

Community Topics

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**Competition policy in
the Common Market**

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Competition policy in the Common Market

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Until fairly recently it was left to individual states alone to create a just and humane economic order. Today the European Economic Community is also faced with this task. For three reasons it is not an easy one.

In the first place, each of the six Community states – Belgium, France, Germany, Italy, Luxembourg and the Netherlands – already has its own economic system which by no means corresponds with the others on all points. Each country in the Community has its own history and its own set of values, and these are reflected in its economic policies. In view of these divergences, what can and should be the economic system of the Community as a whole?

The second difficulty arises from the need for the Community's emerging economic system to meet the requirements of intra-Community trade, and to lead to economic union, i.e. to a gradual fusion of the six national economies. In this there are no precedents to guide us. In the economic, legal, political, psychological, and even linguistic fields, we are faced with new questions to which there are as yet no proven answers.

Thirdly, a Community policy for international trade still has to be put into force. Here, too, we are largely facing entirely new problems, whether in respect of the states associated with the Six, policy towards less developed countries, or the creation of an Atlantic partnership.

Thus in the Community three economic systems are today superimposed on one another: that of the six individual member countries; the

nascent Community system; and the international economic system, which is influenced by both the other two and is, at the moment, only partly worthy of being called an economic system at all.

By an economic system I mean the sum of all the arrangements which serve to guide the economic process at any given time. What can and should be the nature of these arrangements in the Common Market and in trade with the free world? Can the principles which apply, for instance, to trade within the German Federal Republic, i.e. the principles of a market economy, be applied to this wider sphere? What special problems arise? Are there any alternatives?

These are the questions confronting the Community institutions. Like all forms of policy, economic policy is the art of moulding a given situation to meet desired ends. To do this successfully, and to take the right action at the right time, the constantly changing facts, trends, and other circumstances must be continuously recorded and analyzed. The experience of the world economic crisis in the twenties and early thirties shows that economic policy can only be completely successful if measures are not taken in isolation, if they do not conflict with each other, and if they do not cancel each other out – if, in short, they are all based on one guiding principle, an overall approach, and are themselves co-ordinated. There must be a rational connection between the initial situation, the aims pursued, the guiding principles, and the methods of economic policy applied by the Community.

1 The problem

The facts about the European Community's progress since 1957 are well known. It is more than half way along the road to a full customs union between the six member countries; industrial duties have been cut by 70 per cent of their January 1957 level; and all quotas in trade between the Six have been abolished; and for imports from outside the Community the member countries have eliminated 60 per cent of the difference between their national tariffs and the duty levels of the Community's common external tariff.

The first important steps have also been taken on the road to economic union by evolving a common approach to agricultural policy, competition policy, measures concerning state aids, the free movement of persons, services and capital, and freedom of establishment.

But we still have a long way to go to achieve economic union, and we cannot act as though it already existed. No market in any product is yet characterized throughout the Community by conditions similar to those obtaining on a domestic market; true competition is still prevented, restricted or distorted by a wide variety of factors based on the traditional national divisions. The main obstacles to competition and trade are: customs barriers, tax barriers, state trading monopolies, subsidies, cartels, transport barriers, restrictions on free establishment and the movement of capital, discriminations in patent regulations, and disparities in company law, legislation on foodstuffs and pharmaceutical products, the laws regulating standards and competition law. Finally, barriers caused by exchange rates are making themselves increasingly felt.

These are the main obstacles to competition and trade within the Community. However, they are only one side,

in a sense the outer skin, of the situation in which our member countries find themselves. Inside, we have six different economic orders with varying structures, six different legal systems, and six social systems, each with its own peculiar structure.

In Germany, there is the "social market economy". The economic systems of the other member countries also bear the stamp of the market economy, though in some ways they differ appreciably from the German model. In France there is a market economy with a superstructure of planning and intervention. In Italy, where the outlines of a five-year economic plan including social aims have been published, there is a market economy directed mainly via the big public undertakings. In the Netherlands the market economy approach is coupled with overall analytical forecasts intended to provide the authorities, the two sides of industry, and management with guidance on the effects to be expected from any given measure.

Thus two questions arise. Firstly, does the concept of the superiority of an economy based upon competition, which is valid for the separate national economic areas, hold good also in the initial stages of a common market? In the above conditions, in fact, is competition an adequate means of achieving conditions similar to those found in a domestic market, and, if so, what institutions, what measures, what economic policy are needed to make the concept of competition an effective instrument of integration? Secondly, under what conditions can competition assume the role of an instrument to guide the economy of a "domestic" market on a Community scale once it has come into existence, and what economic policy measures are needed for this purpose?

2 Competition as an instrument of integration

We have faced the first question – the efficiency of competition as an instrument of integration and its encouragement by means of a suitable policy – ever since the Common Market came into being. It will continue to exercise us until the whole of the Community is a single, internal market.

The ends and means of the Rome Treaty

This question can only be answered if the ends to be attained are known. The Rome Treaty sets them out in Article 2: harmonious development of economic activity, continuous and balanced economic expansion, increased economic stability, a faster improvement in living standards, and closer relations between the member countries.

