The expiry of the period laid down in Article 22(2) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 and extended by Article 2 of Regulation (EEC) No 2622/69 of the Council of 21 December 1969, implied, at the time of the events submitted for consideration by the national court, the abolition of the exclusive sales right laid down within the framework of the 'system of collection and distribution areas for milk in the Italian Republic' referred to by the said provisions, and that consequently all provisions of national legislation granting that exclusive right were inapplicable.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 21 March 1972.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 23 FEBRUARY 1972[1]

Mr President,
Members of the Court,

The SAIL undertaking, an Italian company having its registered office at Bari, operates a dairy at Gioia del Colle. On 17 April 1971 it delivered through its licensee 'Perle', homogenized, pasteurized whole milk to a dairyman at Bari. These facts were established by the public health authorities and gave rise to criminal proceedings before the Pretore di Bari. In that respect I must discuss some aspects of Italian law, the following particulars of which must be known. Article 1 of Law No 851 of 16 June 1938 (Gazzetta Ufficiale, No 147) permits the establishment of milk centres in communes where the daily consumption of drinking milk is at least 100 hectolitres. These centres have the task of collecting the milk intended for direct local consumption, ensuring its purity, subjecting it to treatment to ensure that it is safe and packaging it for sale to consumers so as to prevent any adulteration. They are set up on the request of the communes concerned, by means of an authorization which the Prefect grants after agreement by the Ministry concerned. Originally it was intended that the communes would entrust the establishment and the management of these milk centres to corporate professional associations. Since the professional associations and the corporate economic system had however ceased to exist at the end of the Fascist era,

1 — Translated from the French version.

those centres may now be managed either directly by the communes or by private companies under the control of the communes. Article 11 of the said Law No 851 requires the centres to buy the milk which they require from all the producers in an area fixed in accordance with the needs of the population by a decree of the Prefect. Article 12 provides that, exceptionally, when the milk produced in the reserved area is not sufficient to meet local consumption, centres may be authorized by the Prefect to import milk from another source. Most important, however, in the present case is Article 13 according to which, for communes where there is a milk centre the Prefect shall determine the area in which it is prohibited to bring in or to sell milk which does not come from the centre. Independently of certain other exceptions, the Law authorizes only processing undertakings which cannot obtain from the centre the industrial milk intended to be processed in establishments situated in the area, to buy it directly from the producers. Lastly, Article 16 of the Law lays down that infringements of Article 13 are punishable by a fine not exceeding Lit 16 000.

Because there is a milk centre at Bari and because SAIL had no right to sell milk to it, criminal proceedings were brought against SAIL before the Pretore di Bari for infringement of Article 13 of the Law the provisions of which I have just explained. In its defence the legal representative of the undertaking maintained that Italian Law No 851 was incompatible with the provisions laid down concerning monopolies in Article 37 of the EEC Treaty and with Community agricultural Regulations (EEC) Nos 804/68 (OJ English Special Edition 1968 (I), p. 176) and 2622/69 (OJ English Special Edition 1969 (II), p. 615) and that consequently this Law could no longer be applied. In view of this argument and considering that in application of Article 15 of the introductory provisions of the Civil Code, the provisions of Community law which are directly applicable must in the case of conflict with national law take precedence over the provisions of internal law made prior thereto, the Pretore decided on 3 July 1971 to stay the proceedings and to ask the Court to give a preliminary ruling on the following questions:

(1) Must Article 37 of the EEC Treaty be interpreted as meaning that national monopolies which cause discrimination between nationals of the Member States with regard to the conditions under which goods are procured and marketed include the milk centres to which the Italian Republic guarantees exclusive rights of importation and sale of drinking milk in the areas reserved to them (zone di pertinenza)?

(2) Must Article 37 of the ECC Treaty be interpreted as meaning that the bodies through which a Member State supervises or appreciably influences imports between the Member States include the milk centres existing in the Italian Republic?

(3) Does the expiry of the period laid down in Article 22(2) of Regulation (EEC) No 804/68 of 27 June 1968 and extended by Article 2 of Regulation (EEC) No 2622/69 of 21 December 1969 involve a prohibition on restrictions on the importation and sale of milk in view of Articles 5 and 37 of the Treaty?

(4) Do the provisions of Article 90(2) of the Treaty preclude the duty to abolish the restrictions in question?

(5) Have the provisions laid down in Article 37, and particularly those in the first paragraph thereof created direct and immediate rights in the Member States which individuals may assert before a court, as from 31 December 1969 (or at least as from 31 July 1970) (or does this direct effect follow from Article 22 of Regulation (EEC) No 804/68 and Article 2 of Regulation (EEC) No 2622/69)?

I shall now try to reply to these questions, taking into account the written and oral observations submitted by SAIL, the Government of the Italian Republic and the Council and the Commission of the European Communities.

