own account.

I shall now discuss matters arising from plans to introduce a general system of common carriage. The Transit Directive will be dealt with in a separate section.

II. THE COMMUNITY'S ENERGY OBJECTIVES

In the Community policy on natural gas, a distinction should be

9. *Id.* at 66.

10. *Towards Completion of the Internal Market for Natural Gas*, COM(89) 334 final (1989) (Communication from the Commission).

11. *Proposal for a Council Directive on the Transit of Natural Gas*, COM(89) 334 final (1989) (included in Communication, *supra* note 10).

12. *Id.* at 2.

made between policy objectives and the means available to attain them. The objectives, as defined *inter alia* in the communication from the Commission to the Council on natural gas dated December 11, 1986,¹³ relate to the role to be played by natural gas in meeting the Community's overall energy requirements. This includes maintaining the current level of natural gas at eighteen percent of overall requirements until 1995; reducing the Community's dependence on imported petroleum by increasing the proportion of natural gas in overall energy supplies; and improving security of gas supplies by diversifying supply sources and further integrating the network.¹⁴ These projections, based on the overall economy, show no clear connection with the market-oriented objectives of the policy on natural gas. The Commission sees the common energy policy as being characterized by a combination of the play of market forces, ensured in particular by the internal market provisions, and of the political measures guaranteeing or providing for Community supplies.¹⁵

How these measures, which are intended to ensure Community supplies, are to relate to the free play of market forces is still extremely unclear. The more integrated energy market is to "reduce the cost of access to energy," particularly for user industries.¹⁶ This will be achieved in such a way that the discrepancies in cost structures in the various Member States and the lack of price transparency will be overcome.¹⁷

This definition of the aims and objectives of energy policy is visibly connected with article 3 of the ECSC Treaty, under which all consumers in similar circumstances are guaranteed equal access to the sources of production. Price transparency, the instrument provided for this purpose, is also reproduced in article 60 of the ECSC Treaty (requirement for price lists). At the same time, the competitiveness of energy companies is to be improved. By this, the Commission simply means the rationalization of energy production, transmission, and distribution,¹⁸ and also competitiveness in "a world which is increasingly open to demanding competition,"¹⁹ *i.e.*, competitiveness with non-Member States.

13. *Communication from the Commission to the Council on Natural Gas*, COM(86) 518 final (1986) [hereinafter *Communication on Natural Gas*].

14. For detailed discussion of diversification of supply sources, see *id.* at 12-13.

15. *Internal Energy Market*, *supra* note 3, at 7-8.

16. *Id.* at 5.

17. *Id.* at 26.

18. *Id.* at 5.

19. *Id.*

One should take account of the strategic nature of energy.²⁰ The Commission infers from this that a single European market is not automatically synonymous with unconditional or unlimited opening of the market vis-à-vis the outside world.²¹ The degree of dependence on gas imports is thirty-five percent. However, the Community's natural inclination to free trade must not backfire and turn it into a one-way free trade zone for certain competitors who continue to protect their own markets to some extent. Here, just as in the case of closer contacts with companies from non-Member States, reciprocity should play a decisive role.

The Commission believes that progress towards a "European purchase price for natural gas"²² is equally important for the competitiveness of energy-consuming industries and gas companies. The Commission infers this from the movement in the European natural gas market from a seller's to a buyer's market. The Commission does not explain how the Community policy could contribute towards a uniform purchase price. The Commission's ideas on the gas industry, briefly reviewed here, show conflicting objectives and unresolved matters in the relationship between objectives and means. The conditions required for the introduction of a "European purchase price for natural gas" have not been defined.

In a genuine common market for energy, which the Commission sees as a prerequisite for such a development, the various elasticities of natural gas supply and demand would be reflected in the various prices on the individual gas markets. Given the present market structures, a uniform European purchase price would probably be possible only if the European gas companies combined to form a demand cartel. However, this would be incompatible with the principles of free trade and, because of its effects on the internal market, would run contrary to the rules guaranteeing a system of undistorted competition.

The Commission's aim of providing "resource" access to companies distributing and consuming gas may come into conflict with the parallel aim of increased competitiveness of European energy companies vis-à-vis other States. When they purchase gas in Algeria, Norway, and the USSR, these companies come up against suppliers with a state monopoly. These market structures should be considered when attempting to create competition by means of access to the resource.

There are also conflicts within the Commission's plan intended to

20. *Id.* at 7.

21. *Id.* at 8-9.

22. *Natural gas annex, supra* note 8, at 60.

help promote the competitiveness of gas-consuming industries and the gas industry. Discrepancies in the cost structure of the companies using gas are to be ironed out by harmonization of natural gas prices. This is to be achieved by price transparency, recommended by the Commission in the case of sales of natural gas to large industrial consumers. However, as will be explained later, price transparency would result in a restriction of competition between gas and petroleum. The Commission itself points out that because they have to compete against other energy sources in their end-use markets, the gas companies do not have an "economic monopoly."²³

Such a monopoly is necessary for price transparency to provide customers with the same conditions in their transactions with a monopoly company without any adverse effects on competition. The same requirement under competitive conditions means that the uncertainty of competing suppliers with regard to their rivals' reaction to competition is removed. Restriction of competition becomes distortion of competition if price transparency is required of only one of the suppliers of a product in substitute competition. This would, however, be the position of the gas companies vis-à-vis oil suppliers. This dilemma indicates that the Commission does not distinguish sufficiently in its proposals between its aim of competition within the gas industry and substitute competition. One of the basic decisions in energy policy is whether the process of diversification of energy supply should be channeled through substitute competition in the market or whether it should be the subject of measures to regulate the market.

Against this background we should consider whether the Commission's proposal that gas companies be subject to common carriage and the introduction of price transparency in the case of gas supplies to industrial consumers is compatible with the principles of genuine competition emphasized in the internal market. Community law provisions which the Commission considers applicable to the gas industry include those on unrestricted movement of goods (articles 30-36), the freedom to provide services (article 59), State monopolies of a commercial character (article 37), and the rules on competition (articles 85-90). The Commission announced an in-depth examination in this connection²⁴ and pointed out the need for respect of Community law.

In the Coopers & Lybrand report, the potential advantages and drawbacks of common carriage are compared.²⁵ The report does not

23. *Id.* at 56.

24. *Internal Energy Market*, *supra* note 3, at 10.

25. Coopers & Lybrand/Belmont in association with Prognos AG. *Study of the Advantages and Drawbacks for the European Community of the Introduction of a System of "common car-*

recommend the introduction of common carriage. It explains what would happen if the Community institutions decided to introduce such a system.²⁶ This will be discussed in more detail later.²⁷

PART TWO: COMMON CARRIAGE

I. DEFINITIONS AND NEEDED REGULATIONS AS SEEN IN THE COOPERS & LYBRAND REPORT

1. Definitions

Under Anglo-American law, common carriage is taken to mean the requirement for common carriers to provide their services to any customer on a reasonable and non-discriminatory basis. Interregional gas supply companies will also be required to make their grid available to third parties for gas transmission in return for payment without discrimination as regards the conclusion and terms of the contract. However, this obligation to contract would provide for more than just the responsibilities of the common carrier because it would make interregional gas supply companies, which had previously had only a merchant function, undertake an unfamiliar business activity.

Transmissions are performed as follows: an interregional gas supply company takes a certain amount of gas from a producer, feeds it into its own network and delivers the same amount of gas to one or more gas consumers at a certain destination. The contract of purchase relating to the transported gas is concluded between the producer and the consumer or another interregional gas supply company. The interregional gas supply company's obligation to contract is fulfilled by concluding a transportation contract with the producer or consumer or both.

Where an interregional gas supply company places its pipelines at the disposal of others for the conveyance of gas, its business functions alter. Interregional gas supply companies are engaged in the purchase and sale of gas, the development and maintenance of the pipeline network which that necessitates, and the operation of all the facilities required to ensure round-the-clock gas supplies. These companies perform a merchant function. The transportation of gas within their own pipeline network is a separate part of such activities. If the company transports third-party gas, it is performing a service. This consists of the operation of the network in order to feed in third-party gas

rier" for the Transport of Natural Gas, Published by the Commission of the European Community, Directorate-General for Energy, Jan. 1989 [hereinafter *Coopers & Lybrand report*].

26. *Id.* at 103, paras. 5.1 - 5.38.

27. See *infra* note 28 and accompanying text.

and deliver the same quantity of gas to a destination specified by the other party.

The obligation to transport gas is designed to facilitate competition with regard to demand for and the use of gas. This changes the competitive conditions for all the parties involved. Consumers purchasing gas directly become the competitors of interregional gas supply companies as regards demand for gas. The conditions governing competition for demand change in that gas suppliers are able to select from additional customers. Production and transmission companies compete to sell gas to consumers purchasing directly. The effect on the conditions governing competition as regards sales varies according to the market where the consumer purchasing directly is active. A distinction should be made between transmission for consumers in the interregional supply company's district and transmission for consumers outside that district (transit). For consumers within the district, a further distinction should be made between distributors and large industrial consumers. There may also be distinctions between old customers of the interregional supply company and new consumers.

This brief review of the influence of common carriage on company functions and conditions governing competition shows that its effects can be assessed only if market conditions are considered in their entirety from source to the final consumer. However, account should also be taken of the need for regulations, which would be associated with the introduction of common carriage. The Coopers & Lybrand report serves as a basis for this purpose.

2. The form of common carriage as set out in the Coopers & Lybrand report

The report recommends the measures which would be required if the Community decided to introduce common carriage.²⁸ The additional recommended measures relating to common carriage are claimed to be justified on the grounds that they are needed to ensure that the system is effective and fair. The recommendations are informative because they acknowledge the considerable need for additional regulation which would be associated with the introduction of common carriage. The following recommendations are highlighted:

1. The setting up of a separate body responsible to the Commission with delegated powers for the effective policing of common carriage.
2. In addition to the policing of dominant positions, the drafting of guidelines on what it considers to be reasonable and fair transmission conditions. This would include the ratio of transmission tariffs to the

28. *Coopers & Lybrand report, supra* note 25, at 125, para. 5.38.

- average cost of the facilities used and special charges for interruptible services.
3. A requirement for interregional gas supply companies to publish system development proposals in order to allow the incorporation of third-party capacity requirements. By taking on the cost of additional investment, the interregional supply company would be obliged to create the corresponding capacity.
 4. The development of a measure to prevent abuse of the system by the companies required to transport gas.

The recommendations are based on UK legislation, which will be dealt with separately. Consideration has not been given to whether they could be implemented under Community law. It has become apparent that the introduction of common carriage — assuming it would be effective — would do more than change the function of interregional gas supply companies; it would require comprehensive official supervision of tariffs, transport capacity and investment. Supervision of tariffs would not be restricted to common carriage tariffs. Since transmission costs for intra-firm and third-party use are actually joint costs, directives would need to be drafted for both sorts of tariff and their inter-relationship. It is entirely logical that the report should recommend the setting-up of a special supervisory body, since the authors consider that the Commission would not have sufficient expertise or resources to perform the defined tasks.

The requirement for additional investment to create transmission capacity is not compatible with an autonomous management. Although the ECSC Treaty states that the High Authority shall prepare programs and investment plans in consultation with the undertakings,²⁹ such programs are only for guidance purposes and lay no obligation on the undertakings to invest in specific areas.

There is legislation governing common carriage obligations in the UK, FRG and U.S. Consideration should be given to whether, in light of the various objectives respecting regulation and the different market structures, such provisions could be used to help assess common carriage in the Common Market.

II. COMMON CARRIAGE IN THE UNITED KINGDOM

Under the 1986 Gas Act, the assets of the British Gas Corporation were transferred to British Gas plc. The Government put British Gas shares on sale to the public. Under section 3 of the Act, gas privatization was accompanied by the abolition of the British Gas Corporation's exclusive right to supply natural gas through pipelines in the

29. Treaty Establishing the European Coal and Steel Community, *opened for signature* Apr. 18, 1951, 26 U.N.T.S. 140 (art. 46).

UK. The Act allows the Secretary of State for Energy to grant any person or group an authorization to operate a gas company. This authorization may be subject to conditions and requirements. Until June 28, 1986, British Gas was the only entity allowed to operate as a public gas supplier.³⁰

Under section 19 of the 1986 Gas Act, a public gas supplier is required *inter alia* to place his pipeline network at the disposal of other persons for the conveyance of gas in return for payment. The requirement applies only if the gas is of a kind which the pipeline is designed to convey and if conveyance on behalf of other persons is in keeping with duties required of British Gas as a public gas supplier on the basis of contractual commitments. One of the requirements imposed on British Gas when it was granted the authorization to operate was to advertise the terms whereby it would transmit gas for other persons.³¹ This statement is to be used as a basis for working out the transportation conditions between British Gas and the other contracting party. If no agreement is reached, the party requiring conveyance may ask the Director General of Gas Supply to lay down the conveyance conditions for British Gas. Section 19 of the Gas Act 1986 stipulates how to charge for conveyance:

Such charges should cover an appropriate portion — reflecting the use of the pipeline system by the third-party compared with use by British Gas and others — of the operating, administrative and maintenance costs of the system as well as rate of return on the relevant capital assets equal to the return earned by British Gas on the system generally.³²

British Gas published the following guidelines in November 1986: "Information for those wishing to have gas conveyed by British Gas" and "Information for those wishing to receive back-up supplies of gas

30. Department of Energy, *Authorization granted and directions given by the Secretary of State for Energy to the British Gas Corporation under the 1986 Gas Act* [hereinafter *Authorization*].

31. Schedule 1, No. 9 of the *Authorization* reads:

Conveyance of gas for others:

- 1.) The supplier shall, within three months after the date on which this Authorization comes into force, and after consulting the Director, prepare a statement setting out general information for the guidance of those persons who might wish to have gas conveyed by the Supplier's pipelines for the purpose of negotiations with the Supplier for the conveyance of gas, giving examples of the prices which the Supplier would expect to be paid for such conveyance in typical circumstances, and a general description of the principal matters which the Supplier would expect to be the subject of those negotiations in such circumstances.
- 2.) In the event of any material change in such prices and other matters, the Supplier shall, after consulting the Director, prepare a revised statement incorporating the changes.
- 3.) The Supplier shall send a copy of
 - a.) each statement prepared under paragraphs 1 and 2 above to the Director; and;
 - b.) the statement in its latest form to any person requesting it;

Id.

32. Gas Act, 1986, § 19.

from British Gas." No company has as yet taken advantage of the possibility of conveyance under the 1986 Gas Act. The reasons are explained in a report from the Director General of Gas Supply.³³

The Director General of Gas Supply is in charge of the Office of Gas Supply (Ofgas). The Office monitors whether British Gas is fulfilling its legal obligations and the duties specified in the Authorization. The law distinguishes between the tariff and contract sectors. The tariff sector supplies homes with gas at published tariffs. The contract sector deals with special consumers using more than 25,000 thermal units or "therms" *per annum*. In such cases, prices can in principle be set individually. The Director General has sole responsibility for the tariff sector. The contract sector, on the other hand, is governed by the Gas Act and the 1973 Fair Trading Act.

The provisions on common carriage in the 1986 Gas Act are designed to ensure effective competition in gas transmission in the case of consumers taking over 25,000 therms a year.³⁴ The conveyance requirement therefore applies only if special consumers are to be supplied. It follows from this that in addition to the Director General of Ofgas, the Director General of Fair Trading also has jurisdiction by virtue of the 1973 Fair Trading Act. It was with this in mind that the Monopolies and Mergers Commission was asked to ascertain, with regard to the supply of gas through pipes to persons other than tariff consumers, if a monopoly situation existed, whether this situation was being exploited or deliberately maintained, and whether facts had emerged as a result of its study which could be supposed to operate against the public interest. A central question in the Commission's report is how effective competition can be generated with regard to the supply of gas through pipes.³⁵

In this connection the following was stated after examination of the pricing policy of British Gas in the contract sector:

We believe that ultimately the only effective means of remedying the adverse effects of the present monopoly situation is direct competition in gas supply. We therefore make three major proposals for action — concerning BG's pricing policy for gas, its charges for common carriage, and its policy with respect to gas purchasing — which all seek to encourage effective competition. These measures are intended to ensure that potential competitors are not deterred by selective price-cutting on

33. Office of Gas Supply, *COMPETITION IN GAS SUPPLY: A REPORT BY THE OFFICE OF GAS SUPPLY* (1987) [hereinafter *Ofgas*].

34. Gas Act, 1986 § 4(2)(d).

35. Monopolies and Mergers Commission, *Gas: A REPORT ON THE MATTER OF THE EXISTENCE OR POSSIBLE EXISTENCE OF A MONOPOLY SITUATION IN RELATION TO THE SUPPLY IN GREAT BRITAIN OF GAS THROUGH PIPES TO PERSONS OTHER THAN TARIFF CUSTOMERS*, (1988) [hereinafter *Gas Report*].

the part of BG, by uncertainty as to the level of common carriage charges, or by lack of availability of gas. Until direct competition in gas supply is effective, we also see a need to restrain BG's discriminatory policy in pricing and supply of gas.³⁶

The Commission recommended that BG be required: 1) to publish a schedule of prices to contract customers and not to discriminate between them; 2) to supply interruptible gas regardless of the use made of the gas and of whether there is an alternative fuel available; 3) to detail the terms whereby British Gas offers common carriage in such a way that a potential customer is able to make a reasonable estimate of the charge that would be sought by British Gas; and 4) to contract initially for no more than ninety percent of any new gas field. A common feature of these recommendations is that they are designed to create the competition desired by the legislature with the help of conveyance requirements.³⁷

The Commission agrees with the Director of Gas Supply that the major obstacle to realization of common carriage potential is the vested interests of the gas producers. They are dependent for their major transactions on the sole gas purchaser, BG. BG ensured that new fields were exploited, because it guaranteed the continuous acceptance of all gas produced through life-of-the-field contracts as well as financing via take-or-pay obligations.³⁸ If transportation was requested, BG would know the potential customer's name and would be able to exercise predatory pricing.³⁹ Transaction costs and risks associated with gas sold to customers, who had shorter term horizons and less certain requirements, were greater than in transactions with BG.⁴⁰ The only customers of fields still to be developed are companies whose foreseeable gas consumption is constant and non-seasonal and which in their order of magnitude equate approximately with the gas to be produced.⁴¹ The same is also true with regard to the possibility of constructing an independent transmission network.⁴² These conditions are satisfied in the UK only by a very small number of industrial consumers.⁴³

The Monopolies Commission's recommendation that BG be entitled to contract for only ninety percent of the new gas fields should

36. *Id.* at para. 8.52.

