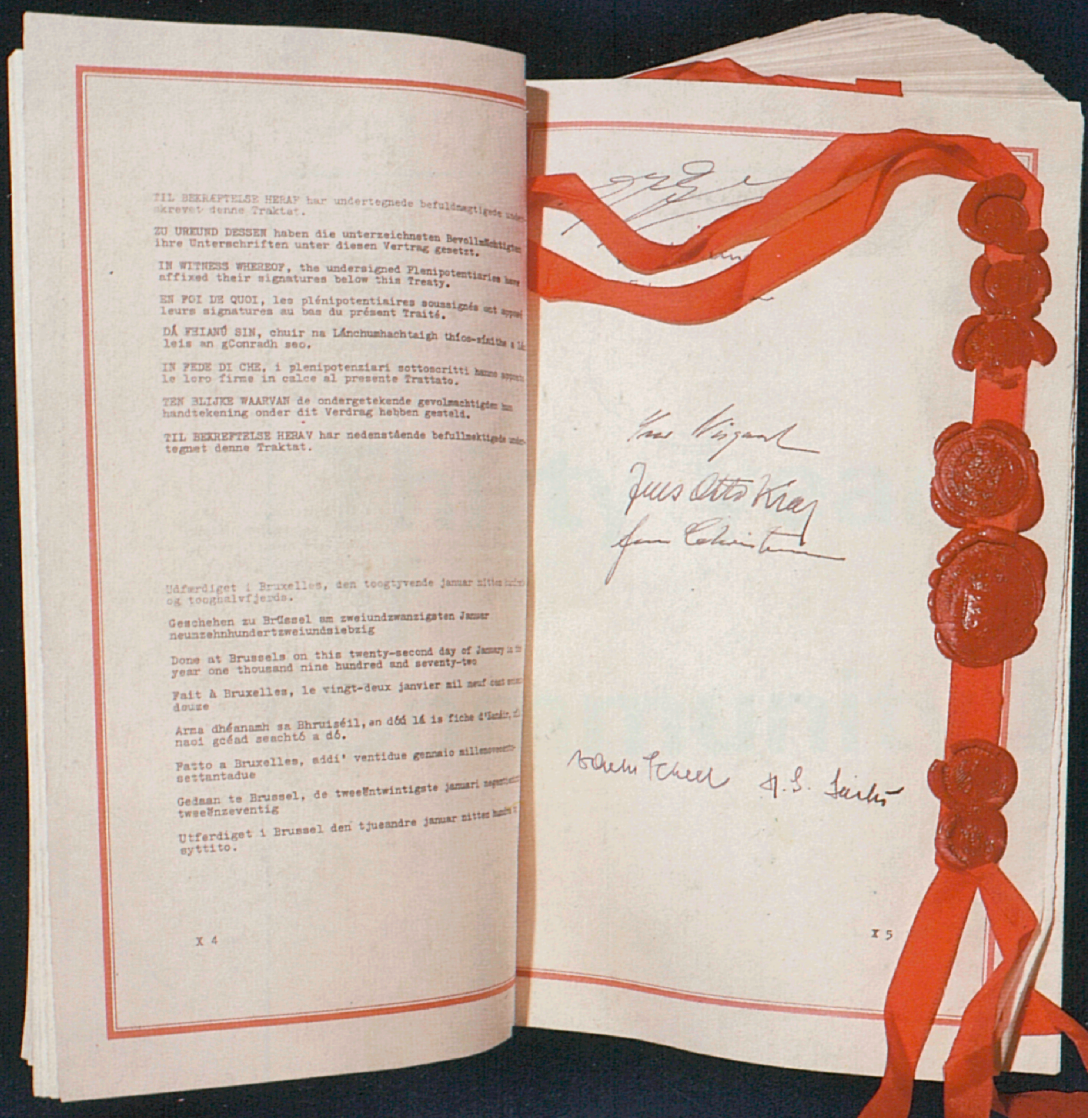
Commission of the European Communities

Thirty years of Community law



COMMISSION OF THE EUROPEAN COMMUNITIES

european perspectives

Thirty years of Community law

Photograph of the original of the Treaty concerning the accession to the European Communities of Denmark, Ireland and the United Kingdom, signed in Brussels on 22 January 1972

The following have contributed to this publication:

Rudolf Bernhardt
Giorgio Bernini
Prodromos D. Dagtoglou
Maurice Flory
Isi Foighel
Eberhard Grabitz
Claus Gulmann
Trevor C. Hartley
Albert W. Koers
Robert Kovar
Bryan M.E. McMahon
Michel Melchior
Finbarr Murphy
Hjalte Rasmussen
Georg Ress
Henry G. Schermers
Guy Schrans
Christiaan W.A. Timmermans
Antonio Tizzano
John A. Usher
Gillian M. White

COMMISSION OF THE EUROPEAN COMMUNITIES

Thirty years of Community law

THE EUROPEAN PERSPECTIVES SERIES

This publication is also available in:

DA ISBN 92-825-2649-6
DE ISBN 92-825-2650-X
GR ISBN 92-825-2651-8
FR ISBN 92-825-2653-4
IT ISBN 92-825-2654-2
NL ISBN 92-825-2655-0
ES ISBN 92-825-2656-9
PT ISBN 92-825-2657-7

Cataloguing data can be found at the end of this publication

Luxembourg: Office for Official Publications of the European Communities, 1983

ISBN 92-825-2652-6

Catalogue number: CB-32-81-681-EN-C

Printed in Belgium

Preface

On 9 May 1950 the declaration by Robert Schuman began the process of integrating the countries of Western Europe into a European Community.

This work, published under the auspices of the Commission, aims to survey the development of the Community legal order during the 30 years from that beginning to 31 December 1980. The principal features of this legal order—the basic structure of the Community and the lines along which its activities have developed—are placed in historical perspective by examining their origins and gradual implementation through the Treaties, secondary legislation and judicial pronouncements.

A temporal perspective is essential to a full understanding of any phenomenon: this is particularly true of European integration, which was conceived from the outset as a process of modular construction, concentrating initially on a limited field and intended to expand into full political union. Robert Schuman stated: 'Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a de facto *solidarity.' He went on to say that pooling the means of production of coal and steel as he proposed would constitute the first concrete foundation of the European Federation.*

Later on, the EEC Treaty set out a general economic framework for the Community and, by vesting broad discretion in the institutions regarding the decisions required for this purpose (consider, for example, the Community's power under Articles 43, 113 and 235), opened the way for a process of development which was regarded as no more than the straightforward implementation of the Treaty, for which the institutions were responsible. But, of course, the Member States were no less able to make other agreements going beyond the limits of this edifice in order, as the preamble to the EEC Treaty put it, to create an ever closer union among the peoples of Europe and to call upon the other peoples of Europe who share their ideal to join in their efforts.

It is only in retrospect that some Community achievements can be seen as decisive steps forward on the road to integration and the inevitable obstacles and set-backs assessed in their proper light.

The historical perspective shows how the main legislative acts and principal judgments of the Court of Justice have strengthened Community law. It also shows that progress continued even at times when the European idea was not at the forefront of the political stage.

*
* *

Thirty years of Community law *has been written by a group of academic lawyers from the various Member States. They have endeavoured to adopt the simplest and most straightforward style so that their work may be accessible to the general public as well as to specialists.*

This work is designed to fill the vacuum left by the general surveys of Community law written for other purposes.

- *The digests of judgments of the Court which appear from time to time in specialist journals and the chapter on Community law in the* General Report *issued each year by the Commission (which also appears separately as an offprint) review the most important acts of the Community institutions shortly after the event. Their time-scale, however, is too short for them to consider the general trend of developments in European law.*

- *A number of authors have produced remarkable studies of the judgments of the Court over a number of years. This work, however, also covers acts by other Community institutions and some particularly important national legislation and rulings.*

- *The great commentaries of the Treaties, whether article by article or systematic, are synchronic in character, in the sense that they state the law as at the time of writing as if it had always been so and would remain unchanged. As we have seen, however, a diachronic view—one which sees developments as a continuum—is essential to a proper understanding of European construction as progressive and forward-looking.*

* * *

Given the number of topics to be considered and the range they cover, each chapter of this book was contributed by a specialist, generally in public law or economic law. An Editorial Committee was set up to ensure consistency, and its first task was to prepare a structure plan to which the contributors—academic lawyers of different nationalities, backgrounds and schools of thought—were asked to adhere. The Committee then provided them with the information they required and coordinated their work so as to keep contradictions, repetitions and gaps to the minimum. It also prepared some additional material itself.

The contributors willingly accepted the restrictions of subject-matter and presentation which were imposed upon them. No restrictions, on the other hand, were imposed on their freedom of thought. Their views are not necessarily those of the Commission—unorthodox views are advanced and the Community institutions are criticized.

I believe that an editor should refrain from any form of censorship and that the reader gains from being offered a variety of opinions. The honest presentation of a debate ranging over a number of questions is preferable to enforced unanimity. Taken as a whole, then, this book reflects the complexity of the European edifice as seen by legal experts in the Community.

However, the conclusion which may be drawn is encouraging. There have been more steps forwards than backwards; the contributors to this book do not shrink from drawing attention to the difficulties encountered on the road towards integration and the mistakes made, but they nevertheless recognize that there were good grounds for most of the solutions adopted and that the European enterprise is in good heart.

Gaston Thorn
President of the Commission
of the European Communities

List of authors

Rudolf Bernhardt

Dr. jur.
Professor an der Universität Heidelberg
Direktor am Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht
Richter am Europäischen Gerichtshof für Menschenrechte

Giorgio Bernini

Professore ordinario di diritto commerciale
Università di Bologna
LL M. S.J.D., Michigan Law School

Prodromos D. Dagtoglou

Τακτικός καθηγητής τοῦ Πανεπιστημίου Ἀθηνῶν
Honorarprofessor an der Universität Regensburg
Honorary Lecturer at the University College, University of London

Maurice Flory

Professeur de la Faculté de droit d'Aix-Marseille

Isi Foighel

Dr. jur., Professor
Institut for Skatteret, Københavns Universitet

Eberhard Grabitz

Dr. jur.
o. Professor für öffentliches Recht, Europarecht und rechtliche Grundlagen der Politik an der Freien Universität Berlin

Claus Gulmann

Dr. jur., Professor
Institut for international Ret og Europaret
Københavns Universitet

Trevor C. Hartley

BA, LL B (Cape Town)
LL M (London)
Senior Lecturer in Law
London School of Economics and Political Science

Albert W. Koers

Professor Dr.
Hoogleraar in het volkenrecht aan de Rijksuniversiteit te Utrecht

Robert Kovar

Professeur de droit européen
Président de l'Université des sciences juridiques, politiques, sociales et de technologie de Strasbourg

Bryan M.E. McMahon

BCL, LL B, LL M (Harvard), Ph.D.
Professor of Law, Head of the Department of Law
University College, Cork

Michel Melchior

Professeur ordinaire à l'Université de Liège
Directeur ad interim de l'Institut d'études juridiques européennes «Fernand Dehousse»

Finbarr Murphy

College Lecturer at University College Dublin
Assistant Dean of the Faculty of Law of the University College, Dublin

Hjalte Rasmussen

Lektor, lic. jur.
Handelshøjskolen, København

Georg Ress

Dr. jur. Dr. rer. pol.
ordentl. Professor für öffentliches Recht, Völkerrecht und Europarecht an der Universität des Saarlandes
Direktor des Europa-Instituts

Henry G. Schermers

Hoogleraar in het Recht der Internationale Organisaties aan de Rijksuniversiteit te Leiden
Lid van de Europese Commissie voor de Rechten van de Mens

Guy Schrans

Hoogleraar aan de Rijksuniversiteit Gent
Hoofd van het Juridisch Department van de Generale Bankmaatschappij
Assessor in de afdeling Wetgeving van de Raad van State

Christiaan W.A. Timmermans

Professor, Rijksuniversiteit Groningen

Antonio Tizzano

Professore ordinario di diritto delle Comunità europee
Facoltà di giurisprudenza, Università di Napoli

John A. Usher

LL B, Lecturer in European Law
Centre of European Governmental Studies
University of Edinburgh

Gillian M. White

LL B, Ph.D., Barrister-at-Law
Professor of International Law
University of Manchester

* * *

The Editorial Committee was chaired by Mr Giancarlo Olmi, Deputy Director-General of the Legal Service of the Commission of the European Communities, and consisted of Donald Allen, Jean Amphoux, Gerhard Bebr, Adam Blomefield, George Leonard Close, Bevis Clarke-Smith, Thomas Cusack, Jean-Pierre Delahousse, John Forman, Peter Gilsdorf, Jean Groux, Hans Peter Hartvig, Peter Karpenstein, François Lamoureux, Antonio Marchini Camia, Giuliano Marenco, Bernard Paulin, Jacqueline Remy, Jean-Claude Séché, Denise Sorasio, Chantal Straumann, Thomas Van Rijn and Erich Zimmermann.

List of abbreviations

ACP	African, Caribbean, Pacific countries party to the Lomé Convention
AFDI	Annuaire français de Droit international
AJCL	American Journal of Comparative Law
AJDA	Actualité juridique — Droit administratif
ASEAN	Association of South East Asian Nations
AWD des BB	Außenwirtschaftsdienst des Betriebs-Beraters
BB	Der Betriebs-Berater
BGBl.	Bundesgesetzblatt
BNB	Beslissingen in Belastingszaken
Bull. EC	Bulletin of the European Communities
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CCH	Commerce Clearing House
CCT	Common Customs Tariff
CDE	Cahiers de Droit européen
CJEC	Court of Justice of the European Communities
CML. Rep.	Common Market Law Reports
CML. Rev.	Common Market Law Review
D	Dalloz-Sirev
D (Chr)	Dalloz Chronique
D (JR)	Dalloz Jurisprudence
DÖV	Die öffentliche Verwaltung
Dr. Sc. Int.	Diritto comunitario negli scambi internazionali
DVBL	Deutsches Verwaltungsblatt
EAEC	European Atomic Energy Community
EC	European Communities
ECE	Economic Commission for Europe
ECSC	European Coal and Steel Community
EDC	European Defence Community
EDF	European Development Fund
EEC	European Economic Community
EFTA	European Free Trade Association
EIB	European Investment Bank
EMA	European Monetary Agreement

EMS	European Monetary System
EMU	Economic and Monetary Union
EUA	European unit of account
EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Europarecht
Eur-Arch.	Europa-Archiv
Eur. LR	European Law Review
FAO	Food and Agricultural Organization of the United Nations
FECOM	European Monetary Cooperation Fund
F. It.	Il Foro Italiano
F. Pad.	Il Foro Padano
GATT	General Agreement on Tariffs and Trade
Gazz. Uff.	Gazzetta ufficiale della Repubblica italiana
GDR	German Democratic Republic
GP	Gazette du Palais
GSP	Generalized system of preferences
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILO	International Labour Organization
JCM. St.	Journal of Common Market Studies
JCP	Jurisclasseur périodique — La semaine juridique
J. Dr. Int.	Journal de Droit International
JET	Joint European Torus
JORF	Journal officiel de la République française
JT	Journal des tribunaux
JWTL	Journal of World Trade Law
LT	Lovtidende
M.B.	Moniteur belge
MDR	Monatsschrift für deutsches Recht
Mém.	Mémorial, Journal officiel du Grand-duché de Luxembourg
MFA	Multifibre Arrangement
Mod. LR	Modern Law Review
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
OJ	Official Journal of the European Communities
RCADI	Recueil des cours de l'Académie de Droit International
RD. Eur.	Rivista di Diritto europeo

RDI	Rivista di Diritto internazionale
RDP	Revue de Droit public et de la Science politique
RGDI	Revue générale de Droit international public
RIDC	Revue internationale de Droit comparé
RMC	Revue du Marché Commun
RSDIC	Revue suisse de Droit international de la concurrence
RTDE	Revue trimestrielle de Droit européen
RW	Rechtskundig Weekblad
SEW	Sociaal-Economische Wetgeving
Stb.	Staatsblad van het Koninkrijk der Nederlanden
Trb.	Tractatenblad van het Koninkrijk der Nederlanden
Unctad	United Nations Conference on Trade and Development
UNEP	United Nations environment programme
Unesco	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commission for Refugees
Unicef	United Nations Children's Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near-East
VAT	Value-added tax
WFP	World Food Programme
WHO	World Health Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZZVerbr.	Zeitschrift für Zölle und Verbrauchsteuern

Contents

Part Two — The activities of the Community

Introduction

by Giancarlo Olmi

I — The ECSC, the first European federal structure

1. On 9 May 1950 in the Salon de l'Horloge at the Quai d'Orsay, Robert Schuman, the French Foreign Minister, made a declaration to which Jean Monnet had contributed in a decisive fashion. The importance of this declaration lay not only in the fact that it proposed pooling the coal and steel resources of France and Germany in an organization open to all European countries, but also in the declaration of aims and methods which have remained the basis for the construction of a united Europe. [1] The aim was to create a stable basis for peace in Europe and prepare for a European federation. The strategy was to create real solidarity among Europeans through practical achievements, beginning with economic unification and the establishment of common institutions and rules.

Belgium, France, Germany, Italy, Luxembourg and the Netherlands accepted these principles, but the United Kingdom felt unable to undertake to submit to a supranational authority. Hence Europe began as a Community of Six.

On 18 April 1951 the Six signed the Treaty establishing the European Coal and Steel Community (ECSC), whose task was to create in this sector a common market without barriers to trade and without distortion of competition so that economic activity would develop in a healthy environment.

The Treaty was inspired by a free-market philosophy but the Community authorities were given the power to intervene in times of crisis.

The ECSC Treaty gave the Community a real executive, the supranational High Authority, which had wide regulatory and administrative powers not just over the Member States but also over individual firms.

This High Authority consisted of nine independent personalities appointed by the governments of the six Member States. It was answerable to an Assembly which alone had the right to dismiss it by motion of censure, but which had no powers other than political control.

The High Authority was expected to work independently, but for its most important acts it had to consult a Council of Ministers composed of representatives of the governments

[1] E. Noël, *The European Community: How it works*, European Perspectives 1979, p. 75.

of the Member States, whose assent was required for some acts. Judicial control over the High Authority was exercised by a Court of Justice, modelled on the French Conseil d'État, in its judicial function, which could hear cases brought by a Member State or, more often, a firm which considered that its rights had been infringed. The Court could declare the acts of the High Authority void if the Authority exceeded or abused its powers or violated a rule of law. The Community was provided with an own resource—a 'levy' payable by coal and steel firms in proportion to their turnover.

This, then, was the launching pad from which governments hoped to bring Europe to a form of political unification. In 1953 a Treaty establishing a European Defence Community (EDC) was signed: this was a European solution to the problem of German rearmament. After it had been ratified in the other five countries, it was rejected by the French National Assembly on 31 August 1954. A planned Political Community proposed by the European Assembly also had to be dropped.

II — The EEC, an economic community with an all-encompassing role

2. The internal logic of what had begun in 1950 inevitably meant that economic integration should go beyond the ECSC to embrace the whole economy.

On 25 March 1957, ministers of the Six met in Rome to sign two Treaties:

(i) the first established a European Economic Community (EEC), the aim of which was that common economic policies would be applied over a large area, thus permitting continued expansion, greater stability and faster growth in living standards;
(ii) the second brought into being the European Atomic Energy Community (Euratom), whose task was to promote peaceful uses of nuclear energy in Europe.

From the beginning, the first of these Treaties was the more successful and became the driving force behind European integration.

It has been said that this Treaty is less 'supranational' than the ECSC Treaty. The term 'High Authority' for its executive was replaced by 'Commission' and the independent decision-making powers enjoyed by this body were far narrower than those enjoyed by the 'intergovernmental' body, the Council. There is, however, a good reason for all this. The ECSC Treaty is a treaty-law (*traité-règles*) laying down detailed rules for all situations—hence its implementation could be entrusted to an executive composed of independent people of standing, with an intergovernmental institution exercising control only over its most important acts. For the same reason, the Assembly needed to act only in a supervisory capacity. The EEC Treaty, on the other hand, is an outline treaty (*traité-cadre*) covering a very wide area and laying down little more than a set of broad principles, on the basis of which the institutions have to enact from time to time the legislation which proves necessary.

At the stage which European integration had then reached, the legislative function clearly had to be performed by the Council, since this body represented the Member States (and, contrary to the opinion of some, it possesses undoubted legitimacy in that it reflects majorities in national parliaments). But three factors helped to redress the balance in favour of supranationality:

(a) the rule of qualified majority voting (requiring about two-thirds of the votes, weighted in accordance with Article 148);
(b) the role of the Assembly, which is not merely supervisory, since it is required to give its opinion on all important legislation; it very quickly decided to call itself the 'European Parliament';
(c) the Commission's power to prepare, draft and defend legislative proposals of its own choice for consideration by the Council (at all of whose meetings it is represented).

Besides its power to propose legislation, the Commission also has certain decision-making powers concerning the implementation of the Treaty, which confers on it some powers of independent action, notably as regards applying the competition rules, monitoring the activities of the Member States, administering safeguard clauses and implementing the budget. In addition, Article 155 gives it the right to implement rules laid down by the Council. These responsibilities and its subjection to political review by the Assembly give the Commission the characteristics of an executive.

The Court of Justice retains its role as a 'Conseil d'État' as regards the Commission's administrative acts, which may be challenged by those to whom they are addressed (including individuals) on the grounds of lack of competence, misuse of powers or infringement of any rule of law. Since the Community now has legislative jurisdiction in relation to matters which are still also the responsibility of the Member States, the Court has also acquired the features of a constitutional court. The Member States can challenge Community legislation before the Court and, conversely, the Commission can ask the Court to find that the legislation of a Member State infringes the Treaty. Individuals have no right of direct access to the Court in respect of Community or national legislation but national courts hearing a case brought by an individual can (and, in some cases, must) refer the matter to the Court of Justice so that it can either declare a Community act invalid or interpret Community law (usually so that the national court can find that an act of a Member State infringes the Treaty).

The jurisdiction of the Court of Justice to give preliminary rulings in this way is similar to that of the constitutional courts in Germany and Italy.

III — The merger of the executives and the search for unity

3. By the Merger Treaty of 1965 the three Communities, which already consisted of the same Member States and had two institutions (Parliament and the Court) in common, were given a single Council and Commission and a unified budget (with the exception of the operating revenue and expenditure of the ECSC).

Since then the division into three Communities has been something of a legal fiction. The legal personality of each has, of course, remained distinct (with little effect in practice), but the Community has a single legal order. For the man in the street, there is now just one body, the European Community, on behalf of which our statesmen deliver their speeches in New York, Helsinki or Tokyo. The European Parliament and the Council decided that the designation 'European Community' would be used in official documents (but not in legislation) wherever this was both possible and appropriate. [2]

[2] Resolution of 16 February 1978 on a single designation for the Community (OJ 63, 13.3.1978, p. 36); letter from Mr von Dohnanyi, President of the Council, to Mr Colombo, President of the European Parliament, of 26 July 1978 (PE 54.451).

IV — The momentum of the EEC and the obstacles which it has encountered

4. During the transitional period, which had originally been set at 12 years, the EEC successfully carried out the following priority tasks:

(a) creation of a common market in all sectors of the economy, which meant establishing the four freedoms (free movement of goods, persons, services and capital) within the Community, imposition of the competition rules on the Member States (supervision of aid from public funds) and in particular on firms (fight against restrictive practices and the abuse of dominant positions) and the establishment of a common external customs tariff;

(b) implementation of a number of common policies, in particular as part of a common agricultural policy aimed at protecting producers from the unstable markets and prices that typify this sector of the economy, and a common commercial policy in relation to non-member countries.

The Community has never considered its role to be purely economic, and the spirit underlying its actions has not been a mercantilist one. Of the four freedoms, the free movement of workers has been treated as a priority; indeed it has been interpreted in a broad sense, for example, by prohibiting arbitrary measures of expulsion without appeal or on the basis of considerations other than the worker's own conduct. In developing the common agricultural policy, the Community has paid particular attention to the less prosperous regions and types of farming. It has had regard to environmental requirements and the quality of life, for example by assisting mountain regions threatened with depopulation. Its trading policy has never neglected the interests of exporters in non-member countries. Furthermore, this has been accompanied by a development policy designed to assist many of the emergent non-member countries and those less prosperous than the European nations (for example the African, Caribbean and Pacific States and the countries of the Maghreb and Mashreq).

The rapid advances of the European economy in the early 1960s led the Six to establish the common market at a faster rate than the rather cautious one laid down by the authors of the Treaty. There was a particularly strong feeling of triumph in the case of agriculture which, at the beginning of 1962 and following some historic 'marathon' Council meetings, succeeded in overcoming enormous technical and political difficulties, especially those arising from the gap between the relatively low prices of Dutch and French produce and the relatively high prices in Germany and Italy. Then, in December 1964, the Council decided to adopt a plan for the rapid establishment of a single market, without internal barriers, for cereals and other agricultural products.

In view of this success, which paved the way for the early introduction of a common market for all agricultural and industrial products, the Commission concluded that time had come to propose:

(a) that the Community should finance all expenditure under the common agricultural policy, since the Community now fixed prices and other support mechanisms and the Community was responsible for surpluses and for the expenditure incurred in eliminating them either internally (through market intervention) or externally (by the payment of export refunds);

(b) a reform of the Community's financial arrangements which would replace contributions from the Member States by 'own resources' in the form of customs duties and

agricultural import levies. These were regarded as constituting Community revenue in the same way that customs duties had constituted the first financial resources of the fledgling federal nations of the United States and Germany;

(c) a strengthening of the powers of the European Parliament: now that own resources were replacing the national contributions formerly entered annually in the national budgets of each Member State, this body had to be associated with the Council in adopting the budget so as to maintain democratic control over revenue and expenditure, which, henceforward, escaped scrutiny by the national parliaments.

5. The Community fell a victim to its own success. These proposals were totally logical and appeared to be the natural consequence of the establishment of a single market for agricultural and industrial products. The strengthening of Community institutions involved was not, however, acceptable to all the Member States. On 30 June 1965 France, invoking the reluctance of some of its partners to transfer full responsibility for financing the common agricultural policy to the Community, noted that discussions were deadlocked and for seven months refused to take its seat in the Council, which was thereby prevented from taking any decisions other than those concerned purely with day-to-day management of current policies.

This crisis was resolved in January 1966 by the 'Luxembourg compromise'. France had challenged certain 'supranational' aspects of the Community, especially majority voting on matters held to affect the vital national interests of a Member State. The other countries met France's objections by accepting that every possible effort should be made to reach a unanimous decision. The Luxembourg communiqué noted that agreement had not been reached on what should happen if these efforts were unsuccessful; in such cases France was alone in rejecting majority voting.

This 'agreement to disagree' was, however, enough to put an end to the dispute. And, in practice, unanimity became the rule for all but budgetary decisions and a small number of other exceptions.

But these hurdles did not halt the Community's progress. Gradually, all the Commission's plans, which had caused so many difficulties, were accepted.

On 1 July 1968 the customs union for industrial products was completed and free movement of most agricultural products introduced.

Community financing of the common agricultural policy was largely achieved in 1967 and completed in 1970.

In that year too, it was decided that, in addition to customs duties and agricultural levies, value-added tax at an as yet unspecified rate should also become a Community own resource.

At the same time the Treaties were amended to strengthen the budgetary powers of the European Parliament. The Commission's proposals had been ahead of their time.

V — Political cooperation

6. These positive developments culminated in the Summit Conference of Heads of State or Government held at The Hague on 1 and 2 December 1969 which, by settling

these problems and accepting the principle of admitting the United Kingdom to the Community, put an end to a war of religion, so to speak, between the Member States.

One of the key decisions of this meeting was the instruction to Foreign Ministers 'to study the best way of achieving progress in the matter of political unification, with a view to enlargement'. The result was the first report of the Foreign Ministers, adopted in Luxembourg on 27 October 1970. In it, the governments undertook to cooperate in the field of foreign policy by consulting regularly, harmonizing views, concerting attitudes and, where possible, undertaking joint action. Meetings were to be held for these purposes at three levels—heads of political departments (Political Committee), Foreign Ministers (twice a year) and, in exceptional circumstances, Heads of State or Government. The Paris Summit in October 1972 decided that the Foreign Ministers should henceforth meet four times a year and a second report, adopted in Copenhagen on 21 October 1973, put the final touches to the system.

This decision was a turning point in the development of the Community. The initial idea, shared by Jean Monnet and the other founding fathers, had been that the Community would always develop on the basis of a 'community' institutional structure of which the ECSC was the first stage. This was the background to plans for the EDC and later, and more successfully, the EEC and Euratom. France was opposed to this plan and proposed a political union of an intergovernmental kind. The other Member States could not accept the French proposal and feared that a political superstructure of this type would eventually overwhelm the original structure of the Community.

The decision taken was a compromise between the two positions in that cooperation on foreign policy matters was to take place outside the Community institutions, albeit without affecting their responsibilities. The immediate result was the total isolation of political cooperation from the activities of the Community. Political cooperation meetings were prepared by the Foreign Minister of the Member State acting as President of the Council and not by the Council Secretariat, and they were held in the capital of that Member State, not in Brussels. The Commission was only invited to these meetings 'if the activities of the European Communities are affected by the work of the Ministers'.

Since that time, the rigid distinction has to some extent been broken down. Political cooperation meetings are held in Brussels if the Foreign Ministers are there for a Council meeting, and the Commission is almost always present. The European Parliament is briefed on political cooperation more frequently, and has been given a less passive part to play, than originally intended. In particular it can put questions to the Foreign Ministers meeting within the framework of political cooperation.

Political cooperation has grown continuously; it has allowed the Nine to reach a common view on important issues (the Middle East, Afghanistan, Iran, etc.) and enabled them to speak with one voice, so increasing their authority on the international stage.

VI — The first enlargement

7. After France had twice vetoed the accession of the United Kingdom to the Community (in 1961 and 1967), it changed its attitude and agreed that the entry of new countries was possible provided that the Community first achieved the main objectives which the Treaty laid down for the transitional period and felt itself strong enough. This was the

famous formula of 'completion, reinforcement, enlargement'. Completion was considered to have been achieved by the establishment of the common market and the common agricultural policy and reinforcement by the decision of the Heads of State or Government meeting at The Hague on 1 and 2 December 1969 to make progress towards economic and monetary union and political unification.

Thus, at the same Hague Summit the Community agreed to open negotiations in the middle of 1970 on the accession of the United Kingdom and the other applicant countries (Denmark, Ireland and Norway). These began on 30 June and the Treaty of Accession was signed on 22 January 1972.

The principles underlying this first enlargement were as follows:

(a) Acceding to a treaty and entering an existing Community is quite a different thing from negotiating a new treaty and founding a new Community. The new member must accept the Treaty without amendment and join the Community, which is a living entity, at the stage of development which it has reached. The President of the Commission, Walter Hallstein, used the following simile to convey this idea: accession is like the embarkation of new passengers on a liner—the ship has started its journey and can neither return to its point of departure nor change its route. Hence the Community required applicants to accept the *acquis communautaire,* that is the Treaties and their policy aims, all the decisions taken since the Treaties came into force and the options already selected.

(b) Naturally the Treaties required a degree of 'adaptation' to enable the new members to take their places in the institutions. The number of seats in Parliament had to be determined, votes in the Council had to be weighted afresh and the number of Members of the Commission and of the Court of Justice had to be increased. The negotiators kept these changes to what was strictly necessary, although the Accession Treaties could have been used to go further to ensure the smooth functioning of the institutions.

(c) Any change requires transitional arrangements. Accession involved changes both for the new members, who had to integrate themselves into a new legal order, and for the founder members, who had to accept their new partners. The applicant countries accepted a short transitional period (five years), which was to be the same for all of them and for all sectors of the economy.

All the Member States ratified the Treaty of Accession during 1972. In May, 83% of Irish voters said 'yes', in September, 63.5% of Danish voters did likewise and in October the House of Commons passed the European Communities Act by a large majority. But in September a bare majority of Norwegians (53%) said 'no', so there were nine Member States instead of ten.

VII — Economic and monetary union is launched

8. Shortly before the Treaty of Accession came into force, the Heads of State or Government of the enlarged Community met in Paris on 19 and 20 October 1972. They declared that, at the moment when enlargement was about to become a reality, 'the time has come for Europe to recognize clearly the unity of its interests, the extent of its

capacities and the magnitude of its duties: Europe must be able to make its voice heard in world affairs, and to make an original contribution commensurate with its human, intellectual and material resources'.

To this end, the Member States were 'determined to strengthen the Community by establishing an economic and monetary union, the guarantee of stability and growth, the foundation of their solidarity and the indispensable basis for social progress, and by ending disparities between the regions'. The implementation of all this, which echoed decisions already taken on 22 March 1971 and 21 March 1972, involved not only important decisions on economic and monetary policy but also the strengthening of existing common policies and the launching of others which were either entirely new or had hitherto existed only in embryo. These included regional policy, social policy, industrial policy and policies on science and technology, the environment and energy. For this purpose they agreed that it was 'desirable to make the widest possible use of all the provisions of the Treaties including Article 235 of the EEC Treaty'. Article 235 is a key provision which permits the Council (acting unanimously) to take measures to attain one of the objectives of the Community even if the Treaty has not provided the necessary powers.

As we have already seen, the Heads of State or Government also agreed to intensify political cooperation between the Member States in the area of foreign policy.

The Summit communiqué ended by stating that the Heads of State or Government had 'set themselves the major objective of transforming, before the end of the present decade and with the fullest respect for the Treaties already signed, the whole complex of the relations of Member States into a European Union'.

What sort of European Union was promised for 1980? Was it to be a federation, a confederation or something different? The Heads of State or Government did not say but asked the Community institutions to prepare a report by the end of 1975.

VIII — The economic difficulties of the 1970s

9. The Community had hoped to make great progress in economic and monetary union. The Commission memorandum of 12 February 1969, named the 'Barre Plan' after the Vice-President of the Commission who was its main architect, proposed a short-term harmonization of economic policies, and solidarity on the monetary front. The Council accepted these proposals on 17 July 1969 and in February 1970 an automatic support fund of USD 2 000 million was set up. The Werner Report, drawn up under the direction of the Luxembourg Prime Minister, set out the ways and means of attaining the objectives of economic and monetary union by 1980. The Council accepted the main outlines of this plan on 22 March 1971, when the margins of fluctuation of Community currencies were reduced from 0.75% to 0.6%. The time was not right, however. The crisis of confidence in the US dollar caused a massive shift to the German mark, and Germany and the Netherlands decided to let their currencies float upwards. On 21 March 1972 the Community tried to redeem the situation by setting up the 'snake', which ousted the dollar from its central role in the Community currency system and allowed a 2.25% margin of fluctuation between any two Community currencies. Central banks were to

intervene in Community currencies. However, first Ireland and the United Kingdom, and then Italy, left the 'snake'.

After the dollar crisis came the oil crisis. The production cuts imposed by the Arab countries in October 1973 and the total embargo on deliveries to the Netherlands raised the spectre of recession and put Community solidarity in jeopardy. This was the first of a series of adverse developments which was to culminate in a severe economic crisis.

10. The Labour Party came to power in the United Kingdom and threatened withdrawal from the Community if the terms of accession were not 'renegotiated'. The Community remained intact, however, and the Heads of Government looked at European affairs with renewed interest. In March 1975 the British renegotiations were declared completed at Dublin and a referendum in June produced a 67.2% vote in favour of continued membership.

IX — The European Council

11. Europe received a new political impetus in May 1974 when Valéry Giscard d'Estaing became President of France and Helmut Schmidt became Federal Chancellor in Germany, for both men were convinced that it was impossible to solve the serious economic problems of the day by purely national measures.

At the Paris Summit on 9 and 10 December 1974, France announced that it no longer opposed direct elections to the European Parliament but, on the contrary, hoped that they could be arranged quickly. The Belgian Prime Minister, Leo Tindemans, was given the task of preparing a general report on what was involved in European Union as agreed by the 1972 Summit and how it was to be achieved. This report was to be submitted by the end of 1975.

The nine Heads of Government also decided that in future they would meet regularly, three times a year, as the 'European Council'.

This was a significant change. Previously summits had been solemn occasions held at turning points in European affairs to resolve a number of important issues. By institutionalizing these meetings, the Heads of State or Government were taking into their own hands the management of policy issues which had hitherto been the responsibility of the Council composed of Foreign Ministers.

12. The European Council deals with both Community matters and those aspects of foreign policy which form part of 'political cooperation'—this constitutes another link between the two spheres of action.

As far as Community affairs are concerned, the European Council is, strictly speaking, none other than the Council of the European Communities meeting at a higher level: 'The Council shall consist of representatives of the Member States. Each government shall delegate to it one of its members' (Article 2 of the Merger Treaty). Yet in practice, it has all the appearances of a new institution. It is attended only by the Heads of Government, usually but not always accompanied by their Foreign Ministers, together with the President of the Commission and another Member of the Commission directly concerned with the matters under consideration. None of the other people normally present

at Council meetings, including the Permanent Representatives, attend. One practical result is that the European Council is unable to enact legislation in due and proper form. It is a political body which discusses problems and finds solutions which it then leaves to the Council (either of Foreign Ministers or of Finance Ministers) to implement.

The Commission still has a vital role to play in this mechanism but it operates in a lower key than at ordinary Council meetings—it is there to provide assistance rather than to take initiatives. Normally the European Council decides to consider a question of importance (which then becomes its exclusive concern) at the request of a member government. Naturally, the Commission adopts a position on every question. The agenda for the European Council is generally agreed in advance and the Commission can help with preparations by providing the European Council with a brief policy document on each point analysing the problems and suggesting solutions.

There is no provision for dialogue between Parliament and the European Council, and Parliament is rarely in a position to give its opinion before matters have been finally settled. Legally, of course, this does not violate the Treaties because either there is only a policy debate which is not intended to produce legislation or matters remain at a stage prior to the legislative process, which will happen later in the normal way. Nevertheless, there is undoubtedly a danger of prejudging the final decision.

X — The discussions on European Union — Direct elections to the European Parliament

13. In June 1975 the Commission presented its report on European Union—a union which the Paris Summit in 1972 had hoped to see attained by the end of the decade. In the Commission's view, this union would require considerable institutional and operational changes. It was to be based on a collegiate European Government of members, independent of the national governments but supervised by a Chamber of States appointed by the national governments and a Chamber of Peoples elected by direct universal suffrage. The main function of European Union was to be the achievement of total social and economic integration and of a common foreign policy; responsibility for defence was also to be gradually assumed.

The European Parliament adopted a report along the same lines and the Court of Justice prepared a report on the legal aspects; the Council, however, never succeeded in producing any response.

At the end of 1975 Mr Tindemans submitted to the European Council the report which had been requested of him at the 1974 Summit. This report did not propose a new treaty between the Member States, as proposed by the Commission and Parliament, but a series of pragmatic measures to strengthen the Community's internal and external cohesion. Leo Tindemans commented on them as follows:

'For me, European Union is a new phase in the history of the unification of Europe which can only be achieved by a continuous process. Consequently, it is difficult to lay down, at this stage, the date of completion of the European Union. It will only achieve its objectives by means of institutions which have been adapted to its new requirements. It is in fact by means of institutions which have been strengthened and improved that the Union will be able to give increasing expression to its own dynamism. In this respect, the

role of a directly-elected European Parliament will be decisive in the development of the Union.'

Mr Tindemans insisted that priority should be given to the rapid implementation of those policies which dealt most directly with matters of public concern such as economic, social, regional, environment and research policies. Responsibilities would be transferred to common institutions and resources would be transferred from more prosperous to less prosperous countries.

Despite their pragmatism, Mr Tindemans's proposals met with no more success than the more 'utopian' ideas of Parliament and the Commission. But, after difficult negotiations in the European Council, mainly concerned with the number and allocation of seats in the new Parliament, the legislation providing for direct elections to the European Parliament was approved on 20 September 1976 and subsequently ratified by the Member States in accordance with their respective constitutional procedures (Article 138 of the EEC Treaty). The first election was to be held at the same time (10 June 1979) throughout the Community in order to bring Europe into the public eye in all the Member States. Direct elections were intended to strengthen Parliament's legitimacy.

XI — The Community on the eve of further enlargement

14. The institutional structure of the Community is basically the same as that established by the Treaties of Rome in 1957 and confirmed by the 1965 Merger Treaty. But its features have changed somewhat under the pressure of circumstances and as a result of a number of 'constitutional conventions'.

Legislative power and all the important policy decisions remain in the hands of the Council, a body which speaks for the governments of the Member States, which are themselves the source of power and are reluctant to transfer any of it to supranational institutions. Since 1975 the European Council, within which the Heads of State or Government meet three times a year to consider what it regards as the most important matters and to lay down guidelines, has provided an additional layer in the structure of the Council as normally constituted (by Foreign Ministers or specialist ministers).

The European Council has not been entirely successful. Some matters, such as the European passport, dragged on for years without being settled and negotiations on the reduction of the United Kingdom's financial contribution in respect of 1980 and 1981 broke down in the European Council only to be brought to a successful conclusion, with the Commission's assistance, by the Council of Foreign Ministers. On the other hand, the European Council has scored a number of successes, including British 'renegotiation' in 1975, direct elections to the European Parliament and, on 12 March 1979, the replacement of the 'snake' by the European Monetary System (EMS). The EMS should ensure greater exchange rate stability within the Community and include those currencies which could not accept the discipline of the snake because of their less prosperous economies. (However, the United Kingdom is outside the system for the moment.) Each national currency is allowed to fluctuate to a limited extent around a central rate expressed in ECU, the forerunner of a European currency.

The Council takes a large number of decisions but its mechanisms are overloaded by its routine insistence on taking unanimous decisions even where the Treaties provide for majority voting. This problem was aggravated by the enlargement of the Community from six to nine members.

At the Paris Summit in December 1974, the Heads of Government stated that, in order to improve the functioning of the Council, they considered it necessary to renounce the practice which consists of making agreement on all questions conditional on the unanimous consent of the Member States. Since then, there have been encouraging developments and some decisions have been taken by a majority vote, but there is still a long way to go before the spirit of the Treaties is fully observed once again.

Even so, when faced with urgent deadlines or serious problems demanding a solution, the Council has managed to take the most difficult of decisions. On 30 May 1980, three apparently insoluble matters were settled simultaneously, the financial measures in favour of the United Kingdom in respect of 1980 and 1981, agricultural prices for the new farm year and the common organization of the market in sheepmeat, demonstrating, incidentally, that the 'package deal' technique was an indispensable tool for achieving consensus.

15. The European Parliament has gradually acquired considerable authority. Through the full use it has made of its budgetary powers (not without provoking conflict) it is now a force to be reckoned with by the other institutions. Parliament has also succeeded in ensuring that, in connection with important decisions with financial implications (which will therefore affect future budgets), the Council does not merely consult it but engages in a 'conciliation procedure' aimed at seeing agreement between the two institutions. The Commission, too, is involved in this procedure.

The impact of direct elections was widespread. They took place simultaneously in all the Member States from 7 to 10 June 1979 and filled three-quarters of Parliament's seats with new faces, younger and more motivated people. After the elected Parliament's first year it is still too early to attempt a final conclusion; as an institution it is still evolving. It has continued its struggle to consolidate its hold over the establishment of the budget to the point of rejecting outright the 1980 draft budget established by the Council—its first use of this power. By doing so, Parliament placed on the agenda a burning question which was in urgent need of resolution—how to balance the items of expenditure necessary for the improvement of economic structures taken as a whole within a budget whose resources are at present confined within the 1% VAT rate fixed by the 1970 own resources decision, when that rate has almost been reached.

On the other hand, the impact of the elected Parliament on the Community legislative process seems no greater than that which its predecessor had succeeded in acquiring over the years. Most of its attention has been focused on the great problems of the day, and especially on foreign policy. It is a dynamic, aggressive and attractive assembly to which the media, finding there an authentically European voice, pay a great deal of attention.

16. The Commission is often criticized for failing to display the leadership and flair of its early days, for having become staid, and for exercising its right of initiative with excessive caution. It is true that it acts with circumspection and also that, before launching an important initiative, it takes care to ensure that it has a chance of success, whether

through prior consultations with governments and Parliament or by publishing a discussion paper in advance of its formal proposals. But the pioneering days, when what was required was a bold advance to occupy the land set aside for the Community by the Treaties, are now behind us. What is involved today is the management of a whole series of highly complex activities for which the Community has assumed responsibility. New ground need only be occupied when this is both possible and necessary. Moreover, the Commission's realism has not prevented it from making imaginative proposals (the latest Convention with the African, Caribbean and Pacific States, for example, and those concerning the Tokyo Round) and bold proposals (such as those for dealing with milk surpluses) which, even if they meet with opposition, at least succeed in focusing the attention of those responsible on the matters at issue.

The Commission also shows its vitality by using its own powers vigorously, for instance in solving the many problems of the agricultural markets or in implementing the steel industry crisis plan.

17. The Court of Justice, finally, has bolstered the fabric of the Community by its teleological interpretation of the Treaty—an interpretation which has enabled it to fill in the gaps left by the Community legislature.

The *van Gend en Loos* judgment in 1963 was the first in a series which declared a large part of the Treaty rules to be 'directly applicable', so that individuals could secure their application by the national courts despite opposition from national administrations: see the judgments in the *Reyners, Van Binsbergen, Defrenne, Donà* and other cases.

In 1964 the judgment in *Costa* v *ENEL* asserted the primacy of Community law and the principle that it could not be affected by opposing national provisions.

The *AETR* judgment in 1971 and the *Kramer* judgment in 1975 followed by Opinion No 1/76 found that the Community's external competence included not only what was laid down in the EEC Treaty (Article 113 on commercial policy and Article 238 on association) but also whatever naturally followed under the Treaty from an extension of internal competence.

Finally, a series of decisions, starting with the *Stauder* judgment in 1969, found that fundamental human rights, even if not expressly enshrined in the Treaties, must be regarded as part of Community law since they were part of the shared legal traditions of the Member States and may be invoked in the courts if violated by an act of the institutions.

18. To sum up, although the attainment of certain objectives has met with delays and obstacles, the Community has fully lived up to the wishes expressed by its founders when they declared that they were 'resolved ... to preserve and strengthen peace and liberty, and calling upon the other people of Europe who share their ideal to join in their efforts'.

The desire to join the Community expressed first by Greece, then by Portugal and finally by Spain constitutes 'an act of faith in a united Europe, which demonstrates that the ideas inspiring the creation of the Community have lost none of their vigour or relevance'. [3]

---

[3] *Enlargement of the Community—General considerations*, Communication sent by the Commission to the Council on 20 April 1978, Supplement 1/78 — Bull. EC, p. 6.

The instruments of the accession of Greece to the Community were signed in Athens on 28 May 1979 and ratified by the Greek Parliament on 28 June by a majority of more than the 60% of votes required to authorize the transfer of powers to an international organization.

The process of further enlargement has begun. 'The challenge of enlargement can and must be the start of a new Community thrust towards the objectives set by the authors of the Treaties.' [4]

[4] In op. cit. at footnote 3, p. 17.

PART ONE

The structure of the Community

Chapter I — The Community and its institutions

by Guy Schrans

Section I — General considerations

1. A number of institutions and organs were set up by or under the Treaty of 18 April 1951 establishing the European Coal and Steel Community (ECSC) and the Treaties of 25 March 1957 establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC). It is generally acknowledged that only the institutions so named in these Treaties can be considered as Community institutions. The ECSC Treaty (Article 7) provided for the High Authority, the Common Assembly, the Special Council of Ministers and the Court of Justice, and each of the other two Treaties (Article 4 EEC and Article 3 EAEC) provided for the Assembly, the Council, the Commission and the Court of Justice.

The EEC and EAEC Treaties clearly provide that each institution is to exercise the powers that are specifically assigned to it ('Each institution shall act within the limits of the powers conferred upon it by this Treaty'). The ECSC Treaty makes no such provision, but the ECSC institutions are likewise generally recognized as enjoying the specific powers assigned to them. [1]

Since the entry into force of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities (the Merger Treaty), the Council acts in place of the Special Council of Ministers of the ECSC and the Councils of the EEC and EAEC; it exercises the powers conferred on those institutions in accordance with the provisions of the different Treaties. A similar arrangement applies to the Commission of the European Communities, which acts in place of the High Authority of the ECSC and of the Commissions of the EEC and EAEC. The institutions of the Community are thus:

(i) the Council of the European Communities;
(ii) the Commission of the European Communities;
(iii) the Assembly (or 'European Parliament');
(iv) the Court of Justice of the European Communities. [2]

---

[1] In certain circumstances the institutions' powers of action may be extended: see Articles 95 ECSC, 235 EEC and 203 ECSC.

[2] The Court of Justice is considered in Chapter VII and will therefore be left out of this chapter.

Lastly, in a separate category, is the European Council, consisting of the Heads of State or Government of the Member States, supported by their Foreign Ministers.

2. In 1951 the Community's institutional structure was already marked by this quadripartite pattern. Since the days of Montesquieu, governments have been analysed in terms of the legislative power, the executive power and the judicial power, which are wielded by constitutionally separate bodies. In practice, this tripartite institutional structure can take several forms: between the extreme parliamentary system and the extreme presidential system there are other institutional relationships. The tripartite system also applies in federal States, although in such States the legislative body is often split into a 'Chamber of States' (e.g. the Senate in the United States, the Bundesrat in the Federal Republic of Germany) and a 'Chamber of Peoples' (e.g. the US House of Representatives, the Bundestag in Germany).

The authors of the ECSC Treaty discarded this traditional model with the aim of creating an institutional structure which would meet the special requirements of a Community hallmarked by the partial and gradual transfer of powers. [3] The quadripartite structure of the Community takes three of its institutions from the tripartite system: the Assembly or Parliament, the Council and the Court of Justice. The fourth institution is the Commission (earlier the ECSC High Authority), whose basic role is to defend the Community interest, whereas the Council, though also a Community institution, constitutes the forum where national interests tend to prevail.

3. The development of the Community's quadripartite structure shows an idiosyncratic pattern, for this structure is no merely formal innovation. Since 1951 the Community has also seen sweeping internal changes.

First and foremost we have the pattern of relations between the Council and the High Authority or Commission. Whereas, in the ECSC, the High Authority (the Community institution) had the edge in powers of decision, the system set up by the EEC and EAEC Treaties rests on constant cooperation between the Council and the Commission. The cooperation (see point 13 below) is established by those Treaties and was confirmed by the Merger Treaty of 1965, Article 15 of which states that 'the Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation'. This development in the allocation of powers reflects fundamental value-judgment. The authors of the EEC and EAEC Treaties sought to establish a balance between the powers of the national governments and those of the most truly Community institution. [4]

Secondly, the Parliament has steadily grown in importance. The Treaties give the Assembly of the ECSC, the EEC and the EAEC both supervisory and consultative powers. It has neither 'government-making power' (though it can compel the Members of the Commission to resign as a body—Article 144 EEC), nor legislative power. Two factors have done much to enhance the political importance of the Assembly (which renamed itself the 'Parliamentary Assembly' in 1958 and the 'European Parliament' in 1962). The Treaties

[3] J. Megret, M. Waelbroeck et al., *Le droit de la Communauté économique européenne*, Vol. 9, Brussels, 1979, p. 2.

[4] E. Noël, *Les rouages de l'Europe*, second edition, Paris-Brussels, 1979, p. 35.

of 22 April 1970 and 10 July 1975 enormously strengthened Parliament's budgetary powers: the draft budget of the Communities established by the Council can now, in certain circumstances, be amended or even rejected outright by Parliament. There have already been clashes with the Council, particularly over the 1979, 1980 and 1981 budgets. Parliament's political weight was also substantially increased by the election of its members by direct universal suffrage, pursuant to the Act of 20 September 1976.

Whereas the Parliament had formerly been composed of delegates designated by the national parliaments (Articles 21 ECSC, 138 EEC and 108 EAEC), so that there was no direct link between its members and the peoples of the countries forming the Community, this direct link has now been forged (and it is synonymous with political answerability to the electorate) since the election by direct universal suffrage in June 1979.

4. The substance of the powers of the institutions is determined by the legal nature of the Treaty conferring those powers. Thus the ECSC Treaty is what is called a 'treaty-law' laying down detailed rules to govern the Community coal and steel market and entrusts implementation of those rules to a Community institution, the High Authority. [5] In that structure, the main role of the Council is to harmonize the action of the High Authority with those of the national governments (Article 26 ECSC).

In contrast, the EEC and EAEC Treaties tend more to take the form of what are called 'framework treaties', which lay the keel to an institutional structure in which the institutions are responsible not only for implementing the Treaties but also for legislation. In a structure of that type it is only to be expected that the Member States will wish to retain their key function in the legislative process, and this is why the allocation of powers and cooperation between the Council and the Commission are not regulated in the same way as they are under the ECSC Treaty.

The difference is less sharp as regards the establishment and functioning of the common market, the chief means of integration mentioned in Article 2 of the EEC Treaty. Here, the basic political option is already contained in the Treaty itself. It is therefore for the institutions, and especially the Commission, to act on the logical inferences.

Conversely, when 'progressively approximating the economic policies of Member States' (the second means of integration mentioned in Article 2 of the EEC Treaty) and all the more so when working towards economic and monetary union, the authorities must act consciously and effectively, which means that they must constantly make a choice from among a number of political alternatives. [6] The Member States themselves clearly want to determine much of the action taken on this second means of integration, and to be directly involved in it.

---

[5] Article 8 ECSC: 'It shall be the duty of the High Authority to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof.'

[6] P.J.G. Kapteyn, 'De implicaties van de economische en monetaire unie voor het Gemeenschapsrecht en voor het nationale recht', SEW, 1973, p. 614 et seq., particularly pp. 624-626; G. Schrans, *Rechtsbescherming in het economisch recht*, Leyde-Zwolle, 1979, pp. 10-11.

Section II — The Council of the European Communities

¶ 1. *The Council's role in the ECSC*

5. The ECSC Treaty states that the Special Council of Ministers (the Council of the European Communities since the Merger Treaty of 8 April 1965) shall consist of Member States' representatives, each government delegating to it one of its members. Article 26 of the Treaty sets its task as follows: 'The Council shall exercise its powers in the cases provided for and in the manner set out in this Treaty, in particular in order to harmonize the action of the High Authority and that of the governments, which are responsible for the general economic policies of their countries. To this end, the Council and the High Authority shall exchange information and consult each other. The Council may request the High Authority to examine any proposals or measures which the Council may consider appropriate or necessary for the attainment of the common objectives.' Although it is already clear from this article that the Council is not to perform a central function in implementing the ECSC Treaty, the Treaty nevertheless contains rules enabling the Council to wield a decisive influence on the action of the High Authority.

This is especially true when the ECSC is in a 'period of manifest crisis' or confronted with 'a serious shortage' (Articles 58 and 59). In the first instance the High Authority must, with the assent of the Council, introduce a system of production quotas; if the High Authority does not take the initiative the Council, acting unanimously, may require the High Authority to establish a system of quotas (Article 58(1)). In certain circumstances (Article 58(3)) the Council may prevent the quota system from being terminated. In the second instance (serious shortage) the High Authority must apprise the Council of the situation and, unless the Council unanimously decides otherwise, propose the necessary measure. If the High Authority fails to act the Council may take a unanimous decision declaring that the situation exists. It is again the Council which, acting unanimously on a proposal from and in consultation with the High Authority, establishes consumption priorities and determines the allocation of coal and steel resources between the ECSC industries, export and other sectors of consumption.

These provisions, which established the principle of cooperation between the Council and the High Authority, were a source of serious conflicts of opinion between the two during the coal crisis of the 1950s.[7] They did, however, manage to act together in 1980 to counter the steel crisis.

As a general proposition, the ECSC Treaty system places the decision-making power in the hands of the High Authority, though major decisions need the Council's assent.[8]

¶ 2. *The Council's role under the EEC and EAEC Treaties*

6. The situation under the EEC and EAEC Treaties is altogether different. The key decisions are taken by the Council, which can act (except in special cases) only on a

[7] J. Mertens de Wilmars in *Droit des Communautés européennes*, ed. W.J. Ganshof van der Meersch, Les Novelles, Brussels, 1969, No 1379.

[8] For majorities required within the Council, see Article 28 ECSC.

proposal from the Commission. If it wishes to take a decision which diverges from the Commission's proposal, the Council must act unanimously.

7. Since the Merger Treaty of 8 April 1965 the Council of the European Communities has replaced the Councils of the three Communities and exercises their powers in accordance with the three original Treaties.

As under the ECSC Treaty, the Council consists of Member States' representatives, each government delegating one of its members to it.

The governments may choose their own delegates; designation always depends upon the subject on the agenda, e.g. the Minister for Finance, Agriculture or Economic Affairs. [9]

Council proceedings are prepared by the Permanent Representatives Committee (commonly referred to by the French abbreviation 'Coreper'). This Committee, which had already existed in practice on the basis of Articles 151 EEC and 121 EAEC, was given formal status by Article 4 of the Merger Treaty of 8 April 1965: 'A committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council'. [10] In preparing the ground for Council meetings the Committee must find solutions and, if possible, reach agreement on the texts. [11]

Whenever 'Coreper' reaches agreement on a solution and/or a text, these must always be formally confirmed by the Council, which might not even follow the solution reached in committee.

The general tendency, at any rate, is to settle more and more matters at 'Coreper' level.

Depending upon the Treaty or article to be applied, the Council acts by simple majority (the general rule save as otherwise provided by the Treaties), by qualified majority, or unanimously. Where the Council is required to act by a qualified majority (e.g. under Article 43(2) and (3) EEC in respect of common organizations of agricultural markets), the votes of its members are weighted as follows: [12]

Belgium	5	Ireland	3
Denmark	3	Italy	10
Germany	10	Luxembourg	2
Greece	5	The Netherlands	5
France	10	United Kingdom	10

[9] When the European Council (see Section VI) sits as the Council of the European Communities, it consists of the Heads of State or Government and their Foreign Ministers. This Council has recently appeared as a pendant to the Treaties.

[10] This does not mean that the Council can formally delegate powers to 'Coreper'.

[11] Final communiqué of the Conference of Heads of State or Government, 9 and 10 December 1974. Bull. EC 12-1974, point 1104; European Union Report by Leo Tindemans to the European Council, Supplement 1/76 — Bull. EC, pp. 35-36.

[12] For the sake of simplicity this chapter gives the present figures resulting from the Act of Accession of Greece, which was signed on 31 May 1980 and came into force on 1 January 1981. In the Community of Six the weighting was as follows: Germany, France and Italy : 4, Belgium and the Netherlands : 2, Luxembourg : 1; the qualified majority was 12 votes. The weighting shown in the text refers to the first enlargement, Greece not yet being a member (the majority required was therefore 41).

A qualified majority is 45 votes in favour for decisions to be taken on a proposal from the Commission; in other instances (Article 114 EEC) 45 votes are still required, but they must be cast by at least six members (Articles 148 EEC and 118 EAEC). [13]

The rule of the simple or qualified majority is a hallmark of Community (some may prefer to say supranational) organization and emphasizes the basic difference between the Council of the European Communities and a conventional diplomatic conference, where in practice each country has a right of veto. Under the majority system no one Member State ever has a right of veto (even where a qualified majority is required).

In what was already a climate of underlying unease, it was over the majority voting system that in 1965 and 1966 the Community suffered a severe crisis when one of the Member States refused to accept being outvoted if its vital interest were prejudiced by the decision in question. By the 'Luxembourg compromise' of January 1966 the Member States agreed to endeavour within the Council to find a solution acceptable to all whenever a decision threatened the vital interests of one or more Member States (they failed to agree on what should be done if no agreement was reached in that way).

The Luxembourg compromise does not alter the provisions of the Treaty and cannot be regarded as more than a 'gentlemen's agreement', and yet its political significance has been quite considerable, for ever since then a consensus has systematically been sought by means of reciprocal concessions on the part of the Member States in respect of the various decisions which have to be taken at Council meetings (the 'package deal').

The compromise is, however, clearly not only contrary to the spirit of the Treaty; it also negates the very concept of a Community (or supranational) institution. The final communiqué of the December 1974 Conference of Heads of State or Government cautiously skated round it. In practice, the majority vote has come back in certain cases where the Treaty provided for it (but never on politically sensitive issues). [14]

Unanimity is naturally still required wherever the Treaty so prescribes. Since the end of the transitional period (31 December 1969) 27 articles of the EEC Treaty have still required unanimity, [15] notably on the approximation of laws (Article 100) and on measures to attain a Community objective where the Treaty has not provided the necessary specific powers (Article 235).

8. The EEC and EAEC Treaties confer extensive powers on the Council. Article 145 EEC, for instance, provides that the Council shall:

(i) ensure coordination of the general economic policies of the Member States;
(ii) have power to take decisions. [16]

The first limb (coordination of the Member States' general economic policies) admittedly has somewhat limited substance: it means in effect that the Council commands a residual power of coordination whenever an explicit provision of the Treaty does not give it

---

[13] The qualified majority defined in Article 28 ECSC, however, is the absolute majority of the Member States' representatives, including the votes of two Member States which each provide at least one-eighth of the total value of Community coal and steel production; only budgetary decisions are governed by the EEC and EAEC rules.

[14] E. Noël, op. cit. at footnote 4 above, p. 43; E. Cerexhe, *Le droit européen.*

[15] J. Megret, M. Waelbroek et al., op. cit. at footnote 3 above, p. 124.

[16] Compare with Article 115 EAEC.

legislative power. [17] The Council does have limited legislative powers in the field of economic policy (notably as regards 'conjunctural policy' under Article 103 EEC). The 'power to take decisions' conferred by the second limb of Article 145 implicitly refers to the many provisions of the Treaty which empower the Council, generally on a proposal from the Commission, to enact legislation in the form of regulations, directives or decisions (Article 189 EEC) of a *sui generis* act, involving, for example, the conclusion of an international agreement.

In actual fact it is the Council that has the legislative power in the implementation of the EEC and EAEC Treaties, but this power is exercised in close cooperation with the Commission (see point 13 below) and in most instances after consulting the European Parliament.

Whereas cooperation between Council and Commission regarding legislation is governed by formal rules, no such rules exist for consulting Parliament. Legally, the Council is not compelled to take account of Parliament's opinions. [18]

Section III — The Commission of the European Communities

¶ 1. *The Commission under the ECSC Treaty*

9. The ECSC Treaty confers on the High Authority (the Commission of the European Communities since the Merger Treaty of 8 April 1965) major powers to implement the Treaty, which being a 'treaty-law' (see point 4 above) governs policy on the common market for coal and steel in some detail. The major role conferred on the High Authority is clear enough from the Robert Schuman declaration of 9 May 1950: '... The French Government proposes to place Franco-German production of coal and steel under a common higher authority within the framework of an organization open to participation by the other countries of Europe.' The High Authority is in fact the executive arm of the ECSC, even though on vital issues it must first consult the Council and on occasion seek the Council's assent before acting (see point 5 above).

Under Article 8 of the ECSC Treaty it is 'the duty of the High Authority to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof'.

The powers so conferred are to be interpreted broadly and could include certain powers in the field of ECSC external relations. [19]

These powers, nevertheless, have their limits: the High Authority may act only in accordance with the provisions of the Treaty. [20] Another crucial provision is to be found

---

[17] J. Megret, M. Waelbroek et al., op. cit. at footnote 3 above, p. 100.

[18] For Parliament's budgetary powers, see point 16.

[19] G. Olivier, in op. cit. at footnote 7 above, No 496.

[20] M. Lagrange, 'Les pouvoirs de la Haute Autorité et l'application du Traité de Paris', RDP, 1961, p. 41 et seq. See also Article 95 ECSC, whereby the High Authority can, in certain circumstances, take a decision or make a binding recommendation in all cases not provided for in the Treaty where a decision is necessary to attain one of the ECSC's objectives; this action also requires the unanimous assent of the Council. In the corresponding provision of the EEC Treaty (Article 235) it is the Council which, acting unanimously on a proposal from the Commission, takes the 'appropriate measures'.

in Article 5, which lays down that the Community shall carry out its task in accordance with the Treaty, 'with a limited measure of intervention'. It has never been established how far this rule, which has no counterpart in the EEC and EAEC Treaties, is binding in law, except in so far as it may be regarded as a token of the principles of proportionality. [21]

¶ 2. *The Commission under the EEC and EAEC Treaties*

10. Under these Treaties the Commission of the European Communities exercises different powers, less extensive than those conferred by the ECSC Treaty. Its status and functions are nevertheless the same under the three Treaties. The Commission currently consists of 14 Members chosen on the grounds of their general competence and whose independence is beyond doubt. The Commission must include at least one national of each of the Member States, but may not include more than two Members having the nationality of the same State. [22] The Members of the Commission must, in the general interest of the Communities, be completely independent in the performance of their duties. In performing these duties they may neither seek nor take instructions from any government or from any other body. [23] They are appointed by common accord of the governments of the Member States for a term of office of four years. [24]

The Council and the Commission consult each other and settle by common accord their methods of cooperation. [25]

The Commission publishes annually a general report on the activities of the Communities. [26]

The Commission constitutes a collective body: its powers are vested equally in each Member, and each Member is jointly responsible for all measures taken by the Commission. As the Commission is a collective body, its decisions are valid only if the number of Members laid down in its Rules of Procedure is present [27] and if its decisions are taken by a majority of its 14 Members. [28]

The Commission may be compelled to resign as a body if a motion of censure is carried in the European Parliament (Article 144 EEC).

11. The Commission's powers are defined in Article 155 of the EEC Treaty and Article 124 of the ECSC Treaty. They amount to the obligation to 'ensure the proper functioning and development of the common market' (Article 155 EEC) and to 'ensure the development of nuclear energy within the Community' (Article 12 EAEC). This means that of all

---

[21] C.M. Schmitthoff, 'The doctrines of proportionality and non-discrimination', Eur. LR, 1977, p. 329 et seq.; F. Delperee, *Le principe de la proportionalité en droit public*, Belgian reports to the Tenth International Congress on Comparative Law, Brussels, 1978, p. 503 et seq.

[22] Article 10(1) of the Merger Treaty, as amended by the Council Decision of 1 January 1973, upon the accession of the three new Member States.

[23] Article 10(2).

[24] Article 11.

[25] Article 15.

[26] Article 18.

[27] The quorum is currently eight members.

[28] Article 17 of the Merger Treaty.

the institutions it is above all the Commission which must look to the Community interest. It is in that capacity that it is involved in the Council's legislative activity, since the Council, barring very few exceptions, cannot deliberate until a formal dialogue has been initiated with the Commission. [29] The Commission's chief powers are set out in Article 155 of the EEC Treaty (Article 124 EAEC):

(i) It must ensure that the provisions of the Treaties and the measures taken by the institutions pursuant thereto are applied. In that capacity it is the custodian of the Treaties [30] and, more especially, of Community legality. It steps in whenever a Member State fails to honour one of its obligations under the Treaty (Articles 169 and 170 EEC); it checks for infringements of the Treaties by addressing comments or recommendations to the Member States (Articles 93(3) and 102(1) EEC). As regards private individuals it may—particularly in the fields of competition (Regulation No 17) or transport (Regulation No 11)—impose bans, fines and periodic penalty payments.

(ii) It makes recommendations or issues opinions on matters relevant to the Treaties, wherever the Treaties expressly require it to do so or as it sees fit. Recommendations and opinions are not binding (Article 189 EEC, Article 161 EAEC), but they offer the Commission a flexible, persuasive means of trying to ensure that the Community interest prevails with the Member States, with their nationals and with other Community institutions. [31]

(iii) The Commission has its own power of decision and is involved in shaping measures taken by the Council and Parliament in accordance with the Treaty (Chapter V). This rule explicitly refers to specific provisions conferring power on the Commission. The Commission's 'own power of decision' extends to the elaboration of legislative measures provided for by Article 189 (or Article 161 EAEC) when the Treaty confers this power on it. This collaboration in the shaping of Council measures is probably the Commission's chief task; we shall return to it. [32]

(iv) Lastly, the Commission exercises the powers delegated to it by the Council for the implementation of the rules the Council lays down. In practice, the Commission has very broad implementing powers, since in most of its legislative measures the Council has to delegate these powers to the Commission. At the Conference of Heads of State or Government in December 1974 it was agreed that more use should be made of the provisions of the Treaty which allow the Commission 'powers of implementation and management'.

12. In connection with specific tasks the Commission is assisted in its implementation and management powers by management committees and committees on rules (Part I, Chapter V, and Part II, Chapter VIII). Management committees have been set up by many regulations establishing common organizations of agricultural markets. In managing these market organizations the Commission consults the appropriate management committee (which is made up of Member States' representatives) and takes the necessary

---

[29] See point 13.

[30] W. Much, 'La Commission, gardienne des Traités', in *La Commission des Communautés européennes et l'élargissement de l'Europe*, Brussels, 1974, p. 86.

[31] For Commission recommendations to the Council, see, for example, Articles 105(1), 108(1), 109(2) and 113(3) EEC.

[32] See point 13.

decision. It is only when the management committee opposes the decision that the matter is referred to the Council, which may take a different decision: if no Council decision is forthcoming within a specified time, the Commission takes the final decision.

Since these committees have no powers of decision but are simply advisory bodies, they are considered to be acceptable by the Court of Justice. [33] In practice, the management committee system works well and the Council rarely has to step in.

The committees on rules, the first of which was set up in 1968, assist the Commission in preparing certain regulations (e.g. as regards the origin of goods, management of quotas, etc.). In contrast to the management committee procedure, the Commission here takes the decision itself only if it has the favourable opinion of the responsible committee. Should the committee issue an unfavourable opinion (or none at all), the Commission must make a proposal to the Council. But most of the regulations concerned provide a 'safety net' allowing the Commission the power to adopt its draft, if the Council fails to take a decision after a specified period.

Acting under the EEC and EAEC Treaties the Commission may thus have more limited formal powers than when acting under the ECSC Treaty; but it none the less performs a leading and essential role in the institutional structure and in the Community's decision-making process.

It represents the Community element in that process, though since the Treaties came into force, many institutional measures (and here the management and rules committees come to mind) have helped to facilitate cooperation between the Commission and the Member States.

Section IV — Cooperation between the Council and the Commission in the preparation of Council legislation

13. Article 149 EEC (Article 119 EAEC) epitomizes cooperation between the Council and Commission: 'Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal. As long as the Council has not acted, the Commission may alter its original proposal, in particular where the Assembly has been consulted on that proposal.' This article governs cooperation between the Council and the Commission at two critical levels.

(i) Barring a few exceptions (e.g. Articles 84(2) and 126 EEC) the Commission has the right of legislative initiative: the Council cannot draw up legislative measures without a proposal from the Commission. The Council may indeed 'request the Commission to undertake any studies which the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals' (Articles 152 EEC and 122 EAEC), but this in no way diminishes the crucial and dynamic role of the Commission in the decision-making process. As long as the Council has taken no decision the Commission may amend its proposal, either on its

[33] Judgment of 17 December 1970, Case 25/70 *Köster* [1970] ECR 1161, and judgment of 17 December 1970, Case 30/70 *Scheer* [1970] ECR 1197.

own initiative, or at the request of the Council, Parliament or the Economic and Social Committee.

(ii) Unanimity is required if the Council is to amend a Commission proposal in those cases where it cannot act without such a proposal. This rule should have had the effect of affording the Commission a very strong position in the decision-making process, as the Council is virtually obliged to maintain a dialogue with it. The first paragraph of Article 149 could 'deadlock' the institutional relationship if the Council did not agree unanimously to depart from the Commission proposal. But the second paragraph of Article 149 leaves the Commission enough scope to adapt to the situation which has arisen in the Council. It may thus, by judicious amendment of its original proposal, be instrumental in achieving the majority required by the Treaty, when it seems unlikely that there will be a majority of its original proposal. In point of fact, the regular quest for unanimity within the Council following the Luxembourg compromise (see point 7 above), even if a majority of the Member States are prepared to accept the Commission's proposal, has prevented the Commission from performing such a key role. But the fact remains that the Commission does much to inspire the Council's resolve by means of the constant dialogue between them, in the course of which the Council frequently has to change its original position.

This institutional cooperation between the Council and the Commission does not match the standard model of the decision-making process in democratic States and that is perhaps why it has sometimes caused confusion. [34] According to some people the Council and the Commission together constitute the 'twin-headed' executive of the Communities; this interpretation is quite wrong for two reasons. First, we are dealing here with far more than a purely executive body since the Council and the Commission together perform a legislative function. Second, that explanation fails to recognize that each of the two institutions, which represent different principles in the construction of the Communities, is of a specific kind and independent of the other; it particularly fails to recognize that the Council is an intergovernmental body and that the Commission is the Community institution *par excellence.*

Others think that the Council can be compared to a 'Chamber of States', a Senate in a federalist structure (like the United States Senate and the Bundesrat of the Federal Republic of Germany) and that the European Parliament can be compared to a 'Peoples' Chamber'.

This view is based on the long-standing tripartite State structure, but again it fails to recognize the institutional reality of the Communities, which confers a much bigger role on the Council than on Parliament.

We must emphasize the originality of this quadripartite structure underlined by Pierre Pescatore. [35] The Commission may be regarded mainly as the executive, which plays a leading role in the decision-making process, whilst the Council not only represents the Member States but is also the Community legislator. This institutional structure corresponds to the political reality within the Communities, for they have yet to become a political federation or confederation. The institutional cooperation between the Council

[34] P. Pescatore, 'L'exécutif communautaire: justification du quadripartisme institué par les Traités de Paris et de Rome', CDE, 1978, p. 387.

[35] In op. cit. at footnote 34 above.

and the Commission also distinguishes the Community from traditional intergovernmental organizations.

Section V — The European Parliament

¶ 1. *Composition and election by direct universal suffrage*

14. Already in Article 20 of the ECSC Treaty we find the principle that the Assembly 'shall consist of representatives of the peoples of the States brought together in the Community', while Article 21 of that Treaty states that the Assembly 'shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States'; these provisions are to be laid down by the Council, acting unanimously. [36] This principle is also laid down by Articles 137 and 138(3) EEC and by Articles 107 and 108(3) EAEC. This demonstrates that from the birth of the Community it was assumed that eventually the Assembly would be elected by direct universal suffrage. But Parliament had to wait until June 1979 before the intention became a reality.

Until then the European Parliament consisted of delegates whom the national parliaments had to designate from among their members in accordance with the procedure established by each Member State. After the Community's first enlargement the number of delegates was as follows:

Belgium	14	Italy	36
Denmark	10	Luxembourg	6
Germany	36	The Netherlands	14
France	36	United Kingdom	36
Ireland	10		

The Act of 20 September 1976 concerning the election of representatives to the European Parliament by direct universal suffrage determined the number of members elected for the first time in June 1979:

Belgium	24	Italy	81
Denmark	16	Luxembourg	6
Germany	81	The Netherlands	25
France	81	United Kingdom	81
Ireland	15		

The Act of Accession of Greece added 24 Greek members.

Members are elected for a term of five years. They may accept neither instructions nor any binding mandate: they vote on an individual and personal basis. They may concurrently be members of a national parliament but any national provision which would require only members of national parliaments to be eligible for a seat in the European Parliament would be illegal. The office of representative in the European Parliament is also incompatible with certain functions, such as membership of the government of a

[36] Here, the Council recommends the Member States to adopt these provisions in accordance with their respective constitutional requirements.