1. Let me start with a comment of a general nature.

As we have seen, the Pretore di Bari considers that in case of conflict between Community law and national law, the solution must be sought by referring to Article 15 of the introductory provisions of the Civil Code, that is to say, by giving the provisions of Community law precedence over internal laws which *precede* them. This view-point was criticized by the Commission which pointed out that Community law must take precedence in any event whenever it lays down directly applicable rules.

In fact, the correctness of that statement cannot be contested. It is sufficient in this respect for me to refer to the case-law of the Court (Judgment of 15 July 1964 in Case 6/64, *Costa* v *ENEL* [1964] ECR 585). Consequently the Court might consider stressing this essential characteristic of Community law once more. I think that it would be wise to recall it, despite the fact that the question is not decisive with regard to the solution of the problems before the national court, in view of the date on which the national law in question in this case was adopted.

2. Having said that, before going into the problems of substance, I still have to consider certain questions of admissibility. The Italian Government in particular has referred to them, but so, too, has the Commission. The manner in which certain of the questions which have been referred to the Court are worded compels me to admit that these objections are not groundless.

Thus above all in its first two questions the national court appears to intend to ask the Court to link a particular internal situation to the field of application of rules of Community law, in other words to apply Community law to a particular case. However (as the Court has already emphasized on several occasions) it is certain that unlike the case of the procedure under Article 169, the procedure under Article 177 of the EEC Treaty does not permit the Court to give a ruling on the compatibility of a provision of national law with the Community rules, because that is the task of the national court.

But let me say on the other hand that there is no difficulty in altering the formulation of the questions which have been put to the Court in order to extract from them the real problems of interpretation raised in the present case, for example in the way in which the Commission has done on page 6 of its written observations. And (contrary to the view of the Italian Government) by proceeding thus it is perfectly possible to retain the reference to a particular national situation. In fact, not only is that reference justified by the fact that the Community regulations, the interpretation of which is here requested, obviously apply to clearly determined national measures, but, in a more general way, it enables (as I have already had occasion to mention in several cases of references for preliminary rulings) the scope of the request for interpretation to be clearly defined. Provided that the Court proceeds as I suggest it is in fact impossible to deny in principle the admissibility of the questions raised by the Pretore di Bari, especially since in the grounds of the order by which the Pretore asks the Court to give a preliminary ruling he himself has emphasized that because the case has come before the Court in this way, the Court clearly cannot rule on the *compatibility* of the rules of national law with the Community provisions.

The same applies obviously to the third and fourth questions, the wording of which appears also to indicate, even though less clearly, that they seek the application of the law, that is to say, the evaluation of a situation as it appears in concrete form in a particular State. We shall see later how it is nevertheless possible to examine them within the framework of the procedure under Article 177.

With regard to the fifth question, it must be observed also that the Italian Government regards it as inadmissible for lack of clarity, apparently because of the expression 'giustiziabili' used in the Italian text of the order making the reference (to indicate the provisions which individuals may plead before the national court). Further, it is not clear to the Italian Government which of the provisions laid

down in Article 37 of the EEC Treaty the national court refers to or of which provision of Article 22 of Regulation (EEC) No 804/68 it asks for an interpretation. An analysis of these objections shows, however, that they too are without foundation. It is clear in fact that the national court wishes to know simply whether as from certain dates certain rules of Community law are 'self-executing', whether, in other words, they may be applied directly at the national level and whether they create for individuals rights, the scope of which the case-law of the Court has already often had occasion to specify. Further, the context in which that court came to refer to this Court its request for interpretation leaves no doubt as to the provisions which it had in mind. I shall demonstrate this later as regards each question, and in doing so will make it clear that the fifth question is no less admissible than the first four questions.

Let me point out lastly, that the admissibility of the reference by the Pretore di Bari cannot be affected either by the fact that the replies to the questions which he refers to this Court may have repercussions in the field of national criminal law. As the Commission emphasizes correctly, the supremacy of the provisions of Community law which are directly applicable must be understood in a very wide sense. If, through a refusal to accept that fact, certain branches of national law such as criminal law were excluded from the application of this principle, this might easily result in reducing the field of application of Community law by camouflaging as criminal law certain areas of the law which have an effect in the economic sphere. It is self-evident that such a result is incompatible with the concept of the common market and the uniform applicability of the essential rules of Community law.

It appears, therefore, that in fact nothing prevents the Court from considering the substance of the problems put before it by the national court.

3. As to the substance of the case properly so-called, the Pretore di Bari asks you first of all to interpret Article 37(1) of the EEC Treaty, that is to say (if we take the first two questions together) to specify the concept of 'State monopolies of a commercial character', to decide what must be understood by a body 'through which a Member State, in law or in fact, either directly of indirectly supervises, determines or appreciably influences imports... between Member States' and to explain the phrase in Article 37(1) according to which it is necessary that 'when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'. The Court is asked to provide that interpretation with regard to the Italian milk centres the particular duties and special privileges of which I have already explained, especially the exclusive right granted to them to sell milk in a certain area. In order to reply to the Pretore within whose jurisdiction lies the interpretation of national law the Court must confine itself to what he has informed the Court of the nature of those centres.