37. *Id.* at para. 8.16.

38. *Ofgas*, *supra* note 33, at para. 27.

39. *Gas Report*, *supra* note 35, at para. 8.34; *Ofgas supra* note 33, at para. 27b.

40. *Ofgas*, *supra* note 33, at para. 18.

41. *Id.* at para. 16.

42. *Id.* at para. 25.

43. *Id.* at para. 16.

enable producers to develop their own sales potential in competition with BG without the development of new fields having to be financed under these contracts. Its recommendation that price lists be published for contract gas sales should prevent the ouster of new competitors through selective predatory pricing.

It is not yet known whether these recommendations will make it possible to institute competition between gas suppliers with the help of common carriage requirements. So far, British gas producers and British Gas have been unable to participate in the cross-border movement of goods within the Common Market because there is no gas link between the British gas fields and the Continent. Moreover, producers are required to land the gas from the British gas fields in the UK first.

III. CONVEYANCE REQUIREMENTS UNDER GERMAN ECONOMIC LAW

The structure of the gas industry relevant to the assessment of transportation requirements in the FRG differs substantially from that in the UK. In the UK, British Gas is the only company supplying natural gas to final customers. Consequently, the only parties interested in transportation are large industrial consumers. In the FRG, however, there are a number of transmission companies delivering to regional and local supply companies as well as to large industrial consumers. British Gas obtains gas solely from producers in the UK, whereas German interregional gas supply companies cover most of their requirements through imports, partly from the Community (Netherlands) and partly from other states (Norway, USSR). Competition between local and regional supply companies and between interregional gas supply companies is prevented by a large degree through concession and demarcation agreements. By means of concession agreements, municipalities are able to grant a certain company — often the public utilities — the exclusive right to lay gas pipelines. In this way, competition is largely excluded at the final distribution stage. At a wholesale level, demarcation agreements separate the supply areas of the transmission companies. In addition to concession agreements, vertical demarcation agreements may leave final supply in the hands of the local gas company. This system of closed supply areas is made possible by the exemption of the above agreements for policy reasons from those clauses of the competition law relating to restrictions on competition.⁴⁴

44. GESTZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (GWB) (LAW AGAINST RESTRAINTS OF COMPETITION) at para. 103.

The law associates authorization for the agreements mentioned with control of abusive practices by the Cartel Office. Paragraph 103 V.1.1 reads:

Paragraphs 1, 15 and 18 shall not apply to

- 1) Agreements between companies responsible for the public supply of electricity, gas or water (supply companies) with other supply companies or area authorities, where a party to the agreement undertakes in this way to refrain from public supply by means of fixed pipelines in a given area.⁴⁵

The exempted agreements are subject to control of abusive practices by the Cartel Authorities under paragraph 103 V.1. The Cartel Authorities must take into account the meaning and purpose of exemption and ensure a supply which is as secure and reasonably priced as possible. Conveyance becomes an obligation if a refusal to convey is deemed abusive. The provision reads:

Abusive practice shall be deemed to exist *inter alia* if a supply company unduly prevents another supply company or other company from selling or purchasing electricity or gas (energy) in such a way that it refuses to conclude agreements with these companies on the movement of energy (conveyance) into and out of its supply network on reasonable terms. When assessing improper action, account should be taken of the effects of conveyance on the market conditions, and particularly on supply conditions, of the customers of the supply company required to transport energy. Refusal to transport is in general not an abusive practice if conveyance would result in supply of a third-party within the supply company's territory.⁴⁶

Exemption of the concession and demarcation agreements from the outlawing of agreements to restrict competition is based on the legislature's belief that the delivery to customers by a single supply company of electricity and gas within a defined area is in principle a condition for secure and rational supply.⁴⁷ The rule regarding transportation was enacted in 1980 by the fourth amendment to the GWB. The official line was once again, "the technical and institutional peculiarities of the energy sector make a system geared completely to competition impossible."⁴⁸

During discussion of the government draft by the Upper House, the state of Lower Saxony spoke in favor of a considerable relaxation of the territorial monopoly. The protection of territory should merely

45. *Id.* at para. 103 V.1.1.

46. *Id.* at para. 103 V.2.4.

47. See in connection with the history of the BGH law 15 WIRTSCHAFT UND WETTBEWERB 517 (1965) (WuW/E BGH 665); 22 WIRTSCHAFT UND WETTBEWERB 821 (1972) (WuW/E BGH 1223); 36 WIRTSCHAFT UND WETTBEWERB 729 (1986) (WuW/E BGH 2247, 2249).

48. BUNDESTAGSDRUCKSACHE (OFFICIAL DOCUMENTS OF THE WEST GERMAN PARLIAMENT) 8/2136 (1978) at 17 [hereinafter BTDrucks.].

complement a general obligation to provide public utility services. A proposal was also made to augment the definition of an abusive practice. In the proposed revisal, a practice would be considered abusive where "a supply company refuses to place any of its supply pipes at the disposal of another company for conveyance purposes within the bounds of what is economically reasonable." The Upper House adopted this proposal in its stance on the government draft.⁴⁹ In its reply to the stance taken by the Upper House,⁵⁰ the federal government evoked the energy sector's need of a common resolution on transportation acceptable to all parties. This meant not only common carriage in the framework of cooperation in the electricity sector between electricity producers and industry, but also within the public electricity and gas supply industries.

There were also doubts as to whether the control of abusive practices referred to in paragraph 103 of the GWB could provide such a general basis for improvement in the scope of common carriage. These doubts arose both on the grounds of general energy policy and the specific desire to promote competition. Common carriage, and the legality of the refusal to transport, primarily concerned the limitations of the right of exclusive use, to which every owner — even of supply pipelines — was entitled irrespective of the existence of a dominant market position. It was therefore not possible to qualify as an abusive practice every instance of a single refusal by a supply company to allow competing firms to use its facilities, *i.e.*, its network, within reasonable economic bounds. However, a refusal to transport could constitute an "undue hindrance" or an abusive practice depending on the circumstances. The current paragraph 103 V.2 refers back to the report by the parliamentary committee on the government draft of the Fourth Amendment to the GWB.⁵¹ The committee stressed that in view of the undeniable technical and economic peculiarities of the networked energy sector, a major departure from the current system of closed supply areas could involve risks for the safest and most economical supply of energy. Nor did it see justification for such a far reaching new regulation on common carriage as proposed by Lower Saxony. The committee agreed upon the wording, which has become law, of paragraph 103 V.2.4. The aim of the provision was to "counteract unjustified obstacles to a sensible utilization of CHP from

49. *Id.*, annex 2, at 36.

50. *Id.*, annex 3, at 39.

51. BTDrucks., *supra* note 48, 8/3690 (1978) at 31 *et seq.*

an energy point of view.”⁵²

The Committee, at the same time, considered the new provision relating to abusive practices as a legislative “support” for the agreement signed in 1979 between the public electricity supply and industrial associations, which also contains provisions on “entry with destination” *i.e.*, common carriage.

For its interpretation of an undue hindrance which would justify a request for common carriage, the Committee refers to the principles of interpretation developed in case law in this connection. These include a comprehensive examination of the interests of the network owner in relation to those of the company requesting common carriage. Generally, these provisions stipulate that, in principle, the fulfillment by the network owner of the obligation to supply all comers took preference over the individual interests of the company requesting conveyance. Legislative history shows that the legislator who inserted paragraph 103 V.2.4 was influenced by energy policy considerations. Common carriage was referred to specifically only where it was for the purposes of economic use for electricity produced by CHP plants. Account was not taken of the special nature of the gas industry. Although the text of the provision relates also to gas, it has not yet been applied for that purpose. Exemption of agreements providing for closed supply areas is restricted under paragraph 103(a) to twenty years. The Cartel Authorities then have to decide whether exemption is still justified.

Unlike British law, which is designed to open the gas industry to competition, German law is based mainly on considerations of energy policy. The system of closed supply areas is to be guaranteed. The provision relating to common carriage in paragraph 103 makes it clear that this purpose of the exemption and the corresponding restricted control of abusive practices should also be taken into account when laying down common carriage requirements. The problem which is central to German law of what effect common carriage requirements will have on competition in distribution does not arise in the UK. British Gas is the sole supplier of gas consumers. There are no independent distribution companies.

IV. COMMON CARRIAGE REQUIREMENTS IN THE AMERICAN GAS INDUSTRY

1. *Legal Basis*

Two partly overlapping laws govern the American gas industry -

52. *Id.* at 32. CHP, or “combined heat power” plants, burn various fuels to produce electricity via steam turbines.

the 1938 Natural Gas Act⁵³ and the 1978 Natural Gas Policy Act.⁵⁴ Order No. 436 of the Federal Energy Regulatory Commission (FERC) of October 9, 1985⁵⁵ defines common carriage obligations as does the judgment of the U.S. Court of Appeals of June 23, 1987, which partly confirms and partly revokes the FERC decision.⁵⁶

The 1938 Natural Gas Act (1938 NGA) contains a public utility regulation of a traditional form. It is designed to monitor the monopoly position of the interstate, interregional gas supply companies acting as buyers and sellers, with a view to securing lower prices for consumers. Under the 1938 NGA, the interregional supply company is under the control of an independent federal authority, the Federal Power Commission. The prices the company charges regional distributors must be just and reasonable. They are regulated by means of the costs apportioned to available output. Authorization is required for access to the market, withdrawal from the market, and all major gas investments. The authorities use the "public convenience and necessity" criterion to decide whether or not to grant authorization.⁵⁷

All unjustified preferential treatment and unreasonable discrimination as regards prices, costs, services, and investment is prohibited.⁵⁸ The FERC has to intervene if prices, costs and categories or any associated rules, conditions, behavior or agreements are "unjust, unreasonable, or unfairly discriminatory."⁵⁹ However, the 1938 NGA did not impose on the transmission companies the obligations required of a common carrier. Under the common law principles of Anglo-American law, public transport companies have to place their services at the disposal of any customer on reasonable terms and at a reasonable price within the limits of their capacity. Draft bills repeatedly submitted to Congress designed to impose public transport company obligations on interregional gas supply companies did not become law.

Following a decision of the Supreme Court in 1954, gas price regulation under the 1938 NGA includes prices in contracts between gas producers and transmission companies.⁶⁰ Price regulation for producers is geared to a modified standard cost based largely on historical costs. "These costs were generally lower than repurchase costs and

53. 15 U.S.C. § 717 (1988).

54. 15 U.S.C. §§ 3301-3432 (1988).

55. Fed. Energy Reg. Comm'n Order No. 436 (1985) (final rule and notice requesting supplemental comments) [hereinafter FERC Order No. 436].

56. *Associated Gas Distrib. v. Fed. Energy Reg. Comm'n*, 824 F.2d 981 (D.C. Cir. 1987).

57. 15 U.S.C. § 717(c) (1988).

58. 15 U.S.C. § 717 (1988).

59. 15 U.S.C. § 717(d) (1988).

60. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

the market value. This resulted in constantly rising demand and fall in supply. The ensuing under-supply led to rationing using a system of quotas for consumers."⁶¹ Price regulation also distorted competition between intrastate and interstate gas sales. These were the main reasons which led to the 1978 Natural Gas Policy Act (1978 NGPA).

The Natural Gas Policy Act released producers from price regulation. A decisive factor was the legislature's belief that the gas market at source was competitive rather than monopolistic. Apart from the ending of price regulation, the Act also prevented control of market entry and investment at the production stage. At the same time, the competent authority was empowered to permit the conveyance of gas as a separate service and to set appropriate prices and conditions.⁶² This provision was included in the 1978 NGPA "to facilitate development of a national natural gas transportation network without subjecting intrastate pipelines, already regulated by State agencies, to Federal Power Commission regulation over the entirety of their operations."⁶³

The FERC used the provisions in the 1978 NGPA authorizing interregional gas supply companies engaged in interstate trade to transport gas for one-state gas companies or consumers to promote the development of an independent market for gas and gas transportation. This policy is based on the 1978 NGPA's aim of providing consumers with the most direct access possible to the gas market and supplying them at the lowest possible prices.

A gas spot market can be achieved only in a highly competitive wellhead market and by means of a diversified common carriage system covering the whole country. These conditions are largely satisfied in the United States. However, deregulation of the gas market requires more than just access to the market and common carriage system. Contract practice, which was developed on the basis of the regulated system, also needs to be adapted to the new conditions. At the production stage, the long-term take-or-pay requirements agreed between producers and the transmission companies are largely incompatible with the transition to a common carriage system. This problem is exacerbated by the fact that, at the end of the 1970s and the beginning of the 1980s, transmission companies contracted high take-or-pay obligations because of energy shortages. The FERC encouraged this to promote the development of new fields. On transition from a seller's market for heating energy to a buyer's market, these

61. FERC Order No. 436, *supra* note 55, at (II) (18).

62. 15 U.S.C. § 3371.

63. *Associated Gas Distrib.*, 824 F.2d at 1001.

take-or-pay obligations, together with cost-based price regulation, proved to be the main obstacle to adjustment of supply and demand to market conditions. In order to alleviate matters, the FERC authorized "special marketing programs" and "off-system sales programs." The gas sold under such a program was set off by the producer against the minimum amount agreed by the interregional supply company if the latter was charging the consumer for transportation and if the gas was sold at competitive prices.

However, the FERC allowed such programs only if consumers were able to switch to other energy sources ("energy-switchable consumers"). "Captive consumers" were not allowed access to the special programs. Because this amounted to discrimination against this group of consumers, the FERC's administrative practice was held to be unlawful.⁶⁴

Nevertheless, since 1983 these conditions have resulted in the development of a gas spot market in the U.S. which is important in quantitative terms. This process was accelerated by legislation in major gas-producing states promoting or prescribing in-state gas transportation.⁶⁵

The FERC interpreted economic and legal developments by saying that natural gas had become a product in its own right, which was as different from oil as it was from gas transportation, storage, or adjustment of pipeline capacity.⁶⁶ The aim was to alter the framework conditions of the gas market in such a way that: 1) the public utility regulation of transport functions in trade would be continued and revised to take account of the legislature's decision that because of a lack of effective competition further official regulation of gas transportation was in the public interest; and 2) competition in the product market would at the same time continue to be developed.

The FERC issued Order No. 436 in order to achieve this objective. The Federal Court of Appeals, before which the decision was challenged, described it as a milestone in the history of the American gas industry, comparable only with the 1938 NGA, the 1978 NGPA, and the Supreme Court's decision to subject producers to price regulation. The FERC's decision and the Federal Court of Appeal's ruling upholding the decision's main points shed light on the problems which arise if transmission companies have to become common carriers in addition to their role as traders. The restructuring of the gas industry

64. Maryland People's Council v. Fed. Energy Reg. Comm'n, 761 F.2d 768, 774 (D.C. Cir. 1985).

65. See FERC Order No. 436, *supra* note 55, at (II) (35-36).

66. *Id.* at (II) (1).

is to be achieved by using the continued regulation of the transmission companies provided for under the 1938 NGA and the 1978 NGPA to force a separation of the markets for gas and gas transportation, sometimes labelled "unbundling." This will be done by means of new regulations on the transportation of natural gas.

2. *Regulations on gas transportation in Order No. 436*

Gas transportation is one of the services which requires authorization under section 7 of the 1938 NGA. The procedure for individual authorization is cumbersome and time consuming. In order to promote the supply of transportation services by transmission companies, the FERC issues general authorizations (blanket certification) for gas transportation. The 1938 NGA applies to fields already developed at the time of the 1978 NGPA's entry into force and to contracts signed relating to those fields. One of the aims of the 1978 NGPA was to promote transportation of new gas as an independent business activity. Section 311 (a) of the 1978 NGPA, therefore, empowers the FERC to authorize the transportation of gas in general where this involves contracts under which an interstate pipeline is used by a one-state interregional supply company or a local supply company. The same also applies if local or one-state companies take on transportation for interstate pipeline companies. The FERC has made use of this power.⁶⁷ The FERC refers to the general authorizations laid down in the 1978 NGPA and section 7 of the 1938 NGA in Order No. 436.

Those transmission companies which avail themselves of the opportunities afforded in the aforementioned provisions and convey gas independently are required to offer service to everybody without discrimination (open access condition). The FERC did not specify whether it was entitled to compel the companies under its authority to take on common carriage business directly.⁶⁸ However, it is entitled to link the general transportation authorization to the proviso that all customers should be given fair and equal access. This would not turn the transmission companies into common carriers, because they would be free to decide whether or not to enter the gas transportation business. However, if they agreed to do so, they would have to agree to provide their services to everybody without discrimination. It was therefore up to them whether in their capacity as gas suppliers they wished to compete against themselves in their capacity as transporters. The Court of Appeals had described this supposedly free choice as

67. 18 C.F.R. §§ 2, 4 (1989).