Member State, of the European Commission, or of another institution or organ of the Communities (Article 6 of the Act of 1976).

In June 1979 the members of the European Parliament were elected according to different national electoral procedures. But Article 7 of the Act of 1976 requires Parliament to draw up a proposal for a uniform electoral system. [37]

The Act of 1976 is the result of numerous proposals from both Parliament and the Member States. Election by direct universal suffrage obviously confers upon members a democratic legitimacy which makes them genuine 'representatives of the peoples of the States brought together in the Community'.

¶ 2. *Parliament's powers*

15. On 20 March 1958 the Assembly decided to take the name of 'European Parliamentary Assembly' and on 30 March 1962 rechristened itself 'European Parliament'. Ever since then the 'European Parliament' has called itself just that in all its working documents. The same practice is followed in Council documents, except that French language versions follow the letter of the Treaties and use the word *Assemblée*. The European Parliament does not, however, enjoy all the powers vested in a parliament within a parliamentary democracy. It does not, for instance, take any effective part in the exercise of legislative power. The powers conferred upon the European Parliament under the ECSC Treaty are not quite the same as under the two later Treaties. The 'Assembly' has the right under the ECSC Treaty to review *a posteriori* the acts of the High Authority (or the Commission).

Under the EEC and EAEC Treaties these powers are broader. Article 137 EEC and Article 107 EAEC state that the European Parliament shall exercise the advisory and supervisory powers which are conferred upon it by this Treaty, while Article 20 ECSC allowed it only supervisory, and thus not advisory, powers.

16. There are three main areas in which Parliament can act.

(i) As regards the exercise of legislative power (Chapter V), Parliament has only consultative powers. [38] Parliament is generally consulted by the Council on proposals laid before it by the Commission even in instances where the Treaties do not demand such consultation. Although Parliament acts here only in a consultative capacity (and there is no obligation on the Council to take account of Parliament's opinion), Article 149(2) EEC (Article 119(2) EAEC) nevertheless gives Parliament's opinion some potential weight. It states that when it has submitted a proposal to the Council and that body has not acted, the Commission may alter it, 'in particular where the Assembly has been consulted on that proposal'. This means that the Commission can amend its proposal to accommodate Parliament's opinion.

(ii) With regard to supervision of the Commission in its administrative function, Article 144 EEC (like Article 24 ECSC and Article 114 EAEC) makes provision for compelling the Commission to resign as a body after a motion of censure has been tabled and carried in an open vote by a two-thirds majority of the votes cast, representing a

[37] This is based on Article 3 ECSC, Article 138(3) EEC and Article 108(3) EAEC.

[38] The fourth paragraph of Article 95 ECSC provides for an exception (of limited practical scope).

majority of the members of Parliament. A number of supervisory techniques, less drastic and perhaps therefore more effective, have been developed. These include oral or written questions put to the Commission (third paragraph of Article 23 ECSC; third paragraph of Article 140 EEC; third paragraph of Article 110 EAEC) and to the Council,[39] opinions on matters referred to it pursuant to the Treaties[40] and the Question Time introduced after the accession of the United Kingdom, when members can put precisely worded questions to the Commission, the Council or even the Conference of Foreign Ministers. Moreover, Article 140 EEC (Articles 23 ECSC and 110 EAEC) stipulates that 'the Council shall be heard by the Assembly in accordance with the conditions laid down by the Council in its rules of procedure'. Since 1954, members of the Council have been appearing in Parliament to speak in debates and explain the Council's viewpoints. But Parliament cannot be said to exercise any real political supervision over the Council because it cannot censure the Council. A trend is nevertheless emerging towards more consultation and conciliation between the Council, Parliament and the Commission. The greater political weight of a Parliament elected by direct universal suffrage will certainly promote this trend.

(iii) On the budgetary side (Chapter VIII) the original Treaties gave Parliament only very limited powers. Article 203 EEC (Article 177 EAEC) requires Parliament (like the other institutions) to draw up estimates of its own expenditure and makes provision for proposing amendments to the Council's draft budget. This system, however, gave the final say to the Council.

Now that the Communities command substantial own resources (see Council Decision of 21 April 1970 on the replacement of Member States' financial contributions by the Communities' own resources), the Member States have agreed that Parliament can play a bigger part in the budgetary procedure. The expansion of Parliament's budgetary powers was achieved in two stages: by the first Treaty of 22 April 1970 amending certain budgetary provisions in the Treaties and then by the Treaty of 10 July 1975. Under these Treaties Parliament has the right to amend non-compulsory expenditure; the Council may accept or reject these amendments, but Parliament has the last word within certain limits. For compulsory expenditure under the Treaties a distinction should be made: if it does not result in an increase in total expenditure, it is considered to be tacitly accepted unless the Council expressly rejects it; when it does result in an increase in total expenditure, it must have the express approval of the Council.

It is nevertheless Parliament which adopts the budget. It is also entitled to reject it, for valid reasons, by a majority of the House and by two-thirds of the votes cast.

In the light of these greater budgetary powers, Parliament, the Council and the Commission adopted on 4 March 1975 a joint declaration laying down a conciliation procedure between Parliament and the Council, in which the Commission must cooperate actively. This procedure (on the initiative of any of the three institutions) may be applied for Community acts of general effect which have major financial repercussions and whose adoption does not necessarily result from already existing acts. The procedure begins when the Council announces its intention of amending an opinion adopted by Parlia-

[39] The Council's and Parliament's Rules of Procedure make provision for putting these questions to the Council.

[40] This power also derives from Parliament's Rules of Procedure.

ment. The aim of conciliation is to secure agreement between the Council and Parliament. When the viewpoints of the two are sufficiently close, Parliament may issue another opinion, following which the Council adopts a final decision.

Expansion of Parliament's budgetary powers and its participation in the conciliation procedure (especially if it is properly applied) can both in their way enhance Parliament's stature in the quadripartite institutional structure of the Communities.

When in 1979 the Parliament elected by direct universal suffrage rejected the draft budget by 288 votes to 64, it was not only a declaration of its new political identity but also an unmistakable warning that, in budgetary terms at least, it was going to raise itself to the rank of an institution on a par with the Council. The conditions under which the 1980 budget was finally established demonstrate that there must henceforth be an institutional dialogue on the budget between the Council and Parliament.

Section VI — The European Council

17. The European Council, consisting of the Heads of State or Government assisted by their Foreign Ministers, was born at the Summit Conference of December 1974 (see 'Introduction', points 11 and 12). The European Council meets at least three times a year to deal both with political cooperation between the Member States and with internal Community affairs. It is not a new institution; the European Council acts as the Council of the European Communities, but with a specific membership as allowed by Article 2 of the Merger Treaty. [41]

In this capacity the European Council can enact legislation (in the form of regulations, directives or decisions) provided the procedures laid down by the Treaties (notably with regard to the Commission's right of initiative) are complied with. This may well be the case when it has to settle matters which cannot be settled at a lower level. It remains to be seen whether the European Council will confine itself to taking political decisions of principle which then have to be implemented by the ordinary Council. At any rate it has already succeeded in solving certain thorny problems, such as the 1975 dispute over the United Kingdom's financial contribution to the Community, and in averting, at least temporarily, some serious crises.

Conclusions

18. It must be remembered that in law there are still three Communities, the ECSC, the EEC and the EAEC, although the institutions are common to all three. But it is generally agreed that the three Treaties should in practice be regarded as a whole and should be interpreted and applied in such a way as to avoid contradictions between them. On 16 February 1978 Parliament proposed that a single name be used for the Communities—the 'European Community'. Though the three separate Treaties have yet to be merged

[41] 'The Council shall consist of representatives of the Member States. Each government shall delegate to it one of its members.' These, of course, may be the Heads of Government or, in the case of France and under the French Constitution, the Head of State.

and no single European Community exists, a single name would certainly generate less confusion in the public mind.

The endeavours to achieve a 'European Union' (see 'Introduction', point 13) involve more than a question of name, and here the stances vary. In its report on European Union [42] the Commission proposed three possible new institutional models, which differ from the present institutional structure of the Communities. The Commission clearly preferred the model consisting of a collegiate government body whose men thus would be independent of the national governments, together with a bicameral parliament comprising a 'Chamber of Peoples', whose members would be elected by direct universal suffrage, and a 'Chamber of States' which would be an offshoot of national governments. The Commission did not rule out possible intermediate solutions.

The Tindemans Report takes a more pragmatic line. [43] It contends that European Union can and must be built on the institutional foundations which the Member States have already accepted under the existing Treaties. The report nevertheless makes a number of suggestions for improving institutional performance and strengthening institutional machinery, all based on four criteria: the necessary authority to determine policies, the effectiveness essential to Community action, the legitimacy also essential to democratic stewardship and cohesion in institutional vision and policy.

It would be unrealistic to erect a new institutional structure in which the Member States as such had no major function to perform. From that angle, the Tindemans objective would appear more easily attainable, provided the necessary steps are taken to ensure that the decision-making process can move more effectively. The first steps along that road must consist of reinforcing the powers of the Commission and applying the simple or qualified majority voting rule within the Council. [44]

---

[42] Supplement 5/75 — Bull. EC.

[43] 'Report on European Union' by Leo Tindemans, Belgian Prime Minister, to the European Council, Supplement 1/76 — Bull. EC.

[44] P. Pescatore, op. cit. at footnote 34 above, pp. 405-406.

Chapter II — The legal nature of the European Community

by Prodromos D. Dagtoglou

Preliminary observations

1. The legal nature and, in general, the character and identity of the European Community [1] have formed the basic problem ever since the ECSC, the first in date of the European Communities, was established 30 years ago. Attempts to provide an answer to this question have given rise to a copious bibliography in many languages, extending beyond the Community's frontiers. No complete and final answer has yet been given and probably no such answer can be given because the Community is in a permanent state of evolution.

2. To determine the nature of the Community is a matter which concerns not only law, but above all politics, even in the relatively frequent cases where this is done without direct political involvement. Moreover, while such a definition is only possible in terms related to the Community's existing situation, structure and orientation, it influences the mode and rhythm of Community evolution and must inevitably combine diagnosis and prognosis. This is the reason why the various theories regarding the nature of the Community, at the same time, both reflect and determine the political climate and the political perspectives of the period during which they were formulated.

Political understanding and legal understanding of the Community necessarily go hand in hand.

¶ 1. *Federalist and internationalist theories*

3. There can be no doubt that the political figures who conceived, founded and fashioned the Communities (Jean Monnet, Robert Schuman, Paul-Henri Spaak, Konrad Adenauer, Alcide De Gasperi, Walter Hallstein) had the federal State in mind as a model. Legal writers too (especially German legal writers) attributed to the Community a federal nature, or, at all events, federal elements (federalist theory) during the early years which

[1] The use of the term 'European Community' in place of 'European Communities' corresponds to the resolution passed by the European Parliament (OJ C 63, 13.3.1978, p. 36) and the letter dated 26 July 1978 sent by the President of the Council to the President of the European Parliament.

followed the conclusion of the Treaties establishing the Communities (C.F. Ophüls, E.J. Wohlfarth, G. Jaenicke, H.J. Schlochauer, G. Schwarzenberger, G. Heraud, L. Cartou).

The federal concept was not, however, the only theory to be advanced in the Community's early years. The totally different internationalist theory also found advocates among writers and practitioners of international law (E. Vitta, P. de Visscher, R.L. Bindschedler, A. Verdross, F. Berber, L. Delbez, I. Seidl-Hovenveldern and, recently, A. Bleckmann). According to this theory, the Community, as it is at present, has been established by international treaties and falls totally within the realm of international law since it is an international organization, although with some peculiarities which are not new, but are to be found (though not all together) in existing international organizations.

Even the European Court of Justice, in its important decisions in *van Gend en Loos* [2] and *Costa* v *ENEL,* [3] delivered in the early years following the conclusion of the Treaties of Rome, defined the Community (EEC) as 'a new order of international law'. The Court, however, in its later cases gave up this reference to international law.

4. This internationalist theory is unable to explain the Community's fundamental characteristics and the Community legal order; for example, the autonomous procedure for partial amendment of the Treaties, the autonomous creation of rules of law, especially the primacy over national laws and the direct effect of these rules, the binding force and directly enforceable effect of the decisions of the Court of Justice, the development of Community powers (beyond the express provisions of the Treaties) to the exclusion of national powers which can no longer be exercised even concurrently. [4]

However, it cannot be disputed that the Member States of the Community not only were entirely separate 'States' at the time of their creation but have continued to be so up to the present day.

This is the reason why it continues to be more difficult to establish the Community's independence under international law than to do so under domestic (national) law. [5]

The weakness of the internationalist case as a whole was, however, fairly quickly and very widely recognized. Meanwhile it gradually became apparent that the federalist view, owing to its failure to reflect either political or legal reality, was too ideological in content to be accepted as a scientific theory. This latter finding dates back to the 1960s when after the 1965/66 crisis the agreement known as the Luxembourg compromise came into being.

¶ 2. *The development of the Community*

5. In reality, the way in which the Community is developing has robbed the federalist theory not only of such of its foundations as refer to the current period but also of the legal objective directed towards the future. During the course of the 1950s and 1960s

[2] Judgment of 5 February 1963, Case 26/62 *van Gend en Loos* [1963] ECR 1.

[3] Judgment of 15 July 1964, Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

[4] Judgment of 31 March 1971, Case 22/70 *Commission* v *Council* (AETR) [1971] ECR 263; Joined Cases 3, 4, 6/76 *Kramer* [1976] ECR 1279; Opinion 1/75 [1975] ECR 1355; Opinion 1/76 [1977] ECR 741.

[5] F. Rigaux, 'Nature juridique des Communautés' in *Droit des communautés européennes,* published under the direction of W. Ganshof van der Meersch, Les Novelles, Brussels, 1969.

there was a widespread conviction that the Treaties contained a mechanism which would automatically transform the Economic Community into a political confederation or a federal State.

Experienced political figures shared this conviction. Admittedly, after the ECSC had been set up, the failure of the European Defence Community (and with it the abandonment of all projects for creating a European political community) made it abundantly clear that the political will to create a federal Europe did not yet exist. The establishment of the EEC and the EAEC, however, served to put new life into the federalist theory.

Learned men with great reputations championed the idea that the modern way of unification is not, as in the 19th century, the creation of a common constitution, but the formation of a common administration. [6] In other words they believed that European unification was going to occur gradually and ineluctably by the way of a common administration.

This development, however, has not taken place. It has, on the contrary, become apparent that there is no automatic process for bringing about European unification and that nothing can take the place of political will. This will had been limited from the start. The Treaties did not give the Community a system of instruments that would, if not automatically, at any rate by providing a preconceived and clearly-delineated model, lead to the Community becoming a federation. The Treaties make the European Parliament an institution devoid of important powers of decision and equipped with powers of control which are not exercisable over the most powerful Community organ (the Council) but over the Commission.

There is an idea, which is certainly widespread and supported by some eminent writers, that the Treaties provide for a system of balanced relations between the Council and the Commission, instead of which 'the Council has made itself the centre of gravity and has relegated the Commission... to the role of a satellite'. [7]

The central position of the Council was in reality provided for in the Treaties themselves (except in the ECSC Treaty where, however, the power of the High Authority, now taken over by the Commission, is restricted by the detailed wording and the administrative character of the Treaty's provisions).

6. The expectations of the early years that its technocratic superiority would eventually shift the centre of power in the Commission's favour have not been realized, still less the hope of seeing the latter evolve in the direction of becoming a 'European government' even in embryo. Indeed the opposite has occurred: on many points the Commission has been confirmed in the role of an organ for preparatory work on Council decisions, work which often goes unheeded.

The declarations of the summit conferences at The Hague and in Paris, in 1969 and 1972, were unable to set their seal on the nature of the Community. Although, after the Davignon Report in 1970, European political cooperation was instituted and the regular sessions of the 'European Council', provided for every four months, were begun from 1974, no action has been taken either on the Commission's far-reaching projects—the Werner Plan on economic and monetary union (1970) and the ambitious recommendations

---

[6] E. Fortshoff, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Vol. 18, Berlin, 1960, p. 177.

[7] cf. Sasse in *Die Zeit* of 14 January 1972, p. 38.

of the Vedel group on enlarging the powers of the European Parliament (1972)—or on the prudent and modest Tindemans proposals on European Union, on the proposals of the Spierenburg working party regarding the reform of the Commission (1979) and those of the 'Three Wise Men' concerning the operation of the Community institutions (1979). After the international oil crisis in 1973, the Community programme for social action published that year came to nothing whereas it could have constituted the Community's contribution to the solution of one of the most vital problems of our time and have helped in the construction of European Union. However, though ambitious schemes usually do not come to fruition, more specific and restricted projects have a greater chance of success. Thus in 1979, for example, the European Monetary System came into operation.

7. Two important steps were taken in the direction of European Union when the European Parliament began to participate, though to a limited extent, in the adoption of the Community budget (1975) and when direct elections based on universal suffrage were held in 1979. The European Parliament's newly acquired democratic legitimacy, consequent upon its direct election, has, however, not been accompanied so far by any extension of its powers or by any noticeable reinforcement of its position in the Community's institutional system; it has therefore so far had no effect on the nature of the Community. This is, however, being progressively affected by the continual enlargement (even if this does not always occur in depth) of the Community's field of activity into almost every sphere of internal and external policy, by means of legislation in an ever-increasing field, as well as through regular or institutionalized consultation and collaboration. Often, however, the question is not European unification but rather forms of close intergovernmental cooperation. It is not in any case disputed that the Community was not originally, has not subsequently become and will not become, either through legal necessity or political automatism, a federal State—although such a possibility of course remains open. This very fact (that there is an open possibility of a 'federalist' solution or a European Union) is an essential component of the Community which, viewed qualitatively, distinguishes the latter from traditional international organizations.

¶ 3. *The nature of the present-day Community (supranational and functional theories)*

8. This conclusion plainly leaves unanswered the question of what the Community's nature is today (and not yesterday or tomorrow) since there is no answer to be found in the traditional models of international law, any more than in those of domestic (national) law.

If we leave aside the description of the Community as an international organization *sui generis* (a term denoting perplexity which in practice does little to solve the problem but merely evades it), there are essentially two answers, not incompatible with each other, that seek to explain the Community phenomenon, one derived from its international aspect and the other from its federal (nation State) aspect, in this connection emphasizing respectively the inter-State element or the administrative element of the Community.

9. The first answer, the older of the two, is that the Community is an organization which is neither international nor national according to traditional concepts, but a 'supranational' organization, the distinctive marks of which are possession of its own

sovereign rights (*Hoheitsrechte*), the independence of its institutions *vis-à-vis* the national governments and the power to make decisions not necessarily requiring unanimity but directly applicable both in the case of all the Member States and of the individuals living within its territory. These conceptual elements are not, however, sufficient to constitute a new independent concept and their use in the ECSC Treaty (Article 9(5) and (6), before its repeal by Article 19 of the Merger Treaty) and their omission in the Rome Treaties is of no special importance. The term 'supranational' is not in fact much used nowadays.

10. The other answer to the question regarding the present nature of the Community emphasizes its differences by comparison with the State and stresses its 'administration' aspect. Starting from the American theory of supranational functionalism as formulated by Mitrany and developed by Haas and Lindberg in particular, the German theory of the Community considered as an organization for special ends (*Zweckverband* according to the conceptual model of German administrative law) has been developed especially by Hans Peter Ipsen (*Zweckverband funktionaler Integration*).[8] According to this theory, the Community is not a State because it does not possess the *Kompetenz-Kompetenz*, that is to say because it does not have universal competence in all spheres; on the contrary, since it only possesses specific powers which (just like the Community's objectives) are defined in the Treaties, it is an organization for special ends (particularly economic ends) and with limited powers. Understood in this way the nature of the Community presupposes, and accordingly is marked by, the absence of Community institutions with general normative (law-making) power, or, to use positive terminology, it exemplifies the general rule of specific delegation of powers (*Prinzip der begrenzten Ermächtigungen*, second subparagraph of Article 4(1) EEC).

This description of the Community does not in any way prejudge its future orientation in the direction of the nation-State form or the rejection of such a form. However, it avoids too marked ideological involvement, such as has always been and still is devoid of political foundation and motivation force, and consciously confines itself to the administrative sphere for the attainment of specific objectives which can (it is presumed) be achieved within the framework and with the facilities at the Community's disposal.

This theory, by minimizing the political element and stressing the technocratic, offered the Community the prospect, during the Gaullist era and in the period immediately following, of a safe voyage on the troubled waters which separated those who dreamed of a federal Europe on the one hand from the champions of a 'Europe of nation States' on the other.

¶ 4. *Assessment of the functional theory*

11. In reality this was clearly an attempt to remove the Community from the political arena. During the Gaullist era, even non-functionalists[9] sought to bring about a divorce between the Community and politics, but the functionalist theory maintained that the Community could and should shun politics and political power with all its conflicts, by

[8] H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen, 1972, p. 197.

[9] D. Sidjanski, 'L'originalité des Communautés européennes et la répartition de leurs pouvoirs', RGDI, 1961, p. 40 et seq., especially ¶ 42. F. Rigaux, op. cit. at footnote 5 above, p. 36, No 101.

assuming an administrative and technocratic character; it was, moreover, from here that it drew some of the arguments opposing the alleged need for the 'democratic legitimation' and a democratic control of the Community (cf. W.N. Hogan: Power which does not exist does not need an external control in order to be consistent with 'democracy'). [10]

But it is clearly impossible to avoid politics. (Community activity is *par excellence* political activity.) The Community, moreover, possesses strong and continually increasing political force not only in its own domain but also in the international field. Its political influence is not restricted solely to cases where it is operating, but extends also to fields which, for want of will or want of ability, it is not tackling at the right time or with the right degree of intensity. Talleyrand's definition of non-intervention (namely that it means almost the same thing as intervention) is already valid for the Community at the present day, and very likely will continue to be even more so in the future. At the same time, however, the Community's unifying force has been weakened by continual claims in support of national interests. Functionalism, which was to have turned the Community away from its dangerous course of wandering in an impractical dream world, is incapable either of comprehending and appreciating the political dimension or of checking the decline in European unification.

12. On the other hand, functionalism is so safely and surely 'grounded' that it is not at all disposed to attempt a 'take off' and accordingly cannot offer a body of theory capable of evaluating Community activity which has been constantly expanding over the past 10 years or so, even into realms not expressly provided for or barely mentioned in the Treaties (though admittedly other realms expressly provided for remain untouched). This action was possible from a legal point of view because the so-called principle of specific powers does not set narrow limits, but, quite the contrary, as has already been observed, a large number of 'grants of legislative power' in the Treaties and especially, of course, the provision contained in Article 235 EEC, are drafted in wide terms and are, moreover, interpreted in a wide sense by the Court of Justice. In this way there is hardly any aspect of the Member States' policy which has escaped Community intervention, although, in a number of cases, this does not go beyond the limits of intergovernmental cooperation.

13. Taking as his starting point the phenomenon of the *grande illusion* of creating a 'European nation' and also the development of certain analogies with States which has occurred inside the European Community after some decades of coexistence, Thomas Oppermann [11] suggests making use of all the opposing theories existing up to the present and conceiving the Community as a political umbrella (*parastaatliche Superstruktur*). It would be preferable, however, to avoid the term 'State', which can give rise to false interpretations, and to keep to Carl Friedrich Ophül's well-tried and felicitous term 'Community'; in other words simply to describe the nature of the Community as purely 'Community' (*communautaire*) [12] and to concentrate our attention on distinguishing and coordinating its principal characteristics.

---

[10] W.N. Hogan, *Representative Government and Integration*, Lincoln, Nebraska, 1967, p. 207; see also by the same author *Political Representation and European Integration*, Integration 1970, p. 294.

[11] T. Oppermann, *Die Europäische Gemeinschaft als parastaatliche Superstruktur — Skizze einer Realitätsumschreibung*, in Festschrift für H.P. Ipsen, Tübingen, 1977, p. 688.

[12] E. Noël, *Les rouages de l'Europe*, Brussels, 1976, p. 11.

¶ 5. *Centripetal and centrifugal tendencies in the Community*

14. Study of the European Community reveals both centripetal and centrifugal tendencies, some of which are expressly laid down in the Treaties, while others have been recognized in case-law or have the support of prevailing legal theory though they have not been the specific subject-matter of judicial decisions.

15. Chief among the centripetal influences in the Community are the following:

(a) the creation, preservation and operation of a common market and common policies;
(b) the amalgamation of the Community and its Member States into a system of common rights and obligations;
(c) the elements of Community autonomy to be found in the procedure for revising the Treaties establishing the Communities or the Treaties amending these, and in the procedure for the accession of new Member States (or for association with third countries or international organizations);
(d) the autonomous production of rules of law, the direct effect of these rules *vis-à-vis* individuals and their primacy over the domestic law of the Member States;
(e) the Community's power to conclude certain international treaties to the exclusion of national competence in this respect;
(f) elements of autonomy vested in the Community institutions (Council majority decisions, Commission independence, direct election of Parliament by universal suffrage);
(g) the Community's own resources;
(h) the obligation to accept the jurisdiction of the Court of Justice and the character of its decisions, which are binding on the parties concerned and (to some extent) capable of enforcement;
(i) the possession of legal personality by the Community and the Community liability.

16. The centrifugal influences in the Community are chiefly as follows:

(a) the large and continuing 'national wedges' driven into the common market, the limited number of common policies and the failure to develop some of these to the full;
(b) the dominant elements of international law in the procedure for revising the Community Treaties and the procedure for the accession of new Member States;
(c) the restriction of the Community to certain, admittedly wide, spheres of action (chiefly economic), to the exclusion of defence policy in particular;
(d) the absence of general legislative power;
(e) the dominance of the national element in the operation of the Council and the Committee of Permanent Representatives (which accounts for the use of the Luxembourg compromise regarding unanimous decisions by the Council);
(f) the reservations in favour of national power (for example, safeguard clauses);
(g) the right of Member States to withdraw which, at the present stage of European integration, cannot be legally denied.

17. The characteristic marks of the Community which we can distinguish on the basis of the above and from the decisions of the Court of Justice are unity, a new legal order

and a dynamic enlargement of aims and activities entailing increased participation by the Community in politics.

¶ 6. *Community unity*

18. The 'unity' element, which is being emphasized more and more by the Court of Justice, is contained not only in the idea of a common market and common policies but also in the idea of Community in general. The chief signs of this 'unity' element are the following:

(a) the principle of the equality of Member States with regard to Community law;
(b) the principle of Community preference;
(c) the principle of Community loyalty or the duty of solidarity;
(d) the principle of indivisibility, balancing benefits and burdens;
(e) the principle of the Community's 'external' power to conclude international agreements, to the exclusion of the Member States' power, being parallel and proportionate to its 'internal' normative power;
(f) the principle of unity or of the uniform application of Community law, which results in its primacy over national laws and the direct effect of the rules of Community law.

¶ 7. *The existence of a Community legal order*

19. One characteristic element of the Community is the creation of a new legal order resulting from the limitation of their sovereign rights by the Member States. The EEC Treaty (as well as the general principles of Community law) is evolving towards a kind of 'constitution' for the Community which also includes protection for individual rights which is gradually taking shape.

The principal characteristics of this new legal order are:

(a) the specific, independent Community institutions which, although lacking general legislative power, nevertheless have had very wide powers conferred on them by the Treaties and are continually increasing the scope of these powers;
(b) the fact that individuals, alongside the Member States, are entitled to certain rights;
(c) the direct effect of certain rules of Community law;
(d) the primacy of Community law over national laws, including constitutional law and even the constitutional protection of individual rights;
(e) the creation not only of rights and obligations but also of obligatory procedures for enquiring into infringements and applying sanctions, particularly the provision for submission to the Court of Justice and the binding character of that Court's decisions;
(f) Community liability for unlawful conduct of its institutions or servants.

20. The European Community's new legal order simultaneously presupposes and creates unity—and vice versa. The Community is above all a 'Community based on law'

in the sense that the relations between the Community's subjects are relations between subjects of law and 'legalized' to a high degree under the control of the Court, which must 'ensure that ... the law is observed' (Article 164 EEC). For this reason Community law is important as a unifying factor, especially because not only the Member States, but also individuals, have been recognized as directly subject to that law. This explains the particular importance of the Court of Justice (S.S. Scheingold, P. Pescatore, A.W. Green, O. Mann, etc.). These observations are confirmed by decisions of the national courts which, after considerable initial reservations and hesitations, acknowledge the autonomy and primacy of Community law. It is however significant that, in the case-law of the four 'big' Member States, the primacy of Community law still meets with opposition, especially in France. Nevertheless, we can say that time is on the side of and not against full recognition of the autonomy and primacy of the Community legal order and that, in this process, the case-law of the Court of Justice of the European Communities plays a crucial part.

¶ 8. *The far-reaching character of the Community's aims and activities*

21. The third element characteristic of the Community is the dynamic extension of its aims and activities (despite certain set-backs) and its consequently increased involvement in politics. In the present political climate, as regards the near future, the Community has neither the intention nor the ability to take over the role of the Member States. Moreover, the Court of Justice itself, as has been properly observed, [13] avoids definitions of the Community couched in systematic terms. Meanwhile the Community field of action is continually expanding, though with different degrees of intensity.

Nowadays, there is hardly any State activity which remains totally unaffected by the Community activity; certain State powers cannot be effectively exercised without Community cooperation. The Community may consequently be distinguished from the State not so much by the extent but principally by the intensity of its powers. The inevitable expansion (as a whole) of the Community's field of action (a tendency far stronger than the Community's ability to modify the status quo, even where this is the object of continual bitter criticism, as in the case, for example, of the Community's common agricultural policy or staff policy) entails increased involvement in politics and raises ever more acutely two problems which are often confused: justification and democratic legitimation of Community power. Justification for the Community is to be found in the opening of new fields of action to safeguard the peace, liberty and well-being of its citizens [14] (for this reason imbalance in Community activities, especially in agriculture/industry or farmer/consumer relations, has considerable repercussions on the Community's credibility). This justification does not, however, make democratic legitimation superfluous; the direct election of the European Parliament marked an important step forward in this connection but it has not yet been brought to a final conclusion. The future development of the European Parliament's position and powers will reflect fairly accurately the development of the nature of the Community.

---

[13] cf. J. Boulouis and R.M. Chevallier, *Les grands arrêts de la Cour de justice des Communautés européennes*, Paris, 1977, Vol. 1, pp. 191, 194 et seq.

[14] cf. V. Everling, *Vom Zweckverband zur Europäischen Union Überlegungen zur Struktur der Europäischen Gemeinschaft*, in Festschrift für H.P. Ipsen, Tübingen, 1977, p. 595, ¶ 613.

Chapter III — The powers of the Community

by Antonio Tizzano

Section I — The framework of powers conferred by the Treaties

1. Although intended to pursue wide aims and exercise far-reaching powers, the European Communities, as is well known, do not have unlimited jurisdiction. Unlike States, but like other international organizations, all they actually possess is merely a derived power, *compétence d'attribution* to use the traditional phrase; in other words, they must act within the framework of the provisions laid down in their respective statute. Although nowadays this statement does not fully explain the significance of the Community experiment and a deeper study of its meaning and scope is therefore needed, it remains the indispensable starting point for any enquiry into Community powers.

To define the framework of these powers, it is therefore necessary to start from the original design of the Treaties. But it must also be remembered that these texts do not set out a list of the subjects falling within the Communities' jurisdiction, as is usually the case—to take a fairly common example—in federal States or States where wide autonomous powers are granted to lesser territorial entities. As is true of the majority of international organizations, the technique employed in the Treaties is, by contrast, more complex because the sphere of Community competence is defined by reference to a combination of elements to be assessed; it is based on the subject dealt with as well as on the action the Community may undertake and the powers which have been conferred upon it for that purpose.

Thus, to consider the EEC Treaty alone at this stage, it is useful to remember that, apart from indications furnished by the preamble and provisions relating to individual sectors,[1] the organization's objectives are set out in general terms in Article 2, which states that 'the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it'. However, having specified the ends, the Treaty does not automatically confer on the Community all the powers necessary for attaining them. Developing the theme and expanding the meaning of part of

[1] See, for example, Articles 29, 39, 110, 117, 123.

the sentence appearing in Article 2 ('by establishing a common market and progressively approximating the economic policies'), Article 3 proceeds to draw up a list of tasks to be executed and instruments to be used for the purpose of attaining the Treaty's objectives. These tasks and these instruments are not, however, necessarily encompassed by the 'activities of the Community', or, at least, they are not entrusted solely to the Community institutions, since there is also provision for action by the Member States or by bodies which in the strict sense are not included in the Community institutional system. [2]

In other words, the principle of derived powers also applies with regard to the EEC. This principle emerges chiefly from Article 3, which specifies that the activities of the Community must be exercised 'as provided in this Treaty and in accordance with the timetable set out therein', whereas the second subparagraph of Article 4(1), which is usually quoted in this connection, only refers to the principle indirectly. This provision, which states that 'each institution shall act within the limits of the powers conferred upon it by this Treaty' is probably only intended to affect interinstitutional relations and to emphasize the internal spheres of competence inherent in those relations. But as a whole the principle is chiefly apparent in the system adopted by the Treaty, which consists in specifying, in its substantive rules, the scope, conditions and methods for exercising the various Community powers, thus ensuring that provisions of a general character cannot be interpreted as automatically conferring unlimited powers of action on the Community institutions.

2. It follows that, abiding by the texts, the substantive powers of the EEC have to be reconstituted on the basis of each of the Treaty's various rules, by identifying not only the matters which are the subject of them, but, necessarily too, the nature and extent of the powers in these matters which have, in each case, been conferred on the Community. Thus to sum up very briefly the principal powers of the EEC, the first point, following the lay-out of the Treaty itself, is the sector on the free movement of goods, persons and capital, where the powers conferred on the Community are especially far-reaching. The subjects are, however, adequately defined by the Treaty which also lays down the general terms of the rules to apply to these subjects and the conditions under which Community action is to take place; this action is to consist chiefly in fixing time-limits and arrangements for achieving freedom of movement. This explains the frequent use of the directive as an instrument, since Community intervention is chiefly intended to stimulate and coordinate action by the Member States whose duty it is to adopt the practical measures necessary for achieving free movement. [3] Quite often, especially in the movement of goods sector, the Treaty imposes specific obligations directly on the Member States to act or refrain from acting, so that action by the institutions is limited to supervisory tasks, apart from the general power to issue recommendations. [4]

In other sectors (agriculture: Articles 38 to 47; transport: Articles 74 to 84; commercial policy: Articles 110 to 116) the Community's power is, on the contrary, marked by a

---

[2] As in the case of the EIB (Articles 129 and 130). As regards action by the Member States see, for example, Articles 11, 13, 16, 23, 27, 31 to 34, 37, 50, 53, 62, 95, 102, 221.

[3] See especially Articles 13, 14, 21, 33, 49, 54, 56, 57, 63, 66, 69, 70.

[4] See for example, Articles 11, 13, 16, 23, 27, 31 to 34, 37 for the free movement of goods. For other movements, Articles 50, 53, 62, 64, 65, 68, 71. See further the tax provisions directly linked to the free movement of goods (Articles 95 and 96).

wider spread of normative powers; the Treaty confines itself to defining Community objectives in general terms, leaving it to the institutions to adopt specific implementing provisions. These are, moreover, the sectors where the Community's 'legislative' power is most often spoken of, meaning that in these cases the institutions enjoy a wide margin of discretion as regards both the choice and the content of normative instruments for attaining the specific objectives of the sector.

Competition policy is defined with precision by the Treaty, so that the institutions' normative powers are limited to implementing the principles set out in Articles 85 and 86. In this domain there are duties involving direct management entrusted to the institutions of the EEC, so that it is incumbent on them to ensure observance of Community rules, to assess the legality of behaviour in this context and to put an end to any infringements that may occur.

3. In other sectors the texts make Community power less clear, with outlines which are less well defined though potentially more flexible. This is particularly true of economic and monetary policy which, after an early mention in Article 3(g) and in Article 6, is governed by Articles 103 (Conjunctural policy) and 104 to 109 (Balance of payments). Given the importance and the nature of this subject, the Treaty relies in essence on action by the Member States, although it does not rule out various forms of intervention on the part of the Community institutions; control and coordination (Article 105), exercising direct powers of decision (e.g. Articles 107 to 109) and even the exercise of 'legislative' powers. [5]

The extent of Community powers is, on the other hand, particularly limited in the social policy sector, which is basically entrusted to action and collaboration by the Member States (Articles 117 to 122) except in respect of the organization and operation of the European Social Fund (Articles 123 to 128). In this sector, as generally in all the sectors so far considered, note must be taken of the power, to some extent instrumental, which the Treaty confers on the Community for the approximation of such national provisions 'as directly affect the establishment or functioning of the common market' (Article 100 and, for more specific cases, Articles 54(g), 99 and 101). The question here is one of normative power, functionally circumscribed, in that it has no specific subject-matter but may exert an influence on rules in numerous sectors in order to attain the stated objectives of Article 100. These objectives are and have in fact been open to the very widest interpretation, particularly in order to promote the development of Community power in the so-called 'frontier' zones and preventing recourse in these fields to agreements between Member States (see point 16 below).

Finally some mention must be made of the Community's powers in the field of external relations where, apart from commercial policy which has already been mentioned, there are contemplated agreements with certain international organizations (Articles 229 to 231) and especially association agreements (Article 238).

---

[5] This is especially true of Article 103 under which, for example, regulations were issued for conserving and managing fish stocks, such as Council Regulations (EEC) Nos 350/77 of 18 February 1977 (OJ L 48, 19.2.1977); 672/77 of 25 July 1977 (OJ L 186, 26.7.1977); or on energy and supply policy, especially control of imports of crude oil and/or petroleum products: Council Regulations (EEC) Nos 1893/79 of 28 August 1979 (OJ L 220, 30.8.1979), 2592/79 of 20 November 1979 (OJ L 297, 24.11.1979), 649/80 of 17 March 1980 (OJ L 73, 19.3.1980).

Section II — The development of Community powers

4. The Treaties establishing the European Communities outline, in a very sketchy and limited fashion, the actual extent of Community powers as it has been determined over the years by virtue of an extremely dynamic practice, which has progressively led to a considerable expansion of these powers, with results often exceeding the most optimistic expectations. It is accordingly necessary to look beyond the Treaties in order to discover the instruments, tendencies and results of this practice.

In this connection it must be observed, very briefly, that the advances just mentioned have basically been achieved in two ways: on the one hand, developing principles and techniques of interpretation, especially judicial, that made clear the full potential of the rules known as Community law; on the other hand, by making continually wider and more frequent use of the clauses in the Treaties which lay down formal procedures to supplement the powers of the Community institutions, especially Articles 95 ECSC, 203 EAEC and 235 EEC (see point 8).

It is true that many commentators, who in general emphasize the importance of the route which, for convenience, one may call judicial, nevertheless, as regards the extension of Community powers, end by diminishing its scope. Such an approach is only partially satisfactory, chiefly because it is possible nowadays to take as a standard of reference a rich and meaningful practice which makes clearer the system's direction and lines of development, and the implications of the process underlying it. It will become apparent that, although formally and logically distinct, the two ways described are in reality closely connected at a functional level, in the sense that both tend toward the development of Community powers; though following different routes, they give expression to needs which are basically alike and they reflect in very similar ways the evolutionary tendencies in the system as well as the principles of interpretation and the politico-constitutional practice developing within the system and finding expression principally in these two ways.

Proof of all this is furnished by a sort of interaction and reciprocity between these two methods on account of their common function, and also because for a long time, owing to the vicissitudes suffered by the Community enterprise, they had been employed in different ways. The judicial method represented at the outset practically the only means of strengthening and developing Community powers in view of the reluctance of the Member States to make any appreciable use of Article 235. However, from about 1973, following certain political developments which will be covered later, a change eventually took place. Since that date the two ways have been employed almost on an equal footing, because the more frequent use made of Article 235 in no way curbed judicial action and the wide influence of the latter did not and does not affect recourse to the other method.

It may broadly be said that the real result of employing Article 235 instead of conferring more vigorous powers of action in cases already coming within Community jurisdiction was to extend this jurisdiction to cases where such jurisdiction did not exist or was open to some doubt. The alternative way, on the contrary, apart from the results which are covered in the next paragraph, brought about an increase in the institutions' powers of action in sectors already subject to Community jurisdiction.

¶ 1. *The doctrine of implied powers and the role of the Court of Justice*

5. In any rapid analysis of the judicial way, it must be emphasized that the extension of Community powers through the practice of the institutions, and of the Court of Justice in particular, was underestimated; this attitude is based essentially on the general recognition of the principle of derived powers in connection with Articles 235 EEC, 95 ECSC and 203 EAEC, which lay down a special procedure for supplementing these powers. Accordingly it is generally and nowadays almost automatically accepted that extension of Community powers beyond the formal provisions should be entirely or very substantially ruled out. In particular, application to the European Communities of the doctrine of implied powers should be severely restricted. This theory of judicial origin was developed by the Supreme Court of the United States and gradually spread to important international tribunals where it is used both to legitimize and to curtail the common tendency of federal States and international organizations to extend in the practice their own jurisdiction regardless of the traditional principle that limits to the sovereignty of States are not to be presumed. In particular, it is perhaps useful to recall briefly that this theory, which at the outset recognized powers not expressly conferred by the texts but indispensable for carrying out the institutions' tasks more thoroughly, ultimately accepted the grant of new powers and functions in so far as they were necessary to the attainment of the ends laid down by the constituent act. [6] As mentioned previously, even if its application is admissible, it is only in very limited terms that the doctrine has been accepted in the context of the European Communities, bearing in mind that the above-mentioned provisions in the Treaties restrict its implementation.

One observation can, however, be made: in its pressing anxiety to observe the principle of derived powers and, more generally, the principle of legality, the approach just described, both in this case and in the case of the problems raised by Article 235 EEC, ends by overlooking the possibility that an overall evolution of the system with its consequences might require such broad rules of interpretation and constitutional practices that the very principle would be affected. Accordingly, instead of evaluating the validity of the principle from this point of view, commentators either criticize the important practical developments as excessive and unjustified, or else minimize their significance and scope.

If, however, profitable and realistic instruction is to be sought from the substantial and forceful action so far taken by the Court of Justice, with the constant consent, moreover, of the Member States, the restrictive conclusions described above may be somewhat tempered.

---

[6] For the case-law of the Supreme Court of the United States, see especially the celebrated judgment in the case of *McCulloch* v *Maryland* (1819), in Munro, *The Constitution of the United States,* 1947, p. 55. For international case-law, apart from the consultative opinion of the Permanent Court of International Justice on the powers of the European Commission of the Danube (PCIJ, Series B, No 14, p. 64), the following are of special interest: consultative opinions of the International Court of Justice of 11 April 1948, on compensation for damage sustained by individuals in the service of the United Nations (ICJ [1949] 179); of 13 July 1954, on the effect of judgments by the Administrative Tribunal of the United Nations awarding damages (ICJ [1954] 57); of 20 July 1962, concerning certain expenditure by the United Nations (ICJ [1962] 168). In particular, in the first of these opinions the Court, referring to the United Nations, stated that the rights and duties of a body such as the organization must depend on its aims and functions as set out or implied in its constituent act and developed in practice.

6. It is true that the more restrictive version of the doctrine of implied powers seemed at the outset to have been endorsed by the Court of Justice itself, whose judgments appeared openly to conform to it, albeit rather more in practical effect than in statements of principle. [7]

One element, however, is generally overlooked: in the Court's case-law, as opposed to the works of legal writers, this theory is not in any way connected with the existence in the Community Treaties of the provisions mentioned above; indeed no reference is ever made to them. All things considered, the theory seems the product of initial political hesitation on the part of the Court of Justice, especially in ECSC matters, arising from the caution which was inevitable in the face of a process which at the time was taking its first steps in order to find a definitive asset. Once these hesitations had been surmounted and a new case-law had started to emerge, there is no longer any trace to be found in the Court's judgments of the theory of implied powers as such. Instead, increasingly wide-ranging principles of interpretation gradually emerge, and then become definitely established; taking, however, the same direction as the theory assimilating it and stripping out the restrictive version, they provide greater impulse for construction and definition of the Community legal system and especially for extension of the institutions' powers.

These principles and rules of interpretation are variously designated and classified by legal writers, but they all point in the same direction and have the same objective, namely the strengthening and development of Community integration. Whether the expression used is implied powers, teleological, dynamic and evolutive interpretation, the principle of practical effect or, more succinctly, functional interpretation, these principles and rules of interpretation are in any case homogeneous and always take that objective as a decisive and univocal guidance.

This position has yielded results of considerable importance going far beyond the matter under examination because they influence the reconstitution of the whole system. However, from this angle too, as regards the operation of Community law, the precise definition of the Member States' obligations and, as a corollary, the reinforcement of the powers conferred on the Community institutions, it is not without importance that case-law should confirm the immediate effect of numerous rules in the Treaties establishing the Communities and in the implementing legislation, the direct effect of these rules and their primacy over rules made by the Member States (see Chapter VI). But above all, in this field, interpretation by the Court has on every occasion enabled the sphere of Community powers to be enlarged, sometimes through strict definition of Member States' obligations derived directly from the Treaties, sometimes through broad interpre-

---

[7] See CJEC Case 8/55 *Fédération charbonnière de Belgique* v *High Authority* [1956] ECR 299: 'without having recourse to a wide interpretation, it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied'.
See also CJEC Case 20/59 *Government of the Italian Republic* v *High Authority* [1960] ECR 663; Case 25/59 *Government of the Kingdom of the Netherlands* v *High Authority* [1960] ECR 731. For a restrictive application of this case-law see also Case 31/59 *Acciaieria e Tubificio di Brescia* v *High Authority* [1960] ECR 169 et seq.; Joined Cases 4 to 13/59 *Mannesmann* v *High Authority* [1960] 271 et seq.

tation of the overall effect of the powers conferred or, with the same result, of the concepts taken by the Community rules as their standard of reference. [8]

7. However, intervention by the Court of Justice sometimes ends in results so far-reaching that they tend to blur the boundary between broad interpretation and enlargement of Community powers and to give rise to the view that even the limits of the restricted version of the doctrine of implied powers have been exceeded. This problem arises mainly in connection with the EEC's power to conclude agreements; until the Court delivered its judgments, even though the doctrine was kept in mind, it was almost unanimously considered that the Treaty did not authorize the exercise of such power outside the cases expressly provided for. Instead, relying on the principles of interpretation discussed above, the Court of Justice, subsequently supported by a large section of legal opinion, decided upon an entirely opposite view and in gradual stages defined the principles of parallelism between the Community's internal and external powers, making the extent of the latter proportionate to the increase in the former. [9]

It is not possible here to embark upon a more profound analysis of this line of cases (see Chapter IX for a closer examination). Nevertheless, it should be noted that in view of the interpretations current before this line of decisions was developed, of the terms in which it has been expressed and its objective scope, this line of decisions seems to transcend the restricted version of the doctrine of implied powers and almost to go so far as to envisage a genuine extension of Community powers outside the procedure laid down in Article 235 EEC, in spite of the fact that this provision is equally applicable in the field of external relations. It has been actually suggested that Article 235 has undergone a sort of judicial transposition on to this field. [10] The fact that such developments are generally justified by invoking the broad principles of interpretation already referred to does not affect the root of the problem, when it is results rather than phrases that are under consideration.

The work done by the Court of Justice thus presents a much more pliant and articulate surface picture than results from the current rigid concept of the doctrine of implied powers and it enables the restrictive conclusions set out above to be relaxed. In particular, it can be held that use of Article 235 and analogous provisions is rendered necessary only when there is absolutely no possibility of granting powers to the Community institutions either on the basis of express provisions in the Treaties or by application of all the principles developed over the years by the Court of Justice for reconstituting and defining the system. It is indeed only on these terms that it is possible to reach a conclusion which does not formally devalue this action on the part of the Court and, at the same time, provides a plausible explanation for the otherwise unjustifiable coexistence of such consistently vigorous action alongside the wide use made of Article 235.

---

[8] See, for example, Opinion 1/75 [1975] ECR 1355 et seq. and 1364; Opinion 1/78 [1979] ECR 2871 regarding the concept of commercial policy and Community competence in the matter.

[9] See especially Opinion 1/76 [1977] ECR 755; but also Case 22/70 *Commission* v *Council (AETR)* [1971] 263; Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Case 61/77 *Commission* v *Ireland* [1978] ECR 417; Case 88/77 *Minister for Fisheries* v *Schonenberg* [1978] ECR 473; Cases 185 to 204/78 *van Dam* [1979] ECR 2345; Case 141/78 *French Republic* v *United Kingdom of Great Britain and Northern Ireland* [1980] ECR 2923; Case 32/79 *Commission* v *United Kingdom of Great Britain and Northern Ireland* [1980] ECR 2403.

[10] See Hardy, 'Opinion 1/76 of the Court of Justice: the Rhine Case and the Treaty-Making Powers of the Community', CML. Rev. 1977, p. 561, especially at p. 592.

¶ 2. *The provisions in the Treaties for allowing an extension of Community powers (especially Article 235 EEC)*

A. Function and scope of Article 235

8. Independent of the above and separate from the actual procedure for amending the texts (Articles 96 ECSC, 236 EEC, 204 EAEC), the Treaties contain a special normative instrument for extending Community powers in order to tackle, in due form but with more flexible procedures, the gradual adaptations bound to be required in organizations as dynamic as the Communities. This instrument is Article 95(1) ECSC, Article 235 EEC and Article 203 EAEC. Except for some details, we shall only examine here the article which, in practice, is by far the most important, namely Article 235 EEC. [11]

9. Nowadays it would probably seem superfluous to emphasize the exceptional importance of this archetypal provision. It must not, however, be forgotten that in the past this opinion was less prevalent and that it is only in recent years that the provision has received adequate attention, by virtue here too of considerable—and sometimes even unforeseeable—developments in practice. The provision came to be vigorously and systematically applied and more lively and widespread interest in the surrounding theory was aroused, since it became possible to find more practical points of reference for an argument which had for a long time remained basically theoretical. [12]

---

[11] The text of the provision reads as follows: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.' Article 203 EAEC is drafted in identical fashion but does not contain the phrase 'in the course of the operation of the common market'.
But the text of the first paragraph of Article 95 ECSC is different: 'In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the High Authority is necessary to attain within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.' The second and third paragraph of the article contain what is called the small revision clause; in this connection see point 26 below and Chapter IV.

[12] Apart from general works on the Community, see especially: Wohlfarth, 'Art. 235', in Wohlfarth, Everling, Glaesner, Sprung: *Die EWG, Kommentar zum Vertrag*, [1960]; Ferrari-Bravo, Giardina, 'Commento art. 235', in Quadri, Monaco, Trabucchi: *Commentario CEE, 1965, Vol. III, pp. 1699-1713*; von Meibom, *Lückenfüllung bei den Europäischen Gemeinschaftsverträgen*, NJW, 1968, p. 2165 et seq.; Marenco, *Les conditions d'application de l'art. 235 du traité CEE*, RMC, 1970, p. 147; Gericke, *Allgemeine Rechtsetzungsbefugnisse nach Art. 235 EWG-Vertrag*, 1970; Schumacher, *Die Ausfüllung von Kompetenzlücken im Verfassungsrecht der Europäischen Gemeinschaften*, AWD des BB, 1970, p. 539; Gori, 'Commento art. 95', in Quadri, Monaco, Trabucchi: *Commentario CECA*, 1970, Vol. II, p. 1325-1345; Henckel von Donnersmarck, *Planimmanente Krisensteuerung in der Europäischen Wirtschaftsgemeinschaft*, 1971; Mitzka, *Möglichkeiten und Grenzen des Art. 235 EWG-Vertrag*, ZZVerbr., 1972, p. 357; Peeters, *L'art. 235 du traité CEE et les relations extérieures de la CEE*, RMC, 1973, p. 141; Lesguillons, *L'extension des compétences de la CEE par l'art. 235 du traité de Rome*, AFDI, 1974, p. 886; Ehring, 'Art. 235', in von der Groeben, von Boeckh, Thiesing: *Kommentar zum EWG-Vertrag*, II, 1974, pp. 749-796; Giardina, 'The Rule of Law and Implied Powers in the European Communities', in *Italian Yearbook of International Law*, 1975, p. 99 et seq.; Everling, *Die allgemeine Ermächtigung der Europäischen Gemeinschaft zur Zielverwirklichung nach Art. 235 EWG-Vertrag*, EuR, 1976, special issue, p. 2 et seq.; Schwartz, *EG-Rechtsetzungsbefugnisse, insbesondere nach Art. 235 — ausschließlich oder konkurrierend?*, idem, p. 27 et seq.; Tomuschat, *Die Rechtsetzungsbefugnisse der EWG in Generalermächtigungen, insbesondere in Art. 235 EWG*, idem, p. 45 et seq.; Lauwaars, *Art. 235 als Grundlage für die flankierende Politiken im Rahmen der Wirtschafts- und Währungsunion*, EuR, 1976, p. 100; Kapteyn, 'Art. 235', in Smit en Herzog: *The Law of the European Economic Community*, Vol. V, 1978, p. 288 et seq.; Olmi, *La place de l'art. 235 CEE dans le système des attributions de compétence à la Communauté*, in Mélanges F. Dehousse, 1979, p. 279-295; Kaiser, *Grenzen der EG-Zuständigkeit*, EuR, 1980, p. 97; Tizzano, *Lo sviluppo delle competenze materiali delle Comunità europee*, RD, EuR, 1981, p. 139 et seq.

Various factors brought about and maintain these developments; it is therefore necessary to give a brief summary of them, though in extremely succinct and schematic terms.

Emphasis must first be laid on the dynamic nature of the system and on the evolution already mentioned in the previous paragraph, both of which are equally relevant to Article 235. That article is itself subject to the broad principles of interpretation described above and to the tensions which accelerate the progress of the system, the more so because it is drafted in sufficiently general terms to allow for considerable extension of its scope.

Furthermore, the constantly changing situations, the dynamics of economic processes, the fact that the objectives of the Treaty are gradually fulfilled and the ever increasing areas occupied by Community activities inevitably lead to further developments. This is especially true in the field of general economic policy where, as we have seen, the Treaty restricts the Community institutions merely to the task of coordination (see point 3). When the transitional period was over and the customs union more or less fully established together with some sectoral policies (agriculture, transport, commercial policy), the limits of the system became more clearly apparent in face of the further developments called for: to allow for closer and broader cooperation and to remedy the social and regional imbalances occasioned by the actual introduction of the common market itself and, especially, to tackle the consequences of the monetary and energy crisis and then the more general crisis in the world economy. The developing integration process has also revealed new needs in the sectors of industry, technology, environmental conservation, consumer protection, etc., where common action by the institutions finally proved desirable or even indispensable (see point 25).

The most effective instrument for achieving the objectives described could only be the *ad hoc* procedure laid down in Article 235, not only because of the length and complexity of the mechanism for a formal revision of the Treaty provided for in Article 236, but owing, especially, to the doubts entertained as to its being politically practical and the inherent risks of weakening the Treaty's original design.

10. It is clear, however, that the reasons marshalled above would in practice have achieved very little, if the Member States had not been politically in full agreement on the advantage of employing Article 235. Whether the reason lies in objective pressures resulting from integration, impulsion arising as a result of the new situations described above, internal pressures in the system, reluctance to embark on the formal revision procedure or perhaps in the conviction that its development can be controlled owing to the decision mechanism contained in the provision, it is a fact that the national governments have at a certain stage abandoned their initial mistrust of Article 235 and agreed that this provision should be put into practical effect. The turning point was reached at the summit of Heads of State or Government held in Paris from 10 to 21 October 1972. On that occasion the political leaders of the Member States, stating their desire to proceed with strengthening and completing the Community, agreed to the introduction of an economic and monetary union and requested that a series of action programmes be drawn up in the sectors mentioned above, expressing the opinion that 'it was advisable to use as widely as possible all the provisions of the Treaties including Article 235 of the EEC Treaty'. From that moment Article 235 came to be in frequent use, especially since subsequent summits impliedly renewed the call to that effect whenever the Community institutions were asked to produce action programmes in sectors where recourse to that provision was unavoidable.

The developments just described are quite clearly of fundamental importance. Apart from occasional specific reservations, they make plain not only the Member States' acquiescence in a practice the legality and expediency of which have previously been often in doubt, but also their explicit willingness to exceed the limits usually set for the application of Article 235. The fact that these limits have been exceeded in actual fact at the instance of the Community's highest policy-making body confirms, on a more general level, the close connection between the constitutional development of that organization and the definition of limits on the use of Article 235.

Furthermore, the agreement of the national governments once achieved, there has been no insurmountable resistance offered in practice to the extension of Community powers already mentioned, apart from that arising out of objective difficulties inherent in individual subjects. The other Community institutions could not, of course, raise objections; they had always favoured both enlarging the organization's powers and using Community procedures for the purpose. But, after full consideration, no fundamental difficulties have arisen even at national level. The consolidation of the Community phenomenon, the wide consensus of political and social forces towards the progress of European integration, the gradual adjustment of relations between Community and State legal systems, a constitutional practice matured over many years and now definitely orientated in the direction of full acceptance of the Community experience, have all contributed to overcoming initial resistance and actually increasing the readiness of the constitutional bodies to cooperate in this matter. [13]

In conclusion, it would not be unduly rash to speak of the formation of a genuine constitutional practice within the Community orientated towards extremely broad application of Article 235 and rather flexible delineation of that provision's limits, in the sense that its frontiers advance from time to time, keeping pace with the overall development of the system and the consequences that this entails as regards the definition of the Community and the attainment of its objectives.

B. The conditions for the application of Article 235 of the EEC Treaty

11. The conclusions just stated can be confirmed and illustrated in more detail by examining the many problems of interpretation raised by Article 235 and studying the indications furnished by practical experience. Since these are subjects which have already been widely discussed by legal writers, we shall be able to limit ourselves to summarizing the basic conditions and the principal questions raised.

I. The attainment of one of the 'objectives' of the Community

12. First of all it is necessary to examine the meaning and effect of the condition that new powers may be conferred on the institutions only if this is necessary 'to attain, in the course of the operation of the common market, one of the objectives of the Treaty'.

[13] On this subject see point 22 also. Of course the preceding observations, as is clear in the text, concern the specific problem discussed here and are not intended to describe as idyllic relations which in many respects are peculiarly tormented (see, in this connection, Kaiser, op. cit. at footnote 12 above, p. 100 et seq).

Nowadays, it seems self-evident that, when defining these 'objectives', the principal point of reference must be Article 2 of the Treaty which lists the tasks of the Community. In the great majority of cases, acts based on Article 235 are indeed aimed at the objectives set out in Article 2, sometimes referring explicitly to that provision, but most often confining themselves to the use of its terminology. There are, however, some acts where the reasoning is expressed in extremely vague terms or which contain no reasoning of this kind; similarly there are acts which introduce objectives that are not set out in any provision of the Treaty ('the attainment of economic and monetary union') or which employ vague phrases ('smooth running', 'harmonious operation' of the Community) or which appear to avoid any reference to a specific provision and merely make allusion to an overall evaluation of the system.

However, in this connection it is clearly not the use of ritual phrases that counts, nor the description, however full and detailed, of the objectives to be pursued. What is important is that the innovation should be actually and indisputably linked to one of the Treaty's objectives. Viewed from this standpoint, there is no doubt that practice confirms the trend outlined, towards a widening of the Community's powers and even of its objectives. A number of new 'policies' were concerned with activities in 'frontier' areas, and for this reason raised doubts and objections from the angle considered here; nevertheless these actions had all been initiated and sometimes brought to fruition on the basis of Article 235 (see point 25).

A fact to be noted, especially in the light of the observations made in point 10 above, is that recourse to Article 235 is usually accompanied by explicit mention of the conclusions reached by summits or European Councils and the action programmes proposed at these meetings and drawn up by the Council and/or the representatives of the Member States. In other words, as developments in integration came to require a progressive extension of Community activity and as the traditional limits of Article 235 proved to be inadequate, so the institutions were able to avoid any hesitation, relying not so much on mere instruments of interpretation as directly on explicit requests made by the highest political authorities, which were also taken as the formal basis for new developments.

II. The restriction imposed by 'the operation of the common market'

13. Furthermore, only by adopting the view just described is it possible to explain the broad interpretation of the phrase 'the operation of the common market' nowadays current among legal writers and accepted in practice. [14]

In this connection it is generally recognized that the phrase was inserted in order to restrict the application of Article 235 to the pursuit of Community objectives bound up with the attainment of the 'common market', that is solely to cases where there is a clear functional connection between the measures to be introduced and the attainment of the actual 'common market'.

The definition of the expression 'common market', however, remains highly controversial. Initially, it was interpreted broadly but always in conformity with Article 2 of the Treaty, accordingly employing the concept of 'common market' in the strict sense as

[14] As stated in footnote 11 above, this expression does not appear in Article 203 Euratom, since the more restricted and well-defined objective of that Community rendered any specific limitation superfluous.

distinct from and almost opposed to the concept of 'progressively approximating the economic policies'. Over the years, however, the expression became the subject of much wider interpretation which gradually blunted the technical meaning of the concept to the extent of assimilating it to the Treaty itself or making it synonymous. as in current language, with the concept of Community. [15] With this end in view it has been stressed that the concept in question has different meanings in the provisions of the Treaty where it is employed, and that Article 235, owing to both its position and its aims, must necessarily provide the widest sense as it covers both free movement and the common policies intended by the Treaty. Above all it is emphasized that, since this concept affects an extremely evolutive element, it should itself be subject to wide evolutive interpretation, in order to enlarge its scope in keeping with the objective developments and growing involvements of the common market in the sense mentioned above. [16]

Further, although the objectives of the Treaty are to be identified by reference to the creation of a 'common market', the opposite is equally true, namely that the latter concept should, in its turn, be judged in relation to the ends set out in the Treaty; these ends, as is shown by various points including the text of Article 2 itself, not only cover the whole economic sector which is moreover the direct object of the integration process, but need not be limited to a purely commercial perspective, restricted solely to the production and trade aspects. These ends are also, to a great extent, involved with the social aspects, which cannot in any case be overlooked, and isolated within the attainment of a 'common market' and the various consequences which this entails. [17]

14. In conclusion, therefore, with support drawn also from the indications found in practice, it may nowadays be held that the expression 'in the course of the operation of the common market' defines the scope of Article 235 in the sense that it authorizes, for the purpose of attaining the Treaty's objectives, any measures which have a direct functional connection with the subjects which initially formed part of the Community's field of action or which have gradually been incorporated into it. In view of the above remarks, these may comprise any measures falling within the context of economic life understood in the widest sense and therefore including also the social aspects directly or indirectly connected with it.

III. The necessity for new powers

15. Another condition for applying Article 235 is that 'action by the Community should prove necessary' to attain the objectives set by the Treaty. It is clear that it is for the Council to judge whether action is 'necessary' and that it naturally enjoys a wide margin of discretion in this regard.

---

[15] In the first sense, Olmi, op. cit. at footnote 12 above, p. 289; in the second sense, Louis, *The Community legal order,* 1980, p. 34.

[16] For these observations see especially Close, *Harmonization of Laws: Use or abuse of the powers under the EEC Treaty?,* Eur. LR, 1978, p. 461 et seq.; also useful for the purpose of comparison with Article 100 EEC. However, the broad interpretation of the concept under consideration is nowadays by far the most widely accepted in academic discussion.

[17] One should think of Article 2, which refers to the 'harmonious' development of economic activities, a 'balanced' expansion, a raising of the 'standard of living', 'closer relations' between the Member States. These are precisely the expressions which have justified the new common policies intended to protect non-material values (Paris Summit, 1972).

16. Another more complex and far more controversial question in the context of that expression concerns the compatibility of Article 235 with the practice of concluding agreements between Member States in the traditional forms or—as is more often the case—in the simplified form of decisions by representatives of the Member States meeting within the Council (Chapter IV). In the opinion of some writers, who point to the practice of the ECSC as well as to the early experiences of the EEC, new action on the basis of such agreements rather than under a measure pursuant to Article 235 should be allowed since, until such a measure is taken, the matter does not fall (or does not yet fall) under Community jurisdiction, with the result that the Member States would be free to regulate it directly, independently of institutional procedures. The so-called 'intergovernmental' way and the Community way would therefore both be available as alternatives, the only problem being to judge the political expediency of following one or the other.

In opposition, however, the theory gradually emerged that once the conditions for applying Article 235 have been satisfied the intergovernmental way should be abandoned, except in the cases provided for in the Treaty itself (Articles 20 and 220). In taking this view, the authors are relying essentially on the text of Article 235 (the Council 'shall' take the appropriate measures), inferring that this provision imposes on the institution a positive obligation to act in cases where the requisite conditions have been genuinely satisfied. Furthermore, it is pointed out, the meaning and function of Article 235 properly consist in giving a wholly 'Community' answer to the problem of integration of the organization's powers. To admit the alternative would, it is argued, be to accept procedures foreign to the system, outside the Court's judicial control and unlikely to ensure coordination between Community action and the action of the Member States: in a word, it would destroy the very foundations for the existence of Article 235. [18]

The case-law of the Court of Justice seems to support this view. Although it is true that in the *AETR* judgment (see footnote 9), the Court seems to reject the argument that the Council's decision pursuant to Article 235 is a mandatory act, on other occasions it has openly displayed its aversion to intergovernmental agreements and has denied that the Treaty can be amended except by the *ad hoc* mechanisms provided therein. [19] The Court's recent decisions regarding external relations are also significant: it is denied that the Member States, even when acting collectively, can conclude agreements with third countries where the subject-matter of such agreement falls within Community competence or where 'Community participation in the agreement' is 'necessary to attain ... one of the objectives of the Community'. [20]

---

[18] For the first theory see especially Zuleeg, 'Les répartitions de compétences entre la Communauté et ses États membres, in *La Communauté et ses États membres,* proceedings of the Sixth conference of the Institut d'études juridiques européennes, 1973, p. 56 et seq., p. 282 et seq. The other theory is fully explained with the aid of textual and schematic arguments by Schwartz, op. cit. at footnote 12 above, p. 27 et seq.

[19] cf. for example Case 7/71 *Commission* v *France* [1971] ECR 1018; Case 185/73 *König* [1974] ECR 616; Case 43/75 *Defrenne* v *Sabena* [1976] ECR 497; the Treaty can only be altered—saving specific provisions—by revision in accordance with Article 236.

[20] cf. Opinion 1/76 (footnote 9 above). Of course it is always possible to maintain, though the conclusion appears ever less defensible, that the Member States, acting collectively, would be able to alter the Treaty by procedures other than those provided therein (see, for example, Zuleeg, op. cit. at footnote 12 above, p. 56 et seq. and p. 282 et seq.). But this supposes that these States wish to place themselves outside and above the system and, in that case, the intergovernmental way should be practicable, even if a decision had already been taken under Article 235. If, on the other hand, one starts from the premise that it is desired to remain within the system, the choice of the intergovernmental agreement would constitute a breach of Article 235.

17. The latter theory thus rests on arguments which appear more solid and more logical. It has, however, been advanced by legal writers and practitioners only at a relatively recent date and accompanied by a considerable amount of uncertainty and contradiction. This is understandable, when it is borne in mind that the problem under discussion has extremely delicate political and constitutional overtones and reflects, like few others, the overall developments of the system. Any consolidation of solutions accordingly necessitated a compromise with the various interests at stake. This is the reason why, despite the validity of the arguments and despite the aspirations everywhere apparent, Article 235 became a practical alternative to intergovernmental agreements only after the political and institutional developments which we have described, in other words after the European summits and councils gave the green light for the full use of that provision and showed, moreover, that they wanted it to have precedence over the other solution.

From that time on, 'decisions' by the representatives of the Member States and intergovernmental agreements in general became considerably less frequent and finally vanished almost completely. The institutional way, despite the reservations mentioned (point 20), is gaining ground; use of Article 235, and of Article 100, has been proposed and often put into practice, even in cases where the other procedure had already been embarked upon. [21]

IV. The absence of provision in the Treaty for the necessary powers

18. The action necessary to attain one of the objectives of the Treaty is possible only if the Treaty 'has not provided the necessary powers'.

Many writers initially deduced from this expression that Article 235 was applicable solely in cases where the Treaty conferred no power at all on the Community institutions, thus rejecting its use in the purpose of increasing powers already conferred under other provisions. However, after certain initial hesitation, the Court of Justice took a different view. In the *Massey-Ferguson* judgment [22] it recognized the legality of a regulation based on Article 235, although powers in the matter, but not fully effective powers, were conferred on the institutions by other provisions in the Treaty. This is not all: the Court went even further in that case, since it has held the use of Article 235 to be legitimate even in cases where other provisions in the Treaty affect the matter but where it is not possible to state with certitude that they are applicable because this would require extensive controversial interpretation of those provisions. [23]

V. The 'appropriate measures' which may be taken

19. Where the conditions for applying Article 235 are satisfied, the Council shall 'take the appropriate measures'. It has already been shown that the Council has both a power

---

[21] For fuller information on this practice see Schwartz, 'Voies d'uniformisation du droit dans la Communauté économique européenne: Règlements de la Communauté ou conventions entre les États membres', J. Dr. Int., 1978, p. 751 et seq., esp. p. 790 et seq.

[22] Case 8/73 [1973] ECR 897.

[23] In that case, observed the Court, 'there is no reason why the Council could not legitimately consider that recourse to the procedure of Article 235 was justified in the interest of legal certainty ... since, under the circumstances, the rules of the Treaty on the forming of the Council's decisions or on the division of powers between the institutions are not to be disregarded'.

and a duty to act. The measures which it may take by virtue of the provision in question are any of the acts provided for in Article 189 of the Treaty. However, the Court has declared that measures taken pursuant to Article 235, although decided by the Council acting unanimously, are Community acts and not agreements between Member States. [24]

The measures taken by the Council must be appropriate, that is to say connected and proportionate to the action judged necessary to attain one of the objectives of the Community. In this context, however, the institution enjoys the very widest freedom and has not hesitated to take advantage of it. Suffice it to recall simply that regulations made pursuant to Article 235 have actually enabled new organs to be created, endowed with legal personality and intended to cooperate in the attainment of the Community's objectives under the control of the EEC institutions. [25] This situation has come about despite the Court's previous attitude (perhaps less severe nowadays) which made delegation of powers to the institutions subject to strict conditions except in cases provided for in the Treaty, [26] and despite the contrary view widely held by legal writers following this case-law.

VI. Limits to the use of Article 235 and its relation to the revision procedure contained in Article 236

20. The final point to be dealt with concerns the limits for applying Article 235 and its relation to the revision procedure laid down in Article 236.

Although it is clear that formal amendments to the text of the Treaty cannot be made by means of Article 235 (as can be done under Article 236), it is nevertheless true, that its application can bring about substantial alterations in the extent of the Treaty's single provisions, quite apart from cases where new Community policies are actually introduced. To trace the limits within which this process can legitimately develop is not a particularly easy task since the practice shows, as has been emphasized on several occasions, the provision in question to be extremely flexibly adapted to the overall development of the system. It is, however, important to determine the criteria likely to help in defining the field within which Article 235 may be applied, both in the abstract, since the Community is not a body with unlimited power, and in relation to the procedure laid down in Article 236, with which Article 235 is tending more and more to overlap.

In particular, since every enlargement of Community powers generally entails a corresponding reduction in the powers of the Member States (cf. Section III), it is obviously not a matter of indifference whether the process results from one procedure or the other. The use of Article 235 in fact presents some considerable practical advantages and certainly constitutes progress by comparison with the practice of making agreements in simplified form (point 16). It does, however, raise a number of problems regarding democratic guarantees and the right formulation for relations between the Community and its

---

[24] Case 38/69 *Commission* v *Italian Republic* [1970] ECR 57.

[25] One thinks of the European Monetary Cooperation Fund, the European Centre for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working Conditions: see point 25 and Chapter V generally.

[26] cf. Joined Cases 9 and 10/56 *Meroni* v *High Authority* [1958] ECR 34, especially at p. 73 et seq. The trend towards a reversal of this theory appeared recently in Opinion 1/76 (see footnote 9 above).

Member States. Reservations and anxiety are especially prevalent because it is a procedure which ultimately amounts to concentrating in the hands of governments the power to extend Community jurisdiction, without any control by national parliaments or even any immediate likelihood that the latter might be adequately replaced by the European Parliament.

21. This consideration explains the concern, often expressed, that the scope of Article 236 should be safeguarded since this article, unlike Article 235, takes full account of the Member States' constitutional requirements (Chapter IV). However, while almost all legal writers, as a consequence of these arguments, declare the need to define limits for applying Article 235, such statements are usually no more than declarations of intent, limited to very general indications. To summarize the indications so far provided by the case-law of the Court of Justice and by legal writers, it might be said that the use of Article 235 does not mean going as far as to change the 'Community identity' or to cause European integration to take 'qualitative leaps'. [27] To be more specific, Article 235 cannot go beyond the bounds, described below, set by what has become known as the Community constitution (in this connection, see Chapter IV), namely:

(i) observance of the principles essential to the organization's structure, especially those concerned with safeguarding interinstitutional balance, allocating powers and laying down the methods for exercising them, as is done in Articles 189 to 191; [28]

(ii) observance of the substantial principles of the Community constitution, in the context, naturally, of the organization's socio-economic objectives; principles which, though open to wide interpretation, do nevertheless set bounds which cannot be crossed when applying Article 235 (cf. points 12 and 13). Drawing on the very adequate case-law developed so far by the Court of Justice, it is possible to summarize these principles as follows: non-discrimination, freedom, solidarity and unity; [29]

(iii) observance of the general principles of law laid down by the Court of Justice, such as respect for acquired rights and legitimate expectations, or introduced owing to evolving Community experience, as in the case of the protection of fundamental rights (Chapter IV).

The bounds just traced undoubtedly constitute useful points of reference, especially for the purposes of judicial control exercised by the Court of Justice over measures taken pursuant to Article 235. Nevertheless, they still appear too fluid and too general and accordingly incapable of defining clearly and surely the field within which Article 235 may apply, and particularly unsuited for determining the relations between that article and Article 236, especially since the latter is not confined solely to radical transformations of the Treaty. It is useless to try to banish the problem by denying that Article 235 itself also constitutes a form of Treaty revision, even if a limited form. Word disputes apart, the introduction of new instruments for Community action, the alteration of institutional mechanisms through the creation of new organs and, more generally, the shift in

---

[27] cf. respectively Ehring, op. cit. at footnote 12 above, p. 783, and Tomuschat, op. cit. at footnote 12 above, p. 66.

[28] Regarding these principles see the *Massey-Ferguson* judgment, cited in footnote 22, together with Opinion 1/76, cited in footnote 9, which states that any changes made must not affect the relations between the Member States which arise from the Community Treaties (ground 10), and that the basic principles concerning the Court's jurisdiction must be observed (ground 18 et seq.).

[29] For these principles, see especially Pescatore, *Les objectifs de la Communauté économique européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice,* in Mélanges Ganshof van der Meersch, 1972, p. 325 et seq.

the distribution of powers between the Community and the Member States, all amount to departures from the strict provisions of the Treaty.