(a) In this connexion let me first point out that the case-law of the Court already contains factors which enable the concepts set out in Article 37 to be explained. Thus (in Case 6/64, [1964] ECR 585), the Court stated that 'to fall under this prohibition [Article 37] the State monopolies and bodies in question must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade'. This statement is also of interest in the present case and I can consequently take it as the starting point for my analysis. In particular, it makes it possible to state, as the Commission has rightly emphasized, that it is not the fact that the product in question is 'whole milk' which could exclude the application of Article 37, since modern methods of preparation enable it to be kept for a sufficient length of time for it to be able to become the subject of international trade.

(b) As for further clarification concerning the concept of a monopoly I believe that

there is no alternative but to follow the opinion of the Commission which coincides with the opinion expressed by the accused. (In fact only these two have analysed the provisions of Article 37 exhaustively).

They consider that Article 37 applies above all to cases in which it is the State itself which reserves to itself the exercise of an economic activity, in particular the right to trade in certain goods. A further stage is then reached by the second subparagraph of Article 37(1) which must be interpreted in conjunction with the first subparagraph. It is clear that the said second subparagraph gives a very wide definition of the bodies in question here. It refers particularly to 'delegated monopolies', that is to say, situation in which the economic activity in question is carried out under the control of the State or under that of regional authorities, as soon as the result thereof is appreciable (spürbar') supervision or influence exercised on trade between the Member States. It is certain, however, that this latter condition cannot be understood as meaning that the activity of the State or of its delegated bodies must *directly* concern imports or exports; I concur with the Commission in regarding it as sufficient that the sale of national products is favoured by unilateral measures. Lastly, since Article 37 is drafted in very wide terms, there is no doubt that its field of application extends to activities which are limited to a *part* of the territory of a Member State. That must be accepted or otherwise the rules contained in Article 37 would be easily evaded by the creation of a large number of local monopolies. With regard to the application of Article 37, it is consequently indispensable to consider the matter generally; that is the only means of determining exactly whether the combined action of a series of local monopolies actually plays a part in trade between the Member States.

As soon as these considerations are accepted it is quite conceivable (a comment which I may, no doubt, be permitted to make within the framework of an opinion) that the Italian milk centres which have an exclusive right of sale fall within Article 37. Certainly these centres are run by associations governed by private law, but what is decisive as regards them is that their establishment is based on a measure adopted by the public authorities and that they are subject to the supervision of the latter. It is important further to note that they exist in numerous communes and that they deliver to a considerable proportion of the population quantities of whole milk which are very large in relation to the total quantities sold. It is possible therefore that they exercise an appreciable influence on trade between the Member States. The objection that since 1963 even in communes where there is a milk centre there has been freedom to sell *skimmed* or *partly skimmed* milk does not seem tenable. The decisive argument in that respect is in fact that even though it is possible that those products may to a certain extent compete with whole milk, they cannot be substituted for it entirely and that in many communes the milk centres have the exclusive right to sell whole milk.

(c) After thus deciding how the concept of monopoly referred to in Article 37 of the Treaty should be interpreted, let us now consider the meaning to be attached to the terms in which the same article requires that 'when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'.

There is no doubt (and that is a further point upon which the Commission is correct) that this phrase expresses a *strict* requirement. The French version of Article 37 shows that most clearly when it says that 'l'exclusion de toute discrimination' must be 'assurée'. It is correct to deduce from this that the *possibility* of any discrimination must be eliminated.

When bodies mentioned in Article 37 of the Treaty possess an exclusive right of sale, the question should consequently be asked whether discrimination with regard to nationals of other Member States necessarily follows therefrom. As the Commission has shown, that question requires an affirmative answer, at least as regards the *possibility* of discrimination,

where the State reserves to itself the exclusive right of sale, since it is possible that in so doing that State is seeking to defend interests which are not purely economic. This is *a fortiori* the case where the exclusive right of sale is granted to a body which itself produces or processes the goods which it distributes. In applying these considerations to the facts in the present case, taking account of the fact that as a general rule only processed milk may be the subject of international trade, it may be assumed in fact that the milk centres which have an exclusive right of sale will give preference to the sale of the milk which they have themselves processed. On that assumption the monopoly would not be sufficiently adjusted with regard to the requirements set out in Article 37 if, the attempt to neutralize the situation, only the obligation *to obtain supplies* exclusively in the area reserved were abolished. In fact only the abolition of the exclusive right of *sale* could eliminate all possibility of discrimination within the meaning of Article 37 of the Treaty. As the Commission and SAIL have both emphasized, this is the decisive consideration which may be deduced from Article 37 for the purpose of resolving the problems raised before the court making the reference.