68. FERC Order No. 436, *supra* note 55, at (IV) (A) (20).

“the choice between the noose and the firing squad. . . . Thus even if only one [competitor became a transporter], competition might force others [to do the same].”⁶⁹

Nevertheless, the Court upheld the FERC’s decision. It said that the fact that neither the 1938 Act nor the 1978 Act laid down common carrier requirements did not mean that the FERC could not justify this requirement within the framework of its legal authorization. Both acts were intended to prevent unjustified discrimination. Insofar as it was needed to prevent discrimination, the FERC could make agreements on transportation compulsory. Grounds for this statement are given in a detailed argument including the historical background to the acts, case law, and administrative practice.⁷⁰

The problems for the use of pipeline networks and competition in sales resulting from the transition to an autonomous market for carriage related to the production stage will now be discussed each in their relevant context and in the context of how they might be tackled in the Common Market.

V. THE COMMUNITY LEGAL FRAMEWORK FOR THE INTRODUCTION OF COMMON CARRIAGE IN THE COMMON MARKET

There are substantial differences between the Member States in the organization of their gas industries, the economic law applicable thereto, and the relevant market structures. The Member States pursue their own particular energy objectives with the help of public utilities, through the granting of exclusive rights with regard to production, exports, imports, transportation, and sales of natural gas. The market activities of the gas companies are everywhere subject to special state control. It is in this light that the Commission emphasized that the role of public control in energy must be maintained. However, there was no question that as a result of the larger market, authorization would increasingly be organized at a Community level.⁷¹ The Community refers to article 8a, added to the Single European Act in connection with article 100a, as the legal basis for the completion of the internal gas market.

1. *The Single European Act*

Under article 8a (1) the internal market should be complete by

69. *Associated Gas Distrib.*, 824 F.2d at 1024.

70. *Id.* at 997-1004.

71. *Internal Energy Market*, *supra* note 3, at para. 27.

December 31, 1992. Article 8a (2) states that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."⁷² The wording shows that the provisions of the EEC Treaty have not been altered. With a view to fulfilling the objectives of article 8a, article 100a has created a new legal basis for the harmonization of laws. Unlike article 100, whereby the harmonization of laws is achieved by means of directives, provision is made in article 100a for the "measures" required for the harmonization of laws. This means that for the purpose of harmonizing laws, both directives and regulations may be used. The objective of these measures is "the establishment and functioning of the internal market."⁷³ However, there is no provision for an extension in the scope of article 8a. The measures described in article 100a are to be taken by the Council by qualified majority, with the exception of article 100a, paragraph 2. In the case of majority decisions, article 100a, paragraphs 4 and 5 allow for a derogation for Member States, where this is necessitated by major needs as defined in article 36 or for the purposes of the protection of the working environment or consumer protection.

It should be pointed out in this connection that the Court of Justice has allowed exceptions to the principle of the unrestricted movement of goods under article 36 in order for a Member State to achieve energy objectives.⁷⁴ The most important proviso in this connection reads:

[P]etroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect.⁷⁵

The judgment is particularly significant for the energy policy of Member States because under the case law of the Court of Justice article 36 provides for the protection of non-economic interests. However, the Court applies article 36 to legislation under which consumers of crude oil products were obliged to cover a certain percentage of their re-

72. Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11 (art. 8a(2)) [hereinafter EEC Treaty].

73. EEC Treaty, *supra* note 72, art. 100a.

74. *Campus Oil Ltd. v. Minister for Indus. and Energy*, 1984 E.C.R. 2727.

75. *Id.* at 2751.

quirements by recourse to the sole state crude oil refinery. The Court ruled that:

[T]o come within the ambit of article 36, the rules in question must be justified by objective circumstances corresponding to the needs of public security. Once that justification has been established, the fact that the rules are of such nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security, other objectives of an economic nature which the Member State may also seek to achieve, does not exclude the application of article 36.⁷⁶

However, this does not affect the principle whereby under article 36 there are no specified areas reserved for the exclusive jurisdiction of the Member States. It cannot therefore be deduced from this judgment that Community law is not applicable to the energy sector.

According to the Commission and the Coopers & Lybrand Report, special emphasis is laid on the application of the rules of competition regarding the introduction and control of common carriage. Special attention should therefore be paid to its applicability to the gas industry.

2. *The applicability of the rules of competition in the gas industry*

In connection with state supervision of the gas industry, Member States often implement restrictions on competition through public or private measures. However, the fact that special rules apply in Member States does not mean that the rules on competition under Community law (articles 85-90) cannot be applied to companies in the gas industry. In a judgment dated January 27, 1987, the Court of Justice took a stance on this matter using the insurance industry as an example.⁷⁷ It first pointed out that the EEC Treaty contained an express derogation from the rules insofar as certain activities were to be excluded from the provisions on competition. Article 42 of the EEC Treaty made this provision for the production of agricultural products and trade. The insurance industry is not covered by a provision which, like this article, does not allow the application of the rules on competition or makes it dependent on a Council decision.⁷⁸ Moreover, Council Regulation No. 17 of February 6, 1962, contained all the necessary implementing provisions of all the economic activities covered by articles 85 and 86. The Court stated that the only exceptions to this are the activities covered by special provisions on the basis of article 87 of the EEC Treaty as in the case in certain transport sectors

76. *Id.* at 2752.

77. *Verband der Sachversicherer v. Commission*, 1987 E.C.R. 405 (fire insurance).

78. *Id.* at 451.

such as shipping and aircraft. However, no such exception applies in the case of the insurance sector.⁷⁹ With regard to the relationship between national economic policy pursued in areas where competition is excluded and the Community's rules on competition, the Court also states that Community law may not make the implementation of articles 85 and 86 dependent on how specific branches of the economy are legally controlled in a Member State.⁸⁰ These statements also apply to the energy sector.

Article 90 (1) states that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall not enact or maintain in force any measure contrary to the rules in the Treaty, particularly those rules provided for in article 7 and the rules on competition. The Court of Justice has inferred from this provision, and from article 5 (2) of the Treaty, that the rules on competition also apply to Member States. In a 1977 opinion, the Court rationalized this conclusion in the following manner: article 5 (2) of the Treaty states that Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. Although article 86 relates to companies, the Treaty also binds the Member States not to take or maintain in force any measures which might jeopardize the effectiveness of this provision. In this connection, article 90 provides that in the case of public undertakings to which Member States grant exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules in the Treaty, particularly articles 85 to 94. Similarly, Member States may not take any measures which will enable private companies to evade the commitments to which they are subject under articles 85 to 94 of the Treaty.⁸¹

In this way the applicability of the rules on competition to national measures which may jeopardize the useful effect of these rules has in the interim become established in the case law of the Court of Justice.⁸²

Article 90 (2) provides for a derogation from the provision of the Treaty and the rules on competition in the case of undertakings entrusted with the operation of services of general economic interest. Such companies are governed by the Treaty only insofar as the appli-

79. *Id.* at 451.

80. *Id.* at 453.

81. NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak (ATAB), 1977 E.C.R. 2115, 2169-71.

82. The Court's most recent ruling involves competitive flight tariffs. *Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, case 66/86 (1989) (not yet published).

cation of its provisions does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Although this provision does not allow the application of the rules on competition to the aforementioned companies in the event that there is incompatibility in law or in fact with the performance of their duties, it does confirm their validity.⁸³

It must now be ascertained in advance whether a refusal to transport can be seen as an infringement of article 86, with the result that the transportation requirement could be based on article 86 and, as a general provision, on article 87.

3. *Community rules on competition affecting specific sectors of industry*

Article 87 may form the legal basis for the introduction of common carriage. Under this article the Council shall, acting on a proposal from the Commission and after consulting the European Parliament, adopt any appropriate regulations or directives to give effect to the principles set out in articles 85 and 86. Article 87 (2) (c) states that the regulations or directives referred to in paragraph 1 shall define, if need be, in the various branches of the economy, the scope of the provisions of articles 85 and 86. One of these branches of the economy is the gas industry. The implementing provisions are designed to put into practice the principles laid down in articles 85 and 86. The measures laid down on this basis are to be used in connection with the rules on competition; however, they may not alter the actual content of the rules. The Community bodies have no power to change the provisions of the Treaty by means of implementing provisions. Nevertheless, the issue of regulations under article 87 provides the Council and the Commission with more scope for assessment than application of articles 85 and 86 in specific cases. The determining factor here is the connection between article 87 and the introduction of a system of undistorted competition (article 3 (f)). This basic provision contains more than just a set of programs which are not legally binding; the objective laid down therein is in fact a vital factor in the interpretation of the rules on competition.⁸⁴

With regard to the rules on competition, not only the Member States and, the enterprises are bound by the principles laid down in article 3 on the Community's activities vis-à-vis Member States and

83. Sacchi Case, 1974 E.C.R. 409, 431; 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, 3275.

84. Europemballage Corp. and Continental Can Co., Inc. v. Commission, 1973 E.C.R. 215.

companies. The general principle is laid down in article 189 (1): "In order to carry out their task, the Council and the Commission shall, in accordance with the provisions of this Treaty, make negotiations, issue directives, take decisions and make recommendations or deliver opinions."⁸⁵

It follows from the provision on competition between companies that the Community bodies are bound by the means and the objectives compatible with the system of undistorted competition and the provision laying down this system. The Court of Justice established this by means of the direct application of the rules on competition. The ruling reads as follows:

As the Court of Justice decided in its judgment of January 30, 1974, in case 127/73 (BRT/Sabam vol. 1974, 51), because the prohibitive provisions of articles 85 (1) and 86 are by their nature likely to have a direct effect on relations between individuals, they give rise directly to rights for those individuals which should be safeguarded by the courts of the Member States. If these courts were to be denied jurisdiction here by invoking article 9 of Regulation No. 17, this would mean that the individuals were being denied rights they enjoy by virtue of the Treaty.⁸⁶

The rules on competition therefore give rise to and determine the rights and obligations of competing individuals. These provisions are binding not only on companies but also on Member States which, as already mentioned, are required to refrain from taking or maintaining any measures which might nullify the practical effect of such provisions. However, the same also applies to the Community institutions. The Court of Justice provided the following in regard to competition in air transport:

Admittedly, in the preamble to Regulation No. 34976/87 the Council expressed a desire to increase competition in air transport services between Member States gradually so as to provide time for the sector concerned to adapt to a system different from the present system of establishing a network of agreements between Member States and air carriers. *However, that concern can be respected only within the limits laid down by the provisions of the Treaty.*⁸⁷

The Treaty allows the Community to introduce a common policy in specific economic sectors, e.g., agriculture (article 3d) and transport (article 3e). However, the EEC Treaty and the Single European Act make no provision for the introduction by the Community bodies of a common energy policy. The Community has the right to create an internal market free of obstacles where competition is not distorted.

85. EEC Treaty, *supra* note 72, art. 189 (1).

86. Marty-Lauder Case, 1980 E.C.R. 2483, 2500.

87. *Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, case 66/86 (1989) (not yet published) (emphasis added).

Account may also be taken in this connection of the special technical and economic characteristics of individual sectors of the economy. However, the introduction of market regulations, such as those provided for in the ECSC Treaty for coal and steel and in the EEC Treaty for agriculture and transport, are not allowed.

For this reason, there is no basis in Community law for the measures recommended in the Coopers & Lybrand report relating to tariff control and investment requirements. The Community institutions are bound by the rules under Community law to regulate competition. Consequently, the area of validity of the provisions on undertakings in articles 85 through 90 needs to be distinguished from the Community's authority to harmonize laws under article 100a in connection with article 8a. The rules on competition are among the provisions not affected by article 8a in connection with article 100a. It is also essential that a distinction be made between the respective scope of these provisions because the special procedural provisions and the Member States' rights of reservation in article 100a (4) and (5) relate only to the measures under article 100a and not to the rules on competition. It is, therefore, necessary to ascertain whether the Transit Directive is covered by article 100a or whether it falls under the provisions of the rules on competition.

In the Commission's proposed general system of common carriage, the requirements in question are imposed on undertakings. The legal question here is whether the introduction of common carriage in the Common Market is appropriate for the implementation of the principles laid down in articles 85 and 86. However, prior to examining this question, it should be ascertained whether there are obstacles to the free movement of goods in the gas industries of the Member States, because these are the trans-frontier economic activities free of any obstacles which companies and Member States may not seek to influence by means of restrictions on competition.

VI. ACCESS TO THE MARKET IN THE COMMUNITY GAS INDUSTRIES

The common aim of the rules on competition and the provisions for free unrestricted movement of goods, open rights of establishment, and barrier-free services is to provide access to Community markets without any distortion in competition. Despite this systematic context, account has to be taken of differences in individual circumstances, procedures, and legal implications when Community law is applied. The Commission and the Coopers & Lybrand report cite the introduction of common carriage as a means of providing access to the

gas market. However, no mention is made of the other means of direct access to the market specific to the gas pipeline companies, viz., authorization to construct pipelines.

1. *Freedom of establishment*

If nationals of a Member State wish to construct and operate a gas pipeline in another Member State, they thereby lay claim to the right of establishment. Article 52 calls for the abolition of restrictions on the free establishment of nationals of any Member State in any other Member State under the conditions laid down for its own nationals (paragraph 2). Under article 54, paragraph 3e, the right to establishment also includes the acquisition and use of land and buildings in the territory of a Member State by nationals of another Member State. The Court of Justice ruled that when the transition period comes to an end, article 52 will be directly applicable.⁸⁸ It applies the prohibition of discrimination on the grounds of nationality (article 7) to the specific area of the right of establishment. A consequence of this is the obligation of national treatment. Accordingly, such restrictions on the right of establishment do not run contrary to the Treaty which apply in exactly the same way to nationals and nationals of other Member States.⁸⁹

If a Member State reserves the right of constructing and operating gas pipelines to itself, this does not constitute an infringement of article 52, because the resulting restriction applies equally to a Member State's own nationals and nationals of other Member States.

2. *Free movement of goods*

The prohibition of the same effect as quantitative restrictions (article 30) applies according to the *Dassonville* ruling to "any trade agreement between the Member States which is liable to hamper trade within the Community either directly or indirectly in practice or in principle."⁹⁰ An exception is made for obstacles which are needed to meet urgent requirements. According to the case law of the European Court of Justice, such obstacles include effective tax control, the protection of fair trade, and consumer protection.⁹¹ The *Cassis de Dijon* ruling implies that action by Member States which hampers natural gas exports or imports is not allowed. Such action includes, for exam-

88. *Reyners v. Belgium*, case 2/74, 1974 E.C.R. 631.

89. *Robert Fearon & Co. v. Irish Land Comm'n*, 1984 E.C.R. 3677.

90. *Procurer du Roi v. Dassonville*, 1974 E.C.R. 837, 852.

91. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Brantwein (Cassis de Dijon)*, 1979 E.C.R. 649.

ple, the possibility under British law of making an authorization to produce gas dependent on the requirement of landing gas first in the United Kingdom.

Article 37 contains a special provision on State monopolies of a commercial character. The provision requires Member States to adjust any State monopolies of a commercial character so as to ensure that, when the transitional period has ended, no discrimination regarding the condition under which goods are procured and marketed exists between nationals of Member States. The Coopers & Lybrand report states:

[T]here are in the European gas industry a number of statutory monopolies, exclusive rights, and preferential treatments which appear inconsistent with the principle of free circulation of natural gas within the Community, particularly if a common carriage system were to be established. Failure to address these would leave a situation of uneven, partial, and unfair competition in the gas industry, given the favorable legal treatment of certain enterprises in certain Member States.⁹²

A distinction should be made between the question of whether national regulations obstruct international transport and the completely separate question of whether common carriage can be justified under Community law. The following is a summary of the most important provisions of the Member States on natural gas imports, exports, transportation, and distribution.

3. *Legal provisions in the Member States relating to exports, imports, transportation, and distribution*

In Belgium, DISTRIGAZ, a public company with a fifty percent government stake, has sole rights to store and transport natural gas by means of a pipeline irrespective of the gas' origin. It is the only Belgian importer of natural gas, selling natural gas to local distribution companies and large industrial consumers. Local distributors with varying legal status and structures are responsible for supplying households and commerce.⁹³

The structure of the natural gas market in the FRG is characterized by the previously described system of closed supply areas which are protected against restrictions on competition by exemptions from the legal provisions. There are no legal restrictions on the importing

92. *Coopers & Lybrand report, supra* note 25, at para. 5.32.

93. Commission of the European Communities, *National Laws and Regulations Relating to the Natural Gas Industry*, 4, 10 (1988) [hereinafter *National Legal Provisions*]; Energy Advice Limited, *The Belgium, Dutch, French, Italian and West German Gas Industry, with particular reference to regulation and pricing*, 3 (1988) (prepared for the Office of Gas Supply) [hereinafter *Energy Advice Limited*].

or exporting of natural gas.⁹⁴

In Denmark, the national natural gas company Dansk Naturgas A/S has sole franchise to import, trade, transport, and store natural gas under Law No. 294 of June 7, 1972, on natural gas supply. However, the law does not apply to the local sale of natural gas which, in order to be resold, requires an authorization from the owner. Amendment No. 330 of June 29, 1983 to law No. 258 of June 8, 1979, on the distribution of heating also provides that the sale of natural gas by regional gas distribution companies to consumers who buy a specified minimum amount each year should proceed along standard lines throughout the country agreed by Dansk Naturgas and approved by the Minister of Energy.

In France, two public companies have a legal monopoly on the export, import, transport, and delivery of natural gas: the Société Nationale des Gaz du Sud Ouest, a subsidiary of SNEA/P and Gaz de France, in southwestern France; and Gaz de France in the rest of France. A few local supply companies which deliver natural gas to private households and commercial establishments are exempt from this monopoly.⁹⁵

In Ireland, the construction and operation of pipeline systems and the transportation, delivery, and distribution of natural gas are in the hands of the Irish Gas Board under the 1976 Gas Act.⁹⁶

In Italy, SNAM, a public undertaking of the ENI Group, does not have a legal monopoly on gas imports and supplies. However, in the Po Valley, under Law No. 136 of February 10, 1953, ENI has the sole right to construct and operate pipelines for the transportation of national hydrocarbons. Furthermore, under Law No. 613 of July 21, 1967, ENI also has an option on liquid and gaseous hydrocarbons on the continental shelf. SNAM supplies all the available natural gas (approximately ninety-eight percent in 1986) to final consumers (large industrial consumers and power stations) and to over 700 local companies having various legal forms and structures. The latter supply households, businesses, and industrial concerns up to a certain amount.⁹⁷

In Luxembourg, natural gas is imported and transported by the Société de Transport de Gaz SOTEG SA in which both the government and two steel companies have a fifty percent stake. SOTEG sup-

94. Energy Advice Limited, *supra* note 93, at 3f (West Germany).

95. *See id.* at 32, 33, 40, 41; Energy Advice Limited, *supra* note 93, at 3f (France).