[*22.* It should also be remembered that some legal writers, German ones in particular, insist that it is possible to find, among the constitutional principles common to the Member States, limits which can be set to the growth of Community powers and that it is accordingly feasible to furnish a new guarantee against possible abuses arising from the application of Article 235. Recalling in particular article 24 of the Grundgesetz, they stress that the constitutional law of the Member States precludes any idea of those States willingly authorizing the creation of organizations endowed with indeterminate and unlimited powers (see especially Tomuschat, op. cit. at footnote 12). In this connection it is, however, necessary to recall what has already been stated in connection with development of internal constitutional practices progressively directed towards full acceptance by national systems of the arguments for Community integration and its implications (point 10). These developments undoubtedly contribute to promoting and legitimizing, on the national plane also, the extension of Community powers, and therefore to justifying the fluidity of their boundaries. But they confirm, in particular, that the problem should be considered not so much on the normative plane as from the angle of the structural alterations which the development of European integration is likely to bring about in the relations between the Community system and the State systems (also affecting the constitutional principles of the latter) and which must be verified and evaluated chiefly in the historical and political context.

As regards possible intervention by national courts, especially constitutional courts where these exist, it must be stressed that their supervision of Community measures taken pursuant to Article 235 can always cover the last of the limits of the Community constitution described above, particularly from the point of view of observance of the substantial principles of national constitutions, relating to the fundamental rights and liberties of citizens. [30] It must nevertheless be borne in mind that recent decisions of the Court of Justice tend, in their turn, to reduce this domain, since, at Community level, the Court is gradually taking over the protection of these rights. Furthermore, however, it is only within restricted limits, except in extreme cases, that national courts can legitimately exercise control, since the Treaties have reserved to the Court of Justice the task of ensuring that 'in the interpretation and application' of the Treaties themselves 'the law is observed' (Articles 31 ECSC, 164 EEC, 136 EAEC). This duty clearly includes jurisdiction over any infringement of the limits of application of Article 235].

23. In fact, to make sense of Community practice and of the important developments which have been indicated several times, it must be realized that there has come to be a large measure of overlap between the spheres where Articles 235 and 236 apply in matters covered by the Treaty's vast socio-economic objectives. In this context, provided there is no question of formal amendments to the Treaty, the choice between the two provisions is less concerned with the quality and scope of the innovations than with the nature of the procedure to be followed. It is a choice based on assessments of a political and constitutional character rather than on considerations of legal form: the stronger the

[30] In this connection see judgment No 183 of the Italian Constitutional Court delivered on 27 December 1973, *Frontini*, F. It., 1974, p. 314 et seq.; judgment delivered by the German Constitutional Court on 29 May 1974, *Internationale Handelsgesellschaft*, EuR, 1975, p. 50 et seq.

political will of the Member States to extend cooperation by institutional and 'Community' means rather than by inter-State means and the greater the encouragement to make this choice provided by the objective pressures of the integration process, the greater will be the extension of the scope for use of Article 235 (at the expense of the other provision) and it will become more and more the key stone of further developments of the Community. Of course, if this process is to stop providing pretexts for reservations and anxieties and is not to be reduced to a matter of concern merely to Community and national bureaucracies, a decisive solution must be found to the problems already mentioned regarding the democratic character of the system, to avoid the institutional system, despite the declarations, becoming a mere façade intended to conceal the national governments' almost unlimited freedom of action.

C. The practical applications of Article 235 EEC and Article 95 ECSC

24. Rapid consideration must now be given to the practical application of Article 235 EEC, without however disregarding the first paragraph of Article 95 ECSC, in order to provide concrete illustrations in support of the observation made above.

It must be remembered firstly that until the 1972 Paris Summit Article 235 was employed primarily in the sectors of agriculture (where the first measure on that basis was taken) and the customs union, with very rare incursions into other fields (social policy, acts of the institutions), amounting to a total of about 35 measures up to 31 December 1972. After the 1972 Summit, the provision was employed in new sectors on an increasing scale: between 1 January 1973 and 31 July 1975, 54 Council measures were based on Article 235; there were 32 more in the period ending 30 March 1977; nowadays, it has even become difficult to keep an exact count of them. An exhaustive list of these measures, even if limited to measures based solely on Article 235, therefore appears impossible. This is the reason why only the most important are mentioned. [31]

Further, as regards what one may call traditional sectors, it is possible to disregard the many measures relating to the customs union and the free movement of persons which here are of no special interest. The same is true of the agricultural sector where, however, it is useful to recall Community action on food aid, usually taken under Article 43 of the Treaty, but sometimes, owing to extraneous financial considerations, under Article 235 also, [32] and in the fisheries sector, where special note should be made of Council Regulation (EEC) No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry, subsequently replaced by Council Regulation (EEC) No 101/76 of 19 January 1976 where the use of Article 235, though controversial, was justified by the fact that the fishermen of each Member State were authorized to fish in the waters subject to jurisdiction of the other Member States. [33]

---

[31] See the careful list in Marenco, op. cit. at footnote 12 above, p. 155 et seq., for the period up to 1969; for the period up to 1975/76, Lauwaars, op. cit. at footnote 12 above, p. 107 et seq.; Ehring, op. cit. at footnote 12 above, p. 751 et seq.; Everling, op. cit. at footnote 12 above, p. 22 et seq.; Kapteyn, op. cit. at footnote 12 above, p. 270 et seq.; Olmi, op. cit. at footnote 12 above, p. 282 et seq. and, more recently, Tizzano, op. cit. at footnote 12 above, p. 7.

[32] See for example Council Regulation (EEC) No 1010/80 of 21 April 1980, regarding the supply of sugar to UNRWA (OJ L 101, 26.2.1980, p. 1); Council Decision 80/444/EEC of 21 April 1980 on concluding the agreement with UNRWA for assistance to refugees in the countries of the Near East for 1979 and 1980 (OJ L 101, 26.2.1980, p. 55).

[33] OJ L 236, 27.10.1970; OJ L 20, 28.1.1976. For other measures concerning fisheries, see footnote 5 above.

In the sphere of the common commercial policy Council Decision 74/393/EEC of 22 July 1974 is particularly important. This measure, establishing a consultation procedure for Member States' cooperation agreements with third countries, does not state any special ground for the recourse made to Article 235. [34] The regulations governing the conclusion of cooperation agreements between the Community and third countries are also important; they are made under Article 235 as well since they provide for wide forms of economic cooperation and therefore initiate action which exceeds the Community's powers in the commercial policy sector. [35]

25. But the most noteworthy developments, as has been emphasized several times, are to be found in connection with the introduction of new Community initiatives, beginning with economic and monetary cooperation. It is Article 235 that was relied upon for attaining economic and monetary union by the Paris Summit on 19 and 20 October 1972, and, previously, by the resolution on the matter adopted by the Council and by the representatives of the governments of the Member States on 22 March 1971 and 21 March 1972. The modest developments which followed have not made it possible to solve the highly controversial question of the limits to be set to the use of Article 235 for the purpose of attaining economic and monetary union. It is, however, significant that the first and most important measure on the subject, Council Regulation (EEC) No 907/73 of 3 April 1973, setting up a European Monetary Cooperation Fund (EMCF), makes express reference to the acts just referred to and that, for the first time, as stated in point 12, it includes among the Community's objectives 'the attainment of economic and monetary union'. The regulation provides for the creation of a new body, intended to form the nucleus of a 'Community organization of central banks', entrusted with important tasks. These tasks have subsequently been considerably increased since the EMCF has been entrusted with the operation of the European Monetary System (EMS) instituted by Council Regulation (EEC) No 3181/78 of 18 December 1978 for the purpose of creating a European Monetary Fund which, however, has still not seen the light of day. [36]

In the context of economic and monetary cooperation, Council Regulation (EEC) No 397/75 of 15 February 1975 must also be noted: this has now been replaced by Regulation (EEC) No 682/81 of 16 March 1981, which permits Community borrowing for the purpose of making loans to Member States whose balance of payments has been adversely affected by the increasing cost of petroleum products. Also worthy of mention is Decision 78/870/EEC of 16 October 1978 which similarly empowers the Commission to contract loans on the capital market, but for the purpose of promoting investment inside the Community ('Ortoli facility' or 'New Community Instrument'). [37] Finally, Article

---

[34] OJ L 208, 30.7.1974.

[35] See especially Council Regulation (EEC) No 2300/76 of 20 September 1976 regarding the agreement with Canada (OJ L 260, 24.9.1976); Council Regulation (EEC) No 2237/78 of 26 September 1978 regarding additional protocols to the agreement with Portugal (OJ L 274, 29.9.1978); Council Regulation (EEC) No 1440/80 of 30 May 1980 regarding the agreement with Member States of ASEAN (OJ L 144, 10.6.1980); Council Regulation (EEC) No 3323/80 regarding the agreement for granting aid to Portugal (OJ L 349, 1980, p. 1).

[36] cf. OJ L 379, 30.12.1978.

[37] OJ L 46, 20.2.1975. The implementing regulation is Regulation (EEC) No 398/75 of the same date (idem). The new regulation was published in OJ L 73, 19.3.1981. Under Regulation (EEC) No 397/75 loans were granted to Italy and Ireland, see Council Decision 76/322/EEC of 15 March 1976 (OJ L 77, 24.3.1976); for Italy, see also Decisions 76/324/EEC of the same date (idem); 77/359/EEC and 77/361/EEC, both of 17 May 1977 (OJ L 132, 27.5.1977); 78/840/EEC of 10 October 1978 (OJ L 291, 17.10.1978); for Ireland, Council Decision 76/323/EEC of 15 March 1976 (OJ L 77, 24.3.1976); Decision 78/870/EEC (OJ L 298, 25.10.1978).

235 is also the basis used by Council Regulation (EEC) No 1172/76 of 17 May 1976 'setting up a financial mechanism' consisting essentially in granting subsidies out of the Community budget 'to Member States in a special economic situation whose economies bear a disproportionate burden in the financing of that budget'. [38]

Once again it is Article 235 that is employed in the so-called structural and support policies for economic and monetary union. Chief among these should be noted: regional policy, entirely and exclusively based on this provision, despite countless uncertainties and hesitations, and put into operation by Council Regulation (EEC) No 724/75 of 18 March 1975, setting up a European Regional Development Fund, subsequently amended by Regulations (EEC) No 214/79 of 6 February 1979 and No 3325/80 of 16 December 1980; [39] social policy, which admittedly cannot be considered a new venture since it was already provided for in the Treaty (see point 3) and since Article 235 had already been employed in the matter, but which once again did not come into effective operation until the 1972 Paris Summit and the action programme adopted on 21 January 1974 by resolution of the Council. [40] Many other measures followed, among which the following should be recalled: Council Regulation (EEC) No 337/75 of 10 February 1975 establishing a European Centre for the Development of Vocational Training; Council Regulation (EEC) No 1365/75 of 26 May 1975 setting up a European Foundation for the Improvement of Living and Working Conditions; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. [41]

The 1972 Paris Summit, finally, required that, under Article 235, action should be launched or reinforced in the following sectors: industrial, scientific and technological policy, including data processing, environmental protection where it now became possible to legalize Community participation in important international agreements and many measures on the subject, often taken also under Article 100, and energy policy, demanded by the Paris Summit in order to guarantee the Community a sure and lasting supply on satisfactory terms. Measures regarding the supply of petroleum-based products, which is also an objective of the common energy policy, have, however, been based on Article 103 (see footnote 5).

26. In conclusion, some mention should also be made of the use of Article 95(1) ECSC, which was intended to fulfil the same function in that Community as Article 235 in the EEC Treaty. The two provisions are, however, distinguished by certain significant differences which reflect the special characteristics of the two Communities and help to explain the different developments in practice. In particular, it must be remembered that Article 95 is far more restricted in its application than Article 235; it can be employed only for the purpose, in cases not provided for in the ECSC Treaty, of enabling decisions or recommendations of the High Authority (now the Commission) to be made in accordance with Article 5 to attain one of the objectives set out in Articles 2 to 4.

---

[38] OJ L 131, 20.5.1976.
[39] OJ L 73, 21.3.1975; OJ L 35, 9.2.1979; OJ L 349, 1980.
[40] OJ C 13, 18.1.1977.
[41] OJ L 39, 13.2.1975; OJ L 139, 30.5.1975; OJ L 39, 14.2.1976; OJ L 6, 10.1.1979.

Moreover, the use of the first paragraph of Article 95 is further limited in principle by paragraphs 3 and 4, which lay down a special procedure for what is called slight revision (*petite révision*) of the Treaty, meaning adapting the rules for the High Authority's exercise of its powers (Chapter IV). It must, however, be remembered that the Court of Justice subjected the latter provision to very stringent conditions, so that use of the first paragraph of Article 95 despite the limits indicated, was felt to be a practical way of providing an 'institutional' answer for needs arising during the Community's existence.

In any case, few measures were taken under this provision, even though their importance should not be underestimated, as they were almost all adopted to cope with the serious crisis which affected first coal and, later, iron and steel: until 1973 there were only 10 or so, almost all referring to the coal sector and the number of subsequent measures is comparable.

Section III — The relations between Community powers and national powers

27. It has already been observed that an extension of Community powers normally goes hand in hand with a decrease in the powers of the Member States. The question now is to describe more exactly—and the above analysis puts the problem clearly into relief—the relation between the two spheres of competence when Community power becomes exercisable in a given sector.

It must be made clear at the outset that, in examining this question, no account will be taken of the controversy which has arisen in this connection between the writers who, generally speaking, take the 'internationalist' and 'federalist' views when defining the relations between the Community and the Member States. In face of the specific problems under consideration, these writers continue to find in favour of opposite solutions: some hold that Community powers are revocable and not exclusive; others state that once these powers have been drawn into the Community's orbit, they never again come under the jurisdiction of the Member States.[42] The argument, however, has become a matter of dogmas, and is concerned essentially with the theoretical aspects of the problem. Accordingly, it has not only lost sight of the compromises which were still possible and the points of contact between the two theories but has proved of very little use in solving the more concrete but no less complex questions on the subject which have arisen in the course of practical application over the years regarding the special technique followed by the Treaties in defining the powers of the Community.

28. As was indicated in point 1, the Treaties do not contain a list of these powers and do not share them out at all precisely between the Community and the Member States, as is the case in federal constitutions. On the contrary, powers are specifically conferred on

[42] For a full explanation of the first theory, see Zuleeg, op. cit. at footnote 18 above, p. 56, p. 282 et seq. For the other theory, see Pescatore, 'Les répartitions de compétences entre la Communauté et les États membres' in *La Communauté et ses États membres,* proceedings of the Sixth Conference of the Institut d'Études juridiques européennes, 1973, p. 63 et seq. and p. 79 et seq.; Louis, 'Quelques réflexions sur la répartition des compétences entre la Communauté européenne et ses États membres', in *Revue d'Intégration européenne,* 1979, p. 357 et seq.; idem, op. cit. at footnote 15 above, p. 9 et seq. On the problem in general, see also, quite recently, Tizzano, op. cit. at footnote 12 above, p. 8.

the Community according to sector, to a degree which varies depending on the case and with caution as to their extent and the compass of the matters covered. These uncertainties were further amplified by the developments continually taking place in legislative and judicial practice. Moreover, it is quite certain that the obligations of the Member States are becoming clearer and more definite by virtue of the acceptance of the primacy and direct effect of Community law, which ensure, at national level, that Community powers are respected (Chapter VI). However, in a normal situation, these powers come into being, and thus limit the freedom of powers of the Member States, only in so far as they are actually exercised; as a result new difficulties may arise when, for various reasons, these powers have not been exercised or have been exercised only belatedly and in part, as often occurs.

This situation does not facilitate the drafting of general, unitary criteria and lends itself even less to *a priori* solutions. Furthermore, the Court's decisions in this regard bear witness to a high degree of pragmatism, since the Court has been obliged to adapt the principles to fit the particular nature of the case in point. A brief survey of the solutions proposed in the case of the principal common policies may enable some light to be shed on what has just been said.

29. It must be recollected at the outset that it is in the sector of commercial policy that the Court first spoke clearly of the Community's exclusive power (from the end of the transitional period) irrespective of whether or not the Community has exercised its powers in the matter. In the Court's view, such a policy is conceived in Article 113 'in the context of the operation of the common market, for the defence of the common interests of the Community ... Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations ...'. [43]

This applies both as regards the conclusion of international agreements on the subject and for the so-called 'autonomous' commercial policy measures, taken unilaterally by the Member States. In the case of the latter the Court also reaffirms the Community's general jurisdiction and the prohibition against Member States taking such measures. But the prohibition in that case is less stringent, since the consequences of national action are different and easier to remedy. On account of the gaps still existing today in the Community rules on the matter, the Court admits that Member States may take independent action if the Commission so authorizes them in accordance with Article 115. [44]

However, the as yet incomplete character of the common commercial policy is not the only obstacle to declaring unreservedly the exclusive nature of Community powers: some considerations of politics or expediency also have to be taken into account. For example, in the opinion regarding Community participation in the international agreement on natural rubber, the Court, though considerably enlarging the scope of the commercial policy concept, eventually held, contrary to its previous Opinion 1/75, that the organization did not have exclusive competence in cases where the agreement in question would result in burdening the Member States with the financial commitments it contained: in this case, in the Court's view, participation in the agreement by the Member States would prove necessary, perhaps jointly with the Community. [45]

---

[43] cf. Opinion 1/75, cited in footnote 8.
[44] cf. Case 41/76 *Donckerwolcke* [1976] ECR 1937.
[45] cf. Opinion 1/78, cited in footnote 8.

30. Outside commercial policy, however, the Court of Justice inclines towards stating that the Community enjoys wide and exclusive power in the whole field of international agreements. Raising some lingering doubts as to interpretation following the well-known *AETR* judgment, the Court not only extended very considerably the field within which this jurisdiction is applicable, going so far as to declare absolute parallelism between the Community's internal and external powers; it also stated specifically, in successive cases, that once both have been exercised, the organization's power to conclude agreements thereby becomes exclusive. [46]

This solution, however, has to make allowances for the many difficulties encountered during the integration process. There are delays, for example, in achieving Community policies and this makes it necessary to authorize Member States to conclude agreements directly with third countries. The Community is therefore often forced to reinforce the instruments for 'endorsing' action by the Member States. [47] There are also obstacles to the recognition of the Community set up by important groups of States (especially those of Comecon) or to allowing its participation as of right in international organizations and the conventions concluded in that context (for example, the ILO) and the Member States' continuing status as contracting parties within GATT, etc. This explains a certain hesitancy on the part of the Court in some decisions of this sort, the continuing practice of 'mixed' agreements, adopted jointly by the Community and the Member States, the conclusion of many economic and commercial cooperation agreements solely by the Member States, etc.

31. The case-law of the Court of Justice abounds in decisions on the common agricultural policy and the interesting subject of the relations between the Community's powers in that sector and those of the Member States. Accordingly, it is not easy to summarize the principal guidelines emerging from this line of decisions, especially on account of the hesitation and uncertainty resulting from the evident complexity of the subject and the difficulties which have arisen as time goes by. [48]

Leaving aside some aspects with a narrower compass, it can be said that the problem assumed special importance as regards the common organization of the markets; the progressive introduction of such organization might, by virtue of its very existence, have put an end to national action, apart from any points of incompatibility. This, moreover, is the approach adopted by the Court for the first time in a famous judgment where it stated that 'the very existence of a common organization of the market has the effect of precluding the Member States from adopting in the sector in question unilateral measures capable of impeding intra-Community trade'. [49]

However, the Court already recognized in this judgment that Member States could adopt unilateral measures for fixing prices at retail trade and consumer level, 'on condition they

---

[46] cf. judgments cited in footnote 9; also Ruling 1/78 *Euratom* [1978] 2177.

[47] It is in this context that the explanation is to be found for the consultation procedure on the subject introduced by Council Decision 74/393/EEC (OJ L 208, 30.7.1974).

[48] For a profound analysis of the Court's case-law on the subject, see especially Marenco, 'Le limitazioni dei poteri degli Stati per effetto delle organizzazioni comuni dei mercati agricoli', Dr. Sc. Int. 1977, p. 13 et seq.; Cappelli, De Caterini, 'La Corte di Giustizia e la politica agricola comune', in *Politiche comunitarie e giurisprudenza della Corte di Giustizia*, Sienna, 1977, p. 55 et seq.; finally, with bibliography, Louis, op. cit. at footnote 42 above, p. 364; Capelli, *Controllo dei prezzi e normativa comunitaria*, Milan, 1981, p. 409.

[49] See Case 31/74 *Galli* [1975] ECR 64; see also Case 190/73 *Van Haaster* [1974] ECR 1123.

do not jeopardize the aims and functioning of the common organization of the market in question'. Subsequently, the Court not only reaffirmed this position but came to recognize the legality of national action, even in respect of production and wholesale trade. In the Court's view, these actions are not indeed illegal in themselves but 'in every case it is for the national court to decide whether the maximum prices which it is called upon to consider produce such effects as to make them incompatible with the Community provisions in the matter. In this respect it is necessary to take account of the specific nature of the organization of the market in question'. [50]

It is from the same standpoint that, outside the question of fixing prices, the various aspects of the matter have been approached. [51]

It is quite clear that, in this way, the problem propounded above has not been solved in a general *a priori* fashion, but pragmatically, by considering firstly the specific characteristics and practical implications of the common organization of the markets rather than its mere existence. As a result the limitations placed on the power of the Member States are not absolute in character but are solely a facet of rigorous observance of the objectives and operation of the common organizations.

32. Even in the fisheries sector, delay in exercising Community powers and the need, in consequence, to avoid general legislative paralysis forced the Court to relax in practice the principle of exclusive powers, although affirming it in general terms. In particular, with regard to the policy for conserving the sea's biological resources, the Court, in the face of the delay in adopting Community regulations on the subject, had to recognize the competence of the Member States to enter into international undertakings on the subject. At the same time, however, the Court continued to state that such competence was only 'transitional', in that the adoption of the common rules provided for must bring it to an end and that, moreover, it was limited by observance of the Community obligations incumbent on Member States under any heading whatever: the obligations in question being basically the general obligation to cooperate described in Article 5 EEC and the specific obligation contained in Article 116 of the same Treaty to proceed, within the framework of international organizations, only by common action. [52]

The Court employed the same criteria with regard to conservation measures taken unilaterally by a Member State; it held them provisionally to be possible (although in the particular case they were illegal), provided they complied with the obligation to cooperate based on Article 5 and with the 'requirements of Community law'. [53]

---

[50] cf. Case 223/78 *Grosoli* [1979] ECR 2362. For previous development of this trend see Case 65/75 *Tasca* [1976] ECR 291; Joined Cases 88 to 90/75 *Sadam* [1976] ECR 323; Case 154/77 *Dechmann* [1978] ECR 1573. For further developments, not always clear and consistent, see Case 51/74 *van der Hulst* [1975] ECR 95; Case 60/75 *Russo* [1976] ECR 45; Case 50/76 *Amsterdam Bulb* [1977] ECR 137; Case 52/76 *Benedetti* v *Munari* [1977] ECR 163; Case 5/79 *Denkavit* [1979] ECR 3203; Case 10/79 *Toffoli* [1979] ECR 3301; Joined Cases 16 to 20/79 *Danis* [1979] ECR 3327; Joined Cases 95 and 96/79 *Kefer and Delmelle* [1980] ECR 103.

[51] See Case 111/76 *van den Hazel* [1977] ECR 901; Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347; Case 31/78 *Bussone* [1978] ECR 2429; Case 151/78 Nykøbing [1979] ECR 1; Joined Cases 15 and 16/76 *French Republic* v *Commission* [1979] ECR 321.

[52] Joined Cases 3, 4 and 6/76 cited in footnote 9.

[53] See the judgments in Cases 61/77, 88/77, 185 to 204/78 and 141/78 cited in footnote 9. See similarly Case 32/79 (cited in footnote 9) where these obligations are defined in the sense that the Member States are under a duty not only to refrain from actions incompatible with Community rules but also to take positive action in cases where inertia on their part might prejudice the pursuit of the common objectives.

33. If the Court's decisions so far show evidence of a remarkable degree of pragmatism even as regards the most advanced of the common policies, this is all the more reason for the definition of the limits of the States' powers in other sectors to be based on the specific nature and scope of the Community's powers of intervention which vary considerably from one sector to another, even though they all tend to increase.

In general terms it can be said that, even in these sectors, it is the exercise of the Community's legislative powers which precludes any contrary initiative by the Member States. The latter, however, have a duty to observe not only the specific requirements of the Treaty, but also the general principles, both structural and normative, summarized above, and especially Article 5 which in a certain sense sums them all up, since it imposes a general obligation to cooperate, 'the actual significance of which depends in each particular case on the provisions of the Treaty or on the rules laid down within its general framework'. [54]

Thus even when the Member States retain autonomous and parallel jurisdiction in a given sphere, as in the competition field for example, a national system of rules 'can be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules ... and of the full effect of the measures adopted in implementation of those rules'. [55] Similarly, in sectors where there is a noticeable absence of Community rules, such as certain aspects of tax provisions and movement of goods, the Member States' competence will still be limited by the need to observe the principles mentioned above. There can therefore be no question of violating the principle of non-discrimination or 'the condition that those rules do not present obstacles, directly or indirectly, actually or potentially, to intra-Community trade'. [56]

---

[54] cf. Case 2/73 *Geddo* [1973] ECR 878.

[55] Case 14/68 *Wilhelm* [1969] ECR 14 et seq. More recently in the same direction, see Joined Cases 253/78 and 1 to 3/79 *Guerlain and Others* [1980] ECR 2327.

[56] Case 788/79 *Gilli* [1980] ECR 2017. See also Case 120/78 *Rewe* [1979] ECR 660. For the fiscal sector see, for example, Case 148/77 *Hansen* [1978] ECR 1787; Case 168/78 *Commission* v *French Republic,* Case 169/78 *Commission* v *Italian Republic,* Case 170/78 *Commission* v *United Kingdom of Great Britain and Northern Ireland,* Case 171/78 *Commission* v *Kingdom of Denmark,* all [1980] ECR 345, 385, 417 and 447 respectively.

Chapter IV — The sources of Community law: the 'constitution' of the Community

by Rudolf Bernhardt

Section I — The concept of constitution

1. The word 'constitution' is used in various ways. In non-legal terminology, we refer to the actual physical or mental constitution of an individual or of a community, and even animals or inanimate objects can be said to possess a good or bad 'constitution'. Similarly, in the case of States, international organizations or a country's domestic institutions, such as associations or cooperatives, the concept of constitution can be applied to the physical composition of the organization concerned, irrespective of the legal context. However, that is not the sense in which, in this paper, we shall use the word 'constitution' in connection with the European Communities (or Community),[1] much as the evolving composition of the Community deserves to be studied and appraised.

2. In legal terminology, 'constitution' means the law on which a community is based. Both international and national communities may be endowed with a constitution within the legal meaning of the word. However, the word is often employed in a narrower sense when it refers exclusively to the constitution of a State. It cannot be given this restricted meaning when applied to the European Communities since they are not States or comparable entities, even though the final conceivable stage of development may be a federal union or confederation of States. By 'constitution of the Community' we mean the law on which this community is based and by which it is bound.

The word 'constitution' appears nowhere in any of the Treaties. Nevertheless, it is used

[1] We need waste no time on the question whether we are dealing with one or three Communities as separate legal entities whose activities are governed by several basic Treaties. Although, in this paper, we shall refer to the Community, the question is left open although, on grounds of institutional unity, we incline to the view that there is only one legal entity.

to identify and emphasize the special features of the Community legal order.[2] It also has political undertones in that it suggests the idea of an increasingly closer union which could lead to the foundation of a State. In this paper, we shall refer to the constitution in the more neutral sense of the basic law of the present Community.

3. Another distinction which is also drawn from public law and found in the work of learned writers is that between a 'formal' and a 'material' constitution. A 'formal constitution' comprehends all the rules embodied in a written constitution, together with any unwritten rules which supplement them, provided that they have the same force, that is to say, that they are as binding as the provisions of the written constitution and that, in particular, all organs of the State, including the legislature, are bound to abide by them. On the other hand, 'material constitution' means all the basic provisions of a community's legal order, regardless of their relative force. The formal constitution is concerned with the comparative ranking and precedence of the norms whereas the material constitution is concerned with their fundamental significance for the community and with their content. A formal constitution and a material one may coincide, but this is by no means necessary. It is no rarity for a written constitution to contain provisions which have less than fundamental importance, leaving the legislature to resolve important 'constitutional questions' such as those which relate to the economic order.

4. The distinction between formal and material constitution will be maintained throughout this paper, which will primarily concern itself with the formal constitution and only as a subsidiary topic consider the possible existence of 'material constitutional law' outside the formal constitution. The concept of constitution is, accordingly, treated here as broadly corresponding with that of primary Community law, which has largely prevailed in practice as well as in theory and serves to distinguish the law of the Treaties which binds the Community institutions and the Member States from the secondary Community law which is laid down by the institutions and which they have power to amend or repeal.

Consequently, the term constitution, as a source of Community law, will be used in this paper to designate those rules which are binding upon all the Community institutions and upon the Member States, which are beyond their reach and which, in the main, are written into the Community Treaties, and exceptionally, those rules which are reflected in certain specified acts of the Community institutions or which may be binding as part of unwritten constitutional law.

---

[2] In 1967, Walter Hallstein emphasized 'the fact that the Treaty of Rome had proved its efficacy as a constitutional instrument and could be looked on as the first chapter in a constitution for Europe' (see *First General Report*, point 28). Since the establishment of the European Coal and Steel Community the word 'constitution' has been used by various writers (e.g. Ophüls, 'Die Europäischen Gemeinschaftsverträge als Planungsverfassungen' in Kaiser, *Planung I*, 1965, p. 229 et seq.; more recently, H.J. Hahn, *Funktionenteilung im Verfassungsrecht Europäischer Organisationen*, 1977); during the preliminary discussions on the ECSC Treaty, the use of the word 'constitution' was contemplated but later abandoned (see Herman Mosler, 'Die Entstehung des Modells supranationaler und gewaltenteilender Staatenverbindungen in den Verhandlungen über den Schuman-Plan' in 'Probleme des Europäischen Rechts', *Festschrift für Walter Hallstein*, 1966, p. 355 et seq., especially at p. 382).

Section II — The elements of Community constitutional law

5. Most of the constitutional law of the Community is contained in the Community Treaties. The provisions are, in their entirety, equally binding upon the Member States and the Community institutions, whether or not, in substance, a basic provision is involved. It is only in cases where the Treaties themselves provide for the possibility of a derogation (see below) that the Community institutions and Member States possess certain powers, but this arises from the wording of the constitution and not solely from a decision of those institutions or States.

The constitution of the Community is, in all material respects, set out in Treaties concluded between States. The question is often asked whether the Community Treaties and *a fortiori* the remainder of Community law, especially secondary legislation, form part of international law or constitute a separate and independent legal order. The Court of Justice of the European Communities has unequivocally pronounced in favour of the second alternative; [3] however legal opinion is divided. [4] This is not the place to continue the debate; all that needs to be borne in mind is that the Community Treaties, including the Treaties amending them, were concluded between the Member States and, on their entry into force, became fully binding upon the institutions and the Member States.

There is no need here to deal with all the revisions of the Community Treaties or even to cite them. The main instruments may be briefly listed as follows:

(i) Treaty of 18 April 1951 establishing the European Coal and Steel Community;
(ii) Treaty of 25 March 1957 establishing the European Economic Community;
(iii) Treaty of 25 March 1957 establishing the European Atomic Energy Community;
(iv) Convention of 25 March 1957 on certain institutions common to the European Communities;
(v) Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities;
(vi) Decision of the Council and Treaty of 22 January 1972 on the accession to the Communities of Denmark, Ireland and the United Kingdom;
(vii) Decision of the Council of 21 April 1970 and Treaties of 22 April 1970 and 22 July 1975 on financial and budgetary questions relating to the Community;
(viii) Decisions and Act of the Council of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage;
(ix) Decisions of the Council of 24 May 1979 and Treaty of 28 May 1979 on the accession of Greece to the Communities.

All the other acts and treaties constituting Community law as well as the annexes, protocols, etc. thereto must each be considered in turn with a view to establishing whether they are treaties or parts of treaties of equal rank and, in consequence, form part of the constitutional law (see below). [5]

---

[3] Case 6/64 *Costa* v *ENEL* [1964] ECR 585; Case 14/68 *Wilhelm* v *Bundeskartellamt* [1969] 1.

[4] The different viewpoints are set out in Werner Meng, *Das Recht der internationalen Organisationen — eine Entwicklungsstufe des Völkerrechts*, 1979, p. 162 et seq.

[5] The decisive factors in each case are the wording of the provisions under consideration and the intentions of the contracting parties; in the Acts concerning the Accession of Denmark, Ireland and the United Kingdom, provisions of the Treaties were 'downgraded' to the status of secondary Community law (see *Sixth General Report*, point 371).

6. The instruments of primary Community law are so numerous that they sometimes contradict or conflict with each other. In each case, their effect must be determined by the rules traditionally applied by legal commentators. A later instrument takes precedence over an earlier one and a special instrument prevails over a general instrument (primacy of the *lex posterior* and of the *lex specialis*). Since the provisions of the Treaties are technically of equal rank, it is in principle impossible to attribute to some a wider application or significance than to others; on the contrary, interpretation must aim at harmonization and endeavour to treat all the rules uniformly. Nor is there any hierarchical relationship between the ECSC Treaty, the EEC Treaty and the EAEC Treaty; they all rank equal. Here, again, interpretation must be used to determine which rule applies in a particular case, what the various provisions are to be taken as meaning in relation to each other, and so on.

Article 232 of the EEC Treaty expressly states that the Treaty shall not derogate from either the ECSC Treaty or the EAEC Treaty. This means that the provisions of the ECSC Treaty and of the EAEC Treaty continue to apply within their respective fields and to that extent exclude the application of the EEC Treaty. This does not, however, mean that the EEC Treaty has no application whatsoever; on the contrary, it operates to fill the gap where there is an absence of provision in the other Treaties. [6]

7. Apart from the Community Treaties, the question arises whether other legal acts of the Community institutions or of the Member States can, with or without reservations, be regarded as also forming part of the constitutional law of the Community. The question applies to the decisions of the 'representatives of the Member States meeting in the Council', to the Luxembourg Agreement of February 1966, to the treaties concluded between the Member States and to those which the Community and/or the Member States have entered into with non-member countries and even, in certain cases, to measures taken in implementation of the Treaties (e.g. under Article 235 EEC).

At this juncture, a radical dividing-line must be drawn: the only other acts which can be regarded as forming part of the constitutional law of the Community are those covered by articles of the Treaties providing for acts amending or superseding the existing law of the Treaty. In this connection reference should be made to the following provisions, in particular: Article 95 ECSC, Articles 138 and 201 EEC and Article 76 EAEC. [7] Once the substantive conditions set out in those provisions have been satisfied and the specific procedures carried out, the new constitutional law can supersede the old.

Moreover, the Treaties themselves contain rules providing for their own formal amendment (see Section III below).

To put it negatively, amendments and additions to Community law which are not provided for or authorized in the Treaties do not form a part of the constitution of the Community. That is not to say that such amendments and additions are in general unlawful and without legal effect; we will return to this point later.

8. The case-law of the Court of Justice has done much to shape the present concept of the 'constitution'. The Court has usually interpreted and applied previously obscure and disputed provisions and principles in favour of the Community. Among the many examples of this are the precedence of Community law over national law, the direct applica-

[6] See *Second General Report*, point 655.

[7] On Article 76 (2), see *Fifth General Report*, point 619; Case 7/71 *Commission* v *France* [1971] ECR 1003.

bility of certain provisions after expiry of the transitional period and of provisions contained in directives, the Community's competence in external matters, etc.

In this case-law, are the rulings concerning the content and scope of the Treaties to be regarded as also forming part of the constitutional law of the Community? The broad answer must be in the negative. The Court's primary duty is to 'ensure that in the interpretation and application' of Community law 'the law is observed' (Article 164 EEC); moreover, Community law is binding on all the other Community institutions and on the Member States. It follows that, quite apart from the fact that the parties before the Court are formally bound by its decision, its case-law must be observed by those institutions and the States. The fact is, however, that despite the law-creating elements which, like any other, its case-law possesses, the Court of Justice does not, strictly speaking, do more than apply existing law; it concretizes the constitution of the Community but does not make constitutional law in the proper sense of the words. This means that Community law is not bound by case-law and that the interpretation of Community law can, like the case-law of the Court, evolve in the light of changing circumstances and possibilities without the need for formal amendment of the Treaties.

9. The classification of unwritten law, which supplements written Community law, and, in particular, of the general principles of law in the Member States, is of equal complexity. A distinction must be drawn on the basis of whether the legal principle in question is or is not of fundamental importance. Some involve quite technical rules or basic legal principles of secondary importance. To a large extent, this applies to the rules laid down in the second paragraph of Article 215 EEC on the subject of non-contractual liability: while they do not form part of the constitutional law, the principle of liability which they embody certainly does.

Except where temporary provisions are involved, the basic rights enshrined in the constitutions of the Member States apply also to the Community. The Court of Justice has made it increasingly clear that the Community is under an obligation to respect those basic rights; the other Community institutions followed suit in a declaration made on 5 April 1977. Since the declaration is neither a treaty nor a unilateral legal act having direct and binding effect, it cannot rank as formal constitutional law. This does not alter the fact that the text of the declaration reflects the legal concept, which all the Community institutions and the Member States share, of the obligation on the Community to respect the major basic rights and human rights. The latter should and may form part of the constitutional law of the Community.

10. In conclusion, consideration must be given to the rules of international law in general and of the main international treaties. Do they, too, form part of the constitutional law? Here again, the answer must be only in general terms. The law of international treaties and certain rules of customary international law may well be binding in principle on the Community, but they hardly belong to its constitutional law. The situation is different in the case of the basic rules which, in common with Alfred Verdross, we can bring within the expression 'constitution of the international community'. Both the *jus cogens* and other basic rules of international law (in the field of human rights, for example) are, in the writer's view, part of the Community's constitutional law in the sense that all Community institutions are bound to respect them.

11. Much has been written and said on the subject of the rules to be applied in interpreting primary Community law. [8] It has, for instance, been argued that there should be no reference to the rules of interpretation applied to international treaties and that, on the contrary, regard must be paid to the independent status of the Community legal order in relation to international law. Here again, we must differentiate: while interpretation cannot wholly ignore the fact that the Community Treaties have their roots in international law, it must be primarily guided by the objectives and principles of Community law, which differ from the objectives and principles of almost all other international treaties. In Community law, interpretation attaches special importance to the *effet utile* (practical effect).

12. To sum up, the position is that the constitutional law of the Community consists of the Community Treaties (primary Community law), the amendments and additions to primary Community law authorized by the Treaties and, in addition, the basic principles of the law of the Member States and the basic rules of international law.

Section III — Amendments and additions to the constitution of the Community

13. The various legal acts which can amend or add to the Community constitution were described above. They can be summarily listed as follows:

(i) formal amendments of the Community Treaties pursuant to the general rules contained in the Treaties;
(ii) extraordinary amendments under special provisions of the Treaties;
(iii) formal amendments which ignore the procedure laid down in the Treaties;
(iv) amendments and additions by other acts and Treaties;
(v) measures taken under Article 235 EEC.

These variations will now be examined. The essential task is to determine whether or not such amendments and additions are permissible.

14. The Community Treaties contain provisions relating to their amendment (Articles 96 ECSC, 236 EEC and 204 EAEC) and to the admission of new Member States (Articles 98 ECSC, 237 EEC and 205 EAEC). The admission of a new member usually requires a substantial number of amendments and additions to the Treaties. If the details and special features of the ECSC Treaty are ignored, the procedure for amendment may be summarized as follows: an amendment is proposed by a Member State or by the Commission, the Commission and Parliament take part in the procedure which follows and, as far as the Community is concerned, the final decision rests with the Council. The amendment comes into force only after it has been 'ratified by all the Member States in accordance with their respective constitutional requirements'.

If this procedure has been followed and the Treaty formally amended, the new provision becomes part of the constitutional law of the Communities; it replaces any existing provision which conflicts with it and ranks equal with all other provisions of primary Community law.

---

[8] See for example 'Judicial and Academic Conference, 27-28 September 1976' (at Court of Justice), Reports, Luxembourg, 1976.

The Treaties do not impose any express limitation on constitutional amendments; they do not, for example, contain anything which could make sacrosanct the basic rules set out in Articles 2 and 3 EEC or would prohibit substantial amendments of the institutional provisions. An amendment could, conceivably, conflict with the spirit and general principles of the Treaties and, in consequence, be open to challenge. However, it is virtually impossible to give any convincing examples of a legal restriction on the amendment of the Treaties. In any case, any amendment is possible provided that the prescribed procedures have been followed.

15. Reference has already been made to Articles 138 and 201 EEC. The amendments of the Treaty for which they provide are subject to a special procedure, and once adopted, they have the same force as the primary constitutional law of the Community and supersede the corresponding previous rules.

Other provisions which appear throughout the Treaties provide for their amendment at the instance of the Community institutions alone. [9] Similarly, constitutional amendments of a special kind are provided for in Article 95 ECSC. By way of derogation from the rules normally applicable to amendments to the Treaties, amendments under Article 95 are subject to special rules governing both procedure and content. With regard to procedure, it is necessary and sufficient for a proposal to be made jointly by the Commission and by the Council acting by an eight-ninths majority of its members, for the Court of Justice to give a favourable opinion and for Parliament to approve the proposal by a majority of three-quarters of the votes cast (and two-thirds of its members). Ratification by the Member States is not required. With regard to content, amendments under Article 95 must not 'conflict with the provisions of Articles 2, 3 and 4 or interfere with the relationship between the powers of the High Authority and those of the other institutions of the Community'. Here, the Treaty differentiates between, on the one hand, its own basic provisions and, on the other, the adaptation of the Commission's powers to a change of circumstances. The latter is alone authorized under the procedure laid down in Article 95.

On entering into force, amendments effected under Article 95 form part of the constitutional law and rank equal with all other rules of primary Community law.

16. Under a general principle of international law, the parties to a treaty of any kind are 'masters of the treaty' in the sense that they can at any time, in principle unanimously, amend the treaty as they see fit, formally or informally, or revoke it. [10] Even where a treaty specifies a precise procedure for this amendment, or is concluded for a specified period or subject to notice of termination, the parties can, by common consent, dispense with such requirements. This is because the contracting parties are sovereign.

Does the same apply to the Community Treaties? Are the Member States free to ignore the procedure laid down for amendment of the Treaties and, by means of formal or tacit agreements, create a new law in place of the old? Could they go so far as to revoke the

[9] Articles 14 (7), 33 (8) and 165 (4) EEC; non-standard amendments to the Treaty also proved necessary when the Community was first enlarged, the eventual withdrawal of Norway requiring an amendment of the institutional provisions of the accession instruments; see Decision of the Council of 1 January 1973 (OJ L 2, 1973); the Acts concerning Accession also contain idiosyncracies which need not be noticed here.

[10] See Articles 39, 54 and 57 of the Vienna Convention on the Law of Treaties, 1969.

Treaties by unanimous vote? The answer to these questions is neither clear nor free from controversy. [11] The Court of Justice would probably reply in the negative. In fact, when account is taken of the underlying purpose of the Treaties and the intentions of the contracting parties when they entered into them, the conclusion is inevitable that the Treaties can be amended only under the procedure for which they provide and that there can be no question of any other amendments or of revocation of the Treaties, even by common consent. In the writer's view, this is not so much the consequence of the independence claimed for Community law or of its separation from international law as of the wording, objects and underlying purpose of the Treaties. The Treaties created a new legal entity, having its own institutions and sovereign rights, and to that extent the Member States have accepted a limitation of their own sovereignty. They can neither renounce nor substantially modify this commitment, even by common consent.

There is often a delicate balance between precept and practice, between what the law permits and what the facts allow. This is especially true of the international community, whose members and most prominent representatives are still sovereign States. It is difficult to deny that some Member States of the Community are quite capable of withdrawing from their Community obligations and, *a fortiori,* to deny that decisions taken unanimously and by common consent by all the Member States could bring down the whole edifice of the European Community and its legal system, or force it to undergo radical change. Without doubt, however, this would be a revolutionary act which could have no foundation in the law in force.

It is possible to conceive of derogations from the Community constitution which would be less dramatic and less open to challenge. If, bypassing the required procedure, the Member States, by formal Treaty, unanimously adopted provisions supplementing the Community Treaties in the light of changed circumstances and without infringing the objects and basic principles of the constitution, failure to fulfil the procedural requirements would provoke fewer objections. In other words, even if a derogation from the constitution has been adopted in a manner which is open to challenge, it can have binding force provided that its substance is not open to criticism and is welcomed and approved by the legal community as a whole. [12]

It follows from the foregoing that, in contrast to the general position in international law, where the rules of interpretation treat the subsequent conduct of the parties as an independent consideration, the Member States cannot act in this way and validly amend or add to the constitution of the Community as they see fit. This is why the Luxembourg agreement of 1966, despite its practical importance and implementation, does not involve any legally binding amendment of Community law. [13] The application and interpretation of Community law are the task, essentially, of the Community institutions and it is for the Court of Justice to ensure that the Community constitution is observed. This

---

[11] O. Jacot-Guillermod has recently come out against recognition of the Member States as having an independent right of revision (*Droit communautaire et droit international public,* 1979, p. 11 et seq.), running counter to the prevailing view (see Meng, op. cit. at footnote 4 above, pp. 120 and 121).

[12] These comments apply to the revision of the ECSC Treaty carried out on the conclusion of the EEC Treaty, Article 96 ECSC being ignored; a different view is taken by L. Constantinesco, *Das Recht der Europäischen Gemeinschaften,* I, 1977, p. 544, where he refers to an amendment which takes effect, although invalid in law.

[13] J.H. Kaiser refers to a 'constitutional compromise' in *Grenzen der EG Zuständigkeit,* EuR 1980, pp. 97 and 99, see also J.H. Kaiser, *Das Europarecht in der Krise der Gemeinschaften,* EuR 1966, p. 4 et seq.

mandatory division of responsibilities makes it impossible for the Member States to amend Community law without restraint or control and so once more regard themselves as masters of the Treaties. [14]

17. In all cases where the Community constitution, formally (under Article 220 EEC) or tacitly, leaves it to the Member States to conclude additional treaties, the conclusion of international treaties is not open to criticism. The contents of such treaties must be compatible with the Community constitution. However, treaties which add to Community law cannot, strictly speaking, be regarded as forming part of the constitution of the Community, even though the institutions of the Community are bound to observe them. They cannot form part of the constitution since they remain subject to the general rules of international law and, in consequence, under the control of the Member States. The question arises as to whether it is possible to amend additional treaties so as to extinguish Community obligations and jeopardize the integration which has been achieved. In spite of the fundamental objections which such 'anti-Community' measures may provoke, there is, in the writer's view, no compelling reason why such amendments should not be valid when considered in the light of the general rules of international law.

18. Nevertheless, the relationship between the constitutional law of the Community and other international treaties (whether concluded by the Community or by the Member States) raises a number of difficult questions. The treaties concerned fall into four categories: treaties concluded by the Community with non-member States (or international organizations); 'mixed' treaties to which the Community and the Member States on the one hand and non-member States (or international organizations) on the other are parties; treaties concluded between the Member States and non-member States (or international organizations); and treaties concluded between Member States.

19. The treaties which the Community concludes with non-member States must not derogate from the constitutional law of the Community either in regard to content or to the prescribed procedure (Article 228 EEC). In the event of a breach of Community law, that law must be regarded as taking precedence within the Community and as far as its institutions are concerned. As for the Community's obligations under international law and its external liability, the same rules as those binding the States under unconstitutional treaties must apply.

The same principles govern mixed treaties. However, the latter raise further questions, such as the obligation of the Community and the Member States to observe all the provisions of the treaties concerned or splitting of commitments, possibility of denunciation, etc. Without going into these very delicate questions, all that need be stated about such treaties here is that they too may not be considered to form part of the Community's constitutional law.

---

[14] This is not the place to consider the extent to which exceptional circumstances may require or permit extra-constitutional amendments to the Treaties, especially by virtue of the *clausula rebus sic stantibus*; see the declarations which the Government of the Federal Republic made on the protocol when the EEC Treaty was signed to the effect that 'in the event of the reunification of Germany, the Treaties will be the subject of review' (M. Hilf, comments on Article 240 EEC in von der Groeben, von Boeckh, Thiesing, *Kommentar zum EWG-Vertrag*, second edition, 1974, p. 828).

Finally, treaties between the Member States and non-member States can be concluded only if they conform to the constitutional law of the Community. The external obligation to abide by illegally concluded treaties is, here again, subject to the general rules of international law.

20. Treaties concluded between Member States are lawful in so far as Community law does not limit the sovereignty of the States. Treaties which are in breach of Community law are not only illegal but, moreover, have no binding force in international law. This follows both from the underlying purpose of the constitution and from the fact, mentioned above, that the Member States are no longer masters of the Treaties. The same would apply to treaties concluded between the Community and some or all of the Member States.

21. Article 234 of the EEC Treaty makes special provision for the treaties concluded between the Member States and third countries before the Treaty itself entered into force: until such treaties are extinguished or amended under international law, they take precedence over Community obligations. Article 234 must, *mutatis mutandis*, undoubtedly apply to the treaties which the Member States still had the right to conclude after the entry in force of the Community Treaties; subsequent Community law must respect such treaties.

22. Other questions arise in connection with Article 235 of the EEC Treaty. This article enables the Community to take fresh powers by decision of the Council, acting unanimously on a proposal from the Commission and after consultation with the Parliament. As an exception to a fundamental principle of Community law, namely, the conclusive and binding determination of the Community's sovereign rights by the Treaties, fresh powers of limited extension can be created and exercised.

Provisions adopted under Article 235 cannot properly be included as part of the constitutional law of the Community, whether looked at from the standpoint of content or of procedure. The substance of the new provisions must conform to primary Community law and must not amend the law of the Treaties; as to procedure, the amendment or repeal of provisions adopted pursuant to Article 235 must be effected in the manner provided for in that article and not according to the rules relating to the amendment of the Treaties. Where, and to the extent that, the constitutional law of certain Member States forbids the adoption of provisions under Article 235 without the consent of the national parliament, the question arises as to whether the Council's decision has to await the outcome of consultation with the parliament within each of the States concerned, in other words, the outcome of a consultation prior to the consent given in the Council by the representatives of the Member States. [15] Community law does not, of course, require such a procedure, but nor should it stand in its way.

[15] Kaiser draws attention to the constitutional limitations on an unjustified use of Article 235. EuR 1980, op. cit. at footnote 13 above, p. 118.

Section IV — The decisions of the Member States' representatives meeting in the Council

23. These decisions are the result of practical experience and are not easily classified in law. In neither the Community constitution nor in international law in general is there anything to prevent the members of a Community institution from performing different functions and acting sometimes as members of the institution and sometimes as mandated representatives of the governments concerned.

In the first case, it is the Community institution which acts; in the second, its members act as participants in a kind of conference of States. They may be the same people but in each case they assume different functions.

Since the constitution of the Community itself provides for action by the governments (and not the Community institution), as in the first paragraph of Article 167 EEC, for the appointment of judges, there is nothing to prevent the members of the Council from also exercising the relevant powers of their governments.

In the case of other 'decisions' of the Council, in the wider sense, which have no formal basis in the Treaties proper, the governments of the Member States use their authority to meet as often as they wish and to take decisions by common accord.

Those decisions must, however, remain within the bounds of the Community constitution; they must not be in breach of material constitutional law, nor must the representatives of the Member States undertake the tasks reserved to the Community institutions. The dividing line must be determined in relation to each case.

Legal classification of the decisions adopted must not be carried out as a theoretical exercise but in the light of circumstances in each case. Although only political pronouncements or objectives may be involved, consideration may also have to be given to informal agreements the effect and scope of which are governed by general international law.

Section V — The 'constitutional agreements'

24. The day-to-day work of the Community involves a large number of acts and measures which have no formal legal basis in the Treaties, yet have greatly influenced the evolution and working of the Community. Among numerous examples are the setting-up of the European Council, the agreements on the Community institutions and the declarations on human rights and on democracy. To be valid and binding, these acts must not conflict with Community law.

These quasi-constitutional instruments are equally difficult to classify in law. They are unlikely to fall into a single legal category. The circumstances of each case form the only basis on which to determine whether the States or the institutions really intended to enter into a legal commitment or whether they had no objective other than to publish a declaration of political intent and lay down guidelines. The latter case is undoubtedly the most common.

This is also true of a number of rules developed in practice for concerted action by the Community institutions [16] or, again, by the institutions and the Member States. In so far as those rules have not been embodied either in the form prescribed for the Community or in agreements clearly designated as legally binding, they cannot rank as law. Their want of binding force in law does not affect their practical political importance; in fact, it enlarges the field for political initiative in the future.

Decisions and declarations which are, strictly speaking, without binding effect may, nevertheless, disclose legal tenets held in common by the States or institutions participating in them. This, in the writer's view, applies to the declarations on democracy [17] and human rights. [18] These acts are not in themselves legally binding but they shed light on the legal tenets shared by the States which subscribed to them. Although not rules of law, these acts provide guidance and information on the legal principles and rules of law in force which, as indicated earlier, can be regarded as forming part of the Community's constitution.

Section VI — The 'material' principles of the constitution

25. The difference between a formal and a material constitution was explained at the beginning of this chapter. As an introduction to a brief account of the material principles of the constitution, it must be emphasized that they can be set out in the Treaties or, equally well, unwritten. Do the unwritten principles rank as part of primary Community law? The question must be answered separately in the case of each principle.

26. The 'Declaration on democracy' of April 1978 contains this passage:

> 'The Heads of Government confirm their will ... to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights. The application of these principles implies a political system of pluralist democracy which guarantees both the free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights.
> They solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities.'

Attachment to the principles of representative democracy and to the other values mentioned in the declaration is not, as such, expressly referred to in the Community Treaties. Nevertheless these principles and values form part of the unwritten constitutional law of the Community. This implies that the Community takes for granted that the Member States have constitutional structures which are democratic. So long as Greece, Spain and

---

[16] This applies, in particular, to Parliament's involvement when the Community concludes Treaties in accordance with the Luns and Westerterp procedures. Where consultation with Parliament is expressly provided for, e.g. under Articles 228 (1) and 238 of the EEC Treaty, it is, strictly speaking, consultation, not the actual procedure, which is obligatory; where, e.g. in connection with agreements concluded under Article 113 of the EEC Treaty, the participation of Parliament is enlisted without having been provided for, this usually involves nothing more than political arrangements and practices; on the procedure for concerted action between the Community institutions, see *Seventh General Report*, point 455 and the Joint Declaration of 4 March 1975 (OJ C 89, 23.4.1975).

[17] Declaration of 7 and 8 April 1978, Bull. EC 3-1978.

[18] OJ C 103, 27.4.1977.

Portugal had dictatorial and undemocratic forms of government, their entry into the Community was out of the question; their accession was given serious consideration only after their transition or return to democracy. If in the future one of the Member States abandoned democratic consensus and adopted an authoritarian structure, its continued presence in the Community would be difficult to reconcile with the principle of consensus and it would be desirable for it to withdraw. How such a withdrawal could be effected is beyond legal speculation at the moment.

27. Similarly, the principle of respect for human rights constitutes an obligation on the Community institutions as well as the Member States. This is a further basic principle of the Community constitution which, without providing directly and in detail for the protection of fundamental rights, asserts that respect for those rights is inalienable.

28. Among the basic principles of the Community constitution are the existence of the present main institutions and the broad distribution of responsibility amongst them: the Commission, composed of independent persons, as a legislative and executive organ; the Council, composed of one representative for each Member State, as a legislative organ with overall political responsibility; the Parliament, the elected representatives of the peoples, endowed with powers which are still rudimentary but enjoying the authority of having been directly elected; and, finally, the Court of Justice, a tribunal whose essential task is to interpret and apply Community law.

It may seem consistent with the process of integration that Parliament's powers and the Commission's responsibilities should be strengthened in relation to those of the Council, since it is mainly through Parliament and the Commission, together with the Court of Justice, that the Community demonstrates its independence, whereas the Council is more inclined to reflect the Member States' traditional concepts of sovereignty. However, even in cases where integration demands a strengthening of the Community institutions, whether they be legitimized by the democratic process or independent, the constitution in force is, despite its lacunae, binding and it must be observed. Only by means of interpretation of Community law does it seem possible legally to attribute a more important role to Parliament and the Commission. For this reason, the 'quasi-constitutional' participation by Parliament in the decision-making process, as it evolves from day to day, is compatible with the Community constitution so long as it does not conflict with the right to take the final decision as provided for in the Treaties.

29. The Community is a community based on the rules of law, in that its institutions and the Member States are bound by the constitutional law and by all Community legislation and its acts can be reviewed by an independent court. These are basic constitutional principles which apply not only to the Community but also to the Member States as States founded on the rule of law.

30. To conclude, there can be little dispute that the Community constitution itself lays down the limitations on the changes that can be made in the economic order of the Member States and of the Community. At the present day, States no longer rely exclusively on market mechanisms; on the contrary, they influence economic activity in a wide variety of ways. The authors of the Community constitution fully realized this and allowed for it, at least in part. The Community system itself rests on both the free play of economic forces and the constant activity of the institutions in relation to the economy.

However, we must not lose sight of the fact that an economy completely regulated by the States or by the Community institutions would cause the edifice of the Community constitution to collapse. To that extent economic freedom is also a fundamental principle of the constitution.

Section VII — Conclusion

31. A full description of the Community's material constitution would necessitate going into much greater detail, a task which is neither possible nor appropriate here. Taken as a whole the Community constitution does not depend on details but on future progress towards a genuine 'European Union'.

Chapter V — The sources of Community law: acts of the Community institutions

by Eberhard Grabitz

Section I — The different types of legal act

¶ 1. *Classification and characteristics*

1. The different forms of act which the institutions of the European Communities are empowered to adopt in carrying out their tasks are set out in the Treaties establishing the Communities (first paragraph of Article 189 EEC, Article 161 EAEC and Article 14 ECSC).

The Treaty establishing the European Economic Community (EEC Treaty) and the Treaty establishing the European Atomic Energy Community (EAEC Treaty) draw a distinction, in the first paragraph of Articles 189 EEC and 161 EAEC, between regulations, directives, decisions, recommendations and opinions. The Treaty establishing the European Coal and Steel Community (ECSC Treaty) does not employ the same terms. In the first paragraph of Article 14 it refers to general and individual decisions, recommendations and opinions.

These legal acts, prescribed by the Treaties, may be characterized in accordance with different legally valid criteria, based on the description of the different forms of legal act contained in the Treaties. These criteria relate partly to those to whom the measures are addressed and partly to their legal effect. However, the designation which is chosen by the Community institutions is not the decisive factor. [1]

The legal acts referred to in the Treaties may, therefore, be classified in relation to each other and their characteristics may be defined as follows.

---

[1] Joined Cases 16 and 17/62 *Confédération nationale des producteurs de fruits et légumes* v *Council* [1962] ECR 471; Case 8/55 *Fédération charbonnière de Belgique* v *High Authority* [1956] ECR 245 and 292; Case 8/70 *Commission* v *Italian Republic* [1970] ECR 961 et seq., especially at p. 980.

A. Regulations and ECSC general decisions

2. Pursuant to the second paragraph of Articles 189 EEC and 161 EAEC, a regulation is a legal measure which has general application, is binding in its entirety and is directly applicable in all Member States.

With regard to a general decision of the ECSC, the second paragraph of Article 14 ECSC merely provides that it shall be binding in its entirety. However, the Court of Justice of the European Communities has laid down a definition of what precisely this means, which is that a general decision establishes a legislative principle, imposes abstract conditions for its implementation and sets out the legal consequences entailed thereby. [2]

This definition makes it clear that a general decision of the ECSC has the same basic structural characteristics as a regulation; that, therefore, it is of general application; and that it is directly applicable in all Member States. [3]

The general application of a legal act means that it contains general and abstract provisions and that its legal effects extend to an indeterminate group of persons and to a multiplicity of circumstances described in general terms. It is clear from the case-law of the Court that, where a measure has the character of a regulation or of a general decision, that character is not called in issue by virtue of the fact that the number and even the identity of the persons to whom it applies may be determined more or less precisely, provided its application depends on an objective legal or factual situation defined by the measure with reference to its purpose. [4]

To say that a legal act is binding means that it creates rights and obligations for those to whom it is actually addressed. When it is said that a regulation or a decision shall be binding in its entirety, this is to distinguish it from a directive or a recommendation of the ECSC, which are binding only as to the aims to be pursued. It also means that the Member States are not entitled to apply the provisions of a regulation in an incomplete or selective manner and thus exclude those parts of Community legislation which they consider to be against certain of their national interests. [5]

Direct application means that legal acts take immediate effect. In order that they may do so it is not, therefore, necessary for the legislative institutions of the Member States to take any action to put them into operation. Within the scope of such acts the Member States can adopt legislative measures only so long as they limit themselves to reproducing the Community provisions, in which case they must ensure that their Community nature is manifest, [6] or to adopting provisions implementing Community law or adapting the rules of their own legal order to the rules of Community law. [7]

---

[2] Case 8/55, cited at footnote 1 above; Case 13/57 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *High Authority* [1957 and 1958] ECR 265, especially at p. 286.

[3] See also Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 447. Rabe, *Das Verordnungsrecht der EWG*, 1963, p. 65.

[4] Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409; Case 64/69 *Compagnie Française Commerciale et Financière* v *Commission* [1970] ECR 221; Case 101/76 *Koninklijke Scholten Honig* v *Council and Commission* [1977] ECR 797, especially at p. 807.

[5] Case 128/78 *Commission* v *United Kingdom* [1979] ECR 419, especially at pp. 428-429.

[6] Case 50/76 *Amsterdam Bulb* [1977] ECR 137.

[7] Case 34/73 *Variola* [1973] ECR 981; Case 31/78 *Bussone* [1978] ECR 2429.

As far as those subject to Community law are concerned, the consequence of direct applicability is that the provisions of a regulation or of a general decision confer rights and impose obligations on them and that the national institutions responsible for applying the law are bound to use those provisions as the basis for any decisions which they may make in respect of individuals. [8]

Finally, a regulation or general decision is directly applicable in all Member States. This means that, in principle, these acts must embody rules the legal effects of which apply throughout the whole of the territory of the European Communities. Regulations and general decisions may, however, be enacted exceptionally in cases where the situation referred to exists only in some of the Member States. [9] In any event, it is essential that their structure should possess all the other characteristics and that the measures involve no discrimination.

B. Directives and ECSC recommendations

3. A directive is binding on each Member State as to the aim or, rather, the result to be achieved but leaves to the Member States the choice of form and methods for attaining within the national legal order the objectives laid down at Community level (third paragraph of Articles 189 EEC and 161 EAEC). The same applies to a recommendation of the ECSC addressed to the Member States. Moreover, unlike a directive, a recommendation of the ECSC may also be addressed to individual citizens of the Community.

In all cases, the structure of a directive and of an ECSC recommendation requires a legislative process comprising two stages.

In the first stage, the result which the act aims to produce is imposed as an obligation on the addressee concerned, who is legally bound to produce this result. To this extent, such acts are, as far as their legal status and scope are concerned, indistinguishable from other provisions by which the Member States are bound. [10] Whether a legal instrument is called a directive or a recommendation within the meaning of the ECSC Treaty and notwithstanding the use of the term 'objective', the binding force of these instruments remains unchanged. [11]

The fact that a directive or ECSC recommendation is binding as to the result to be achieved obviously does not give any indication of the extent or magnitude of the results to be achieved. Nor does the wording of the third paragraph of Article 189 of the EEC Treaty contain any information on this point.

In practice, the Community institutions have promulgated both general directives [12] and very detailed directives. [13] No objections have been raised against the practice either by

---

[8] Case 65/75 *Tasca* [1976] ECR 291.

[9] See Articles 5 and 6 of Commission Regulation (EEC) No 834/74 of 5 April 1974 (OJ L 99, 9.4.1974).

[10] Case 79/72 *Commission* v *Italy* [1973] ECR 667.

[11] Case 52/75 *Commission* v *Italy* [1976] ECR 277.

[12] For example, Council Directive 64/475/EEC (OJ, 30.7.1964); Council Directive 67/227/EEC (OJ, 11.4.1967, p. 1301).

[13] For example, Council Directives 70/524/EEC of 23 November 1970 (OJ L 270, 14.12.1970); 75/318/EEC of 20 May 1975 (OJ L 147, 9.6.1975); 76/432/EEC of 6 April 1976 (OJ L 122, 8.5.1976).

the Member States or by the Court of Justice, which has often had occasion to give a ruling on detailed directives. [14]

The second stage is concerned with the transposition into the law of the Member States of the substance of the objectives laid down by Community law. The measures adopted by the Member States alone enable directives and ECSC recommendations also to have a direct effect as far as individuals are concerned. For this purpose, it is not enough for a Member State to make provision, *de facto* or by appropriate administrative action, for the requirements of the directive; the directive must really be transposed into the national law and it is solely within the framework of this operation that the Member States are free to choose the form and methods used to implement it. [15]

Since 1970, in the course of the continuous process of developing its case-law, with respect to the immediate applicability of the provisions of the Treaties, [16] the Court of Justice has recognized the provisions of directives and decisions (EEC and EAEC) addressed to States as capable of having direct effect. [17]

One of the factors which, in the view of the Court, support this interpretation is the argument that the effectiveness of a directive would be weakened if the nationals of a Member State to which it was addressed could not rely on the directive before the national courts and if those courts could not treat it as an element of Community law. [18] According to the case-law of the Court the pre-conditions for the direct applicability of directives are the same as those which the Court has already developed in its case-law relating to the direct applicability of the rules laid down in the Treaties. [19]

Under the precedents established by the Court, it is necessary to examine, in each case, whether the legal nature, general scheme and wording of the provision in question is capable of having direct effects in the legal relationship between the Member States and individuals. This is the case when the provision is sufficiently clear and precise, its application is not subject to any material condition and its implementation and validity do not require the intervention of any other Community or national act on the part of the institutions of the Community or of the Member States. [20]

C. EEC and EAEC decisions; individual ECSC decisions

4. Under the fourth paragraph of Article 189 EEC and the fourth paragraph of Article 161 EAEC a decision shall be binding in its entirety upon those to whom it is addressed. It can be addressed to the Member States or to a natural or legal person.

Under arrangements which are otherwise the same, the second paragraph of Article 14 ECSC, taken together with the second paragraph of Article 15 ECSC, refers to decisions

---

[14] Case 33/70 *Sace* [1970] ECR 1213; Case 48/75 *Royer* [1976] ECR 497.

[15] Case 102/79 *Commission* v *Belgium* [1980] ECR 1473.

[16] Among others, Case 26/62 *van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

[17] Case 9/70 *Grad* [1970] ECR 825; Case 33/70, cited at footnote 14 above; Case 41/74 *Van Duyn* [1974] ECR 1337; Case 51/76 *Nederlandse Ondernemingen* [1977] ECR 113; Case 21/78 *Delkvist* [1978] ECR 2327; Case 148/78 *Ratti* [1979] ECR 1629.

[18] See Grabitz, *Entscheidungen und Richtlinien als unmittelbar wirksames Gemeinschaftsrecht*, EuR 1971, p. 8.

[19] Case 41/74, cited at footnote 17 above.

[20] Cases 26/62, 6/64, cited at footnote 14 above; Case 41/74, cited at footnote 17 above.

which are individual in character (in contrast to general decisions under the first paragraph of Article 15 ECSC, which deals with a variety of situations) and not to individual addressees. However, this makes no difference to the legal effect.

A decision addressed to a natural or legal person as a means of regulating particular situations provides the Community institutions with a suitable legislative instrument for the performance of their executive functions; in that respect, it can be compared with the administrative act known to German law.

In the first place, it has individual application, which means that the addressee is individually named and bound. If there are a number of addressees, there is no need for them to be individually named; if the group of addressees can be identified, that suffices. The Court of Justice has held that this happens when, on the day of publication, there is a distinguishable group of addressees which cannot be added to later. [21]

Another basic feature of a decision is that it is binding in its entirety. This distinguishes it from a directive or a recommendation of the ECSC, which are binding only as to the aims to be pursued. This is subject to the reservation that difficulties always arise when, in a directive or an ECSC recommendation, the Community institutions are not content to indicate the aim to be pursued in general terms but prescribe it in detail.

The Court has held that decisions addressed to the Member States are directly applicable under the same conditions as the provisions of the Treaties and directives. [22]

D. EEC and EAEC recommendations and opinions

5. A recommendation as provided for in the EEC and EAEC Treaties (fifth paragraph of Article 189 EEC and fifth paragraph of Article 161 EAEC) and an opinion, which is common to all the Treaties (fifth paragraph of Article 189 EEC, fifth paragraph of Article 161 EAEC and fourth paragraph of Article 14 ECSC) differ from the other legal measures in that they are not binding and, in consequence, do no impose any legal obligation upon the addressees. The addressees of recommendations or opinions are almost always the Member States. Nevertheless, in certain cases specified in the Treaties, the addressee may be a person, a group of persons or an undertaking (Article 91(1) EEC, fifth paragraph of Article 54 ECSC).

A recommendation is distinguished by the fact that, as a rule, it emanates from the Community institution which made it. Its object is to recommend a particular course of conduct to the addressees without legally binding them thereby.

On the other hand, an opinion is given in consequence of an initiative from elsewhere. It contains either a general appraisal of certain processes or a contribution to the preparation of further legal acts.

As acts which are in no sense legally binding, recommendations and opinions are of largely political and psychological significance. They may, however, give rise to indirect legal effects if they create the conditions necessary for further measures or where the

---

[21] Joined Cases 106 and 107/63 *Töpfer* v *Commission* [1965] ECR 405; Joined Cases 41 to 44/70 *International Fruit Co.* v *Commission* [1971] ECR 411.

[22] Case 9/70, cited at footnote 17 above; Case 20/70 *Lesage* [1970] ECR 861; Case 23/70 *Haselhorst* [1970] ECR 881.

Community institution which drew them up binds itself, the consequence of which may be to create a situation of legitimate expectation.

E. Mixed-type acts

6. Generally speaking, acts of the Community institutions have a uniform legal character. Sometimes, however, not all the provisions of an act have the same legal character and the act in question contains provisions which differ in kind. There have been, in practice, legal acts which were given the title of regulations and were adopted as such but which contained provisions directed to certain specified persons and thereby acquired the nature of a decision. [23]

Another point to be noted in connection with such acts is the principle that the title chosen by the Community institutions is in no way indicative of the real legal character of the act. [24] It is, accordingly, quite possible to describe the various provisions by ascribing to them their real character by reference to their content. However, it is not difficult to imagine a series of rules making no sense unless viewed as a whole and thus requiring to be uniformly described. In such cases, even if the rules in question are accepted as having a uniform character in law, it is important to ensure that the need for individuals to have legal protection is satisfied. This aim can be achieved only if the individuals concerned have the right to contest the provisions of a regulation which are in the nature of a decision, even if those persons have no right of action against the act because it is a general one. [25]

¶ 2. *Freedom of choice between several legal acts*

7. As a rule, the Treaties establishing the European Communities leave the Community institutions with no choice as regards the legal form which their acts must take; on the contrary, for each enabling rule, they prescribe the form in which the required provisions must appear (Articles 13(2) EEC, second sentence, 33(2) and 100 EEC; Articles 33 and 49 EAEC; Articles 60(1) ECSC, second subparagraph and 63(1) ECSC). It is only occasionally that the Treaties leave the Community institutions with discretion to choose the type of instrument. This sometimes occurs when a provision of the Treaty specifies the choices available, for example, regulations and directives (Articles 49 and 87(1) EEC), directives and decisions (Article 97 EEC) and regulations, directives and decisions (Article 43(2) EEC). On the other hand, in certain cases, the Treaties prescribe no particular instrument and employ general words such as 'provisions' or 'rules' (Article 7 EEC, second paragraph).

In so far as the Community institutions have discretion to choose the form of instrument, their discretion is not unlimited but is subject to certain conditions. This is necessary because, in choosing a particular type of instrument for their purpose, the Community

---

[23] Council Regulation (EEC) No 1778/77 of 26 July 1977 (OJ L 196, 3.8.1977), at Article 3; on this subject, Case 113/77 *NTN Toyo Bearing Co.* v *Council* [1979] ECR 1185, especially at p. 1205.

[24] See footnote 2 above.

[25] Joined Cases 16 and 17/62, cited at footnote 1 above; Case 30/67 *Industria Molitoria Imolese* v *Council* [1968] ECR 143; Case 113/77, cited at footnote 23 above.

institutions, in so doing, also determine the legal effect, the procedural requirements and the availability of protection by the law which appertain to the legal character of the chosen instrument.

One restriction on freedom of choice arises from the enabling provision, which lays down that the choice must fall on the most appropriate instrument to achieve the objectives pursued by the measure in question.

Moreover, in accordance with the principle of proportionality, which occupies an important place in Community law, there is, in making a choice from among the various methods available for the achievement of the objectives pursued, an obligation to choose the method which is the least burdensome for those concerned.

In practice, the applications of this basic principle may mean that a Community institution is obliged to promulgate a directive and not a regulation or a decision. If an arbitrary choice is made it would, in such circumstances, constitute an infringement of the Treaty on the ground of lack of competence.

Section II — Legislative technique

¶ 1. *Form of legal acts*

A. Formal structure

8. The formal structure of a legal act of the Community institutions consists of a title, a preamble, the provisions properly so called of the act and a form of words concluding it.

The title of a measure adopted in one of the forms provided for in the Treaties gives an indication of its nature. The title also states the name of the adopting authority and the number of the act, followed by a reference to its content.

The preamble, which precedes the provisions properly so called, begins by repeating the name of the adopting authority. Then comes a reference to all the provisions of the Treaty which constitute the legal foundation of the power to adopt the act in question. In addition, the preamble refers to the proposal and to the opinions of the European Parliament or of the Economic and Social Committee and sets out the grounds on which the act was adopted.

The final provision of the act differs according to its nature. In the case of a regulation or of an ECSC (general) decision, there is a reminder that the act is binding in its entirety and directly applicable in all Member States. In the case of a directive or of an ECSC (individual) recommendation, the final provision states to whom the act is addressed. The final provision concludes by stating the place where and the date on which the act, which is signed by the president-in-office of the institution concerned, was adopted.

B. Rules on participation and cooperation

9. In addition to the rules relating to the form of legal acts, there are rules on participation and cooperation.

The aim and purpose of the rules on participation are to ensure that the measure contemplated is prepared with care and circumspection. [26] The most important example of cooperation is that represented by the Commission's right of proposal, as provided for in numerous provisions of the EEC Treaty (e.g. Articles 7, second paragraph; 21, second paragraph; 43, second paragraph; 44, fifth paragraph; 49, 51, 75, 87 and 235 of the EEC Treaty). Under these provisions, the Council cannot adopt the measure which it is empowered to enact unless the Commission has submitted a proposal to it for the adoption of a legislative act. Furthermore, the three Treaties contain a large number of provisions for participation, generally in the form of an opinion, which, in the procedure for adoption of legislative measures, involves consultation with the European Parliament, the Economic and Social Committee or, in the ECSC, the Consultative Committee. In other circumstances, the Council (Article 60(1) ECSC) and the Member States (Articles 88 ECSC and 169 EEC) are also consulted. In Cases 138/79 and 139/79, [27] the Court of Justice was called upon for the first time to give a ruling on the consultation of the European Parliament as part of the legislative process after the Parliament, pursuant to Article 37 of the Protocol on the Statute of the Court of Justice, intervened in support of two actions for annulment. In its judgments, the Court emphasizes that consultation enables the Parliament to play an effective part in the legislative process of the Community and constitutes an essential element of the institutional balance which the EEC Treaty intended to provide. For these reasons, the Court considered that the proper consultation of the Parliament, in the cases prescribed in the Treaty, constituted an essential procedural requirement, non-observance of which renders the act in question null and void. The Court ruled that the fulfilment of this requirement means that the Parliament must express an opinion; it is not fulfilled merely by a request from the Council for one.