4. Having said that, it is still important to consider whether certain other provisions of the Treaty may be an obstacle to the application of Article 37. In that respect consideration must first be given to Article 90(2) the interpretation of which the national court requests in its fourth question. As you know, this paragraph provides that 'Undertakings entrusted with the operation of services of general economic interest... shall be subject to the rules contained in this Treaty, in particular to the rules on competition' only 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. When considering how this provision is to be interpreted in view of the position and tasks of the milk centres as they have been described by the national court I find first of all that (as the Commission has pointed out) the expression 'operation of services of general economic interest' appears to cover a wide field of application. The services must be of an economic nature, for example the distribution of consumer goods, carried out in the interest of the citizens as a whole, although the whole population need not necessarily be involved because it is enough that certain groups of the population benefit from the services in question. It can probably be accepted that such is the case with regards to the Italian milk centres, despite doubts expressed thereon by SAIL. It may further be accepted that 'particular tasks' have been assigned to the milk centres by the national authorities, particularly as these centres must ensure the commercial and hygienic qualities of the milk which they distribute, and perhaps also in view of their duty to supply the population with milk. But another essential comment must be made on Article 90(2), which is that it only exludes (as I have already said) the application of the general rules of the Treaty to the extent to which the latter obstruct the performance, in law or in fact, of the particular tasks assigned to the undertakings referred to by subparagraph (2). On this point, the Commission rightly observes that in view of the exceptional nature of this provision it should be interpreted strictly in every case. It points out further that the exemption in question does not apply where trade is prejudiced to an extent which conflicts with the interests of the Community. Therefore there is no doubt that when the interests in question are evaluated it is necessary to be especially strict when rules concerning the free movement of goods have to be applied. I cannot see what other general criteria of interpretation may be deduced in relation to Article 90. At most I can mention also that it is impossible to see how, by implementing the requirements laid down by Article 37 (that is to say, by eliminating the possibility of discrimination by the abolition of the exclusive right of sale), it would be possible to prevent the performance in law of the tasks assigned to the milk centres, because, on the contrary (at least as regards supplies), it may be considered that the performance thereof would be improved. I do not believe either that it is

possible to say that this measure would *in fact* jeopardize the performance of those tasks on the ground that the abolition of hindrances to competition might endanger the existence of the milk centres. That assumption is certainly very unlikely. It may be said, further, that with regard to the application of Article 90 it must not be forgotten that the principle that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community must in any case be made to prevail.

This is the guidance which I believe will enable the Pretore di Bari to rule upon the application of Article 90 to the facts submitted for his judgment and for this purpose correctly to decide upon the interests concerned.

5. But, independently of Article 90(2) the present case may also bring into play Article 36 of the Treaty. As you know, this article authorizes 'prohibitions or restrictions on imports' which are justified on grounds of the protection of health and life of humans, animals or plants. And it is certainly possible to consider that it does not apply only to the provisions of Articles 30 to 34, but, because of the relatedness of the matter, it must also be considered in applying Article 37. Thus I should consider how Article 36 must be interpreted in relation to a situation, such as that in the present case, which has been put before the national court. No doubt the objection could be made that the latter has not asked you a question on this point and that it seems in fact that having interpreted Italian Law No 851 the court *deliberately* did not ask this. Like the Commission, however, I do not see what could prevent some guidance from being added on this subject for the sake of completeness.

In that respect it appears above all that because it is a derogating provision Article 36 must be interpreted *strictly*. Unquestionably, it is not enough that the words used by the national legislature show that the measure in question was adopted on the grounds of the protection of health; independently of the manner in which the legislature has described it, it is necessary on the contrary to consider whether this measure is *necessary* and *suitable* for the purpose described.

When this criterion is applied it is undeniable that serious doubts arise about the Italian milk centres and the need to ensure for them exclusive rights to sell whole milk (this, furthermore, may explain why the national court did not raise the question of the interpretation of Article 36). It is in any case interesting to notice that large parts of the population of Italy may be supplied with fresh milk without the intervention of the centres and that, since 1963, even in the regions which possess a centre fresh skimmed or partly skimmed milk may be sold without its intervention. It is also symptomatic that in certain other Member States (such as France and the Federal Republic) which have introduced extremely strict provisions to ensure the protection of health, the system of the exclusive selling right of milk centres is unknown or no longer known. In these circumstances, it seems therefore that the Commission is justified in describing the maintenance of the exclusive selling right of the Italian milk centres as excessive in view of Article 36 and in stating that since the practice of pasteurization of whole milk is at present widespread, and that taking account of the strictness of the other controls exercised in Italy when milk is produced and imported, it is henceforth useless to rely upon grounds of protection of health to justify this exclusive selling right.

Consequently, it certainly appears that none of the observations which may be made concerning the interpretation of Article 36 is such as to exclude the application of Article 37 to the Italian milk centres.