96. *See* National Legal Provisions, *supra* note 93, at 44.

97. *See id.* at 50; Energy Advice Limited, *supra* note 93, No. 3.1 (Italy).

plies the three local distribution companies and large industrial consumers.⁹⁸

In the Netherlands, NV Nederlandse Gasunie, in which the government has a fifty percent stake and two oil companies have the remainder, has a monopoly on the export, import, and supply of natural gas to power stations, large industrial consumers, and local distribution companies.⁹⁹

In Spain, a franchise is required from the authorities for the transportation and supply of natural gas. This authorization is issued by the Ministry for Industry and Energy in the case of gas pipelines and by the autonomous communities in the case of local distribution networks.¹⁰⁰

I have already outlined the structure of the gas market in the United Kingdom. British Gas is currently the only gas supplier authorized by the government.

4. *The application of article 37 to the gas industry in the Member States*

Article 37 is particularly important for interpretation of the aforementioned Member States' provisions under Community law. It applies to state monopolies and institutions if they "first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly. . . play an effective part in such trade."¹⁰¹ Article 37 (1) (2) defines the bodies which require adjustment under paragraph 1 to ensure that there is no discrimination:

[T]he provisions of this article shall apply to any body to 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. This provision will be directly applicable once the transitional period has been completed. It will also continue to be applicable after this time if the monopoly has in fact been adjusted but the effects of the remaining exclusive rights still lead to discrimination.¹⁰²

The adjustment requirement laid down in article 37 (1) is intended to prevent any discrimination in conditions relating to supply and sales. The Court of Justice interprets article 37 using the principles relating to the guaranteed, unrestricted movement of goods. This applies in

98. See National Legal Provisions, *supra* note 93, at 56-57.

99. See *id.* at 61; Energy Advice Limited, *supra* note 93, No. 3.1 (Netherlands).

100. See National Legal Provisions, *supra* note 93, at 65-66.

101. *Costa v. Enel*, 1964 E.C.R. 585, 598.

102. *Hansen GmbH v. Hauptzollamt Flensburg*, 1979 E.C.R. 935, 952.

particular to discrimination, the definition of which corresponds to the measures of the same effect as quantitative restrictions under the *Dassonville* rule. Under case law, the type of discrimination defined and prohibited by article 37 still exists if the state body has an exclusive right to import gas. Consequently, all state monopolies of a commercial character must be adjusted by the end of the transitional period in such a way that there is no longer an exclusive right to import gas from other Member States.¹⁰³ The same also applies to exclusive rights to export gas to other Member States. However, article 37 applies only to trade between Member States. In the case of products imported from non-EEC states, it is the provisions on trade policy rather than on the internal market which apply.¹⁰⁴

In order to define article 37 in relation to other provisions of the Treaty, particularly the rules on competition, the Court of Justice ruled that article 37 should apply if the provision or activity is by its nature connected with the specific function of the monopoly.¹⁰⁵ It follows that article 37 does not apply to those restrictions on trade which still exist without a monopoly position.¹⁰⁶ It further follows from these rulings that exclusive rights to import or export natural gas issued to certain bodies by the Member State constitute a monopoly of a commercial character under article 37. Exclusive rights to import and export natural gas have ceased to exist with the end of the transitional period.

However, article 37 does not affect the exclusive rights to import gas from Algeria and the Soviet Union because the adjustment requirement relates only to trade between Member States. In the case of Norway, a different provision might apply because of the free trade agreement signed with the Community.¹⁰⁷ However, the Agreement contains no provision equivalent to article 37 with the result that there is no adjustment requirement with regard to trade with Norway.

The application article 37 to bodies in the Member States does not impose any transportation requirements on these bodies. The transportation of gas constitutes a service provided to other parties. It is not included in the specific functions of the aforementioned bodies. Nor does the refusal to transport gas for third parties constitute dis-

103. *Pubblico Ministero v. Manghera*, 1976 E.C.R. 91, 101.

104. *Hansen & Balle GmbH v. Hauptzollamt Flensburg*, 1978 E.C.R. 1787, 1806 (Hansen I).

105. *See S.A. des Grandes Distilleries Pereux v. Services Fiscaux de La Haute-Saone et du Territoire de Belfort*, 1979 E.C.R. 975, 986.

106. *Hansen*, 1978 E.C.R. at 1806.

107. *Regulation (EEC) No. 1691/73 of the Council of June 25, 1973*, 16 O.J. EUR. COMM. (No. L 171) 1 (1973) (agreement between the European Economic Community and the Kingdom of Norway).

crimination in the conditions of supply and sale, provided this activity is not performed for the State's own nationals.

VII. RULES ON COMPETITION

In order to establish and define common carriage, the Commission and the Coopers & Lybrand report again refer to the rules on competition. Reference should be made to the following points: (1) the application of the rules on competition and in particular of article 86 in the event of a refusal by a company to transport gas in a specific case; (2) the implementation of the provisions laid down in articles 85 and 86 by directives or regulations in accordance with article 87; and (3) the application of the rules on competition to Member States in the case of companies to which they grant special or exclusive rights (article 90(1) in tandem with article 90 (3)). Ultimately, the rules on competition are intended to serve the Community's overriding aim of setting up a system which will prevent distortion of competition in the Common Market. The Community also must take account of the goal of harmonizing laws where such measures are designed to ensure the proper operation of the Common Market and the completion of the internal market. In this respect article 100a, added under the Single European Act, has, as already explained, not resulted in any change.

1. *Exceptions to the application of the Treaty under article 90(2)*

The derogation from the provisions of the EEC Treaty provided for in article 90 (2) may be applicable to companies in the gas industry. Under this derogation, the provisions of the EEC Treaty and the rules on competition apply to undertakings entrusted with the application of services of a general economic interest only 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 Court of Justice initially interpreted article 90 (2) as confirming the validity of the Treaty, particularly regarding the rules on competition in respect of the companies referred to therein. The direct applicability of the rules on competition to companies performing services of a general economic interest remains unaffected: "even within the framework of Article 90, therefore, the prohibitions of Article 86 have a direct effect and confer on interested parties rights which the national courts must safeguard."¹⁰⁸

However, the rules on competition are applicable only insofar as

108. Sacchi Case, 1974 E.C.R. 409, 432 (preliminary ruling); see *Télémarketing (CBEM) SA*, 1985 E.C.R. at 3275.

they are compatible with the performance of the particular tasks assigned to the companies under national law. In this connection, the Court of Justice again ruled that at the current stage of integration, article 90(2) is not a suitable means of establishing individual rights which the courts of the Member States will have to safeguard. It argued:

Article 90 (2) provides that undertakings entrusted with the operation of services of general economic interest shall be subject to these rules, and 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 those undertakings, but subject to the condition that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.¹⁰⁹

The Commission is empowered to perform this task under article 90(3). It is also for the Commission alone to decide whether the performance of particular tasks is obstructed in law or in fact by the application of Community Law.

It should then be considered systematically and procedurally in advance whether a refusal by an interregional gas supply company to transport gas constitutes an infringement of article 86. It can then be considered on this basis whether the establishment of a general transportation requirement in line with article 87 is likely to contribute to the implementation of the principles laid down in articles 85 and 86. Only if this is the case, *i.e.*, if there is a requirement for common carriage under Community law, could it then be considered whether such a requirement is compatible with the interest of the Member States referred to in article 90(2).

2. *Article 86 in a system of undistorted competition*

The importance of article 86 to the establishment of common carriage should be discussed with respect to those questions that are relevant to the interpretation of the provision as part of the system of undistorted competition. However, consideration does not need to be given to those matters which are important only in connection with the application of article 86 to individual cases.

The rules on competition, and particularly article 86, apply to undertakings. The important question is whether an independent activity is being performed. The type of organization, intentions as regards profits, and the legal definition of the activity under the law of Mem-

109. *Ministère Public of Luxembourg v. Hein "Hafen von Mertert"*, 1971 E.C.R. 723, 730; see also *Syndicat National des Fabricants Raffineurs d'Huile de Graissage v. Groupement d'Intérêt Economique "Interhuiles"*, 1983 E.C.R. 555, 567.

ber States are of little importance.¹¹⁰ According to the above, there is no doubt that gas suppliers in the Common Market are enterprises within the meaning of the rules on competition.

In order to ascertain whether a company has a dominant position in the Common Market or a substantial part of that market, the market needs to be defined both in terms of the product and its geography. "The opportunities for competition under article 86 of the Treaty must be considered having regard to the particular features of the product in question with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogenous for the effect of the economic power of the undertaking concerned to be able to be evaluated."¹¹¹

A dominant position is deemed to exist in this defined market if a company has "a position of economic strength. . . which enables it to prevent effective competition being maintained on the relevant market. . . affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately its consumers."¹¹²

For the purposes of this examination, the company's structure and the conditions governing competition should be considered. However, there is currently no market in the Common Market for common carriage. Such a market is to be created by interregional gas supply companies being compelled to act as common carriers in order to improve access to the natural gas market. It should be ascertained through the case law of the European Court of Justice, therefore, how a refusal to conduct business should be judged if it constitutes an obstacle to market access.

The Court of Justice defines abusive practice as an objective term relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.¹¹³

110. *Van Landewyck Sàrl v. Commission (Fedetab)*, 1980 E.C.R. 3125; *Italy v. Commission*, 1985 E.C.R. 873; *Bureau national interprofessionnel du cognac (BNIC) v. Clair* 1985 E.C.R. 391, 423.

111. *United Brands Co. v. Commission (Chiquita bananas)*, 1978 E.C.R. 207, 270; *Europemballage Corp. v. Commission*, 1973 E.C.R. 215.

112. *Hoffman-La Roche & Co. v. Commission*, 1979 E.C.R. 461, 520; *NV L'Oréal v. PVBA De Nieuwe AMCK*, 1980 E.C.R. 3775, 3793; *United Brands*, 1978 E.C.R. at 286.

113. *Hoffman-La Roche*, 1979 E.C.R. at 541.

Refusal to deliver by a company in a dominant market position may be an infringement of article 86 if it is intended to reduce the potential for competition of other parties and to strengthen the company's own dominant position.¹¹⁴ The same applies to a refusal to conduct transactions with the aim of preventing goods from being re-imported.¹¹⁵ Further references to market domination and access to markets can be found in the Court's *Solvents Corporation* judgment.¹¹⁶

In *Commercial Solvents*,¹¹⁷ an Italian company, the subsidiary of an American producer of raw materials and intermediate products for the production of medical drugs, sold U.S. produced aminobutanol in the Common Market 1970. Aminobutanol is an intermediate product which is needed to produce ethambutol. Ethambutol is a medicine used in tuberculosis therapy. One of the purchasers of aminobutanol was, for some years, an Italian producer of medications. After 1970 Commercial Solvents changed its business policy because it wanted to produce the final product ethambutol itself and instructed the subsidiary operating in the Common Market to stop supplying the intermediate product aminobutanol to third parties.

The Court of Justice went along with the Commission's argument that the market for raw materials required to produce an article should be distinguished from the market for the end product: "An abuse of a dominant position on the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw material are sold and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market."¹¹⁸

Commercial Solvent's decision to stop supplying the intermediate product on the market is interpreted by the Court of Justice not in connection with the definition of the relevant market but in relation to abusive practices: ". . . [a]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position."¹¹⁹

By comparing previous market behavior with current market be-

114. *United Brands*, 1978 E.C.R. at 286.

115. *British Leyland Public Ltd. v. Commission*, 1986 E.C.R. 3263, 3303.

116. *Instituto Chemioterapico Italiano and Commercial Solvents Corp. v. Commission*, 1974 E.C.R. 223.

117. *Id.* at 249-50.

118. *Id.* at 251.

119. *Id.* at 251.

havior, the Court of Justice therefore inferred that the aim was to restrict competition. A company with a dominant market position which has opened up the market may not withdraw from such a market if its aim is to force out a customer which has become a competitor as a result of a change in its policy. However, a refusal to supply may be justified by a genuine limit on capacity.¹²⁰

Control of abusive practices is designed to protect remaining competition from any further restrictions on the dominated market. This criterion also governs the assessment of a refusal to transport gas and the possibility of establishing a general requirement for common carriage on the basis of article 87. The contentious point which was often raised at the outset of European integration as to whether article 86 was actually intended to combat restrictions on competition or to establish a permanent government supervisory body as did the Public Utility regulation, has been superseded by the aforementioned case law of the Court of Justice. Under article 86, control of abusive practices is directed against individual acts restricting competition. However, the existence of a dominant market position does not prevent the company from "protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said needs."¹²¹ If the company with a dominant market position has not carried out such activities in the past and is not currently doing so in other geographically separate markets, it can be assumed that this is rational business practice without any associated aim of restricting competition.

A similar importance is attached to the protection of remaining competition on the dominated market. This competition, which is protected against interference by the dominant company, is an indication of the competition which is economically possible. Consequently, prohibition of business practices by the dominant company aimed at restricting this competition is also compatible with the system of genuine competition. However, there is no such obvious link between control of abusive practices and maintenance of effective competition in the case of a refusal to transport gas for other parties.

Separate consideration should therefore be given to whether the requirement to transport gas for other parties in exchange for payment is compatible with a system of genuine competition. It should be considered whether it is possible through such an obligation to create gen-

120. *Id.* at 251.

121. *United Brands*, 1978 E.C.R. at 293; see also 38 WIRTSCHAFT UND WETTBEWERB 257 (1988) (WuW/E EV 1265).

uine competition on the gas market. If this were so, it would not mean that interregional gas supply companies would be under an obligation to contribute to the creation of competition. Companies with a dominant market position are not required to create potential competition. However, they may be compelled to abandon practices restricting potential competition.

VIII. COMMON CARRIAGE IN THE COMMON MARKET

The introduction of common carriage is designed to make business activities — which have thus far been part of an overall business policy — independent to some extent and thereby open the market to competition. The aim is to create independent markets for gas at source and gas transportation. The division of previously integrated business activities makes it necessary to study separately the foreseeable effects on individual market areas and the companies concerned. On this basis, the merits of the proposed arrangement should be weighed in the light of the situation as a whole. A distinction should be made between the effects on production and those on sales. It should not be taken for granted that the interregional gas supply company itself will be interested in transportation. Consequently, the conditions which they will be required to meet, if necessary, in order to act as common carriers in addition to their own activities need to be laid down officially. The ensuing problems should be dealt with separately.

The foreseeable effects of common carriage on the Common Market should be assessed in the light of UK and American experience. One must consider the differences in the organization of the market, market structures, and the aforementioned governmental supervision of the gas industry.

1. *The effects of common carriage requirements on production*
 - a. Market for gas at source

The Community intends to create an independent gas market via common carriage requirements to ensure both that gas consumers have a greater choice through direct access to the resource and that purchase prices are thereby reduced. The Commission thinks that the next stage in this process could be to reflect the current trend toward a genuine Common Market in energy; even a European purchase price is anticipated.¹²²

In this respect the Commission seems to some extent to be turning

122. *Natural gas annex, supra* note 8, at 60.

towards the model in the United States and Canada which it cites in paragraph 1 of the document to show that a common energy market can have positive implications in federal states. The ability of this new market to function will depend on the market structure. The most important differences between the United States and the Community Member States, lie in the market structure of the gas industry. The producers' market in the United States is intensely competitive. There are many producers, none of which has a dominant market position. There are few obstacles barring access to gas production. Production companies are, to a large extent, legally and economically independent of the gas transmission companies. Because of the highly developed pipeline network, a number of gas transmission companies often play the role of customer. The gas transmission companies' monopoly on demand vis-à-vis production companies is a thing of the past.¹²³

Under these conditions and as a result of the FERC's policies, independent markets for gas at source, common carriage, and storage capacity have developed in the United States. Only if such prerequisites for effective competition are fulfilled is it at all possible to maintain a constant supply of gas through short term transactions.

Experience in the United Kingdom confirms the key role played by market structure and the cooperation of production companies and gas consumers to develop an independent market for gas and common carriage. The aim of the recommendations made by the Monopolies and Mergers Commission is not to develop a spot market for gas; it is gradually to subject British Gas, in its role as sole customer of the production companies, to a minimum amount of competition within the gas industry.¹²⁴ It is not expected that the trend in the United States will be reflected in the Common Market, where conditions are completely different.

b. Delivery of natural gas from non-EC States

With regard to the Commission's proposed changes to conditions governing the market and competition, a distinction should be made between access to gas fields in the community and in other states. Under the Community's energy policy projections, the purchase of natural gas from other states is of vital importance to the supply of the Community as a whole. The Commission estimates that the Commu-

123. FEDERAL TRADE COMMISSION FINAL REPORT TO THE SENATE ON ECONOMIC CORPORATE OPERATING AND FINANCIAL PHASES OF THE NATURAL GAS PRODUCING, PIPELINE, AND UTILITY INDUSTRIES 588-601.

124. *Coopers & Lybrand report, supra* note 25, at 136, para. 6.21.

nity will become increasingly dependent on imports.¹²⁵

The Community is dependent on imports for the supply of forty percent of its natural gas. However, this takes into account the fields in the Netherlands and the United Kingdom. Dependence on imports is much higher in individual Member States. The Commission estimates that in 1990, imports from non-EC States (Algeria, Norway, and the USSR) would account for 41.3 percent of gas requirements in the FRG, 80.8 percent in France, 64.4 percent in Italy, 60.0 percent in Belgium, and 62.5 percent in Spain. Unlike the Netherlands and the United Kingdom, the share accounted for by self-supply in these countries is minor.