C. **Statement of reasons for legal acts**

1. Obligation to state reasons

10. Among the procedural rules which the Community institutions must comply with in adopting legal acts are the provisions of the Treaties relating to the obligation to give the reasons for such acts. As far as the EEC and the EAEC are concerned, the Council and the Commission are, in Article 190 EEC and Article 162 EAEC, bound to give the reasons for the regulations, directives and recommendations which they make. Article 15 ECSC, first paragraph, widens this obligation in so far as non-obligatory opinions, as well as decisions and recommendations made within the competence of the ECSC, must also be justified by a statement of reasons.

The obligation to give reasons was embodied in the Treaties primarily to enable the Court of Justice to exercise full supervision of the validity of legal acts. [28] Moreover, it is in the interests of the addressees of the acts in that a clear and comprehensive statement

---

[26] Case 6/54 *Netherlands* v *High Authority* [1955] ECR 103; Case 20/59 *Italy* v *High Authority* [1960] ECR 325; Case 25/59 *Netherlands* v *High Authority* [1960] ECR 355.

[27] Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333; Case 139/79 *Maizena* v *Council* [1980] ECR 3393.

[28] Well-established doctrine since Case 18/57 *Nold* [1959] ECR 41.

of reasons enables them to verify that the measures involved have been correctly applied and whether the facts described are correct. [29] This makes it possible for those to whom the act is addressed to assess the scope of the act and to assert their rights in consequence; this applies in particular to measures which have involved an appraisal of the situation by a Community institution. For the institution responsible for the act, the obligation to give reasons for it involves a kind of self-criticism since, in drawing up its reasons, it must pay close attention to the conditions precedent laid down for its action in the Treaties. [30] This self-criticism is even more important in cases where the provisions of the Treaty imply legal concepts which are unclear or which give the institutions a margin of discretion since, in that event, the link which binds the institution to the Treaty loses much of its force.

The obligation to give reasons is also a sound one in so far as the reasons stated can help in the interpretation of the act while at the same time providing the European Parliament and third parties not immediately concerned with information regarding economic policy and the legal standpoints of the Council or of the Commission. [31]

2. Extent of the obligation to state reasons

11. There is nothing in the Treaty provisions cited above to indicate the extent of the obligation to state reasons.

As soon as the Court of Justice began its work, it therefore had occasion to deal with this question. [32] On that occasion, it laid down certain general requirements which, in principle, still hold good today, regarding the extent of the obligation to state reasons. These requirements can be defined by saying that the statement of reasons must contain the legal and factual considerations on which the measure is based.

In the judgments of its earlier years, the Court placed a very narrow interpretation upon these requirements, with the result that, during that period and more frequently than in subsequent years, it annulled acts for want of a sufficient statement of reasons. [33] Understandably, it has declared that there is no need to repeat reasons where the facts taken as a whole enable the reasons for the act to be identified; [34] it has also ruled that it is in order for the Community institutions to confine themselves to essentials and explain the reasons succinctly. [35]

It was not until judgment was delivered in Case 5/67 that the Court abandoned this strict attitude and laid down the general requirements in the light of the legal nature of the measure involved. [36] This change of course was based on the distinction between a measure of individual application and one of general application. In any event, there is a

---

[29] Case 18/57, cited at footnote 28 above.

[30] Scheffler, *Die Pflicht zur Begründung von Maßnahmen nach dem europäischen Gemeinschaftsrecht,* 1974, p. 49.

[31] Bleckmann, EuR, 1978, p. 68.

[32] Case 6/54 *Netherlands* v *High Authority* [1954 to 1956] ECR 103.

[33] Case 10/56 *Meroni* v *High Authority* [1957 and 1958] ECR 157; Case 18/57, cited at footnote 28 above; Case 1/63 *Macciorlati Dalmas* v *High Authority* [1963] ECR 303.

[34] Case 16/65 *Schwarze* [1965] ECR 877.

[35] Case 34/62 *Germany* v *Commission* [1963] ECR 131; Case 24/62 *Germany* v *Commission* [1963] ECR 63.

[36] Case 5/67 *Beus* [1968] ECR 83.

continued obligation to ensure that, in stating the reasons for an individual act, the minimum requirements must be fulfilled.

In the case of a regulation or of an ECSC general decision, it must be borne in mind that these instruments govern a general situation without being too specific. Consequently, it is not possible to require the inclusion of the numerous and complex facts which led to the adoption of the measure. Instead, the statement may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. [37]

Moreover, the statement of reasons for a legislative act must be considered and assessed in the context of the complex of instruments of which it is an integral part; in other words, a statement of reasons which is insufficient in itself may be amplified and made clear by previously published measures. [38]

3. Validation of an act otherwise invalid on account of a procedural irregularity

12. Where, in a particular case, it is established that the statement of reasons is insufficient, the deficiency cannot be made good *ex post facto* unless the reasons had already been given in embryonic form and the information provided after the event merely supplies further details. [39]

D. **Indication of remedies**

13. Community law does not make it a procedural requirement that the legal acts of the Community institutions should contain an indication of the means of redress available.

E. **Principle of publication**

14. Under Article 191 EEC, first paragraph, first sentence, 163 EAEC, first paragraph, first sentence, and 15 ECSC, third paragraph, only regulations, ECSC general decisions and ECSC general recommendations require to be published in accordance with the legal principle of publication practised in all the Member States. Publication is effected in the *Official Journal of the European Communities,* which was established pursuant to decisions of the Council of the EEC [40] and of the EAEC dated 15 September 1958 [41] and is also available to the ECSC as an organ of publication, replacing the *Official Journal of the ECSC,* which was published from 30 December 1952 until 13 May 1958. It is published

---

[37] Confirmed repeatedly in decisions since the judgment in *Beus,* cited at footnote 36 above; Case 80/72 *Koninklijke Lassiefabrieken* [1973] ECR 635; Case 87/78 *Weldings* [1978] ECR 2457; Case 134/78 *Danhuber* [1979] ECR 1007; Case 166/78 *Italy* v *Council* [1979] ECR 2575.

[38] Case 78/74 *Deuka* [1975] ECR 421; Case 29/77 *Roquette Frères* [1977] ECR 1835.

[39] Case 28/68 *Torrekens* [1969] ECR 125; Case 18/57, cited at footnote 28 above.

[40] OJ 17, 6.10.1958.

[41] OJ 17, 6.10.1958.

by the Office for Official Publications of the European Communities, which is situated in Luxembourg.

Publication is a condition for validity of a measure and in consequence, creates a right. [42] Because publication has this effect, the date on which a legal act can be said to have been published is of particular importance. The Community Treaties are silent on the subject so that it falls to the Court, in its interpretative decisions, to determine the date of publication.

In this connection, regard must be paid to the basic principle of the Community legal order that an act of law which has been published cannot be invoked against those subject to it before they can take notice of it. It is not necessary for the act to be brought to the notice of the public at large; it is enough if it is made available to the public in a manner which enables every citizen to take notice of it. Moreover, when the date of publication is determined, it is important to bear in mind that the unity and uniform application of Community law require that legal acts shall enter into force simultaneously for all citizens of the Community. On the basis of these principles, the Court of Justice has ruled that an act is to be regarded as published on the date borne by the issue of the *Official Journal* containing the text of the act the publication of which is obligatory. [43] The position would be different only if there were proof that the date on which an issue was in fact available does not correspond to the date which appears on that issue; in which case, the date on which it became available is deemed to be the date of publication.

Finally, publication does not depend on the time-limits prescribed for the exercise of certain powers. [44] Although the act has to be published within the time-limit, it can also be published after the time-limit has expired without its validity in law being affected thereby.

Under the Community Treaties, publication is not necessary in the case of directives and decisions (second paragraph of Article 191 EEC) or in the case of individual decisions and individual recommendations (second paragraph of Article 15 ECSC).

It is enough for these instruments to be brought to the attention of the addressees by notification or communication. However, the Community institutions may also publish these instruments in the *Official Journal of the European Communities.* From the standpoint of integration policy and the democratization of the Community, this practice is not only desirable but necessary. Considerable use is, in fact, made of this facility and, in particular, directives and decisions addressed to the Member States are published in the *Official Journal.* This is expressly provided for in Article 15(3) of the Council's provisional Rules of Procedure and in Article 4(2) of Decision No 22-60 of the High Authority. [45] However, publication of such acts is no substitute for their notification, since the latter alone makes it possible to identify the parties upon whom the institution responsible intends to confer rights or impose obligations. [46]

---

[42] Case 185/73 *König* [1974] ECR 607.

[43] Case 98/78 *Racke* [1979] ECR 69.

[44] Case 185/73 *König* [1974] ECR 607.

[45] Decision No 22-60 of the High Authority of 7 September 1960 (OJ 61, 29.9.1960, p. 1248).

[46] Joined Cases 73 and 74/63 *Handelsvereniging Rotterdam* v *Minister van Landbouw* [1964] ECR 1; Case 41/69 *Chemiefarma* [1970] ECR 661.

F. **Prohibition of application by analogy**

15. The fact that the procedural rules prescribed by the Community Treaties constitute conditions precedent which are indispensable for the applicability of legal acts means that there can be no authorization for the application of those acts by analogy to situations to which they do not expressly refer. [47]

¶ 2. *Period of validity*

A. **Entry into force**

16. 'Entry into force' means the creation of normative effects. It is at that moment that legal acts give rise to rights and obligations. In this connection, the Community Treaties draw a distinction between, on the one hand, regulations, ECSC general decisions and ECSC general recommendations and, on the other, directives, decisions, ECSC individual decisions and ECSC individual recommendations.

1. Regulations and ECSC general decisions

17. With respect to regulations, Article 191 EEC, first paragraph, second sentence, and Article 163 EAEC, first paragraph, second sentence, provide as follows: 'They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following their publication.' On the other hand, the ECSC Treaty contains no provision relating to the date on which general decisions and recommendations shall enter into force. The fourth paragraph of Article 15 ECSC declares that the High Authority shall determine the manner in which the question should be resolved. This was done in Decision No 22-60 of the High Authority, [48] Article 6 of which provided for an arrangement corresponding to that laid down in Article 191 EEC, first paragraph, second sentence, and Article 163 EAEC, first paragraph, second sentence.

Under the rules laid down in the Treaties, it is clear that, apart from those very rare cases where the act itself does not lay down the date on which it shall enter into force, the Community institutions are at liberty to determine that date themselves. This wide liberty is, however, restricted by the prohibition of a true or quasi retroactive effect and by the principle of proportionality. [49] Moreover, the observance of these restrictions is subject to review by the Court of Justice. [50]

Although, under these conditions, to make the date of its publication the date on which an act comes into force does not contravene the provisions of the Treaty, the fact remains that to do so runs contrary to legal certainty and must, accordingly, be regarded as inadmissible in the absence of overriding considerations to the contrary dictated by the interests of the Communities. [51] Furthermore, if the date of entry into force is set at a

---

[47] Case 21/64 *Macciorlati Dalmas* v *High Authority* [1965] ECR 175; Case 37/64 *Mannesmann* v *High Authority* [1965] ECR 725.

[48] Decision No 22-60, cited at footnote 45 above.

[49] Ehle, 'Inkrafttreten von EWG-Verordnungen und Rückwirkungsverbot', DVBl., 1970, pp. 600-602.

[50] Case 17/67 *Neumann* v *Hauptzollamt Hof* [1967] ECR 441.

[51] Case 17/67 *Neumann* v *Hauptzollamt Hof* [1967] ECR 441.

date prior to the date of publication this, despite the fact that, legally, there is nothing to prohibit it in the Treaties, constitutes a form of retroactivity, with the result that the admissibility or otherwise of such an arrangement must be determined in the light of the principles governing the extent to which enactments may have retroactive effect.

On the basis of the principle of a constitutional State, in accordance with the rule embodied in the first paragraph of Article 191 EEC, end of second sentence, the Community institutions ought as a rule to adhere to the 20th day following publication in deciding the date on which their acts are to enter into force and thus satisfy the principles of legal certainty and the protection of expectations. Exceptions to this rule should be allowed only in emergencies. The decision of the High Authority relating to the form and notification of its legal acts [52] provides for a similar system.

2. Other legal acts

18. Directives and decisions of the EEC and EAEC take effect on notification (Article 191 EEC, second paragraph, and Article 163 EAEC, second paragraph). Similarly, individual decisions and individual recommendations of the ECSC also take effect upon their notification to the addressees.

The difference of wording in the German version of, on the one hand, the EEC and EAEC Treaties and, on the other, the ECSC Treaty (*bekanntgegeben* and *Zustellung* respectively) has no material significance, as is demonstrated by the use of uniform terms in the other versions of the Treaties. The French version employs the word *notification* in both provisions.

A legal act is considered to have been notified when it has duly come into the possession of the addressee [53] so that he may take notice of it. Until this happens, the act is without effect.

If some only of the intended addressees have received notification, the act takes effect only in respect of those persons to whose attention it has been duly drawn.

B. Retroactive effect of legislative acts

1. Prohibition of true retroactivity

19. True or formal retroactivity arises when the provisions of a legislative act have an effect on a set of circumstances which existed in the past. In the case of acts the publication of which is obligatory, this always occurs when a Community institution makes the date of entry into force a date prior to the publication of the instrument or, again, when, on entering into force after their publication, the provisions of an act apply to a course of events which had already ceased on that date. The validity of the retroactive effect in that case is subject to the assurance of legal certainty and the protection of legitimate expectation. This condition can be regarded as satisfied in circumstances where the result of the act is to improve *ex tunc* the legal position of the addressee and the

[52] Decision No 22-60, cited at footnote 45 above.
[53] Case 8/56 *A.L.M.A.* v *High Authority* [1957 and 1958] ECR 95.

measure is, therefore, to his advantage. There may, indeed, be cases where application of the principles of legal certainty and equal treatment create a legal obligation to back-date an advantageous provision or call for an amendment or supplementary provision to cover a period which has already elapsed. [54]

On the other hand, the formal back-dating of a disadvantageous legal act is not compatible with the requirement of legal certainty and the protection of legitimate expectation; in consequence, such acts cannot have retroactive effect. The only exceptions recognized by the Court of Justice occur when the expectation of the party concerned does not warrant protection. According to the reasoning of the Court, the protection of legitimate expectation can never be relied upon in circumstances where the parties concerned ought themselves to bear the risk of a change in the situation or where retroactive effect is justified in the wider interests of the Community. [55]

2. Prohibition of quasi-retroactivity

20. There is another form of retroactivity, which is frequently met in practice where, although an act is designed for application in the future to a set of circumstances which have not yet ceased to exist, the immediate effect of that act is to worsen or even render invalid the legal situation in question *ex post facto.* [56]

This occurs most commonly when, although the entry into force of the legislative act of the Community has been set at a date subsequent to publication, it also covers a series of events which reaches back to the period before its entry into force or its publication and which has not yet come to an end. The Court of Justice holds that this form of retroactivity (that is to say, the effect of a new law on a set of circumstances that has not yet ceased to exist) is in principle admissible, quite apart from the question whether the measure involved is favourable or otherwise. [57] According to the Court, the position would be different only if, exceptionally, retroactivity conflicted with the principle that the legitimate expectations of the person concerned deserve protection. [58] In that case, it would be proper to apply the principles developed on the subject of the formal retroactivity of measures detrimental to those concerned.

C. **Revocation and withdrawal of acts of individual application**

21. On the subject of revocation and withdrawal of acts of individual application, the provisions of primary and secondary Community law contain only specific rules which are incapable of generalized application.

In order to formulate general rules, the Court of Justice has had recourse to the general principles of law relating to the revocation and withdrawal of acts.

The Court does not draw a clear distinction between revocation and withdrawal but applies the word 'revocation' also in cases where an unlawful Community enactment is

[54] Ehle, cited at footnote 49 above.
[55] Case 37/70 *Rewe-Zentrale* [1971] ECR 23; Case 74/74 *CNTA* v *Commission* [1975] ECR 533.
[56] Ehle, cited at footnote 49 above.
[57] Case 1/73 *Westzucker* [1973] ECR 723; Case 143/73 *SOPAD* [1973] ECR 1433.
[58] Case 1/73, cited at footnote 57 above.

repealed. [59] However, it is clear from the case-law of the Court of Justice that it has established principles which differ according to whether the repeal is concerned with a lawful or an unlawful individual act. This is why, to follow German terminology, it is desirable to distinguish the word 'revocation', which is applied to the repeal of lawful enactments, from the word 'withdrawal', which is applied to the repeal of unlawful enactments.

1. Revocation of a lawful act

22. As is the case in the national legal orders, the revocation of an unfavourable act is in principle admissible, since the revocation of such an act is usually in the interests of the party concerned, while third parties have no justifiable interest in its retention. This is not so where, in any given case, the public interest dictates otherwise. [60]

On the other hand, the revocation of a favourable act is usually held by the Court to be unlawful. In view of the principles of the protection of legitimate expectation and of legal certainty, this is especially true in the case of acts which confer an individual right on the party concerned. [61] This also applies when the addressee of a measure has conducted his business on the assumption that the act will remain in force.

2. Withdrawal of an unlawful act

23. An act which is unfavourable is usually liable to be withdrawn, since its unlawful character is incompatible with the principle that Community acts must accord with the law and since its withdrawal is in the interest of the individual.

On the other hand, the question whether a favourable act may be withdrawn depends on the balance between the interest which the Community may have in seeing it withdrawn and that which the individual has in seeing it retained. In the decisions of its early years, the Court of Justice had accepted that an act could be freely withdrawn, at least during the period within which an action for annulment could be brought. [62] In later decisions, it upheld the principle of the balance of interests. [63]

In striking this balance, it is of special importance to ascertain whether the wrongful act or omission took place within the sphere of responsibility of the Community institution or whether the irregularity must be attributed to the conduct of the person advantaged (for example. in fraudulently obtaining a benefit). If no conclusion can be drawn in either direction, a balance must be struck between the interests of the Community and those of the individuals affected by the withdrawal.

---

[59] Joined Cases 7/56 and 3 to 7/57 *Algera* [1957] ECR 39; Case 15/60 *Simon* [1961] ECR 115; Case 56/75 *Elz* [1976] ECR 1097.

[60] Wiesner, *Der Wiederruf individueller Entscheidungen der Hohen Behörde der EGKS,* 1966, p. 21; Joined Cases 4 to 13/59 *Mannesmann AG* v *High Authority* [1960] ECR 113.

[61] Case 1/55 *Kergall* [1954 to 1956] ECR 151; Joined Cases 42 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53.

[62] Joined Cases 7/56 and 3 to 7/57, cited at footnote 59 above.

[63] Case 14/61 *Koninklijke Nederlandse Hoogovens* v *High Authority* [1962] ECR 253; Case 111/63 *Lemmerz* v *High Authority* [1965] ECR 677.

However, the Court has held that a comparative assessment of the opposing interests may be carried out only in respect of the withdrawal of an act which, in addition, applies to a period of time in the past, since it is only in such a case that vested interests, lawfully acquired, can be set against the annulment *ex tunc* of the act. On the other hand, withdrawal for the future is always lawful. [64]

¶ 3. *Amendment and correction*

A. **Amendment**

24. 'Amendment' means the partial withdrawal or cancellation of the substantive content of a Community act. The requisite power to make an amendment derives from the provision of the Treaty enabling the measure to be enacted. It follows, first, that the institution which enacted the instrument alone may amend it and, secondly, that the amendment must not derogate from the legal character of the original measure. It is, for example, for this reason that a regulation cannot be amended by an instrument adopted for its implementation. [65]

In practice, the principle that legitimate expectation must be protected makes it unlawful to amend regulations without concomitant transitional measures. The only exception to this rule occurs when an overriding matter of public interest prevents the adoption of such measures. [66]

B. **Correction**

25. Correction serves exclusively to make good a clerical or numerical error, a defect of procedure or of form or any other mistake found in a Community act which is not one of substance. The substance of the act is, therefore, unchanged and the correction cannot render it invalid.

Accordingly, even in the absence of an enabling provision in the Treaty, any Community act containing an error can, with retroactive effect, be corrected without further formality.

¶ 4. *Ancillary provisions, time-limits and period of limitation*

A. **Ancillary provisions**

26. The Community Treaties contain no general provision enabling the institutions to adopt ancillary provisions to supplement Community acts. They are so enabled only in certain provisions of primary and secondary Community law, for example, in Articles

---

[64] Case 15/60 *Simon* and Case 56/75 *Elz*, cited at footnote 59 above; Case 54/77 *Herpels* v *Commission* [1978] ECR 585.

[65] Case 58/70 *Compagnie Continentale* [1971] ECR 169.

[66] Case 84/78 *Tomadini* [1979] ECR 1801.

65(2)(c) ECSC, third subparagraph, and 70 ECSC, fourth paragraph, which are applied for the various forms of obligation, condition, fixing of time-limits and reservation of the right to repeal, such as they are to be found in German law.

In cases where a general power to enact ancillary provisions is not expressly provided for in the Community Treaties, the possibility of so doing depends on the question whether the enabling provision in the Treaty which makes it possible to adopt the act confers a margin of discretion upon the Community institution responsible. [67] If the institution has the power to decide as it sees fit whether or not to adopt a legal act, it will *a fortiori* be entitled to decide whether the act should be supplemented by ancillary provisions. On the other hand, if the Community institution is bound to adopt a favourable measure, it cannot attach conditions to it, include time-limits, or reserve the right to repeal it. In such cases, the imposition of an obligation is permitted only if it consists of a penalty provided for in the event of non-fulfilment of legal requirements. [68]

B. Time-limits

27. The imposition of a time-limit appears mainly in directives, and in ECSC recommendations. Only occasionally is a time-limit prescribed in a regulation, when the Member States are required to adopt supplementary measures. The importance of the time-limits imposed in directives or in ECSC recommendations is enhanced by the fact that the implementing measures are left to the discretion of the Member States, the consequence of which is that acts of this type remain without effect if the objectives pursued are not attained within the prescribed period. [69] Moreover, only by the imposition of a time-limit can the implementation of directives and ECSC recommendations be achieved uniformly within the whole Community. [70] This is a matter of vital importance since, otherwise, different rules could remain in force in the Member States for an indefinite period and this would give rise to discrimination.

In emphasizing the special importance which attaches to time-limits in the case of directives and ECSC recommendations, the Court of Justice has, on several occasions, declared that a Member State cannot justify the non-observance of a time-limit by pleading the provisions, practices or circumstances existing in its internal legal system. [71]

C. Periods of limitation

28. Periods of limitation are an element of legal certainty. Experience shows that in general, rights which are not exercised for a considerable period of time are eventually extinguished or become unworthy of protection. The barring of claims by time is, therefore, a simple means of protection for a person who, belatedly, has to defend himself against claims which, in all probability, are ill-founded.

---

[67] Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 454.

[68] Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 454.

[69] Case 79/72 *Commission* v *Italy* [1973] ECR 667.

[70] Case 10/76 *Commission* v *Italy* [1976] ECR 1359; Case 52/75 *Commission* v *Italy* [1975] ECR 277.

[71] Case 163/78 *Commission* v *Italy* [1979] ECR 771; Case 95/77 *Commission* v *Netherlands* [1978] ECR 863; Case 93/79 *Commission* v *Italy* [1979] ECR 3837.

In order to provide this protection, the period of limitation must be laid down in advance. The fixing of this period and the rules for its application are within the competence of the Community legislature. Up to the present, provisions on the subject have only occasionally been adopted. Among them are the Council regulation concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition; [72] the decision of the High Authority on the barring by time of claims in respect of ECSC levies; [73] and Article 43 of the Statute of the Court of Justice, which lays down a limitation period of five years for actions based on the liability of the Community. In the absence of any provisions on this matter, only the fundamental requirement of legal certainty can have the effect of preventing a Community institution from indefinitely delaying the exercise of its powers. [74]

¶ 5. *Penalties*

A. **Penalties applicable to the Member States**

29. The conditions precedent and the procedure laid down for the application of penalties are contained in Article 88 ECSC, Articles 169 and 171 EEC and Articles 141 and 143 EAEC.

A common feature of these rules is that, before the Commission delivers a reasoned opinion ('reasoned decision' in the ECSC Treaty), it must reach the conclusion that a Member State has failed to fulfil an obligation under the Treaty. If it does so, the Member State concerned is given an opportunity to submit its observations on the strictures made by the Commission. In the decision the State is set a time-limit for the fulfilment of its obligation.

Under the ECSC Treaty, if the State has not fulfilled its obligation before the time-limit, the Commission may, with the assent of the Council, apply penalties. If, however, the Member State makes use of its right to bring proceedings before the Court of Justice within two months of notification of the decision, a penalty can be imposed only if the Court finds that the Treaty has been infringed.

On the other hand, under the EEC and EAEC Treaties, no penalty may be imposed on the Member State if the opinion is not complied with by the time the prescribed period expires. In that event, the Commission has the right to bring proceedings before the Court of Justice for a declaration that the Treaty has been infringed. If, in its judgment, the Court finds in favour of the Commission and rules that the Treaty has been infringed, the penalty consequent upon this finding is that the Member State shall be required to take the necessary measures to comply with the judgment. However, the Commission itself has no power to impose any other penalty.

---

[72] Council Regulation (EEC) No 2988/74 of 26 November 1974 (OJ L 319, 29.11.1974).
[73] Decision No 5-65 of the High Authority of 17 March 1965 (OJ 46, 22.3.1965).
[74] Case 52/69 *Geigy* v *Commission* [1972] ECR 787.

B. **Penalties applicable to citizens of the Member States**

30. All the Community Treaties provide for the imposition of penalties upon individuals and undertakings in order to compel them to fulfil their Community obligations. The ECSC Treaty deals with this aspect in a series of different enabling provisions (for example, Articles 47, third paragraph, 50, third paragraph, 54, sixth paragraph, 64 and 91 of the ECSC Treaty), whereas the EEC and EAEC Treaties contain some general enabling provisions for use by the Council and the Commission (for example, Article 172 EEC and Articles 83, first paragraph, and 81, third paragraph, of the EAEC Treaty).

The types of penalty provided for under Community law are fines, periodic penalty payments and surcharges for delay (Article 87(2) EEC, Article 83 EAEC and Articles 50(3) and 65(5) ECSC). Fines are imposed for infringment of the rules of the Treaty or of secondary law. Periodic penalty payments are designed to compel those concerned to act in conformity with the Treaty. Finally, surcharges for delay are demanded in the event of non-payment of pecuniary obligations to the Community. [75]

¶ 6. *Enforcement*

A. **Enforceability**

31. Under Articles 192 EEC, first paragraph, and 187 EEC and Article 159 EAEC, decisions of the Council or of the Commission which impose a pecuniary obligation and the judgments of the Court of Justice are enforceable. The same principle applies under the ECSC Treaty (Article 92) to decisions of the Commission which impose a pecuniary obligation and also to the judgments of the Court of Justice (Article 44 ECSC).

B. **Enforcement**

32. The Community institutions do not possess an organ of their own which is responsible for the enforcement of decisions or the execution of judgments. Moreover, there are no detailed rules in Community law which govern the procedure for enforcement or execution. Under the provisions of Articles 192 EEC, second, third and fourth paragraphs, Article 164 EAEC and Article 92 ECSC, second paragraph, enforcement is governed by the rules of civil procedure in force in the State in whose territory it takes place.

Section III — The decision-making process

¶ 1. *The Commission's power to legislate*

33. In conformity with the principle of limited enabling powers, which lies at the root of Community law, the Commission's power to legislate on its own authority is derived exclusively from the Community Treaties.

---

[75] Ipsen, op. cit. at footnote 67 above, p. 533.

Under the ECSC Treaty, the Commission, in its capacity as successor to the former High Authority,[76] is the institution which takes the decisions. However, the Commission's decision-making powers are limited by the fact that a number of decisions can be taken only with the assent of the Council which, in certain cases, can give it only by unanimous vote (for example, see Articles 54, second paragraph, and 58(1) of the ECSC Treaty).

Under Article 155 EEC and Article 124 EAEC, the Commission also has, in all matters within the ambit of the EEC and EAEC Treaties, its own power of decision as provided for in those Treaties. However, the various conditions provided for make it clear that the Commission is recognized as having power to enact binding legal measures only as and when circumstances require. During the transitional period, the Commission's legislative power related mainly to adjustments for the benefit of the customs union and the application of protective measures in the Member States. After the expiry of this period, its power was concerned with only a small number of comparatively unimportant situations (see, for example, Articles 13(2), 33(4) and (7), 90(3) and 97 EEC). These arose in circumstances where the need for emergency measures demanded an immediate decision and it was not possible to await one from the Council.

On the other hand, in the case of legal acts, such as opinions and recommendations, which are not binding, the Commission does not need to be expressly enabled and is free to decide whether to adopt such acts (Article 155 EEC and Article 124 EAEC). The only restriction on this power is the fact that, in exercising it, the Commission must not encroach upon matters which fall within the competence of other Community institutions. Although this represents a breach of the principle of limited enabling powers, which is one of the foundations of Community law, this is offset by the fact that the acts in question are not binding.

¶ 2. *The Council's power to legislate*

34. Whereas, in matters within the competence of the ECSC, the Council's part in the decision-making process is essentially confined to assenting to the measures adopted by the Commission, the EEC and EAEC Treaties establish it as a decision-making organ. These Treaties confer on the Council the power to take decisions, especially in those spheres where the law created by the Treaties requires to be supplemented and developed, where account has to be taken of vital interests of the Member States, or, again, where fundamental issues affecting the constitution of the Community or of its institutions require to be resolved. In order to accomplish these tasks, the Council has at its disposal the choice of instruments provided for in Article 189 EEC and Article 161 EAEC.

¶ 3. *Cooperation between the institutions*

35. The legislative procedure of the European Communities is largely dependent upon cooperation between several institutions.

---

[76] Article 9 of the Treaty establishing a Single Council and a Single Commission of the European Communities of 8 April 1965 (published in *Treaties establishing the European Communities*, Office for Official Publications, Luxembourg, 1978, p. 785).

A. The EEC and EAEC Treaties

36. As a general rule, the Council established by these Treaties acts on a proposal from the Commission after consulting the European Parliament and the Economic and Social Committee.

The essential feature of this procedure is cooperation between the Council and the Commission. In the exercise of its right of initiation, the Commission draws up proposals for legislative acts (draft regulations or directives) which, accompanied by a detailed statement in justification, it forwards for decision to the Council. The instrument to be adopted is prepared on the basis of the proposal, which determines its content and form.

As the custodian of the interests and law of the Communities, the Commission has alone been empowered to send proposals to the Council and, without them, the Council cannot act. This being the position, the Council can act only as provided in Article 152 EEC, Article 122 EAEC and Article 26 ECSC, third paragraph, and request the Commission to submit to it any proposals the Council considers desirable for the attainment of the common objectives. Furthermore, the Council can amend a proposal from the Commission only by a unanimous vote (Article 149 EEC, first paragraph and Article 119 EAEC); this gives the Commission additional weight in the decision-making process of the Community.

Apart from cooperation in drawing up the acts of the Council, the Commission can create laws on its own authority only where the Treaties so provide.

37. The European Parliament has no more than the right to be consulted in the general procedure for the creation of legislation; it does not have any general or direct powers in connection with joint decisions. In accordance with the principle of the specific attribution of competence, the EEC and EAEC Treaties have clearly specified the circumstances in which the Council is bound to consult the Parliament. [77] The Council decides whether the provisions of the Treaty require it to consult the Parliament and, if the decision is in the affirmative, it communicates the Commission's proposal formally to the President of the Parliament. In practice, however, the Commission usually forwards its proposal to the Parliament at the same time as it sends it to the Council, in order that the Parliament may have sufficient time to prepare its opinion.

In view of the fact that both the Council and the Commission have the right to amend the Commission's proposal, even after the opinion of the Parliament has been heard, the question arises whether, in those circumstances, the Parliament should be consulted afresh. The Court of Justice has held that the need to consult the Parliament once more depends upon whether the amendment affects the 'substance' of the original proposal. [78] This ruling does not, however, give sufficiently clear guidance on the question whether, in a specific case, the Parliament can demand to be consulted afresh. In view of the fact that the Parliament's cooperation in the creation of Community legislation is an integral feature of the Treaty provisions on the relationship between the Parliament, the Council and the Commission and that this relationship could be compromised if an attempt were made to limit or circumvent the right of the Parliament to make its contribution, the

[77] See the list drawn up by Grabitz-Läufer, *Das Europäische Parlament,* 1980, No 20, p. 124.
[78] Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661.

requirement as to the scope or tenor of the amendments to the Commission's proposal before the Parliament is recognized as having the right to give a further opinion, should not be too stringent.

In addition to the right to give its opinion in this way, the Parliament was granted the right to take parliamentary action in connection with the election of its members by direct universal suffrage. Under Article 138 EEC, third paragraph, Article 108 EAEC, third paragraph and Article 21 ECSC, third paragraph, the Assembly was given the task of drawing up proposals for the election of representatives to the Assembly by direct universal suffrage. The act concerning the election of the representatives of the Assembly by direct universal suffrage [79] gave the Parliament two further rights of parliamentary action. Under Article 7, first paragraph, of the act, the Assembly is made responsible for drafting a proposal for a uniform electoral procedure for the election by universal suffrage, while Article 13 of the act provides that the necessary implementing measures shall be adopted by the Council on a proposal from the Assembly.

Finally, the Joint Declaration of the European Parliament, the Council and the Commission, dated 4 March 1975, [80] institutes the collaboration of the Parliament in the legislative procedure of the European Community. This inter-institutional agreement provides for a conciliation procedure between the Parliament and the Council before legislative acts with appreciable financial implications are promulgated. The object of the procedure is to provide an opportunity for any differences between the two institutions to be resolved by mutual agreement.

The Parliament's collaboration ends with the opinion; this may contain proposals for amendment but these are not legally binding on the Council when it comes to the final vote. In certain circumstances expressly provided for in the Treaties, the Economic and Social Committee also takes part in the legislative procedure of the Communities. Its participation arises when the Council or the Commission is under an obligation to consult it. Apart from those occasions, the Council and the Commission are at liberty to consult the Committee as they see fit.

On the other hand, there is no provision in the Treaties for direct participation by the Member States in the legislative procedure. The part played by the Commission, which is independent of the Member States, in the decision-making process shows that the procedure laid down in the Treaties is more of a Community operation. The fact is, however, that when the Commission submits its proposals, it does so not only with the Community's interests in mind. On the contrary, when its proposals are being drawn up, it is in contact with national and European experts. These contacts and consultations do not merely keep it informed about the situation in the Member States and about the various interests involved but also represent a constant source of pressure from the Member States in regard to the Commission's proposal in that often conflicting national interests, in conjunction with reservations of one kind or another, exercise a decisive influence on the framing of the proposal. This influence on the Community decision-making process is compounded by the fact that the decisions of the Council are adopted only at the cost of intense activity on the part of the Member States.

---

[79] Council Decision of 20 September 1976 (OJ L 278, 8.10.1976).

[80] Joint Declaration of the European Parliament, the Council and the Commission of 4 March 1975 (OJ C 89, 22.4.1975); see also Chapter IV of Part One at point 24.

B. The ECSC Treaty

38. Under the ECSC Treaty, the power to enact legislation is very largely exercised by the Commission, whereas the Council is endowed with no more than the right of assent. However, this gives the Council the power to resist the promulgation of legislative measures and its position is even stronger in cases where approval must be unanimous.

Certain provisions of the ECSC Treaty also require that, before a final decision is taken, there must be consultation with the European Parliament and with the Consultative Committee, a body which does not exist outside the ECSC.

¶ 4. *Implementation of secondary law*

39. The Treaty provisions which confer upon a Community institution the power to adopt legislation also vest in it the power to lay down rules for the implementation of legislation enacted in accordance with the Treaties do not compel it to make use of this power.

On the contrary, under certain provisions of the Treaty it is possible to transfer the power necessary to adopt implementing measures.

A. Conferring of powers on the Commission

40. Under Article 155, fourth indent, of the EEC Treaty and Article 124, fourth indent, of the EAEC Treaty, the general power is conferred upon the Council to empower the Commission to implement the legislation enacted by the Council. Specific provision is made elsewhere in the EEC Treaty enabling the Council to transfer similar powers to the Commission (for example, in Article 121 EEC). On the other hand, there is no provision for the delegation of powers in this manner in the ECSC Treaty; this is explained by the fundamental difference in the nature of the relationship between the Council and the Commission under that Treaty.

Having thus been vested with this power, the Commission has authority to adopt implementing and executory measures within the framework of the EEC and EAEC Treaties. In exercising this power, the Commission cannot amend, extend or restrict the scope of the act to be implemented. With regard to the form in which the measure must appear, the Commission must abide by the instructions on this subject in the provisions by which the Council delegates its authority. If, as is usually the case, the provisions are silent on the point, it is for the Commission to choose the type of instrument, the only limitation on its discretion being the principle that it must choose the type which is most suitable. [81]

In cases which are of special political or economic importance, the Council usually decides to enact the implementing provisions itself. When, however, it makes use of its power to delegate, it does not transfer authority without involving the committees.

---

[81] Schindler, *Delegation von Zuständigkeiten in der Europäischen Gemeinschaft*, 1972, p. 196.

The Management Committee procedure provides for a committee, composed of representatives of the Member States, to be heard before any implementing provisions are adopted. The Commission can, without taking into account the views expressed, immediately adopt the necessary measures. Nevertheless, if the Committee's opinion of the Commission's draft measure is unfavourable, the Council may, within a period of one month, take a different decision, in which case it takes back the executive power. [82]

The Management Committee procedure has for long been the subject of dispute, on the ground that it is incompatible with the structure of the Communities and their institutional balance from the standpoint of the relationship between the institutions and the exercise of their respective powers. [83] Meanwhile, however, the procedure has been recognized in the case-law of the Court of Justice, which has declared it to be lawful. [84]

The Court held that Article 155 EEC allows the Council to decide whether to make use of the provision and enables it to determine any detailed rules to which the Commission is subject in exercising the power conferred on it. Since, in the view of the Court, the Management Committee procedure forms part of those detailed rules, the Council may make the use of this procedure a condition of a delegation of power to the Commission. The Court declared that, in view of the nature of the Committee's tasks and especially of the fact that it does not have the power to take a decision, there was no substance in the objection that the procedure distorted the structure of the Communities and the institutional balance. [85]

Another procedure, that of the Regulatory Committees, was introduced in 1968. It can be compared with the Management Committee procedure but it enables the Council to exercise much greater influence. [86] Under this procedure, the Commission, in particular, is placed in a weaker position since it is unable to apply implementing measures immediately if they conflict with the opinion of the Committee. If they do, the Commission must recommend a measure for adoption by the Council and the Council must take a decision on this proposal within three months. If, at the end of that period, the Council has not taken a decision, the power to promulgate the measure is restored to the Commission.

There has, to date, been only one opportunity for the Court of Justice to comment on the nature of this procedure. [87] If the precedents established with regard to the Management Committee procedure are any guide, it can be assumed that the procedure based on Regulatory Committees will be considered unacceptable only if the position of the Commission were weakened to such an extent that it was virtually compelled to follow the Committee's opinion.

---

[82] Detailed study of the Management Committee procedure, in Bertram, *Das Verwaltungsausschußverfahren*, p. 134 et seq.

[83] Discussed, with numerous references in Schindler, 'Zur Problematik der Ermächtigung der Mitglieder der Kommission der Europäischen Wirtschaftsgemeinschaft (EWG) bzw. der Europäischen Gemeinschaften (EG) zum Erlaß von Verordnungen auf agrarrechtlichem Gebiet', DVBl., 1970, p. 605 et seq., and Ehlermann, *Institutionelle Probleme im Bereich der Durchführung des abgeleiteten Gemeinschaftsrechtes*, EuR 1971, p. 250.

[84] Case 25/70 *Köster* [1970] ECR 1161; Case 23/75 *Rey Soda* [1975] ECR 1279.

[85] Case 25/70, cited at footnote 84 above.

[86] Ehlermann, op. cit. at footnote 83 above, especially at pp. 250-257.

[87] Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555.

B. **Conferring of powers on the Council**

41. Since the provisions of the Treaties authorizing the delegation of powers relate exclusively to the Council, the other institutions have no power to delegate in this way. [88] In particular, the Commission is forbidden to transfer to the Council the powers vested in it by the Treaties in regard to the adoption of regulations and directives.

C. **Conferring of powers on the European Parliament**

42. The transfer of powers to the European Parliament by the Community institutions is not permitted, much as this might be regarded as a step in the direction of the democratization of Community law; legislative powers can be conferred only by means of the procedure for amending the Treaty laid down in Article 95 ECSC, Article 236 EEC and Article 203 EAEC. [89]

D. **Delegation of powers to institutions other than those provided for by the Treaties**

43. In its decisions, the Court of Justice permits the power of decision to be delegated otherwise than as provided for by the Treaties only within very narrow limits. [90] To begin with, delegation is permissible only in so far as it is limited to the power to prepare or implement legal acts. The delegating institution can delegate only those powers which it possesses itself. Moreover, it must make the exercise of the delegated powers dependent upon the fulfilment of the same conditions as those to which it would itself be subject in exercising them directly. Furthermore, when delegation takes place, care must be taken to ensure that there is no distortion of the balance of powers which is inherent in the organizational structure of the Communities.

Observance of this fundamental safeguard affects the extent to which powers can be delegated both in the case of authorities other than those designated by the Treaties and in the case of Community institutions as possible recipients of those powers.

The effect of this safeguard is, in fact, to limit the extent of the delegation in so far as the powers transferred cannot include any margin of discretion or of appreciation. They can consist only of strictly defined powers respecting implementation and application which remain subject to close supervision by the delegating institution. A delegation of powers which involves a margin of discretion is tantamount to an actual transference of responsibility for the measure, since the discretionary power of the competent institution is thereby superseded by that of a body alien to the Treaty. Finally, delegation to such an extent would be inadmissible because it would compromise the institutional balance within the Communities.

The principle of institutional balance is another ground on which the Council is in no circumstances whatever permitted to delegate powers to a body for which no provision is made in the Treaty. Otherwise, it would be possible to avoid the involvement of the

[88] Schindler, op. cit. at footnote 81 above, especially at p. 97.

[89] Ipsen, op. cit. at footnote 67 above, especially at p. 441.

[90] Case 9/56 *Meroni* v *High Authority* [1957 and 1958] ECR 133; Case 10/56 *Meroni* v *High Authority* [1957 and 1958] ECR 157.

Commission in the adoption of implementing measures, with consequent contravention of the procedure provided for in Article 155 EEC, and this would drastically weaken the Commission's role in the operational system of the Communities. That principle is, however, safeguarded when the delegation of powers of decision to bodies other than those provided for in the Treaties is effected within the terms of an appropriate enabling provision of the Council or of a directly enabling provision in the Treaties (for example, Article 53 ECSC). In that case, the Council does not weaken the Commission's position, since it does not place it under a duty to take the delegation of powers any further. Nor does the Commission compromise the position of the Council, since the latter, in any case, wished to be relieved of responsibility for implementation. [91] None of the foregoing considerations necessarily imply recognition of the admissibility of a delegation of powers by the Commission to authorities for whom no provision is made in the Community Treaties; before this can take place, the other conditions precedent laid down in the case-law (and described above) must be satisfied in each and every case.

An example of the delegation of powers to organizations not provided for by the Treaties is the creation of legal persons under European law, such as, at the moment, the European Monetary Cooperation Fund (Monetary Fund), [92] the European Centre for the Development of Vocational Training (Vocational Training Centre) [93] and the European Foundation for the Improvement of Living and Working Conditions. [94]

In its Opinion No 1/76 of 26 April 1977, [95] which the Commission had sought from the Court of Justice under the second subparagraph of Article 228(1) EEC on the question whether the new organs provided for in the creation of the European Laying-up Fund for Inland Waterway Vessels were compatible with the EEC Treaty, the Court declared that the power to take decisions could be conferred on the new organs only in accordance with the principles established in the *Meroni* judgments. [96] This means that powers may be delegated to legal persons under European law only in accordance with the principles established by the case-law and, moreover, that the delegation of powers must be confined to the promulgation of measures implementing and applying legal acts adopted by the Community institutions.

Hitherto, the Community institutions have, in general, paid regard to these principles when setting up legal persons under European law. Thus, the Vocational Training Centre and the Foundation for the Improvement of Living and Working Conditions play an auxiliary role in the fields of research, information and communication without, however, being authorized to adopt public law measures *vis-à-vis* the Member States or individuals. The Monetary Fund has alone been empowered to take decisions in the form of powers relating to assistance and concerted action. This delegation of powers may, in the light of the principles established by the case-law, be open to criticism but, because its function is that of a central bank and the tasks to be performed by the Monetary Fund are of a special character, [97] it has been generally and unreservedly accepted. [98]

---

[91] Ehlermann, op. cit. at footnote 83 above, especially at pp. 250-260.

[92] Council Regulation (EEC) No 907/73 of 3 April 1973 (OJ L 89, 5.4.1973).

[93] Council Regulation (EEC) No 337/75 of 10 February 1975 (OJ L 39, 13.2.1975).

[94] Council Regulation (EEC) No 1365/75 of 26 May 1975 (OJ L 139, 30.5.1975).

[95] Opinion 1/76 [1977] ECR 741.

[96] Case 9/56 and Case 10/56, cited at footnote 90 above.

[97] See Article 3 of Regulation (EEC) No 907/73, cited at footnote 92 above.

[98] More exhaustively discussed in Priebe, *Entscheidungsbefugnisse vertragsfremder Einrichtungen im Europäischen Gemeinschaftsrecht*, 1979.

Chapter VI — The relationship between Community law and national law

by Robert Kovar

Introduction

1. There are many aspects to the highly complex question of the relationship between Community law and the laws of the Member States. When it stated that 'the EEC Treaty has created its own legal system which ... became an integral part of the legal systems of the Member States and which their courts are bound to apply',[1] the Court of Justice affirmed at one and the same time the autonomy of Community law with respect to national law, its status as part of the national legal order and its supremacy over rules of national law; to these should be added the fact that the two systems of law complement each other, which is another essential feature of this relationship.[2]

The relationship between Community law and national law is often approached in a highly theoretical, indeed conceptualized way. The Court itself proceeds from a general conception of the nature of the European Communities. The solutions which it finds flow from the logic of the Community legal order and this approach is generally accepted as necessary by legal writers.[3]

The result is an edifice remarkable for both its consistency and its originality whose foundations were laid about at the time of the Court's earliest decisions[4]—though it took time for their full implications to become clear. Much has already been done, but there is fear that these developments have not yet been taken to their ultimate conclusion.

Different phases can be distinguished in the consistent spirit which informs the Court's decisions. It is hardly surprising that it should have begun by asserting the autonomy of Community law. Although this has been one of its constant concerns, the wish to see that Community law is truly effective within the legal systems of the Member States has been no less dominant in the Court's thinking.

---

[1] Case 6/64 *Costa* v *ENEL* [1964] ECR 585; Case 14/68 *Walt Wilhelm* [1969] ECR 1.

[2] See L.J. Constantinesco, 'Das Recht der Europäischen Gemeinschaften' in *Das institutionelle Recht*, Volume 1, Baden-Baden, 1978, p. 639.

[3] See in particular L.J. Constantinesco, op. cit. at footnote 2, Volume 1; P. Pescatore, *L'Ordre juridique des Communautés européennes*, Liège, 1973, p. 228.

[4] Case 26/62 *van Gend en Loos* [1973] ECR 1; Case 6/64 *Costa* v *ENEL*, cited at footnote 1 above.

The emphasis is thereby placed upon the way in which Community law is incorporated into the national legal order: this involves the elaboration of the concept of the direct effect of Community law, with an accompanying increase in the impact of that law and a widening of its effects. At the same time the Court has been careful to emphasize the supremacy of Community law. These three ideas are, in fact, so closely intertwined that distinctions between them are sometimes artificial.

Section I — The autonomy of Community law with regard to national legal systems

2. There is no doubt that the relative autonomy which is essential to Community law was originally a defensive reaction arising from the Court's desire to protect the identity of Community law from the incursions of national laws. This autonomy is therefore the foundation of the Community legal order.

It is on the basis of this principle that the Court has refused to consider the argument of unconstitutionality on the ground that its function is to preview the legality of Community decisions and not 'to ensure respect for national law in force in a Member State, and this is true even of constitutional laws'.[5] Nor has it accepted that it should examine the legality and constitutionality of the national provisions on which the Treaty is based.[6] Subsequently, it has indeed shown some willingness to take account of national constitutional traditions to ensure that fundamental rights receive the protection which is their legitimate due; but, always affirming the autonomy of Community law, the Court has never accepted the need for legal convergence. Thus in *Internationale Handelsgesellschaft*[7] the Court stated that 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.

The principle of autonomy has also led the Court to prefer in a very general way Community concepts which alone can ensure the uniformity of Community law. Its rulings are based on the needs of Community law and the objectives of the Community.[8] The Court's decisions also reveal its concern to enshrine certain concepts, such as that of public policy,[9] which might have been regarded as more properly the concern of national law. By acting in this way, the Court has tended to limit the discretionary powers of national authorities.[10]

---

[5] Joined Cases 36, 37, 38 and 40/59, *Präsident and Others* v *High Authority* [1960] ECR 423; Case 1/58 *Stork* v *High Authority* [1959] ECR 17.

[6] Case 10/61 *Commission* v *Italian Republic* [1962] ECR 1.

[7] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[8] From many examples see, as regards the term 'worker', EEC Treaty Articles 48 to 51: Case 75/63 *Unger* [1964] ECR 177 or, as regards the term 'offer' used in regulations concerning the common organization of the market in cereals, Case 49/71 *Hagen* v *Einfuhr- und Vorratsstelle Getreide* [1972] ECR 23. Concerning the term 'nationality' of the State in whose territory the place of employment of an official is situated, see Staff Regulations, Annex VII, Article 4 and Case 21/74 *Airola* v *Commission* [1975] ECR 221. For an overall view, see H. Kutscher, 'Les méthodes d'interprétation vues par un juge de la Cour' (Rencontre judiciaire et universitaire, 27-28 September 1976), pp. 1 and 25 et seq.

[9] Articles 36, 48(3) and 56 EEC.

[10] Case 36/75 *Rutili* [1975] ECR 1219; Case 30/77 *Bouchereau* [1977] ECR 1999.

Community law is independent of national law and the converse is to some extent also true. That is why the Court has stated that it has no power to annul a national legislative or administrative act. [11] Similarly, when a national court asks for a preliminary ruling under Article 177 of the EEC Treaty, the Court refuses to interpret rules of national law.

3. This independence is not total: the Court does seek to extract from national laws the common principles which it accepts as roles of Community law. The autonomous nature of Community law does not preclude all interaction with national laws, which can take place on every occasion provided for in the Treaties or when it does not threaten the independence of the Communities. Such interaction may take various terms involving greater or lesser degrees of cooperation. Sometimes Community law itself refers to national law, as in the case of freedom of movement for workers or freedom of establishment where the potential beneficiaries must be defined, with special regard to nationality conditions. The Court's decisions provide numerous other examples. [12] On other occasions, Community law uses national law-enforcement agencies to supplement its own rules. The Court's decisions are enforced through the procedures obtaining in the Member States. [13] More generally, Community law is applied through national authorities which, in accordance with the principle of institutional autonomy, apply their own rules of law for this purpose. The Treaties also authorized the Communities to set a legal act in the context of a national law. An example is the rule that the ordinary law applies to contracts. [14] In such cases, an arbitration clause giving jurisdiction to the Court may result in its applying national law. The freedom of choice left to the Communities generates situations which are governed, in part, by Community law and national law; the statutes of Euratom joint undertakings provide numerous examples of this.

The autonomous nature of Community law is also a prerequisite for its supremacy, just as it is the condition on which direct applicability depends.

Section II — The supremacy of Community law in relation to national legal systems

4. The supremacy of Community law is a fundamental requirement of the legal order of the Communities. [15] It is a necessary consequence of the very idea of a common market, which is the primary object of the Communities. In legal terms, this requires a separate legal order which offers unity, uniformity and efficiency, and it was on these principles that the Court originally based its concept of the direct effect of Community law in the legal orders of the Member States. [16] It was on these same principles that it established the supremacy of that law [17] which has been described as the 'corollary of the Court's conception of the Community legal order as being integrated into the legal systems of the

---

[11] Case 6/60 *Humblet* [1960] ECR 559.

[12] On the position of a lawyer under the Court's Rules of Procedure, Case 18/57 *Nold* [1957] ECR 121; on the right of applicants acting as family representatives, Case 18/62 *E. Barge* [1963] ECR 259.

[13] Article 92 ECSC; Article 192 EEC; Article 164 Euratom.

[14] Article 42 ECSC; Article 181 EEC; Article 153 Euratom.

[15] P. Pescatore, op. cit. at footnote 3, p. 227.

[16] Case 26/62 *van Gend en Loos* [1963] ECR 1.

[17] Case 6/64 *Costa* v *ENEL* [1964] ECR 585, see footnote 1 above.

Member States binding on their courts'. [18] However, the basis, impact and effects of this idea have often led to differences of interpretation because of political factors which are bound to be involved in recognizing the superior nature of Community law. This is also tempered by the limited powers of the Community Court, which can only partially impose its will on national courts of which it is not truly the hierarchical superior, by the institutional autonomy of the Member States and by different concepts and rules concerning the prerogatives of the national courts.

5. Ever since *Costa* v *ENEL* [19] the Court of Justice has not constantly affirmed and extended, in a series of completely consistent decisions, the principle of the essential, absolute and unconditional supremacy of Community law, a principle which derives from its very nature and which holds good both for primary law and for secondary legislation, for law which is directly applicable as for provisions which are not and without distinction across the whole range of Community law. However, in the first instance, it will be the task of national courts to ensure that Community law prevails. That is why the Court has been careful to spell out the obligations of national courts in this respect. Unlike the concepts which still prevail generally in international law, the supremacy of Community law over national law is, as J.V. Louis says, 'not simply an obligation which it is incumbent upon the founder of the constitution or the legislator to implement. It is a rule to be applied by the courts'. [20] We shall, therefore, begin by considering the principle of supremacy as the Court of Justice has conceived it (¶ 1) and then turn our attention to the conditions under which it is put into practice in the legal systems of the Member States of the Community (¶ 2).

¶ 1. *The principle of the supremacy of Community law*

6. Although this principle was clearly in the minds of the founders of the European Communities, it was not explicitly stated in the Treaties which created them. In its favour, there can be adduced various provisions of the founding agreements which would have no force without it. While useful, they have not in themselves been considered by the Court as of sufficient importance to form the basis for the supremacy of Community law: it has preferred to seek this in the nature of the Communities. By doing so, the Court has been able to invest them with general impact.

A. **The basis for the supremacy of Community law**

7. Even though the Treaties do not explicitly mention the principle of the supremacy of Community law, a number of their provisions require it. For example, Articles 169, 170, 171 and 177 of the EEC Treaty which create new legal procedures imply the supremacy of Community law. In Case 6/64 [21] the Court also referred to the second paragraph of Article 5, which requires the Member States to abstain from any measures which could

[18] J.V. Louis, *The Community Legal Order*, European series, 1979, p. 94.
[19] See footnote 1 above.
[20] Louis, op. cit. at footnote 18, p. 95.
[21] See footnote 1 above.

jeopardize the attainment of the objectives of the Treaty, to Article 7 which bans discrimination on grounds of nationality, to Articles 15, 93(3) and 223 to 225, which lay down that the Member States may act unilaterally only when authorized by a special clause, and to Articles 8(4), 17(4), 25, 26 and 73, the third paragraph of Article 93(2) and Article 226, which make derogations from Community rules subject to prior authorization. Nevertheless, the superiority of Community law is essentially a judge-made rule which is in keeping with the nature and purpose of the founding Treaties.

The Court of Justice's position is quite unequivocal: by gathering together the relevant constituent elements to show more clearly how they fit together, it has shown that the legal basis on which the Community rests necessarily presupposes the supremacy of Community law. [22]

The basic ideas which the Court set out in Case 6/64 [23] have never altered. A number of these combine to justify the proposition that the foundation of the supremacy of Community law is the special and original nature of that law. The Court points out first that by creating the Community the Member States consented to transfer to it certain of their powers and to restrict their sovereign rights. To this argument is added another based on the direct applicability of Community law. By establishing a Community with real powers, the States created a body of law which applies to their nationals as well as to themselves. Then follows an enumeration of the Treaty provisions previously mentioned. From these facts the Court concludes that, since the law stemming from the Treaty has an independent source, it cannot be challenged by judicial process on the basis of any provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question; 'the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail'. These considerations have only been amplified by the Court's later decisions. [24] It would be impossible to state more clearly that the supremacy of Community law follows from the very nature of the Community itself. Conversely recourse to national law as a basis for the autonomy of Community law is also excluded. Supremacy stems from the Treaties and not from national constitutions, so it is at best superfluous to use the written or unwritten constitutional rules which govern the relationship between international law and national law as a basis. The supremacy of Community law must be acknowledged because of its 'special and original nature'.

B. The impact of the supremacy of Community law

9. The whole of Community law prevails over the whole of national law. This axiom sums up exactly the principles on which the Court of Justice has operated.

---

[22] See J. Boulouis and R.M. Chevallier, *Grands arrêts de la jurisprudence de la Cour de justice des Communautés européennes*, Volume I, pp. 168, 172.

[23] See footnote 1 above.

[24] See in particular Case 48/71 *Commission* v *Italian Republic* [1972] ECR 527; Case 106/77 *Simmenthal* [1978] ECR 629.

I. The impact of supremacy and the nature of the rules of Community law

10. The principle of the supremacy of Community law is closely linked to that of the autonomy of the Communities' legal system. In considering therefore, the impact of this supremacy, the Community system must be taken as a whole within which no discrimination may be made as to the nature of the rules which constitute it or their relative standing.

Thus, supremacy is not the exclusive preserve of provisions of the Treaties establishing the Communities. While the ruling in *Costa* v *ENEL* [25] dealt with a conflict between the EEC Treaty and subsequent national legislation, the *Internationale Handelsgesellschaft* ruling [26] was concerned with a conflict between provisions in a constitution and a Community regulation, in other words between a provision of secondary legislation and the supreme law of a Member State. The supremacy of regulations was reaffirmed in Cases 43/71 and 84/71. [27]

This indisputable supremacy over national law applies not only to regulations but to all secondary legislation directives, decisions and even agreements binding the Communities [28]—to which the same authority must be attributed.

11. At least as far as the principle of supremacy is concerned, no distinction may be made between law which is directly applicable and that which is not, except as regards implementation techniques.

In the first place, this is because the grounds on which the Court justifies that principle apply to the whole of Community law. A second reason is that the Court has not hesitated to find against national infringements of rules without direct effect, whether these are Treaty provisions or contained in directives. A failure to fulfil an obligation is a concept which does not depend in any way on the direct effect of the rule contravened since the whole of Community law is binding on the Member States. Furthermore, the Court's rulings against such infringements are binding on all national authorities, and particularly on the courts, which must prohibit, of their own motion, the application of national rules which have been found to be incompatible with Community law. [29] It is only in the application of the principle that distinctions appear. It is easier for Community law to assert its superiority in the case of rules which can produce a direct effect because national courts then have the power and the duty to enforce it on their own authority. [30]

In this respect, it should also be noted that developments in the Court's decisions have led some writers to argue that parties may rely on a directive against national law without satisfying the usual conditions which have to be met for Community law to have direct effect. [31]

---

[25] See footnote 1 above.

[26] See footnote 1 above.

[27] Case 43/71 *Politi* v *Italian Republic* [1971] ECR 1039; Case 84/71 *Marimex* v *Ministry for Finance of the Italian Republic* [1972] ECR 89.

[28] Case 84/71 *Marimex*, see footnote 27 above. See also Case 31/78 *Bussone* [1978] ECR 2429.

[29] As regards directives, Case 52/75 *Commission* v *Italian Republic* [1976] ECR 277 and Case 148/78 *Ratti* [1979] ECR 1629.

[30] See Order in Joined Cases 24/80 and 97/80 *Commission* v *French Republic* [1980] ECR 1319.

[31] See C.W.A. Timmermans, 'Directives: their effect within the national legal systems', [1979] CML. Rev. 533, in particular p. 545. For more details see below.

II. The impact of supremacy and the nature of the rules of national law

12. Community law prevails over all types of national law. As long ago as Case 6/64 [32] the Court stated that 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overriden by domestic legal provisions, however framed ...'. Subsequent rulings have continued to clarify and amplify the principle of the supremacy of Community law over national constitutions which was first discreetly propounded in *Costa* v *ENEL.*

A firm seeking the annulment of a decision of the High Authority asked the Court of Justice to suspend judgment until the Italian Constitutional Court had ruled on the claim that certain provisions of the ECSC Treaty were unconstitutional. The Court of Justice dismissed this application, stating that 'all States have adhered to the Treaty on the same conditions, definitively and without any reservations other than those set out in supplementary protocols, and that therefore any claim by a national of a Member State questioning such adherence would be contrary to the system of Community law'. It went on 'such a claim is all the more inadmissible in that, in this case, any decision to suspend judgment would be tantamount to reducing the Community to a cipher by regarding the instrument of ratification either as only partially accepting the Treaty, or as the means of according to it different legal consequences, varying with the Member State concerned, or as the means whereby some nationals might evade its rules'. [33]

In these important grounds of judgment, the Court emphasizes that any claim by a State that the requirements of its own constitution should prevail over Community law is a source of disruption for the Community and is contrary to the principle of accession on the 'basis of reciprocity' already evoked in *Costa.*

The Court is here concerned with something which is fundamental to the integration process. 'States can only accept the limitations of sovereignty corresponding to important changes of power if the rules to which they submit are genuinely common.' [34] The supremacy of Community law over national constitutions is therefore a necessary consequence of the very nature of the Communities.

13. Previously the Court had refused to make the validity of Community law subject to its compatibility with national constitutional provisions. In its ruling of 15 July 1960 in the *Nold* case it stated: 'It is not for the Court to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected.' [35]

Nor would it agree to verify whether the national acts on which the Treaty was based were constitutional. [36] In a series of decisions following *Costa* v *ENEL* it went beyond this 'reverse dualism' to insist that national courts were to make Community rules prevail even where they conflicted with their own constitutions. The Court has reaffirmed this principle on a number of occasions.

---

[32] See footnote 1 above.

[33] Order of 22 June 1965 in Joined Cases 9/65 and 58/65 *San Michele* [1967] ECR 1.

[34] Louis, op. cit. at footnote 18, p. 96.

[35] Joined Cases 31, 37, 38 and 40/59 *Präsident and Others* v *High Authority* [1960] ECR 423 and Case 1/58 *Stork* v *High Authority* [1959] ECR 17.

[36] Case 10/61 *Commission* v *Italian Republic* [1962] ECR 1.

In *Leonesio* [37] it rejected the claim of a country which, in accordance with the provisions of its own constitution, wished to make subject to the adoption of budgetary provisions the payment of a premium which was provided for by Community regulations despite the fact that the applicant had fulfilled all the conditions. It was to repeat this point of view more vehemently at a later date in proceedings for failure to fulfil an obligation. [38]

14. The Court has consistently and still more clearly rejected the excessive claims of those proponents of the concept of 'convergence' who wished to make the authority of Community rules dependent on their compatibility with the fundamental constitutional provisions of the Member States, although it has shown itself concerned to respect the fundamental rights of the individual. In *Internationale Handelsgesellschaft*, [39] after repeating one of the grounds of its *Costa* v *ENEL* judgment, the Court continued by asserting that 'the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure'.

In Stauder [40] it asserted that the fundamental rights of the individual formed part of those general principles of Community law, observance of which the Court must ensure. In confirmation of this solution, it stated in *Internationale Handelsgesellschaft* [41] that 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'. This illustrates the Court's concern to ensure that the special nature of the Community legal order is respected.

15. The Court clearly regards Community law as having supremacy even over national law of a later date: [42] the basis for the principle excludes any reference to the chronology or specific nature of the laws under consideration. [43] The Court has constantly pressed this point, ever since the *Costa* ruling right down to the *Simmenthal* decision. [44]

¶ 2. *The supremacy of Community law in practice*

16. Provisions of Community law are 'an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States'. [45] This means that the national court is in effect a Community court whenever it is directly faced with a conflict between Community rules and national law.

The Court of Justice has therefore sought to define the function of the national courts in such a way as to ensure that Community law really does prevail. But we also have to consider how the principles it has propounded have actually been applied in the Community countries.

---

[37] Case 93/71 *Leonesio* v *Italian Ministry for Agriculture and Forestry* [1972] ECR 287.

[38] Case 30/72 *Commission* v *Italian Republic* [1973] ECR 161.

[39] See footnote 7 above.

[40] Case 29/69 *Stauder* v *Ulm* [1969] ECR 419, at p. 425.

[41] See footnote 7 above.

[42] Cases 43/71 and 84/71, cited at footnote 27 above.

[43] This applies in regard to the principles of *lex posterior priori derogat* and *lex specialis generali derogat*. This would place Community law on the same footing as national law.

[44] See footnotes 1 and 24 above.

[45] *Simmenthal*, cited at footnote 24 above, paragraph 17 of the decision.

A. The function of national courts

17. The rule that Community law prevails is binding on all national authorities, each of whom will have to apply it in the appropriate fashion. [46] Obviously the courts will be faced most directly with the principle. When the Court of Justice stated in *Costa* v *ENEL* that Community law 'cannot be overridden by domestic legal provisions', [47] then reference was clearly to the national courts. This is the crux of the distinction between on the one hand, the hierarchical relationship between Community law and national law, and, on the other, the more usual relationship between national law and international law. [48] The combined effect of direct applicability and the supremacy of Community law is to ensure the full effectiveness of Community law.

The Court of Justice began by emphasizing the obligation of national courts to safeguard the rights conferred on individuals by Community law. [49] It then went on to consider how they should act in the event of a conflict between a directly effective Community rule and a rule of national law. In *Lück* [50] it stated that direct effect 'has the effect of excluding the application of any national measure incompatible with (the Treaty)'. Likewise in *Marimex* [51] it held that no provision of national legislation which is incompatible with a Community regulation may be applied. Indeed it held, in connection with the French Code du Travail Maritime, [52] that directly applicable Community law confers rights on individuals which the national authorities must 'respect and safeguard' and that 'all contrary provisions of internal law are rendered inapplicable to them'. In Case 48/71 [53] it went so far as to hold that direct applicability entails 'a prohibition having the full force of law ... against applying a national rule recognized as incompatible' with a Community provision. The same point is made in *Simmenthal*, [54] where we read '... in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures ... render automatically inapplicable any conflicting provision of current national law'.

18. It has been argued that the condition applying to subsequent national legislation is more severe, [55] that a statement of inapplicability, requiring these rules to be held to be void or even non-existent, is insufficient for the Court. The importance attached by the Court of Justice to the transfer of powers from the Member States to the Community is well known.

---

[46] Case 48/71 *Commission* v *Italy* [1972] ECR 529.

[47] See footnote 1 above.

[48] Louis, op. cit. at footnote 18 above, p. 112.

[49] The idea was first formulated in 1964 in *Costa* v *ENEL*, cited above, and is unlikely to undergo substantial change.

[50] Case 34/67 *Lück* v *Hauptzollamt Köln-Rheinau* [1968] ECR 245, at p. 251.

[51] See footnote 28 above.

[52] Case 167/73 *Commission* v *French Republic* [1974] ECR 359, at p. 371.

[53] See footnote 24 above.

[54] See footnote 24 above.

[55] V.A. Barav, Note on the *Simmenthal* judgment, 'Les effets du droit communautaire directement applicable', CDE, 1978, pp. 260, 275-276.

The *van Gend en Loos*[56] judgment is especially illustrative of this. Likewise in *Costa* v *ENEL*[57] the Court held that 'by creating a Community ... having ... real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights ...', an idea which is echoed in several other judgments, and particularly in that given in Case 48/71.[58] As a result the Member States have lost certain powers; they may no longer interfere individually in matters that are within the Community's responsibility nor, consequently, pass measures in conflict with Community law. The powers exercised by national bodies have been radically reduced.[59] Certain indicia of such a view are to be found in the Court's judgments.

In *Bollmann*,[60] for instance, it holds that 'to the extent to which Member States have transferred legislative powers in tariff matters ... they no longer have the power to adopt legislative provisions in this field'. It is in *Simmenthal*[61] that the relationship between directly applicable Community law and conflicting but subsequent national rules is considered in the clearest terms. The Court held that 'in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures, not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'.

19. It has been suggested that this is an implicit reference to the non-existence theory.[62] It is by no means certain that the Court wished to go that far. What it did was to consider the penalty for incompatibility and the proper reaction of the national courts, stating that 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'. In either case, then, the inapplicability of the national rule would be the penalty for conflicting with a directly applicable Community provision. More precisely, this is a minimum requirement, which does not prevent each national court from going further if it has jurisdiction to do so. The solution is in conformity with the principle of institutional autonomy which normally governs the implementation of Community law in the Member States. The obligation to disregard a national rule found to be incompatible with a directly applicable Community provision is incumbent on national courts by virtue of the inherent supremacy of Community law. This, of course, may have the effect of weakening the autonomy principle. In *Simmenthal,* for instance, the Court of Justice rejected the Italian Constitutional Court's claim that the national law would be inapplicable only if it had first been declared unconstitutional.

---

[56] See footnote 4 above.
[57] See footnote 5 above.
[58] See footnote 24 above.
[59] Barav, loc. cit. at footnote 55 above.
[60] Case 40/69 *Hauptzollamt Hamburg* v *Bollmann* [1970] ECR 69.
[61] See footnote 24 above.
[62] Barav, loc. cit. at footnote 55 above.

If the need for the prior intervention of that court had been accepted, this would have meant compromising the immediate, simultaneous application of directly applicable Community law. [63]

20. The requirement for a national court to disregard a national rule that has been found to be incompatible with a directly applicable Community rule, if necessary exceeding its jurisdiction, is simply the practical expression of the theory that Community law prevails by its very nature, regardless of any constitutional rules in the Member States, none of which may be allowed to impede its effect.

It is therefore not unreasonable to suggest that the national court is playing a full part in the Community legal system, its jurisdiction being defined by reference to its position in that system, at least where the efficacy and especially the supremacy of Community law are subject to restrictions bound up with the national legal order. By defining the impact of direct effect and of the Community law, the Court of Justice has in effect given a Community definition of the jurisdiction of the national courts. Judicial immediacy is thus seen to be the corollary of legislative immediacy. Respect for procedural autonomy must always be tempered by deference to the Community legal order. [64]

B. The decisions of national courts

21. Following a process which has unfolded at different speeds in different countries, the principle that Community law prevails has finally been accepted in all the domestic legal systems, although appreciable difficulties still remain in some cases. But the few pockets of resistance should not blind us to the great progress that has in fact been made.

The attitudes taken by the national courts may be summed up as follows:

(i) The basis for the rule that Community law prevails is not necessarily that taken by the Court of Justice. While the specific character of Community law is recognized in certain cases, the judge generally tends to look to national rules of a constitutional nature for a basis on which to rest the supremacy of Community law, although in many cases he will be able to combine the two bases.

(ii) Community law is generally accepted as prevailing over ordinary legislation, subject to a few well-known exceptions, but the position with regard to constitutional law is less clear.

I. The basis for the supremacy of Community law

22. The supremacy of Community law is recognized either on the basis of constitutional provisions or, more rarely, by reason of its nature on international law. The adoption of one or the other solution depends on a number of factors, beginning with the specific constitutional features of each of the Community countries. Paradoxically, the traditional

---

[63] See also point 90 below.

[64] The implications of the role of the national courts in the Community system are considered by V. Constantinesco and R. Kovar in their note on the *Simmenthal* case, J. Dr. Int., 1979, pp. 936, 940.

dualist conception of the relation between international law and national law which prevails in Germany and Italy has led the courts in those countries to invoke the 'specific nature' theory in order to ground the supremacy of Community law over national law. Only reasons relating specifically to its own nature qualified it for privileged status, thus shielding it from the consequences of the dualist principle. It could be given this status because the national legal system had been opened up by constitutional provisions legitimating the transfer of powers to the Community institutions. [65] But the situation is not exactly identical in the two countries.

In Germany the Federal Constitutional Court and other courts which have supported the principle of the supremacy of Community law, subject to occasional reservations, have never referred either to its nature or to its contractual origin in treaty law. On 18 October 1967 the Constitutional Court declared inadmissible actions brought under constitutional law by individuals against provisions of Council and Commission regulations since 'Council and Commission regulations are acts of a special, supranational public authority set up by the Treaty and clearly distinct from the public authority in the Member States'.

Hence it is the specific character of Community secondary legislation which determines its status within the national legal order. This hypothesis was even more clearly asserted in the judgment of 9 June 1971, when it was held that decisions of the Community institutions must be recognized as being acts emanating from an original and exclusive authority upon which powers have been conferred pursuant to Article 24 of the Basic Law. [67]

That principle is not formally jeorpardized by the Order of 29 May 1974 which, apart from some admittedly suspect statements relating to the supremacy of Community law, reaffirms its original features. [68]

23. The Italian courts have taken what is in some ways a less unequivocal approach. As for recognition of the specific nature of Community law, we might cite the judgment given by the Milan Court of Appeal on 12 May 1972, [69] and a large number of decisions given by lower courts and by the Court of Cassation. [70] In 1965 the Constitutional Court itself held [71] that the Community legal order (in that case that of the ECSC) was a foreign legal order, distinct from the Italian legal order. As a result that Court held that the national courts were prevented from scrutinizing Community regulations for conformity with the Italian constitution, stressing that there was an organized scheme of judicial protection within the jurisdiction of the Court of Justice of the European Communities. Other decisions have refined the distinction between Community law and international treaty law. On 6 October 1972 the Court of Cassation [72] referred both to cases decided by the Court of Justice illustrating the implications of the transfers of power to the Com-

---

[65] Basic Law of the Federal Republic of Germany, Article 24; Italian Constitution, Article 11.

[66] EuR 1968, p. 34. Other aspects of this decision will be considered subsequently in connection with fundamental rights. See point 53 below.

[67] EuR 1972, p. 56; AWD des BB, 1971, No 8/9 p. 418.

[68] Note by G. Cohen Jonathan, CDE, 1975, p. 1491.

[69] Note by L. Plouvier, CDE, 1972, p. 692.

[70] For example, judgments given on 8 June 1972: F. It., 1972, I, pp. 1963 and 3119.

[71] Judgment of 27 December 1965, Giur. It., 1966, I, p. 193.