6. In a further question the Pretore asks the Court whether, as from the expiry of the period which was laid down by Article 22(2) of Regulation (EEC) No 804/68 and extended by Article 2 of Regulation (EEC) No 2622/69, that is to say, from 1 April 1970, it is necessary to take the view that, in view of Articles 5 and 37 of the EEC Treaty, there was a prohibition on

restrictions on the importation and sale of milk.

Of the questions raised in the present case this is the one which appears to me to require the greatest thought. I think that it necessitates an examination in several stages.

(a) First of all the relationship between the provisions of Article 37 and the special provisions regarding agriculture set out in Title II of Part 2 of the Treaty must be analysed generally. In that respect the Court will remember that SAIL claims that where a monopoly extends to trade in agricultural products it is necessary in any case that the resulting discriminations should have been abolished at the latest by the end of the transitional period. It considers, in other words, that since Article 37(4) is a special provision governing monopolies in agricultural products, it must prevail over the other provisions on agriculture and to support this view it relies on the fact that that paragraph provides that in the application of the rules concerning monopolies there should be 'equivalent safeguards for the employment and standards of living of the producers concerned'. The Commission, on the other hand, considers that the special rules on agriculture must in any case prevail over the general provisions of the Treaty and that the monopolies which form an integral part of national organizations of the market may be retained as they are until their replacement by common organizations of the market, that is to say, if necessary after the end of the transitional period.

In view of this controversy I was, at first, impressed by the arguments of SAIL which point out that in speaking of equivalent safeguards for the employment and standard of living of agricultural producers Article 37(4) uses words identical to those used by Article 43(3) in respect of the substitution of a common organization of the market for national organizations. However, having compared all the arguments put forward and taken account of the general structure of the title concerning agriculture and the underlying purpose of the rules which it lays down, I think that I must agree with the argument of the Commission and acknowledge that the provisions on agriculture must in principle prevail over the other rules of the Treaty, including that which is laid down in Article 37. A point which appears to me to be significant in this respect is the quite general terms in which Article 38(2) provides that 'the rules laid down for the establishment of the common market shall apply to agricultural products' only 'save as otherwise provided in Articles 39 to 46'. It is plain that the rules thus referred to also include those laid down by Article 37. Next it is important to note that it follows from the provisions of the title concerning agriculture, especially from Article 43(3) and from Article 45, that the national organizations of the market could continue to exist, with all that they involved as derogations from the rules of the Treaty, until they were replaced by the common organizations envisaged in Article 40. Since Articles 43 and 45 mention no date, that substitution did not necessarily have to occur before the end of the transitional period (that is a point to which I will return later). Furthermore, the reservations with regard to long-term agreements mentioned in Article 45 also warrant the conclusion that certain types of discrimination may continue beyond that date. It appears, consequently, that the physical and temporal scope of the derogating provisions laid down with regard to agriculture is very wide. Therefore it is hardly conceivable that precisely in cases where monopolies operate in agriculture and where therefore it may be assumed that the products and interests are particularly important, regard should be had to the period laid down in Article 37 for the elimination of discrimination. In fact, in order to avoid such an absurd result (to use the Commission's expression), the only reasonable interpretation which can be given to Article 37(4) is that this article applies only to cases in which the rule relating to monopolies is applicable, in cases, for example, where, since the monopolies which extend to agricultural products are not part of a national organization of the market, there can be no

question of relying on the special provisions relating to agriculture.

(b) As I am thus led to accept that the special provisions of the Title relating to agriculture may exclude the application of Article 37 of the Treaty, I should now consider whether the latter are applicable in respect of the milk centres which in Italy have an exclusive right of sale.

In that respect, it is clear that the Court cannot consider whether the system of milk centres forms an integral part of a national organization of the market, because that would amount to carrying out the *application* of the law which the Court is prohibited from doing within the framework of Article 177. The matter to be specified is what is understood by organization of the market within the meaning of the Treaty so as to enable the national court to determine the nature of the national rules in question having regard to Articles 43 and 45 of the Treaty. For this purpose I can first of all refer to some guidance which the Court has given on the concept of organization of the market in Joined Cases 90 and 91/63 ([1964] ECR 625, 13 November 1964, *EEC Commission* v *Luxembourg and Belgium*—licence charges for certain milk products). It is interesting to point out next the considerations put forward by the Commission relating to the definition of this concept, according to which it is possible to speak of organization of the market when there are rules which govern the market in an agricultural product and provide safeguards for the employment and the standard of living of the producers concerned and ensure the sale of the products in question at stable and remunerative prices.
Regarded in this light it must be accepted (I can allow myself at least this comment within the framework of my opinion) that it is possible that, as the Italian Government and the Commission have both emphasized, the rules governing the Italian milk centres constitute important factors in an organization of the market. In fact the exclusive right of sale granted to the centres and the requirement imposed upon them to purchase milk produced in the reserved area ensures a sales outlet. Furthermore, it may be assumed that agricultural producers who for their part are not required to sell to the centres exercise an influence on price formation and that the machinery in question therefore also ensures reasonable prices. This means that there is no reason why the special rules laid down in respect of agriculture cannot apply to the situation at issue before the court making the reference.