The percentage accounted for by imported natural gas in the Community's Member States is so high that it plays a decisive role with regard to supply, market structure, and conditions governing competition. The Community's energy policy has to take account of the implications for relations with the supplier countries. In these countries, production and sales of natural gas are subject to state monopolies. The Community bodies cannot influence such monopolies by legal means. It is not expected that these state monopolies will be changed by privatization or an unrestricted access to gas exploration and production. However, common carriage would give these organizations additional bargaining power.

This is in conflict with the aim of the Community's energy policy, as expressed by the Council, to reinforce the competitiveness of European gas industry compared with non-EC States. The Commission has described the internal market as a means of improving competitiveness in a world which is increasingly open to competition. The Commission concludes that the strategic nature of energy and the international dimension of the energy sector will affect the Community's relations with other states. However, the Community's inclination to free trade must not backfire on the Community and turn it into a free trade dumping ground.¹²⁶

The economic consequences of these considerations will not be discussed here. However, the requirement that European interregional gas supply companies act as common carriers is likely to jeopardize their competitiveness vis-à-vis other states. It cannot be predicted how the aforementioned producing states will use their increasing bargaining power. The Coopers & Lybrand Report says that one of the producing states could try to "obtain a higher market share by reducing

125. *Communication on Natural Gas*, *supra* note 13, at 9.

126. *Internal Energy Market*, *supra* note 3, at 26-27.

prices it charged to consumers purchasing direct."¹²⁷ This possibility is highly speculative, because the structure of the international gas market is oligopolistic and oligopsonistic.

In view of the production structure, the recommendation¹²⁸ that gas transmission companies be required to make available certain percentages of their sales — initially five percent and ten percent and ultimately fifteen to twenty-five percent—for common carriage is rather unrealistic. The Monopolies and Mergers Commission told British Gas to contract on a fixed basis no more than ninety percent of estimated production in its agreements with producers so as to make participation in the common carriage system easier for producers. Given the structure of the national producer's organizations, it is highly unlikely at present that competition at source will be able to develop on this basis.

c. Long-term supply agreements including take-or-pay requirements

Market conditions relating to gas production and sales are influenced by the need for long-term business planning. This applies to the exploration and development of gas fields, the construction of pipeline systems, and distribution. In order to make it possible to calculate the amortisation of investment costs for producers, minimum-pay or take-or-pay requirements are laid down in the supply contracts, just as they are in the American gas industry. These provide that a minimum amount of gas must be paid at the agreed prices irrespective of the amount actually delivered. Common carriage requirements may increase the burden of the pipeline owner as a result of the minimum-pay requirement if common carriage were to bring about a reduction in the owner's revenue to such an extent that the minimum offtake was not reached. In addition to the earnings lost by the owner as a result of the difference between sales revenue and a common carriage fee, there would be the continued obligation to pay the purchase price for the quantity of gas covered but not taken under the minimum-pay requirements and not sold. These conditions will often be satisfied if the transported gas is supplied to customers who were previously supplied directly or indirectly by pipeline owners and whose deliveries were planned and were part of the minimum-pay requirement.

While these problems can, in the U.S., be traced back in part to unsuccessful regulation policies, they do show the vital importance of

127. *Coopers & Lybrand report, supra* note 25, at paras. 6.19, 6.20.

128. *Id.* at para. 6.56.

common carriage for relations between producers and interregional gas supply companies. It is only within these confines that matters connected with the fulfillment of take-or-pay requirements are discussed.

The American experience illustrates the problems which arise as a result of a parallel purchase and transportation system. When the National Gas Policy Act of 1978 released producers from supervision by the authorities, the aim was to enable them to exercise their own interests as suppliers freely on the market. Encouraged by the national energy policy and the FERC, gas transmission companies tried to secure long-term sources of supply. The chief way of doing this was long-term supply contracts with strict take-or-pay requirements. Producers were not prevented from charging high prices and gas transmission companies were willing to pay, because they were not prevented, either legally or economically, from passing on such prices to consumers. This is the reason for high prices in conventional distribution systems. Take-or-pay requirements are an obstacle to the adjustment of the gas transmission companies' sales policies to changes in market conditions. The Court of Appeals pointed out the conflicts arising in this connection:

At the heart of the industry's immediate problem is the discrepancy between the average cost of gas that pipelines have under contract and the much lower price of gas now available at the wellhead. The essence of that discrepancy is the same whether the pipelines buy over-priced gas and thereby incur take-or-pay liabilities.¹²⁹

The FERC's decision in Order No. 436, in effect, made the interregional gas supply companies run the entire risk of taking a loss. In particular, they were not entitled to accede to requests for transportation from producers simply because the latter were prepared to moderate their claims contained in earlier take-or-pay requirements. The Court of Appeals quashed this part of the decision. In contrast to the legal interpretation of the authorities, it ruled that the transmission companies were entitled to make the producers' access to pipelines dependent on their willingness to cooperate on the adjustment of hitherto unfulfilled take-or-pay requirements. Restricting the access of producers who insisted on the wording of the contracts did not constitute unjustified discrimination.

Subsequent to the quashing of this part of Order No. 436 by the Court of Appeals, the FERC issued Interim Rule No. 500 on July 8, 1987, to ensure the continuation of the non-discriminatory supply of

129. *Associated Gas Distrib. v. Fed. Energy Reg. Comm'n*, 824 F.2d 981, 1021 (D.C. Cir. 1987).

transportation services, and bring a solution to the take-or-pay problem nearer.¹³⁰ As a temporary solution to the take-or-pay problem, gas transmission companies would be able to make access to gas transportation dependent on the producer's inclusion of the conveyed gas in the offtake minimum of the take-or-pay requirements in delivery contracts concluded before June 23, 1987. While this "crediting provision" would not resolve the take-or-pay problem completely, it would make the transition from gas sales to gas transportation easier. The FEREC anticipated that the parties concerned will mutually agree to adjust delivery contracts to reflect changes in market conditions. The FEREC also called upon interregional gas supply companies to define examples of gas common carriage fees and to submit them for approval. The FEREC hopes that this will prevent the take-or-pay problem from arising again because all of the parties concerned would have to be more careful in estimating future requirements and entering into contracts. This highlights the conflict between the development of laws for a spot market for gas and requirements promoting long-term security of supply. These "gas supply inventory charges" enabled gas transmission companies to pass on costs of fixed delivery commitments to their customers and to renege on commitments already entered into if the customers were unwilling to bear the costs allocated to them.

d. Obligation to contract with regard to gas producers
in non-EC States

The specific Community law questions arising as a result of a carriage obligation with regard to non-EC States are not mentioned by the Commission or the Coopers & Lybrand report. The report refers to the problem of reciprocity which might arise if Norwegian gas were transported using the common carriage system through the continental grid. Gas produced in the Community could not then be refused access on similar terms to Norwegian offshore networks.¹³¹

When the Commission expressed its desire that consumers be allowed access to the resource, no consideration was given to the reciprocity requirements mentioned by Coopers & Lybrand which would provide non-EC States access to the Common Market by means of the obligation to contract at the expense of Community companies. The requirement to make the pipeline system available for carriage works in favor of the gas consumers purchasing directly and other interre-

130. See FOSTER REPORT NO. 1631 (1987); FOSTER REPORT NO. 1632 (1987).

131. See *Coopers & Lybrand report*, *supra* note 25, at 151.

gional gas supply companies in the case of transit and production companies. Under Community law, it is of secondary importance whether the transportation contract is concluded by the gas consumer purchasing directly, by other interregional gas supply companies, or by the producer. Whether ownership is transferred at the source or at the destination is also of secondary concern. In any event, non-EC States are legally entitled to use the pipeline system of Community interregional gas supply companies even if the latter do not wish it. This extraterritorial application of Community law at the expense of Community companies is wider in scope than the extraterritorial application of the rules on competition in individual cases. The general requirement to make the network available for transportation purposes does not constitute action against certain activities restricting competition. Instead, non-EC States have been given a privileged legal status which would, from the outset, prevent genuine reciprocity for economic and legal reasons. Nor can the provisions relating to the free movement of goods and article 100a constitute a basis for an obligation to transport gas in relation to non-EC States. According to the case law of the Court of Justice, the freedoms guaranteed under the Treaty relate solely to trade within the Community and not to trade with other States.¹³²

As provided for under article 59 (2), the freedom to provide services is restricted to nationals of the Member States. Consequently, the establishment of common carriage with regard to non-EC States does not relate to the completion of the internal market or competition policy, but is a matter of general trade policy.

2. *Effects of common carriage on distribution*

The Commission intends initially to introduce common carriage for transmission and distribution companies. In the light of the experience gained, it will then decide whether the same system could include large industrial consumers.

a. The benefits of common carriage for distribution companies

The benefits of common carriage for distribution companies depend on the organization of gas sales. In this respect, there are substantial differences between the markets of the Member States. In the UK, the whole pipeline network, including local distribution networks, is operated by British Gas. The same is broadly true in France, where Gaz de France has a network covering sales to final consumers.

132. *Polydor Ltd. v. Harlequin Record Shops Ltd.*, 1982 E.C.R. 329, 348.

However, in other Member States, final consumers are mainly supplied by economically autonomous supply companies operating at the regional and local levels. Another difference is whether large industrial consumers are supplied by distribution companies or by gas transmission companies directly. As a result of these differences in the organization of sales, the granting of carriage rights to distribution companies which is being considered by the Commission would proceed solely in those Member States where such companies actually exist.

b. Common carriage and closed supply areas

Where there are closed supply areas, the introduction of common carriage presupposes that local and regional monopoly positions will cease to exist. Only in this way will interregional gas supply companies be able to compete with distribution companies wishing to benefit from common carriage or with producers in supplying large industrial consumers. American experience has shown that common carriage can help stimulate competition only if it is combined with the abolition of the protected area. This is the reason why the reorganization of the gas industry provided for by the FERC in Order 436 has encountered stiff opposition from the local distribution companies (LDC's). They are afraid that the interregional gas supply companies will use the simplified procedure introduced by the FERC to penetrate their closed sales areas. Under the system of closed sales areas, a gas distribution company usually requires a Certificate of Convenience and Necessity in accordance with individual state laws, while the requirement that competing firms be authorized is generally waived. Thus, the relationship between federal law and public utility regulations in the individual states raises constitutional questions. Delimitation is also revealing as regards the relationship between Community law and the legislation of Member States.

Paragraph 1(b) of the 1938 NGA made the Federal Power Commission (now FERC) responsible for the trans-frontier transportation of natural gas, sale for resale, and the companies operating in these areas, whereas the individual states remained responsible for regulation of public gas supply. Under Order No. 436, the FERC has sole authority to approve the interstate transportation of natural gas if sales are taken away from local distribution companies ("by-passing"). Individual states are no longer authorized to assess the transaction themselves.¹³³

133. *National Steel Corp. v. Long*, 689 F.Supp. 729 (W.D. Mich. 1988).

In the court proceedings scrutinizing Order No. 436, representatives of the local and regional distributors argued that the provision would destroy the system of closed distribution areas in each state because they would be by-passed. Although the court anticipated lasting effects on competition in distribution, it felt that these were justified. However, where losses incurred by the local distribution companies were economically justifiable, there was the risk that they would be borne not by shareholders but by remaining customers, particularly "captive residential customers." Individual states now had sufficient resources to prevent this. However, the supply areas would not be penetrated if local distribution companies supplied their industrial customers at competitive prices or transported gas on their behalf.

The ruling illustrates the main economic and legal viewpoints which are vital to the assessment of the effects of common carriage in the Common Market and are also detailed in the Coopers & Lybrand report. A decision with important consequences for competition and energy policy is whether the national systems of closed supply areas should be abolished in the Member States or under Community law. Such areas may be covered by contracts under private law or franchises and may be linked to an authorization to use land. A general assessment is not possible because of the wide variety of arrangements in Member States. However, as is stated in the Coopers & Lybrand report, the introduction of common carriage presupposes the abolition of closed supply areas.¹³⁴

3. *Requirement for regulation in connection with common carriage*

When assessing obligations with respect to common carriage, account has to be taken of the need for regulation generated by such a policy. The UK and American experiences have shown that legally defined common carriage obligations give rise to serious problems in regulating production companies, gas transmission companies, and regional distributors. The problems relate *inter alia* to carriage tariffs and the allocation of pipeline capacity if demand exceeds supply.

a. *Common carriage tariffs*

The authorities will need to set the tariffs because the performance of such activities conflicts with the gas transmission companies' own commercial interests. It is not possible to predict in general terms the criteria laying down these tariffs because they have to be linked to the

134. The Commission's proposed Transit Directive will be dealt with separately. See *infra* note 142 and accompanying text.

tariffs governing the interregional gas supply company's own activities.

In the UK, British Gas is required to publish the criteria for the calculation of transportation charges. Agreement is supposed to be reached on this basis with the companies using common carriage facilities. If no agreement is reached, the charge is set by the Director General of Gas Supply. To prevent it from undercutting competition from companies using common carriage, British Gas is obliged to issue price lists from which it may not deviate in individual cases. For the same reason, British Gas itself seeks to ensure that information on prices which it inevitably receives from producers during negotiations on common carriage is not used for sales policy purposes.

The FERC's policy in the United States has given rise to similar questions. Under Order 436, the FERC demands that gas tariffs and gas transport tariffs be "unbundled." It has also allowed companies to offer individual reductions on list prices if this is required to set competitive prices. A gas transmission company which in a particular case does not wish to charge the maximum tariff must inform the authority of the relevant maximum tariff, the amount actually charged, the name of the shipper, and any business relationship between the interregional gas supply company and the shipper. Minimum tariffs are set in relation to the average variable costs. This is designed to combat price-cutting. The essential question here, too, is whether competition between the company requesting and the company providing transportation can be made possible and maintained.¹³⁵

b. Pipeline capacity

Problems similar to those encountered in the separation of the charges for gas and gas transport arise with regard to the division of the capacity of the company concerned between intra-firm activities and common carriage.

In the UK, care has been taken in the legislation to ensure that provision is made for the necessary transportation capacity when pipelines are planned and built. Section 20 of the Gas Act requires British Gas to give the Director of Ofgas notice of plans for the construction of any high pressure pipeline exceeding two miles in length two years before construction begins. The notice is published. If third parties are interested in conveyance, the Director is authorized to require British Gas to install the pipeline in such a way that conveyance is

135. Federal Energy Regulatory Commission, Order No. 436, 33 Fed. Energy Reg. Comm'n Rep. (CCH) para. 61,007.

made possible. Section 21 further provides for the extension of the pipeline network in order to facilitate conveyance.¹³⁶ In the event that demand for common carriage exceeds pipeline capacity, the report proposes a first-come, first-served system.¹³⁷

This proposal reflects the regulations in the United States, where non-discriminatory common carriage is required only within the bounds of existing capacity. The FERC decided that a policy of first-come, first-served would be applied in the event of any further requests for common carriage. This policy is best suited to a system of contracts concluded under private law. While these must be arranged without discrimination, this requirement does not constitute a general obligation to contract. When ascertaining available capacity, physical capacity, definite delivery and transportation commitments, and contract demand conversion must all be considered.¹³⁸

The court examining the Order pointed out the uncertainties associated with this policy and its difficult implementation. It correctly predicted that potential customers would try to take precautions by making requests for unlimited capacity over an unlimited period. However, the decision was not quashed as a result of this argument. It was left for the FERC to define criteria to make good the remaining deficiencies in the subsequent approval procedure.

The distribution of capacity to meet excessive demand has proved by far the most difficult aspect of the FERC's administrative procedure. It has remained unresolved. The granting of common carriage rights on a first-come, first-served basis has resulted in demand for such rights which far outstrips available capacity. Alternative procedures being discussed are preferential treatment of supply companies and intra-firm customers, auctions, and lotteries. The FERC is also considering whether the first-come, first-served system may be supplemented by authorized brokering.¹³⁹

The aim of authorizing fixed common carriage rights for resale is to create a market for transport and storage capacity. The FERC hopes to make better use of capacity in this way. The first-come, first-served system will also be supported by the authorization of trade in transport rights at market prices. However, freedom to set prices will

136. The Coopers & Lybrand report proposes that similar regulations be incorporated into Community law. However, as has been shown, the legal basis for this is lacking. *Coopers & Lybrand report, supra* note 15, at 119.

137. *Id.*

138. Federal Energy Regulatory Commission, Order No. 436, 33 Fed. Energy Reg. Comm'n Rep. para. 61,007.

139. 53 Fed. Reg. 15,061 (1988) (proposed Apr. 4, 1988).

be allowed only where the preconditions for effective competition are fulfilled. On markets which are highly concentrated, maximum and minimum prices are set for trade in common carriage rights. The FERC has deferred a general regulation of this kind for the time being. Individual cases will be used initially to ascertain the implications of brokering.¹⁴⁰

Provision has been made for an amended tenders procedure for the primary allocation of common carriage rights. Bids may be submitted within a four-week period. Thereafter, consideration will be given to the highest bidder. If capacity is insufficient even at the maximum price, it will be divided proportionally among the bidders offering the highest price.

Even such procedures as these may be used only if there are sufficient options for all the parties concerned at source and between pipeline networks. This is not the case in the Common Market.