The Treaty also indicates in varying details what means, i.e. what measures and procedures, are to be used for the attainment of these objectives. To mention only a few: the dismantling of tariffs, the removal of obstacles to freedom of movement of persons, goods, services and capital, the introduction of a system of undistorted competition, the co-ordination of economic policy, and the alignment of the member states' legislative provisions.

It is clear from the more than one hundred Treaty provisions in this field that co-ordination of the economic programs of the Community countries is to be achieved by the play of market-economy forces and not at the behest of a single central authority. There is, therefore, no question of the Community having to choose between merging the national markets under a central plan and allowing a balance to emerge between the forces of supply and demand, mainly through the price mechanism. The only question is whether the merging of the markets and the economic objectives of the Community can be attained most quickly and most efficiently through the effective degree of competition available at each stage in the development of the Common Market, or whether further measures – in addition to the promotion of competition – are necessary because of the restrictions on and distortions of competition still persisting in trade between the member countries.

The effects of freer trade and competition on national economies

First let us consider the effects of free international trade – based on competition – on national economies involved. The theory of international trade states that free, or freer, trade leads to increased prosperity in all the countries taking part. Under perfect competitive conditions the price mechanism automatically ensures that each country

specializes in the goods for whose production it is relatively best suited, and that it only imports goods which it can obtain more cheaply abroad than by producing them at home. Free or freer trade thus permits greater international division of labour. If goods are imported at a price with which industry at home cannot compete, it is obliged to reduce output or go over to other lines of production. The factors which move over to other fields of production can then operate more economically, and turn out greater volumes of the goods which consumers require.

The effects of freer trade and competition on integration

The degree of freer trade already achieved between the Community countries, i.e. the considerable reduction of duties and the abolition of quotas, has led to a substantial improvement of competition. In so far as customs and quota barriers have been lowered, and are being further lowered, new business opportunities have emerged for industry and commerce. When these opportunities are seized, greater competition ensues, as can be seen from the increase in the volume of intra-Community trade by 166 per cent between 1958 and 1964.

Thus the role of competition as a factor in integration, by expanding the national markets and gradually merging them, has steadily grown in importance. The progressive and reciprocal opening of markets has increased the number of competitors; competition has become keener, and productivity has risen. Monopolies and cartels in some countries are finding themselves threatened, and the oligopolistic market positions of other companies are being undermined. In turn, growing competition stimulates the manufacturers' will and determination to enter markets in other member countries so far reserved to their competitors. They are consequently led to apply the best production methods and so promote technical progress. The emergence of wider markets also makes it possible to exploit the advantages of large-scale mass production. With growing competition the most efficient manufacturer or service provider can reduce his prices, which obliges the high-cost competitor to rationalize and so bring down his own costs. With prices thus reduced, or at any rate prevented from rising, the real incomes of workers are boosted or at the very least maintained. The degree of economic integration so far attained in the Six may be said to be mainly due to the pressure which growing competition has exerted on the economic behaviour of those participating in the market. Its function as a mainspring and driving force in integrating the Six markets is undeniable.

3 Competition policy in the Common Market

We have already seen that freer (as opposed to completely free) trade and competition in the Common Market has led to an increase in the gross national product of all member countries, and that competition, albeit in many cases limited or distorted by cartels, monopolies, state aids, and fiscal and other regulations, performs a decisive and successful function in integration – to the benefit of the Common Market as a whole.

However, it is certain that the influence of the market mechanism in co-ordinating individual plans is different, under conditions of state and private intervention, from what it would be if there were no distortions and limitations of competition. Trade and competition take place not only between the national economies of the Six but even more between individual firms. From the standpoint of the firms and industries affected, distortions of competition often look different than when seen from the standpoint of the economy as a whole.

Thus keener and freer competition between enterprises is not in itself sufficient. In order that the companies and national economies involved may derive maximum benefit from the economic advantages of a competitive economy, and in order to share these advantages fairly and to complete the integration process, it is also necessary to eliminate artificial distortions and restrictions of competition. Even if artificial assistance to a particular economic sector in a member state is of advantage to the overall economies of the other member states, we cannot assume that this will, in fact, be acceptable to these states. They may take countermeasures, which will make integration more difficult. Such countermeasures, together with uncertainty as to how long the resultant distortions of competition will last, impede the optimum division of labour. Since the First World War these artificial distortions of competition have proliferated, and today their abolition is at least as important to the achievement of a single economy as the removal of long-standing barriers to trade.

This is where the work of the Community's competition policy proper begins: it must eliminate these distortions and restrictions, or at least reduce them to a tolerable level for the firms affected and for the Community generally.

The aim: effective competition

To achieve this aim we must first know what criteria to apply and what form of competition we wish to introduce. Should our model be perfect competition, or some other market arrangement? The answer is that the aim ought not to be any particular economic model, but a workable

system of competition. This means seeking not perfect competition between unlimited numbers of firms but a system of competition that is effective in practice. The first essential of this is that any change in supply and demand should be reflected in prices, which should be the expression of economic scarcity and not the result of subsidies, monopolies or cartels. Nor can competition be effective unless there is open access to markets, i.e. unless new competitors can enter them freely and are not prevented from doing so by cartels, dominant enterprises or state action. Competition in this dynamic sense represents the opportunity for every competitor to expand his business at the expense of other competitors.