(c) On the basis of this finding I shall now consider the rules which the national court mentioned in its third question. In this respect the Court will recall that the fourth subparagraph of Article 22(2) of Regulation No 804/68 had authorized the Italian Republic to maintain until 31 December 1969 measures regulating the supply of drinking milk to certain areas and that, by means of Regulation (EEC) No 2622/69 of 21 December 1969, 31 March 1970 was substituted for 31 December 1969. In the absence of other provisions of Italian legislation which may be taken into account, there seems to be no doubt that those Community regulations could have referred only to the system applicable to the milk centres or at least to certain aspects of the functioning of these centres and, in particular, to the exclusive right of sale which was granted to them for certain areas.
However the point at which the controversy becomes keen is when the scope of that temporary authorization has to be determined; whether (as the Commission and SAIL consider) that authorization implies that upon the expiry of the period for which it was granted the provisions of Article 37 of the Treaty are to be applied, or whether (as the Italian Government believes) it is necessary to consider that, for certain reasons which I shall examine later, the expiration of that period does not involve the duty to apply the general rules of the Treaty.
The examination of this problem calls for a somewhat closer investigation. As you know, on 27 June 1968 the Council adopted Regulation (EEC) No 804/68, which is intended to determine the defini-

tive organization of the market in milk and milk products, in order to replace Regulation No 13/64 (OJ No 34, 1964, p. 549), the objective of which was the progressive establishment of a common organization of the market in milk. But that organization of the market was not complete; it revealed certain lacunae precisely as regards drinking milk, the product in question in the case before the national court. Because certain difficulties of definition and certain problems of the protection of health had arisen regarding this product, the Council decided by Article 22(2) of Regulation (EEC) No 804/68 that the Community system of supplementary measures for products falling within heading 04.01 of the Common Customs Tariff should be adopted before 1 April 1969 and applied not later than 1 January 1970. This paragraph provided also that the Council would adopt transitional provisions for intra-Community trade in milk of a specified quality and that these provisions would be applicable not later than 1 January 1969. Article 22 further provides that 'Until these transitional provisions are applied Member States may retain for such products the quantitative restrictions and measures having equivalent effect operative at the time of the entry into force of this regulation'. However, the difficulties which emerged during the later stages of the deliberations prevented the time-table thus laid down from being adhered to. In fact rules governing drinking milk were first drawn up in Regulation (EEC) No 1411/71 of 29 June 1971 (OJ English Special Edition 1971 (II), p. 412) and the application of those rules depends on the adoption of supplementary general rules. Article 10 of Regulation (EEC) No 1411/71 provides that the rules in question must begin to apply not later than 31 March 1972. The quantitative restrictions which Article 22(2) of Regulation (EEC) No 804/68 permits to be maintained must also be abolished by this date at the latest.

In view of this situation one fact must first be established: in fact (as I have already indicated) no objection can be made that the organization of the market in milk was not completed until *after* the expiration of the transitional period. It would be useless to object that Article 40 of the Treaty provides that the common agricultural policy must be worked out during the transitional period and that it must be brought into force by the end of that period at the latest. It is impossible in fact, interpreting the wording of Article 40 strictly, to claim that the national organizations of the market should have been replaced immediately and at the latest by the end of the transitional period, since in this respect Article 43(2) makes provision for the determination of the necessary dates and details including the adaptation measures to be laid down with regard to the national organizations of the market. This argument gains further support from the fact that several provisions of the Title concerning agriculture (for example Articles 42, 44 and 45) make provision for derogations which may continue beyond the end of the transitional period.

On this assumption, the decisive question is then whether it is necessary to take the view that the national organization of the market in milk (provided that it exists) may, with all its detailed rules by virtue of a unilateral voluntary measure of the State, continue to be applied as long as is necessary, that is to say, until the completion of the common organization of the market, and that, consequently, the application of the general provisions of the Treaty, including those laid down in Article 37, is excluded. That, as you know, is the argument of the Italian Government which accordingly claims to acknowledge the authorization granted by Regulation (EEC) No 804/68 and extended by Regulation (EEC) No 2622/69 as being of a *declaratory* nature only. To this SAIL replies that the existence of certain elements of a common organization of the market is a sufficient condition and that even if there exists only an incomplete organization as, in this case, that which has been established by Regulation (EEC) No 804/68, this makes it justifiable to require the adaptation of national provisions on monopolies. As for the Commission, it considers that from the time when a common organization of the

market has been started, if only in the form of a partial organization, only the Community retains regulatory and discretionary powers with regard to the sector in question and national measures relating to the organization of the market are applicable only by virtue of an authorization by the Community. The Commission submits that, accordingly, the authorization laid down in Regulation (EEC) No 804/68 and the periods applicable thereto must be considered as of a *constitutive* nature.