4. *Weighing of interests in the Common Market*

a) The introduction of common carriage is designed to make business activities which were previously part of an overall business plan autonomous, and thus open to competition. Whether this can be achieved without jeopardizing the medium to long term supply-demand matching depends on the market structures at the production and distribution stages.

b) In the United States and Canada, the wellhead market is highly competitive; there are few obstacles barring access to gas production. Conversely, a relative lack of competition at source provides more obstacles in Europe. The purchase of natural gas from non-EC States (Algeria, Norway, and the USSR) is of vital importance to Community supplies. These countries have a state monopoly on the exploration, production, and distribution of gas. Consequently, common carriage obligations in their case are unsuited to the promotion of competition at source. These factors threaten the competitiveness of the European gas industry and strengthen the negotiating position of the producing countries. This weakening of European competitiveness is at odds with the Community's energy objectives.

c) If interregional gas supply companies had a general obligation to act as carriers, this would establish an obligation to contract not only with gas consumers in the Community, but also with the aforementioned producers in non-EC States. There is no basis for such an arrangement under Community law either under the article 87 rules

140. FOSTER REPORT NO. 17,095 (1989).

on competition or article 100a in tandem with article 8a. The provisions of the EEC Treaty guaranteeing the unrestricted movement of goods and services apply, by their own admission and under the established case law of the Court of Justice, only to trade within the Community. With regard to non-EC States, access to the resource relates to general trade policy rather than to the completion of the internal market.

d) Common carriage obligations jeopardize the long term supply contracts between production and transmission companies essential to uninterrupted gas supply. American experience has shown that the introduction of such obligations gives rise to conflicts with the take-or-pay requirements contracted between transmission companies and producers. Conflicts arise mainly because transmission companies lose sales when gas consumers change from direct or indirect supply by the transmission companies to common carriage. Common carriage impinges upon the willingness and ability of transmission companies to match gas supply and demand in the long term. Only if there is effective competition at the production and sales stages between pipeline networks can security of supply be ensured in a large number of short-term contracts. This is, to some extent, the case in the United States. However, the reorganization of the gas industry has not yet fully resolved the clash in objectives between competition and long-term security of supply.

e) The positive effects of common carriage on distribution companies depend on the organization of gas distribution in the Member States of the Community. In Member States where distribution is in the hands of a single company, such as the UK and France, this arrangement would have no effect.

f) If common carriage is to work for distribution companies and large industrial consumers, closed supply areas will have to be abolished. Conflicts in distribution may then arise if those consumers who are unable to buy gas directly incur higher prices. Because of the difference between distribution companies, it is not possible to make a general prediction as to how Community law might provide for competition in distribution by means of common carriage.

g) The introduction of common carriage makes the need for regulation so great that the cost of such regulation would most probably be higher than the anticipated benefits. Experience in the UK and the United States has shown that investment, tariffs, and use of capacity must be regulated by the authorities. Blanket regulation would be needed because of the interrelation of intra-firm business and common carriage in the gas market.

h) Common carriage obligations are dependent on pipeline capacity. Should demand for common carriage exceed existing capacity, the market would not be able to resolve the ensuing problems of allocation. The first-come, first-served system used in the United States has proved incapable of resolving the problem of scarce capacity.

i) In a system of genuine competition, even companies with a dominant market position are justified in looking after their own business interests. The interest of the interregional gas supply companies in taking on a merchant function and reaping the benefits of integrated planning from procurement to sales is consistent with the public interest of the Community in ensuring security of supply for consumers.

j) The preconditions which have to be fulfilled if transport obligations are to make possible competition within the gas industry are non-existent in the Community given the conditions for the production and sale of natural gas. Despite the fact that the Community is not able to lay down common carriage obligations with regard to non-EC States, there is no provision in Community law for the establishment of a general obligation for common carriage.

IX. THE TRANSIT DIRECTIVE

1. *Legal Basis*

The draft transit directive is based on article 100a. This means that it is among the instruments which, in accordance with Article 8a (1), are adopted with the aim of "progressively establishing in the internal market without prejudice to the other provisions of this Treaty." Article 8a defines the internal market as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured. Consequently, the measures for the harmonization of laws are designed to remove the obstacles to the free movement between Member States. Article 100a defines such laws as legal and administrative provisions of the internal market. Measures taken by Member States are therefore also covered by the harmonization of laws. These measures cover the establishment and functioning of the internal market if and to the extent that they are an obstacle to free movement within the meaning of article 8a (1). It would seem from the reasons given by the Commission that the Directive meets these requirements. They state that the obligation to allow transit will reduce the number of non-tariff barriers to trade. They also stress the need "to approximate legislative, regulatory, or administrative provisions passed by other Member States." However, there are no technical barriers to trade and other provisions passed by Member States

preventing the companies concerned from carrying gas for third parties. The fact is that gas companies act almost exclusively as merchants in cross-border gas trade and are not obligated to also act as transporters. This has not hampered international trade. The Commission itself points out that the amount of gas traded on the high-pressure European gas network is growing annually. It is true that the directive is officially directed at the Member States. However, it does not cover any national measures constituting obstacles to free trade. The directive's sole objective is, in fact, the conduct of undertakings. This is shown by article 2.3 of the directive, which reads:

The high-pressure natural gas transmission grids and the entities responsible for them, which are listed in the Annex, shall be covered by the provisions of this Directive. This list shall be revised whenever necessary by decision of the Commission.

However, the only provisions on undertakings in the EEC Treaty are in the first section of the rules on competition. Consideration, therefore, needs to be given to whether this directive contains a provision falling under the Treaty provisions on competition policy. This is necessary because, as was explained in detail earlier,¹⁴¹ in measures affecting competition policy, Community institutions are bound to enforce the principles enshrined in articles 85 and 86.

Examination of the directive shows that, in addition to relating to the conduct of undertakings, it is also intended to regulate how undertakings compete. In the Transit Communication¹⁴² and the recitals of the Transit Directive, the Commission says that the purpose of this is to generate competition between gas companies and to implement the first stage of the internal market under satisfactory conditions of competition. The directive is designed to compel the listed entities to allow the transit of gas. It is thereby assumed that a refusal to do this constitutes an abusive practice within the meaning of the rules on competition.

This is confirmed by article 3.1 of the draft directive. According to this article, the terms and conditions of natural gas transit through the major grids shall be negotiated by the companies responsible for the grids concerned and for the gas supply quality.

The remainder of the directive's provisions also relate to commercial practice. This is made very clear by the fact that, according to case law, directives are directly applicable if their provisions are clear and precise; if their validity is not subject to any conditions; and if

141. *Supra* notes 84-87 and accompanying text.

142. *Proposal for a Council Directive on the Transit of Natural Gas*, COM (89) 334 final, at 7, 10, 11.

they are by their nature suited to producing direct effect.¹⁴³

In *Van Duyn*, the Court justifies its ruling as follows:

It would be incompatible with the binding effect attributed to a directive by article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.¹⁴⁴

In the case of the said directive — assuming it is legally effective — its direct applicability would not entitle individuals to make Member States take a certain course of action. The practical effect of the directive could actually only be achieved by requirements placed on one another by the interregional gas supply companies listed in the annex.

Finally, the procedures provided for by the Commission in article 4 show that the instruments in question relate to undertakings and competition. Procedures are to be instituted, if necessary, against companies which refuse to agree to transit or whose refusal is not legitimately motivated. However, the Commission may do this only on the basis of the rules on competition and the associated implementing provisions.

In conclusion, contrary to the Commission's assertion, the directive is directed not against technical barriers to trade or variations in administrative provision in the Member States, but against commercial practice and with the aim of generating gas to gas competition. Even the procedures provided for can, according to the EEC treaty, be based solely on the rules on competition. It follows that the directive is governed by the Treaty provisions on the rules on competition rather, than article 100a.

If the Council were to adopt the directive in its present form, it would not be valid because of an infringement of article 173 (1) of the Treaty. Under article 173 (2), any natural or legal person may institute proceedings against such 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. As can be seen from previous comments, this condition would apply to the entities listed in the annex to the directive. The fact that it is a directive rather than a regulation or decision would not make the proceedings invalid. According

143. See *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1348.

144. *Id.*

to case law, validity is not determined by the legal form which the Community body gives to its actions. Article 173 (2) is designed to prevent the Community bodies from preventing an individual from instituting proceedings against a decision which is of direct and individual concern to him purely on the basis of its legal form.¹⁴⁵

This applies to all of the Commission's legal instruments, including a directly applicable directive. The question, therefore, is whether an act by the Community authority is of direct and individual concern to any particular individual. This will always be the case if companies can prove that they were named in a Commission legal instrument or affected by the preceding studies.¹⁴⁶ These criteria apply to the entities listed in the annex to the directive.

2. *Requirement for common carriage in connection with transit through the Common Market*

An analysis of the requirement contained in the Draft Directive for the interregional gas supply companies to allow transit follows from the author's previous comments on common carriage in the Common Market.¹⁴⁷ In the case of transit, the effects on competition at the production stage are not that dissimilar from those concerning a general obligation for common carriage. This is particularly true with regard to relations with third States. In paragraph 16.1 of the Transit Communication, the Commission claims that the only sources of additional gas are the USSR, Norway, and Algeria; such a list is quite questionable since it omits the Netherlands. This would mean that even in the first stage of the energy policy favored by the Commission, a conflict would arise between promotion of competitiveness of the European gas industry and promotion of the market position of the state monopolies mentioned.¹⁴⁸ Even the Transit Directive has extra-territorial effects, and relations with third States are a matter of commercial policy.¹⁴⁹ The Commission does mention common commercial policy in Part III (18b) of the Transit Communication, but draws no consequences for Community law.

In contrast to a general obligation for common carriage, the Transit Directive does not apply to large natural gas consumers and there will be no effects on existing distribution systems in those Mem-

145. *Calpak v. Commission*, 1980 E.C.R. 1937, 1961.

146. *Allied Corp. v. Commission*, 1984 E.C.R. 1005, 1030.

147. *Coopers & Lybrand report*, *supra* note 25, at 38-50.

148. *Id.* at 39-41.

149. *Id.* at 42-43.

ber States where only one company is involved in transit.¹⁵⁰ This applies, as can be seen from the annex to the directive, to all Member States apart from the FRG. There, twenty-nine companies will be authorized and required to be involved in transit within the Community. The Commission points out the FRG's special situation in the Transit Communication as follows:

As mentioned above, the structure of the West German gas industry is particularly complex and may merit some separate discussion, given the size of the West German market and its central importance to the integrated gas grid in Western Europe. The ownership pattern is a complicated web of cross-holdings and sub-holdings which involves a number of major West German industrial and mining concerns as well as some of the major international oil companies or their West German subsidiaries. Although there is some indirect public sector interest, the degree of private ownership in the main West German gas transmission companies is significantly higher than in most other Member States.¹⁵¹

The Commission, however, has not taken up the "separate discussion" it deemed necessary. Such a discourse would seem advisable for economic and Community law purposes given the particular implications which the introduction of the Transit Directive would have on the FRG.

As a result of market structure, the competition which transit is supposed to generate can have an effect on distribution in the FRG. In Member States where only one company is involved in transit, gas to gas competition is an impossibility from the outset. Only in the FRG can the conditions for competitive distribution be changed by transit. The gradual approach favored by the Commission, whereby large final consumers would initially have no right to transit, is the ultimate approach in the FRG. Whereas interregional gas supply companies in other Member states would be able to enter the German market with the help of transit or one of the twenty-nine companies on the German market, German companies would not be able to do the same. In other Member States, the restrictions would apply only to a company acting as both a customer and a supplier of natural gas. Consequently, the directive would not help to establish conditions for undistorted competition in the Common Market. It would instead distort these conditions in distribution at the expense of the German gas industry.

150. *Id.* at 44-45 (on the effect of common carriage on distribution companies).

151. *Towards Completion of the Internal Market for Natural Gas*, COM (89) 334 final, at 5 (1989) (Communication from the Commission).

PART THREE: PRICE TRANSPARENCY IN THE COMMON MARKET
FOR NATURAL GAS

In April, 1983, the Council recommended to Member States "to take steps to ensure that natural gas prices should have the greatest possible transparency and that these prices and the costs to the consumer should as far as possible be disclosed."¹⁵² The recommendation is based on article 235 of the EEC Treaty. With this recommendation, the Commission sees the lack of price transparency as an obstacle to the creation of a common market for natural gas and to the operation of competition in that market. The problem of price transparency apparently arises mainly with regard to non-tariff sales of natural gas to industrial consumers. In individual Member States, according to the Commission, practices vary considerably. In France, Italy, the Netherlands, and Belgium, natural gas sales to industry are made on a tariff basis. In the United Kingdom and the Federal Republic of Germany, on the other hand, they are covered by individual contracts. However, even in those countries that have industrial tariffs, special conditions exist for major consumers or groups of undertakings within a certain branch of industry. It is not the Commission's intention, it says, to make individual prices public, but everything must be done to find an acceptable solution while guaranteeing a certain degree of commercial confidentiality. The lack of price transparency prevents the consumer from exercising his right to make sure that his competitors are not being given artificial price advantages.¹⁵³

The improvement of price transparency for non-tariff sales in countries where this transparency appears to be inadequate (United Kingdom, Federal Republic of Germany) is described by the Commission as the most important priority concerning prices. This objective was confirmed in the Commission's note to the Council about price transparency in energy consumption, dated January 27, 1989.¹⁵⁴

152. *Council Recommendation on price and tariff formation for natural gas in the Community*, 26 O.J. EUR. COMM. (No. L 123) 40 (1983).

153. *Internal Energy Market*, *supra* note 3, at 61.

154. COM (89) 123 final, at 3 (Natural gas). The Commission's draft directive of July 20, 1989 on transparency of end-user prices for gas and electricity, *Draft Council Directive concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users*, COM (89) 332 final (1989), is based upon EEC Treaty, art. 213. Article 213 reads:

The Commission may, within the limits under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it.
EEC Treaty, *supra* note 72, art. 213. In addition, the Commission refers to the rules on competition and Regulation No. 17 of February 21, 1962. This combination of authorities reflects an uncertain compromise between the directive's purposes of purely statistical price reporting and price transparency of individual transactions.

It remains to be seen whether price transparency encourages competition in the natural gas markets and contributes to the creation of an internal market; and whether there is support in Community law for such a policy.

I. THE INFLUENCE OF PRICE TRANSPARENCY ON COMPETITION CONDITIONS

1. *Current situation and the functions of price transparency*

Price transparency is the obligation on the part of undertakings to make known the prices they charge in certain transactions. Price transparency places other market operators, particularly customers and competitors, in a position to take such information into account when making their own decisions. The obligation to reveal prices may be enshrined either in law or in an agreement. An example of a legal obligation to publish prices is contained in article 60 of the ECSC Treaty. Examples of contractual obligations to reveal prices are provided by price information systems agreed upon by competitors amongst themselves. The function of statutory price transparency obligations depends on the purpose of the controls and the nature of individual price-information systems.

a. Price transparency as part of official price controls

Price transparency may be laid down as part of official price controls. If tariffs or prices are officially fixed or subject to authorization, then publicity is a non-independent instrument for implementing that policy. The authority decides whether the tariffs submitted by the undertakings are in accordance with the law. Publication serves the purpose of informing market operators about permissible prices. Even if prices are fixed and made binding by agreements between undertakings or decisions by associations of undertakings, price transparency does not hold any independent significance. Rather, it serves to inform the consumer and to ensure that the undertakings are in keeping with the agreed prices.

Member States require that natural gas be supplied to households on the basis of published tariffs. In most Member States, the tariffs for supply to distribution undertakings and large-scale industrial consumers are also subject to government control. This control is linked to an obligation to publish tariffs.¹⁵⁵

The way in which tariff controls operate cannot be conclusively

155. See survey of regulations in Member States in National Legal Provisions, *supra* note 93, at 6, 7 (Belgium), 28 (Denmark), 34 (France), 44 (Ireland), 54-55 (Italy), 62 (Netherlands).

assessed on the basis of the regulations quoted. It should be noted, however, that price transparency in the Member States discussed above is only of independent significance if, and to the extent that, gas suppliers are free to decide their own tariffs. Only in the United Kingdom and the Federal Republic of Germany does the Commission assume this to be the case.

b. Price transparency as a way of preventing discrimination

The predominant purpose of statutory price transparency is to prevent price discrimination. This purpose is served, as a rule, by the obligation on the part of undertakings to contract to supply gas only at the prices published by them. The Commission presumes the prevention of discrimination as a condition for the price transparency it recommends, since the idea is to prevent a consumer's competitors from being given "artificial price advantages."

For undertakings in the European Coal and Steel Community, article 60 forms the basis for price transparency. The purpose of the provision is to prevent discrimination. In the U.S. gas industry too, a special significance is attached to the link between price transparency and the prohibition of discrimination. Under the 1937 National Gas Act, however, it is left to the FERC to decide whether to enforce the prohibition on discrimination by making its price lists binding on undertakings or intervening against discrimination in individual cases.

In regulations of this type, a distinction must be made between infringements of price transparency and *de facto* discrimination. Prohibited discrimination may be contained in a published price list. It may coincide with a deviation from a price list, without necessarily meaning that all deviations from the published prices automatically constitute discrimination. The question of which of these possible situations exists depends on the content and purpose of the prohibition on discrimination. The Commission has expressed only an indirect opinion on this question. It points out that price transparency should prevent not only "artificial advantages in favor of certain consumers," but that it should also serve to enable competition to operate in the gas market. Consequently, a distinction has to be made between customer discrimination and competition-related discrimination.

In the gas market, it is necessary to distinguish competition between gas suppliers (gas to gas competition) from competition between substitute sources of energy, particularly oil. The price formation system for gas in the Community is characterized by reference to the market prices for petroleum products (the principle of market-related prices). Yet, the Commission is proposing price transparency only for

gas. Among the effects that such a regulation will have on gas supply and on competition, therefore, will be different price-formation rules applying to gas suppliers on the one hand and to competing alternative products on the other. Rules on substitution competition are especially important because one of the Community's energy policy objectives is to reduce dependence on petroleum imports by increasing the use of natural gas.

c. Effects on competition

The effects of price transparency and the prohibition of discrimination on first, the behavior of undertakings subject to the obligation and second, competition both depend on the structure of the market. Protection of the consumer against discrimination can be put into practice without side effects on competition only if the undertakings subject to the obligation have a complete monopoly. If they are in competition, then price transparency will change the conditions of that competition. The conditions of competition are changed because uncertainty about competitors' price behavior is removed.