The issue is therefore the creation, maintenance and promotion of competition which stimulates and rewards efficiency and ensures a primary distribution of income and wealth consonant with performance. Only such competition can create a sufficiently broad basis for a secondary distribution of income and wealth, i.e. one consonant with social justice.

Specific distortions of competition

We can distinguish between specific distortions, i.e. those working to the advantage or detriment of given industries or given classes of firms, and general distortions, i.e. working to the advantage or detriment of the entire economy of one or more member states. We shall begin with the specific distortions, dealing first with state aids.

State aids, preferential fiscal and transport rates

The most important case is that in which one member state supports a given industry by exempting it from a tax, by directly subsidizing it from public funds, or by according it particularly low transport rates up to the frontier, while the other member states do not grant any of these advantages to the corresponding industry in their countries. Alternatively, the different member states may all grant such aids, but in varying form and volume. Such action affects the function of prices as a gauge of scarcity. Firms enjoying such protection make supplementary profits which are in no way related to their efficiency, but are made at the expense of firms that have to depend on their own efficiency; or these protected firms cause losses to the national economy by employing production factors which would be more economically employed elsewhere.

The European Commission is giving priority to these questions, and is demanding the elimination of such distortions of competition or, when elimination does not seem

possible, a harmonization of aid systems throughout the Community.

Restraint of competition by firms

The gradual merging of the six markets is creating new conditions to which those engaged in business must constantly adjust themselves. But businessmen can themselves hamper, delay or limit this process of adjustment through agreements restricting competition between firms; particularly effective are restrictions on competitors' access to the market, through horizontal and reciprocal exclusive-dealing agreements, agreements on market-sharing, and the fixing of production or sales quotas and of prices. In these circumstances, prices cannot change in accordance with variations in supply and demand; they are no longer the expression of economic scarcity, and cease to regulate investment and to stimulate growth.

Once the procedural conditions had been laid down in 1962 by a Council regulation on the basis of a proposal of the Commission (1), the Commission began to deal with cartels of this kind as a matter of priority. The first recommendation it issued concerned an international cartel in the building industry [*"Convention Faïence"* (2)] in which manufacturers, traders and builders undertook to deal exclusively with each other and impose limitations on market access by other traders. The Commission recommended that these restrictions be eliminated, and the parties concerned accepted the recommendation.

In another case of a collective and reciprocal exclusive-dealing system in the building industry, involving agreements on prices, quotas and market sharing (3), the Commission informed the considerable number of undertakings involved that it was of the opinion, after a preliminary examination, that these restraints on competition infringed the Common Market Treaty's prohibition of cartels (Article 85, para. 1, which bans price-fixing, production and sales quotas, restriction of technical development, market-sharing, discrimination, and tied sales) and were not eligible for exemption under Article 85, para. 3 (which permits agreements to improve production or distribution and to promote technical and economic progress, provided they are not restrictive and do not allow the firms concerned to eliminate competition). This meant that the firms involved lost their protection against the imposition of fines (Article 15, para. 6 of Council Regulation No. 17). The firms were called upon to end their infringement of the ban on cartels within a specified time.

Finally, the decision in the Grundig-Consten case (4) is worth mentioning. Under this decision the Commission

banned an exclusive-dealing agreement involving absolute territorial protection, and making Consten the sole distributor of Grundig products in France. For this purpose Grundig imposed an export ban on all its dealers in other countries, so that French customers could obtain supplies of Grundig products only from Consten. In addition, Grundig and Consten had signed a supplementary agreement on the use in France of a special trade mark ("*Gint*"), the aim of which was also to prevent firms other than Consten from importing Grundig products into the country. The Commission found that the agreement in this form infringed the ban in Article 85, para. 1 of the Treaty, and also that it could not be authorized under Article 85, para. 3. The Commission also forbade Grundig and Consten to obstruct rival imports into France.

In all, five decisions [Grosfillex (5), Bendix (6), Vitapro (7), Grundig (8), Deca (9)]; one recommendation [*"Convention Faïence"* (10)]; and one notice of prohibition [(11) Article 15, para. 6 of Council Regulation No. 17] have been issued so far. Further decisions will follow. However, the investigation of cartel cases, especially major international ones, takes some time.

In the matter of firms holding dominant positions in the market, the Treaty prohibits only the *abuse* of such positions. The legal and economic difficulties in interpreting Article 86 are considerable. Experience in applying it has been small, and no complaints have yet been made to the Commission. Such abuses are also difficult to detect by official investigation. Experience will show whether individual firms in dominant position can be subjected to an effective check on abuse by using the Treaty's provision for general investigations by economic sector.