On this crucial point, I must say immediately that after considering all the arguments carefully I am obliged once more to endorse the opinion of the Commission. It seems in fact that one can only agree with the argument that the derogating provision which permits the provisional maintenance of national organizations of the market is to be interpreted *strictly* particularly because it is only contained *by implication* in Article 43 of the Treaty. Furthermore, in view of the requirements of legal certainty, it seems reasonable to accept that the Member States cannot unilaterally and without a measure of Community law continue to apply their national rules on the organization of the market where the essential components of a common organization of the market have already come into existence. In fact, far from its being necessary, with regard to the replacement of the national organizations of the market, for the common organization to be a faithful reproduction down to the smallest detail, all that is required is that 'equivalent safeguards for the employment and standard of living of the producers concerned' are created and that 'conditions for trade within the Community similar to those existing in a national market' are ensured. It is obvious that such criteria imply a discretion which can clearly be exercised only by the competent authorities of the Community. If, consequently, a Member State considers that a common organization of the market does not ensure safeguards equivalent to those of the national organizations it must raise this objection either when the common organization is created, or, if appropriate, by bringing the matter before the Court, if the Council has overruled its objection. But I cannot see how, on the sole basis of the imprecise wording of Article 43 of the Treaty, it could be permitted to maintain certain elements of its national organization of the market without the consent of the Community instititutions. Consequently the only conclusion which I can reach in the present context is that the authorization contained in Article 22 of Regulation (EEC) No 804/68 and the period laid down by that article and by Regulation (EEC) No 2622/69 are of a *constitutive* nature.

However this is not sufficient to warrant the definitive conclusion that since the authorization had ceased at the expiration of those periods, the rules laid down by Article 37 in respect of monopolies could consequently apply. Such a deduction still in fact encounters several other problems.

The first is a *problem of interpretation* raised in respect of those periods by the Italian Government. The latter considers that it is a mistake to refer solely to the expiry of the periods because account must be taken of the general structure of Article 22 of Regulation (EEC) No 804 which shows that in fact the authorization is subject to the fulfilment of a *condition*, that is to say, the adoption of supplementary measures which had to be taken with regard to drinking milk. It must be conceded that at first sight this argument may be impressive, both because Article 22(1) provides that the supplementary measures must be adopted before 1 April 1969 and because they *must be applied not later than 1 January 1970*, that is to say, exactly on the date prescribed for the expiry of the period laid down in the authorization. Ultimately, however, it appears that this reasoning is unsound and it is easy to demonstrate this by means of two arguments. First, it is necessary to note the method by which Article 22 has arranged the maintenance of quantitative restrictions: this is permitted until the implementation of the transitional system provided for in the second subparagraph of Article 22(2). In my opinion it may immediately be concluded from this that the Council would certainly have adopted similar wording for the authorization

provided for in the fourth subparagraph if in fact, as the Italian Government claims, it had intended to link its authorization to the adoption of supplementary provisions. Secondly, (and this is perhaps even more significant), although at the date of the *extension* of the period of the validity of the authorization, that is to say, when Regulation (EEC) No 2622/69 of 21 December 1969 was adopted, it was clearly not expected that those supplementary provisions would be laid down in the near future, the authorization was nevertheless extended for only three months. Furthermore, the recitals in the preamble to Regulation (EEC) No 2622/69 refer only to the fact that the milk marketing year was in progress, without mention of the absence of the supplementary provisions which the Italian Government claims to be the decisive factor. Consequently it appears that, in fact, the interpretation attempted by that Government cannot lead to the conclusion that the periods in question have not really expired.