The view expressed from time to time, that price and market transparency are always a prerequisite for effective competition, has been disproved both in theory and in practice. The relevant principle was first set out by John Maurice Clark in his theory of workable competition:

If there are, e.g., five conditions, all of which are essential to perfect competition and the first is lacking in a given case, then it no longer follows that we are necessarily better off for the presence of any one of the other four. In the absence of the first, it is a priori quite possible that the second and the third may become positive detriments; and a workably satisfactory result may depend on achieving some degree of 'imperfection' in these other two factors.¹⁵⁶

As an example, Clark refers to the competition-reducing effect of price transparency in a narrow oligopoly. In fact, one of the conditions that determines competitiveness is the manner in which competitors are informed about market conditions. The question of whether market information actually contributes to competitiveness cannot, therefore, be answered in general terms. Moreover, it may be that uncertainty about the future behavior of one's competitors is a prerequisite for effective competition. The European Court of Justice has repeatedly ruled that it is an indication of competition-restricting behavior when competitors can eliminate all uncertainty about their fu-

156. Clark, *Toward a Concept of Workable Competition*, 30 AMERICAN ECONOMIC REVIEW 241 (1940).

ture behavior and thus remove the normal risk associated with any autonomous change in behavior in one or more markets.¹⁵⁷

The significance of compulsory price transparency and its connection with the prohibition of discrimination is demonstrated by the experiences of the ECSC, discussed in part two. The cartel prohibition is applied to such arrangements because of the effects of agreed price information systems on competition, as discussed in part three. In light of this experience, it is necessary to examine the effects of price transparency on the natural gas markets.

2. *Price transparency in the European Coal and Steel Community (article 60 of the ECSC Treaty)*

The first sentence of article 60(1) of the ECSC Treaty specifically defines the prohibition of discrimination contained in article 4b with regard to the pricing policy of coal and steel companies:

Pricing practices contrary to Articles 2, 3 and 4 shall be prohibited, in particular, . . . discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer.

The High Authority may define in more detail the practices covered by this prohibition by decisions taken after consulting the Consultative Committee and the Council (article 60 (1), 2nd subparagraph). Article 60(2)(a) contains the following provision:

For these purposes:

- (a) the price lists and conditions of sale applied by undertakings within the common market must be made public to the extent and in the manner prescribed by the High Authority after consulting the Consultative Committee.

The application of this provision by the High Authority and by the Court of Justice is important in assessing the proposed price transparency from the point of view of Community law.

The High Authority, in its decision 30/53 of February 5, 1953,¹⁵⁸ which is based on article 60(1), first described selling at prices other than the deposited list prices as prohibited discrimination. The authority to conform to the lower prices of a competitor with different freight conditions, contained in article 60(2)(b), formed the only exception to this principle. In addition to this, the High Authority laid down the rules for the content of price quotations for coal¹⁵⁹ and for

157. *ICI v. Commission*, 1972 E.C.R. 661, 664 (agreeing with *Suiker Unie v. Commission*, 1975 E.C.R. 1965, paras. 73-74).

158. 2 J.O. COMM. EUR. DU CHARBON ET DE L'ACIER (ECSC) (Decision No. 30/53) 109 (1953).

159. *Id.* at 21.

steel.¹⁶⁰ In order to give those involved — buyers, sellers, and the High Authority — the opportunity to adjust to the price changes announced, new prices do not enter into force until five days after they have been announced.

However, it proved impossible to make this system work. The undertakings did not comply with these provisions, which they viewed as interventionist and rigid. Due to a depressed economic climate, the actual prices became further and further removed from the list prices, and the deposited lists were not corrected. At the beginning of 1954, the High Authority amended its decisions 30/53 and 31/53, “in order to allow the formation of steel prices to proceed freely and in conformity with market trends, and to take into account trade-related requirements in business transactions.”¹⁶¹ From then on, the High Authority made a distinction between discrimination and deviation from the list price.¹⁶²

Under the new decision, an infringement of article 60(1) occurred only if an undertaking deviated from its price lists and could not prove that the transactions were not comparable, or that the price alteration had been applied to all comparable transactions. In addition, the High Authority amended the provisions governing price quotations for steel¹⁶³ and laid down new obligations to supply information.¹⁶⁴ Undertakings were permitted to deviate by 2.5 percent from their published prices, calculated on the basis of the average of their deviations over sixty days, without altering their price lists. Every price alteration entered into force one day after its notifying the High Authority. If undertakings had deviated from their list prices, they had to inform the High Authority every two weeks.

The French and Italian governments (and two Italian steel industry associations) lodged a complaint before the Court of Justice against Decisions 1 to 3/54. The complaint was against the abolition by Decision 1/54 of the identical nature of discrimination and deviation from the published price lists. It was also based on the fact that article 60(2) gave rise to a strict obligation to publish the price lists beforehand and to observe them.¹⁶⁵

160. *Id.* at 111.

161. *Italy v. High Authority*, 1954 E.C.R. 37.

162. *France v. High Authority*, 1954 E.C.R. 1.

163. *Italy v. High Authority*, 1954 E.C.R. 37.

164. *Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority*, 1954 E.C.R. 63.

165. *France v. High Authority*, 1954 E.C.R. 1, 6-8, 15-16; *Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority*, 1954 E.C.R. 63, 79, 86.

The Court of Justice saw no infringement of the ECSC Treaty in the separation of price list and discrimination. Nowhere, it concluded, did the Treaty provide that an infringement of the provisions concerning the publication of prices would at the same time constitute a prohibited practice within the terms of article 60(1). In particular, the Court stated, it could not be disputed that the application of a deviation from the prices or conditions of sale set out in the price list of an undertaking, irrespective of its extent, did not constitute discrimination if the transaction was of a special nature or if the same deviation was made in all comparable transactions.

Article 1 of Decision 2/54 was, however, repealed by the Court of Justice in so far as a deviation from the published price lists was allowed. The ECSC Treaty, it concluded, provided for obligatory publication in respect to three objectives: 1) putting an end to the prohibited practice where possible; 2) allowing buyers to be accurately informed about prices and to do their part in controlling discrimination; and 3) enabling the undertakings to have an accurate knowledge of their competitors' prices in order to allow them to adjust.

According to the Court, the wording of the rules on publication contained in the Treaty, together with the *ratio legis*, shows that the advance publication of exact prices is mandatory. The Court explains, admittedly, that it concerned itself in particular with "the idea of the free formation of prices by the market." This point of view, however, could not justify any other solution. The Treaty, it argues, assumed that free price formation was guaranteed by the right of individual undertakings to set their own prices and, when they wanted to change those prices, to publish new price lists. If the market situation changed, producers were forced to adjust their price list to match it. In this way, "the market forms the price." It was not the task of the Court to pronounce any opinion regarding the usefulness of this principle; it could only acknowledge that it was enshrined in the Treaty which — rightly or wrongly — did not contain any provision allowing a more flexible application of the lists in the event of slight or temporary market fluctuations.¹⁶⁶

The conflict between the price transparency that the Commission considers mandatory and the requirements of competition was also mentioned by Advocate-General Lagrange in his conclusions. During periods of falling demand, he said, undertakings hesitate to lower their prices generally and publicly; thus, the confines of price schedules strengthen a tendency towards price rigidity. Such behavior may,

166. *France v. High Authority*, 1954 E.C.R. 1, 32.

moreover, facilitate price-setting leadership or mutual price adjustments.¹⁶⁷

With regard to the grounds for the obligation on natural gas suppliers to practice price transparency, however, one must emphasize the independent significance which the Court of Justice attaches to the rule contained in article 60 of the ECSC Treaty. We must conclude from this that an obligation under article 60 cannot be deduced by the Community institutions from the prohibitions on discrimination contained in articles 85 and 86. These prohibitions, given as examples of activities which restrict competition, relate to business activities in individual cases. They are not suitable, even within the framework of article 87, to be used as grounds for a general price transparency obligation.

3. *Contractually agreed price information systems*

In agreements on price information, competitors undertake to make known their pricing policy to their competitors or to a central body set up for that purpose, while retaining the right to obtain information about their competitors' pricing practices either from the competitors themselves or from the central body. The agreements may take different forms. For instance, the notification of all transactions, including the naming of the contracting parties, in which the prices deviate from the deposited prices; the notification of specific transaction prices at the request of a competitor or the price notification body; the obligation on the part of the notification body to make all price notifications accessible to the parties involved; the obligation on the part of the parties involved to reveal their business records to the price notification office or to competitors on request; and, finally, the identification of their customers in the regular price reports of parties concerned, are all examples of such agreements. As a justification for price information systems involving identification, the same grounds are put forward as for statutory price transparency: to encourage market transparency; to prevent discrimination between customers; and to prevent customers from illicitly playing off one competitor against another, *i.e.*, the "untruthful buyer" syndrome.

Under Community law, price information systems which involve identification are inadmissible in principle. In many of its decisions, the Commission has ruled that such agreements are practices which restrict competition and as such are contrary to article 85(1). Nor do

167. *Italy v. High Authority*, 1954 E.C.R. 37, 56, 61, 62 (opinion of Advocate-General Lagrange).

such practices fall under the Commission Declaration on cooperation between undertakings, in particular section II.1, thereof.¹⁶⁸ The only harmless practices involve dissemination of general statistical data on the production and marketing conditions of an industry, provided it is not possible for the undertakings involved to identify the competitive behavior of the other parties.

This administrative practice is in line with the aforementioned case law of the Court, under which there is an infringement of article 85 if competitors, by means of an agreement, create conditions which make it possible "for all competitors to be given the opportunity to know in advance with sufficient certainty what price policy their competitors are going to pursue."¹⁶⁹ Community law agrees in this respect with German cartel law and U.S. antitrust law.

In the relevant decision taken by the Bundesgerichtshof (BGH) (Federal High Court) on this subject, the court ruled that the cartel prohibition could cover obligations to exchange information, even if the freedom of the contracting parties to decide autonomously on the conclusion and content of the contracts remained unaffected.¹⁷⁰ Agreeing with the Kammergericht (KG) (Berlin court of appeal), the BGH finds that any contracting party who knows that his prices, supplements, discounts, and rebates, together with his supply and payment conditions, will be disclosed to any other contracting party on request, must always reckon with the fact that the latter, when competing for a given customer, will match the former's prices if offering goods of the same kind. This means, according to the Court, that a particular price effort is likely to be successful for only one particular business transaction, since other contracting parties will probably already have followed suit when the demand next arises.¹⁷¹ On this basis, the Bundeskartellamt (BKA) (Federal Cartel Office) adopted administrative principles for handling market information procedures in line with cartel law.¹⁷²

In the United States, open-price systems were practiced quite early and were initially encouraged by the government and the Federal Trade Commission. The application of antitrust laws has fluctuated.

168. *Vegetable Parchment*, 20 O.J. EUR. COMM. (No. L 70) 54, 62 (1978); *Agreements Between Manufacturers of Glass Containers*, 16 O.J. EUR. COMM. (No. L 160) 1 (1974); *IFTRA Rules for producers of virgin aluminum*, 17 O.J. EUR. COMM. (No. L 228) 3 (1975); *COBELFA-VNP*, 19 O.J. EUR. COMM. (No. L 242) 10 (1977); *Hasselblad*, 25 O.J. EUR. COMM. (No. L 161) 18 (1982).

169. *Vereeniging van Cementhandelaren v. Commission*, 1972 E.C.R. 977, 990.

170. 26 BUNDESGERICHTSHOF ST. 64, 65.

171. *Id.*

172. 27 WIRTSCHAFT UND WETTBEWERB 248 (1977).

The Supreme Court first accepted that price stabilization resulting from price information was not an unreasonable restriction on competition, and that these effects followed "in a natural manner" from the dissemination of such information.¹⁷³ In subsequent rulings, the courts have examined whether the parties involved had, by their agreements, created an artificial price structure which made free price formation impossible. In any case, the obligation on members to disclose their prices and conditions and to keep to the prices and conditions disclosed until further public notification of a price change constitutes a restriction on competition.¹⁷⁴ The most recent decision of the Supreme Court comes close to being a *per se* prohibition on price notifications that involve identification.¹⁷⁵ The parties concerned had agreed to inform one another on request of the exact conditions of the latest contracts signed with certain customers. The Court found that in such cases, as a rule, the price requested was the same as that of the competition. This *de facto* control on prices triggered the Court's *per se* prohibition on price agreements.

II. PROHIBITION OF DISCRIMINATION AND PRICE TRANSPARENCY IN THE UNITED KINGDOM AND THE FEDERAL REPUBLIC OF GERMANY

The EC Commission considers the price transparency on non-tariff sales in the United Kingdom and in the Federal Republic of Germany to be inadequate. It is giving priority, therefore, to the improving of price transparency in these two countries. Any analysis of the Commission's determinations, therefore, requires a discussion of the legal and economic conditions for non-tariff sales in the UK and the Federal Republic.

1. *The United Kingdom*

Under the present legal system in the UK, which we have already examined, British Gas is not obliged to publish tariffs in its business relations with contract customers who take more than 25,000 therms a year. On the basis of the provisions of the 1973 Fair Trading Act that apply to this part of the gas supply business, the Monopolies and Mergers Commission recommended that British Gas should be

173. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582 (1926); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 604 (1926).

174. *Sugar Institute, Inc. v. United States*, 15 F.Supp. 817, 887-908 (D. N.Y. 1934); *modified* 297 U.S. 553, 585-86 (1936).

175. *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

obliged to publish tariffs for contract customers too.¹⁷⁶ British Gas is obliged to stick to these tariffs until they are amended. The Director General of Gas Supply must be given prior notification of all amendments. Any deviation is regarded as an amendment to the tariff schedule and must be published; the amended tariffs must be granted to all customers in the same conditions. Moreover, British Gas is prohibited from discriminating among its customers. This regulation is justified by the Monopolies and Mergers Commission on the grounds that it encourages potential competition within the gas industry. The risk that British Gas could give price discounts to those customers who were negotiating with competing gas suppliers wanting to enter the market would, the Monopolies and Mergers Commission believed, be a considerable barrier to market entry. This risk would be increased still further owing to the fact that British Gas, in its common carriage negotiations with potential competitors, would be able to discover details of planned business transactions between the latter and their customers.¹⁷⁷

British Gas explained to the Monopolies and Mergers Commission that in the non-tariff sector it distinguished between customer groups according to their ability to switch to other sources of energy. This resulted in price differences which had no connection with the purchasing conditions as such. The Monopolies and Mergers Commission ruled that British Gas' pricing policy, which was geared to different elasticities of demand, was contrary to the public interest. The considerable difference in gas prices to "fuel switchable customers" on the one hand and captive customers on the other was, it ruled, based not only on the need to adjust to competition from substitute fuels but also on British Gas' monopoly position vis-à-vis the captive customers.¹⁷⁸ The Monopolies and Mergers Commission therefore proposed that only the purchasing conditions as such be used as criteria for permissible price differentiation, and not, on the contrary, the purpose of gas use or the different elasticities of demand. A corresponding prohibition of discrimination should, it said, be included in the authorization.¹⁷⁹ Only under these conditions could decisions on price levels and price structure continue to be made by British Gas and be geared towards market conditions.

With regard to the Monopolies and Merger Commission's priority

176. *See Gas Report, supra* note 35, at 8.69; 8.101 (a).

177. *Id.* at 3.49, 5.23, 6.18, 6.19, 8.34, 8.52, 8.53, 8.63 (b); 8.101 (a); *see Ofgas, supra* note 33, at 42, 43, 54.

178. *Gas Report, supra* note 35, at 8.29, 8.37, 8.38.

179. *Id.* at 8.49, (f), 8.65, 8.67.

objective, *i.e.* to facilitate competition within the gas industry, it is accepted that there will be disadvantages arising from the arrangement for British Gas with regard to competition with other substitute energy sources.¹⁸⁰ British Gas has in the meantime published price lists which comply with these requirements.¹⁸¹

2. *The Federal Republic Germany*

In the Federal Republic, gas suppliers are governed by the "Tarifordnung Gas" (Order on Gas Tariffs) only in respect of household tariffs. As in the UK, the provisions of the law against restrictions on competition are applicable to gas suppliers. Unlike the UK, however, no prerequisites for competition within the gas industry are given at source, so the question of preventing discrimination against newcomers does not arise. Insofar as gas suppliers enjoy a dominant position on the market, or are "market-strong" within the meaning of paragraph 22 of the GWB (law prohibiting restraints of competition), they are covered by the prohibition of discrimination contained in paragraph 26(2) of that law. In interpreting this provision, similar questions arise as those dealt with by the Monopolies and Mergers Commission in the Gas Report. The recommendations of the EC Commission again trigger the question: Under what conditions do undertakings that use gas receive "artificial preferential conditions" which are contrary to the prohibition of discrimination?

Paragraph 26(2) protects undertakings against: 1) differentiated treatment that is not justified for practical reasons; and 2) unfair obstacles in a business transaction normally accessible to undertakings of the same type. Determining whether undertakings are of the same type depends on the basis of their business activities and financial operation. According to previous court rulings, this criterion should be interpreted broadly. It enables only a relatively rough classification to be made.¹⁸² It is generally not only sufficient, but also essential, that the basic functions should coincide; it is not essential that there should be any actual or potential competitive relationship. As far as receiving gas supplies is concerned, within the group of special customers, large consumers and gas distribution companies should be regarded as undertakings of the same type. For them, business transactions with interregional gas supply companies are also "normally accessible." The essential criterion for scrutinizing the prices agreed to individually

180. *Id.* at 8.62.