Of late, an increasing number of mergers has taken place in the Community, and they may affect competition in much the same way as cartels. In conformity with the plans foreshadowed in its 1962 Action Program, the Commission has put in hand a number of studies and investigations to clarify the legal situation of such mergers in the light of

(1) Reg. No. 17, *Journal officiel des Communautés européennes* (JO) p. 204 (1962)

(2) Bulletin of the EEC, No. 5, May 1964, p. 46

(3) EEC Commission Press Release IP (64) 145 of September 16, 1964

(4) JO p. 2545 (1962)

(5) JO p. 915 (1964)

(6) JO p. 1426 (1964)

(7) JO p. 2287 (1964)

(8) See Note 4 above

(9) JO p. 2761 (1964)

(10) See Note 2 above

(11) See Note 3 above

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the Rome Treaty's provisions. These do not constitute an investigation of the problem of economic concentration in general; when that is undertaken, many other considerations will have to be taken into account in addition to the maintenance of effective competition.

Moreover, competition has always been regarded and promoted by the Common Market Commission not only as an instrument of economic integration and guidance but also as a means of preserving freedom of economic activity. Cartel, monopoly and merger law is therefore an essential element in the Community's economic system, which is based on freedom and a market economy.

The consumer is interested not only in low prices but also in having the widest possible choice of goods. Only a plentiful supply of products offers him the chance to choose what he needs. Such freedom of choice for the consumer is desirable not only on economic grounds, however, but also on social grounds. It is an essential feature of our free society; and since competition increases the supply of goods in the wider Community market and thus enlarges the consumer's freedom of choice, it is not only an instrument for guiding the economy but also a factor in shaping our social order.

The counterpart to the consumer's freedom of choice is the entrepreneur's freedom to operate in the market, which should as a rule (12) be limited solely by the economic principles of the market. Only if the entrepreneur attempts to evade or invalidate these principles are limits imposed on him by the law – notably through legislation against restriction of competition and against unfair competition. The freedom of action allowed to an operator in the market thus reaches its limits when the corresponding freedom of another operator is suppressed or curtailed through restrictive or unfair practices. This is what gives competition its constitutional, social and democratic significance and function.

In order to safeguard freedom of competition it is necessary to ensure that competition is fair. Unfair competition and dumping are abuses of the freedom to compete. Accordingly, the Rome Treaty provides for measures against intra-Community dumping. So far, in all cases where complaints of dumping have been shown to be justified the Commission has succeeded in stopping it without delay. The Treaty makes no provision for Community rules against other forms of unfair competition. Here national laws come into play, and the question of whether and how far these need to be aligned is at present still being studied.

Public undertakings and monopolies

The existing national laws governing market conditions also raise difficult questions for competition policy. The Common Market Treaty is gradually divesting the member states of the traditional instruments for influencing trade between Community countries: customs duties, quantitative restrictions, and limitations on the free movement of persons, goods, services and capital. In this way opportunities are created which, if exploited, result in competition across frontiers. The Treaty protects that competition; it gives the Community and the member states no powers to intervene directly in entrepreneurial planning and operations, which are co-ordinated through the play of the market, including prices.

On the other hand, the state is itself an entrepreneur in a number of cases. Through public enterprises and trading monopolies it can exert the same limiting effects on trade and competition as through the traditional measures listed above. In particular, it can place public enterprises in a more favourable position than their private competitors.

For this reason the Common Market Treaty lays down that by 1970 the member states must have adjusted their trading monopolies so as to remove all discrimination between public and private undertakings in the conditions of supply and marketing. As regards their public undertakings, Article 90, para. 1, requires member states to refrain from enacting or maintaining in force any measure contrary to the rules on cartels and aid. Article 90, para. 2, further provides that the cartel and aid provisions shall also apply to public undertakings.

What does this adjustment of state monopolies entail? Is it enough for a member state to eliminate individual discriminations while maintaining the exclusive import and marketing rights of the monopoly? Or must direct access to its market be made available for competitors from other member states? Does the guarantee of equal marketing and supply conditions for both the trading monopoly and private enterprise mean that the state monopoly's competitors shall enjoy the same freedom of movement in the latter's market as the monopoly has in the markets of its competitors? If it does not, would it be possible to speak of equal conditions of competition and, from 1970 on, of conditions throughout the Community similar to those of a single internal market?

These are the most important questions regarding state monopolies (Article 37). The same basic principle holds

(12) Cf. *Medium-term economic policy* below, under III, fourth section

good here as in interpreting the general prohibition of state action which has effects similar to cartels or of aids favouring public enterprises (Article 90, para. 1): that the rules of competition must be applied uniformly to all undertakings, public or private.

The regulation of markets by the public authorities should therefore only be allowed to an extent compatible with the Community's competition rules. Furthermore, where public undertakings engage in inter-state trade, competition, not state direction of their entrepreneurial activity, must be the means by which the Common Market comes about.

In this matter the European Commission is faced with difficult, often delicate problems that cannot be solved overnight. Initial successes have been achieved, however, and further steps will follow.

General distortions of competition

So far I have been concerned with distortions and restrictions of competition working to the advantage or disadvantage of specific industries or firms. To eliminate, harmonize or control these distortions and restrictions is one task of Community competition policy. The provisions of the Rome Treaty and various enforcing regulations already make it possible for the Commission to work out and to apply more and more fully a common policy on cartels, intra-Community dumping, state trading monopolies, and subsidies.