The second problem arises from the fact that, in its turn, Regulation (EEC) No 1411/71 containing supplementary provisions for drinking milk authorized the Italian Republic 'to maintain until 31 March 1973 the provisions applying on 31 March 1970 to those milk centres which were at 31 March 1970 supplying drinking milk to certain communes under those provisions'. This leads to the question whether this regulation had the effect of *retroactively* authorizing the retention of the system of milk centres and whether the view should be taken, which is that of the Italian Government, that Article 37 of the Treaty cannot be applied until after the expiry of the period thus laid down in Regulation (EEC) No 1411/71 or whether that conclusion can be avoided either by a suitable interpretation of Article 9 of the said Regulation (EEC) No 1411/71 or by taking the view that this provision is invalid (which ultimately is what SAIL maintains). In fact the Pretore di Bari has not asked you that question. But it may be accepted that he would have done so if he had known of Regulation (EEC) No 1411/71 before giving the judgment in which he made the reference to the Court. (As you know, the regulation in question was published in the Official Journal of the European Communities on the very day of this judgment). Therefore there is certainly nothing to prevent me from extending my examination to Regulation (EEC) No 1411/71 in order to reply correctly and fully to the questions referred by the Italian court. There is furthermore all the more reason to do so since this problem does not present any undue difficulties. Thus, first of all I do not consider that there is any reason to throw doubt upon the *validity* of Regulation (EEC) No 1411/71, at least with regard to the provisions thereof which apply to this case (because I do not have to concern myself here with the question whether the derogation authorized in favour of the Italian Republic may, on the grounds relied upon by the Council in support of its regulation, remain in force beyond the date of the application of the common organization of the market in drinking milk). On the other hand I consider that a reasonable interpretation shows that the Council did not intend to make the derogation which it authorized retroactive to 1 April 1970. If in fact such was its intention, it should have expressed it formally (but, in that case the validity of the regulation might be exposed to criticism, since in the meanwhile it might have become possible for those concerned to derive rights directly from the Treaty and to rely upon them in order to escape prosecution by the State). In fact, not only has the Council made no such formal provision but further, contrary to what the Italian Government believed, it is impossible to say that Article 9 of Regulation (EEC) No 1411/71 *replaced* Article 22 of Regulation (EEC) No 804/68, because the new regulation merely reaffirmed that the provisions applying to the Italian milk centres could be maintained. In this respect, in view of Article 10 of Regulation (EEC) No 1411/71, it is even possible to consider that Article 9 is also only applicable as from the adoption of the general rules provided for in Article 4. If, however, taking account in particular of the fact that Article 9 applies to meas-

ures *already in force*, that result is to be avoided, the only conclusion which may be accepted is that the authorization laid down in Article 9 took effect from the entry into force of the regulation, that is to say on the third day following that of its publication in the Official Journal of the European Communities.
Nor, therefore, can an examination of Regulation (EEC) No 1411/71 provide grounds for the assertion that the expiry of the period laid down in Regulation (EEC) No 2622/69 is unimportant in evaluating the situation on which the Pretore di Bari is required to give judgment. In consequence, at the end of all these considerations, there is no escaping the conclusion that since there was no authorization as required by Community law for the maintenance of national measures concerning the organization of the market in April 1970, the provisions of Article 37 of the EEC Treaty, with which the exclusive right of sale granted by Italian law to the milk centres is incompatible, consequently applied.

7. There remains one last question for me to consider within the framework of the present case: that of the direct applicability of the said Article 37. On that point I can be very brief.
The solution of the problem is facilitated by the fact that in its judgment in Case 6/64 the Court has already held Article 37(2) to be directly applicable. If the difficulties connected with the concept of discrimination have not prevented the Court from attributing that character to paragraph (2) of the said article, it is clear that the same must apply to paragraph (1), the content of which is similar. As for the determining date for the application of paragraph (1), that point has also already been elucidated. It is not necessary (as is in theory the case with regard to Article 37) to take into consideration the end of the transitional period but, in view of the special provisions governing agriculture, to have regard to the period laid down in Regulation (EEC) No 2622/69. Since it is the application of a simple prohibition, there is consequently nothing to prevent acceptance of the fact (as the Court has previously done in respect of the third paragraph of Article 95 of the EEC Treaty) that as from the expiry of the said period that prohibition creates direct effects within the meaning laid down by the case-law of the Court. Nothing, in other words, can prevent individuals from directly invoking the provisions of Article 37(1) before national courts. That is the manner in which the Court should reply to the last question which has been referred to it.

8. To recapitulate, I suggest, therefore, that the Court reply to the Pretore di Bari as follows:

(1) It follows from Article 37 of the EEC Treaty that national monopolies of a commercial nature and the bodies through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States include the bodies to which a Member State grants an exclusive right to sell a product in a particular area of its territory, where they are managed or supervised by local public authorities, where the product in question may be the subject of trade and where the activity of those bodies may have an appreciable (spürbar) effect on intra-Community trade.

(2) An exclusive right of sale of this type may lead to discrimination between the nationals of the Member States regarding the conditions under which

goods are procured and marketed if it is granted to bodies which themselves carry out the production or the processing of the product in question.

(3) With regard to the situation referred to in the last subparagraph of Article 22(2) of Regulation (EEC) No 804/68, the expiry of the period as laid down by that article and extended by Article 2 of Regulation (EEC) No 2622/69 involved the duty to abolish measures contrary to the principles set out in Article 37(1) of the Treaty.

(4) Neither the provisions of Article 90(2) nor those of Article 36 of the EEC Treaty appear capable of constituting an obstacle to the fulfilment of the obligation which results from Article 37.

(5) In principle the provisions of Article 37(1) of the Treaty became directly applicable from 1 January 1970 within the legal systems of the Member States. With regard to the situation mentioned in the last subparagraph of Article 22(2) of Regulation (EEC) No 804/68, the provisions of Article 37 of the Treaty did not, however, produce direct effects in the relationships between the Member State concerned and individuals until the period laid down in Article 2 of Regulation (EEC) No 2622/69 had expired. As from the expiry of this period, Article 37 creates for the benefit of individuals rights which national courts must protect.