[72] Note by J.V. Louis, CDE, 1973, p. 591.

munity and to a ground given for the Belgian Court of Cassation's judgment in the *Franco-Suisse Le Ski* case, [73] stating that the EEC Treaty prevails because it is based on consent. Within the pattern of developments here the judgment given by the Constitutional Court on 18 and 27 December 1973 [74] is without doubt the most remarkable, since it combines a strictly orthodox view of the specific nature of Community law with a final reservation regarding the power to scrutinize it for compatibility with the constitution. [75]

The court analyses the Community legal order in the light of Article 11 of the Italian Constitution. It defines the Community as a new type of permanent, supranational, inter-State organization enjoying legal personality and full status as a subject of international law.

The Community and national legal orders are described as being 'autonomous and distinct legal systems, although coordinated with each other in accordance with the allocation of powers defined and guaranteed by the Treaty'. Lastly, the direct applicability of regulations is defined in terms perfectly compatible with the law as stated by the Court of Justice.

24. In Belgium matters developed from the principle that a law and an international treaty have equivalent status; since the judgment given by the Court of Cassation on 27 May 1971 [76] the basis for supremacy has been found in the nature of international law, the specific nature of the Community legal order being argued in support of this principle. The Court of Cassation has held that 'where there is a conflict between a rule of national law and a rule of international law having direct effect in the internal legal order, the treaty rule must prevail. The supremacy of the international rule derives from the very nature of international treaty law. This is all the more the case when the conflict is, as in this case, between a national rule and a Community rule. The Treaties establishing Community law set up a new legal order in whose favour the Member States have agreed to restrictions on the exercise of their sovereign powers in the areas governed by the Treaties'.

In the Netherlands the courts have regularly recognized the supremacy of Community law by reason of its specific nature. [77] In other cases, however, Articles 65 and 67 of the Constitution have been taken as a basis. [78]

Considerations based on international law of the traditional type were for a long time taken as a basis for statements by the Luxembourg courts [79] that Community law prevailed. The tendency now, however, is to look beyond international law and strengthen the impact of the supremacy of Community law by means of specific justifications. [80]

---

[73] See footnote 76 below.

[74] CDE, 1975, p. 114.

[75] See points 47 and 53 below.

[76] *Fromageries Franco-Suisse Le Ski* [1971] ECR 460; conclusions by Ganshof van der Meersch at pp. 510-520 and note by J.J.A. Salmon at pp. 529-535; note by P. Pescatore, CDE, 1971, p. 561.

[77] Cass. Crim., 18 May 1962, *Bosch* [1965] ECR 1850.

[78] Tariefcommissie, 12 November 1963, BNB, 1964, p. 181.

[79] Unreported decisions of the Cour Supérieure de Justice of 10 July and 2 December 1970, cited by J. Neuen in 'Jurisprudence sur les problèmes généraux de l'intégration', Report to the VIth International Congress of European Law, FIDE, Luxembourg, 24-26 May 1973.

[80] Unreported judgment of the Luxembourg Criminal Court, 20 February 1970; see Neuen, loc. cit. at footnote 79 above.

25. In France the supremacy of Community law is generally accepted by the courts on the basis of Article 55 of the Constitution. In relation to international law the existence of this article has not prevented the courts from showing considerable reluctance to give full effect to the rule that treaty law prevails. Often, they have proceeded from the principle *lex posterior priori derogat,* although in accordance with the 'Matter doctrine' they have endeavoured to use every possible means of reconciliation. [81] On some occasions, however, the judgments have shown more innovatory attitudes to Community law. The Paris Court recognized the supremacy of the EEC Treaty over national legislation on grounds of the very nature of the order established by the Treaty, coupled with a reference to Article 55 of the Constitution. [82]

On 24 May 1975 the Court of Cassation [83] adopted an ambiguous attitude to the basis for the supremacy of Community law, referring to Article 55 of the Constitution but also accepting considerations regarding the specific nature of the Community legal order. [84] In the *von Kempis* judgment of 15 December 1975 [85] we see perhaps the beginnings of a tendency to recognize the supremacy of Community law on grounds of its own specific nature. The drawbacks of solutions based exclusively on the Constitution appear most clearly in a decision given by the Constitutional Council on 15 January 1975. [86] Article 55 of the Constitution incorporates a condition of reciprocity, to which the Constitutional Council expressly referred. As a result the supremacy of international law is relativized, and this is incompatible with the principles laid down by the Court of Justice of the European Communities. [87] In the *Jacques Vabre* judgment the Court of Cassation rightly refused to apply this condition, having regard to the specific nature of Community law.

26. Decisions of the Danish, Irish and United Kingdom courts do not allow of firm conclusions as to the basis for the supremacy of Community law. On the contrary, there has been something of a tendency to contest its supremacy. In two cases decided by the English Court of Appeal, Lord Denning felt able to assert that the Treaty 'is equal in force to any statute'. [88] Wherever the supremacy of Community law is recognized and a detailed reason given for it, the European Communities Act 1972 is generally cited. [89]

II. The extent of supremacy of Community law

27. Following a rather tortuous development, and bearing in mind that the position is still not absolutely certain in the newer Member States, we have now reached broadly the following position:

---

[81] R. Kovar, note on the judgment given by the First Chamber of the Paris Court on 7 July 1973 in *Directeur Général des Douanes et Droits Indirects* v *Société des Cafés Jacques Vabre* [1974] ECR 394.

[82] *UNEF* v *Consten* [1963] ECR 189; *LTM* v *MBU* [1965] ECR 250.

[83] *Jacques Vabre* case, note by R. Kovar, [1975] ECR 631.

[84] Discussed by R. Kovar in the above-mentioned note (footnote 83), p. 651.

[85] J. Dr. Int., 1976, p. 416.

[86] Note by J. Rideau, CDE, 1975, p. 606.

[87] Joined Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 1232.

[88] *Application des Gaz SA* v *Falks Veritas Ltd* [1974] ECR 51; *H.P. Bulmer Ltd and another* v *J. Bollinger SA and another* [1974] ECR 1226.

[89] For example High Court, Chancery Division, in *Aero Zipp Fasteners Ltd and Lightning Fasteners Ltd* v *YKK Fasteners (UK)* [1973] CML. Rep. 819; judgment given by a Magistrates' Court in *Pigs Marketing Board* v *R. Redmond* on 26 January 1979.

(i) the supremacy of Community law over national law is almost universally asserted, despite certain minor points of resistance;
(ii) on the other hand, Community law has not yet come to be regarded as prevailing absolutely over constitutional law. This, of course, is particularly important in those countries where the courts have jurisdiction to review legislation and international conventions for compatibility with the constitution.

(a) Community law and national law

28. The supremacy of Community law over subsequent national law is now acknowledged in all the founder Member States. In some of them the rule was arrived at after a considerable delay, and in some cases only after conflicting decisions had been given by the highest courts within the hierarchy. Isolated decisions denying this supremacy are still occasionally taken.

In some countries it was easier to recognize the supremacy of Community law over national law as there were constitutional rules or legal traditions which already militated in favour of the idea.

29. In the Netherlands the question of the relationship with international law was expressly resolved by constitutional changes in 1953 and 1956. Article 66 of the Constitution states that a treaty prevails over a law, even if the law is passed subsequently, provided that it incorporates provisions having direct effect. Article 67 extends the principle to rules laid down by international organizations to which legislative, administrative or judicial powers have been transferred by convention. The combined effect of these two articles is to entrench the supremacy of Community law, both the Treaties themselves and secondary legislation, at least where it is directly applicable.

30. The Luxembourg Constitution has no provision regulating the relationship between international law and domestic law. But Article 49 bis provides that it is constitutional to devolve on international organizations, being subjects of international law, powers reserved by the Constitution for national authorities. The supremacy of Community law flows from a long-standing judicial tradition of treating international treaties as superior to national legislation. [90] The principle is generally accepted by all the courts.

31. Greater difficulties have been encountered in Belgium, where early authorities considered a treaty as having equal status to a law, thereby attributing supremacy to the subsequent rule. A doctrinal initiative by the *procureurs généraux* at the Court of Cassation was necessary before this concept was finally abandoned. The Court of Cassation, in a very important judgment given on 27 May 1971, [91] categorically confirmed the thesis that Community law prevails over subsequent national legislation.

This decision constitutes a considerable departure from a line of cases going back nearly half a century. Although the lower courts showed considerable reluctance to accept the

[90] Cour Supérieure de Justice, *Pagani*, 14 July 1954: *Pasicrisie luxembourgeoise*, 16, p. 150; note by P. Pescatore in JT, 1954, p. 694.
[91] *Belgian State* v *Sté des Fromageries Franco-Suisse Le Ski*, cited at footnote 76 above.

principle, the rule that international treaty-based law and directly applicable Community law prevail over Belgian law was reaffirmed by the Court of Cassation. [92]

32. The same trend has been apparent in France. Despite constitutional provisions in force since 1946, and now especially Article 55 of the 1958 Constitution, the ordinary courts were rather timid in their approach. The Conseil d'État adopted an even more negative attitude.

There were two kinds of resistance to acceptance of the principle that international treaty law and Community law should prevail: first, because of the doctrine of the separation of powers and of the supreme power of the legislative, the courts traditionally have no right to verify the constitutionality of legislation, and assessment for compatibility with international conventions is treated in the same way as assessment for compatibility with the Constitution; secondly, there is a body that has this specific function, the Constitutional Council. These two barriers were removed by decision of the Constitutional Council of 15 January 1975. [93] Proceeding from arguments that were not universally accepted, the Council held that it had no power to scrutinize national legislation for compatibility with international conventions as part of its jurisdiction under Article 61 of the Constitution to assess the compatibility of laws with the Constitution. It considered that there was a difference of nature between appraising a piece of legislation in the light of a treaty and appraising it in the light of the Constitution. At the same time it acknowledged that Article 55 of the Constitution requires it to have regard to the principle of the supremacy of treaty law. From this it has been deduced that verifying compliance with this principle is not a matter of constitutional concern and is therefore not within the jurisdiction of the Constitutional Council, so that it is for the ordinary courts to verify it. [94] Accordingly the Court of Cassation, in joint session, held unequivocally on 24 May 1975 that the EEC Treaty prevails over subsequent national legislation. A subsequent judgment of the same court came to the same conclusion without referring to Article 55 of the Constitution but arguing solely on the basis of the very nature of Community law. [95]

33. In Italy, where there is no constitutional provision expressly governing relations between international treaty law and national legislation, the barriers raised by a resolutely dualist tradition have had to be removed. On 7 March 1964 [96] the Constitutional Court was still able to argue that the law implementing the EEC Treaty had no greater authority than any other law. It thus accepted that subsequent laws could derogate from international agreements. Later, the same court implicitly but no less clearly recognized that a Community regulation prevailed over subsequent national legislation. [97]

And yet a large number of decisions from a wide variety of courts all found in favour of the supremacy of Community law. [98] The resistance of the Italian courts in general and of

---

[92] On 6 January 1976: RW 1975-76, Col. 1745, with conclusions by Dumon.

[93] Decision 75/74, JORF, 16 January 1975, p. 671; comments by L. Favoreu and L. Philip, RDP, 1975, p. 165; note by J. Rideau, CDE, 1975, p. 306.

[94] See the conclusions by Touffait in the *Jacques Vabre* case referred to at footnote 83 above; *Droit Social* 1975, p. 497.

[95] 15 December 1975 (von Kempis), cited at footnote 85 above.

[96] *Costa* v *ENEL*, F. It. 1964, I, Col. 465.

[97] 18-27 December 1973, note by P. de Caterini, CDE, 1975, p. 114; note by J.V. Louis, JT, 1974, p. 409.

[98] Conciliatore at Milan, note by L. Ferrari-Bravo, CDE, 1967, p. 194; the Milan Court, note by L. Plouvier, CDE, 1972, p. 692; Court of Cassation, 6 October 1972, note by J.V. Louis, CDE, 1973, p. 591; Court of Cassation, 3 May 1976, CDE, 1978, p. 302.

the Constitutional Court in particular has not been entirely broken down. In 1975 the Constitutional Court held that an ordinary court could not of its own motion declare inapplicable a law that was either incompatible with a regulation or simply reproduced its provisions; all it could do was refer the question of the constitutionality of that law on grounds of indirect violation of Article 11 of the Constitution. [99]

That decision was quite rightly criticized. While it admittedly did not call in question the extent of the supremacy of Community law, it was nevertheless regarded as striking at its very basis, its effectiveness and its direct applicability. This is why the Court of Justice felt bound to condemn the position taken by the Italian Constitutional Court. [100]

34. In Germany the Constitutional Court has quite categorically held that Community law ranks higher than the ordinary law, which it overrides and displaces (*überlagern und verdrängen*). It is for the ordinary court hearing a case to decide what law applies to it, and hence to acknowledge that in a given case Community law may enjoy priority. [101] A large number of other decisions have followed the principle propounded by the Constitutional Court. [102]

35. The position in Denmark, the United Kingdom and Ireland is still not entirely clear. As we have seen, certain United Kingdom judges refuse to recognize the supremacy of Community law. [103] But it would be a hazardous enterprise to predict the future pattern of judicial decisions on the supremacy of Community law in the United Kingdom. In Ireland the Treaties establishing the Communities and the Accession Treaty were incorporated in the legal order by the European Communities Act of 1972. The act begins by listing the Treaties to which it applies and then, in Section 2, provides: 'From the first day of January 1973 the Treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those Treaties.'

It has been concluded that this refers back to the Treaties themselves as regards every aspect of the effect of Community law in the internal legal system, which would mean that the traditional dualist approach taken in Ireland has now been left behind. [104] But does this mean that this provision, which is chiefly designed to guarantee the direct effect of Community law, will also secure its supremacy over subsequent legislation, since it is to be transposed into the Irish legal order 'under the conditions laid down in those Treaties'?

Danish accession to the Communities was facilitated by the fact that since 1953 Article 20 of the Constitution has allowed powers exercisable by the Danish authorities to be transferred to international organizations. The Community Accession of 11 October 1972

---

[99] Note by R. Monaco, F. It., 1975, I, p. 2661; J.V. Louis, *Recours institutionnel et primauté du droit communautaire*, 1975, p. 3227; L. Plouvier, *L'Arrêt de la Cour Constitutionnelle*, 1975; *ICI* case [1976] ECR 271.

[100] Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629; note by A. Barav, CDE, 1978, p. 260; note by V. Constantinesco and R. Kovar, J. Dr. Int., 1979, p. 936.

[101] EuR 1972, p. 56.

[102] Notably on 13 May 1977: MDR, 1977, p. 771.

[103] See point 26 above.

[104] P. Pescatore. *L'ordre juridique des Communautés européennes*, Liège, 1973, p. 243. Much the same point is made by L.J. Constantinesco, op. cit. at footnote 2 above, pp. 790-791.

settles the position regarding the direct effect of Community law in the Danish legal system by reference to the concepts of Community law itself.[105] This is particularly important in view of the dualist tradition in Denmark. On the other hand, the Danish Constitution does not explicitly provide for the supremacy of Community law. The traditional dualist approach in Denmark may turn out to be unhelpful. But it has been argued that Article 20 of the Constitution, in conjunction with Article 3 of the Accession Law,[106] should provide a firm basis for the rule.

(b) **Community law and constitutional law**

36. In order to help the Community acquire an undeniable constitutional basis, certain Member States have revised their constitution. Wherever the constitution did not provide for the transfer of their sovereign powers to the Community institutions and even more so where it actually excluded it, it was necessary to make the appropriate provision.

In certain Member States the question arose as to the compatibility of Community law with certain basic rules of the constitutional order. The national parliaments were called on to consider the constitutionality of the Community Treaties—in view of the extent to which contracting parties were required to transfer powers—when debating the ratification legislation.

In the founder Member States at least, the question was generally left on one side. But in 1956 Luxembourg amended its Constitution, inserting a new provision providing that the exercise of powers conferred by the Constitution on the legislative, executive and judicial authorities may be devolved temporarily on institutions governed by international law.[107] Since 1953 Article 67 of the Netherlands Constitution has authorized the transfer of legislative, administrative and judicial powers to international organizations. A new Article 25bis was inserted in the Belgian Constitution in 1970, providing that the exercise of specified powers may be entrusted by treaty or by law to institutions governed by public international law.

37. In these three States the courts have no jurisdiction to scrutinize international agreements for constitutionality. There is a second group of countries—Italy, Germany, Denmark and Ireland—whose constitutions contain provisions authorizing the transfer of national powers and providing for scrutiny of treaties for compatibility with the constitution.

Under Article 11 of the Constitution of 1948 Italy undertakes, provided other States do so, to accept restrictions of its sovereignty required in a system ensuring peace and justice between nations; it shall assist and promote international organizations having such objects.

---

[105] Article 3.

[106] Sørensen, *Compétences supranationales et pouvoirs constitutionnels en droit danois*, Miscellanea Ganshof van der Meersch, p. 481; M. Rasmussen, 'Primauté du droit communautaire en cas de conflit avec le droit danois', RTDE, 1975, p. 700.

[107] Article 49bis of the Luxembourg Constitution.

The Constitutional Court has held [108] that Article 11 constitutes an enabling provision; Italy is enabled to join the Communities but legislation implementing the Treaties has no special status in comparison with any other legislation.

It subsequently held that the Community legal order was compatible with the Italian Constitution, but expressed a final reservation on the question of respect for fundamental rights. [109]

38. Article 24 of the Basic Law of Germany empowers the Federation by legislation to delegate sovereign rights to inter-State bodies. And yet both the courts and learned writers have felt able to regard this delegation as being necessarily subject to observance of 'the structures of the Constitution in force in the Federal Republic of Germany' and specifically to 'provisions governing fundamental rights'. Referring to the principle of conveyance and taking a restrictive interpretation of Article 24 of the Basic Law, the Constitutional Court has, of course, reduced the authority of Community law. But later the same court categorically denied that it had any jurisdiction to consider whether a provision of the Treaty, as it had been interpreted by the Court of Justice, was or was not contrary to the German Constitution. As for secondary legislation, the Constitutional Court has left open the question whether and to what extent the principles set out in its decision of 29 May 1974 continue to apply 'in view of subsequent political and legal developments in the Community'. Here it may well have had in mind the joint declaration on fundamental rights issued by the political institutions on 5 April 1977, the Commission memorandum on Community accession to the European Convention on Human Rights and perhaps also the fact that the European Parliament is now elected by direct universal suffrage. [110]

39. Since 1953 Article 20 of the Danish Constitution has allowed powers conferred on authorities in the Kingdom by the Constitution to be delegated by law, to an extent to be determined, to inter-State authorities established by mutual agreement for the promotion of legal order and cooperation between States. The ratifying law must be approved by more than a simple majority, as in most of the cases considered here. This procedure was followed in 1972. [111]

40. The Irish Constitution was amended, following a referendum on 10 May 1972, in particularly explicit terms: 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.'

41. The constitutional position in France is noteworthy on two counts. For one thing, paragraph 15 of the preamble to the Constitution of 27 October 1946 declares that 'subject to the principle of reciprocity, France consents to restrictions on sovereignty needed for the organization and defence of peace'. The Constitution of 4 October 1958 expressly incorporates the preamble to the 1946 Constitution. For another, the French courts have no jurisdiction to determine whether treaties are constitutional; Article 54 of the

---

[108] Decision of 24 February 1964 - 7 March 1964, F. It., 1964, I, p. 466.

[109] Judgment of 18-27 December 1973, cited at footnote 74 above.

[110] Judgment of the Federal Constitutional Court of 27 May 1974, note by G. Cohen Jonathan, CDE, 1975, p. 149; and judgment of 25 July 1979, EuGRZ, 1979, p. 547.

[111] On 19 June 1972 the Court of Appeal struck out an action for a declaration that the procedure to be followed was the same as for revision of the Constitution: *Lars O. Gronborg* v *Prime Minister*, cited by J.V. Louis, op. cit. at footnote 99, p. 101.

Constitution confers that jurisdiction on the Constitutional Council, which has exercised it on many occasions in Community matters.

It will be seen that a restricted interpretation has been placed on paragraph 15 and that this may hamper any further extension of Community powers.

In the United Kingdom the European Communities Act 1972 regulates the constitutional problems involved in incorporating Community law. Section 2 (1) deals with direct effect, and Section 2 (2) seeks to resolve possible conflicts with subsequent legislation by laying down a principle of interpretation which gives overriding effect to the principles of the act itself, and indirectly to Community law. Several attempts to block the application of Community law have failed, though the United Kingdom courts have yet to give a clear statement as to the constitutional status of the Community Treaties. [112]

42. The first conclusion here is that the transfer of sovereign powers is not recognized unreservedly even in those States where the constitutions recognize the principle. In some cases the limits flow from the conditions in which constitutional provisions authorizing the transfers apply. Such is the case of Article 25bis of the Belgian Constitution, which refers only to the exercise of specific powers, and of Article 49bis of the Luxembourg Constitution, which further stresses that this devolution is only temporary.

Moreover, provisions for the transfer of powers have to be interpreted in light of the basic rules of the relevant constitutional system.

By way of example, Article 11 of the Italian Constitution and Article 24 of the Basic Law of the Federal Republic of Germany have been read as excluding violations of the fundamental principles of the constitutional order, particularly as regards the inalienable rights of man, [113] or violations of the structures of the Constitution in force in the Federal Republic of Germany, particularly the rules governing fundamental rights. [114]

43. The courts and learned writers have put these restrictions into methodical form, especially in Germany and Italy. Two main principles have been put forward: the principle of structural convergence and the principle of proper respect for the fundamental rights guaranteed by national constitutions. The first concerns the constitutional status of the Treaties and of subsequent changes to them, whereas the second is more concerned with secondary legislation.

The principle of structural convergence means that a national court cannot apply rules of Community law if the institutional structure from which they derive—the institutional organization of the Communities—does not conform with the essential principles of its own constitution (such as the principle of the separation of powers). German and Italian courts have raised this principle, but it has been rejected both by the constitutional courts in those two States and by the European Court of Justice. [115] It is by no means certain

---

[112] John Usher, 'Le droit communautaire devant les tribunaux britanniques', CDE, 1975, p. 560, especially at pp. 560–562.

[113] Italian Constitutional Court, judgment given on 27 December 1973, JT, 1976, p. 412.

[114] German Constitutional Court, judgment of 29 May 1974, cited at footnote 68 above.

[115] Examples of the structural convergence argument can be seen in the judgment given by the Finance Court of Rhineland-Palatinate on 14 September 1963, RTDE, 1964, p. 237; the Court at Turin, 11 December 1964, Dr. Sc. Int., 1964, p. 282. The contrary thesis can be seen in judgments given by the Federal Constitutional Court on 18 October 1967, RDTE, 1968, p. 203; the Italian Constitutional Court on 18 December 1973, GP, 1974, I, p. 155; and the European Court of Justice on 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125, cited at footnote 7 above.

that the idea has been entirely abandoned, however. Traces of it can still be seen in the Order made by the German Constitutional Court on 29 May 1974. [116]

Objections have also been raised by the national courts to the supremacy of Community law in relation to the protection of fundamental rights of the individual. The German Constitutional Court has held [117] that Article 24 of the Basic Law, which concerns the transfer of sovereign powers to inter-State authorities, must be regarded as authorizing such transfers subject always to respect for the fundamental structure of the Constitution, and hence of its provisions relating to fundamental rights of the individual.

It therefore considers that it must verify Community provisions in the light of those principles. [118] In a judgment given on 27 December 1973 [119] the Italian Constitutional Court likewise claimed the right to ensure that the EEC Treaty is constantly compatible with the fundamental principles of the Italian constitutional order and the inalienable rights of man in the event that the Court of Justice should interpret a provision of Community law in a manner incompatible with those principles, though it agreed that that event is distinctly unlikely. While these two decisions reveal that the approach taken by the court was not the same in each case and that a different procedure was adopted for verifying constitutionality, they clearly manifest a refusal to recognize that Community law enjoys absolute and unconditional supremacy over rules of constitutional law. [120] At any rate the pre-eminence of Community law is not accepted as being a principle overriding positive law and binding on all concerned, even against the intentions of the authors of the Constitution.

44. In France the Conseil d'État has declared inadmissible an action seeking to have the ratification of the Treaty of Rome establishing the EEC set aside. [121] The Constitutional Council was first asked to consider the constitutionality of the Treaty of 22 April 1970 amending Certain Budgetary Provisions of the Treaties establishing the European Communities and the Decision of the European Council of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources. [122]

Regarding the Treaty of 22 April 1970, the Constitutional Council stated that it contained only provisions governing internal arrangements between the European Communities on the one hand and the Member States on the other.

Regarding the Decision of 21 April 1970, the Constitutional Council regarded this as a measure implementing the Community Treaties, which had been properly ratified and published and were therefore covered by Article 55 of the Constitution. Nevertheless, a law was required for the implementation of this decision, some of whose provisions

---

[116] See footnote 68 above.

[117] Order of 29 May 1974, cited at footnote 68 above.

[118] A decision more favourable to Community law was given by the Federal Constitutional Court on 25 July 1979, 2 BVL 6/77.

[119] Note by P. de Caterini, CDE, 1975, p. 114.

[120] See J.V. Louis, 'La primauté du droit communautaire' in *Les recours des individus devant les instances nationales en cas de violation du droit européen.* Colloquium organized by the Institut d'Études Européennes, Larcier: Brussels, 1978, p. 145, especially at p. 160.

[121] Conseil d'État, 3 March 1961, *Lebon Reports*, p. 154.

[122] Constitutional Council, Decision 70/319, DC 14/6/1970, series 15. See L. Favoreu and L. Philip, *Les grandes décisions du Conseil constitutionnel*, p. 257; D. Ruzié, 'L'autonomie financière des Communautés européennes et l'accroissement des pouvoirs budgétaires du Parlement européen, à propos de la décision du Conseil constitutionnel du 19/6/1970', JCP, 1970, I, p. 2354.

related to matters which under Article 34 of the Constitution are of a legislative nature. Lastly, it confirmed that the condition of reciprocity required by Article 55 was indeed met. It accordingly concluded that in the instant case the decision would not in any way be prejudicial to the exercise of any essential aspect of national sovereignty.

If we disregard secondary decisions concerning the establishment of an isoglucose levy, [123] the Constitutional Council expresses its reservations most clearly in its decision of 30 April 1976 concerning the election of the European Parliament by direct universal suffrage. It considered that the 1958 Constitution did not authorize the transfer of national sovereignty in whole or in part to any international organization whatsoever. This would require prior revision of the Constitution and of the Treaty. At the same time it declared that it had jurisdiction under Article 54 and again under Article 61 of the Constitution to verify the constitutional status of a draft law for ratification of an international agreement transferring powers. [124] While there are grounds for objecting to a refusal to allow transfers of powers, the argument regarding jurisdiction to consider the constitutional status of any international agreement transferring powers to international organizations is without doubt perfectly legitimate.

45. In none of the Member States, therefore, does Community law enjoy absolute supremacy over constitutional rules. The specific nature of the Community would be well reflected by provisions inserted in national constitutions, specifically declaring that Community law prevails over national law, on the basis of the principles elaborated by the Court of Justice. [125]

Section III — The effectiveness of Community law in the national legal systems

46. The effectiveness of Community law depends both on the way in which it is incorporated into the legal orders of the Member States and on the scope which is given to it in those orders.

¶ 1. *The incorporation of Community law into the national legal order*

47. For a long time the incorporation of Community law into the legal system of each of the Community Member States was considered solely in relation to regulations. The position seemed to be that what happened to Treaty provisions was a matter to be settled solely by national law. The status of directives and decisions addressed to the Member State was regarded as being somewhat uncertain, depending on their ability, in any case widely contested, to produce direct effects.

---

[123] Decisions of 30 December 1977, JORF, 31/12/1977, p. 6385. These decisions have the merit that they recognize the transfer of powers that has been made and the binding character of Community regulations.

[124] R. Kovar and D. Simon, 'À propos de la décision du Conseil constitutionnel français du 30/12/1976 relative à l'élection de l'Assemblée parlementaire européenne au suffrage universel direct', RTDE, 1977, p. 6651, and CML. Rev., 1977, p. 525.

[125] L.J. Constantinesco, op. cit. at footnote 2 above, pp. 790-791.

This clearly was a misunderstanding of direct effect, where the principle is that rules which have direct effect are automatically incorporated into the legal order of a Member State. Indeed it was even felt possible to argue that the whole of Community law as such could be so incorporated, at least where by virtue of their subject-matter Community rules were likely to have effects on legal relations arising within a country. [126] Hence the prohibition on measures designed to transpose Community rules into national law (A). Hence also the prohibition on arguments that Community rules were fully applicable only if they had been duly received into the national legal system (B). And hence, more generally, the condemnation of any implementation process that weakened the essential character of Community rules (C).

A. Transposition measures

48. The position of the regulation is the clearest. Under Article 189 of the EEC Treaty regulations are 'directly applicable in all Member States' and are binding both on public authorities and on private citizens without any form of national incorporation, implementation or promulgation. [127] Any act whereby a regulation is either acknowledged or confirmed is not only pointless but frankly unacceptable. [128] As the second paragraph of Article 189 says in the German version, a regulation *gilt unmittelbar* and this excludes any measure transposing it into national law. [129]

Seen in these terms direct applicability is tightly bound up with a monistic concept of the relation between Community law and national law. [130] At the risk of being controversial, it may be said that the principle that any process of incorporation whatsoever must be excluded ought perhaps to be extended to all provisions having direct effect, and there are those who argue that it should be extended to the whole of Community law. [131]

This applies first of all to the Treaties. Morand [132] is convinced of this. Proceeding from the emphasis in *van Gend en Loos* [133] on the independence of Community law from the legislation of the Member States and on the self-executing nature of these Treaties, he deduces that there should be no transposition procedures although certain States require them in respect of other international agreements. This conviction is shared by Green and Schermers. [134]

---

[126] Timmermans, cited at footnote 31 above, p. 534.

[127] J.V. Louis, 'Le règlement, source directe d'unification des législations', in *Les instruments du rapprochement des législations dans la Communauté économique européenne*, Éditions de l'Université de Bruxelles, 1976, p. 16.

[128] Houben, *Le Conseil des ministres des Communautés européennes*, Leiden: Sijthoff, 1964, p. 78; J. Boulouis and R.M. Chevallier, *Grands arrêts de la Cour de justice des Communautés européennes*, second edition, Volume I, p. 36.

[129] See H.G. Schermers, *Judicial Protection in the European Communities*, Leiden, 1979, paragraph 158, p. 86. A. Dashwood, *The Principle of direct effect in European Community Law*, JCMSt 1978, p. 220.

[130] J.A. Winter, *Direct Applicability and Direct Effect, Two Distinct and Different Conceptions in Community Law*, CML. Rev., 1972, pp. 425-431; H.G. Schermers, op. cit. at footnote 129 above, p. 76.

[131] Timmermans, cited at footnote 31 above.

[132] C.A. Morand, *La législation dans les Communautés européennes*, Paris, 1968, p. 58.

[133] Case 26/62 *van Gend en Loos* [1963] ECR 1, op. cit. at footnote 4 above.

[134] A.W. Green, *Political Integration by Jurisprudence: the Work of the Court of Justice of the European Communities in European Political Integration*, Leiden, 1969, p. 326; H.G. Schermers, op. cit. at footnote 129 above, pp. 76-77, paragraphs 158 and 159.

49. These views can be supported by two major judgments given by the Court of Justice, in Cases 48/71 [135] and 106/77. [136] They condemn two arguments based on the same dualistic approach. The first is that Community law can be applicable only when competing national law has been repealed; the second is that the competing laws must be declared unconstitutional. Both assume that the Community rule must be implicitly, not to say surreptitiously, assimilated to Italian law. The argument was particularly explicit in the first case: the conflict between the Community rule and the national rule could be resolved only by means of legislation repealing the national rule.

Although more discreet, the argument defended by the Italian Constitutional Court in *Simmenthal* is nevertheless a direct extrapolation of that put forward by the Italian Government in 1972. First, because the conflict between the national rule and the Community rule was reduced to an internal constitutional conflict, the law being voidable on the sole ground that it was unconstitutional. This insertion of an extra link in the legislative chain was accompanied by an extra link in the institutional chain also: the Constitutional Court deprived other courts of the jurisdiction to see that directly applicable Community rules produced their full effects wherever a national rule first had to be removed.

In these circumstances they had to wait for a decision from the Constitutional Court, which was alone empowered to consider whether national legislation was constitutional, before all the barriers to the direct effect of Community law could be removed. Obviously the Court of Justice could not allow the full effect of Community law to be dependent on the prior removal of competing national law by legislative means or some other appropriate constitutional procedure. For one thing, 'direct applicability ... means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force'. [137] For another, the argument supported by the Constitutional Court distorted the very nature of the direct effect of Community law. Hence the condemnation of any process whereby a Community rule, be it enshrined in a regulation or a treaty, is directly or indirectly converted into a national rule.

The same applies to directives, at least when their provisions are capable of having direct effect, though this, of course, is not to say that the Member States need not take the measure required to implement a directive. [138] It is possible that the exclusion of any idea that the validity of Community law depends on its incorporation, let alone its prior transposition, applies generally to all rules of Community law. [139]

B. **Reception measures**

50. The Court's censure extends, incontestably at least as regards regulations, to procedures for their reception into the national legal order. [140]

---

[135] *Commission* v *Italian Republic* [1972] ECR 529.

[136] Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* [1978] ECR 629, see footnote 24 above.

[137] *Simmenthal*, cited at footnote 136 above, ground 14.

[138] Case 102/79 *Commission* v *Belgium* [1980] ECR 1473.

[139] Timmermans, op. cit. at footnote 31 above, especially at p. 534.

[140] Case 34/73 *Variola* [1973] ECR 981; see also Case 50/76 *Amsterdam Bulb* v *Produktschap voor Siergewassen* [1977] ECR 137; Case 94/77 *Zerbone* v *Amministrazione delle Finanze dello Stato* [1978] ECR 99; and Case 31/78 *Bussone* v *Italian Ministry of Agriculture* [1978] ECR 2429.

As J.V. Louis so rightly says, 'the fact that a regulation is directly applicable means that, without any action by the national law-making authority, it is automatically valid throughout the Community, and as such, may confer rights and impose obligations on the Member States, on their institutions and on individuals, just as national law does'. [141] Reception measures would detract from its unilateral character, its binding force and its direct effect, [142] in other words all its essential features.

51. The exclusion of all such measures cannot extend to the Treaties establishing the Communities, which were made and brought into force in accordance with the constitutional procedures of the contracting parties. M. Waelbroeck considers, however, that the national courts must refuse to apply measures of internal law which conflict with obligations undertaken by the State wherever the State is committed internationally, and need not have regard to procedures required by national law.

He considers that to abide scrupulously by constitutional rules governing the incorporation of international agreements into the internal legal order would be over-formalistic and impede the direct effect of commitments entered into by the State. [143] While this opinion may well be 'too absolute', [144] there are certainly far better reasons for refusing to make the validity of Community law subject to reception in the national legal system where, for instance, a directive or decision is addressed to the Member State but its provisions are capable of producing direct effects. D. Wyatt would like us to move in this direction, [145] pointing out that in the *Zerbone* case [146] the Court referred to the direct effect both of regulations and of other Community rules, holding that 'accordingly Member States must not adopt or allow national institutions with a legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned'.

Admittedly the Court did not wish to prevent the Member States from taking the measures required for implementation of a directive, even where the provisions of the directive satisfy the tests for having direct effect, since the directive actually obliges them to take such measures. [147] But the fact remains that the Court will not allow the applicability of Community rules to be subject to measures receiving them into the domestic legal system.

52. In *Ratti* [148] the Court made a further useful statement on this point. Once the period appointed for implementation has expired a Member State may not plead its failure to complete the procedures required for transposing the requirements of the directive into domestic law in order to prevent its courts from applying provisions which are capable of having direct effect. [149]

---

[141] J.V. Louis, *The Community Legal Order*, p. 56.

[142] Case 94/77 *Zerbone*, cited at footnote 140 above.

[143] M. Waelbroeck, *Effets internes des obligations imposées à l'État*, Miscellanea Ganshof van der Meersch, Brussels, 1972, p. 573, especially at p. 577.

[144] Ganshof van der Meersch, *L'ordre juridique des Communautés et le droit international*, Proceedings of the Academy of International Law, The Hague, 1975.

[145] D. Wyatt, Eur. LR, 1978, p. 303.

[146] See footnote 140 above.

[147] Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, see footnote 13 above.

[148] Case 148/78 *Ratti* [1979] ECR 1629.

[149] Case 148/78 *Ratti* [1979] ECR 1629, ground 22.

It follows that 'a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise'. [150]

The terminology used by the Court to refer to measures giving effect to directives is a little uncertain, as we have references both to 'implementing measures' and to 'incorporation'. [151] But at any rate the direct effect of rules contained in a directive cannot be dependent on incorporation into the national system.

It has been argued that in such a case these measures would be not only pointless but also quite unlawful. The Court has spoken out against this argument: 'The effect of the third paragraph of Article 189 is that Community directives must be implemented by appropriate implementing measures carried out by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court of Justice recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. [152] This minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189 cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive.' [153]

The Court of Justice thus makes it clear that the direct effect of a directive is only a palliative, so to speak.

At the same time, by stressing the fact that Member States are under an obligation to take in good time the implementing measures required by the directive, it highlights one of the specific distinctions between the directive and the regulation.

C. **Implementing measures**

53. In its concern to see that Community law is fully effective, the Court of Justice has demanded that national authorities adopt the measures required for Community rules to achieve their full effect, while prohibiting those which would be prejudicial to the inherent nature of those rules.

In its desire to maintain the direct effect of Community law the Court constantly and firmly prohibits all implementing procedures which may be detrimental to the specific character of Community law.

The specific features which the second paragraph of Article 189 confers on a regulation—its general scope, its binding force, its full legislative status and its direct applicability—combine to make it automatically valid in all the Member States of the Community. The latter must allow Community law to operate, without being exempt from the duty to help

---

[150] Case 148/78 *Ratti* [1979] ECR 1629, ground 23.

[151] Grounds 22 and 23 respectively. In a subsequent decision Case 93/79 *Commission* v *Italy* [1979] ECR 3837, the Commission and the Advocate-General speak of implementation.

[152] See also Case 148/78 *Ratti*, cited at footnote 148 above.

[153] Case 102/79, cited at footnote 138 above, paragraph 12 of the decision.

it to operate. [154] This latter obligation is based either on specific powers delegated by the Community institutions, [155] or on the general obligation to cooperate imposed by Article 5 of the EEC Treaty.

54. This 'untouchability' of the direct effect of Community law entails a restriction on the institutional autonomy of the Member States. [156]

The principle of autonomy means that national authorities, when implementing regulations and other Community rules, in general comply with the rules of their own public law regarding the determination of the appropriate authorities and proper procedures. [157]

But their autonomy is not unlimited. In particular, the intervention of State authorities must not deprive Community law of its direct effect. Thus 'all methods of implementation are contrary to the Treaty which would have the effect of creating an obstacle to the direct effect of Community regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community'. [158] This includes all procedures which may adversely affect the direct applicability of a Community rule, or impede its effects in the national legal system. One obvious example is the practice of reproducing the content of a regulation in a national law or subordinate instrument. The risks which such practices represent for the direct effect of Community law first came to the Commission's attention, in a case concerning a system of penalties for infringements of a regulation. The argument was that the legislature could not be content with a simple reference to the provisions that were to be enforced, which had to be incorporated into the national penal legislation. [159] This disregarded the fact that regulations are designed to create a unified body of law in the Member States. [160]

The Commission, therefore, in its reasoned opinions rightly asked the Netherlands and Italian Governments [161] to have the following paragraph inserted in the preamble to their national legislation: 'whereas the fact that, for the sake of consistency and

---

[154] J.V. Louis, 'Le règlement, source directe d'unification des législations', cited at footnote 127 above, pp. 16-17.

[155] In *Bussone*, cited at footnote 140 above, the Court held that the adoption of national provisions required for the application of a regulation could not have the effect of depriving it of direct applicability (ground 36). At the most, the fact that such measures are necessary is relevant in determining whether the regulation has direct effect.

[156] See J. Rideau, 'Le rôle des États membres dans l'application du droit communautaire', AFDI, 1972, pp. 864, 884-885.

[157] In Case 39/79 *Norddeutsches Vieh- und Fleischkontor* [1971] ECR 49, at p. 58 the Court states: 'where national authorities are responsible for implementing a Community regulation it must be recognized that in principle this implementation takes place with due respect for the forms and the procedures of national law'. In Joined Cases 51 to 54/71 *International Fruit Company* [1971] ECR 1107, at p. 1116, it then held that 'when provisions of the Treaty or of regulations confer power or impose obligations upon the State for the purposes of the implementation of Community law the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State'.

[158] Case 39/72 *Commission* v *Italy* [1973] ECR 101; Case 48/71 *Commission* v *Italy* [1972] ECR 529, cited at footnote 24 above.

[159] I.G. Torley Duwel, 'Incorporatie van Communautaire Verordeningen in de nationale vervoerwetgevingen', NJB 1971, p. 457; for the contrary argument see M. Bigay, 'L'application des règlements communautaires en droit pénal français', RTDE, 1971, p. 53, and 'Droit communautaire et droit pénal', RTDE, 1972, p. 725.

[160] Commission submissions in Case 75/63 *Unger* [1964] ECR 177, at pp. 359-360, cited at footnote 8 above.

[161] Opinion of 24 February 1971 (OJ L 57, 10.3.1971, p. 26).

comprehensibility, this Order partly reproduces certain provisions of Regulation No 543/69 is wholly without prejudice to the direct applicability of that Community regulation within national territory'.

The practice of reproducing regulations was found to be most common in Italy. It was not regarded as acceptable, even though the procedure was not used systematically and therefore appeared to reflect not so much a definite plan to 'receive' directly applicable Community provisions as a desire to be comprehensive: *melius abondare quem deficere.* [162] This procedure was liable to raise doubts as to the direct applicability of the provisions which were thus reproduced.

55. Any claim by national authorities to place a binding interpretation on a Community rule would also jeopardize its nature and its effect. Both litigants and the courts themselves would be placed at one remove. [163]

The Court has been consistent in its severe condemnation of such practices. [164] The Court also sees that Member States take the measures required to ensure that Community law actually does have full effect. Even where the provision of Community law is directly applicable, this does not relieve the State authorities of the obligation to take whatever measures are required to see that Community law is fully effective. [165] In particular, they must adjust their national law in compliance with the Community rule, even though a conflicting national rule automatically ceases to have effect as a result of the principle of direct effect. The Court is not satisfied with just any national measure. The measure which is taken must leave no room for any doubt as to the effectiveness of Community law. Its judgment of 4 April 1974 regarding the French Code Maritime [166] was the first and highly eloquent example of this.

In the end, the Community did not demand that the Code du Travail Maritime be amended, as there was considerable resistance in the French Parliament. The Commission was satisfied with two French Government instructions published in the *Journal Officiel de la République Française* repeating that the principle of the free movement of persons was directly applicable and stating that as a result there was a derogation from the Code in favour of Community nationals.

56. Likewise, in connection with directives, the Court has not only repeatedly emphasized that Member States must take in good time the measures required for their implementation, but has also gone on to examine whether the measures taken were in fact appropriate, thus demonstrating the limits of the autonomy of the national authorities. A rule of practice or mere administrative tolerance does not meet its requirements as to legal certainty and security, and it refuses to accept them as 'a proper fulfilment of the obligation imposed by Article 189 on Member States to which the directives are addressed ... These measures must consist in this case in provisions equivalent to those

---

[162] Opinion of 5 November 1971 (OJ L 254, 17.11.1971, p. 12).

[163] The incorporation of provisions or regulations in national legislation and the imposition of a binding interpretation by national authorities can be seriously prejudicial to, among other things, the preliminary ruling procedure laid down by Article 177 EEC.

[164] Through a line of judgments from *Bollmann* (Case 40/69) [1970] ECR 69, cited at footnote 60 above, to *Zerbone*, cited at footnote 140 above.

[165] Case 48/71 *Commission* v *Italy* [1972] ECR 527.

[166] Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

which are applied under the national legal system for the purpose of securing observance of requirements which are described as "mandatory" in the preamble to the two framework directives'. [167]

¶ 2. *The effects of Community law in the national legal systems*

57. It is generally agreed that the fundamental distinction which must be made as regards the question of the effects of Community law within the internal legal systems of the Member States is between Community provisions having indirect effect and those having direct effect. [168] Direct effect is a crucial concept, but it is singularly complex. It is at the very heart of the relation between Community law and the national legal systems. Moreover, it is the fruit of a long and constantly developing line of cases. It may even be that excessive demands have been placed on the concept, as it has been used to serve a number of widely different purposes. Hence the broad range of terminological distinction which may be found in the literature.

The expressions are not necessarily synonymous, but those which are used include 'immediate effect', 'direct effect' and 'direct applicability', and there are so many others that it would not be possible to conduct an exhaustive study of them. [169] Even the vocabulary used by the Court of Justice itself is not entirely settled, and we sometimes have the impression that it attaches only secondary importance to standardization of usage. To take one example, the French version of the *van Gend en Loos* judgment [170] declares that the prohibition in Article 12 of the EEC Treaty *se prête parfaitement, par sa nature même, à produire des effets directs dans les relations juridiques entre les États membres et leurs justiciables,* but further on we read that Article 12 *doit être interprété en ce sens qu'il produit des effets immédiats et engendre des droits individuels que les juridictions internes doivent sauvegarder* .... And while 'direct effect' is the most commonly used expression, it is not the only one. [171] Very often the Court refrains from conceptualizing; it simply declares that the relevant rule can be relied upon by individuals in national courts. [172]

58. The Court's lack of interest in terminological matters, which is shared by a number of writers, [173] is not universal. Many writers, like the Commission, consider that direct applicability and direct effect should not be confused. When Article 189 speaks of a 'directly applicable' provision it is referring to a technique for the incorporation of Community law into the legal system applying in the Member States of the Community. A rule is directly applicable if—and because—there is no need for any reception measure

---

[167] Case 102/79 *Commission* v *Kingdom of Belgium* [1980] ECR 1473, cited at footnote 138 above.

[168] L.J. Constantinesco, *Applicabilité directe dans le droit de la CEE*, LGDF, Paris, 1970, p. 6.

[169] F. Dumon, 'La notion de «disposition directement applicable» en droit européen', CDE, 1968, p. 269, and O. Jacot-Guillarmod, *Droit communautaire et droit international public*, GEORG, Geneva, Librairie de l'Université, 1978, pp. 110-111.

[170] Case 26/62 *van Gend en Loos* [1963] ECR 1, cited at footnote 4 above.

[171] In Case 2/74 *Reyners* [1974] ECR 631 the Court uses the two expressions direct effect and direct application almost indiscriminately. In Case 43/75 *Defrenne* [1976] ECR 455, Article 119 is said to be 'capable of direct application' and at the same time is regarded as having direct effect. In Case 49/75 *Rewe* [1976] ECR 181, at p. 200, the Court states that the first paragraph of Article 95 EEC has 'direct effect', whereas in Case 65/75 *Tasca* [1976] ECR 291, at p. 309, it describes the regulation as having 'immediate effect'.

[172] See Case 77/72 *Capolongo* [1973] ECR 611.

[173] See J. Boulouis and R.M. Chevallier, *Grands arrêts de la Cour de justice des Communautés*, Vol. I, p. 155, especially at pp. 164-167.

and even less for transposition into national law. [174] Direct effect refers to the creation of rights in favour of individuals, who may rely upon them in the national courts. [175]

59. While the distinction is clear, there is a substantial qualification which must nevertheless be added. Excessive attempts to separate direct applicability from direct effect could give the impression that the two concepts are quite unrelated. And yet careful reading of the judgments of the Court of Justice provides abundant evidence to the contrary. In particular it can be seen how the Court, desirous of preserving the ability of Community law to produce its full direct effect, has sought to determine how it should be inserted into the legal orders of the Member States. [176]

60. Briefly, it can be stated that the binding rules of Community law can be classified into two main categories according to their internal effects. The first category consists of rules which have direct effect, and the second of rules which have indirect effect in the sense that, while they are binding on the States themselves, they cannot take effect of themselves in the internal legal system.

In reality this is only an initial approximation, and necessarily provisional. Only detailed subsequent study of the implications of direct effect will make it possible to come to a full understanding of the concept. While so far the accent has tended to be placed on the creation of rights or of obligations in respect of individuals, which is without doubt an essential aspect of the matter, a study of the cases shows that this is not the only function of direct effect. The variations in the terms used considered above are evidence of this. Apart from being a purely linguistic phenomenon they are evidence of the diversity and gradation of the direct effect of Community rules. At the same time, Community law having indirect effect, which has largely been assimilated to international law and therefore somewhat neglected, appears to be attracting renewed attention. These two parallel trends could produce a degree of relativization of the distinction between the two categories of Community rule, and possibly even supersede it altogether. [177]

61. This trend, to which we shall return, is tied up with a gradual process of refining the criteria of direct effect (A). The Court of Justice has substantially enlarged the scope of directly applicable Community law at the same time as it has diversified and strengthened its effects within the internal legal system (B). It may be thought that this twofold movement has been possible only because of the basis taken for the direct effect of Community law (A).

A. The basis for direct effect

62. It has been said [178] that Community law in itself contains an existential requirement of supremacy, and that the direct effect of Community law flows from the very nature of

---

[174] See above.

[175] J.A. Winter, *Direct Applicability and Direct Effect, Two Distinct and Different Conceptions in Community Law*; Schermers, op. cit. at footnote 129 above, pp. 75 and 87; A. Dashwood, *The Principle of Direct Effect in European Community Law*, cited at footnote 129 above, p. 243.

[176] See point 57 et seq. above.

[177] See, for instance, Timmermans, op. cit. at footnote 31 above, especially at p. 554.

[178] P. Pescatore, *L'ordre juridique des Communautés européennes*, cited at footnote 104 above, p. 227.

the Communities. As the Court stated in *van Gend en Loos*, [179] it is the very concept of the common market and its substantive consequences which provide the basis for the direct effect of Community law. In the EEC Treaty the Member States set out their objective of attaining a common market, and they necessarily acknowledged that this Treaty would be more than a mere agreement to be bound by reciprocal obligations. The inherent logic of a common market means that its rules must be addressed directly to individual citizens. The Court has a series of mutually compatible reasons to support its convictions. The preamble to the Treaty 'refers not only to governments but to peoples', and in the institutional structure the citizens of the Community countries are 'called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee'. Likewise, the Treaty establishes a kind of cooperation between the Court of Justice and national courts in the interpretation of Community law, which is meaningful only if the national courts can have regard to a body of Community law which litigants are entitled to plead. Hence direct effect is a concept reflecting very sharply the specific nature of the Community legal order. The concept is hence an essentially Community one.

63. In addition to this first consideration, the Court attaches considerable importance to a number of others. The unity of Community law is an essential demand inherent in its very nature. Legal concepts must be interpreted uniformly so that their Community-wide scope is preserved. [180]

Thus the Court shows a very clear preference in favour of the 'Community meaning' rather than any other interpretation technique. It has regularly reaffirmed this principle: 'terms used in Community law must be uniformly interpreted and implemented throughout the Community, except when an express or implied reference is made to national law'. [181] From the principle of the unity of Community law it deduces the need for a Community definition of direct effect. The concept cannot relate to international law, nor can it relate to national law. Otherwise it would lose both its specific nature and its unity. Here we have a specific illustration of the autonomy of Community law. In *van Gend en Loos* [182] the Court stressed that 'independently of legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'. In so holding it was dismissing the argument of the Netherlands Government that the direct applicability of Community law depended on national constitutional rules. The Court went so far as to state that the question of direct applicability depends on the interpretation of Community law itself, and is therefore within the jurisdiction of the Community court. Hence the three themes of the unity, uniformity and even the supremacy of Community law are interlinked. The Community foundation which is thus set under the direct effect concept can be seen in the conditions which must be met for the concept to apply, but it can also help to determine its consequences, though here there are limits as a result of the institutional autonomy doctrine.

---

[179] Case 26/62, cited at footnote 4 above.

[180] P. Pescatore, *Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice. Contribution à la doctrine de l'interprétation téléologique des traités internationaux*, Miscellanea Ganshof van der Meersch, p. 327, especially at p. 354.

[181] Case 49/71 *Hagen* [1972] ECR 23, cited at footnote 8 above.

[182] See footnote 4 above.

B. The conditions for direct effect

64. Direct effect is a Community concept defined by the Court on the basis solely of Community criteria reflecting the structure and objectives of the Community.

Before retracing the development of the cases determining the conditions which a rule must satisfy if it is to have direct effect, we must first stress the originality of the canons of interpretation applied by the Court of Justice.

While they are not in fact restricted to the direct effect of Community law, they are expressed with considerable clarity in that context. It can be seen from the cases that the Court's reasoning prefers the teleological, systematic approach rather than the strictly literal approach based on the intention of the legislative. This is because of the particular features of treaties designed to achieve a form of integration. In Case 26/62 [183] the Court does not confine itself to considering the arguments of certain Member States to the effect that the avowed will of the parties and the terms of the provision which was to be interpreted showed that the obligation created thereby was incumbent solely on the Member States and not on individuals. Rather than dealing immediately with the case in issue, the Court preferred to set the theory of direct effect within the context of a general Community legal order. [184] It then proceeded to remove the objections already raised by stating that rights enjoyed by individuals arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. The identity of the person to whom a provision is addressed is accordingly not the decisive criterion for judging the effects in internal law. Individual rights may be created for private citizens even if they are not expressly declared to be the addressees of a Community provision.

'The fact that ... it is the Member States who are made the subject of the ... obligation does not imply that their nationals cannot benefit from this obligation.' The accent is on the nature of the obligation rather than on the words used to define it. [185]

The way in which the Court has gone about deciding cases on this kind of point has been confirmed as regards the direct effect of Community secondary legislation. Article 189 of the EEC Treaty provides that regulations shall be 'directly applicable in all Member States', but there is no comparable provision for decisions and directives. And yet the Court has refused to exclude them from the direct effect doctrine. In *Grad* [186] the Court held that while Article 189 expressly provides for the direct application only of regulations, this does not mean that the other types of instrument cannot have the same effect. Here again, it refuses to be drawn into a strictly literal interpretation as other factors strike it as being decisive—the fact that the Community consists not only of Member States but also of peoples, and that the objective of acts addressed to Member States should not be overlooked. In certain circumstances this objective will have the effect of making such acts directly applicable. By a constructive interpretation based on the original intention, the Court goes beyond the mere letter of Article 189 and sets it within the

---

[183] See footnote 4 above.

[184] See points above on the basis for direct effect.

[185] See, among others, Case 6/64 *Costa* [1964] ECR 1143; Case 57/65 *Lütticke* v *Hauptzollamt Sarrelouis* [1966] ECR 293.

[186] Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825.

general scheme of the Treaty. In Case 33/70 the Court went on to hold that it was necessary to consider not only the form of the relevant instrument but also its substance and its function within the general scheme of the Treaty. [187] On the basis of these principles it then confirmed, in a series of cases beginning with *van Duyn*, [188] that even directives have direct effect. It has constantly held that it would be incompatible with the binding effect attached to the directive by Article 189 if private citizens could not rely upon the obligation which the directive imposes and that in each case consideration must be given to the question whether the nature, the scheme and the terms of the relevant provision are such as to have direct effect in relations with the Member States and with private citizens. [189]

It might have been thought that this would be accepted by the national courts, and yet on 22 December 1978, in the case of *Ministre de l'Intérieur* v *Cohn-Bendit*, [190] the French Conseil d'État held that it was 'clear' from Article 189 of the EEC Treaty that a directive could in no circumstances have direct effect, however clearly its provisions were drafted.

65. Proceeding from these decisions the Court's cases have moved resolutely towards extending the scope of the direct effect of Community law. On the other hand, it seems to have taken a more restrictive, and even conservative, attitude towards the ability of international agreements binding on the Communities to produce direct effects.

Examples can be found in Cases 21 to 24/72, [191] and even in Case 85/75, though in this latter case the Court recognized that a particular provision of the Convention of Yaoundé did indeed have direct effect. [192]

66. The body of case-law on the conditions required for direct effect has been built up gradually. Thus the criteria used by the Court to determine whether a particular Community rule is directly applicable have tended to change, or at least to become clearer. Let us now consider the development of these principles over the years.

Initially, in *van Gend en Loos*, [193] the Court attaches considerable importance to the fact that the provision in issue imposes a negative obligation. It stresses that the prohibition is 'clear and unconditional' and that it is not 'qualified by any reservation on the part of the State, which would make its implementation conditional upon a positive legislative measure enacted under national law'. Its implementation in relation to individuals thus requires no intermediate intervention. The Court also considers that the relative uncertainty of the concepts on which the obligations imposed on the State depend does not constitute an obstacle to direct effect. All in all, a provision expressing a clear, precise and

---

[187] Case 33/70 *SpA Sace* v *Italian Minister of Finance* [1970] ECR 1213.

[188] Case 41/74 *van Duyn* v *Home Office* [1974] ECR 1337.

[189] Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113; Case 88/77 *Enka* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 2203; Case 148/78 *Ratti*, cited at footnote 148 above; Case 21/78 *Delkvist* v *Anklagemyndigheden* [1978] ECR 2327; Case 88/79 *Grunert* [1970] ECR 1827.

[190] Recours Lebon 1978, p. 524, submissions of the Commissaire du gouvernement Genevois.

[191] Cases 21 to 24/72 *International Fruit Company and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1217.

[192] Case 85/75 *Conceria Daniele Bresciani* [1976] ECR 129.

[193] On the whole of this problem see M. Waelbroeck, 'Effect of GATT in the Legal Order of the EEC', JWTL, 1974, p. 614; V. Constantinesco, J. Dr. Int., 1974, p. 650; J. Rideau, note on the judgment of the Court of Justice in Cases 21 to 24/72, CDE, 1973, p. 477, at pp. 481-482.

unconditional obligation requiring no implementing measures by the Community institutions or by the Member States is capable of producing direct effects.

Subsequently, the Court has had occasion to specify that the intervention of implementing measures taken by a Community institution, by a national authority or by both still do not deprive a Community rule of direct effect. The crucial question is whether or not the relevant authorities are exercising a discretionary power. [194] The Court later clarified the scope of the rule it had laid down, in, among others, [195] the Reyners case [196] relating to Article 52 of the EEC Treaty. Considering the national treatment rule to be one of the fundamental legal provisions of the Community, it held that 'as a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States'. The existence of 'reception facilities' enabling the equal treatment required by the Treaty to be given in practice determines the direct effect of this provision. Article 52 cannot be deprived of its direct effect after the end of the transitional period by the existence of a general programme and directives provided for by the Treaty. The recognition of direct effect does not consist solely of acknowledging that this or that prohibition of the Treaty or of secondary legislation has a particular status but also of penalizing delays in their implementation. The direct effect rule thus helps to increase the effectiveness of Community law.

The Court denies direct effect either to Treaty provisions which impose an obligation confined strictly to relations between the Member States and the Community, as is the case of Article 93(1) and (2) and Article 102, [197] or in the case of a positive obligation, whose implementation and effects are independent of any intervention by the Community institutions, to provisions giving the Member States a discretionary power which wholly or partly excludes direct effect and enforcement by the national courts, [198] or to provisions whose implementation is subject to a special procedure conferring some discretionary power on a Community institution, as is the case with Article 92 of the EEC Treaty. [199]

67. The Court applies the same rules to secondary legislation as to the primary sources. As a result it has recognized that directives and decisions addressed to Member States can have direct effect. [200] The position of the regulation merits special comment. Certain writers have argued that a regulation referring to national implementing measures may, despite Article 189 of the EEC Treaty, be without direct effect if those measures involve any discretionary power. In *Politi* [201] the Court held that 'by reason of their nature and their function in the system of the sources of Community law, regulations have direct effect and are as such capable of creating individual rights which national courts must

---

[194] Case 27/67 *Finck-Frucht* v *Hauptzollamt München* [1968] ECR 341.

[195] Notably Case 13/68 *Salgoil* v *Minister for External Trade* [1968] ECR 661 and Case 10/71 *Luxembourg Public Prosecutor* v *Muller* [1971] ECR 729.

[196] Case 2/74 *Reyners* [1974] ECR 631, cited at footnote 171 above.

[197] In additions to *Reyners*, see also Case 148/78 *Ratti*, cited at footnote 148 above and Case 102/79, *Commission* v *Belgium*, cited at footnote 147 above.

[198] Case 6/64 *Costa* v *ENEL*, cited at footnote 1 above.

[199] Case 13/68, cited at footnote 195 above, and Case 43/71, cited at footnote 27 above.

[200] Case 68/76 *Steinike and Weinlig* [1977] ECR 595.

[201] See footnote 27 above.

protect'. It reaffirmed this view in *Leonesio*. [202] There are those who have deduced that regulations are therefore *per se* directly applicable except that the provisions of some of them, because of their subject-matter, cannot have direct effect. Others have concluded that where a regulation provides that its effects are subject to a condition, its provisions cannot be directly applicable, which means that the requirements imposed by the Court as regards the Community's primary law and the other forms of secondary legislation apply likewise to the regulation. [203] V.J. Louis states in connection with the *Leonesio* judgment that national implementing rules do not form part of the definition of the rights of the individual. Otherwise the direct effect of Community provisions would be suspended upon the adoption of such rules. [204]

C. The implications of the direct effect of Community law

68. Having been integrated into the legal orders of the Member States of the Community, Community law must still be allowed to produce its full effects there. And these effects are indeed of the broadest kind, as Mr Lecourt, past president of the Court of Justice, has so excellently described it: 'What do we mean by direct effect? We mean the right for every citizen to ask his courts to apply the Community Treaties, regulations, directives and decisions to him. We mean the courts' obligation to apply these texts, regardless of the legislation of his country. We mean respect for this right and this obligation not only in relations between private citizens but also in relations between citizens and their Member State.' [205]

Hence there are two main themes: direct effect removes barriers between nationals of Community countries and Community law (I) and up to a point the national courts are endowed with Community functions (II).

I. Removal of barriers between nationals of Community countries and Community law

69. The ultimate aim of direct effect is to allow citizens of Community countries to be directly subject to Community law. All intermediate stages in relations between the citizen and the law are thus removed. Hence the diversity of the internal effects of Community law. C.W.A. Timmermans made this very clear as regards directives. [206] Individuals can rely on them to ask the courts to interpret national law in the light of the directives' provisions, and to scrutinize the national law for compatibility therewith: to ask them to declare that the legislative has no power to enact rules which are incompatible with a harmonization directive and to apply directly those provisions of directives which have direct effect. Whatever applies to directives can without doubt be extended to the whole of Community law. On the other hand, it must be remembered that Timmermans uses the expression 'direct effect' solely with reference to a particular manifestation of Community rules. The diversity of the implications of the direct effect rule has been

---

[202] See footnote 37 above.
[203] See footnote 37 above.
[204] J.V. Louis, *The Community Legal Order*, cited at footnote 18 above, p. 89.
[205] R. Lecourt, *L'Europe des juges*, Bruylant, Brussels, 1976, p. 248.
[206] Op. cit. at footnote 31 above, p. 534.

received only gradually as attention has largely concentrated on its ability to engender individual rights. [207] And yet in *van Gend en Loos* [208] the Court of Justice had already held that Article 12 of the EEC Treaty produces direct effects and creates individual rights, the creation of individual rights being apparently no more than one of the manifestations of direct effect.

70. Direct effect in the broadest sense refers to all the forms which implementation of a Community rule can take. Indeed the Court often uses forms of words which are more expressive of the full range of internal effects of Community law. It has, for instance, held that direct effect gives individuals the right to rely on a provision in the courts [209] or that the provision may be pleaded direct in all Member States. [210] Statements along the latter lines have the advantage of ensuring both that the fullest possible internal effects of Community law can be felt and that individuals are ensured the fullest possible protection. Evidence of this approach can be seen in Case 51/76, [211] where the Court held that 'where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law'. The Court later went on to hold that where a directive leaves the national authorities no room for discretion, the directive 'may be relied upon by parties concerned for the purpose of verifying whether the national measures adopted for its implementation are in accordance with it'. [212] Accordingly, as J. Boulouis and R.M. Chevallier have put it, the directive, being addressed to the Member State, directly becomes an integral part of its legal system as a component of a body of law which the private citizen may demand to have enforced, insisting on penalties if it is not enforced. [213] With its justification in the concern to see that national measures fully reflect the requirements of the directive, individuals' right to rely on this type of act can thereafter be restricted only by considerations of *locus standi*. [214]

This gives us more general confirmation of the depth and breadth of the direct effects of Community law. As Professor W. Ganshof van der Meersch has written, [215] these include the right to oppose a measure of domestic law which conflicts with a rule of Community law but they consist above all in recognizing that the individual directly enjoys not only subjective rights but also legitimate interest which the national courts must safeguard; in many cases the individual will also be directly subject to obligations. Consequently the direct effect of Community law goes well beyond the 'simple direct effect' of interna-

---

[207] A. Bleckman is one of the most helpful contributors to the perception of the multiple implications of direct effect.

[208] See footnote 4 above.

[209] The expression was already used in *Grad* (Case 9/70 [1970] ECR 825), cited at footnote 186 above, and was taken over in *Capolongo* (Case 77/72 [1973] ECR 611), cited at footnote 172 above.

[210] Case 2/74 *Reyners* [1974] ECR 1299, cited at footnote 171 above.

[211] Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, at p. 127, cited at footnote 189 above.

[212] Case 38/77 *Enka* [1977] ECR 2203, at p. 2213; see also Case 88/79 *Grunert* [1980] ECR 1827, where slightly different words were used.

[213] This, incidentally, supports our earlier observations regarding the incorporation of directives into the national legal order (see point 57 above).

[214] J. Boulouis, and R.M. Chevallier, op. cit. at footnote 22, p. 52.

[215] Op. cit. at footnote 22, p. 252.

tional law, which consists in the individual's right to plead in his national court the international obligation incumbent upon the State, clearly determined in the Treaty, with a view to establishing whether the State has infringed this obligation, which is itself a rule of objective law. We are no longer considering simply the right to disregard a measure which conflicts with a Community obligation but the right to demand positive action.

71. For a long time direct effect was regarded as meaning no more than the creation of individual rights for parties concerned, but now we see the multiplicity of situations where the Community rule confronts the national authorities as a full part of the body of law which they are required to take into consideration. It has been asked whether the concept of direct effect was in fact being extended or even exceeded. [216] At the same time the desire to see that Community law can produce its full internal effects has led the Court to specify the scope of these effects in relation to individuals. In this context learned writers have analysed the effects of direct applicability by reference to two categories of directly applicable provisions. [217]

The first consists of those which can be acknowledged to have full and entire direct effect. They are capable of generating rights for individuals and of imposing obligations on them. Their effects can be felt both in relations between individuals and national authorities and in relations between individuals alone. Hence we have 'vertical' direct effect in the first case and 'horizontal' direct effect in the second.

Regulations generally belong to the former category, as do certain provisions of the Treaties, such as Articles 85 and 86, 59 and 60 [218] or 119 of the EEC Treaty. [219]

Provisions with only limited direct effect belong to the second category. They furnish individuals with rights which they can rely upon against States without imposing obligations on them. A number of the provisions of the EEC Treaty are of this type. [220] It has been maintained that, in so far as they have direct effect, directives and decisions addressed to the Member States must fall into this category, [221] but other writers have been more guarded. [222] The Court has not yet ruled explicitly on the 'horizontal direct effect' of directives; it has confined itself to stating that an individual may rely upon rights conferred by directives and decisions against a State but not against other individuals. The need for implementing measures emphasized by the Court in Case 102/79 arises from the partial and remedial nature of the direct effect of directives.

For Community law to operate efficiently, it must be possible for all its effects to be fully deployed in the internal legal system. It will, however, still require effective assistance from national authorities, and in particular, the courts.

---

[216] See Timmermans, op. cit. at footnote 31, p. 554.

[217] See especially D. de Ripainsel-Landy, note on the *Grad* and *Sace* rulings, CDE, 1971, p. 465.

[218] Case 36/74 *Walrave and Koch* v *Union Cycliste Internationale* [1974] ECR 1405.

[219] Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

[220] See for example Articles 12 et seq. and 95 et seq.

[221] In agreement see D. de Ripainsel-Landy and A. Gerard, 'La notion juridique de la directive utilisée comme instrument du rapprochement des législations dans la CEE', in *Les instruments du rapprochement des législations dans la CEE*, op. cit. at footnote 217 above, pp. 38, 69-70; C.W.A. Timmermans, op. cit. at footnote 31 above, especially at pp. 541-542.

[222] See especially O. Stocker, note on the second *Defrenne* ruling, CDE, 1977, p. 168, especially at pp. 208-209; E.J. Easson, 'Can Directives Impose Obligations on Individuals?', ELRev., 1979, p. 66.

II. The Community character of the function of the courts of the Member States

72. Two somewhat contradictory principles—the effectiveness of Community law and the procedural autonomy of the State—must be reconciled. The result is that the direct effect of Community law is to some extent restricted while national autonomy must sometimes yield to the requirements of Community law. National courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law and to do so they use the means provided by their own legal systems, as the Court noted in the *Comet* ruling. [223]

As can be seen, when considering the limitation periods laid down by domestic law for the recovery of taxes levied in contravention of Community law, the Court recognized the principle of procedural autonomy but hedged it around with certain restrictions. One may suppose that the same principle should also be applied to the organization of the action itself, to the system of national penalties to be applied in cases of infringements of Community law and to the means of refunding taxes which traders have been wrongly required to pay. [224]

73. The Court has nevertheless taken care to spell out the obligations of national courts and in doing so has contributed to limiting the scope of this autonomy which would seriously restrict the direct effect of Community law if it were to become absolute. The Court laid down its criteria in Case 48/71 [225] and again in *Simmenthal*, [226] when it stated: 'This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.' There is therefore a tension between the direct effect of the rule and need for an intervening body to enforce it. National courts have a Community task, normally within the framework of what has come to be known as the principle of 'institutional autonomy'.

74. This can in fact only be a relative autonomy, its limits being set by the principles of the uniformity, supremacy and direct applicability of Community law. [227]

This was the basis for the Court's statement in *Simmenthal* [228] that direct applicability 'means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force'. It also led to the Court's view that the obligation for the Italian courts to refer to their Constitutional Court every case in which the question arose of the conformity of national law with a directly applicable Community rule did not satisfy the requirements for direct applicability of Community law. In Case 48/71 [229] it had stated that 'the attainment of the objectives of the Community requires that the rules of Community

---

[223] Case 45/76 *Comet* [1976] ECR 2043; see also Joined Cases 119/79 and 126/79 *Lippische Hauptgenossenschaft AG* [1980] ECR 1863.

[224] See for example Case 130/79 *Express Dairy Foods Ltd* [1980] ECR 1887.

[225] Case 48/71 *Commission* v *Italian Republic* [1972] ECR 527, cited at footnote 24 above.

[226] Case 106/77 *Simmenthal* [1978] ECR 629.

[227] See R. Kovar, 'Le recours des individus devant les instances nationales en cas de violation du droit européen', report to a colloquium at the University of Brussels, Brussels, 1978, p. 245 et seq.

[228] See footnote 24 above.

[229] Case 48/71 *Commission* v *Italian Republic* [1972] ECR 527, cited at footnote 24 above.

law ... are fully applicable at the same time and with identical effects over the whole territory of the Community without the Member States being able to place any obstacles in the way'. The supremacy of Community law, which is closely connected with the principle of direct effect, is a further check on institutional autonomy. The Court has repeatedly reaffirmed the view which it expressed in Case 6/64, [230] and in emphasizing the absolute supremacy of Community law the Court has also demonstrated its supremacy over institutional autonomy. No considerations arising from national legal systems, and particularly from rules concerning the jurisdiction of the courts and the procedures which they should apply, can be set against the requirements of Community law. Such obstacles must be removed as soon as they threaten to diminish the effectiveness of Community law. As Lecourt puts it, this means that the courts must apply and interpret provisions of the Treaties in such a way that throughout the area to which they apply the common rule may achieve all its Community consequences, in law and in fact, both actual and potential, without being hampered nor indeed impeded by any national legal obstacle which has not been expressly permitted. [231]

These are the requirements which led the Court to free national courts from the obligation to observe certain rules limiting their powers. With regard to the procedure for obtaining a preliminary ruling under Article 177, it stated in *Rheinmühlen* [232] that 'the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power provided for by Article 177 of referring cases to the Court of Justice'. [233] Furthermore, in *Simmenthal* [234] the Court concluded that it was not possible to withhold 'from the national court having jurisdiction to apply such law (Community law) the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect', by regarding the question of whether national law conforms to Community law as the province of the relevant authority, in this case the Constitutional Court.

This point requires a more thorough analysis of the relationship between the direct effect of Community rules and institutional autonomy, especially as regards the consequences (for the national court) of the principles of direct effect and supremacy laid down by the Court of Justice. The question is the degree of autonomy allowed to national courts when they are faced with a conflict of rules.

75. From the direct effect of Community law, the Court has, as we have seen, deduced that such Community rules have consequences which concern 'any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law'. Although the national court has tasks with regard to Community law apart from ensuring respect for the subjective rights [235] which it confers on individuals, what is particularly noteworthy is that the Court has tried to produce a balanced statement which reconciles the autonomy of national courts with the direct effect of Community rules.

---

[230] *Costa* v *ENEL*, cited at footnote 1 above.
[231] R. Lecourt , op. cit. at footnote 205 above, p. 240.
[232] Case 166/73 *Rheinmühlen* [1974] ECR 33.
[233] Case 166/73 *Rheinmühlen* [1974] ECR 33, at p. 39.
[234] See footnote 24 above.
[235] See point 84 et seq. above.

76. Some writers [236] have considered that the Court had taken a path leading to contradiction rather than conciliation. Boulouis regards as inconsistent the simultaneous affirmation of the consequences of the direct effect of Community rules and the role of the national court which has to enforce those rules in the face of opposing national legislation; he argues that the source of law and the role of the court cannot be seen in isolation from each other if the existence of a real legal order demonstrates that we are in an integrated system. [237] Here there is an apparent dilemma: the total coherence of the Community edifice, as characterized by the absence of specific rules and procedures to regulate conflicts between Community law and opposing national law, implies that in such a case the national court should be regarded as a decentralized Community court exercising a Community function on the Community's behalf. This is what Carreau [238] would like us to accept when he raises the issue of that duality of functions which is inherent in any legal system of the federal type and to which Scelle is so attached. On the other hand, institutional autonomy is a better description of the present state of relations between the Court of Justice and national courts and, on a more general level, between national and Community institutions, even if it sometimes means accepting the validity of national rules which may limit the effectiveness of Community law. Thus in the case of rules concerning limitation periods, the Court accepts the exclusive jurisdiction of national law provided such rules are reasonable and produce results which are no less favourable than those governing comparable rights of action on an internal matter. [239]

77. This choice demonstrates what the Court's solution really means. It is apparently paradoxical for it seems to satisfy neither those who would regard as logical the alignment of organic relationships on legal relationships nor those who consider that institutional autonomy is circumscribed only by internal legal considerations.