But experience has shown that this is not enough. On the contrary, differences in the economic policies of the member states can also lead to general distortions of the conditions of trade and competition between the states, and these distortions cannot be eliminated by the measures so far mentioned. This is the point where competition policy becomes inextricably linked with general economic policy.

Economic and monetary disparities

The overvaluation of a currency encourages imports and hinders exports; undervaluation has the reverse effect. Both lead to a general distortion, to the advantage or disadvantage of an economy competing in a common market, and adjustment requires a lengthy period. The efficiency of the price mechanism as a gauge of scarcity, laboriously achieved by free trade and competition, is again called into question when there are differing price and cost trends in the member states, and this deprives us of one condition for undistorted competition based on performance. When economic integration is well advanced, changes in exchange

rates are not to be recommended, because of the abrupt alterations they cause in the intra-Community terms of trade.

Thus the effectiveness of competition as an instrument of integration and guidance in a common market depends primarily on the equilibrium of the overall balance of payments of each individual member state. This equilibrium does not come about automatically. On the contrary, inflation can be controlled and economic stability maintained only if the member states and the Community *jointly* employ the weapons of economic, monetary, budget and fiscal policy. Because of the increasing merging of markets and the convertibility of national currencies, the speed with which economic fluctuations spread from one member country to another is increasing all the time. The economic-policy instruments which any one state can apply to keep the value of money stable are no longer adequate to control the development of the economy.

Consequently, a major step towards the co-ordination of the member countries' overall economic policies came in the spring of 1964 when the Council of Ministers adopted a Commission proposal that it should recommend to the member states a number of measures to restore the balance of economic development in the Community. The chief measure recommended was a more restrictive state spending policy, under which government expenditure was not to rise more than 5 per cent in comparison with 1963, and any deficits which resulted were to be financed by long-term loans. In addition, fiscal measures were to be taken to reduce domestic demand if this proved necessary. Finally, it was recommended that credit and incomes should be temporarily restricted.

What contribution can the common competition policy make to the task of combating inflation and improving economic stability in the Community?

The influence of competition between the member countries on productivity and prices is particularly important. If increasing competition speeds up progress in productivity, so that the trend of production keeps pace with wage rises in important industries, total production will keep pace with purchasing power. At the same time, competition puts a brake on inflationary increases in costs or demand.

Furthermore, the lower prices brought about by competition can have considerable influence on the level of wages. When these lower prices keep the cost of living stable or reduce it, a major reason for wage claims is eliminated. Effective competition will also force the employer to put

up stiffer resistance to wage claims which outstrip productivity advances.

Finally, the effectiveness of general economic-policy measures can be influenced by the intensity of competition: for instance, fiscal and monetary policy measures can be nullified by monopolistic actions which increase prices and wages.

These examples show how essential it is for economic and monetary policy to give maximum encouragement to effective competition. Competition not only supplements but also conditions such policy, and vice versa. Today the one can no longer function successfully without the other.

Disparities in tax systems

The second major task currently facing the Community's economic policy-makers is that of aligning the member states' turnover tax systems. Five of the countries apply the "cascade" system of multi-stage tax. This tax, which is levied each time a product changes hands during the course of manufacture or distribution, has a cumulative effect. But it does not permit exact calculation of the compensatory levy which should be charged on imports of comparable goods or of the refund due on exports in order to avoid foreign buyers having to pay turnover tax twice. This leads to distortions in inter-state competition. Furthermore, the "cascade" system, with its cumulative effect, favours integrated (generally large) enterprises, while small non-integrated firms are at a disadvantage. The cumulative multi-stage turnover tax therefore gives arbitrary encouragement to vertical integration, with all its consequences for competition and the social structure.

For these reasons the Commission proposed, in the autumn of 1962, that the "cascade" system should be replaced by an added-value tax system of a kind which is already in use in one member state (France) and which does not impair competition. The European Parliament welcomed and supported the Commission's draft directive and made improvements to it. Meanwhile, the broad lines of this common added-value tax system have been worked out.

The immediate aim of this general attempt to reform turnover taxation in five member states is to eliminate the existing distortions of competition, and the ultimate aim is to encourage free trade and competition between the member countries by abolishing tax frontiers and harmonizing rates of taxation (13). Like customs frontiers, tax frontiers with their physical checks, their bureaucracy, their paperwork, their cost to the state and firms, and, last but not least, their psychological effects, are a considerable

obstacle to free trade and to the creation in the Community of conditions similar to those obtaining in a domestic market.

Disparities in national economic legislation

The differences in tax systems provide a major example of the distortions of competition resulting from the member states' differing legal practices. Accordingly, the Community's competition system is not limited to formulating certain common rules of competition about cartels, dominant firms, dumping and state aids, but also includes the alignment of national legal practices which impede the operation of the common market. Thus the harmonizing of legislation is not only an essential instrument of competition policy but also one of the most important means of achieving European integration in general.

The chapter of the Rome Treaty on the harmonization of legislation is in Part Three, and entitled "Community policy". Under the heading "Common Rules", the Treaty codifies the rules governing competition, the fiscal provisions – aiming essentially at taxing trade in goods across frontiers in a manner which will not impair competition, and harmonization of legislation.