181. International Gas Report, Mar. 31, 1989.

182. 29 WIRTSCHAFT UND WETTBEWERB 589 (1979) (WuW/E BGH 1587, 1589); 30 WIRTSCHAFT UND WETTBEWERB (1980) 127 (WuW BGH 1629, 1631).

with special customers involves a determination of whether there exists any differentiated treatment which cannot be justified on practical grounds. According to the case law of the BGH, this calls for a comprehensive consideration of the interests of the parties involved weighed against the objective of the law, which is to ensure freedom of competition.¹⁸³ This also includes assessment of the market situation as a whole.¹⁸⁴

It follows from the GWB's aim — to ensure freedom of competition — that what is particularly unjustified as regards competition by companies using gas is the impairment of their ability to compete in product marketing. The Federal Cartel Office has stated, in connection with price formation in the electricity sector, that cost differences applied by suppliers of electricity to certain customers are sufficient to justify price differentiation. This is set out in the Annual Report for 1986/87 as follows:

[T]he Federal Cartel Office acknowledges that there is scope for the short-term agreeing of electricity prices that result in the covering of the variable costs of electricity supply and a contribution to covering fixed costs, if, in the absence of this electricity supply contract, available capacity is not used to the full.¹⁸⁵

In any case, it is not the task of the supply companies to maintain the international competitiveness of certain branches of industry. It follows from this that price differences between undertakings using gas are generally justified when those differences take into account the various services provided by the customer. Therefore, price differences are justified *fortiori* when they are essential in order to conform to lower offers from competitors. Even *ad hoc* conformance to competitors' prices is justified in principle, as long as this price covers the variable costs and still provides a contribution to covering fixed costs.¹⁸⁶ Conforming to competitors' prices becomes inadmissible only when there is concerted competition to drive certain competitors out of the market.

Moreover, according to the rulings of the BGH, the unequal treatment of customers of the same type is generally justified, provided that the behavior of the undertaking making the differentiation is not based on arbitrariness or non-economic considerations, and the preferential

183. See 31 WIRTSCHAFT UND WETTBEWERB (1981) 215 (WuW/E BGH 1743).

184. 31 WIRTSCHAFT UND WETTBEWERB (1981) 202 (WuW/E BGH 1730).

185. Report by the Federal Cartel Office on its activities in 1985/86 concerning the position and development in its sphere of activities, BTDrucks. *supra* note 48, 11/554 (1987) at 102.

186. See Markert, *Industriestrompreise und Kartellrecht* (Industrial electricity prices and cartel law), ET 117, 120 (1988). Markert even considers the idea of making it compulsory to conform to competitors' prices.

treatment does not work to the disadvantage of competing customers.¹⁸⁷ An interregional gas supply company differentiating between customers on the basis of elasticities of demand and, in particular, their ability to switch to other sources of energy, is not, therefore, acting contrary to article 26(2). In the UK, however, British Gas is compelled to differentiate its prices exclusively on the basis of the special features of supply and not on the basis of the customer's capacity to use alternatives sources of energy.¹⁸⁸

III. PROHIBITION OF DISCRIMINATION AND PRICE TRANSPARENCY IN THE INTERNAL MARKET

The Commission bases its recommendation of price transparency for gas supply undertakings on the objective of enabling the consumer to ensure that his competitors are not enjoying artificial price advantages.¹⁸⁹ The Commission describes price transparency as a means of controlling compliance with the rules on competition. We therefore need to examine, first, under what conditions non-tariff natural gas sales to industrial consumers may be contrary to the rules on competition. Next, we should assess the Commission's intended price transparency in the context of the Community's competition and energy policies.

1. *The application of article 86's prohibition of discrimination regarding adjustment of natural gas prices*

Under 86c, the abuse of a dominant position may exist in the application of dissimilar conditions to equivalent transactions, placing certain trading parties at a competitive disadvantage. The purpose of this provision is to prevent distortions in competition in upstream and downstream markets, which might arise as a result of the unequal treatment of suppliers or customers. The situations arising in articles 86a through 86d are examples of the application of the general clause enunciated in the first sentence of article 86. They are, therefore, applicable if the conditions for the general clause are met.

The most egregious violations of article 86c, according to the case law of the Court of Justice, involve cases of discrimination between customers who are in competition with one another in their sales markets.¹⁹⁰ In assessing cases of price discrimination, however, the fol-

187. 28 WIRTSCHAFT UND WETTBEWERB (1978) 151, 384 (WuW/E BGH 1495, 1510).

188. *Gas Report*, *supra* note 35, at 8.65. An exception applies only for those customers who use gas as a feedstock. *Id.* at 8.72.

189. *Internal Energy Market*, *supra* note 3, at 61.

190. *Suiker Unie v. Commission*, 1975 E.C.R. 1965, 2021.

lowing points have to be taken into account: 1) the legitimate interests of the dominant undertaking, in connection with the special features of the goods or services in question and 2) the special nature of the market in question.¹⁹¹ Market-dominant undertakings may charge the prices that the market will bear, on condition that they observe the rules laid down in the contract with regard to the regulating and coordinating of the market.¹⁹² In particular, consideration of the strength of the competition is justifiable. This is true even when the circumstances lead to price levels that legitimately differ from one Member State to another. There is, therefore, no obligation on market-dominant undertakings to bring about, by means of their pricing policies, a common market that is economically infeasible. According to the Court's rulings, a limit arises only insofar as the pricing policy of undertakings creates the division of national markets.

A pricing policy on the part of natural gas suppliers, which is oriented towards the customers' ability to switch to substitute sources of energy, does not, by itself, contravene article 86. However, if the customers who receive dissimilar treatment are competing in their own market and are permanently disadvantaging themselves with different purchase prices, an opposite conclusion is possible. The Commission has put forward this argument in the European Parliament. In answer to the question of whether the pricing policy of natural gas suppliers in the Netherlands was contrary to the EEC Treaty, the Commission replied:

In all Member States, and therefore in the Netherlands too, all undertakings to which special or sole rights are granted for the distribution and sale of natural gas, pursue their own sales and pricing policy within the sovereign territory in which they carry out their activities, and that policy is determined by the special conditions in the country or region concerned. As a result of this *de facto* sharing out of the market between distribution companies with different supply conditions and price structures, disparities arise. Consequently it is not possible to judge, solely on the basis of a comparison of the prices paid by various consumers in EEC countries, whether the behavior of NAM/Gasunie results in discrimination within the meaning of articles 7 and 86 against individual companies purchasing Dutch gas, regardless of whether these supply a whole country like Gasunie, Distrigaz or Gaz de France, or whether they are regional companies like Ruhrags, Thyssen-Gas or RWE.¹⁹³

191. *Michelin v. Commission*, 1983 E.C.R. 3461, 3520 (court stresses the need to prove the existence of dissimilar treatment unjustified by legitimate commercial considerations in order to establish violation).

192. *United Brands*, 1978 E.C.R. at 302.

193. See Written Question No. 409/71, by Vredeling MEP, 15 O.J. EUR. COMM. (No. C 54) 2 (1972).

The answer indicates a legal interpretation to the effect that article 86 does not establish an obligation on the part of market-dominant undertakings to guarantee the same consumer conditions throughout the Common Market. The Commission also states that the selling prices for Dutch natural gas at the Dutch border do not differ from one another. It further states that the same applies with regard to the prices that NAM charges Gasunie.

Subsequent proceedings before the Commission and the Court of Justice dealt with the question of whether preferential Dutch natural gas tariffs for undertakings in certain branches of industry (nitrogen fertilizer manufacturers and horticultural holdings) were contrary to article 92 of the Treaty governing state aids.¹⁹⁴ In order to distinguish between entrepreneurial behavior and government aids, the Commission said:

with regard to the differentiation in tariffs dealt with under Point III.2, in principle there can be no objections to the fact that a private or public undertaking forms its prices differently, depending on the use of the goods that it is selling. However, such differentiations would have to be based on sound and understandable considerations such as, for example, safeguarding the competitiveness of gas in individual consumer markets. . . .¹⁹⁵

From this too, it may be assumed that substitute competition qualifies as a justification for price differentiation.

2. Price transparency

The EEC Treaty, unlike the ECSC Treaty, does not contain any provisions obliging undertakings to publish their prices. A possible legal basis for the establishment of such an obligation is article 87, paragraph 1. Under this provision, the Council, acting on a proposal from the Commission and after consulting the Assembly, adopts any appropriate regulations or directives to give effect to the principles set out in articles 85 and 86. Among the examples given, article 87, paragraph 2(c) provides for the definition of the scope of the provisions of article 85 and 86 in the various branches of the economy, although article 87 gives the Community institutions more room for assessment in individual cases. The implementing regulations must be limited to the achievement of these objectives.

The proposed price transparency cannot, therefore, be based on

194. COFAZ v. Commission, 1986 E.C.R. 391; *Commission Decision concerning the preferential natural gas tariff for Dutch horticultural holdings*, 28 O.J. EUR. COMM. (No. L 97) 49 (1985); *Kwekerij Gebroeders van der Kooy v. Commission*, 1988 E.C.R. 219; *Commission v. The Netherlands*, 1988 E.C.R. 281.

195. *Commission Decision*, *supra* note 194, at 53.

article 87 by expanding its interpretation to include development of an internal market for energy. On the contrary, articles 85 and 86, and therefore article 87, too, are concerned merely with preventing behavior which restricts competition. Therefore, the proposed price transparency must be intended and appropriate for the prevention or control of behavior by undertakings which is contrary to articles 85 and 86. This could include the use of price transparency to combat discrimination prohibited by article 86. There are no objections to the limiting of these measures to a single branch of the economy, as is shown by article 87, paragraph 2(c).

The case law of the Court of Justice on article 60 of the ECSC Treaty shows, however, that the publishing of price lists is a separate measure which must be distinguished from the application of the rules on competition. This is particularly true of the relationship between price transparency and the prohibition of discrimination. Compulsory price transparency could be based on article 86 in conjunction with article 87 only if every deviation from the price list were at the same time a prohibited discrimination. Such an arrangement would, however, presuppose the laying down of a discrimination prohibition not contained in the competition rules of the EEC Treaty and not covered by article 87. Price transparency cannot, therefore, be based on the grounds that it is necessary to effectively control prohibited discrimination. This would only be true if a policy of price differentiation charging consumers on the basis of their elasticities of demand and their capacity to switch to substitute sources of energy, were, as a rule, contrary to article 86. However, this is not the case, as has been shown in detail.

3. Price transparency and the prohibition of price differentiation in order to achieve energy policy objectives

The Council cited article 235 as authority for its recommendations on price transparency. Under article 235, the Council, acting unanimously on a proposal from the Commission, and after consulting the Assembly, may take the appropriate measures. Such measures may be implemented only if action by the Community should prove necessary in order to attain, in the context of the common market, one of its objectives where the Treaty has not provided the necessary powers. Under Community law, price transparency does not suitably encourage competition in the energy market or prevent discriminatory measures restricting competition. The limits which apply in the case of article 87 on the legislative powers of the Commission to achieve a system of perfect competition cannot be circumvented even with the

aid of article 235, simply because the provision is worded in such a way as to presuppose that the EEC Treaty has not provided certain powers necessary to attain one of its objectives.

However, it is possible that the price transparency proposed by the Commission may be a suitable means of preventing price differentiations which are undesirable from an energy policy and security of supply viewpoint. One of the energy policy objectives of the Community is to increase the proportion of natural gas accounted for by the Community's supplies, in order to reduce its dependency on imported petroleum. In achieving this objective, the conditions governing substitute competition are of crucial importance. This competition takes place chiefly in those markets for which the Commission considers price transparency to be necessary, *i.e.*, the markets for larger energy consumers. The Commission, however, is proposing price transparency only for suppliers of gas and not for the suppliers of substitute forms of energy as well. Such an arrangement would not encourage substitution competition, but would in fact restrict it. Uncertainty on the part of suppliers of competing forms of energy regarding the behavior of gas suppliers would be removed, while gas suppliers would not receive corresponding knowledge about the conditions of their rivals. The removal of uncertainty regarding the behavior of gas suppliers tends to restrict substitution competition; the unilateral alteration of the conditions under which this competition takes place tends to distort it.

The recommendation of the British Monopolies and Mergers Commission (MMC) does not contradict these findings. It recommended, as has already been pointed out, that British Gas should be required to publish price schedules for firm and interruptible gas supplies to contract customers, to publish any variation from the price schedules, and to supply all other customers under the same conditions. The purpose of this arrangement is to make selective undercutting impossible. The MMC believes that British Gas's ability to selectively undercut the prices of new suppliers of gas is an obstacle to their access to the market. With regard to the objective of permitting direct competition in gas supply itself, the MMC accepts that price transparency will lead to disadvantages for British Gas in its competition with alternative forms of energy.¹⁹⁶

In this assessment of the advantages and disadvantages of price transparency, the MMC assumes that competition will develop in the gas supply market. To make this development possible, the difficulties

196. *Gas Report*, *supra* note 35, at 8.62.

that British Gas will experience in its competition with alternative forms of energy — difficulties regarded as short term — are accepted. This outcome remains palatable to the UK because it has considerable gas deposits of its own available and the proportion of gas in total energy supply is already about fifty percent.

In the United States, too, the policy of the FERC confirms that price transparency, when used as a means of controlling discrimination, does not encourage competition but restricts it. The aim of the FERC's tariff policy is a system of price formation that will convey clear market signals to all those involved in the gas industry.¹⁹⁷ The objective is to be achieved with the aid of the following measures: 1) the stipulation of general principles of tariff rating without tariff fixing; 2) the clear separation of tariffs for gas and tariffs for gas transport (this is referred to as "unbundling."); and 3) the permitting of price discounts in individual cases and the authorizing of conformance to competitors' prices.

Gas transmission companies must submit a tariff schedule to FERC showing maximum and minimum tariffs before taking on any transportation services. A pipeline company which, in individual cases, wants to deviate from its maximum tariff must inform the FERC of the relevant maximum tariffs, the actual amount charged, the name of the shipper, and any intra-group relationship between the transmission company and the shipper. The minimum tariffs are formed by the average variable costs. This is intended to counteract predatory pricing.

Order No. 436 does not establish any price transparency for deviations from maximum tariff rates in individual cases. Admittedly, the FERC has to be notified of these deviations, but their *post hoc* nature indicates that this notification is solely for the purpose of checking individual transactions in light of the prohibition on discrimination contained in the 1938 National Gas Act.¹⁹⁸ Third parties, in particular customers or competitors, are not informed of the price discrepancies. The FERC has expressly refused to adopt an arrangement of the kind recommended by the British Monopolies and Mergers Commission, *i.e.*, to allow only uniform deviations from the price lists ("uniform discounts") and no deviations in individual cases ("selective discounts"). The FERC's stance was challenged on the grounds that it allowed discriminatory activity. The Court of Appeals rejected this

197. Federal Energy Regulatory Commission, Order No. 436, 33 Fed. Energy Reg. Comm'n Rep. (CCH) para. 61,007.

198. *See, supra* notes 53 - 63 and accompanying text.

notion.¹⁹⁹

The court gave deference to the FERC's ability to decide the manner in which it would intervene against prohibited discriminatory measures. The court said that not every price difference constituted a prohibited discriminatory measure. Nor did the law compel companies to be bound by published prices. The law is satisfied if the FERC reserves the right to intervene against discriminatory pricing policies in individual cases. The new rule is not unlawful simply because it allows price discounts which are intended to match the competition from competing energy sources. From an efficiency standpoint, such price discounts bring the quantity sold closer to the amount that would result if the sales were carried out at marginal cost. Price formation in line with demand conditions is the general rule in public utility regulation. Case law has long acknowledged this; for almost a hundred years, the courts have interpreted the prohibition of discrimination contained in the Interstate Commerce Act to permit price differentiation if it is justified from a competitive standpoint. This also includes selling alternative sources of energy.

4. *Summary of price transparency in the EEC*

To sum up, we need to determine whether the limits resulting from the Treaty's competition rules which cover the assessment of price transparency and discriminatory measures are also justified from the energy policy and economic viewpoints. Price transparency is an appropriate means of restricting competition from alternative energy sources. The gas suppliers' power to give individual price discounts in order to match the competition from oil is in line with the Commission's objective to encourage the use of gas, thus reducing the Community's dependence on imported oil. The differences in gas purchase prices which result from price differentiation are compatible with the Common Market, provided that customers who are in direct competition with one another are not given dissimilar treatment. Such price differentiations are not, in themselves, likely to divide national markets or constitute an obstacle to trade. Prices calculated in accordance with the marginal cost principle also work indirectly to the advantage of other customers, because they help to cover fixed costs. Abusive practices can be controlled by the Commission in individual cases by means of articles 85 and 86. There is no need to introduce, on competition policy or energy policy grounds, a system of general price trans-

199. *Associated Gas Distrib. v. Fed. Energy Reg. Comm'n*, 824 F.2d 981, 1010-1011 (D.C. Cir. 1987).

parency to prevent artificial preferences from being given to certain consumers. On the contrary, such a policy would restrict the efficacy of competition against substitute fuels. Differences in price formation for gas in the Member States are the result not of differences in price transparency. They are, instead, largely a result of government tariff control in most Member States. The competition that is possible in those Member States is determined by the policy of the government energy supervisory authority and not by the entrepreneurial decisions of the gas suppliers.

CONCLUSION

We have seen that for a variety of reasons, the proposed common carriage and price transparency systems are ill-equipped to encourage successful integration and competition in the Common gas market. Blind imitation of systems that are marginally successful in other markets may lead to harmful results in Europe. Any system of integration proposed for the opening of the EEC's natural gas market must account for particular characteristics of the already-existing European market structures and the precarious nature of limited indigenous supply networks. Without doing so, the Commission may push the Community into a highly inefficient, albeit "integrated," market structure in a field of vital concern to European energy security.