The *Simmenthal* ruling containing still more categorical statements, is in the direct line of decisions which, although they admit of institutional autonomy, hedge it about with limits to meet the requirements of the Community order. Even though a national court is acting within a national legal system, it 'is under a duty to give full effect to (Community law), if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means'. [240] In its statements, the Court clearly rejects any form of organic or procedural dualism without going so far as to assert a jurisdictional monism. The national court, even when exercising its national jurisdiction, is required to ensure the procedural application of the entire and direct effect of Community law. There is no better way of expressing the desire to eliminate any incipient dualism than by establishing unequivocally the concept that the direct effect of Community law must be ensured by the national court by the setting aside of contrary provisions of national law, even at the risk of exceeding its jurisdiction. This solution is certainly one of those where the tension

---

[236] See J. Boulouis, AJDA, 1978, p. 324.

[237] *Idem.*

[238] D. Carreau, note on the *Simmenthal* ruling, RDTE, 1978, p. 381.

[239] Case 33/76 *Rewe* [1976] ECR 1989, cited at footnote 171 above and Case 45/76 *Comet BV* [1976] ECR 2034, cited at footnote 223 above. See note by R. Kovar, 'Droit communautaire et droit procédural national', CDE, 1977, p. 230.

[240] See footnote 24 above, ground of judgment 24.

between the direct effect of rules and the maintenance of a certain autonomy for the courts is most clearly felt. This autonomy is becoming limited to the exercise of national functions as defined at Community level.

The role of the national court as defined by the requirements of the structure of Community law with direct effect is no more than the identification of the single rule applying to the dispute. Since directly applicable Community law supplants any other law, the national court does not resolve the conflict but merely applies this law which is the chief element of the objective legality binding on the court. Truly, we have now arrived at the limits of functional dualism.

78. At the end of this survey, a conclusion may be hazarded. The Court of Justice has felt an increasing need to ensure the total direct effect of Community law and this has led it to make increasingly stringent demands on national legal systems. At first these demands were expressed with reference to the relationships between legal rules, but soon they extended to the relationships between institutions. The Court has been forced increasingly to align the principles of organic direct effect on the coherence of normative direct effect. It remains to be seen whether the point reached by these decisions is the final limit or whether this path allows of further progress. What has been achieved so far illustrates the complexity of the Community legal order, an order of a rather special hierarchical kind which cannot be fitted into pre-existing categories.

Chapter VII — The Court of Justice

by Hjalte Rasmussen

Section I — The conception of the Court's jurisdiction in the European Communities

1. Oliver Wendell Holmes, a judge of the United States Supreme Court, once said that the United States would not come to an end if the Federal Supreme Court were not empowered to pass constitutional review of the legislative acts of the American Congress. On the other hand, he said, the Union would be imperiled if the Supreme Court was lacking the power to declare a state act invalid in case it was incompatible with the Federal constitution.

The European Communities represent an experiment in federalism. The essence of federalism is that hitherto independent powers pool some of their sovereignty and set up common institutions which are autonomous to the extent of the powers transferred to them. It is, accordingly, characteristic of federalism that the power to make, administer and review laws, etc., is shared between several institutions: between, on one hand, the common legislative organ and, on the other, the original legislative organs. Within each autonomous entity there is usually a separation of the legislative, executive and judicial powers. To some extent it is the duty of the Community institutions, acting together, to exercise the powers of the Communities. In so doing each institution acts within the powers conferred upon it by the Treaties. In reality, the balance between the institutions, central and local, is an extremely delicate one. In an organization of such complex structures, the question often arises whether one organ has legislated on a matter which falls within the decision-making power of some other autonomous entity or which, under restrictive provisions of the basic constitutional instrument, cannot be the subject of legislative action; or whether an administrative authority or judicial tribunal acts in breach of the written or tacitly recognized limitations on its competence.

The form which the basic constitutional instrument takes is, it is submitted, immaterial; it may be a treaty, a constitution or some other instrument.

Judicial review lies at the heart of the system.[1] In a typical federation, responsibility for reviewing the laws rests with a federal supreme court; as a rule, this responsibility is

[1] The Court of Justice of the European Communities (CJEC) and its work have aroused interest among the most distinguished commentators. Space is too limited here to include detailed bibliographical references; we have had to confine ourselves to case references. We express our thanks and, without naming them, acknowledge our indebtedness to the writers on whose ideas and suggestions much of this study is based.

enshrined in provisions of the federal constitution itself. This is an interesting point. The alternative, which was rejected, would have been to leave responsibility for conclusive and final interpretation of the constitution to the political process.

¶ 1. *The place of the Court of Justice in the institutional system*

2. Whereas, under Article 174 EEC, the Court of Justice of the European Communities is empowered to annul Community acts, including regulations, Article 171 permits it merely to determine whether in promulgating a particular law or other measure a Member State has failed to fulfil an obligation under the Treaty. Is the Community at risk because the Court of Justice cannot annul laws and other legislative acts which the Member States may promulgate in breach of the Treaties?

Under the Treaties, moreover, the Member States and the Community institutions alone possess an unconditional right to bring an action before the Court. In common with some national constitutions, Article 173(2) EEC puts the ordinary citizen or businessman in a weak position as plaintiff if he objects to a general regulation, Community or national, as an infringement of his rights under the Treaties. In the case of Article 177 EEC, there is no reference at all to individuals who may be involved. Does this justify anxiety regarding the process of supranational integration, political and economic, in the Community? Or, has the Court of Justice refused to accept the constraints by which the Treaty patently limited its power to monitor the way in which the Community institutions and the Member States observe the Treaty?

The scope of this paper on the jurisdiction of the Court in the European Communities comprehends in general interpretation by the Court of its powers as an institution in a community of States and individuals striving for economic integration. The paper more specifically highlights on the extensions of the said powers by way of judicial interpretation.

3. The idea of setting up a judicial authority is already to be found in the statement made on 9 May 1950 by Robert Schuman, French Minister for Foreign Affairs, concerning the creation of the supranational Coal and Steel Community.

It was soon to become clear that the judicial institution of the Community was intended to be a real court of justice.

With the entry into force of the Treaty of Paris establishing the ECSC, the Court of Justice, set up under Article 7 of the Treaty, became the guardian of the new legal order. Later, under Article 4(1) of the EEC Treaty and, likewise, Article 3(1) of the Euratom Treaty, a Court of Justice was set up for each Community.

The supplementary Convention on Certain Institutions Common to the European Communities, of 25 March 1957, determined that the jurisdiction conferred upon the Court of Justice by each Treaty should be exercised by a single Court of Justice. This Court began work when, in October 1958, the supplementary Convention came into force. Since then, judges and advocates-general have been appointed or re-appointed every three years, in October.

4. The Treaties had invested the Court of Justice with specific jurisdiction and powers. From the standpoint of those subject to its jurisdiction, some of the Court's powers provide them with the means of redress. Thus means are provided whereby in an action based on the alleged violation of a right, a hearing can be secured before the Court. Whether one prefers to speak about 'remedy', 'jurisdiction' or 'competence', or to use any other terminology, these articles in the Treaties and, exceptionally, in provisions of secondary legislation have this in common that they constitute the foundation on which the Court can fulfil its task. Is there, one may reasonably ask, a difference between the foundation provided for in the Treaties and the way in which the Court uses its powers in practice? Is it possible to identify differences between the function which the draftsmen of the Treaties intended the Court to discharge and the place which, in reality, it occupies in the institutional system?

To put the question in terms reminiscent of Montesquieu, did the Court accept the role of the political institutions as leaders in the development of the Community? Acceptance would, in practice, probably have meant recognition by the judicial authority that, in certain not very narrow fields, the political institutions had the right to decide how Community law, including the Treaties, should be interpreted. Or would the Court be more likely to regard and assert itself as an institution no less responsible for ensuring the progress of Community integration than the Council or the Commission? In practical terms, that would mean asserting its claim to recognition as the conclusive and final interpreter of Community law.

In the latter case, what would happen if, as a result of inertia at the political level, the economic and social integration of the Community were proceeding at a pace which a majority of the Court judged to be slower than that required by the Treaty? Could they contemplate imposing their will upon the political will of the Council? Could the Court of Justice be acting lawfully 'to ensure that in the interpretation and application of this Treaty the law is observed' if, for political reasons, it cooperated in slowing down the pace of Community integration?

5. This paper on the jurisdiction of the Court in the European Communities covers several main subjects. First is the Court itself, described against the background of its history. This concentrates on the old Court of Justice of the ECSC and, more particularly, on the Court as a common institution with special reference to its powers within the framework of the EEC. The latter Treaty will occupy the foreground since, over the years, the majority of the cases brought before the Court related and still relate to the EEC Treaty.

Secondly, there will be an attempt to capture the image of what the Court will be like in the 1980s, just a rapid glance as this picture of the Court must necessarily be. So far as possible, the picture will take in certain problems with which the Court was faced in 1980. Some suggestions will be made as to how those problems might be resolved.

The third subject is the period from 1950 to 1980, with emphasis on the directions in which the Court has developed the foundations of its jurisdiction and the ways in which it has done it. Even a superficial study of the case-law reveals that the Court of Justice has, in various ways, adapted the original basis of its jurisdiction to what it felt to be its task. In all probability, this resulted from an effort to strike a better balance between the original foundation, as it emerged from the political compromises of those who framed

the Treaty, and the interpretation placed upon it by the Court in the light of its experience in carrying out its task.

The fourth main topic is the task or institutional role of the Court, as the Court itself sees it. It is an important topic since a knowledge of the subject-matter makes it easier to describe and understand the other three. It receives careful attention in point 59 et seq. below.

6. Lack of space has imposed certain restrictions, the most important of which is that the paper deals mainly with the EEC Treaty. Another restriction is that there is no room to go into every aspect of the Court's jurisdiction in relation to that Treaty.

To deal with the issues common to all three Communities, the Court's jurisdiction is described under the following heads:

(i) *direct actions* as provided for in Article 169 EEC (relating to infringement by a Member State of an obligation under the Treaty), Articles 173, 175 and 178 EEC (for annulment, for failure to act and for damages, based on an illegal Community act) and Article 179 EEC (by officials);

(ii) *references for a preliminary ruling* under Article 177;

(iii) *the special procedure for determining the legality* or otherwise of contemplated agreements, as provided for in Article 228 EEC, Article 103 EAEC and Article 95 ECSC.

A further restriction arises from the fact that, in the space available, it is impossible to cover every aspect of the Court's tasks and responsibilities, so emphasis will be laid on the constitutional aspect. Out of the mass of relevant material a selection has been made in order to give due attention to this aspect.

7. So long as the documents which led to the final drafts of the Treaties are not officially available, we can only guess what examples of judicial authority were used by those who drew them up. Without doubt, there must have been lively discussion on the subject of the Court of Justice's function and responsibilities. The differences in the pattern of the Court's jurisdiction, as between one Community and another, show that nothing was taken for granted.

An initial indication of the draftsmen's conception of the Court's functions is provided by the injunction which they inserted in the Treaty of Paris that its task is to 'ensure that in the interpretation and application of this Treaty and of the rules laid down for the implementation thereof the law is observed' (Article 31 ECSC). An almost identical wording was embodied in the Treaties of Rome (Article 164 EEC and Article 136 EAEC).

In all probability, the following considerations led to the creation of the Court and to this definition of its task. In the first place, the establishment of judicial control with effective powers would reflect the constitutional traditions of the six Member States, the object being to avoid endowing the institutions with substantial political authority to lay down rules without at the same time giving those subject to the law protection against illegal acts. The European Community must be a community based on the rule of law. Perhaps this principle contains the implication that the Court of Justice is there to safeguard something more than the law as a body of rules; that, over and above 'the law', it must safeguard 'the rules of law'. Were the fundamental rights of those subject to the law uppermost in the draftsmen's minds?

Secondly, the Treaties struck a balance between the functions of the various institutions, those transferred to the Community and those retained by the Member States. A judicial organ was made responsible for maintaining this balance intact; no one dared to leave this duty to be discharged through political channels alone.

In the third place, it was essential to ensure that the Treaties, especially the provisions relating to progressive integration at economic, social and political level, were consistently interpreted. The Treaties invested the judicial authority of the Community with this function as well.

Moreover, the words employed suggest that those who framed the provisions on the Court of Justice intended to provide the Community with a court possessing authority and corresponding powers. However, it remained to be seen whether these powers were sufficiently strong to safeguard the Community's institutional balance when the Community would encounter resistance from the political and economic forces in the Member States which refused to accept, without a fight, the claim to be obeyed put forward by the new centre of legal and political power. In its application and interpretation of the Treaty, the Court was called upon to play an important role in enabling the Community to acquire the legitimacy which compels loyalty. Any attempts, on a Community scale, to enact legislation without the loyalty of those subject to it would be an empty pretension, a mere claim to exercise power.

¶ 2. *The determination of constitutional validity in the Communities; comparison with the United States of America*

8. When the draftsmen of the Treaties proposed to set up a judicial safeguard and to ensure a particular institutional balance, what examples did they have in mind? With nothing to go on, they sought to form an increasingly close union between the nations of Europe and created common political institutions with this objective constantly in mind. The institutions were empowered to enact legislation and administer it and, in so doing, to impose directly-applicable obligations on individuals and undertakings in the Member States. Given constitutional traditions of several of the founding States, it is astonishing to find that the judicial authority which the Treaties established as a counterbalance was one which did not recognize the individuals and undertakings concerned as having the right to bring a direct action before it. The only exceptions worthy of mention appear in Articles 33, 35 and 40 ECSC. Under Article 33 ECSC individuals had a virtually unconditional right to bring an action before the Court on the ground that an act of the ECSC, including a binding legal instrument, did not comply with the Treaty. All that had to be proved was the existence of grounds for annulment. However, the Court placed such a wide interpretation on 'misuse of powers' that very little stood in the way of an applicant seeking the protection of the Court against the regulations of the High Authority.

At the same time, a provision was included in Article 35 ECSC under which natural or legal persons could bring an action for failure to fulfil an obligation against the High Authority and in *Gezamenlijke Steenkolenmijnen in Limburg*[2] the Court ruled that this right of action could be exercised also in cases where the action was founded on the

[2] Case 30/59 [1961] ECR 1.

ground that the High Authority had unlawfully failed to initiate proceedings for infringement against a Member State.

In 1958, the establishment of two new Communities opened the way for a strengthening of economic and social integration in terms of both extent and depth. However, coincidentally, restrictions are placed on the right of individuals to bring direct actions before the Court. Among the important new restrictions are noted the provisions of Article 175(3) EEC concerning actions for failure to fulfil an obligation and the provision in Article 173(2) EEC making an action for annulment available only to individuals or firms to whom the decision complained of is of direct and individual concern.

In so doing, the draftsmen clearly preferred to base the Community judicial authority on a model which was not drawn from other examples of political and economic integration on a continental or multi-national scale.[3] Although, in all probability, familiar with the pattern of a thoroughgoing federal judicial system, such as that in the federal constitution of the United States, they decided to construct a judicial authority for the Communities along different and weaker institutional lines. Clearly, the new authority and many specific features of its structure were inspired by the administrative law and procedure of France. For example, Articles 33, 35 and 40 ECSC bear the clear imprint of such parentage.

The provisions of Article 177 EEC relating to the procedure for a preliminary ruling appear, on the other hand, to have been based on the preliminary ruling procedures of Italy or Germany for testing constitutional validity. In this connection, two points are worth noting. The first is that those who first established the constitutional courts in Germany and Italy made extensive use of the American 'model'.

The second is that, none the less, several of the methods adopted to provide a means of redress before the Community court are modelled after the judicial structures which are typical for unitary States. To put it in slightly different terms, why, for example, should France recognize the Court of Justice as having a wider jurisdiction than the *Conseil d'État* or an international court, or an appreciably different one from that of those courts? Nevertheless, at least since 1958 and especially since the judgments in *van Gend en Loos*[4] in 1963 and *Costa* v *ENEL*[5] in 1964, the constitution of the Community has possessed many features which have more in common with present-day Canada and with the United States (in the formative years) than with Germany, Italy or France of the 1950s.

This is surprising if only on the assumption that the institutions of a society must, as regards their functions and structures, make due provision for its foreseeable problems and for their nature. Perhaps have even certain interpretative developments (to be verified later) which the Court of Justice has accomplished in order to enhance its ability satisfactorily to discharge its functions and duties, their root in the circumstance that, while the Community was established as an experiment in federalism, the Court and many of its powers were drafted with models drawn from unitary States in mind. Against this background, it may be of interest to give an indication of the relative weakness and modesty in terms of its institutional weight, which the Court, in the Treaties' initial

[3] *Studies in Federalism*, 1954, by Bowie and C.J. Friedrich, was conceived as a work specially commissioned in readiness for the negotiations on the European Community Treaties (more than 800 pages!).

[4] Case 26/62 [1963] ECR 1.

[5] Case 6/64 [1964] ECR 585.

design, represents within the Community's system. As this can be done by comparing its methods of redress and its structure with those which have been tried out elsewhere, a brief comparison with the Federal Supreme Court of the United States will be given.

9. The salient feature of the American judicial system is that the hierarchy of courts with which every state of the Union is endowed exists alongside a hierarchy of federal courts. The latter's jurisdiction is, however, confined to disputes arising out of federal law.

An appeal against the court's decision can be brought before the United States Supreme Court both from the State and Federal District Courts and from the Federal Appeal Courts, but only on issues relating to the application or interpretation of federal law or, of course, the federal constitution. In practice, the Supreme Court itself decides whether it will entertain an application, before passing judgment upon the merits.

The American constitution expressly empowers the Supreme Court to determine whether the laws of a state contain provisions which, under the federal constitution, are unlawful. On the other hand, a constitutional battle had to be fought before the Supreme Court was vested with power to review the constitutional validity of legislation adopted by the federal Congress. [6] Since 1937, frequent use has been made of this power. The Supreme Court has not hereby confined itself to any kind of strict constructionism on legalism; it has also freely ruled on the question of whether a law conforms with the spirit of the federal constitution. The reply to these questions has frequently depended on the individual views of the majority of the members of the Court as to what this spirit consists of. In the event, this gave the Supreme Court the valuable right to review the policy of Congress rather than the way Congress gave effect to the constitution.

With its rules on the means of redress, the American judicature is able to ensure that every individual receives the fullest protection by the courts against any abuses of power. Nevertheless, the federal courts, especially the Supreme Court, have demonstrated that, when called upon to decide between the aspirations of the states and those of the federal government to greater political and economic influence and power, they have fairly consistently thrown their weight into the balance in favour of the federal government.

10. The draftsmen of the Treaties, it is submitted, wished to avoid laying the foundation for an institutional parallelism which, all things being equal, would enhance the likelihood of a similar evolution, generated by EC judicial fiat, towards a rapid and increasing concentration of power in the hands of the central government. Admittedly, we shall not be able to prove that these were the sort of considerations which markedly influenced their conception of the judicial organ which would best serve the Community. What we know, however, is that they did not adopt a judicial system which, in terms of institutional legitimacy or the means of creating an effective judicial authority, bears much resemblance to the American system.

Without setting up an exclusively Community court hierarchy, the draftsmen of the Treaties could have provided judicial protection for those coming within its jurisdiction by leaving the courts of the Member States to safeguard Community law, subject to a right of appeal to the Court of Justice in matters involving that law. If, under such a system, the Court of Justice had been empowered to annul both the acts of the

[6] See especially *Marbury* v *Madison* 1 Cranch 137 (1803).

Communities and acts promulgated contrary to the Treaties by the Member States, this would have provided a very substantial safeguard for the individual in his relationship with the law. A system along these lines would have resembled the judicial system adopted under the Bonn constitution of 1949.

The system chosen by the ECSC Treaty is the one which comes nearest to the federal and confederal prototypes referred to above. However, the legislative acts of the High Authority were, strictly speaking, decrees rather than laws. The ease with which, as indicated earlier, a case could be brought before the Court of Justice under Articles 33 and 35 ECSC seemed to constitute a check on the legality of a decree rather than on the constitutional validity of a law. In contrast, from the outset, the Treaties gave the Court a weak jurisdiction to supervise the way in which the Member States observe their obligations under the Treaties. This jurisdiction is much weaker than the counterpart powers created by the constitutions of the Federal Republic of Germany and of the United States.

When the EEC was established in 1958 the character of some Community legislation changed. In particular, a number of the Council's regulations now bear a remarkable functional resemblance to a (Danish) law, in terms of content and especially of form. Nevertheless, as the Court of Justice was inherited from the ECSC, one could hardly entirely withhold the jurisdiction to exercise judicial review conferred upon it within the framework of that Treaty. At the same time there was, in the six Member States, a traditional aversion to empowering the courts to determine the constitutional validity of laws. The difficulty was satisfactorily resolved by retaining the Court of Justice while placing very severe limitations on the right of natural or legal persons to bring an action before the Court in order to test the legality of regulations (Article 173(2) EEC) (see point 49 below). Thus the system of monitoring the EEC Treaty by the Court became *sui generis*.

11. To conclude, it is fair to state that the draftsmen of the Treaties seem to have striven to establish a judicial system founded on rules relating to judicial determination of 'constitutional validity' and 'legality' which, under a procedure based on the right of the Member States to bring an action before the Court, would protect their interests in particular. However, the Community institutions were also endowed with very wide powers to involve the Court of Justice in any dispute concerning constitutional validity. Actions relating to the compatibility with the Treaties of legislation by the Member States would, though, in this system of checks and balances enjoy a low status. This conclusion is suggested by the possibility that a tolerant view might be taken of the way in which Member States observe their obligations, a not unforeseeable consequence of any system under which it was left to the Commission's discretion whether to bring infringements of the Treaty before the Court.

It is impossible not to be struck by the modest role allotted to natural or legal persons as prospective applicants before the Court. This applies no less in the context of review of legality involving the Community (Articles 173, 175, 178 and 228 EEC) than in cases involving the Member States and the compatibility or otherwise of their laws with the requirements of the Treaties (Article 177 EEC).

This concludes the account of the Court of Justice as it was in the early years of the Community, and as it was conceived by those who drafted the Treaties.

After an outline of the organization of the Court (in Section II) and its procedure (Section III), an explanation will be given, against this background, of how the Court of Justice has widened the basis of its jurisdiction (Section IV).

Section II — The composition and organization of the Court of Justice

12. The rules on the composition of the Court of Justice, the conditions under which its members are appointed and its jurisdiction are set out in the three Treaties and in the Protocol on the Statute of the Court annexed to the Treaties. The Statute of the Court contains provisions relating to the organization of the Court, the legal status of the judges and of the advocates-general and the procedure.

The latter is covered in detail in the Rules of Procedure which, with the consent of the Council, the Court adopted in 1959. In 1962 they were supplemented by additional articles dealing with letters rogatory and legal aid. Further changes have been made subsequently.

Finally, the Court was vested with unlimited jurisdiction under secondary legislation, specifically the Community Staff Regulations[7] and Regulation No 17 of the Council[8] implementing the rules of competition.

¶ 1. *The appointment of members of the Court of Justice*

13. At the end of 1980, the Court comprised nine judges and four advocates-general. Before the Community was first enlarged, the Court comprised seven judges and two advocates-general. On the accession of Greece, it must include at least one more judge, of Greek nationality (see point 20 below on the nationality problem and point 44 *in fine* on the number of members of the Court after March 1981).

Article 167 EEC requires the judges and advocates-general to be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognized competence.

14. More important than the question whom the governments can appoint is to know what types of men and women they have actually vested with such high responsibilities. The answer to that question might give us an idea as to how the members of the Court will approach their judicial task. The interpreter reveals the style of the interpretation, especially in a new institution where traditions have not acquired much weight or compelling force; an outstanding lawyer, trained and used to working in a comparatively narrow field. will be likely to have a very different outlook from that of a lawyer who has had parliamentary, ministerial or Cabinet experience.

By the end of 1980, 28 judges and seven advocates-general had been appointed over a period of 30 years, all of them men.

---

[7] Council Regulation (EEC) No 259/68 of 29 February 1968 (OJ L 56, 4.3.1968).
[8] OJ 13, 21.2.1962.

From what professional fields were they drawn? Barely one judge out of two, and one out of the seven advocates-general, had at any time served in a judicial capacity, and then, in most cases, only for a short time. Only a few members of the Court appointed later had served exclusively in a judicial capacity.

Another point worthy of note is that the majority of those appointed had followed careers involving a wide variety of political and professional activities. A substantial number of them had been, for fairly lengthy periods, university professors and barristers while one of them had even been an engineer. In view of the number of occasions on which these judges had represented their governments at international meetings or conferences, or had played a leading role as chairmen of committees etc., the judges and advocates-general can almost all be said to have been at one time in their careers closely involved with the government of their respective countries.

A further point is that about one judge in three was at one time an elected member of a parliament; some, in addition, were for a substantial period ministers in charge of a variety of departments. Among those who came to the Court after serving as members of parliament or ministers was Robert Lecourt, former Minister of Justice during the Presidency of General de Gaulle. Mr Lecourt was probably the judge who played the greatest part in developing the policy followed by the Court in the field of interpretation of the Treaties as a whole, including, of course, their provisions relating to the jurisdiction of the Court.

Mr Lecourt became a member of the Court in 1962; in 1967, he became its fourth President, just as John Marshall had, in 1801, been the fourth Chief Justice of the United States Supreme Court. Like John Marshall, Robert Lecourt took over the Presidency of the Court at a time when a number of basic issues of constitutional law had yet to be resolved. When he became President, he headed a team of judges who were above all men of affairs. Several of them, after some years' service as members of a European court, were well versed in the collegiate and anonymous tasks of their office and in the legal system of the Community. This applies to the Dutch judge, A. Donner, who had also been President of the Court of Justice for a time, to the German judge, Walter Strauss, and to the Italian judges Alberto Trabucchi and Riccardo Monaco. All of them had been colleagues of Robert Lecourt when he was still an ordinary member. At the time when he became President of the Court, Pierre Pescatore, of Luxembourg, and Josse Mertens de Wilmars, of Belgium, began their terms of office.

When this team was assembled, the Court was not called upon to deal with many cases in any one year. A total of 36 cases in 1967 comprised 4 actions for annulment, 9 actions by Community officials and 23 references for a preliminary ruling. The Court's reaction was to try to increase the number of references for a preliminary ruling. Its efforts in this direction and the successful outcome are the subject of detailed comment below.

15. As the number of cases and the variety of issues brought before the Court increased, it is clear that, after very few years of preparation, in the course of which, among others, Hans Kutscher, who was to become President on the departure of Lecourt in 1976, succeeded his compatriot, Walter Strauss, in 1970, the Court, under Lecourt's Presidency, began to increase the pace at which its judgments were building up a body of case-law.

There was no sudden change in this process after President Lecourt left in 1976. The judgments in question together with those in the cases of *van Gend en Loos* and *Costa* v

ENEL, [9] already cited, are the cornerstones in the construction of Community law. Without the slightest doubt, they are the 'mortar' which, in the face of political and economic crises, still keeps the bricks of the Community constitution in place. When the judges from the new Member States, first Lord Mackenzie Stuart, a Scot, from the United Kingdom, O'Dalaigh, from Ireland, and Max Sørensen, from Denmark, and later, the Irishman, O'Keeffe, commenced their term of office at the Court, they too gave, so far as can be judged, their unstinted support to the furtherance of the work of building up case-law (see also point 59 et seq. below). It is obviously too soon to reach any conclusion other than the following: whereas the desire for integration, which was both the consequence and the source of inspiration, characterized the greater part of the 1970s, the mood is now, at least to some extent, one of taking stock of the position and drawing the appropriate conclusions. There is certainly no question of overruling the many federally-inclined precedents mentioned earlier. Instead, they are being refined, as efforts are made to determine which of the apparent implications of the leading cases of that period can and must be put into effect and which of them the Community cannot accept or, quite simply, wishes to ignore. The case of *Macarthys* v *Wendy Smith*, considered in point 40 below, is perhaps an illustration of the latter attitude.

Thus during the first 30 years of the Court's existence, the Member States have appointed men of affairs to be its judges. In other words, it is clear that, as far as the Member States are concerned, the outstanding general ability of the candidates has been considered to be at least as important as 'recognized competence'. It could be the result of chance but this is unlikely.

It is really not surprising that, sitting as a court whose deliberations are kept secret, the judges developed a series of precedents which can scarcely be described as interpreting the Treaties according to the political climate of the moment in the capitals of the Member States, as happens in the Council of Ministers. Indeed, the team contained the right people to enable it, under the leadership of a President of proven authority and vision, to take decisions which can be described as 'judicial activism', the work of a 'government of judges' or a form of 'judicial policy-making'. This is not the place to determine whether all or some of the judgments delivered encroach on the province of the legislators as democratically-elected representatives, or on the policy-making powers conferred on their representatives in the Council. The object is merely to demonstrate that the character of those who have served as members of the Court makes it far from surprising that this aspect should have provoked criticism.

16. The judges and advocates-general are appointed for six years. They are eligible for re-appointment (Article 167 EEC).

It is often said that only by appointing for life is it possible to make sure that the members of the judiciary are completely independent of the executive.

¶ 2. *The organization of the Court of Justice*

17. When the judges are appointed, they elect the President of the Court from among their number for a term of three years (Article 167(5) EEC). He directs the work of the

[9] See footnotes 4 and 5 above.

Court. Among the important judicial functions attached to the office of President is that, on application by a party, he is empowered to suspend the operation of any Community measure (Rules of Procedure, Article 83).

18. Reference has already been made to the advocates-general. Their function needs to be described in some detail.

Under the Treaty, it is the duty of the advocate-general to assist the Court in the performance of its task (Article 166 EEC). In practice, this assistance consists mainly of making a thorough examination of the issues raised by the case before the Court. In so doing, the advocate-general frequently explores, recommends or rejects a variety of possible solutions. It is of the utmost importance that he should, at the same time, take account of the precedents, both in Community and in national law. Equally important is the advocate-general's comparative study of the legal orders of the Member States.

The earliest Court of Justice established always sat in plenary session, the only exception being that actions by Community officials were heard by smaller Chambers. Because the volume of cases has increased, especially since the early 1970s, the quorum required for preparatory inquiries into and judgment on a case has been steadily reduced. Finally, at the end of 1979, the article of the present Rules of Procedure under which the majority of cases are in practice heard by one of the three Chambers of the Court, came into force. Only the most important cases now come before the full Court.

20. Community law does not require a member of the Court to be a national of one of the Member States. In practice, however, appointments are made as though such nationality were required. Since the Court was established in 1952, due regard has been paid to the major Member States, who have been entitled to nominate two members of the Court which, as a rule, has meant that each has 'had' one judge and one advocate-general. If each country were to have a judge and there had to be an odd number of judges, together with some advocates-general, the bigger States ought, in the nature of things, occupy more places than the small countries—but how many more?

Section III — The procedure before the Court of Justice

¶ 1. *The Rules of Procedure*

21. There are over a hundred articles in the 'Rules of Procedure'. Most of them are concise and, moreover, comparatively simple. Their provisions must have been closely modelled on specifically French procedural requirements. In all fairness, however, it must be conceded that the procedure before the Court of Justice is not excessively formal.

22. It is a rule that each case must have its 'language of the case', which is chosen by the applicant. In cases based on an action against a Member State or against a natural or legal person having the nationality of a Member State and in proceedings for a preliminary ruling, the language of the case is the official language of that State. The Court can, however, authorize derogations from this rule.

23. In direct actions, the normal procedure comprises a written stage and an oral stage and, of the two, the written stage is by far the more important. The oral procedure is usually very short, its purpose being to go into and clarify the various points in the pleadings exchanged between the parties and to enable the judges to put questions in the course of the hearing. The Court may, in addition, order a measure of inquiry. It is fair to say that, as a general rule, a case is won or lost on the basis of the written exchanges.

The final stage of the oral procedure is reached when the advocate-general delivers his opinion.

¶ 2. *The decisions of the Court and its treatment of the facts*

24. A striking feature of the way in which the Court draws up its judgments is that the facts submitted in a case are set out in the grounds of judgment and in terms which are as concise and brief as possible. Thus the Court seems to concentrate exclusively on the points of law, the rules which apply and their wording, context and spirit. There has been a marked tendency to isolate the different versions of the facts, and their reconciliation, from the statement giving the grounds of judgment.

These comments can be illustrated by comparing the tendency shown by the Court of Justice to concentrate on the legal position and a framework of precedents with the realism and the weight attached to values and interests which are so marked in the case-law of the Supreme Court of the United States, whose attitude owes much to the phenomenon known as the 'Brandeis brief'. Before attorney Brandeis was appointed a judge of the Federal Supreme Court, he had, in the form which was later to become famous, for the first time submitted a whole series of documents in support of his contention in the case of *Muller* v *Oregon* (1908). The case concerned the adoption by the State of Oregon of a law fixing the maximum working day for women at 10 hours. Brandeis argued that, in adopting the law, Oregon was not infringing against the requirement of 'equal treatment' under the laws laid down by the 14th Amendment of the Constitution, although he conceded that a law which discriminated between groups or classes of the same kind (e.g. male and female employees) could not, under the laws in force, normally afford equal protection and was on that account voidable. In spite of this, he contended that where, in reality, women lived in different physical and social conditions from men, difference of treatment under the law should, *de lege ferenda,* be deemed lawful. To ensure that the State of Oregon's contested provision achieved recognition as a special case, Brandeis produced a wealth of documentation dealing with sociology, the medical sciences, legal comparative information and the results of opinion polls. The Supreme Court agreed with him.

Ever since, the submission of this type of evidence, known as a 'Brandeis brief', has been general in American constitutional practice. Its greatest value, however, is in cases where, with the help of an exhaustive recital of the facts, statistical information and other data or with the help of studies in the field of sociology, economics, psychology, education, political science, etc., the government of one of the states of the Union seeks to establish that its laws should be allowed to derogate from the constitution or even that, in a particular field, the generally accepted interpretation of the constitution no longer accords with reality. Furthermore, the grounds of judgments have, ever since, clearly reflected the facts put forward in the form of a Brandeis brief and their importance in the interpretation of laws.

25. In contrast to this, the Court of Justice of the European Communities usually refrains from including in its statement of the grounds of judgment any controversial or merely complicated information regarding the social, economic or political situation in the Member States, even when the parties have supplied the necessary material.

This may be compared with the procedure before the Danish Supreme Court (Højesteret) where, it has been rightly said, three things win a case for you: evidence of the facts, evidence of the facts and, again, evidence of the facts.

The case which came before the Court of Justice of the European Communities in relation to fishing in the Norway pout box provides an example of a government, in the event the Danish Government, putting in an application on the lines of a 'Brandeis brief'. Its contents do not appear in the grounds for the Court's decisions. The only trace of it is the observation made by the Court that the United Kingdom had failed to prove that the contested national measures prohibiting fishing were necessary, whereas the Danish Government had shown that they were not. [10]

In the 'sheepmeat' case, the French Government pointed out the serious and unacceptable social and economic consequences which would follow sudden abolition of the organization of the French market in sheepmeat. In its grounds of judgment the Court indicated that it did not underestimate the importance of the said kind of considerations; in the end, however, it did not take them into account. [11]

Exceptionally, the Court pays regard to the factual context of a particular case and does so in unmistakable terms throughout the grounds of judgment. This happened in the *Second Defrenne case.* [12] The Court took into account the disastrous economic consequences which would follow if an interpretation of Article 119 EEC were backdated to 1962 or 1973 and ruled that the direct effect of Article 119 could be relied upon only from the date of the judgment. In the leading cases relating to Articles 30 to 36 EEC, on quantitative restrictions on imports and exports and on measures having equivalent effect, there is a growing tendency to take conflicting interests into account in the light of the wide variety of considerations which a case may involve. There has been a corresponding increase in the amount of factual material appearing in the grounds of judgments, which represent the outcome of the judges' deliberations and form the basis of their decisions. [13]

A legalistic and abstract method of interpretation can be used as a means of producing results which have specific legal or social implications: this is well exemplified by the way in which the Court has encouraged the process of integration. Both those who criticize and those who defend the Court can agree on that, it must be borne in mind that in so far as interpretation of constitutional provisions involves policy-making this is wholly or partly obscured to the extent that the relevant economic, social or political considerations are developed only in part or not at all. Obviously, however, to enable the statement of grounds in the Court's judgments to reflect the considerations and influences by which, as a matter of policy, it is guided, a system should be worked out on the pattern of the 'Brandeis brief', and put to general use in the cases which the Court is called upon to hear. Only by so doing will the Court be fully capable of identifying the values and

---

[10] Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403.
[11] Case 232/78 *Commission* v *France* [1979] ECR 2729.
[12] Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.
[13] For example, Case 788/79 *Gilli and Andres* [1980] ECR 2071.

interests involved and of appreciating the magnitude of the political, social and economic repercussions which may arise from a decision favouring one party or the other. From this standpoint, the procedure laid down in Article 177 EEC appears *a priori* to be a less suitable means of redress than the procedure under Article 169 and 170 for breaches of the Treaty (see points 27 and 29 below).

26. The Court discusses and reaches its decision on cases in judicial conference with only the judges present. No difference of opinion may ever be divulged. On the assumption that judges holding the majority view usually pay some regard to the views of one or more of their colleagues in the minority, it is to be expected that the grounds of judgment will bear the imprint of different minds. On the occasions when this happens, it is at the expense of incisiveness in the wording of the grounds for its decision. The prohibition, in the interests of justice, of disclosure of a dissenting opinion has the effect of obscuring the finer points, a disadvantage which is to some extent offset by the opinions of the advocates-general.

Section IV — The machinery for resolving disputes

¶ 1. *Action to establish that a Member State has failed to fulfil an obligation*

A. The role of the Commission

27. It is the duty of the Commission to ensure that the provisions of the Treaty and the acts adopted by the institutions are applied (Article 155 EEC). Before applying Article 169, the Commission, acting purely under the terms of this general rule, normally goes into the complaint of an alleged infringement of the Treaty with the State concerned. [14]

Article 169 confers on the Commission a right of action which empowers it, without recourse to the Court, to insist that the Member States abide by each and every requirement of the Community rules. To be effective, this threat of action must be made credible. It is becoming so in so far as the Commission makes it a rule to translate words into action on each occasion when it considers that the Treaty has been infringed.

In practice, the Commission, until the mid-1970s, frequently avoided bringing an action against a Member State alleged to have failed to fulfil its Community obligations. When private individuals realized what the Member States were sometimes able to do with impunity, they were astonished at tactics which seemed to indicate political weakness or lack of independence on the part of the Commission. Even individuals affected by a Member State's flagrant violation of the Treaty often found that their pleas to the Commission to take proceedings were met with a refusal or even silence on the part of the Commission. [15] They subsequently found that they could not rely on Articles 173 or 175:

---

[14] For example, Case 147/77 *Commission* v *Italy* [1978] ECR 1307.

[15] Case 48/74 *Charmasson* v *Minister for Economic Affairs and Finance* [1974] ECR 1383 provides an example of an unsuccessful approach to the Commission; the national measure in question was found to be contrary to the Treaty in proceedings for a preliminary ruling.

the Commission's refusal could not be annulled and its inaction could not be remedied by an injunction of the Court calling upon it to take action under Article 169. [16]

The second paragraph of Article 169 lays down that, if the Commission considers that a Member State has failed to fulfil a Community obligation, the Commission may bring the matter before the Court. Before doing so, however, the Commission must take the administrative steps provided for in the first paragraph of Article 169, under which it must first deliver a reasoned opinion setting out its complaints and calling upon the Member State to take the necessary legal and practical measures. It must also give the State concerned the opportunity to submit its observations regarding the complaints. The way in which Article 169 has been drafted leaves no doubt whatever that the Commission is to decide for itself whether it makes use of the powers which the article confers on it. [17]

While actions for infringement of the Treaty were becoming more infrequent, a development took place which attracted widespread interest for a time. The Court actively began to promote the use of Article 177 (rather than Articles 169 and 170) as a means of bringing Treaty infringements by the Member States before it, proceedings under Articles 169 and 170 being dependent for their initiation on the Commission or a Member State, whereas Article 177, which provides for a preliminary ruling on the interpretation and/or validity of Community law, largely depends on the initiative of private parties. I shall deal with the latter aspect later; [18] meanwhile it should be noted that, probably on pro-Community policy grounds, most commentators warmly welcomed this development. The non-application of Articles 169 and 170 was discussed in legal journals and elsewhere without the criticisms which could with justice have been levelled at it.

As already stated, in the mid-1970s the Commission subjected its policy to a thorough reappraisal. So far as an outside observer can judge, this produced an appreciable increase in the frequency with which the Commission used its power to institute proceedings. At the same time, the issues brought before the Court were politically much more difficult; many of them are of vital importance for the unity of the Community. In this connection, it suffices to recall the series of cases on the tax on alcoholic beverages [19] or on petrol, [20] the 'sheepmeat' case [21] and the many others. Concurrently, the Commission brings 'minor' cases before the Court, such as actions for exceeding the time limit in the application of directives. Previously, only such 'minor' cases had been brought before the Court. [22]

---

[16] Case 48/65 *Lütticke* v *Commission* [1966] ECR 19.

[17] The Court has confirmed the Commission's discretionary power: Case 7/71 *Commission* v *France* [1971] ECR 1003.

[18] See point 36 below.

[19] See, for example, the recent judgments, all dated 27 February 1980, in Case 168/78 *Commission* v *France* [1980] ECR 347; Case 169/78 *Commission* v *Italy* [1980] ECR 385; Case 171/78 *Commission* v *Denmark* [1980] ECR 447.

[20] Case 21/79 *Commission* v *Italy* [1980] ECR 1.

[21] Case 232/78 *Commission* v *France* [1979] ECR 2729.

[22] For example, Case 30/72 *Commission* v *Italy* [1973] ECR 161; the complaint was concerned with Italy's delay in adopting the system of premiums for grubbing fruit trees for the purpose of rationalizing fruit production in the Community.

B. The Court's reaction

28. The rebuke which the Court administered to the Commission, and which will now be discussed, was undoubtedly one of the factors which induced the Commission to apply Article 169 in a different manner.

As already stated, considerations of political tactics without doubt lay behind the previous practice. For a long time there was nothing in the Court's judgments to indicate whether it considered the Commission's adoption of a low profile to be justified or whether it would have welcomed greater efforts to apply the second paragraph of Article 169. As has been said, during this period the Court strove to consolidate the preliminary ruling procedure as the vehicle of judicial review of the way in which the Member States were fulfilling their obligations. The Court's silence was, therefore, quite understandable. However, a turning-point was reached when judgment was delivered in the *Second Defrenne case* on equal pay. [23] In paragraph 73 of the grounds of judgment the Court formally rebuked the Commission for having stood by while the Member States failed to fulfil their obligation under Article 119 to ensure that men and women should receive equal pay for equal (or comparable) work.

29. In the circumstances of the time, it is possible to detect advance indications of the change of attitude by the Court which was to be revealed by *Defrenne.* The infringement of the Treaty was manifest and it had gone on for a long time. Then, since it had been decided with the concurrence of the Commission to postpone the application of Article 119, the Member States' failure to fulfil the obligation took on an unjustified appearance of legality. Moreover, those in a position to comment admitted that Article 119 had no direct effect. A person who had, as regards pay, been discriminated against on grounds of sex had little chance of obtaining redress on his or her own. Proceedings before a national court or a reference to the Court of Justice of the European Communities under Article 177 must, *prima facie,* have seemed a hopeless enterprise. For the Court must undoubtedly have realized that the facts were far from being fully brought to light in all references for a preliminary ruling. It was therefore correspondingly difficult for it to determine with any accuracy the values and interests involved. There was rarely enough information to enable the Court to make a satisfactory appraisal of the consequences which would ensue from a decision one way or another. Furthermore, it may have been embarrassing for the Court to find that, quite often and without receiving any complaint, the Member States could avoid discharging their obligations to the Community. Indeed, to see in the insignificant number of infringement cases, most of them deprived of much political importance, which came before the Court an indication that the mere threat of proceedings imbued the Member States with greater respect for Community law, can only be described as naive. A sixth and final consideration is that, in a given case, a Member State had defended itself with the argument that, as the Commission had so long been aware of the failure to fulfil a provision of the Euratom Treaty, this merely confirmed the State in its belief that the binding effect of the provision had fallen into desuetude. [24] The

---

[23] See footnote 12 above.

[24] Case 7/71 *Commission* v *France* cited at footnote 17 above; sometimes, when the Court is seised simultaneously under Articles 169 and 177, it delivers its judgments on the same day, for example, on 'sea fisheries' in Case 61/77 *Commission* v *Ireland* [1978] ECR 417 and Case 88/77 *Minister for Fisheries* v *Schonenberg* [1978] ECR 473; another example, on the taxation of spirits, is Case 171/78 *Commission* v *Denmark* [1980] ECR 447 and Case 68/79 *Just* [1980] ECR 501.

Court rejected this contention with considerable force, but it must have caused uneasiness.

These last considerations can be summarized by stating that the Court had felt itself to be in increasing need of the procedure for infringements of the Treaty as provided for in Articles 169 and 170. The intention was no doubt to ensure that cases coming before it were fully documented as to the facts and to secure a better grasp of the social problems which had produced the dispute which divided the parties in law.

We can confidently assume that a combination of circumstances decided the Court to sound the alarm. After the *Second Defrenne case* the Court seized several opportunities to emphasize the importance of using the second paragraph of Article 169 whenever the need arose.

If the Court comes to the conclusion that a State should be censured it can, as provided in Article 171, find that the State has failed to fulfil an obligation.

The wording of Article 171 makes it clear that, after a finding that there has been an infringement of Community law, the Court has exhausted its competence. Perhaps the principle of the separation of powers between the Community institutions and the Member States is responsible for the fact that, as Article 171 is worded, the Court was not empowered to enjoin the Member State concerned to take the necessary measures to discharge its obligations or empowered to annul any national legislative acts which conflict with the Treaties. However, in the words of Article 171, the Member State 'shall be required to take the necessary measures to comply with the judgment of the Court of Justice'.

The fact that a Member State does not comply with a judgment relating to failure to fulfil an obligation, delivered in accordance with Article 171, can constitute grounds for a second action under Article 169. The outcome of this will be a finding by the Court that the obligations arising from the first decision have not been discharged. To date, this has happened only once, in *Commission* v *Italy*.[25] At the beginning of 1980, however, the Commission, in similar circumstances, brought an action against France, which had not yet taken the necessary measures to fulfil its obligations under the judgment of 25 September 1979 in the 'sheepmeat' case.[26] In this second case the Court was asked to authorize an interim measure ordering France to cease to apply any import restrictions on sheepmeat from the United Kingdom. The Court rejected this application by the Commission.[27]

31. The Commission's legal interest is not subject to any particular conditions. On several occasions, the Member States have contended that an action brought under the second paragraph of Article 169 must be dismissed in cases where the Commission has no legal interest. Specifically, it was claimed that, once a State has fulfilled its obligation, even belatedly, the Commission no longer has the interest necessary to pursue an infringement of the Treaty.[28] The Court has invariably dismissed this plea and similar

[25] Case 48/71 [1972] ECR 527.
[26] Case 232/78 [1979] ECR 2729.
[27] Joined Cases 24 and 97/80 *Commission* v *France* [1980] ECR 1319.
[28] For example, Case 7/61 *Commission* v *Italy* [1961] ECR 317.

contentions. [29] In particular, it has declared that, over and above a finding that a State has been in breach of one of its obligations, an action brought under Article 169 may establish a basis on which the State's possible liability may be the subject of decision in proceedings before a national court. [30]

However, the Court has always emphasized that, under the terms of the Treaty, a Member State which is the subject of proceedings before the Court must always have had the opportunity to answer the substance of the complaints brought against it by the Commission. If the State's right to submit its observations has been compromised by the way in which the Commission has dealt with the case, the Court sends it back for fresh examination through administrative channels. [31] The Commission's duties are concretized in *Commission* v *Denmark*.

32. The Court of Justice tries to enhance the efficacy of its judgments under Article 171. In this connection, considerable importance must be attached to its view that the power conferred upon it by Article 171 extends beyond a mere finding that there is or was a failure to fulfil a Community obligation. The Court considers that it is competent to tell a State which the Court has found to be in default of its obligations how it should remedy the breach of the Treaty. This is obviously of the greatest importance where more than one course is open. [32] Quite recently, for example, the Court ruled that the obligation of a State to comply with a directive is not fulfilled simply by the fact that there is nothing in its laws to prevent the relevant authorities from giving practical effect to the objectives laid down in the directive. The Court expressly declared that the Member State must implement the provision of the same type of legislative measures as those which, in accordance with its sovereign powers, it applies to the same field of law. [33] The Court also declared that a law which conflicts with Community law must be repealed with retroactive effect. [34] The Court devoted its full attention to a discussion of the effects of a judgment under Articles 169 and 171 in a decision of 14 December 1982, that should be noted here. It should, moreover, be noted that the Court is free to order interim measures.

As the Court found that the failure of a Member State to fulfil an obligation within the meaning of Article 171 may lead to an action for infringement, it also contrived to enhance the efficacy of the infringement procedure provided for in Article 169. On the other hand, the Court has not yet reached the stage of annulling an act of government which conflicts with the Treaty, nor is its attitude likely to change on this point.

---

[29] For example, Case 167/73 *Commission* v *France* [1974] ECR 359; see also judgments cited at footnotes 28 above and 30 below.

[30] Case 39/72 *Commission* v *Italy* [1973] ECR 101.

[31] Case 31/69 *Commission* v *Italy* [1970] ECR 25; Case 67/77 *Commission* v *Ireland* [1978] ECR 417; in Case 238/78, cited at footnote 26 above, the judgment can, perhaps, be interpreted as emphasizing the fact that the Rules of Procedure preclude any fresh issue from being raised rather than as finding that observations had been submitted as provided in Article 169.

[32] See in particular Case 6/60 *Humblet* v *Belgium* [1960] ECR 559; Case 48/71 *Commission* v *Italy* [1972] ECR 529; Case 70/72 *Commission* v *Germany* [1973] ECR 813.

[33] Case 102/79 *Commission* v *Belgium* [1980] ECR 1473.

[34] Case 70/72 *Commission* v *Germany* [1973] ECR 813.

C. Proceedings for infringement of the Treaty and the politico-institutional balance in the Community

33. It has been suggested above that the draftsmen of the EEC Treaty considered judicial supervision of the way in which the States carried out their Community obligations to have been solidly anchored in Articles 169 and 170. Paradoxically, it appears that, in neither case, were their expectations fulfilled. As already stated, over a long period of time the Commission made only sporadic use of the second paragraph of Article 169. Moreover, the States brought hardly any actions against each other under Article 170: by December 1980, only two had been brought. The first was immediately withdrawn, [35] the other went to judgment. [36] Nevertheless, the Member States often intervene in cases of which the Court is seised as the result of an action brought by the Commission against other Member States.

¶ 2. *Preliminary reference proceedings under Article 177 and cooperation between courts*

A. Object of preliminary proceedings

34. When can and when must a reference for a preliminary ruling be made? On this point, Article 177 states that the Court shall have jurisdiction to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of acts of the institutions of the Community when it is requested to do so by a court or tribunal of a Member State.

Where such a question is raised before any court or tribunal of a Member State that court may request the Court of Justice to give a ruling thereon if it considers that a decision on the question is necessary to enable it to give judgment.

When any such question is raised in a case pending before a court against whose decisions there is no judicial remedy under national law the court is bound to bring the matter before the Court of Justice.

35. Why preliminary proceedings at all? The duty to ensure that all directly applicable Community rules are observed in the Member States has its counterpart in the right of the national courts to rule on the application of Community law [37] and even to interpret it subject to the limitations contained in Article 177. This means that the Court of Justice is not, in fact, the only Community court: as it has itself often declared, [38] assessment of the facts and of the position under national law is exclusively within the province of the national court. This is what makes it so vital that the Community rules should be universally and uniformly observed. Special care must be taken to ensure that the national courts do not give interpretations which differ from each other or which conflict with Community law. It was for this reason and in order to ensure that the Community rules

---

[35] *Ninth General Report*, point 521.

[36] Case 58/77 *Ireland* v *France* (removed from Register), Order of 15 February 1978; Case 141/78 *France* v *United Kingdom* [1979] ECR 2923.

[37] See grounds of decision in Case 93/78 *Mattheus* v *Doego* [1978] ECR 2203.

[38] For example, Case 51/74 *Hulst* v *Produktschap* [1975] ECR 79, ground 12 of decision.

were applied (and solely on this account) that Article 177 was adopted. [39] This article establishes, in other words, a cooperation between the Court of Justice and the national courts.

B. The national court's initiating role

36. Judicial cooperation begins when the national court makes a preliminary submission to the Court of Justice. The national court has no sovereign right to decide whether or not it should do so since, as stated earlier, there is to some extent an obligation to request a preliminary ruling. Clearly, any form of compulsion to ensure that the national courts fulfil the obligation to request a preliminary ruling raises questions of some delicacy concerning their independence which, in many cases, is secured by adequate constitutional provisions.

The question as to whether a national court which wishes to apply Article 177 is a 'court or tribunal of a Member State', with the right to request the Court of Justice to give a preliminary ruling on a question within the meaning of the second paragraph of Article 177, has invariably evoked a liberal reply from the Court of Justice, as shown by the judgments delivered in *Vaassen-Goebbels,* [40] *Politi* [41] and *Nederlandse Spoorwegen.* [42]

When, however, the Paris Bar requested the Court of Justice to give a preliminary ruling under Article 177, the Court refused to entertain the request specifically on the ground that an association of barristers did not constitute a court or tribunal entitled to request a preliminary ruling; the Court decided this of its own motion in an Order of 18 June 1980.

C. Preliminary ruling proceedings and review of infringements of the Treaty

37. References for a preliminary ruling under Article 177 serve as a means of reviewing infringements of the Treaty committed by the States. As stated in point 29 above, the way in which, at least hitherto, infringements were reviewed pursuant to Articles 169 and 170 was ineffective and the Court of Justice looked for means of bringing to an end the resulting supervisory deficit.

It was in these circumstances that the Court realized that the preliminary ruling procedure offered possible advantages which, if developed, could not only replace but constitute a marked improvement upon the way in which the Member States' fulfilment of their Community obligations was kept under review. There were many advantages to be gained from using Article 177 rather than Articles 169 and 170 as the main channel for judicial review of Treaty infringements.

---

[39] See more especially Joined Cases 28 to 30/62 *Da Costa* v *Nederlandse Belastingsadministratie* [1963] ECR 31; Case 28/67 *Molkerei Zentrale* v *Hauptzollamt Paderborn* [1968] ECR 143; Case 166/73 *Rheinmühlen* [1974] ECR 33; exceptionally, the subject of cooperation was not broached in Case 83/78 *Pigs Marketing Board* v *Raymond Redmond* [1978] ECR 2347, nor in Case 93/78 cited at footnote 37 above.

[40] Case 61/65 [1966] ECR 261.

[41] Case 43/71 [1971] ECR 1039.

[42] Case 36/73 [1973] ECR 1299.

In particular, it must have appeared essential to remove, if only in part, the initiative for seising the Court in connection with an infringement from the political field and put it into the hands of private parties, i.e. the persons individually concerned. It was undoubtedly an additional advantage, to be gained from reliance on Article 177, that judicial review became a matter of cooperation between judicial bodies on national and Community levels. In any case, the Court's immediate interlocutors were now other judges who had been to the same universities as the judges of the Court. As a rule, therefore, there was a certain degree of intellectual and professional kinship with the judges of the national courts. The exchanges over Article 177 could thus take place between people who shared a common outlook, expository technique and traditions.

The third advantage was probably the fact that there would now have to be a concrete dispute between two or more parties before an infringement of the Treaty by a Member State became the subject of judicial review. In most countries courts have invariably preferred to wait for a dispute to arise, with the parties ready to sacrifice both time and money on the proceedings. Again, in putting the initiative in the hands of private parties with a direct concern in the outcome, the Court could expect to have occasion to intervene more often than, as experience had shown, it could do in proceedings brought by the Commission or by the Member States under Articles 169 and 170. The only limitations which now exist on the frequency with which the Court is called upon to act is the extent to which private persons and bodies are prepared to bring proceedings before the competent national court and the willingness of that court to apply both the spirit and the letter of Article 177.

38. The change whereby the review of infringements would henceforth be based on the Court of Justice's cooperation with the national courts, at the instigation of private parties, did not take place without opposition. To ensure the success of the change, the Court made it its task to overcome three substantial obstacles.

The first problem was to find suitable means of drawing the attention of the national courts and tribunals to the courses of action made possible by Article 177 and which the Court had recognized. With this end in view, the Court embarked on a vast publicity campaign. Year after year a growing number of judges from the various Member States visited the Court of Justice, at its invitation, to listen to lectures and to discuss common problems with each other and with the members of the Court. [43]

The results soon became apparent: from a maximum of seven cases per year from 1952 to 1966 inclusive, the number of references for a preliminary ruling under Article 177 rose steadily over subsequent years, with 23 cases being lodged in 1967, 9 in 1968, 17 in 1969, 32 in 1970, 37 in 1971, 40 in 1972, 61 in 1973, 39 in 1974, 69 in 1975, 66 in 1976, 80 in 1977, 119 in 1978 and 99 in 1979. [44]

39. The second difficulty was the claim that the draftsmen of the Treaty had intended that supervision of the way in which the Member States observed their obligations should be centred exclusively on Articles 169 and 170. The Member States made this claim in *van Gend en Loos,* which was discussed above. [45] The Member States based

[43] See *Synopsis of the work of the Court of Justice of the European Communities* in 1967 and subsequent years (published by the Court).

[44] See R. Lecourt, *L'Europe des juges,* Brussels, 1976, at pp. 10 and 11; the post-1975 figures have been worked out by the author.

[45] See footnote 4 above.

their case against the use of Article 177 as the vehicle for keeping Treaty infringements under comprehensive review on the discussions which took place during negotiations on the establishment of the Communities and in which they themselves had taken part a few years previously. To be fair, it should be noted that not all of the then six Member States submitted observations in *van Gend en Loos*.

The Court of Justice brushed aside all these objections by stating that private parties were able to make use of Article 177 just as the Commission and the Member States could use Articles 169 and 170. In particular, the Court declared that 'a restriction of the guarantees (against an infringement of the Treaty by the Member States) to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals'.

The Court continued: 'The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.' [46]

Although there can be no doubt about the correctness of greater-efficacy argument, the Court supplied no irrefutable proof that the Member States' interpretation was not the correct one. If, however, they had been correct in claiming that supervision should be based on Articles 169 and 170, this would have meant that the draftsmen of the Treaty had not intended to institute too effective a system of supervision of the way in which the States carried out their Community obligations. In this way, the Court rode roughshod over the limitation so ingeniously drafted by the High Contracting Parties.

40. Granted that the judgment in *van Gend en Loos* finally disposed of the argument that actions for infringement of the Treaty could be brought only by virtue of Articles 169 and 170, the fact remained that the national courts were, at the instance of private parties, in a position to cooperate in ensuring the observance of the Community rules only in circumstances where those rules had direct effect in the Member States. But (argued some of the Member States) it was only exceptionally that they had direct effect: in support of their contention, the Member States relied on two main arguments.

The first was that there are very few provisions which, as in the case of Articles 7, 85 and 86, impose obligations on all and sundry, on both States and individual citizens. On the contrary, it is common to find provisions, such as Articles 12, 52 and 119, which impose obligations on the Member States alone. In view of this end, in the light of a long established legal principle, the only logical conclusion (they argued) is that only the first category of provisions, and not those in the second category, are capable of having an extended effect for the benefit of third parties, including individuals in the Member States. The national courts' protection of such rights may, according to circumstances, consist in the non-application of a national law or constitutional rule which is contrary to Community law. [47]

The second argument was that, under Article 189, only regulations or decisions addressed to individuals are directly applicable in the legal orders of the Member States. To use the argument in reverse, traditional legal reasoning leads to the conclusion that the draftsmen

[46] Case 26/62 [1963] ECR 1, especially at p. 25.

[47] See, for example, Case 44/79 *Hauer* [1979] ECR 3727; Case 106/77 *Simmenthal* [1978] ECR 629.

of the Treaty did not intend other provisions of Community law to have direct effects. [48]

Considered on traditional lines, that is to say, from a legal standpoint which pays regard, but not exclusively, to considerations of Community integration, these arguments carry considerable weight. In retrospect, it seems equally clear that if the draftsmen of the Treaty had felt it necessary to draft a general rule on the direct applicability of Community provisions, which is something they admittedly refrained from doing, direct applicability would probably not have been made the exception rather than the rule.

This means that it is thanks to the efforts of the Court of Justice in the intervening period that direct applicability was established by the case-law of the 1970s as the general rule rather than the exception. Its efforts were crowned with success because (quite apart from the 'publicity' promoting Article 177, referred to earlier) the national courts, at all levels, confidently brought before the Court of Justice the cases of which the latter hoped to be seised. Another and equally important contributory factor was the Court's firm determination, from the outset and notwithstanding the weight of the historical argument, to avoid imposing any substantial practical limitation on the direct applicability of Community acts in the Member States. The fact that, in the judgment in *Macarthys* v *Wendy Smith,* [49] the Court of Justice omitted to declare that the directive on equal pay (75/117/EEC of 10 February 1975) recognizes a female worker as having rights which the national court must protect against actions by her employer which are contrary to the directive may, however, be interpreted as an indication that the majority of the Court are not prepared to draw this conclusion. The national court which referred the case had framed its questions in such a way as to give the Court every opportunity of ruling on this controversial issue and of confirming or contesting the view that directives are capable of imposing direct obligations on individuals. [50]

41. When the Court of Justice adapted the procedure of references for a preliminary ruling provided for in Article 177, it was rightly said that its tactics showed how easily Article 177 could be converted into 'a vehicle for appellate judicial review', which is what it has become in the hands of the Court. [51]

It must be acknowledged that, from many standpoints, the procedure for a preliminary ruling, as now applied, resembles a federal appeal under which, at least in procedural terms, the Court's consideration of the case is confined to questions of law. This resemblance is borne out by the fact that, on occasion, the Court of Justice goes so thoroughly into questions of interpretation arising from the evidence brought to its notice concerning the facts that the responsibility of the national court and the margin of discretion available to it in deciding on the merits are appreciably reduced. However, the fact that the Court of Justice makes such a thorough examination is, in all probability, part of its efforts to make its rulings on questions of interpretation as helpful and as capable of being applied by the national court as circumstances allow.

Indeed, the national courts occasionally take advantage of the Court's willingness to give them every possible assistance by sending the entire file of a case to Luxembourg, with

[48] See, for example, Case 9/70 *Grad* [1970] ECR 825.
[49] Case 129/79 *Macarthys Ltd* v *Wendy Smith* [1980] ECR 1275.
[50] See footnotes 3, 4 and 5 above.
[51] G. Casper, Proc. Am. Socy. Inter. L., 1978, p. 171.

the declared or implied purpose of inviting the Court to give a decision on the merits. [52] In other cases, a national court may not have considered in sufficient depth the various aspects of Community law when trying the main action. Sometimes it may altogether miss the real point at issue in Community law. For example, the Resident Magistrate, County Armagh, was avoiding part of his responsibility for applying Community law when he requested the Court of Justice to answer no less than 10 questions, some of them subdivided into supplementary questions, all of them concerning the British organization of the market in pigmeat. The questions cited every article of the EEC Treaty with which the market organization might possibly conflict. [53]

The Danish Supreme Court (Højesteret) erred in a different direction when it submitted a preliminary question in the case of *Dansk Supermarked AS* v *Imerco,* [54] which concerned certain issues relating to exclusive distribution rights in Denmark. The question asked by the Danish court was so vague that, in fact, it left the Court of Justice to decide whether or not there was a question of Community law at all and, if so, to put it into the appropriate words. Needless to add, each of these modes of submitting preliminary questions has the further disadvantage of making it extremely difficult for the Member States, in lodging observations in accordance with Article 20 of the Statute of the Court of Justice, to distinguish which issue or issues the Court has picked out for decision in the particular case. These aspects have given rise to criticism, especially from various quarters in the United Kingdom. [55]

Section I of this paper shows that the draftsmen of the Treaty were probably familiar with several hierarchically organized judicial systems, both federal and transnational, all of which provide for a right of appeal to a higher court with jurisdiction over the whole of the federation concerned. The reason why they did not establish a similar channel of appeal in the Community is, presumably, that they did not wish to. Instead, they chose the procedure in Article 177. Whatever their intentions, they were unable to halt the development of case-law as it has been described above.

D. The success of the preliminary ruling procedure: its limitations and prospects

42. As stated earlier, the large number of submissions of preliminary questions justify the conclusion that cooperation between courts on the basis of Article 177 has, on the whole, proved a great success. There is only one cloud on the horizon: by the end of the 1970s this success threatened to destroy itself since the enormous volume of cases menaced to overstrain the Court's capacity to deal with them. The pressure of work and the concomitant danger that all important cases be not devoted the full attention they deserve or, if such attention is given, that case handling delays become insupportable, led the Court to propose an increase in the number of judges and advocates-general. [56]

---

[52] For example, Case 154/77 *Deckman* [1978] ECR 1571; Case 13/78 *Eggers* [1978] ECR 1935.

[53] Case 83/78, cited at footnote 39 above.

[54] Case 58/80 [1981] ECR 181.

[55] See, among others, editorial comment in CML. Rev., 1970, pp. 3-7 and House of Lords in Report, July 1979.

[56] Memorandum of the Court of Justice to the Council of 22 July 1978, Bull. EC 7/8-1978, points 2.3.3 and 13.

43. A most important contribution to the successful cooperation between the Court of Justice and the courts of the Member States under the provisions of Article 177 is the fact that, for years, the Court did not refuse a request for a preliminary ruling. The Court has, of course, made it clear that a question designed to elicit an interpretation of domestic law or of international law cannot be answered under the procedure laid down in Article 177. [57] At the same time, it has endeavoured to discover the situation underlying the issues of Community law, which is often the indirect reason why the question was referred, and has found an answer to them. [58] If the national court requests the Court of Justice to apply Community law to the issues of fact in the main action, the Court has, of course, also disclaimed jurisdiction. In such cases, however, it has not refused to entertain the request but has provided the national court with all the information regarding Community law which, in the circumstances of the case, it considers necessary to enable the national court to decide what rule to apply in the case before it. [59]

In this connection it should be noted that it was not until June 1980 that, on a submission being made to it, the Court of Justice refused to give a preliminary ruling on the ground that the national court concerned was not entitled to make a reference to the Court. [60]

Finally, in an appreciable number of cases, it has been contended that the question submitted lacked relevance or was so easy to answer that the national court ought not to have submitted it and that, it should, in consequence, be held to be inadmissible. However, the Court of Justice has always held that it is entirely a matter for the national court to decide whether there is need to refer a question for a preliminary ruling and what that question should be. [61] For this reason the Court has, apparently, been willing to remove a reference from the cause list, provided that the judge who referred the question has clearly stated that he wished to withdraw it. Furthermore, the Court will remove a case from the list on learning that a higher national court, before which an appeal is being heard, has annulled the order for submission of a question made by the lower court. [63]

The willingness of the Court of Justice to consider all questions submitted to it by the national courts contributed to the successful launching of cooperation between the Community court and the national courts. Nevertheless, in a situation where the Court's ability to cope with its work is likely to collapse from the growing weight of preliminary submissions, it is reasonable to ask whether the Court should not take steps to discontinue hearing certain cases.

44. The Court has, in fact, reserved the right not to answer a question of interpretation submitted for a preliminary ruling when the submission to the provisions to be inter-

---

[57] Case 16/65 *Schwarze* [1965] ECR 877; Case 20/64 *Albatros* v *Sopeco* [1965] ECR 29.

[58] See, for example, Case 130/73 *Vanderweghe* [1973] ECR 1329, where the Court went well out of its way to be helpful.

[59] See, among others, Case 45/75 *Rewe* [1976] ECR 181.

[60] Order of 12 March 1980 (Juge chargé du service du Tribunal d'Instance d'Hayange) [1980] ECR 771.

[61] See, among others, Case 13/68 *Salgoil* [1968] ECR 453; Case 29/68 *Torrekens* [1969] ECR 125.

[62] Case 127/73 *BRT* v *SABAM* [1974] ECR 51.

[63] See, for example, Case 821/79 *Benyahia*; although the court of first instance had referred a question under Article 177, the Cour d'appel of Metz ruled that the reference was unnecessary and the Court of Justice removed the case from the Register.

preted is obviously misplaced. [64] It has, however, so far refused to reject an application for a preliminary ruling on such grounds.

If the Court of Justice decides to tighten up the requirements for prior, detailed consideration of cases by the national courts and to refuse requests for a preliminary ruling if those courts fail to make the necessary effort to achieve the requisite division of labour between themselves and the Court, the reform will affect volume but not quality. It will not result in the development of new law, but in fresh case-law making it easier for the change to take place.

It is also worth noting that those who argue in favour of existing case-law on the question of admissibility tend to forget that Article 177 provides the legal basis for a revision of that case-law. It has already been pointed out that Article 177 requires, in order that the Court of Justice may have jurisdiction, the 'question' to be 'raised' before a court or tribunal of a Member State. It is not difficult to demonstrate that, within the meaning of those words, a question is not raised in the following circumstances:

1. The facts of the case provide insufficient ground for invoking Community law in order to settle the dispute. This would justify a refusal to entertain a request for a preliminary ruling in cases where, for tactical reasons, counsel for one of the parties drew attention to the wide range of possibilities which Community law would open up in the case under consideration and the national court did not bother to take a decision, preferring to make an order of submission for a preliminary ruling to the Court of Justice.
2. The question raised is so easy to answer that, as a court responsible for applying Community law, the national court has a duty to decide it. [65] This is of importance in circumstances where the national court raises questions on issues which the Court of Justice resolved in a previous case [66] and in cases where the rules are so clear that they do not require interpretation. [67]
3. Some questions are more, others less, important. The Court of Justice has the right (which is not inconsistent with the wording of Article 177) to set aside questions which, in terms of Community law, are without point or importance when viewed in a broad context. Most customs tariff cases fall into this category. If the case-law of the Member States were eventually to show any tendency to vary, the Court could seize the first opportunity to lay down uniform guidelines. [68]

If the Court of Justice were to modify its case-law on the admissibility of references for a preliminary ruling along the lines suggested it would, in all probability, acquire a measure of discretion to decide which cases should occupy its time and attention. Another possible advantage is that such an arrangement might enable the Court, in exceptional circumstances, to set aside a case which, from a constitutional standpoint, was not ready for judgment when, at the instance of a private party, a national court is called upon to decide it. A 'readiness test' could be applied in response to a submission for a ruling

---

[64] Case 13/68 *Salgoil* [1968] ECR 453.

[65] See, for example, Case 86/75 *EMI Records* v *CBS* [1976] ECR 871.

[66] Joined Cases 28 to 30/62, cited at footnote 39 above.

[67] Opinion of Advocate-General Trabucchi in Case 103/73 *Vanderweghe* [1973] ECR 1329, especially at bottom of p. 1338.

[68] cf. the provision in Article 4 of the Protocol of 1971 conferring jurisdiction on the Court of Justice to interpret the Convention of Brussels of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

from a lower court on cases which have major political, economic or social implications and, in any event, where the case is submitted under Article 177 at a stage in the proceedings when, viewed in the light of the implications and repercussions of a decision, the facts have not yet been set out as well as they might be.

The method suggested for enabling submissions of preliminary questions to be refused has something in common with the jurisdiction of the United States Supreme Court in *certiorari* proceedings, in which the court has a discretionary power to refuse to hear an appeal without necessarily having to state the grounds. Although the exercise of discretion to refuse to give a ruling is expressly provided for by the law, the practice of refusing to hear cases in respect of which the law provides a right of appeal is part of judge-made law. [69]

It should also be noted that, without legal justification in any legislative instrument, the Supreme Court of Canada has, in the matter of appeals, recently developed a practice which bears a close resemblance to that of the United States Supreme Court. [70]

In all probability, the Court of Justice took an initial step towards the evolution of a denial-of-reply case-law in the *Foglia* case. There an Italian wine merchant and an independent carrier had entered into a contract with each other for the purpose of bringing the question of the compatibility of French taxes on imports with the provisions of Community law before an Italian, rather than a French court which would have been called upon to hear the case if, after paying the taxes, the carrier had claimed to be reimbursed in the course of proceedings against the French customs authorities. None of the submissions in the case provided any confirmation of the compatibility of French law with the Treaty. However, the Court of Justice saw through the manoeuvre and disclaimed jurisdiction on the ground that the case was an attempt to get round Article 177. [71] The reasonableness or otherwise of the decision will not be the subject of comment here; the only point to be made is that it is no easier to justify inadmissibility by referring to the wording of Article 177 than by recourse to the practice suggested earlier. It is, indeed, more difficult to argue that the decision in the *Foglia* case is well founded.

While on the subject, mention should, perhaps, be made of cases where the Court of Justice has answered the preliminary question submitted to it but has done so with manifest brevity. A method whereby certain references for a preliminary ruling might be held to be inadmissible, and an increase in the number of judges and advocates-general are two sides of the same coin: how can the Court cope with the inflated volume of cases brought before it?

The argument against the method suggested here is that it would upset the relationship of trust and cooperation which, almost without exception, exists today between the Court and the courts of the Member States, especially the lower courts.

However, the way in which some of the States greeted the proposal to increase the membership of the Court is likely to do more harm than good. One particular proposal,

---

[69] On the position in the USA see Novak, Rotunda and Young in *Constitutional Law*, West Publishing Co., 1978, pp. 30-36, especially at pp. 31-33.

[70] In the case of Canada, this is, in particular, the consequence of changes which have occurred since the amendment of Section 36 of the Supreme Court Act.

[71] Case 104/79 *Foglia* v *Novello* [1980] ECR 745.

very possibly from France, was that the major countries of the Community should, as a group, occupy twice as many seats as the group of smaller countries. This proposal must be regarded as an attempt to politicize the appointments, even though, strictly speaking, it was made in response to the request rightly made by the Court with a view to increasing the number of its members and submitted in the summer of 1978, when the burden of work on the judges and advocates-general was, in consequence of the steady growth in the volume of cases, endangering the Court's ability to cope with them. Presumably it would not have made its request if it had had any doubts about the way in which it would be received.

The French proposal would have increased the number of judges to 21 after the accession to the Communities of Greece, Spain and Portugal. It is a disturbingly high number and far higher than the figure which the Court suggested in its 1978 memorandum. Among the disastrous consequences of raising the number to 21 is the effect it would have on the authority of the Court, its unity of purpose, the confidentiality of the deliberations and voting, and its prestige as an institution. A committee of too many members is unlikely to show much initiative and cohesion.

Nevertheless, problems of this order can be resolved, given good management. A greater danger is that the Court's integrity and independence may be compromised by attempts to appoint new members of the Court from among people whom those in power in a Member State believe they can trust to do the right thing when it comes to taking decisions and to the vote. History already provides examples of how courts can become politically motivated in this way. A one-sided system, such as the one in question, of appointing new members of the Court is, in my view, likely to cause more lasting damage than the method suggested on the subject of admissibility. It is better to let the Court solve its workload problem and carry out its heavy responsibilities by applying its own internal discipline. Assistance from the Member States may be the kiss of death.*

E. **Declaration of invalidity under Article 177 EEC**

45. The grounds on which an act may be declared invalid are scarcely any different from those set out in the first paragraph of Article 173. For a long time, there was considerable uncertainty regarding the effect of a finding of invalidity under Article 177. Unlike Article 176, which relates to Article 173, Article 177 is silent on the effect of a ruling that an act is invalid within the meaning of Article 177. The Court gradually contrived to remedy this omission. In decisions dated 19 October 1977, it created an opening for the application by analogy of Article 176.