But the connection between harmonization of legislation and the European rules of competition is even closer. Article 101 actually provides for harmonizing legislation when "a disparity existing between the legislative or administrative provisions of the member states distorts the conditions of competition in the common market and thereby causes a state of affairs which must be eliminated." In order to avoid as far as possible future distortions of the conditions of competition by the issue of new regulations in a member state, Article 102 further provides for preliminary consultation with the Commission, which then recommends to the member state concerned the appropriate measures to avoid the particular distortion.

The third and most important general Treaty provision concerning harmonization of legislation is Article 100, which runs as follows: "The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for harmonizing such legislative and administrative provisions of the member states **as have a direct incidence on the establishment or functioning of the common market.**"

These three provisions, together with a number of special rules, set out the particular function and object of

(13) In its *Initiative 1964* the Commission has since called for the elimination of all frontier controls by 1970

harmonizing member states' legislation. It is an essential component of the plan set out in the Rome Treaty for the progressive merging of the six economies. It is therefore intended to eliminate differences between member states' laws which hinder this process of growing together into a common market with features similar to those of a domestic market. Hence the harmonization of legislation is not an end in itself but serves specific purposes: the establishment and operation of the common market and the creation of similar legal conditions of competition.

The aim is therefore to create fair systems of competition and economic activity by appropriate adaptation of the member countries' economic legislation. The adaptation of national laws must be affected in a form consonant with the existence of the Community, since they must be able to co-exist with Community law – the Treaty and its implementing provisions – and to supplement it in accordance with the aims of the Treaty.

It is immediately clear that this aim cannot be reached by applying the criteria normally valid for conflicts of laws in the traditional sense. Within a common market it is not sufficient to know whether this or that national law is applicable. What matters is that the national law applicable to any given case shall conform **substantively** with the law applicable to competitors in other Community countries to an extent sufficient to preclude conflicts of substance and the distortions in inter-state competition to which they give rise.

Which fields of law has the Commission tackled first? The answer is simple: the national provisions which are the most direct and persistent obstacle to the establishment of the common market. The effects of different levels and forms of turnover tax were the most immediately obvious. Work on harmonizing public law in the economic field has also made progress, particularly in the following sectors: food legislation, pharmaceutical products, veterinary legislation, public contracts, the technical provisions for vehicles, industrial safety regulations, customs legislation, and legislation regarding executory arrangements and bankruptcy. Another comprehensive field for harmonization is freedom of establishment in the Common Market, which is still hindered by numerous national laws and regulations.

In the field of private law the Commission is concentrating on relating to patent, trade-mark and design legislation, and on certain aspects of company law and of the law against unfair competition.

The most important instrument for the harmonization of laws is the "directive", which the Common Market Council of Ministers issues on a proposal by the Commission. It is binding on each member state to which it is addressed in respect of its objectives, but leaves the choice of method to the national authorities. A further instrument is the international convention, which is also designed to create new Community substantive law and, consequently, standards which supplement the Treaty. Examples are the draft conventions on a Community patent, on mutual recognition of companies, and on the mutual recognition and enforcement of judgments.

As regards method, the question arises whether harmonization in any given field should aim at a standard attained in the majority of the member states, or at the most advanced and most practical standard appropriate to the conditions and needs of a large new economic and legal area. The Commission's attitude to this question is shown by its proposal to extend the added-value tax system, which does not impair competition, to the five member states which do not have such a system. Another question of method is that of participation by the academic world in the work of harmonizing Community laws; here, a great task confronts the legal experts of the Six.

Medium-term economic policy

These, then, are the most important measures aimed at making competition an effective instrument of integration and guidance, and at keeping it free from specific and general distortions. At the same time, it is a fact that in various spheres action by the member states goes further than these measures, especially in the financial field. About one-third of national incomes is channelled through public budgets. State investments in public works such as roads, schools, universities, hospitals, city parks, and in promoting education, research, social institutions, etc., are not governed by the rules of the market. The same applies to measures taken by the public authorities as part of regional and development policy, aimed at helping less favoured areas. Thirdly, there are state marketing arrangements and protective measures for particular sectors, such as agriculture, energy, transport and housing.

Some of these measures limit competition and interfere with the price mechanism; frequently the degree in which they achieve their objectives is inadequate. The first task is to see how far they are really useful. Where they are found to be necessary, the second essential is that they should be effectively and systematically applied. With

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short-term *ad hoc* measures in particular, care must be taken to ensure that their indirect and longer-term consequences are taken into account, and that they are not disjointed or contradictory.

These dangers are also a very real threat to the integration of the Common Market and to its market order. With the national economies becoming increasingly open one to another, economic policy measures introduced by one member state have repercussions on the other nations' economies and on the Community as a whole. There is therefore a risk that the member states and the European Institutions may take decisions without sufficient regard to their wider effects on the Community's economy, and that the policies of the national bodies and those of the Community Institutions may develop along divergent lines.

For these reasons these different measures must be co-ordinated, rationalized, and directed towards common objectives. Following a proposal of the Commission, the Council of Ministers therefore unanimously decided, on April 13, 1964, to set up a Medium-Term Economic Policy Committee attached to the Commission. On the basis of this Committee's studies the Commission, after consulting the European Parliament and the Economic and Social Committee, will submit a medium-term economic policy program to the Council for adoption.

This program will be based essentially on the economic forecasts of a group of independent experts working with the Commission. The group will discuss the prospects for the next five years on the basis of all available information, and will work out medium-term quantitative projections with special reference to the origin and utilization of the expected gross Community product. To do this, an analysis of the economy by a few major sectors (not individual industries) is technically essential.

These forecasts are not growth targets, but are intended

simply as pointers to the possible and probable economic trend. In this way the interventions by governments and by the Community Institutions that are recognized as necessary can be fitted into a coherent and systematic framework, while influencing the free play of the market only to an extent which is absolutely necessary and is accepted by all the responsible authorities.

Medium-term co-ordination thus involves an economic forecast aimed at strengthening and completing the competitive system and an economic policy based upon competition. Obviously, as was explained above in connection with short-term economic policy, the common competition policy cannot be successful unless the member countries follow a co-ordinated economic policy which does not run counter to it.

Nor will the forecast expressly limit the freedom of either companies or consumers, for it is not addressed directly to them but exclusively to the member states and the European Institutions. The medium-term forecast is therefore a means of initiating a continuous, factual discussion of economic-policy aims and measures and of enabling incipient undesirable trends to be diagnosed in time. It is thus destined to make a vital contribution to integration and to the establishment of a coherent economic policy based on the common competition policy. Consequently, the Commission has placed the following principle prominently at the beginning of its recommendation on medium-term economic policy :

"In sectors in which there is adequate competition, the free play of the market is the most effective instrument to ensure the best use of available resources; it is a fundamental factor making for economic progress. Therefore, an active policy is required to maintain competition where it exists and to strengthen it where it is not sufficiently effective."

4 Competition policy in the Atlantic partnership

The above chapter completes this outline of the most important tasks and instruments of intra-Community competition policy. But competition policy also has a part to play in the Atlantic partnership. What form should guidance of the international economic process take, especially with regard to trade between the Community and the United States?

Developments to date

Negotiations are now under way for tariff reductions within the General Agreement on Tariffs and Trade (GATT). These negotiations, known as the Kennedy Round, were made possible through President Kennedy's Trade Expansion Act, which empowered the President, in negotiations with the European Community, to make a 50 per cent reduction in US customs duties. This American initiative for an Atlantic partnership was taken in response to the existence of the Community, its growing internal consolidation and its increasing influence on the outside world.

Thus the establishment of the Community has set in motion revolutionary changes in the world economy in the direction of freer trade. The liberal external trade policy so far followed by the Community is evident from the fact that its initial external tariff in 1958 was already lower than the average customs tariff previously applied by the member states. Three further reductions have subsequently been made in this initial 1958 tariff – in 1961, 1962 and 1963. From 1958 to 1963, imports into the Community from non-member countries rose by \$7,900 million, or by 49 per cent, whereas between 1953 and 1958 – before the Community was established – they went up by \$5,200 million. These figures speak for themselves.

Objectives

The idea on which Atlantic partnership is based is that the future Atlantic world will comprise two large entities – the United States and an integrated Europe – and that the association between the two will lead to a new and freer structure for their mutual trade. These entities should not be isolated from each other, but should open up their markets to each other and thus contribute to the liberalization and reorganization of world trade.

Clearly, the reduction of customs duties alone will not attain this objective, for, as duties are reduced, other obstacles to trade gain in importance. Measures with an effect similar to customs duties, i.e. the method of classifying items in customs nomenclatures and the methods of

valuing them for customs purposes, can affect and distort international trade just as much as measures which have nothing to do with customs, such as dumping practices, cartels, discrimination on the basis of nationality (such as the "Buy American" Act), and state aids. An Atlantic competition policy is therefore necessary to ensure that unfair practices, restrictions and distortions do not undermine the greater freedom of action which industry and trade derive from tariff cuts and the resulting keener competition.

The policy necessary to achieve this could be evolved by expanding the Treaty's rules on competition and the corresponding United States laws into rules for an "Atlantic Community" endowed with its own legal personality and its own institutions. Atlantic partnership means consultation, not economic integration. It means not the abandonment of part of sovereignty, but agreement on particular principles and rules of procedure for an international system based on competition.

Principles and methods

The first principle should be that free trade must always be fair trade. Dumping practices must be excluded. Article VI of the General Agreement on Tariffs and Trade (GATT) could suffice as a substantive legal standard, though the enforcing procedure seems to require improvement. To deal with cases of dumping, a system of prior consultation and mutual help among the authorities concerned could be envisaged. In addition, the special difficulties and disadvantages which the American preliminary investigation involves for European importers should be eliminated.

The Community has no common anti-dumping law, and to this extent is at a disadvantage. However, the Commission has submitted proposals to the member states for common rules to protect the Community's trade.