In a decision dated 15 October 1980, in *Providence agricole de la Champagne* v *ONIC*[72] the Court seems to believe that Article 174 can also be applied by analogy. Under that article the Court can state which of the effects of an act which has been declared void are not to be considered as affected, in principle retroactively, by the judgment annulling it. By applying the analogy, the Court found it possible to rule that, in the case before it, the fact that some monetary compensatory amounts had, by virtue of Article 177, been

---

* *Editor's note.* By two decisions dated 30 March 1981 (OJ L 100, 11.4.1981) the Council raised the number of judges from 10 to 11 and of advocates-general from 4 to 5, on the ground of 'the volume of work at the Court of Justice'. Thus, the fatal problem, here dealt with by the author, was happily eschewed.

[72] Case 4/79 [1980] ECR 2823.

declared void should take effect only from the date of the judgment, which meant that previous recoveries and payments were unassailable.[72a]

¶ 3. *Action for annulment and action for failure to act*

46. As stated in the previous paragraph, as a result of procedural developments in the application of Article 177, a wide variety of methods became available to plaintiffs who wanted their complaints in an action relating to the failure, wholly or in part, of a Member State to fulfil its Community obligations to be brought before the Court of Justice. As already indicated, Article 177 is probably much more widely used than the draftsmen of the Treaty ever imagined.

On the other hand, the very limited extent to which private persons may bring an action as provided for in the second paragraph of Article 173 (action for annulment) and the third paragraph of Article 175 (action for failure to act) has frequently been criticized, sometimes so strongly that the practice of the Court has been described as a 'denial of justice'. [73]

47. Historically, the action for annulment in Community law has its immediate origin in the action for annulment of an illegal administrative act, as recognized by the national law of several Member States, including France, where it is known as the action for *ultra vires*. It can be regarded as a means of redress which makes it possible to review both the compatibility with the Treaty of the Community's normative acts which are 'legislative' in character and the validity of specific and general acts of lower rank and, in addition, as a means of resolving conflicts of powers between the institutions. The action for failure to act is closely related to an action for annulment.

As a rule, learned commentators treat the two actions separately. Here the distinction will be overlooked, since the differences between the second paragraph of Article 173 and the third paragraph of Article 175 are a matter of detail rather than of substance. Both provisions have the same main objective, which is to put an end to a situation of illegality. In the first case, the situation arises from an act which it is sought to annul; in the second, the aim is to obtain a judicial injunction putting an end to an illegal failure to act. As the decisions of the Court are no longer concerned with the differences in wording and because, since May 1980, proceedings have been brought on virtually the same basis under both provisions, [74] the matter will not be further discussed. Accordingly, the remarks on the way in which (generally to the disadvantage of the private litigant) the action for annulment has been interpreted will, *mutatis mutandis*, also apply to the right of private persons to bring an action for failure to act against the Community institutions.

[72a] More recently the Court's decision of 13 May 1981, in *International Chemical Corp.* v *Amministrazione delle Finanze dello Stato*, cast new light.

[73] Kovar, 'Chronique de Jurisprudence de la CJCE', J. Dr. Int., 1966, p. 707, especially at p. 710.

[74] See, in particular, Case 15/70 *Chevalley* v *Commission* [1970] ECR 975 and the Opinion of Advocate-General Dutheillet de Lamothe in Case 15/75 *Mackprang* v *Commission* [1971] ECR 806 together with, for example, Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1981; on the other hand, Advocate-General Capotorti argues in favour of a stricter interpretation of the conditions for instituting proceedings under Article 175(3) EEC and of a wider interpretation of the conditions prescribed in Article 173(2) EEC in Case 125/78 *GEMA* v *Commission* [1979] ECR 3193; in its judgment (at p. 3173), the Court leaves the question open.

A. The right of action of the Member States and of the institutions

48. The right conferred upon the institutions and the States to bring an action for annulment or for failure to act is expressed in the same way in the first paragraph of Articles 173 and 175. That paragraph does not contain the differences of wording which appear in the second and third paragraphs.

All that needs to be noted on the right of the Member States and of the institutions is that it is subject to no restriction affecting the admissibility of the action. The time-limits must, however be observed (on this subject see Articles 173(3) and 175(2) and (3)).

Proceedings for annulment must be instituted within two months, a period which, in the case of legislative acts, begins to run from publication of the measure and, in the case of a decision addressed to a natural or legal person, from its notification to the plaintiff or, in the absence thereof, from the day on which it came to the latter's knowledge (third paragraph of Article 173, but see also Article 81(1) of the Rules of Procedure).

The grounds on which an action for annulment can be founded are set out in Article 173. These are: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, and misuse of powers.

When the Court of Justice is called upon to decide what grounds justify annulment, it draws to a considerable extent upon comparative law, studies dealing with the laws of the Member States. Since 1970 it has, for example, recognized the principle of proportionality between end and means as forming part of Community law. [75] Similarly, the legitimate expectations of the applicant must be protected. [76] In consequence, only exceptionally may an act have retroactive effect to the detriment of the parties concerned. [77] Community law also ensures the protection of fundamental rights. [78]

If the Court finds that the action is well founded, it declares the contested act void (Article 174); in principle, it is void with retroactive effect. It ceases, *erga omnes,* to have any legal effect. The judgment of the Court is an unconditional *res judicata.* Consequently, when a regulation which is directly applicable in the Member States is annulled, the administrative and judicial authorities in those States must cease to apply it. In the reverse situation, the Court of Justice rules that an institution whose failure to act has been declared to be incompatible with the Treaty is bound to promulgate the act which it is enjoined to adopt.

However, the Court may, if it considers this necessary, indicate in its judgment which of the effects of the regulation which it has declared void shall be considered as definitive (Article 174).

B. Actions by private persons or bodies

49. As a natural or legal person, a non-privileged applicant has a right of action under Articles 173(2) and 175(3). The conditions under which an action will lie have, in

---

[75] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and, later, Case 122/78 *Buitoni* [1979] ECR 6777; Case 240/78 *Atalanta* [1979] ECR 2137.

[76] See, for example, Case 78/74 *Deuka* [1975] ECR 421.

[77] Case 98/78 *Racke* [1979] ECR 69; Case 99/78 *Decker* [1979] ECR 101.

[78] Case 4/73 *Nold* v *Commission* [1974] ECR 491; Case 44/79 *Hauer* [1979] ECR 3727.

practice, been uniformly defined; with rare exceptions, interpretation has established precedents which are inimical to private applicants.

Under the second paragraph of Article 173, any natural or legal person may institute proceedings 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

The words 'direct and individual' have, in the case-law of the Court, become conditions of admissibility which it is almost impossible for a private person or body to satisfy. In our view, however, these words, vague and flexible as they are, do not necessarily require interpretation in a manner unfavourable to a private applicant.

The Court insists that the measure impugned by the applicants 'affect them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. [79]

The precedents established by the Court can perhaps be accurately summarized by stating that a private person can bring an action for annulment in respect of a decision of which he is or, in the opinion of the Court, he should have been the addressee. In what circumstances is this condition to be deemed to have been satisfied? This is a favourite topic of discussion among legal commentators. It is also the subject of a large number of judgments; the sheer volume of cases prevents us from treating the subject other than summarily.

In what has long been the leading case on the right of an individual to bring an action, the judgment declares that the nature of a measure as a regulation is not called in question by the fact that the number or even the identity of the persons to whom it applies at a given moment can be determined more or less precisely, as long as it is established that it applies by virtue of an objective legal or factual situation defined by the measure in relation to its objectives. This was the ruling of the Court in its judgment in *Koninklijke Scholten Honig* v *Council and Commission.* [80] The Court went on to declare that the fact that a legal provision may have different actual effects for the various persons to whom it applies is not inconsistent with its nature as a regulation when that situation is objectively defined.

The case of *Calpak and Frutta* v *Commission* concerned the validity of a system of production aid for preserved Williams pears, under which the aid had been calculated on the basis of the previous marketing year's production by the companies involved. In its judgment, the Court closely followed the line of reasoning it had adopted in *Scholten Honig* (cited above) but limited the right of action by carefully relating the limitation to the system of aid provided for in the agricultural regulations in so far as that aid was calculated on the basis of production in the previous year. [81] In line with its judgment in *Scholten Honig* the Court declared that the objective of the second paragraph of Article 173 is to prevent the Community institutions from being in a position, by changing the form of a measure from a decision into a regulation, to limit the individual's rights before

---

[79] This requirement was laid down for the first time by the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 203 and reaffirmed later, for example, in Case 72/74 *Union Syndicale* v *Council* [1975] ECR 401.

[80] Case 101/76 [1977] ECR 797.

[81] Joined Cases 789 and 790/79 [1980] ECR 1949.

the courts and that the choice of form cannot change the nature of the contested measure.

Again, paragraphs 8 and 9 of the Court's judgment stick closely to the *Scholten Honig* precedent. Paragraph 10, however, expressly states that the choice of the previous year as the reference period for production in calculating the amount of aid granted to a particular undertaking does not constitute proof that the regulation is not really a regulation. In any event, the facts of the case under consideration do not appear to have satisfied the criterion laid down in *Scholten Honig* to the effect that the nature of the measure as a regulation remains unchanged provided that the situation in which it is applied is objectively defined. In reality, the effect of the regulation varies according to the existence or otherwise of features peculiar to the private undertaking subject to the regulation and which distinguish it from all others, such as its previous year's production.

Paragraph 10 appears to go on to suggest that a closer examination of the facts of the case, which in the event was never carried out, might have raised doubts as to the validity of the measure which were so well founded that the measure might, in consequence, have been annulled. The fact that this suggestion is made, is of great interest since, up to that point, one was inclined to believe that the Court would declare an action admissible if, after making a rough appraisal of the facts, it had, without having to take account of more technical considerations affecting the real nature of the measure impugned, found that there had been an infringement of the applicant's rights which called for action by the Court.

The general effect of the foregoing passages is that the individual subject who complains that his rights have been unlawfully infringed by the adoption of a Community rule will not be able to persuade the Court to entertain his complaint against an economic measure of general application unless he discharges the heavy burden of proof of the facts and convinces the Court that the contested instrument amounted to an attempt to avoid the adoption of an administrative act addressed to him.

This virtually means that an individual subject has really no relief against the Community's legislative and regulatory authority.

Nevertheless, if one accepts at face value the statement of the draftsmen of the Treaty that they intended to provide the protection of the law by establishing judicial supervision of the way in which the institutions used their powers, one is bound to criticize the outcome. We have virtually to accept that the vague and flexible wording of the conditions in which an action can lie was intended to keep the door open for further rights of action by individuals. Otto Riese flatly maintains that the draftsmen believed that they had achieved their aim by wording the second paragraph of Article 173 as they did but he also recognizes that, as a result of the way in which the Court has interpreted those conditions, the aim has not been achieved. [82]

Over the years, the Court has justified the course it has followed on this point by the fact that it felt itself bound to be very restrictive in view of the context in which it read the second paragraph of Article 173 and also, of course, the third paragraph. The specific context is Article 33 ECSC, which made generous provision for private undertakings and associations to institute proceedings for annulment, taken in conjunction with the second

[82] Otto Riese, 'Probleme des Europäischen Rechts', in *Festschrift für W. Hallstein*, Frankfurt am Main, 1966, p. 414 et seq.

paragraph of Article 173, in which the draftsmen revised the conditions under which an action could lie. The Court interpreted the new form of words as an instruction that it should limit the right of action. [83]

50. Do Article 184, relating to the special plea of illegality, and Article 178 on the Community's non-contractual liability compensate for the inadequate provision for rights of action under Articles 173 and 175? In theory, the answer could be in the affirmative but, in practice, this is not so. A private person who is *de facto* unable to enlist the protection of the Court against damage unlawfully caused to him by a Community act of general application has, in proceedings for annulment of an administrative decision or of the imposition of a fine, the right conferred on him by Article 184 to plead that the regulation on which those measures are based is invalid. This must be small consolation for him. [84] If, in his wisdom, he prefers to comply with the administrative decision or pay the fine, he surrenders the right to raise the objection of illegality and, in spite of everything this is what many people, anxious to abide by the provisions of Community law, choose to do. However, without Article 184, the position would have been even worse.

Some commentators on the Community legal system have long considered that, compared with the right to raise the objection of illegality, better compensation for inability to bring an action for annulment under Articles 173(2) and 175(3) is to be found in the right to bring an action for damages against the Community based on its non-contractual liability for illegalities invalidating its acts of general application. This optimistic view was not borne out by precedents during the 1970s (see paragraph 4 below, on actions for damages).

In short, the means of redress provided for individuals under Articles 173 and 175 of the Treaty against the adoption or maintenance by the Community of unlawful acts of general application are non-existent or inadequate. On the other hand, there is no restriction on the right of the Member States and of the institutions to bring proceedings before the Court of Justice to impugn the validity of the Community's acts or to request the Court to require an institution to act when it has failed to do so. If there is any restriction, it is not worth mentioning.

C. **The special features of the action for failure to act**

51. As the counterpart of the action for annulment of positive acts of the institutions, Article 175 provides for the action for failure to act. It constitutes a means of redress against silence or inaction on the part of the Council or of the Commission. [85]

However, the institution concerned must first have been called upon to act and it has two months in which to do so. If, within two months, it has not 'defined its position' an action may, like that for annulment, be brought within a further period of two months. It

---

[83] See for example, Joined Cases 16 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471.

[84] On the relationship between Articles 173 and 184, see Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, grounds 20 and 21; in its judgment in Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, the Court extends the interpretation of Article 173 to Article 184 (grounds of judgment 40 and 41), thus enhancing the value of Article 184.

[85] cf. footnote 74 above.

is an unrestricted right of action for the Member States and for the institutions themselves. On the other hand, the right of the individual is restricted in the same way as his right of action for annulment. In other words, the act which the institution has failed to address to him must be of direct and individual concern to the applicant.

¶ 4. *Action based upon liability (Articles 178 and 215 EEC)*

52. Non-contractual liability is the subject of the second paragraph of Article 215, which provides that the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Under Article 178, the Court has exclusive jurisdiction to decide whether the Community is liable and whether it is bound to make good any damage by physical acts or arising as a result of legal acts of general or individual application. The Court has unlimited jurisdiction in this field, both to determine the basis on which to decide whether the damage may be ascribed to Community action and to assess the extent of the damage and the amount of compensation to be paid.

In theory, an action for damages provides the means of obtaining compensation for damage sustained by a natural or legal person consequent upon the application of an illegal regulation. The fact that the damage was the immediate consequence of the application, by a Community institution or by the authorities of a Member State, of an unlawful legislative provision of the EEC does not, to judge by the wording of the second paragraph of Article 215, have any bearing on the matter.

53. For some years, the Court adopted an equally unfavourable attitude to attempts by individuals to ensure that the theory just explained was put into practice as the one adopted against the individual applicant under the second paragraph of Article 173 and the third paragraph of Article 175. The essential argument in favour of placing a narrow interpretation on Article 178, taken together with the second paragraph of Article 215, was quite simply that the actions for damages which were brought could be regarded simply as attempts to get round the strict conditions laid down for the institution of proceedings under Articles 173 and 175 [86] and should on that ground be dismissed. It is also worth noting that the Court of Justice has, from the beginning, interpreted Article 178 in such a way as to make it a condition of admissibility that the decision impugned should be 'of direct and individual concern' to the applicant.

It is difficult to find any legal justification for these precedents. Unlike those placing a narrow interpretation on the conditions for an action for annulment, these decisions cannot be based on the intentions of the draftsmen of the Treaty.

However, in the early 1970s, the Court clearly began to place a more liberal interpretation on Article 178. The argument involving an 'attempt to get round the conditions laid down in Articles 173 and 175' was abandoned in favour of the one that an action for damages was an independent action which was admissible on conditions which should be determined without regard to the conditions governing the admissibility of an action for annulment. The Court declared that an action for damages had a different purpose from

[86] Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

an action for annulment and had a different effect: the object of the former is to compensate a party for damage sustained as the result of an illegal act, whereas the object of the latter is to secure the annulment *erga omnes* of an illegal measure. [87]

If this thaw created any expectations of compensation amongst private parties, they were quickly stifled. In the first place, the Court defined the circumstances in which, under public law, the Community could incur non-contractual liability in such narrow terms that only few applicants have as yet succeeded in obtaining pecuniary compensation. The Court considered that the conditions for compensation should be narrowly defined on the specific ground that, in the exercise of their legislative powers, the institutions had been vested with a wide measure of discretion in appraising the political and economic situation. The margin of discretion enjoyed by the institutions is a wide one, especially as regards the execution of agricultural policy. Most actions for damages are brought for the purpose of obtaining compensation for damage alleged to have been caused by measures affecting the agricultural sector. [88]

Furthermore, the Court soon began to dismiss actions for damages on the ground that they really came within the jurisdiction of the national courts. The Court did this in cases where the immediate cause of the damage was action by an authority in a Member State, even when the action appeared to constitute the correct application of the Community regulation alleged to be illegal. Despite the wide wording of Article 178, the Court justified its attitude on the ground that, since all the facts of the case had arisen in a Member State, the only logical course was to bring the action in that State. [89]

If, in the course of proceedings before the national court, the validity of a Community regulation were called into question, a reference to the Court of Justice pursuant to Article 177 was the proper course.

This would have been an admirable practice if the automatic consequence of a finding that a regulation was invalid had been that the Community was bound to grant pecuniary compensation, although it seems extraordinary that a national judge should have to decide whether or not the Community had to pay damages. However, the Court ruled that the non-validity of a regulation was only one of the conditions needed to obtain compensation. This is the outcome of the group of skimmed-milk powder cases; in the first, the contested regulation was declared null and void, [90] in the second, compensation for the damage sustained was refused. [91]

At the same time, the Court, as indicated above, tightened up the definition of the circumstances in which damages might be obtained. In line with its own precedents, the Court ruled that the Community incurs non-contractual liability for damage caused to individuals as a result of a legislative measure of general application involving choices of

---

[87] Case 4/69 *Lütticke* v *Commission* [1971] ECR 325; Case 5/71 *Schöppensted* v *Council* [1971] ECR 975; Case 153/73 *Holtz and Willemsen* v *Council* [1974] ECR 675.

[88] See, for example, Case 5/71, cited at footnote 87 above; Joined Cases 56 to 60/74 *Kampffmeyer* v *Commission* [1976] ECR 711.

[89] Case 96/71 *Haegeman* v *Commission* [1972] ECR 1005; Case 99/74 *Grands Moulins* v *Commission* [1975] ECR 1531; Case 46/75 *IBC* v *Commission* [1976] ECR 65; Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677.

[90] Among others in this field, see Case 114/76 *Bela-Mühle* v *Grows-Farm* [1977] ECR 1211.

[91] Joined Cases 83 and 94/76 and 4, 15 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209; cf. judgments in Case 143/77 *Scholten Honig* v *Council and Commission* [1979] ECR 3583; Joined Cases 116 and 124/77 *Amylum and Tunnel Refineries* v *Council and Commission* [1979] ECR 3497.

economic policy provided that a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

In the second skimmed-milk powder case, the Court considered that the above condition had been satisfied but it went on to propound a new condition to the effect that it was only exceptionally and in special circumstances that there was any question of ordering the Community to pay damages in consequence of a finding that a legislative measure of a political and economic character was invalid. [92]

More recently, the Wagner concern was bluntly invited to take its application for damages before a court other than the Court of Justice. Since then the rule appears to be that an action for damages against the Community on the grounds of its non-contractual liability and, for that matter, contractual liability as well (the first paragraph of Article 215 taken in conjunction with Article 183) must be brought before a national court. [93]

To summarize, in the early 1970s, the Court to some extent relaxed the conditions which had hitherto denied private parties access to an action for damages and it did so because there appeared to be a serious unsatisfied need for protection. This was, however, perhaps more significant than the Court had imagined when it decided to make it easier to bring an action for damages. The huge number of actions for damages brought in respect of allegedly unlawful legislative acts threatened to bring the judicial machinery of the Community to a halt (on this see the *second skimmed-milk powder case*). Undoubtedly, the rapidly growing number of actions for damages compelled the Court to be cautious in view of its limited capacity to process them. The grounds of judgments also seem to show that it was specifically its role as a court of first instance that motivated it in non-suiting the large number of applicants who had instituted proceedings for damages. [94]

54. The way in which the Court of Justice modified the actions for annulment and for failure to act has its counterpart, therefore, in its handling of actions for damages between 1970 and 1980. It is a remarkable common feature of these changes that, as a consequence, the Court reduced the value of the legal protection represented by the means available for relief just at those points where the draftsmen of the Treaty had vested it with the function of a court of first and final instance in disputes between the institutions and private parties.

This development must be looked at in the context of the systematic extension by the Court of the applicability of the procedure for a preliminary ruling as provided for in Article 177. This produces the picture of a court which hopes to discharge its task by acting as a kind of court of appeal in matters involving questions of Community law, whether they relate to infringements of the Treaty by the Member States, the validity of the acts of the Community or its failure to act or, again, its non-contractual liability under public law. [95]

The only exceptions to this general rule are cases brought under Articles 169 and 170.

---

[92] See judgments cited at footnote 38 above.

[93] Case 162/78 [1979] ECR 3467.

[94] This attitude is not confined to forms of action under the Treaty; see Order of 17 January 1980 in Case 792/79 *Camera Care* v *Commission* [1980] ECR 119 concerning interim measures relating to competition.

[95] See specifically our article in ELR, 1980, p. 112 et seq.

¶ 5. *Opinion of the Court of Justice within the meaning of Article 228 EEC, Article 103 EAEC and Article 95 ECSC*

A. Article 228 EEC

55. Article 228 provides: 'The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court is adverse, the agreement may enter into force only in accordance with Article 236.' Articles 107 and 108 of the Court's Rules of Procedure make it clear that the opinion of the Court may deal 'not only with the question whether the envisaged agreement is compatible with the provisions of the EEC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement'.

Thus it is not obligatory to consult the Court of Justice but its opinion, once given, is binding.

56. There have been four examples of the preliminary review of agreements prior to their conclusion by the Communities. To date, Article 228 has been applied on few occasions. The first was on 11 November 1975, when, in Opinion 1/75, the Court gave a ruling on the extent to which the power to conclude an international agreement on export credit belonged to the Community institutions or to the Member States. In answer to the objections which had been submitted, the Court made it clear that it was competent to deliver an opinion on the compatibility or otherwise with the Treaty of the international law obligations envisaged. The formal designation of the act envisaged under international law was not of decisive importance in establishing the competence of the Court. The fact that discussions between the contracting parties were now at an end did not affect its competence, despite the absence of an express provision on this point in Article 228. [96]

On 26 April 1977 the Court delivered Opinion 1/76. The case was concerned with the legality of a draft agreement between certain Member States and Switzerland for the establishment of a laying-up fund for vessels on the Rhine. [97] The third opinion was delivered pursuant to Article 103 EAEC (which is related to Article 228 EEC (see below)). This was Ruling 1/78 of 14 November 1978 and concerned the compatibility with the Euratom Treaty of a draft convention of the International Atomic Energy Agency on the physical protection of nuclear materials, facilities and transport. [98] The latest Opinion (No 1/78) was delivered on 4 October 1979. It concerned the compatibility with the EEC Treaty of an international agreement on natural rubber which was to form part of the integrated programme of the United Nations for basic products adopted in the form of a resolution by the United Nations Conference on Trade and Development (Unctad) at its fourth session in Nairobi. The Commission of the European Communities maintained that the Community alone had the power to conclude this agreement and this view was fully supported by the Court. [99]

---

[96] Opinion 1/75 [1975] ECR 1355.
[97] Opinion 1/76 [1977] ECR 141.
[98] Ruling 1/78 *Euratom* [1978] ECR 2151.
[99] Opinion 1/78 *Rubber* [1979] ECR 2871.

B. Article 103 EAEC

57. It has been shown above that the Euratom Treaty contains a legal basis for preliminary review of the compatibility of international agreements with the provisions of that Treaty. On this point Article 103 provides as follows:

'Member States shall communicate to the Commission draft agreements or contracts with a third State, an international organization or a national of a third State to the extent that such agreements or contracts concern matters within the purview of this Treaty.

If a draft agreement or contract contains clauses which impede the application of this Treaty, the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned.

The State shall not conclude the proposed agreement or contract until it has satisfied the objections of the Commission or complied with a ruling by the Court of Justice, adjudicating urgently upon an application from the State, on the compatibility of the proposed clauses with the provisions of this Treaty. An application may be made to the Court of Justice at any time after the State has received the comments of the Commission.'

In other words, that article provides for review of the compatibility with the Treaty of international agreements entered into by the Member States. As regards the conclusion of agreements falling within the ambit of the Euratom Treaty, review under Article 103 of that Treaty does not materially differ from that conducted by the Court under Article 228 EEC.

C. Article 95 ECSC

58. On the other hand, Article 95 ECSC institutes a system of supervision which differs appreciably from that in Article 228 EEC and from that in Article 103 EAEC. The difference arises from the different principles which govern the two types of community; the European Coal and Steel Community is more 'supranational' than the others.

The ECSC was vested *inter alia* with a power of its own to revise the Treaty as provided for in Article 95. The purpose of this provision is to enable the High Authority and the Council, after the end of the transitional period, to make amendments to the Treaty provided that unforeseen difficulties have emerged in the application of the Treaty or fundamental economic or technical changes, directly affecting the common market in coal and steel, have arisen. The Community's power to make amendments to the Treaty of its own motion is limited by Article 95 in that they must not conflict with its fundamental aim or principles as set out in Articles 2, 3 and 4. Nor may the Community change its institutional balance.

Supervision of this wide power to amend the Treaty is entrusted to the Court of Justice: proposed amendments must be submitted to the Court for its opinion. 'In considering them, the Court shall have full power to assess all points of fact and of law. If as a result of such consideration it finds the proposals compatible with the provisions... they shall be forwarded to the Assembly and shall enter into force ...' (fourth paragraph of Article 95). The procedure has been invoked on three occasions. In two cases, the Court rejected the proposals submitted; in the third, they were approved. [100]

---

[100] Opinion of 17 December 1959 [1959] ECR 266; Opinion of 4 March 1960 [1960] ECR 46; Opinion of 13 December 1961 [1961] ECR 252.

Conclusion: From custodian to promoter of Community legal policy

59. Learned comment on the subject of methods of interpretation belongs to the realm of pure law. Methods of interpretation can be described as technical resources available to a judge when he has to determine the law which applies. According to the positivist school, methods of interpretation are in their nature objective. The choice of method is not influenced by the judge's preconceived opinion as regards the outcome of the case. It is said that the judge's choice is determined by the sources of the law.

The reports discussed at the meeting in September 1976 between the members of the Court of Justice and eminent lawyers of the Member States suffice alone to show the importance which the Court attaches to the methods of interpretation. [101] A constant theme of statements made on the subject by members of the Court is that the method preferred is the teleological method of interpretation, which is the one used to achieve Community objectives over and above the wording of the instruments. The Court nevertheless uses other methods, for example, comparative law interpretation, [102] literal interpretation, the determination of the law to be applied on the basis of context, etc. There is, accordingly, only a quantitative and not a qualitative difference between the interpretation technique of the Court of Justice and that practised in the higher courts of the Member States. Thus, the work of interpretation at the Court has much in common with the legal traditions of our States. This affinity (even if more apparent than real) bestows on the Court some of the aura of long-established legitimacy possessed by the national judiciaries. This last point is obviously important.

Subject to the reservations mentioned earlier, it is probably correct to say that, since its creation or at least since the early 1960s, the Court has adopted an interpretation technique which is integrationist. It is, indeed, possible to demonstrate that, on the occasions when the Court was content to use a method of interpretation based on comparative law, on reference to the context or on strict construction of the text this, with few exceptions, occurred in circumstances where, among the possible solutions, the method used produced the one which best served the ends to be attained by the Commission, i.e. without requiring further action by the Court. There is really nothing new in this way of putting it; on the contrary, it bears a close resemblance to the expression used by Pierre Pescatore when he very rightly called Community law 'the law of integration'. The techniques and methods of interpreting this law must naturally be integrationist. [103]

At various points in this paper the Court of Justice has been referred to as a 'policy-maker'. The expression is open to challenge. As there is insufficient space to give a detailed demonstration of its accuracy, I must assume sole responsibility for it. On the other hand, everyone can agree that the Court has given itself the role of promoter of pro-Community public policies. There is every reason to believe that the draftsmen of the Treaties envisaged a modest role for the judicial authority of the Community. The Court of Justice was to be a court whose task was to ensure that the rule of law was maintained within the Community. Thanks to a systematic interpretation of the Treaty

---

[101] 'Judicial and Academic Conference, 27-28 September 1976, at the Court of Justice', Reports published by the Court, Luxembourg, 1976.

[102] See examples given at footnote 77 et seq. above.

[103] P. Pescatore, *The Law of Integration: Emergence of a new phenomenon?*, Leiden, 1974.

provisions in favour of integration, the Court has, instead, become the tirelessly 'uneasy conscience' of a political desire for integration which, outside the Court, has grown weaker as the years go by. Out of the ideals expressed in the preamble and early provisions of the Treaty it has created sources of law. In so doing, it has consistently and, perhaps, too often acted as the Community legislator.

60. On the other hand, if we try to appraise the Court's work through its own eyes, we can hardly say that it has played the role of legislator or of 'policy-maker'. It has every justification for saying that it has not invented anything new but has merely breathed life into legal instruments which had remained dead letters.

It has accomplished its task above all by constantly reminding the countries and institutions of the Community of their declared aim to lay the foundations of an ever closer union among the peoples of Europe (preamble of the EEC Treaty). In the view of the Court of Justice, some Member States have probably not regarded this aim as creating obligations. In consequence, the Court has had to point out what had been agreed and to ensure that it was honoured. This is not necessarily done in accordance with the letter of the instruments but rather in accordance with their spirit. The Court often declares that it interprets instruments in accordance with 'their spirit, structure and wording'.

As is borne out by the public statements of its members in vindication of its work, the Court does not act as a policy-making tribunal; rather it is true that the politicians and the policy of the Community shrink from pursuing the political and legally binding objectives which were once laid down. Nor has the Court power to initiate proceedings of its own motion in order to be in a position to legislate. It is unable to act as legislator if only because a legislator must have the right to set the legislative process in motion. The Court cannot therefore perform a legislative role. This is also borne out by the fact that it has to state the grounds for its decisions.

The Court's efforts to encourage integration have taken several specific forms. To begin with, it has frequently laboured to make the Community's legal and institutional machinery more flexible. The great importance which it attaches to being effective is illustrated by its insistence on emphasizing the direct effect of Community law in the legal order of each Member State and, in case of conflict, its supremacy over the provisions of national law, regardless of their rank in the legislative hierarchy, and, similarly, by the interpretation it has placed upon the external powers of the Community. If, in achieving this aim, it takes decisions which appear to require the use of unorthodox legal methods, this is warranted by the fact that the European Community is an experiment; it is an unprecedented attempt to achieve the economic, social and political integration of an ever-growing number of hitherto wholly sovereign States. Against this background, the use of hitherto untried techniques is justified. Incidentally, it may not be of such great importance to apply to the letter what, under pressure of time and of diplomatic negotiations, those who framed the Treaty managed, by common consent, to put into instruments with a reasonable chance of securing early ratification by six parliaments. [104]

In general, the Court has, where it had the choice, rarely failed to throw the weight of its decision in favour of the weakest parties in the political and institutional balance of the

[104] The opinions of the Court, cited at footnotes 96-99 above, show that greater importance is attached to efficacy than to the letter of the rule.

Community, that is to say, in favour of the Commission of the European Communities and of private parties in the Member States. [105]

Moreover, as demonstrated in a large number of cases, the Court has always held to be invalid any law of a Member State which can be construed as a unilateral attempt to recover powers which have, once and for all, been transferred to the Community. In such cases, the Court has often applied a formula which is a combination of strict legalism and an integrationalist interpretation of the instruments.

Although this labour has undoubtedly borne fruit, this was rendered possible only by omitting from the grounds of judgment any reference to the economic, political and social circumstances in which an attempt was made to secure a fresh transfer of powers, in the reverse direction, for the benefit of the Member States. [106]

Conversely, the Court of Justice has rarely annulled a Council regulation for want of legal justification in the Treaty. There have been a number of occasions when a Commission or Council regulation has been annulled but, as a rule, this has been the consequence of an infringement of an essential procedural requirement or of a fundamental unwritten rule (e.g. principle of non-discrimination, of proportionality, etc.). Furthermore, annulment has on most occasions been for the benefit of private parties and not of the Member States; nor, generally speaking, has it taken place at the instigation of the latter. [107]

61. The constructive participation of the Court was possible because, as the draftsmen of the Treaties had framed it, the Community legal order was far from complete. In the first place, it had been left to posterity to carry out and complete a development of vast dimensions and political importance. Secondly, the Community's institutional balance quickly changed in favour of the Council and to the disadvantage of the Commission. Finally, the pace of the Council's legislative activity was appreciably slower than that which the draftsmen of the Treaties had provided for. In so far as the process of completion could not take shape as originally planned, it follows from Article 4 EEC that, in the evolution taking place, the Court's role was bound to change. Furthermore, the Court introduced and created a new constitutional law. Since, in practice, the procedure laid down for amendment of the Treaty in Article 236 did not prove capable of acting as a safety-valve and imposing on the divisions within the Community a solution which commanded respect, the Court came to play an active part in interpreting the Treaty and creating subordinate legislation, which is a larger role than the draftsmen would have entrusted to it. As is well known, problems do not cease to arise in society because politicians are incapable of finding a political solution for them. As a rule, they do arise and do so as issues of constitutional law.

The court must, therefore, make a choice. It may prefer finding no basis on which to proceed to judgment; since there are no rules of law on which the party or parties can

---

[105] For example, see the whole series of cases concerning the rights of migrant workers and their families, e.g. Case 32/75 *Cristini* [1975] ECR 1085; the Court has been at pains to maintain its constant emphasis on the direct and extended effect of Community law; cf. the judgment of 29 October 1980 in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, in which the Court allows the European Parliament to intervene in a dispute involving an action for the annulment of some of the provisions of a Council regulation.

[106] See footnote 24 above.

[107] There are exceptions, however, e.g. Case 1/76, cited at footnote 97 above, concerning the laying-up of vessels on the Rhine, where an instrument was declared to be unlawful on the ground of a delegation of powers; Case 151/73 *Ireland* v *Council* [1974] ECR 285.

found their submissions, the court may merely give a ruling to that effect. From time to time this is the course adopted by the Court of Justice. It is not unusual for it to declare that 'at the present stage in the development of Community law', it is unable to deliver a judgment on the submissions of the applicant notwithstanding that, from the point of view of considerations arising from an integrationist policy, it would have been better if the legal rule relied upon had been found or created in the course of the proceedings.

The other alternative open to the Court is to declare that it has a duty to act if justice is to be done. In any case, as already indicated, the Court is, under Article 4, jointly responsible for carrying out the tasks entrusted to the Community. From this point of view, a ruling that an action cannot lie is the same as an unacceptable lacuna which constitutes a denial of justice. When the other arms of government refuse to act, it is incumbent upon the Community Court to choose, if necessary between two social values or interests. In making its choice, the preamble of the Treaty provides it with a remarkably reliable guide. According to the procedural requirements, the choice appears as a reasoned choice between two or more legal standpoints. The second alternative is undoubtedly the one which the Court of Justice has adopted.

The reasoning which is based on the assertion of a duty to act invariably leads to what is called 'judicial activism', unless the court concerned is extremely cautious in applying it. Judicial activism is the opposite of 'judicial passivism' or what is more correctly called 'judicial self-restraint', in other words, the attitude of reserve which must be maintained on the bench and which is the result of self-discipline. That attitude must be present in the exercise of functions which, by virtue of the constitution and the institutional balance which the latter makes possible, ought, as must be recognized, to be exercised first by other constitutional organs.

62. The two opposites, judicial activism and judicial self-restraint, are found in other communities as well as in the European Community. In the United States, too, the duty to act has long been the ethical principle on which the US Supreme Court has, in its decisions, vigorously pursued public policy objectives the justification for which may or may not be based on strict constitutional considerations. The Supreme Court's intervention in the often heated disputes which brought it into conflict with the legislatures of the states of the Union, and with Congress and the White House, is familiar to all. These explosive situations can be regarded as the reaction of the surrounding policy to judicial activism. In the European Community there have, on various occasions, been very bitter political conflicts of this kind between, on one hand, the Community, represented by the Court of Justice, and, on the other, the Member States. One example of this was the sheepmeat war, which was the direct result of the decision of the Court of Justice in *Commission* v *France* on 27 September 1979 declaring that the French restrictions on sheepmeat imports from the United Kingdom were incompatible with the Treaty.

Incidentally, the United States Supreme Court has, meanwhile, developed a doctrine on the subject of *political questions.* Its purpose is to provide a safety-valve in cases where, in the Supreme Court's opinion, a particular issue is too hot for any effort to be made to resolve it by judicial fiat. However, the doctrine is illogical; in fact, when a comparison is made between the constitutional issues which the Supreme Court has settled and the social issues which it calls *political questions,* it is difficult to discover any essential difference between them. For example, the Supreme Court did not hesitate to order reapportionment of constituency boundaries in order to ensure that the vote of every

elector carried equal weight during the democratic election process. [108] In contrast to this, it considers that the political process should work out for itself what constitutes the fact of amending the constitution of a state of the Union in such a way as to ensure that it has a republican form of government. [109]

63. In the cases cited, where the European Court of Justice declares that 'at the present stage of Community law' it is impossible to find a better legal solution of a legislative problem than what the judgment has stated to be the strict position in law, the Court comes nearest to the doctrine based on the political question. [110] Nevertheless, it has rejected this formula in numerous other cases in which basic issues of public policy were also involved. It has usually decided the legal issue in favour of the values and interests which best serve the Community law, the scope of direct effect, the range of jurisdiction in matters of foreign policy, the extent to which it is permissible to maintain national market organizations after expiry of the transitional period provided for in the Treaties or in the Act of Accession, etc.

During the 1980s, the Court may well extend the application of its doctrine on 'political questions'. We stated earlier that this phenomenon can easily form part of the development of case-law in which, on the basis of Article 177, the practice of declaring certain requests for a preliminary ruling to be inadmissible can be enshrined. This should have the advantage of making it easier to adjust the pace at which the legal order of the Community is overhauled by the Court, to match the expectations of the community which the Court of Justice serves.

[108] See *Baker* v *Car* 366 US 186 (1962).

[109] See *Pacific States Tel. & Tel. Co.* v *Oregon* 223 US 118 (1912).

[110] For example, Case 34/74 *Roquette* [1974] ECR 1217; Case 119/75 *Terrapin* v *Terranova* [1976] ECR 1039; the 'dyestuffs' cases, e.g. Case 52/69 *Geigy* v *Commission* [1972] ECR 787.

Chapter VIII — The financing of the Community

by John A. Usher

Preliminary remarks

1. After 30 years, the question of Community finance would appear to be a subject which arouses stronger political passions in the Member States than it did when the Communities were founded. Indeed, the question of Member States' contributions was hardly an issue in the Treaty of Paris establishing the European Coal and Steel Community. Article 49 of that Treaty states that the High Authority is empowered to procure the funds it requires to carry out its tasks by imposing levies on the production of coal and steel and by contracting loans, and the only reference to contributions from Member States was in Article 7 of the Convention on the Transitional Provisions, which required Member States to make 'repayable interest-free advances' proportionate to their contributions to the OEEC, as a transitional measure to meet initial administrative expenditure.

Section I — Community revenue

¶ 1. *ECSC revenue*

A. The ECSC levy

2. Hence, from the beginning, the Coal and Steel Community could be described as having had its 'own resources'. Article 50(2) provides that the levies should be assessed annually on the products in question according to their average value, but that the rate should not exceed 1% unless authorized by the Council. The basic system of assessment and collection of the levies was laid down in Decision No 2-52 of 13 December 1952,[1] which is still in force in amended form.

Amongst other things, this decision faced up to one of the fundamental problems of Community finance, that of providing an objective criterion of value, and it provided that the levy should be fixed in the units of account of the European Payments Union,

[1] OJ 1, 30.12.1952.

which corresponded to the gold value of the United States dollar. Fixing the levy in a unit of account meant that the consequences of any change in the value of a Member State's currency were borne by the producers in that State liable to pay the levy, rather than by the Community, a fact which was realized and accepted at an early stage: when the French currency was devalued in August 1957, it was noted that this would oblige undertakings in France and the Saar to pay a levy 20% higher in terms of national currency.[2] When the European Payments Union was replaced by the European Monetary Agreement (EMA) at the end of 1958, the identical EMA unit of account was adopted by Decision No 3-59 of 21 January 1959,[3] and a unit of account of the same value was maintained, following the demise of the EMA at the end of 1972, until Commission Decision 75/3289/ECSC of 18 December 1975[4] introduced the new European unit of account for ECSC purposes. This unit (EUA) is based on the value of a 'basket' of currencies; it had already been used in the context of the first Lomé Convention and is identical in value to the unit of account later used in the European Monetary System[5] (ECU) as originally defined. The logical conclusion of this was accepted in Commission Decision 80/3334/ECSC of 19 December 1980[6] replacing the EUA by the ECU in the ECSC as in the other Communities.

3. The average values and rates of levy were laid down in Decision No 3-52 of 23 December 1952,[7] and subsequent changes in those values and rates have taken the form of amendments to that decision. In the light of later developments, it is interesting to note that the decision originally provided for levy at a rate of 0.3% from 1 January 1953, rising in stages to 0.9% (i.e. very near the authorized maximum of 1%) by 1 July 1953, the arrangements for the collection of the levy actually becoming operational on 15 February 1953.[8] The levy remained at a high level for a number of years, until it was gradually reduced to 0.35% from 1 July 1957,[9] and since then, particularly during the last few years, there has been a considerable reluctance to take the levy anywhere near its permitted maximum, presumably out of a desire not to impose further burdens on a depressed industry, with the result that the ECSC has had to receive finance outside its 'own resources'.

Indeed, an element of cross-subsidy may have crept in with the implementation of the 1965 Merger Treaty, Article 20 of which provides that the administrative expenditure of the ECSC is to be shown in the budget of the European Communities, but limits the amount of expenditure to be covered by ECSC levies to the fixed norm of 18 million units of account. In 1977, the Council agreed to reduce this notional ECSC administrative expenditure from 18 million EUA (as it had then become) to 5 million EUA for the purposes of the 1978 budget,[10] but even so, in order to hold the rate of levy at 0.29% in 1978 and 1979, the Member States had to make a special contribution of 32 million

---

[2] *Sixth Report on Competition Policy*, ECSC, p. 58.
[3] OJ 107, 27.1.1959.
[4] OJ L 327, 19.12.1975.
[5] See Council Regulation (EEC) No 3180/78 of 18 December 1978 changing the value of the unit of account used by the European Monetary Cooperation Fund (OJ L 379, 30.12.1978).
[6] OJ L 347, 23.12.1980.
[7] OJ 1, 30.12.1952.
[8] *First General Report ECSC*, p. 115.
[9] Decision No 13-57 of 17 April 1957 (OJ 183).
[10] Bull. EC 12-1977, point 2.3.111.

EUA. [11] In 1980 the levy was raised to 0.31%, but on a budget making provision for what were termed 'extraordinary receipts' of 43 million EUA, and subject to the condition that the appropriation for conversion aids could not be paid until these receipts had been obtained. [12] It is in the light of this that the Commission put forward a proposal for a Council decision with regard to contributions to be granted to the ECSC out of the general budget of the Communities. [13] Hence the financing of the ECSC, despite the theoretical existence of 'own resources', has become part of the general budget discussion.

B. The equalization scheme

4. The levies expressly authorized under Articles 49 and 50 of the ECSC Treaty are not the only ones to have been raised under that Treaty. Under Article 53, the High Authority was empowered to authorize, or itself make, 'any financial arrangements common to several undertakings which it recognizes to be necessary for the performance' of the objectives of the Treaty. In Case 8/57 *Aciéries Belges* v *High Authority*, [14] the European Court recognized that such arrangements could be based on the transfer of resources, and it was in fact under Article 53 that first a voluntary, [15] and then a compulsory [16] imported ferrous scrap equalization scheme was established. The idea behind this scheme was, in a situation where the price of imported ferrous scrap was higher than the Community price, to subsidize imports and to prevent Community prices rising, and it was financed by a levy on consumer undertakings. However, it is nowadays perhaps best remembered for having given rise to nearly half the litigation under the ECSC Treaty to have come before the European Court, [17] and in particular, since it was administered by a 'Joint Bureau of Ferrous Scrap Consumers' and an 'Imported Ferrous Scrap Equalization Fund', to the leading case on the delegation of powers by a Community institution, Case 9/56 *Meroni* v *High Authority*. [18] It was there held that the delegation of powers granted to those agencies under Decision No 14-55 of 26 March 1955 [19] gave them a degree of latitude implying a wide margin of discretion which could not be considered compatible with the Treaty requirements.

C. ECSC borrowings

5. The borrowings authorized under Article 49 have throughout played an important part in ECSC finance, even though, by virtue of Article 51 of the Treaty, the funds obtained thereby can in turn be used only to grant loans. The sources of the ECSC borrowings have varied over the years, depending on the available markets. The first loan

---

[11] *Eleventh General Report*, p. 49; *Twelfth General Report*, p. 52.
[12] Decision 79/3059/ECSC of 19 December 1979 (OJ L 344, 31.12.1979).
[13] OJ C 118, 13.5.1980.
[14] [1957 and 1958] ECR 245.
[15] Decision No 33-53 of 19 June 1953 (OJ 137, 9.6.1953).
[16] Decision No 22-54 of 26 March 1954 (OJ 286, 30.3.1954); Decision No 14-55 of 26 March 1955 (OJ 685, 30.3.1955); Decision No 2-57 of 26 January 1957 (OJ 61, 28.1.1957).
[17] Some 167 out of about 360 cases (to mid-1980).
[18] [1957 and 1958] ECR 133.
[19] OJ 685, 30.3.1955.

was contracted in the United States in April 1954 for the sum of USD 100 million, [20] and by the end of 1961, out of loans totalling 273 million units of account, 234 million units of account had been borrowed outside the Community. [21] The break came in 1962, when 82% of the funds borrowed were of European origin, as were 100% of the funds in the next two years. [22] The scale of borrowings has grown over the years, amounting to 1 069 million EUA in 1978 and 957 million EUA in 1979. [23]

¶ 2. *The system under the EEC and Euratom Treaties*

A. EEC and Euratom borrowings

6. Borrowings have also been of importance in the European Atomic Energy Community, loans for the financing of research or investment being expressly authorized by Article 172(4) of the Euratom Treaty. One of the early acts of the Euratom Commission was to negotiate a line of credit of USD 135 million from the United States, which became available in August 1959. [24] More recently, in 1977, the Council adopted two decisions [25] empowering the Commission to raise loans on behalf of Euratom for the purpose of contributing to the financing of nuclear power stations, so as to help reduce dependence on external sources of energy. Initially, the total of the loans was not to exceed 500 million EUA, but at the end of 1979 this was raised to 1 000 million EUA. [26]

In the EEC system, on the other hand, borrowings by the Community institutions, as opposed to the separate European Investment Bank, have been relatively rare and for limited purposes. So, in 1975, in a matter again related to energy costs, a regulation was adopted by the Council to enable the Community to raise funds, be it from third countries, from financial institutions or on capital markets, 'with the sole aim of re-lending these funds to one or more Member States in balance-of-payments difficulties caused by the increase in prices of petroleum'. [27] Under this system, the Commission was authorized in 1976 to conclude a complex series of loan contracts so as to enable the Community to re-lend the product thereof to Italy and Ireland. [28]

A further Council decision in 1978 empowered the Commission to contract loans on behalf of the Community so as to finance investment projects 'which contribute to greater convergence and integration of the economic policies of the Member States'. [29] It may be noted, however, that under this decision, the funds borrowed by the Commission are to be deposited with the European Investment Bank, and that it is the Bank which grants the individual loans under mandate from, and on behalf of, the Community, following a Commission decision as to the eligibility of the particular project.

---

[20] *Third General Report ECSC*, p. 132.

[21] *Tenth General Report ECSC*, p. 296.

[22] *Eleventh General Report ECSC*, p. 380; *Twelfth General Report ECSC*, p. 253; *Thirteenth General Report ECSC*, p. 220.

[23] *Thirteenth General Report EC*, p. 57.

[24] *Third General Report Euratom*, pp. 99 and 104.

[25] Council Decisions 77/170/Euratom and 77/271/Euratom of 29 March 1977 (OJ L 88, 6.4.1977).

[26] Council Decision 80/29/Euratom of 20 December 1979 (OJ L 12, 17.1.1980).

[27] Council Regulation (EEC) No 397/75 of 17 February 1975 (OJ 146, 20.2.1975).

[28] Council Decision 76/322/EEC of 15 March 1976 (OJ L 71, 24.3.1976).

[29] Council Decision 78/870/EEC of 16 October 1978 (OJ L 298, 25.10.1978); implemented by Council Decision 79/486/EEC of 14 May 1979 (OJ L 125, 22.5.1979).

7. Both these systems of EEC borrowing were introduced by legislation enacted by virtue of Article 235 of the EEC Treaty, which allows for appropriate measures to be taken where action by the Community proves necessary to attain one of the objectives of the Community 'and this Treaty has not provided the necessary powers'; quite simply, the EEC Treaty does not provide any express borrowing powers except in favour of the European Investment Bank, which under Article 130 of the Treaty is entitled to have recourse to the capital market and under Article 22 of its Protocol is empowered to borrow on the international capital markets the funds necessary for the performance of its tasks. It remains the case that by far the greatest proportion of Community borrowing has been contracted by the European Investment Bank: in 1979 its borrowings amounted to some 2 700 million EUA out of a Community total (including both ECSC and Euratom loans) of 3 825 million EUA. [30]

B. Member States' financial contributions

8. The basic method of financing originally laid down in the EEC and Euratom Treaties was that of financial contributions from the Member States. For most purposes, these were fixed in the ratio of 28% each for Germany, France and Italy, 7.9% each for Belgium and the Netherlands and 0.2% for Luxembourg, but different scales were applied under Article 200(2) of the EEC Treaty with regard to contributions to cover the expenditure of the European Social Fund and under Article 172(2) of the Euratom Treaty with regard to contributions to the research and investment budget, the most important difference in both these cases being a considerable reduction in the size of the Italian contribution, and a rise in the German and French contributions in particular. However, from the very beginning, Article 173 of the Euratom Treaty expressed the hope that the financial contributions of Member States might be replaced in whole or in part by the proceeds of levies collected by the Community in Member States, and Article 201 of the EEC Treaty required the Commission to examine the conditions under which the financial contributions of Member States could be replaced by the Community's own resources, 'in particular by revenue accruing from the Common Customs Tariff when it has been finally introduced'.

In fact, however, long before the deadline for the introduction of the Common Customs Tariff at the expiry of the transitional period, and indeed well before its actual introduction on 1 July 1968, the EEC Commission did put forward proposals in March 1965 [31] for 'independent revenue' for the Community based essentially on agricultural levies as well as Common Customs Tariff duties once they were introduced. None the less, following the merger of the institutions, it was only in 1970 that the Council finally agreed upon the principle of the replacement of financial contributions from Member States by the Communities' own resources. [32]

C. The own resources system

9. The 'own resources' recognized in this decision comprise three major elements: agricultural levies, customs duties, and value-added tax at a rate of up to 1% on a

[30] *Thirteenth General Report EC*, p. 43.
[31] *Eighth General Report EEC*, p. 334.
[32] Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 (OJ L 94, 28.4.1970).

uniform basis of assessment. As things were in 1970, the overriding factor would indeed appear to have been uniformity: the agricultural levies then in force and the customs duties were the external manifestation of the Community as a single market, and should have been the same on the same goods wherever they entered the Community. Hence there was, and indeed still is, a strong logical argument in favour of the proceeds of such levies and duties going to the Community as a whole rather than to the Member States whose external frontier the goods happened to cross. Be that as it may, the decision on 'own resources' treats the three elements differently.

I. Agricultural levies

10. The total revenue from agricultural levies, which are compendiously defined to include premiums and additional or compensatory amounts, was required to be entered in the budget of the Communities from the beginning of 1971. This had in fact been long anticipated. Council Regulation No 25 of 4 April 1962 on the financing of the common agricultural policy, [33] which was adopted on the same day as the first group of regulations providing for the progressive establishment of common organizations of the markets in cereals, pigmeat, eggs, poultrymeat, fruit and vegetables, and wine, [34] provided that at the single market stage 'revenue from levies on imports from third countries shall accrue to the Community'.

The nature of agricultural levies in a single market system can perhaps be best explained by reference to the common organization of the market in cereals, originally introduced in a single market form in 1967 [35] and currently governed by Council Regulation (EEC) No 2727/75 as amended. [36] There, the archetypal agricultural levy is that charged on imports when the world market price is lower than the Community price, intended to cover the difference between the cif price calculated for Rotterdam on the basis of the most favourable purchasing opportunities on the world market and a Community 'threshold' price, also in practice calculated for Rotterdam, so that the selling price for the imported product on the Duisburg market (taken as the area having the greatest deficit on cereals) will be the same as the 'target' price, the price which it is hoped Community producers will be able to obtain.

This is not, however, the only type of agricultural levy: the converse situation may on occasion arise where the levies are imposed on exports of Community agricultural products so as to prevent Community producers taking advantage of higher world prices, which would have the effect of raising Community prices higher than intended levels. It was in this context that the Court, in Case 95/75 *Effem* v *Hauptzollamt Lüneburg*, [37] held that a total of five regulations, fixing flat-rate export levies on compound animal feedingstuffs containing different percentages of cereals, were invalid. Levies have also been used as a method of restricting Community production: in 1977 a 'co-responsibility levy' was introduced in the sector of milk and milk products by effectively reducing guaranteed

[33] OJ 991, 20.4.1962.
[34] Council Regulations Nos 19 to 24/62 of 4 April 1962 (OJ 933, 945, 953, 959, 966 and 989).
[35] Council Regulation No 67/120/EEC of 13 June 1967 (OJ 2269, 19.6.1967).
[36] OJ L 281, 1.11.1975.
[37] [1976] ECR 361.

prices for certain (but not all) producers. [38] The validity of this levy was upheld in Case 138/78 *Stölting* v *HZA Hamburg-Jonas*. [39]

11. The fundamental concept underlying these levies, and in particular the import levy, is that they should form part of a system of uniform agricultural prices and hence be the same throughout the Community. Such uniformity was intended to be achieved by expressing agricultural prices in units of account, defined in 1962, [40] again in terms of the gold value of the United States dollar, and converted into national currencies at the par value recognized by the International Monetary Fund.

Provided exchange rates remained fixed, this system worked satisfactorily. However, in 1971, the German and Dutch currencies floated upwards in value, and the dollar floated downwards. The logic of substantive uniformity of Community agricultural prices would then have demanded that these prices expressed in German and Dutch currency should be decreased, just as in the system of ECSC levies the devaluation of the French currency in 1957 had led to an increase in the levy expressed in French francs, [41] but this was not in fact done. Rather, the prices expressed in national terms were left alone, and a system of compensation was introduced, [42] under which Member States whose currencies had effectively increased in value were authorized to charge monetary compensatory amounts on imports, whether from Member States or third countries, to make up for the fact that imports had become cheaper in real terms, and to grant monetary compensatory amounts on exports, to make up for the fact that exports had become more expensive in real terms.

That the monetary compensatory amounts charged on imports themselves constituted agricultural levies and hence the Community's 'own resources', was recognized in the recitals to the regulation which, at the end of 1972, also brought the expenditure on compensatory amounts granted on exports within the system of financing the common agricultural policy. [43]

It might briefly be noted that the system of monetary compensatory amounts still continues, having been extended, shortly after the United Kingdom's accession in 1973, to currencies which had effectively decreased in value; in this case, the monetary compensatory amounts are granted on imports to make up for the fact that they have become more expensive in real terms, and levied on exports to make up for the fact that they have become cheaper in real terms. In fact, although a uniform denominator has continued to be used for agricultural prices, from 1975 onwards [44] units of account were converted into all national currencies at 'representative' or 'green' rates, a system which had been commenced in 1973 with regard to the UK and Irish currencies. [45] The intention behind this was to ensure that 'conversion rates would be applied which are based not on parities but are more in line with economic realities'. However, they were, and are, not wholly in line with economic realities, and there was a stage in 1978-79 when the

---

[38] Council Regulation (EEC) No 1079/77 of 17 May 1977 (OJ L 131, 26.5.1977).
[39] [1979] ECR 713.
[40] Council Regulation No 62/129/EEC of 23 October 1962 (OJ 2553, 5.10.1962).
[41] See footnote 2 above.
[42] Council Regulation (EEC) No 974/71 of 12 May 1971 (OJ L 106, 12.5.1971).
[43] Council Regulation (EEC) No 2746/72 of 19 December 1970 (OJ L 291, 28.12.1972).
[44] Council Regulation (EEC) No 475/75 of 27 February 1975 (OJ L 53, 28.2.1975).
[45] Council Regulation (EEC) No 222/73 of 31 January 1973 (OJ L 27, 1.2.1973).

difference in real terms between Community agricultural prices in Germany and in the United Kingdom was of the order of 45%;[46] furthermore, in some instances, different conversion rates have been set for different products within the same Member State. None the less, the same system has continued even after the introduction in 1979 of the unit of account (ECU) used in the European Monetary System in the calculation of agricultural prices, when it was simply provided that the old units of account should be converted into ECU at the rate of 1 u.a. = 1.208953 ECU.[47] On the other hand, the representative rates adopted in 1980, after a series of alterations in 1979, were for the most part near the real rates of exchange;[48] the fact remains, however, that the agricultural levies forming part of the Community's own resources will vary according to the Member State in which they are charged, but that the income from the system of monetary compensation designed to make up for this lack of uniformity will also form part of the Community's own resources.

12. As with other Community resources, the collection of agricultural levies remains, by virtue of Article 6 of the 1970 Decision, the responsibility of the Member States. Hence, in Cases 178 to 180/73 *Belgium and Luxembourg* v *Mertens and Others*,[49] which were references made in criminal proceedings relating to fraud in the context of the export and import of agricultural products, the European Court held that it was for the Member States to take the necessary criminal or civil proceedings to enforce or recover agricultural levies. This view was taken further in a ruling given on a reference in criminal proceedings before an Italian magistrate, the *pretore* of Cento, in 1977,[50] where the Court held that the Community institutions are not empowered, in the present state of the law, to take proceedings before national courts for the purpose of claiming payment of Community revenue constituting own resources. On the other hand, the implementing legislation, currently re-enacted in Article 18 of Council Regulation (EEC) No 2891/78,[51] provides that the Commission may be 'associated' at its request with measures of control carried out by Member States, but it was pointed out by the Court in Case 267/78 *Commission* v *Italy*[52] that this does not enable the Commission to carry out measures of control itself, and that it does not, for example, alter national rules as to the secrecy of criminal investigations and of documents related thereto.

13. Conversely, there is a series of judgments holding that an individual trader who wishes to recover agricultural levies which he thinks the national authorities have wrongly charged him must bring his action against the national authorities rather than the Community, even though the levies may constitute the Community's own resources. This was first clearly stated in Case 96/71 *Haegeman* v *Commission*,[53] where an importer brought an action against the Commission for recovery of charges levied by the Belgian authorities under Commission legislation on imports of Greek wine. It was held that since the collection of 'own resources' was basically the responsibility of the national

---

[46] See the example in Usher, 'Agricultural Markets: Their Price Systems and Financial Mechanisms', 1979, 4 ELR 147, p. 152.

[47] Council Regulation (EEC) No 625/79 of 29 March 1979 (OJ L 84, 4.4.1979).

[48] Council Regulation (EEC) No 1366/80 of 5 June 1980 (OJ L 140, 5.6.1980).

[49] [1974] ECR 383.

[50] Case 110/76 *Pretore of Cento* v *Persons Unknown* [1977] ECR 851.

[51] OJ L 336, 27.12.1977.

[52] [1980] ECR 31.

[53] [1972] ECR 1005.

authorities, disputes concerning the levying of such charges should be resolved by the national authorities or before the national courts, subject to the possibility of referring any question as to the interpretation of Community law to the European Court. It might merely be noted that in subsequent cases it has not always proved easy to distinguish between actions for the recovery of agricultural levies and actions for damages for harm caused by the wrongful acts of the Community institutions.

II. Customs duties

14. With regard to the second element of the Community's own resources defined in the 1970 Decision, customs duties, the decision provided for a gradually increasing proportion of them to be appropriated to the Community over the period 1971-75, the precise proportion being calculated from a formula having regard to the combined total of customs duties and agricultural levies, until from 1 January 1975 all customs duties were to be paid to the Community subject to a refund of 10% to cover expenses.

For the purposes of the Community's own resources, customs duties are defined as 'Common Customs Tariff duties and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries'. What is usually thought of as *the* Common Customs Tariff is that established under the EEC Treaty. This was due to be established by the end of the transitional period, [54] but by a Council Decision of 26 July 1966 [55] the original Member States agreed to apply the Common Customs Tariff as from 1 July 1968, 18 months before the deadline, for all products other than those falling within the scope of the common agricultural policy, where the regulations establishing common organizations of agricultural markets provided, as and when they were enacted, for the relevant nomenclature to be included in the common tariff. The tariff itself was enacted by Council regulation, [56] and hence is binding in itself as a Community act.

This may be contrasted with the Common Customs Tariff originally established under Article 94 of the Euratom Treaty, which was introduced, as scheduled, only a year after the entry into force of that Treaty, on 1 January 1959, but by virtue of an agreement between the Member States reached on 22 December 1958. [57] None the less, the Euratom tariff has been reproduced in the appropriate headings of the table setting out the EEC tariff from the beginning. That table also lists for convenience the nomenclature of products falling within the ECSC Treaty, though it is made clear in the recitals that it does not apply to them. Article 72 of the ECSC Treaty allows for the Member States themselves to determine tariffs within certain limits; by virtue of the transitional provisions, however, the Member States reached agreement on 19 November 1957 as to a harmonized, but not common, ECSC tariff to be applied from 10 February 1958. [58]

Indeed, since 1964, the minimum duties on iron and steel products have been fixed by a Commission recommendation [59] issued under *inter alia* Article 74 of the Treaty, which

---

[54] EEC Treaty Article 23.
[55] OJ 2971, 21.9.1966.
[56] Originally in Council Regulation (EEC) No 950/68 of 28 June 1968 (OJ L 172, 22.7.1968).
[57] OJ 408, 31.3.1959; OJ 410, 31.3.1959.
[58] *Sixth General Report ECSC*, p. 82.
[59] Commission Recommendation No 1/64 of 15 January 1964 (OJ 99, 22.1.1964), as amended.

allows the Commission to take protective measures in certain circumstances, but since an ECSC recommendation is binding only as to the result to be achieved, the actual charge is still imposed by national legislation.

15. Under the EEC system, however, Common Customs Tariff duties can be regarded as essentially Community duties; they are imposed under directly applicable Community legislation, according to a uniform nomenclature based on the 1957 Customs Cooperation Council Nomenclature Convention, and the goods on which they are imposed are valued according to rules laid down by directly applicable Community legislation, based originally on the 1951 Customs Cooperation Valuation Convention, [60] but from 1 July 1980 based on an agreement reached in the Tokyo Round, [61] the origin of the goods also being determined according to directly applicable Community rules. [62] In principle, imported goods which have paid the Common Customs Tariff duties are treated as being in free circulation within the Community, and are hence able to take advantage of the rules on the free movement of goods, under Articles 9 and 10 of the EEC Treaty. The substantive uniformity of Common Customs Tariff duties has been little affected by fluctuations in exchange rates, since for the most part the duties are expressed in percentage terms, unlike the flat-rate agricultural levies.

There are, however, instances where the tariff does make use of units of account, which, as elsewhere, were originally defined in terms of the then gold value of the US dollar. An example of the problems to which this could give rise is to be found in Case 135/79 *Gedelfi* v *HZA Hamburg-Jonas* [63] which involved tariff subheadings 20.07 B II (a) 1 and (b) 1; these distinguished between orange juice high in natural sugars and that which contained added sugar by a criterion of value set at 30 u.a. per 100 kg net weight. Orange juice below that value but of the relevant specific gravity was deemed to contain added sugar and hence to be subject to a levy in addition to the customs duty. In this particular case, the price of some orange juice imported into Germany in January 1978 expressed in DM and converted into units of account at the official parity was less than 30 u.a. per 100 kg, even though the current value of the DM was much higher, and the importer was able to show that, if the price was expressed in any other Community currency and converted even at the official parity, the value of the orange juice would be above 30 u.a. per 100 kg. The Court resolved the problem by holding, on the principle that the CCT is meant to be uniform, that the levy could not be imposed if the same orange juice would be exempt in other Member States. Fortunately, the EUA was eventually brought into use in the Common Customs Tariff later in 1978, [64] being replaced by the ECU from the end of 1980. [65]

III. Value-added tax

16. The third element of 'own resources' recognized in the 1970 Decision is that which accrues from value-added tax 'obtained by applying a rate not exceeding 1% to an

---

[60] Council Regulation (EEC) No 803/68 of 27 June 1968 (OJ L 148, 28.6.1968).
[61] Council Regulation (EEC) No 1224/80 of 28 May 1980 (OJ L 134, 31.5.1980).
[62] Council Regulation (EEC) No 802/68 of 27 June 1968 (OJ L 148, 28.6.1968).
[63] [1980] ECR 1713.
[64] Council Regulation (EEC) No 2779/78 of 23 November 1978 (OJ L 333, 30.11.1978).
[65] Council Regulation (EEC, Euratom) No 3308/80 of 16 December 1980 (OJ L 345, 20.12.1980).

assessment basis which is determined in a uniform manner for Member States according to Community rules'. Even under the timetable laid down in the decision, this was not due to occur until 1 January 1975, and until then the balance of Community income was to be found from financial contributions from Member States assessed on a scale which differed from that laid down in the Treaties chiefly in the lower percentage apportioned to Italy. After 1 January 1975, if the uniform rules for assessment of VAT were not applied in at least three Member States, then the financial contribution of each Member State was to be determined according to its gross national product as a proportion of the sum total of the gross national products of the Member States. [66]

In fact, however, the rules determining the uniform basis of VAT assessment were not agreed by this deadline, and they were eventually issued only in 1977, in the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes. [67] This required implementation by 1 January 1978, but only the United Kingdom and Belgium complied with this requirement, one short of the three States required for the VAT own resources scheme to be brought into effect. The time-limit was then extended by the Ninth Directive to 1 January 1979; [68] it may be noted that the Commission's proposal for this directive [69] suggested that this should be without prejudice to the effects of those provisions of the Sixth Directive 'which do not require the adoption of national measures of implementation where such effects arise before the date of the notification' of this derogation, an interesting attempt to give legislative recognition to the doctrine of direct effect developed by the European Court, which was not, however, accepted by the Council. The new time-limit was observed by all the Member States except Germany, Ireland and Luxembourg, and so the 1979 budget was able to include on the revenue account VAT 'own resources' at a rate eventually of 0.77%, [70] those three States continuing to pay contributions based on gross national product. However, they have all applied the directive from the beginning of 1980, and hence the Community can be totally financed from its 'own resources'.

IV. Questions linked to the accession of new Member States

17. The development of this system was complicated by the fact that the United Kingdom, Ireland and Denmark acceded to the Communities before it was fully operational. Hence, for the period up to 31 December 1974, Article 179 of the Act of Accession set out a scale of financial contributions for the new Member States, but Article 130 also set out a formula whereby a progressively increasing proportion of such 'own resources' as had by that stage been appropriated to the Communities and of the post-1974 financial contributions based on GNP should be paid by the new Member States until such resources and contributions were due in full from 1 January 1978, subject only to a possible limitation on any increase in 1979. [71]

Even before this transitional period had expired, complaints were made, particularly by the United Kingdom, that the 'own resources' system would make certain Member

[66] Article 4 (3).
[67] OJ L 145, 17.6.1977.
[68] OJ L 194, 19.7.1978.
[69] OJ C 141, 16.6.1978.
[70] *Thirteenth General Report EC*, p. 51.
[71] Articles 131 and 132.

States bear a disproportionate burden of Community finance—a clear illustration of the fact that although in law the Community's own resources are not contributions from Member States, the reality is that Member States persist in regarding the sum they collect on behalf of the Community as a contribution. Following meetings of the Heads of State or Government in Paris in December 1974 and in Dublin in March 1975, agreement was reached on a 'financial mechanism' which was enacted in a Council regulation in 1976. [72] As originally drafted, it could apply only in favour of the poorer Member States. It allowed for payments to be made to a Member State which met three conditions simultaneously: its GNP was less than 85% of the Community average GNP, the growth rate of its GNP was less than 120% of the Community average and the amount it paid over as 'own resources' exceeded by more than 10% the amount it would have had to pay if that part of the budget had been financed by contributions proportionate to Member States' GNP. The size of the payment to be received depends on the size of this excess, but, subject to certain overall limits, would amount to the whole of any excess above 30%, but would be only a half of any excess between 5 and 10%.

18. In its original form this mechanism has not been used so far, although a simplified and unconditional version of such a mechanism, i.e. a refund rather than a reduction in payments, is contained in the Greek Act of Accession. [73] Article 127 of that act requires Greece to pay the full amount due under the 1970 Decision from 1 February 1981, but allows for refunds decreasing from 70% in 1981 to 10% in 1985.

19. These mechanisms relate only to payments-in as such, but the most serious challenge to the system in the late 1970s, again mounted chiefly by the United Kingdom, has related to the question of 'net contributions', a comparison between the 'own resources' collected by a Member State and the amount of Community money expended in that State. In a sense, this could perhaps be more correctly analysed as a criticism of the distribution of Community expenditure, but its resolution can be best described in the context of Community revenue. The political disputes need hardly be recited here, but what is of legal interest in the solution reached in May 1980 is its recognition of the concept of the 'net contribution' as a criterion of a Member State's liability to the Community, although it is limited in its application to the United Kingdom.

The solution starts from the Commission's estimate of UK payments to the Community in 1980 and 1981, and provides [74] for the net contribution, estimated at 1 784 million EUA in 1980 and 2 140 million EUA in 1981, to be reduced to a fixed sum of 609 million EUA in 1980 and 730 million EUA in 1981, subject to the United Kingdom paying a defined proportion of any overall increase in its actual contributions as opposed to those estimated by the Commission. In part, the refunds to the United Kingdom are made by means of an amended form of the financial mechanism already described, which has replaced the concept of gross national product (GNP) by that of gross domestic product (GDP), and in the case of the United Kingdom only, has removed the sliding scale limit on the amount to be recovered, [75] and in part by means of increased Community expenditure in the United Kingdom, particularly in the form of investment aid. [76]

---

[72] Council Regulation (EEC) No 1172/76 of 17 May 1976 (OJ L 131, 20.5.1976).
[73] OJ L 291, 19.11.1979.
[74] Council conclusions of 30 May 1980 (OJ C 158, 27.6.1980).
[75] Council Regulation (EEC) No 2743/80 of 27 October 1980 (OJ L 284, 29.10.1980).
[76] Council Regulation (EEC) No 2744/80 of 27 October 1980 (OJ L 284, 29.10.1980).

Hence, just as the 'own resources' system has become fully operational, it has been overshadowed by measures intended to take particular account of the individual position of one Member State. Nevertheless, it may be noted that, for 1982, it was agreed to resolve the problem by structural changes, but without calling into question the common financial responsibility for those policies which are financed from the Community's own resources.

V. Tax on officials' remuneration

20. Before turning to Community expenditure as such, there are two further sources of Community revenue which might be mentioned. The first of these is the Community's own direct taxation, which is imposed on its officials.

By virtue of Article 13 of the 1965 Protocol on the Privileges and Immunities of the European Communities, officials and other servants of the Communities are exempt from national taxation on salaries, wages and emoluments paid by the Communities, as had already been stated in the separate protocols attached to the ECSC [77] and the EEC and Euratom Treaties. [78]

In Case 6/60 *Humblet* v *Belgium* [79] the European Court even went so far as to hold, in the context of the ECSC Protocol, that a Member State infringes the Protocol if it takes account of the salaries paid by the Community to its officials in order to determine the rate of tax due on other income, where the national legislation provides for progressive taxation.

However, the correlative of this is that, repeating the EEC and Euratom Protocols, Article 13 provides that such officials shall be liable to a tax for the benefit of the Communities on such salaries. The current basis for taxation is contained in a Council regulation enacted in 1968 [80] on the same date as the current Staff Regulations. After taking account of deduction of family allowance and social benefits, and abatements both at a flat rate of 10% and for dependent children, it provides for chargeable income to be taxed at a progressive rate ranging from 5 to 45%, and states quite simply that 'the proceeds shall be entered as revenue in the budgets of the Communities'.

VI. Fines imposed by the Commission

21. The second exceptional source of Community revenue arises from the fines which the Commission may impose on certain undertakings in respect of behaviour prohibited under the Treaties. The examples may be given of Article 66(6) of the ECSC Treaty, which allows fines to be imposed with regard to unauthorized concentrations, or of Article 87 of the EEC Treaty, which authorizes the making of regulations imposing fines for breaches of the competition rules contained in Articles 85 and 86 of that Treaty, and which was implemented in EEC Council Regulation No 17 of 6 February 1962. [81] Fines

---

[77] Article 11.
[78] Article 12.
[79] [1960] ECR 559.
[80] Council Regulation (EEC, Euratom, ECSC) No 260/68 of 29 February 1968 (OJ L 56, 4.3.1968).
[81] OJ 204, 21.2.1962.

are not primarily a source of revenue, being intended as sanctions or deterrents, but Article 18 of Regulation No 17 provides for the same unit of account to be used as in the Community budget, and some of the same problems were encountered with regard to the gold-parity unit of account, since the range of fines permitted under Article 15 of the regulation is expressed in units of account.

In the request for interpretation in Joined Cases 41, 43 and 44/73 *Société Générale Sucrière* v *Commission,* [82] the European Court was asked to interpret a decision in which the Commission had stated the fines to be paid by three sugar undertakings in terms both of units of account and French francs. It was argued on behalf of the applicants that their liability was to pay the price in units of account, and hence that they could convert that into, for example, Italian lire at the old official parity, which was considerably higher than the current value of the lira and would have the effect of reducing the real amount of the fine. The Commission, on the other hand, urged that the fine was in reality to be paid in French francs, and that, if it was to be paid in lire, it should be converted at the current market rate. The Court agreed with the latter view, holding that the fine was in reality expressed in French francs, the reference to units of account serving only to indicate that it fell within the prescribed limits.