The second principle should be that Atlantic trade should not be impeded by international cartels. It is in the interest both of the USA and of the Community that the opening-up of markets aimed at by tariff reductions should not be prevented or restricted by private market-sharing or by quota, price, export and import cartels. Admittedly, wherever such agreements affect competition on Community markets they fall under the Rome Treaty's rules of competition. But difficult legal problems arise when these provisions have to be applied to companies established abroad. Furthermore, according to American law, cartels

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for exports to the Common Market are admissible, under the Webb-Pomerene Act.

Conversely, European cartels for exports to the United States do not come under the Rome Treaty if the effects of their operations are limited to the American market. American anti-trust law may forbid them, but it is still difficult for the US to enforce their anti-trust legislation against European companies. Finally, Community law and American anti-trust law are often both applicable to international market-sharing, quota and price cartels because of their effects on both markets; in these circumstances, one wonders whether the activity of the anti-trust authorities ought not to be co-ordinated.

A third principle could be that state aids, including tax preferences, should not be substituted for dismantled tariffs. The US Trade Expansion Act contains certain provisions suggesting that the authorities should consult interested parties before they consider aids to compensate for the effects of tariff reductions.

Fourthly, foreigners should not be excluded from partici-

pation in public contracts. Here, from the European point of view, the main problem is the Buy American Act.

A fifth principle would be a ban on introducing new measures distorting or restricting competition, and on strengthening existing measures, without reference to the partner affected.

Finally, it could be agreed that when restrictive non-tariff measures are detected by one partner it should take no unilateral countermeasures until it has consulted the offending partner. It would perhaps even be possible to introduce an arbitration procedure, to be resorted to if consultations prove unsuccessful.

All in all, it can be seen that Atlantic partnership means more than the customary guarantee under GATT of the formal equality of opportunity for enterprise through the application of the most-favoured-nation and equal-treatment principles. These principles represent a novel attempt to supplement the traditional external-trade policy of the two partners by a few substantive and procedural principles which could form the framework for rules of fair competition at the Atlantic level.

5 The concept of competition within the Common Market

Experience shows that the dismantling of internal duties and quantitative restrictions and the building up of the common external tariff have reached a stage at which the other, non-tariff and non-quota barriers to trade are having increasingly strong effects.

It has been found that the quantitative steps towards a customs union are by no means enough to ensure an optimum division of labour: in order to achieve this, artificial distortions to competition must also be eliminated. This will probably be possible only when the Community has a recognizably durable economic order of its own and the Community Institutions are able to maintain it. Competition policy in the Common Market can only succeed within the framework of an economic union.

There is no other way of achieving the objective of the European Economic Community: the free, federal-type economic and social system which is the keystone of the Rome Treaty. To attain it, the Treaty lays down that there shall be a system of undistorted competition, of which the principles are defined in a series of individual provisions.

The Community's competition policy therefore has the two-fold task of promoting integration of markets by eliminating obstacles to competition and by using competition to guide the economic process in the integrated market. The common competition policy must therefore be guided not by the concept of a customs union but by that of an economic union, i.e. of six domestic markets gradually merging into one. The aim is not just to evolve an *international* policy on competition, to be applied among the member states – a form of international free-trade policy – but to lay down a joint Community policy on competition. It is not just a matter of increasing trade between the member states, but of the rules by which this trade is regulated. Competition policy does not mean *laissez-faire*, but the achievement of an economic order based on law.

Such an order is not an end in itself: in the economic sphere, it must promote growth; socially it must lead to the optimum satisfaction of human needs and the fair distribution of incomes, and legally and sociologically it must buttress the right of entrepreneurs and consumers to retain their economic freedom. This implies rejection of the idea that a simple customs union, or even a free trade area, might achieve something fundamental in improving the international division of labour. The facts prove the contrary.

As long as the common market is not completely established, the chief task of competition policy will be to make competition effective in trade between the member countries. This cannot be done all at once, but only step by step. It requires the harmonization and co-ordination of the various measures to promote competition, and calls imperatively for a unified, coherent policy in the face of the various public and private restrictions and distortions. The Common Market Commission is therefore doing its utmost to remove trade barriers by simultaneous, parallel measures.

However, this is possible only to a limited extent and, moreover, is not always necessary. In certain spheres of economic and competition policy, delays have occurred. People continually insist that this or that condition of competition must be harmonized before Community measures to promote competition can be introduced. This line of argument, however, is seldom sound; its approach is static, and it makes every single move dependent on every other move; if it were accepted, integration would immediately come to a stop.

A dynamic, progressive competition policy can neither tackle all obstacles at the same time nor wait until all the so-called "preconditions" are fulfilled before making a move. It is clear that conditions similar to those obtaining in a domestic market still do not exist, so that competition between the industries of the Six is still distorted and limited; but it is equally certain that many of the barriers to trade have already fallen. To this extent the Community's internal market has long since come into operation, and competition has begun to play its part. The task now is to maintain and extend it. The differences between competition policy in the Community market and competition policy in a national market are not differences of kind but differences of degree. Experience has shown that the transitional difficulties are often overestimated, and that the economy today is more capable of adaptation than is generally supposed. Perfectionism in competition policy is therefore just as much to be eschewed as one-sided concentration on partial sectors. Only through constant improvement and progress will the Community achieve the political aim it has set itself: the establishment of an economic and social order consonant with the needs of the twentieth century.

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