Section II — Community expenditure

22. Turning to expenditure, this is something that has grown as the Community has acquired responsibility for more policy areas. In the early days of the Communities, one of the main items of expenditure was the administrative cost of the institutions themselves. In the case of the ECSC, however, this was not the reason why the levy was as high as 0.9% in the first few years. The High Authority had set itself the target of building a guarantee fund of 100 million units of account to guarantee Community borrowings, given the importance of loans in the ECSC system of finance, and also intended to make suitable provision for funds for readaptation and research. This target was in fact achieved by the end of 1957, [83] the year in which the levy was reduced to 0.35%.

In the case of the Economic Community, assiduous readers of its early General Reports seeking to find out information about its budget will find it tucked away under the heading of 'internal administration'. [84] By way of contrast, in the 1980 budget, [85] administrative expenditure accounts for only about one-twentieth of the whole. To list every item of Community expenditure would require an examination of every facet of Community activity, but examples can be given from the three major items of expenditure in recent budgets: agriculture, regional policy and social policy.

¶ 1. *The European Social Fund*

23. Of these, in reverse order of magnitude, expenditure on social policy is expressly provided for in the Treaty in the form of the European Social Fund. Under Article 123, it

[82] [1977] ECR 445.
[83] *Sixth General Report ECSC*, p. 57.
[84] For example, *Fourth General Report EEC*, p. 268.
[85] *Thirteenth General Report EC*, p. 47.

was intended to improve employment opportunities for workers, and it was empowered by Article 125 to meet up to 50% of the expenditure incurred by public bodies in certain schemes of vocational retraining or resettlement allowances, or in granting aid to workers wholly or partly laid off as a result of the conversion of their undertaking, pending their full re-employment.

Initially, there would appear to have been some difficulty in spending the funds available: in 1961 the credits available to the European Social Fund were doubled to compensate for credits which were not taken up in the 1959 budget. [86] However, Article 126 provided that changes might be made in the functions of the Fund after the end of the transitional period, and a Council decision on the reform of the Fund was adopted in 1971. [87] This considerably broadened its scope, allowing it to act wherever the employment situation was affected by Community policies or called for specific joint action, and in particular allowed it to take action with regard to the unemployment situation in certain regions, certain branches of the economy or in certain groups of undertakings.

Initially this regional aspect was required to receive at least 50% of the available credits, a figure maintained when the decision was amended in 1977. [88] This amendment further widened the scope of the Fund, making it clear it could apply to the self-employed, and expressly allowing the Fund to assist operations carried out in the Member States as part of their employment policy. The importance of the Fund can be judged from the fact that in 1979 the demand for assistance exceeded by 72% the appropriations available. [89]

¶ 2. *The European Regional Development Fund*

24. Regional policy as such, however, was something not expressly provided for in the Treaties. Nevertheless, following decisions at the meetings of Heads of State or Government in 1972, 1973 and 1974, a European Regional Development Fund was established in 1975 by a Council regulation [90] enacted under Article 235 of the EEC Treaty, given the absence of any specific authorization. It was amended in 1979 so as to remove certain of its short-term features and to give it a greater air of permanency. [91] It is stated to be intended to correct regional imbalances and may finance Community action in support of regional policy measures taken by Member States, according to a fixed pattern of distribution of resources (the largest shares going to Italy and the United Kingdom), and also to support specific Community regional development measures, but only up to 5% of its resources. In principle, the only areas qualifying for benefit are those aided by Member States, except with regard to the specific Community measures. The actual amount of regional expenditure has been a source of dispute between the Council and the Parliament in the context of the budgetary procedure, but in 1979 it eventually exceeded that on social policy. [92]

---

[86] *Fourth General Report EEC*, p. 268.
[87] Council Decision 71/66/EEC of 1 February 1971 (OJ L 28, 4.2.1971).
[88] Council Decision 77/801/EEC of 20 December 1977 (OJ L 337, 27.12.1977).
[89] *Thirteenth General Report EC*, p. 116.
[90] Council Regulation (EEC) No 724/75 of 18 March 1975 (OJ L 73, 21.3.1975).
[91] Council Regulation (EEC) No 214/79 of 6 February 1979 (OJ L 35, 9.2.1979).
[92] *Thirteenth General Report EC*, p. 41.

¶ 3. *The European Agricultural Guidance and Guarantee Fund*

25. However, far and away the largest item of Community expenditure is the common agricultural policy, largely because it is the only major area of economic activity for which the EEC has assumed direct financial responsibility. Article 40(4) of the EEC Treaty stipulates that, in order to enable the common organization to attain its objectives, one or more agricultural guidance and guarantee funds may be set up. The single European Agricultural Guidance and Guarantee Fund was established by Council Regulation No 25 of 4 April 1962,[93] which, just as it provided that at the single market stage revenue or levies on imports from third countries should accrue to the Community, provided also that the Fund, forming part of the Community budget, should finance refunds on exports to third countries (i.e. the converse of the import levies) and common measures intended to increase agricultural productivity under Article 39(1) of the Treaty. It need hardly be pointed out that there is no necessary correlation between income and expenditure in this system: if there is a high level of production of a particular agricultural product, it is likely that there will be a high level of selling into intervention and hence high expenditure for the Fund, whereas at the same time there will be a low level of imports, and hence little in the way of import levies and little income for the Fund. In 1964[94] the Fund was split into a Guarantee Section, including expenditure relating to refunds and intervention, and a Guidance Section concerned with the measures intended to increase agricultural productivity, and, as part of the move towards the replacement of financial contributions by the Communities' own resources, Council Regulation (EEC) No 729/70 of 21 April 1970[95] on the financing of the common agricultural policy expressly states that both sections shall form part of the budget of the Communities. As with the collection of levies, the actual payment of refunds or intervention purchases is carried out by the Member States, and the basic principle of the regulation is that the Fund is liable to finance expenditure granted or undertaken 'in accordance with the Community rules within the framework of the common organization of agricultural markets'. The European Court has interpreted these rules strictly, holding that the Member States themselves must bear the burden of any amounts which the national authorities wrongly believed themselves authorized to pay in the context of the common organization of the market, unless their conduct was reasonably based on their legitimate expectations. To take just one example from a group of judgments delivered on the same day, Case 18/76 *Germany* v *Commission*,[96] the Fund will not meet expenditure on aids paid without the required documents being produced, nor the cost of allowing securities, lodged to ensure the export of intervention butter within 30 days of its sale, to be released when the butter was exported 30 days after its removal from store, nor the actual costs of storage of a product when only a flat-rate amount was authorized to be paid under Community legislation, nor the deduction of the costs of reconditioning sugar put out to tender when this was not included in the list of items which could be debited to the relevant account. On the other hand, it was held to be reasonable for the German authorities to issue reduced-price butter vouchers for a whole year at a time, and the Fund was liable to meet their cost, even though the Community legislation authorizing the scheme was repealed in the course of that year.

---

[93] See footnote 33 above.
[94] Council Regulation No 64/17/EEC of 5 February 1964 (OJ 586, 27.2.1964).
[95] OJ L 94, 28.4.1970.
[96] [1979] ECR 343.

26. Just as traders seeking to recover agricultural levies must in principle act against the national authority which collected them, so also a trader seeking payment of sums due under Community agricultural legislation must act against the national authority entrusted with making such a payment. The clearest example of this is perhaps Case 99/74 *Grands Moulins des Antilles* v *Commission,* [97] where the applicants were claiming export refunds and carry-over payments due under the relevant Community legislation in relation to cereals respectively exported from or stocked in French overseas departments. It was held that their action should be brought against the national authorities, even though their refusal to pay arose because the EAGGF in turn refused to finance such payments in relation to overseas departments, since by Article 227(2) of the Treaty the benefits of the Fund do not automatically extend to overseas departments. [98] On the other hand, where the Community legislation fails to provide for the payment claimed, and this is alleged to be a wrongful act, an action may be brought directly against the responsible Community institution, as was confirmed in 1979 in Case 238/78 *Ireks Arkady* v *Council and Commission.* [99]

Section III — The budget

¶ 1. *Presentation of the budget*

27. If we now turn to the presentation of Community expenditure in the budget, agricultural finance highlighted a particular problem. Even after exchange rates began to float, the gold-parity unit of account was retained for budgetary purposes by Article 10 of the 1973 Financial Regulation, [100] which meant that, once representative rates had been introduced, common prices expressed in units of account were converted into national currencies at 'green' rates, but that the actual expenditure incurred by the national authorities was converted into gold-parity units of account for budgetary purposes. Indeed, it would appear that some policy decisions were taken for cosmetic purposes to reduce the apparent size of the budget expressed in gold-parity units of account: just as those monetary compensatory amounts which are levies accrue to the Community as 'own resources', so also those which have the effect of subsidies are Community expenditure, and in 1976 the Member States agreed that monetary compensatory amounts payable on imports into Italy and the United Kingdom should be paid in the exporting State because their real cost expressed in a strong currency converted at the old parities would produce a smaller figure in units of account than their real cost expressed in a weak currency and converted at the old parities. [101] Hence, EAGGF expenditure would appear to be smaller in terms of units of account, even though in reality it remained the same. An attempt was made to deal with this almost deceptive aspect of the Community budget in 1977 by a Council regulation 'on the use of a separate heading in the Community budget for the financial effect of different conversion rates applied for measures financed by the Guarantee Section of the EAGGF', [102] which the Commission

[97] [1975] ECR 1531.
[98] A gap now filled by Council Regulation (EEC) No 1386/77 of 21 June 1977 (OJ L 158, 29.6.1977).
[99] [1979] ECR 2955.
[100] OJ L 116, 1.5.1973.
[101] *Tenth General Report EC,* p. 322.
[102] Council Regulation (EEC) No 474/77 of 8 March 1977 (OJ L 64, 10.3.1977).

implemented by setting out a coefficient allowing for the different conversion rates. [103] More fundamentally, however, Article 10 of the 1977 Financial Regulation [104] introduced the EUA, based on the current values of a basket of currencies, for budgetary purposes, this eventually being replaced by the ECU from the end of 1980. [105]

¶ 2. *Adoption of the budget*

28. The method of adoption of the budget, which in this context comprises the administrative budget of the ECSC, the budget of the EEC and the operating budget and the research and investment budget of Euratom, [106] has been changed three times in the case of the ECSC and twice in the case of the other two Communities, the common factor being a gradual increase in the powers of the European Parliament. The original Article 78 of the ECSC Treaty merely required the estimates of administrative expenditure to be included in the annual report of the High Authority laid before the Assembly under the original Article 17 of that Treaty. However, the 1965 Merger Treaty which, as has already been seen, fixed a notional sum for the administrative expenditure to be covered by ECSC levies, also brought the ECSC budgetary procedure into line with that in the original Article 203 of the EEC Treaty and Article 171 of the Euratom Treaty. This system gave the Parliament unlimited power to propose modifications, but left the final adoption of the budget to the Council.

However, when agreement was reached in 1970 on the replacement of Member States' financial contributions by the Communities' own resources, it was realized that this would diminish such control as national parliaments may have had over Community expenditure, and so the 1971 Budgetary Treaty [107] increased the control exercised by the European Parliament in two stages, becoming fully operational from 1975 when the 'own resources' system was supposed to be fully implemented. The 1971 amendment introduced the distinction between expenditure necessarily arising from the Treaties and other expenditure, and effectively allowed the Parliament the last word, within limits, on 'non-necessary' expenditure, but not with regard to 'necessary' expenditure.

Perhaps with this in mind, in March 1975 the Parliament, Council and Commission made a joint declaration [108] to the effect that a conciliation procedure between the Parliament and the Council had been instituted which 'may be followed for Community acts of general application which have appreciable financial implications and of which the adoption is not *required* by virtue of acts already in existence', the archetypal example of such an act being the regulation establishing the European Regional Development Fund. However, also in 1975, agreement was reached on a second Budgetary Treaty, [109] which came into force on 1 June 1977, although the 1977 budget was in practice adopted through this procedure; [110] the effect of this last amendment is to give the Parliament the final word on the fate of the whole budget, if not control over every detail of it.

---

[103] Commission Regulation (EEC) No 679/77 of 31 March 1977 (OJ L 84, 1.4.1977).
[104] OJ L 356, 31.12.1977.
[105] Financial Regulation of 16 December 1980 (OJ L 345, 20.12.1980).
[106] Article 89 ECSC, Article 203 EEC, Article 177 Euratom, as amended.
[107] OJ L 2, 2.1.1971.
[108] OJ C 89, 22.4.1975.
[109] OJ L 359, 31.12.1977.
[110] European Parliament, *Powers of the European Parliament 1978*, p. 18.

29. The actual procedure is of considerable complexity, the result of what might be described as a kind of semi-devolution, in that, while the will is there to involve the Parliament, there is not the confidence to trust it completely. To simplify somewhat, the Council, when it has established the draft budget, which in turn will be based on a preliminary draft budget prepared by the Commission, places it before the Parliament. Parliament may, of course, approve it, but it may also amend it by a majority of its members, subject to an 'exception' covering about 70% of the total: with regard to 'necessary' expenditure, it may merely, by an absolute majority of the votes cast, propose modifications. A proposed modification which does not have the effect of increasing expenditure is deemed to be accepted unless it is expressly rejected by a qualified majority in the Council: one which does have the effect of increasing expenditure is deemed to be rejected unless it is expressly accepted by a qualified majority. If the Council does not modify the amendments and does accept the proposed modifications, then the budget stands approved. Otherwise, it returns to the Parliament which, acting by a majority of its members and two-thirds of the votes cast, may amend or reject the modifications made to its amendments and adopt the resultant budget. It has no further power to propose modifications to the 'necessary' expenditure, but it may, 'if there are important reasons', and again acting by a majority of its members and two-thirds of the votes cast, reject the draft outright and ask for a new one to be submitted.

30. The operation of this system with regard to both the 1979 and 1980 budgets revealed problems of some interest. Under the amended Article 203(9) of the EEC Treaty and parallel provisions in the other Treaties, the maximum rate of increase in non-compulsory expenditure is established by the Commission and then notified to all institutions. In the 1979 budget, an amendment was made by the Parliament to regional expenditure, which by then was agreed to be 'non-necessary', which had the effect of taking the overall sum above this maximum. The Council failed to obtain a qualified majority to modify this figure, so the budget approved by the Parliament exceeded the maximum. In some quarters it was alleged that this totally nullified the budget, [111] but at the least it opened public discussion [112] of the fact that, if the budget could now be regarded as an act of the Parliament, then, unlike Article 38 of the ECSC Treaty, neither the EEC nor Euratom Treaties appeared to provide a method by which an act of the Parliament could be challenged directly before the European Court, although it may be possible for a Member State to challenge a Commission decision implementing the budget. The dispute relating to this budget was in fact resolved in its first supplementary and amending budget. [113]

The 1980 budget was the first to be considered by the directly-elected Parliament. It sought, *inter alia,* to reduce the 'necessary' agricultural expenditure and to increase the 'non-necessary' regional expenditure. Following the rejection of its proposals by the Council, and despite use of the conciliation procedure, in December 1979 the Parliament rejected the whole budget. [114] Here, however, it could probably be dangerous to draw too close an analogy with national parliaments which have wrested power from autocratic rulers by their control of the purse strings: under the 'own resources' system, revenue is raised by a self-contained system which the Parliament does not control, and its control

[111] House of Lords Select Committee on the European Communities. Session 1979-80, Second Report.
[112] See e.g. CML Rev., 1979, p. 175.
[113] *Thirteenth General Report EC,* p. 39.
[114] *Thirteenth General Report EC,* p. 48.

extends in substance only to expenditure. Even here, rejection of the budget does not prevent Community expenditure, since the amended Article 204 of the EEC Treaty authorizes a sum equivalent to one-twelfth of the budget appropriations for a particular area of activity for the preceding financial year to be spent each month if the budget has not yet been voted. Under this system, the body to suffer most from the rejection of the 1980 budget was the Parliament itself, since for half of 1979 it was still a nominated body with a smaller membership, and hence its expenditure in 1979 was much lower than that which would be required in 1980.

¶ 3. *Implementation of the budget and financial control*

31. Implementation of the budget is entrusted to the Commission, the provisions of the EEC and Euratom Treaties having remained unchanged in this respect, and the Commission is required to submit the accounts of the preceding financial year relating to the implementation of the budget to the Council and to the Assembly. Originally, a discharge was granted to the Commission by the Council, acting by a qualified majority. Under the 1971 Budgetary Treaty, however, the discharge was granted by both the Council and the Parliament, and under the 1975 Budgetary Treaty it is granted by the Parliament on the recommendation of the Council (still acting by a qualified majority).

32. With regard to external financial control, Article 78 of the ECSC Treaty originally provided for the appointment of an auditor, whereas Article 206 of the EEC Treaty and Article 180 of the Euratom Treaty provided for the appointment of an Audit Board. The ECSC auditor originally had the responsibility of drawing up an annual report on the regularity of the accounting and financial management of the several institutions of the Community without restriction.

However, when the 1965 Merger Treaty brought the procedure for the ECSC administrative budget into line with the procedure for the EEC and Euratom budgets, it [115] excluded administrative expenditure from the competence of the ECSC auditor, leaving him effectively to supervise the operational expenditure, and introduced an Audit Board to examine the accounts of the ECSC administrative expenditure and revenue; further, Article 22 of the Merger Treaty provided for a single Audit Board of the European Communities to act for all three Communities. In essence, the Audit Board performed a strictly auditing function, establishing that 'all revenue has been received and all expenditure incurred in a lawful and regular manner', although it was also supposed to check that 'financial management has been sound'. Its report was to be submitted annually to the Council and Parliament by the Commission, the discharge of the Commission being dependent upon an examination of this report.

33. A fundamental change was, however, made by the 1975 Budgetary Treaty, which created a Court of Auditors for all three Communities. Following the accession of Greece, this consists of 10 members who have belonged in their respective countries to external audit bodies or who are especially qualified for such office. Its basic duties are defined in terms virtually identical to those of the Audit Board, except that it is expressly provided that its audit may be carried out on the spot not only in the institutions of the Commu-

[115] Article 21.

nity, but also in the Member States. However, its annual reports are required to be published in the *Official Journal*, together with the replies of the institutions to its observations, and, perhaps most important, it may also at any time submit observations on specific questions, and deliver opinions at the request of one of the Community institutions. Hence, by way of example, in 1979 it published a special report on the accommodation policies of the institutions of the European Communities, [116] a question of both financial and political importance. Returning, however, to its auditing function, it might finally be noted that in the ECSC context, the Court of Auditors has replaced not only the Audit Board with regard to administrative expenditure and revenue, but also the auditor with regard to other expenditure and revenue, by virtue of the new Article 78f(5) of the ECSC Treaty.

Section IV — Non-budgetary expenditure

34. No study of Community finance would be complete without mentioning that certain areas of Community expenditure and revenue remain outside the normal budgetary procedure. As has already been indicated, the ECSC operational budget remains the prerogative of the Commission under Articles 49 and 50 of the ECSC Treaty. The non-administrative expenditure for which Article 50 permits ECSC levies to be used comprises three main headings: aid towards readaptation under Article 56, a provision whose scope was broadened by an amendment in 1960 [117] so as to cover changes in marketing conditions not directly linked to the establishment of the coal and steel common market, as well as those that were; servicing of loans and payment of guarantees on loans; and in promoting technical and economic research relating to production and use of coal and steel, and occupational safety in the coal and steel industries, under Article 55(2).

Although Parliamentary control does not apply to this expenditure, it would appear, from its own account, that the Commission does have regard to the opinions of the European Parliament in this matter. [118]

35. The other main policy area which has been financed by measures adopted outside the budgetary procedure is concerned with relationships with developing countries. Here, the main instrument has been the series of European Development Funds. Under Article 131 of the EEC Treaty, the Member States agreed to associate with the Community the non-European territories having special relations with (originally) Belgium, France, Italy and the Netherlands, and under Article 132 one of the objectives of such associations is that Member States should contribute to the progressive development of these territories. The Implementing Convention annexed to the Treaty established a Development Fund for Overseas Countries and Territories for this purpose, into which the Member States had to pay fixed contributions over a period of years, these funds being made available in fixed proportions to the territories of the named Member States. The budgetary regime was laid down in Council Regulation No 5 of 2 December 1958, [119] which required the

[116] OJ C 221, 3.9.1979.
[117] OJ 781, 16.5.1960.
[118] *Thirteenth General Report EC*, p. 48.
[119] OJ 681, 31.12.1958.

Commission to draw up a special budget for the Fund, although the actual administrative costs were to be included in the ordinary budget. However, even the special budget was subject to control by the Audit Board and required a discharge to be granted to the Commission by the Council.

The first Fund actually to be called the European Development Fund (but nowadays known as the Second EDF) was established under the 1963 Yaoundé Convention and a similar fund was again established under the 1969 Yaoundé Convention; both of these comprised fixed sums to be paid over the duration of the agreement. Under the Financial Regulations governing these Funds, [120] a separate system of subordinate administration was established, although the accounts remained subject to control by the Audit Board, and discharge was to be granted to the Commission by the Council. The Fourth European Development Fund was established pursuant to the 1975 Lomé Convention and the parallel provisions for the remaining overseas countries and territories. [121] This again comprised a fixed sum, but for the first time this sum was expressed in units of account calculated from the current values of a basket of currencies, the EUA, [122] which has come to be used as the denominator of value in virtually all aspects of Community policy. A further innovation was that the management of the export earnings stabilization system came within the system of the Fund. [123] On the other hand, subordinate administration is maintained, but under Article 31 of the Internal Agreement on the financing of Community aid [124] discharge is granted to the Commission under the procedure laid down in Article 206 of the EEC Treaty, which has automatically allowed for the adjustments made by the 1975 Budgetary Treaty.

Although a Second Lomé Convention was signed on 31 October 1979, it was unable to come into force on 1 March 1980 when the first one expired, and it was agreed to continue, *inter alia,* the stabilization system and financial cooperation under the 1975 Convention up to the end of 1980. [125] In the context of the Second Lomé Convention, however, a Fifth European Development Fund has been established by the Internal Agreement for the financing and administration of Community aid. [126] Although this creates two committees of representatives of Member States to help with its administration, again provision is made for discharge to be granted to the Commission by the Parliament on the recommendation of the Council. It might be noted that all four earlier Funds provided for uncalled contributions to be called up by the Commission on their expiry, and as a result of decisions on the transfer and utilization of these unexpended balances, discharges under all four Funds were still being given in 1980, *in casu* for the year 1978. [127]

---

[120] Council Regulations Nos 64/356/EEC and 71/68/EEC of 1 June 1964 and 26 January 1971 (OJ 1498, 11.6.1964; OJ L 31, 8.2.1971).

[121] Council Decision 76/568/EEC of 29 June 1976 (OJ L 176, 1.7.1976).

[122] Defined in Council Decision 75/250/EEC of 21 April 1975 (OJ L 104, 24.4.1975).

[123] See e.g. Article 53 of the Financial Regulation No 76/647/EEC of 27 July 1976 (OJ L 229, 20.8.1976).

[124] OJ 225, 30.1.1976.

[125] Council Regulation (EEC) No 434/80 of 18 February 1980 (OJ L 55, 28.2.1980).

[126] OJ L 347, 22.12.1980.

[127] Council Decisions 80/457 to 9/EEC and Recommendation 80/460/EEC of 22 April 1980 (OJ L 111, 30.4.1980).

36. The question of the financing of agreements with non-member States does in fact have wider ramifications. In Opinion 1/75 [128] given under Article 228 of the EEC Treaty, the European Court held that the Community had exclusive competence to participate in an understanding on a local cost standard negotiated under the aegis of the OECD, and said it was of little importance that the financial burdens were borne directly by the Member States. However, in Opinion 1/78 [129] on the proposed International Rubber Agreement, the Court said that if financing of the stabilization scheme there in question was to be by the Member States, rather than through the Community budget, that would imply their participation in the agreement. Hence, it would appear that exclusivity of Community external competence may depend on whether the agreement in question is financed by the Community or by the Member States.

Conclusions

37. In sum, it would perhaps be not quite true to say that the Community has gone from 'own resources' to 'own resources' in 30 years: just as the own resources system could become fully operational, recognition has been given to the need to limit the net burden imposed on an individual Member State. On the other hand, at the Community level, parliamentary and accounting control over finance has been increased both in theory and in practice, even though some aspects still do not fall within the normal budgetary procedure—and at the external level, Community exclusive competence may depend on whether they do.

Finally, recognition must be given to the fact that the use of a unit of account based on the current values of a basket of Member States' currencies has considerably reduced the problems caused in Community finance by floating exchange rates.

[128] [1975] ECR 1355.
[129] OJ C 279, 8.11.1979.

Chapter IX — The Community's relations under public international law

by Henry G. Schermers

Section I — General

1. Until 1952, public international law relations were the exclusive prerogative of States. There were, of course, international organizations but they possessed so few powers of their own that they did not feel the need to play an independent role. Their member States could look after their interests. With the establishment of the European Coal and Steel Community (ECSC), the situation changed. The Community was entrusted with a sovereignty of its own, albeit in a limited field. Although this field did not extend to international relations as such, it nevertheless affected them. The Community concluded agreements with non-member States, diplomatic missions were accredited to it and it was involved in international organizations. However, because the ECSC worked in a limited field, its international role was a modest one.

2. The two Communities which were established later were called upon to play a more important international role. From the outset, the EAEC depended upon agreements concluded with other States both for supplies of nuclear fuel and for the exchange of information. Later, the international rules on the subject of control also acquired increasing importance.

3. The European Economic Community (EEC) was created in the context of negotiation concerning its external relations. Before it was established, there had been much discussion with the other members of the Organization for European Economic Cooperation (OEEC) concerning the mutual relationship between the Six and the 11 other members of the OEEC. The main negotiations were conducted in a committee whose chairman was the British minister Reginald Maudling. After the suspension of these negotiations, in November 1958, the Commission of the EEC pursued an independent foreign policy and, for example, sent a delegation to London in February 1959 for an exchange of views with the British Government. [1]

4. The special position which the Communities occupy in public international law is best illustrated by the right of representation which they can exercise in their relations

[1] *Second General Report EEC*, point 43.

with non-member countries, by their role in international organizations and by the conclusion of agreements. In this study, we shall consider these three aspects, although they are not the only aspects of the Communities' activity in international affairs. The Communities play a by no means negligible role in development aid; the Communities, especially the EAEC, are subject to certain rules of international law on the liability of States; and certain rules on the subject of State succession, recognition, diplomatic protests, etc., apply to the Community in the same way as to States.

Section II — The right of representation

¶ 1. *The right to receive missions*

5. The establishment of permanent missions at the seat of an international organization began in the League of Nations era. From the 1920s, a large number of States were permanently represented at the headquarters of this organization at Geneva. The United Nations and many other, including European, organizations followed suit later. In fact, however, representation was always on behalf of *member States*. It is only in certain cases that third countries have permanent observers accredited to international organizations; Switzerland, for example, has an observer at the United Nations. The main duties of these observers is to supply information: they keep their governments informed about the activities of the organization concerned and, whenever required to do so, provide the organization with information about their own countries. This hardly amounts to active prosecution of their interests.

6. Shortly after the establishment of the ECSC, the United Kingdom accredited a permanent delegation to the High Authority; in 1952, this example was followed by Sweden [2] and, a little later, by some other West European States. The United States did not take long to accredit an ambassador to the High Authority. In 1954, it was the turn of Japan, the first Far Eastern State to do so. The task of these missions was to look after their country's interests in the same way as diplomatic missions between States.

7. On 13 March 1958, Ambassador Butterworth of the United States became the first diplomat to be accredited to the EEC. [3] Some months later, the example of the United States was followed by Greece, Israel, Denmark and Japan. By May 1960, 13 diplomats were stationed with the EEC. Since then, the number has steadily increased and, on 1 February 1981, 118 States had a diplomatic mission to the Community, although the majority of representatives accredited to it also served as ambassador to the King of the Belgians. As a result, Brussels has become a major diplomatic centre.

The doyen of the diplomatic corps accredited to the Community is the Apostolic Nuncio.

8. The legal position concerning the diplomats accredited to the Community is not very clearly defined. The Vienna Convention on Diplomatic Relations of 1961, which governs the status of diplomats, is no guide because its provisions apply only to the diplomatic

[2] *First General Report ECSC*, points 14 and 15.
[3] *First General Report EEC*, point 168.

relations between States. The Vienna Convention of 1975 on the representation of States in their relations with international organizations of a universal character is applicable only to world organizations; in any case, the Convention has not been accepted by the Member States of the Community. Nor does classic international customary law offer much assistance in this case, since it is concerned with relations between States and, in consequence, takes no account of the fact that, in addition to the Community and the State which has a diplomat *en poste*, the receiving State also has a direct interest in the diplomatic mission. It must, in fact, grant the usual privileges and immunities and will suffer the consequence if a diplomatic mission fails to honour its obligations (for example, by carrying drugs in the diplomatic bag).

The Community has never concluded agreements relating to its seat because it has not been able to decide where the seat should be situated. Article 17 of the Protocol on the Privileges and Immunities of the European Communities, which was adopted at the same time as the Merger Treaty, provides that the Member State in whose territory the Communities have their seat shall accord the customary diplomatic immunities and privileges to missions of non-member countries accredited to the Communities. For this reason, Belgium grants to missions accredited to the Communities the same status as it does to missions accredited to the Belgian Government.[4] This means that if, because of strained political relations, the mission of a State enjoyed only limited privileges in Belgium, it would be subject to the same restrictions in fulfilling the same capacity in respect of the Community. Consequently if, for example, countries in Eastern Europe accredited missions to the Community, they would be subject to travel restrictions in Belgium.

9. Until 1966, foreign diplomats were accredited to the High Authority (subsequently, the Commission) of the ECSC and to the Commissions of the other Communities. There was a certain degree of formality attached to accreditation, especially in the case of the EEC.[5] On the occasion of the compromise agreement concluded in Luxembourg in January 1966, it was decided that, in the case of the EEC and the EAEC, diplomats would, in future, be accredited to both the Council and the Commission. In practice, accreditation took place on the same day and identical credentials were presented to the Council and to the Commission.[6] The formality at the Commission was eventually discontinued. Although of no fundamental importance, the change indicated a weakening of the Commission's position, since the formality had confirmed non-member States in their belief that the Commission was the central organ of the Community. As an official change, it could scarcely fail to be interpreted as a shift in the balance of authority.

Both for the establishment of diplomatic relations and for the acceptance of a diplomat as *persona grata*, the Council's decision must be unanimous.[7] Each Member State has, accordingly, a right of veto regarding every mission and every ambassador.

---

[4] See M. Virally, P. Gerbet, J. Salmon, *Les missions permanentes auprès des organisations internationales*, 1971, p. 722.

[5] Ibid., pp. 728-730.

[6] Ibid., pp. 731 and 732.

[7] Ibid., p. 727.

¶ 2. *The right to establish missions*

A. Missions to international organizations

10. Their task obliges the Communities to maintain close links with international organizations, especially in the economic field. To this end, the Member States can, individually or as need arises jointly, work through their diplomatic missions but the Commission soon felt the need for separate representation. Since the majority of these organizations are not empowered to establish permanent missions to serve with the Community, the only way in which the Commission could forge permanent links with them was by sending missions to serve with them.

11. On 15 February 1964, the Commission installed a permanent delegation in Geneva which was headed by Mr Pierre Nicolas who, on the basis of his reponsibilities, was given the status of Embassy Counsellor. The mission was made responsible for looking after the Community's interests in the context of the international organizations in Geneva, which included the GATT, the International Labour Organization, the United Nations Economic Commission for Europe (ECE) and, later, Unctad. By letter of 28 July 1964 addressed to Commissioner Rey, the Swiss Government granted the permanent delegation the same status as that of the missions of States serving with international organizations based in Geneva.

The Commission also has an official mission at the headquarters of the United Nations in New York. It was originally an unofficial mission but it has enjoyed diplomatic status since 1976; recognition of this was given in a letter sent to Commissioner Christopher Soames by Secretary of State Henry Kissinger on 4 August 1977.

In Paris, the Communities have a mission to the OECD which, as necessary, also looks after their interests at Unesco. The mission of the Communities in Vienna is of special importance to the relations between the EAEC and the International Atomic Energy Agency (IAEA); it also keeps a watch on Community interests at the United Nations organs established in Vienna.

12. These missions to international organizations provide relatively informal contact with the secretariats and their appointment and composition are notified to the secretariats. As a rule, the responsible authorities in the organizations concerned are not directly involved in this relationship. It is correspondingly difficult to conclude that the establishment of these missions constitutes recognition by the organization concerned in terms of public law. Nevertheless, they strengthen the international position of the Community.

B. Missions to States

13. There are few legal rules on the subject of the right of international organizations to establish missions abroad. The majority of such organizations have never felt the need to send missions themselves; the missions accredited to them enable them to maintain sufficient contact with their member States. The right to send envoys to a post, even more than the right to receive them, has remained the prerogative of States.

Since its establishment, the ECSC has maintained close links with the United Kingdom. After the Association Agreement entered into force in 1955, the ECSC immediately

installed a permanent delegation in London. Shortly afterwards, the other Communities also felt the need for a mission in the main capitals which would be responsible for maintaining contact with various government departments. The Commission was the prime mover in pressing for these missions to be set up. In February 1960, the Council accepted in principle that the Communities were entitled to have diplomatic representation. In December 1960, the European Assembly pressed for the establishment of missions in non-member countries. [8] However, it was not until 1968 that the first diplomatic representative of the three Communities (Mr Linthorst Homan) was accredited to a non-member State (the United Kingdom).

14. The second mission which the Community set up in a non-member State was the mission of the Commission to Washington. In 1972, by express authority of Congress, the President of the United States granted to the mission the privileges and immunities of foreign diplomatic missions. [9]

15. In 1974, the Commission established a mission in Tokyo. This mission, too, was accorded diplomatic status, in an agreement concluded between the Commission and the Japanese Government on 11 March 1974.

16. Similarly, the status of the Commission's mission to Canada is almost the same as that of a diplomatic mission. To this end, the Canadian law on the privileges and immunities of international organizations was amended in 1975. [10]

17. In particular, as part of its development aid programme, the Community has recently set up missions in many developing countries. Most of these are small missions, headed by a delegate of the Commission, and have clearly defined responsibilities. In October 1980, the Community had missions in a total of 56 States. [11]

18. In all the capitals concerned, the representatives of the Commission are treated as diplomats, save that they appear separately at the end of the diplomatic list. In the order of precedence, therefore, they come after the representatives of States. Accordingly, however long the Commission representative remains in a capital, he can never become the doyen of the diplomatic corps there.

Section III — The place of the Communities among international organizations

¶ 1. *Recognition as a subject of public international law*

19. Cooperation between international organizations does not necessarily mean that they recognize each other as having legal personality in international law. At secretariat level, international organizations frequently conclude agreements mainly for the purpose

[8] Resolution of 19 November 1960 (OJ 79, 16.12.1960).
[9] Executive Order 11689 of 5 December 1972.
[10] *Canada Gazette*, Part III, Vol. I, No 11, Chapter 69.
[11] *Yearbook of the Commission of the European Communities*, pp. 87-96.

of exchanging documentary information. As a rule, agreements of this kind are not accompanied by mutual recognition in any form as public law subjects endowed with authority. This type of agreement may also be concluded with non-governmental organizations and even with private undertakings. Early on, the Communities concluded agreements for the exchange of information. Since 1958, that is to say long before the secretariat of the United Nations established any official links with the Communities, there has been an agreement between them on the exchange of documentary information.

Some form of recognition is necessary only in the case of agreements which endow an international organization with a public law function.

¶ 2. *World organizations*

20. Within the United Nations, the States of the Eastern Bloc were originally opposed to any recognition of the European Communities. It was, therefore, more difficult to conclude agreements with the organs of the United Nations, where these States have considerable influence, than with other bodies.

In 1958, the Community was granted observer status at the United Nations Economic Commission for Latin America; this enabled it to participate in the meetings of the Commission, albeit without the right to vote. It was not until 1975 that the Community received the same status at the UN Economic Commission for Europe (ECE), where the States of Eastern Europe were also represented and which was obviously of the greatest interest to the Community. In 1958, an agreement had been concluded with the secretariat of the ECE on the exchange of information and documentation and this made it possible to establish informal contacts. The Community also obtained observer status fairly quickly at the Office of the UN High Commissioner for Refugees (UNHCR), with the World Food Programme (WFP) and with Unctad, where the States of Eastern Europe play a relatively modest role. The Executive Committee of the High Commissioner adopted a resolution to this effect in October 1960. When the WFP and Unctad were set up, they were empowered to invite representatives of intergovernmental organizations and it was by virtue of this power that they issued an invitation to the Community. The United Nations Economic and Social Council invited observers from the Community for the first time in 1967; [12] the General Assembly of the United Nations followed suit on 11 October 1974. [13] The resolution of the General Assembly, in which it expressed the wish to strengthen cooperation with the Community, can be regarded as official recognition by the United Nations Organization.

21. At the same time, there was a steady reinforcement of the links with the specialized agencies of the United Nations. In 1953 [14] the ECSC had entered into a cooperation agreement with the International Labour Organization (ILO). The first agreement which the EEC concluded with another international organization was that of 7 July 1958 on cooperation with the ILO. The Community has now entered into agreements with the majority of the specialized agencies under which it is able to exchange information with

[12] Resolution Ecosoc 1267 (XLIII).
[13] Resolution of the General Assembly 3208 (XXIX).
[14] OJ 11, 14.8.1953.

them and send observers to their meetings. [15] The Community also maintains close links with the International Atomic Energy Agency (IAEA) and with the General Agreement on Tariffs and Trade (GATT). Documentary information is exchanged with the two bodies and Community observers attend their meetings.

22. The Community's position in relation to GATT is even stronger than that in relation to the other organizations mentioned. Because GATT is almost exclusively concerned with matters which fall entirely within the competence of the Community, the Community is in practice a full member. The Community's link with GATT is based on the fact that its Member States transferred to it their obligations under GATT. On all matters connected with trade policy, the Community participates not only in GATT's activities on behalf and instead of the Member States but also in multilateral agreements on an equal footing with the other contracting parties, [16] who have accepted the Community as one of themselves. [17] The Community has also taken part in the main GATT negotiations, including the Dillon Round, [18] the Kennedy Round, [19] and the Tokyo Round. [20] In its report on the Kennedy Round, the Commission described the part played by the Community as such as one of the greatest successes of the negotiations. [21] The Commission plays an independent role in the work of certain GATT committees. In all negotiations, the normal procedure is that the Council lays down directives for the Commission, which then conducts negotiations on behalf of the Community, usually in close consultation with representatives of the Member States. The result is then submitted to the Council, whose approval is necessary before the Community can be bound by it (see point 34 below).

23. Although the Community acts as though it were a contracting party to GATT, it is not strictly speaking a member of that organization. Only the Member States are entitled to be members. The Member States of the Community have no wish to change this state of affairs, principally because the Community's influence in the organization might not be so great if it alone were a member. The fact is that, at present, the Community has 10 votes; otherwise, it would have only one.

The right to a number of votes is one of the arguments used by the Member States of the Community against giving the Community exclusive competence and against the suggestion that only the Community should be a member of international organizations. Hitherto non-member States have not exercised any pressure in that direction, either because they do not wish to recognize the Community as a political entity or because they do not feel justified in becoming involved in its domestic affairs.

24. The argument against sole responsibility, based on the possibility that the Community alone should be a member, carries less weight in the case of organizations where the vote is a multiple one, such as the Commodity Councils, where the exporting and

---

[15] There are agreements of this kind with the ILO, the FAO, Unesco, the WHO, BIRD, the IMF, the IMCO and WIPO.

[16] J.H.J. Bourgeois, *De GATT-overeenkomst en het EEG-Verdrag*, SEW 1974, p. 412.

[17] See Joined Cases 21 to 24/72 *International Fruit Company* [1972] ECR 1219.

[18] *Fifth General Report EEC*, point 206.

[19] *Seventh General Report EEC*, point 291.

[20] *Thirteenth General Report EC*, point 495.

[21] *First General Report EC*, point 491.

importing countries have a voting strength commensurate with the volume of their exports and imports. The Community may, to the exclusion of the individual Member States, be a member of a Commodity Council which is exclusively concerned with matters within the competence of the Community, since in that case it has the same number of votes as all the Member States together. Thus the Community alone is a member of the International Olive Oil Council (IOOC).

¶ 3. *Regional organizations*

25. The Community sends observers to the meetings of all the organizations of Western Europe which deal with matters within its competence. The Commission's observers take part in the work of the OECD, the Council of Europe, the Western European Union, the Inter-governmental Committee on Migration in Europe, the European Conference of Ministers of Transports, the Central Commission for the Navigation of the Rhine, and other organizations. The Commission also sends observers on behalf of the Community to some non-European organizations, such as the Organization of American States (OAS) and the Association of South East Asian Nations (ASEAN).

Section IV — The power to conclude agreements

¶ 1. *The power of the Community*

26. We can divide the power of the Community to conclude agreements into two sections: first, the power under public international law to act within the rules of that law and, second, the power to act externally under the rules of internal law. The power to make agreements under international law obviously depends upon the extent to which other subjects of public international law are prepared to accept the Community as a partner; the power to do so under internal law depends upon the extent to which, in the Council, the Member States are prepared to adapt themselves to the powers which the Treaties have conferred on the Community and to transfer responsibility to it.

A. **External power**

27. Like the ability to take part in international organizations, the ability to make agreements depends upon the cooperation of the governments of other States. As a rule, this cooperation is forthcoming. The Community carries such economic weight that most States are willing to conclude agreements with it as soon as it becomes clear that the Member States of the Community do not themselves intend to participate in the agreements on an individual basis.

There was a good example of this in the agreements concluded under the aegis of Unctad on the subject of commodities. At the International Sugar Conference held in 1968, the States of Eastern Europe were opposed to any kind of participation by the European Economic Community. The representative of the Soviet Union declared that the EEC's interests did not deserve to be protected, because the Community's sugar policy was

disastrous for the developing countries. In his view, the United Nations Organization was an organization of States and there was no separate place in it for the EEC. He expressed the belief that, just like other international organizations, the Community could send an observer to the Sugar Conference without, however, there being any question of its playing any part at all in the agreement to be made. [22] Nevertheless, the Community received the support of many developing countries, probably because they had everything to gain from its participation in an international sugar agreement.

The legal adviser to the United Nations was of the opinion that the Community occupied an intermediate position between that of a representative of a State and that of an observer, with the result that the Community could play a full part in the negotiations. [23] In the official report on the Conference, the delegation of the Community appears at the end of the list of the delegations of States, but in that list and not in the list of observers. [24] In the text of the agreement, the EEC is expressly mentioned as a possible party. [25] When the agreement was signed, the East European countries entered a reservation regarding this recognition of the Community [25] but this did not prevent them from signing.

28. Since this precedent was set, the Community has found little difficulty in taking part in conferences for the conclusion of other commodity agreements and in ensuring that the agreements contain provisions enabling it to become a party to them. Indeed, the majority of commodity agreements have been concluded as mixed agreements (see point 36 below), which means that, apart from the Community, the Member States are also parties to them. However, the International Agreement on Olive Oil of 30 March 1979 was concluded by the Community alone.

29. In point 22 above, we noted that, as a rule, the Community acts as a single entity in GATT, which is the reason why it is also a party to certain agreements made under GATT, often to the exclusion of its Member States. Examples of this are the Agreement on Public Contracts, which came into force on 1 January 1980, and the Arrangement regarding International Trade in Textiles of 20 December 1972, which was extended until 31 December 1981 by protocol of 14 December 1977.

30. Similarly, in the case of other organizations, agreements have provided for the participation of the Community. Thus, it is a party to certain agreements on export credits concluded under OECD auspices, a Unesco agreement on the importation of educational, scientific and cultural material and certain agreements of the Council of Europe, including one on animals for slaughter. It should perhaps be noted that the fact that the Community takes part in the work of international organizations, even without the right to vote, makes it easier for it to become a party to the agreements made in these organizations; the better an organization knows the Community, the readier it is to accept it as a contracting party. This is a further reason why the Community should take part in the work of international organizations.

31. The Community also concludes agreements with non-member countries outside the sphere of international organizations. Obviously, this applies primarily to agreements

---

[22] UN Document TD/SUGAR. 7/EX/SR. 11-27, pp. 52-54.
[23] *United Nations Juridical Yearbook*, 1968, pp. 201 and 202.
[24] UN Document TD/SUGAR. 7/12.
[25] *United Nations Treaty Series*, Vol. 654, 1969, p. 328.

reached in the field of international trade. In this field, non-member countries have, legally speaking, no choice, since the Community has exclusive competence. Individual Member States cannot conclude trade agreements. If a non-member country wishes to establish trade relations with the territory of the Community, because of the latter's great economic importance, it must first recognize the Community by concluding a formal agreement. A State which, for political reasons, refuses to do so can, of course, try to conclude with individual Member States a treaty of friendship or an agreement on co-operation which may also be advantageous for its trade. Whether a Member State is willing to do this depends on the extent to which it feels free to follow a foreign policy outside the context of the Community. This brings us to the question of the relationship between the Community and its Member States.

B. Internal power

32. Agreements may be concluded for two reasons: (1) to resolve a specific problem, or (2) for the furtherance of foreign policy. It is obviously for the first reason that some agreements, such as those on the prevention of plant diseases, are made, while others, such as treaties of friendship, are made for the second. Most agreements, however, contain an element of both: they endeavour to improve political relations between two or more States and, at the same time, to resolve or mitigate specific problems.

The task of the European Community is not to conduct a foreign policy but to resolve certain economic problems. This gives rise to a situation of conflict: can the Community improve its political relations with certain States or groups of States by concluding agreements? In some fields, the Community's power to conclude agreements is governed by the Treaties. In the case of the EEC, trade policy is governed by Articles 111 and 113 of the Treaty and associations by Article 238. The Treaties make no provision in relation to other fields. The issue arose in connection with the conclusion, under the auspices of the United Nations Economic Commission for Europe, of an agreement concerning the work of crews of vehicles engaged in international road transport (AETR). The Community had adopted a regulation laying down rules on the subject for application in its territory. The Commission regarded the conclusion of an agreement as primarily a means of resolving the difficulties; it considered that the Community, which was responsible for the question of drivers' working hours, ought also to conclude international agreements on the subject. It could not agree that the Community should for its own territory, adopt a regulation which might subsequently be revoked by the Member States because they had made an agreement with non-member countries. The Commission argued that the Community's internal powers automatically implied its right to conclude agreements with non-member countries. On the other hand, the Council contended that the conclusion of agreements was an act of international policy which the Community lacked the capacity to make in so far as the necessary power had not been expressly conferred upon it.

In the end, the Court accepted the viewpoint of the Commission initially with certain reservations, [26] which it subsequently withdrew. [27] Thus, the Court placed the unity of

[26] Case 22/70 *Commission* v *Council* (AETR) [1971] ECR 263.

[27] Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Court of Justice Opinion 1/76 (Article 228) [1977] ECR 741.

Community law above considerations of policy. Whether the law is national or international in origin, its cohesion is of the greatest importance and must be preserved. It would be an intolerable situation if a Community regulation could be contradicted by agreements concluded by the Member States with non-member countries. The judgments of the Court provide a guarantee against this possibility. Obviously, this does not mean that the political effects of international agreements on the subject of transport or fishing cannot also be important; it merely shows that political considerations cannot be divorced from economic considerations and that, if the Community has been granted powers within its internal system, the result is that, in the particular field involved, the Member States lose their external powers and the Community, too, is called upon to play a political role.

¶ 2. *Procedures for the conclusion of agreements*

33. The Commission, or more frequently, a non-member country takes the first step towards the conclusion of an agreement. In either case, the Commission consults the Council before taking any action. If the Council does not object in principle to the establishment of contacts with the State concerned, the Commission tries to ascertain, by way of confidential consultations, what specific points an agreement might cover. The Commission then forwards a detailed report to the Council, which thereupon lays down negotiating guidelines for the Commission. These are sometimes referred to as mandate but this is incorrect since there is no question of a mandate which can be withdrawn. [28] The Commission has its own tasks. It conducts the negotiations with the help of representatives of the Member States, who either act as observers or become members of a special committee which, as provided for in Article 113 of the EEC Treaty, the Commission consults.

When the negotiations are completed, the text of the agreement is submitted to the Council. It is the Council which concludes the agreement and it does so by an official act which is open to interpretation by the Court of Justice under Article 177 of the EEC Treaty. [29] Questions which arise before a national court regarding the effect of agreements concluded by the Community with non-member countries must, therefore, also be referred to the Court of Justice.

34. The European Parliament does not play a very important part in the conclusion of agreements. It need not be consulted in connection with ECSC or EAEC agreements. The great majority of the Community's agreements are concluded under the EEC Treaty. The position of the Parliament in regard to them has evolved over the years. The provisions of the EEC Treaty require the Parliament to be consulted in the case of association agreements (Article 238) but not in the case of trade agreements (Article 114). In the case of association agreements, the Parliament was originally consulted only in the period between signature and ratification. Later, consultation became somewhat more

[28] Horst Habicht, in von der Groeben, von Boeckh, Thiesing, *Kommentar zum EWG-Vertrag*, Vol. 2, 1974, p. 695.

[29] Case 181/73 *Haegeman* v *Belgium* [1974] ECR 449.

substantial in the form of the 'Luns procedure', [30] which was named after the President of the Council at that time and provides for a debate in the Parliament before negotiations begin. During the negotiations, the Commission keeps in touch with the committees of the European Parliament responsible for the subject-matter involved. On completion of negotiations but before signature, the Council informs these committees, in confidence, of the contents of the agreements.

Consultation with the Parliament is even less noteworthy in the case of trade agreements. The only rule of the 'Luns procedure' which is applied is that the text of a trade agreement is communicated in confidence to the parliamentary committees concerned before it is signed.

¶ 3. *Effects of agreements under Community law*

35. In order to interpret the content of an agreement within the meaning of Article 177, the Court of Justice must treat that content as ensuing from an act of the Council. This does not necessarily mean that, as a general rule, the Court supports the thesis that the rules of public international law must be transposed into Community law in order to have the force of law for the Community. That would be contrary to the attitude which the Court has always adopted on the relationship between national law and Community law. It has always upheld the principle that Community law automatically forms part of the national legal system, regardless of the manner in which that system incorporated it. [31]

The internal effect of international agreements offers an interesting problem because some Member States (France, the Benelux countries and Greece) apply the monist doctrine to the rules of international law, which means that those rules take automatic effect within the national legal system and, in case of conflict, prevail over national law. On the other hand, the other Member States transpose the rules of international law into national law, which means that they have the same force as the national act by which they were transposed and that, in consequence, they must yield to a higher ranking provision of national law and to one of the same rank but of later date. This consequence of the dualist system lends practical importance to the difference between the monist and dualist doctrines. If it were not for this consequence, the difference would not matter.

If the Court had in mind, in *Haegeman,* the phenomenon of transposition, that transposition arose from an unspecified act of the Council. Such an act does not affect the ranking of the international rule in Community law. Agreements adopted by the Community can be recognized as taking precedence over other provisions of Community law, even though it is only the act of the Council that has made them part of Community law.

This is the effect, in particular, of Article 228(2) of the EEC Treaty, which declares that agreements concluded by the Community shall be binding on the institutions and on Member States. The Court's reasoning in its judgments in *van Gend en Loos* and in *Costa*

---

[30] See also S. Patijn, *Het europees Parlement: De strijd om zijn bevoegdheden,* Rotterdam, 1973, pp. 125-127; M. Quintin, 'Participation de l'Assemblée parlementaire européenne au déroulement de la procédure de négociation des accords commerciaux', RTDE, 1975, p. 211.

[31] See, in particular, Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

v *ENEL* is based on the monist doctrine. Every argument in support of the precedence of Community law over national law is also an argument in favour of the precedence of international law over Community law. All in all, the classic doctrine of transposition has no relevance for the Community. The doctrine was, in fact, created for the benefit of national parliaments. There was opposition to the idea that international regulations adopted outside these parliaments should be integrated into the national legal system. Transposition means replacing a provision of public international law by a provision of national law adopted by parliament. The position is quite different in the Community. A rule of public international law and a provision of internal law are on an equal footing. In either case, the Council takes the decision, on the initiative of the Commission; in neither case has the European Parliament a decisive vote.

¶ 4. *Mixed agreements*

36. On the basis of the precedents established by the Court of Justice, the Community can be said to be empowered to conclude agreements in all fields in which it can adopt binding rules. The remaining fields are reserved to the States.

Of course, many agreements cover different fields, so that they come partly within the competence of the Community and partly within the competence of the Member States. Generally, in these cases, both the Community and the individual Member State sign the agreement. These are called mixed agreements.

There are a large number of them. Their objects vary widely: for example, the protection of animals, [32] blood plasma banks [33] and conservation of the environment. [34]

37. As an instrument, a mixed agreement is something new. It raises a number of theoretical and practical problems which have not yet been fully resolved.

An international treaty often takes the form of a 'package deal'. The contracting States concede certain points to obtain the benefit of others. An example can be found in an aspect of the Law of the Sea. The great maritime powers have every interest in safeguarding the freedom of the seas. On the other hand, coastal States want to have wide territorial waters in which they can exercise or claim exclusive fishing rights. Some give-and-take has made it possible to reach an agreement providing for wide territorial waters on the one hand and freedom of innocent passage in particular through straits on the other. A compromise of this nature cannot be subject to reservations. If the coastal States could make a reservation as to the freedom of navigation through territorial waters and if the maritime powers could make reservations on the coastal States' exclusive fishing rights, the compromise would have been impossible.

The Community can be a party only to the rules on fishing, since shipping does not fall within its competence. Conversely, the Member States alone have competence in regard to the rules on shipping but no longer have any with respect to fishing. The mixed agreement provides the answer: the Community and the Member States jointly

---

[32] Agreements with the Council of Europe of 13 December 1968, 10 March 1976 and 10 May 1979.

[33] Agreement with the Council of Europe of 14 May 1962.

[34] For example, the Convention for the Protection of the Marine Environment against Pollution in the Mediterranean of 16 February 1976, concluded under the UNEP (United Nations Environment Programme).

undertake to observe all the rules. However, what is the respective jurisdiction of the Community and of the Member States, taken individually?

There are three possible solutions:

(a) Each Member State is bound to accede once the Community does so. This ensures the maintenance of uniform rules but the individual Member States lose their freedom of action. The only reason why the Community does not act alone is the formal division of powers. The Member States want to remain free to decide on their own participation. If the Member States are obliged to participate then their separate participation serves no purpose. So far, the Member States have not accepted this solution.

(b) The reverse possibility is more consonant with the present state of the Community's development. Under this solution, the Community would accede to a mixed agreement as soon as all the Member States had ratified it. This solution accords with the principle of unanimity which is, in fact, applied in the Council and it is likely to be the most acceptable one. However, it lacks the flexibility needed for the conclusion of agreements and, moreover, is hardly in the Community's interests, since the Community would be entirely at the mercy of its most recalcitrant Member State. Under this system the existing Member States would keep their freedom of action. New Member States on the other hand should be bound by the Act of Accession to accept existing mixed agreements. Otherwise, the Community would be compelled to denounce the agreements. As the majority of agreements make no provision for unilateral denunciation, this will normally be impossible.

(c) Unity is abandoned and both the Member States and the Community decide for themselves whether to accede to an agreement. This would not be readily accepted by the other parties to the agreement. To take the example we drew from the Law of the Sea, the Community could commit itself to the rules on fisheries, which are to its advantage, while the Member States could refuse to commit themselves to the rules on shipping, and in particular on navigation through straits, which place the Community members at a territorial disadvantage. All the give-and-take elements in the agreement would thus be cancelled out. Provision could, of course, be made for this when the agreement was concluded. If the other parties to the agreement accepted a formula which enabled one or more Member States not to be bound by certain parts of it, the Community could become a party to the agreement with some only of its Member States. This is what happened in connection with an Agreement between the EAEC and the United States of America on the exchange of nuclear information.[35] The United States agreed that, apart from the EAEC, only six of the nine Member States should be party to the agreement. As a result, the United States received information only from the six States and from the EAEC, while the three other Member States (Denmark, France and the United Kingdom) received the American data via the EAEC. Similarly, the Agreement on safeguards concluded between the International Atomic Energy Agency (IAEA) and the EAEC, together with seven of its Member States, in connection with non-proliferation,[36] constitutes an incomplete mixed

[35] Memorandum of Understanding between the United States of America, the European Atomic Energy Community (Euratom), Belgium, the Federal Republic of Germany, Ireland, Italy, Luxembourg and the Netherlands in the field of nuclear science and technology information of 19 September 1974, Trb. 1974, No 238; 1975, No 93.

[36] Agreement of 3 April 1973, Trb. 1973, No 97; 1974, No 30; *United Nations Juridical Yearbook*, 1976, p. 123; neither France nor the United Kingdom is a party to this agreement.

agreement in which, because of the importance attached to safeguards, the other party accepted the position. There are other incomplete mixed agreements in existence. [37] This type of agreement frequently secures an unfair advantage for the Member States which are not parties to it, and for their citizens. They reap the benefit of the agreement through the Community but they are not bound to honour all the obligations which go with it.

38. Modern agreements often contain institutional provisions vesting newly-created agencies with responsibility for making regulations or supervising their application. Mixed agreements may also contain institutional provisions. When this occurs, the position of the Community gives rise to special problems. The main question is to decide how it should be represented and what position it should occupy in the agency. This kind of problem is best exemplified by the European Convention on Human Rights. In a memorandum of 4 April 1979, [38] the Commission proposed that the Community should become a party to it. This would make the Convention a mixed agreement, since the Member States are already parties. What would be the institutional consequences of the Community's accession to the Convention? A member would have to serve on the European Commission of Human Rights for the Community but, since no two members of the Commission may be of the same nationality, the Community member would have to be a national of a non-member State, unless there were a derogation from Article 20 of the Convention.

Voting rights present even greater problems. Let us suppose that a complaint against the Community had to be investigated by the Committee of Ministers of the Council of Europe. [39] In that event, would the Community have 10 votes and, in the future, perhaps, on the accession of further Member States, an absolute majority? [40]

Efforts must be made, for the time being on an *ad hoc* basis, to find specific answers to this kind of question every time the Community becomes party to a mixed agreement containing institutional provisions. More general rules could be worked out later.

---

[37] More examples are to be found in M.A. Dauses, *Die Beteiligung der Europäischen Gemeinschaften an multilateralen Völkerrechtsübereinkommen*, EuR 1979, p. 140.

[38] Supplement 2/79 — Bull. EC.

[39] In accordance with the procedure prescribed in Article 32 of the Convention.

[40] In the memorandum, the Commission suggested that no reference whatever to the Committee of Ministers should be permitted in 'Community' cases.

PART TWO

The activities of the Community

Chapter I — The free movement of goods

by Christiaan W.A. Timmermans

Section I — Preliminary observations

1. The free movement of goods is the essential element in the common market established by the ECSC, EAEC and EEC Treaties. Part Two of the EEC Treaty governs the free movement of goods as the first of the foundations of the Community (Title I, Articles 9 to 37). The history of the free movement of goods within the European Communities is first and foremost the history of the implementation and application of these provisions of the EEC Treaty. The principal subject of this study will therefore be the law of the EEC, after a short account of the main developments in the coal and steel and atomic energy sectors.

Some general observations may be made by way of introduction. Due weight must be given first of all to the part played by the Court of Justice of the European Communities in defining and maintaining the principles of free movement of goods. The importance of judicial decisions in this field cannot be over-emphasized. The attainment of free movement of goods has been largely due to what has sometimes been called negative integration. The Treaty provisions on the point mainly amount to prohibitions imposed upon Member States; for example, the prohibition on levying customs duties or charges having equivalent effect, that on applying quantitative restrictions or measures having equivalent effect, or again that on imposing discriminatory charges in intra-Community trade. These prohibitions restrict national jurisdiction in whole or in part, in some cases, over a period of time. These Treaty provisions are naturally more susceptible to Court supervision than provisions which require the adoption of a regulation or a directive for their enforcement. There is, therefore, nothing surprising in the fact that Court decisions have been able to make such an important contribution in this field.

However, this does not explain everything. The development of the direct effect doctrine has been just as important. By allowing the parties concerned a very wide discretion to invoke directly the relevant provisions of the Treaty and enforce their application through the national courts, the Court has been able to have the parties concerned within the Member States participate actively as allies in defending Community law in this field. 'The vigilance of individuals concerned to safeguard their rights provides an effective means of supervision, supplementing the roles which Articles 169 and 170 entrust to the diligence of the Commission and the Member States'.[1] This declaration by the Court in

[1] Case 26/62 [1963] ECR 1.

the *van Gend en* Loos judgment of 1963 has been fully confirmed by subsequent events. The decisions of the Court have included an ever-greater number of preliminary rulings pursuant to Article 177 EEC following proceedings, before the national judge, brought by individuals or undertakings and putting in question the principles of free movement of goods.

The Court has from the beginning interpreted these principles strictly, in decisions which are broadly consistent. It must be borne in mind that the provisions of the Treaty contain a number of extremely vague definitions (charges having an effect equivalent to customs duties, measures having an effect equivalent to quantitative restrictions). In this connection Lecourt observes quite justly that the result depended entirely on the Court. [2] In interpreting the imprecise definitions of these concepts, the basic criterion applied by the Court has always been the attainment among Member States of movement of goods with as little hindrance as possible. It is interesting to observe that this criterion has taken shape little by little in judicial decisions, becoming a general principle of Community law. Sometimes indeed the Court makes direct use of a 'principle of free movement of goods' when the Treaty provisions make it impossible to give a clear answer to the question of interpretation which has been raised. [3]

The account which follows describes the adoption and development over the past 30 years of the free movement of goods as an element in the European integration process: a historical account, limited to a large extent to the development of Community law in this field. Alongside (or rather above) this legal reality can be found what might be called the sociological reality. How does the system of free movement of goods operate in practice? What has been the practical result of it in economic terms?

Étienne Davignon made the following observation during a symposium on the customs union in 1977: 'The European citizen has been created by the free movement of goods....' [4] But how does the European citizen feel this liberty and is it real to him? Not many data are available on this sociological reality of the free movement of goods. As far as is possible it will be taken into account below. Nevertheless the central subject of this study remains the legal aspect of the developments during the past 30 years.

Section II — The European Coal and Steel Community

2. 'Coal and steel will be able to move between the member countries duty-free from the beginning....' This sentence is drawn from the declaration by Robert Schuman on 9 May 1950. Article 4(a) of the ECSC Treaty accordingly provides for the prohibition of import or export taxes or charges having equivalent effect and of quantitative restrictions. This prohibition entered into force at the time when the common market was established (Article 9 of the Convention on the Transitional Provisions). The common market for coal, iron ore and ferrous scrap was instituted on 10 February 1953. [5] The date

[2] R. Lecourt, *L'Europe des juges*, Brussels, 1976, p. 22.

[3] Case 31/67 *Stier* [1968] ECR 235; Case 155/73 *Sacchi* [1974] ECR 409; Case 159/78 *Commission* v *Italy* [1979] ECR 3247.

[4] *Union douanière: réalisations et perspectives*, Brussels, 1978, p. 11.

[5] High Authority Decision No 28-53 (OJ 1, 10.2.1953).

for steel was 1 May 1953,[6] or in the case of certain special steels referred to in Annex III to the ECSC Treaty 1 July 1954,[7] later extended to 1 August 1954.[8]

In theory, therefore, the free movement of coal and steel sector products became a reality with the opening of the common market on the above dates. However, Article 1(4) of the Convention on the Transitional Provisions provided for a certain number of exceptions during a transitional period of five years expiring on 9 February 1959; these exceptions were either general or limited to certain Member States, to cover shifts in production or problems of adaptation owing to price competition. The integration of the national coal and steel markets was broadly successful; at all events it was easier than the founding fathers of the Treaty had foreseen.[9] Some of the exceptions authorized during the transitional period proved unnecessary. It should be recalled in this connection that trade between Member States in ECSC products, with the exception of steel, were not subject to customs duties or to quotas before the common market entered into force.[10] The only real problem was the adaptation of the Belgian coal market.[11] The average production costs of Belgian coal were appreciably above the Community average at the time when the common market entered into force. An equalization system was introduced by Article 26 of the Convention on the Transitional Provisions. The payments to Belgian collieries by way of equalization were financed by levies imposed upon the coal products of Community countries in which the average production costs were below the Community level (Germany and the Netherlands). Substantial amounts were paid to Belgian collieries during the transition period under this system. The least that can be said is that these produced no obvious result. The rationalization and reform of the Belgian collieries were far from complete at the end of the transitional period (see point 4 below). On the other hand the Italian coal and steel market was successfully integrated by virtue of the exceptional provisions for the transition period (Articles 27 and 30 of the Convention).

3. The establishment of the common market had the anticipated results, in so far as trade between Member States increased appreciably from the outset. Trade in coal increased by 22% during the first year of operation of the common market (1953);[12] the increase in the case of steel was 23.7% (the figure for the last quarter of 1953 compared to the first half of 1953).[13] The figures available for a longer period confirm this increase in market integration.[14]

4. Compliance with the prohibition in Article 4(a) ECSC seems to have raised no particular problems in practice. There are hardly any judicial decisions on this point. However, the Court emphasized in one of its first judgments that this prohibition was unconditional in nature and took effect immediately.[15]

---

[6] ECSC Council Decision of 6 March 1953 (OJ 4, 13.3.1953).

[7] ECSC Council Decision of 10 April 1954 (OJ 7, 28.4.1954).

[8] ECSC Council Decision of 24 June 1954 (OJ 14, 29.6.1954).

[9] *CECA 1952-62, résultats, limites, perspectives*, Luxembourg, 1963, p. XII.

[10] *L'application du traité instituant la CECA pendant la période de transition*, published by the Study, Information and Documentation Division of the European Parliament, Luxembourg, 1958, p. 59.

[11] *L'application du traité CECA*, see footnote 10 above, and *CECA 1952-62*, cited at footnote 9 above, in particular at p. 491 et seq.

[12] *First General Report ECSC*, point 9.

[13] *First General Report ECSC*, points 20 and 54.

[14] *CECA 1952-62*, cited at footnote 9 above, p. 606.

[15] Joined Cases 7/54 and 9/54 *Groupement des Industries Sidérurgiques Luxembourgeoises* [1954-1956] ECR 175.

Under the ECSC system the rules to promote free movement are not so highly developed as in the EEC Treaty. The ECSC Treaty leaves some questions of practical importance unanswered: three of these will be dealt with.

Article 4 ECSC provides no explanation on imposition of fiscal charges on coal and steel imports into a Member State. Should import charges be regarded as charges having an effect equivalent to a customs duty and therefore prohibited or are they authorized provided that there is no discrimination between imported product and national product? These problems, and more generally the problem of the influence of various national taxation systems upon competition conditions, were very worrying during the first years of the ECSC. [16] In 1953 the High Authority issued a decision based upon principles of non-discriminatory taxation similar to those which were subsequently embodied in Articles 95 to 99 of the EEC Treaty. [17]

Article 4(a) ECSC contains no express prohibition on measures having an effect equivalent to quantitative restrictions. Apparently such problems have not arisen in practice. It is equally possible that this kind of problem is less important in the ECSC sector. Products such as coal and steel are much less subject to national provisions which may give rise to 'technical' impediments than certain industrial products or foodstuffs falling within the scope of the EEC Treaty. [18]

National pricing measures cannot produce obstacles to trade in the case of ECSC products, because it is no longer possible to make these products subject to a national pricing policy. On the other hand, administrative obstacles have been a relevant factor. In 1955 the High Authority supported the view that a system of import and export licences gave rise to obstacles to trade, even when licences were granted automatically. [19] The High Authority was clearly successful in raising with Member States the matter of abolition of these systems and their replacement, if necessary, by a system of import or export declarations in order to secure statistical information. [20]

The final question is whether ECSC products originating in third countries may be entitled to the ECSC system of free movement after being imported into a Member State. Even though the Treaty makes no express provision for this, its arrangement admits this interpretation. [21] While the High Authority had expressed this view since 1955, [22] the Court of Justice confirmed it in the *Vloeberghs* judgment given in 1961. [23] The Court took the view that the principle of free movement for products coming from third countries was not an end in itself but a necessary consequence of the free movement of products originating in Member States.

Exemptions from the principle of free movement of coal and steel may still be authorized, after the end of the transitional period on 9 February 1958, by decision of the High Authority (by the Commission of the European Communities since 1 July 1967) under the terms of Article 37 ECSC. The text of this article does not reveal with certainty the

---

[16] *CECA 1952-62*, cited at footnote 9 above, in particular at p. 415 et seq.
[17] High Authority Decision No 30-53 (OJ 6, 4.5.1953).
[18] See footnote 45 below.
[19] *Third General Report ECSC*, point 119.
[20] *Sixth General Report ECSC*, Part II, point 53.
[21] N. Catalano, *Manuel de droit des Communautés européennes*, second edition, Paris, 1964, p. 194 et seq.
[22] *Fourth General Report ECSC*, point 126.
[23] Joined Cases 9 and 12/60 [1961] ECR 197.

extent to which it is possible to depart from the principle of free movement by resorting to protective measures, [24] but it has been used in practice for this purpose in a limited number of cases. The Court has never given an express decision on the limits of this safeguard clause, confining itself to veiled allusions. [25]

In 1959, faced by the unsatisfactory results of special measures aimed at integrating Belgian collieries during the transitional period (see point 2 above), the High Authority decided upon the partial isolation of the Belgian coal market by the introduction of a system of import quotas based on the provisions of Article 37 ECSC. These measures were intended to support a reorganization (and closure) programme for Belgian mines. After several extensions they were finally abolished on 1 January 1963. [26] Similar measures were enacted under the terms of Article 37 following the events of May 1968 in France, in order to protect the French iron and steel market. [27] Subsequently Article 37 was applied once more, in 1974, in favour of the United Kingdom. [28]

5. When Denmark, Ireland and the United Kingdom joined the ECSC in 1973 the formalities for implementing the common market which had existed in 1953 and 1954 between the original six Member States were altered. The simultaneous abolition of all customs duties, charges having equivalent effect and quantitative restrictions on given dates for specific categories of ECSC products (see point 2 above) gave way (except in the case of coal) to the general system provided for by the Act of Accession regarding abolition of these tariff and non-tariff barriers to trade (see point 19 below). [29] Customs duties on imported coal and charges having equivalent effect (Articles 32(2)(a) and 36(2)(a) of the Act of Accession) were abolished on accession, both as between the original Community and the new Member States and among the latter.

Section III — The European Atomic Energy Community

6. The EAEC Treaty established a common market in the field of atomic energy. On 1 January 1959, one year after the Treaty entered into force, all customs duties, charges having equivalent effect and quantitative restrictions on imports and exports were to be abolished in respect of products in Lists A^1 and A^2 and, under certain conditions, in respect of those in List B. The lists concerned are those appearing in Annex IV to the Treaty (Article 93 EAEC). The free movement of these products was indeed implemented on 1 January 1959. [30]

7. With reference to new Member States, the Act of Accession provides for the establishment of a common market in nuclear products, and for the abolition of all customs duties and charges having equivalent effect, on 1 January 1974 (Articles 32(2)(b) and

---

[24] Catalano, *Manuel*, cited at footnote 21 above, p. 207.
[25] Joined Cases 2 and 3/60 *Niederrheinische Bergwerks-Aktiengesellschaft* [1961] ECR 133.
[26] *25 ans de marché commun du charbon 1953-1978*, Brussels, 1977, p. 91 et seq.
[27] *Second General Report EC*, point 18.
[28] *Eighth General Report EC*, point 101.
[29] On the other hand, Article 43 of the Act of Accession contains a special provision for scrap.
[30] *Second General Report EAEC*, points 61-63.

36(2)(b) of the Act). The abolition of other obstacles to trade falls within the general scope of the Act of Accession (see point 19 below).

Section IV — The European Economic Community

8. Free movement of goods within the EEC was not achieved by a mere stroke of the pen.

The rules in question comprise a whole range of Treaty provisions, some of which also require the adoption of implementing measures. It is impossible to give a historical account of the free movement of goods from 1958 to 1980 without studying the implementation, enforcement, and observance of these provisions. Among these are provisions regarding the abolition and prohibition of customs duties and charges having equivalent effect (Articles 9 to 17), the elimination of quantitative restrictions and measures having equivalent effect including the adjustment of State monopolies of a commercial character (Articles 30 to 37), the prohibition of discriminatory import taxes (Article 95), the harmonization of laws with a view to abolishing technical and administrative barriers to trade (Article 100 and, in part, Article 43), and finally certain provisions authorizing interim exceptions to the free movement of goods (Articles 103, 108, 109, 115, and 223 to 226).

It seems logical to divide this historical review into two periods, the transitional period and the period which followed it. While 31 December 1969, the date which ended the transitional period, was the operative date for implementation of a certain number of provisions, this is certainly not true of all the provisions. To this should be added the fact that, as was mentioned in the introduction, the decisions of the Court have themselves had an important effect. That is why certain elements in the system of free movement of goods will be separately examined after an overall and essentially factual sketch of developments during the transitional period and during the period which followed it. In this way the development of judicial decisions in this field can be dealt with in full. A general examination will then be made of the harmonization of laws, in so far as it is relevant, and the temporary safeguards, including those provided for by Article 226, in order to give an overall view of these matters.

¶ 1. *The transitional period*

9. In accordance with the proposals in the Spaak Report, the EEC Treaty provided for the progressive establishment of the common market over a transitional period of 12 years, divided into three stages of four years each (Article 8). No advantage was taken of the provision for extending the first stage by a maximum of two years (Article 8(3)). As regards the attainment of free movement of goods, the Treaty provided a range of measures for each stage, a large proportion of which were implemented more rapidly than the Treaty required. Consideration will first be given to the measures where implementation was linked to different stages, and subsequently to measures where the Treaty provided for adoption in the course of the transitional period without linking them to a particular stage.

A. The first stage (from 1 January 1958 to 31 December 1961)

10. Unlike the ECSC Treaty, the EEC Treaty expressly states that the system of free movement of goods applies to products coming from third countries which are in free circulation in the Member States (Article 9(2)), products in respect of which import formalities have been completed and customs duties and charges having equivalent effect have been levied (Article 10(1)). The Commission fulfilled its obligation to enact the necessary implementing measures (Article 10(2)) before the end of 1959 by taking the Decision of 4 December 1958. [31]

This decision, since superseded by the Decision of 5 December 1960, [32] governed the use of a certificate for movement of goods among Member States, the famous Certificate DD1. This certificate provided evidence that the goods concerned are in free circulation, and that they came either from another Member State or from a third country or had been obtained under the processing traffic system, for which the Commission issued a special decision at the end of 1958, [33] also pursuant to Article 10(2). The introduction of this certificate was still not *per se* a guarantee of freedom from customs checks and other formalities (see point 17 below), but it did recognize the right, progressively achieved, to abolition of customs duties and quantitative restrictions. [34]

With regard to customs duties and charges having equivalent effect, all products, including agricultural products, [35] have been subject since the beginning of the first stage to the prohibition in Article 12 EEC, on introduction of any new customs duties or charges and any increases in existing duties and charges. On 1 January 1959 the Member States made an initial reduction of 10% in import duties, in accordance with the timetable for reductions in these duties laid down in Article 14. The next reduction was not to be made until 18 months later. The Member States took action on a Commission Recommendation of 26 February 1960 to accelerate the reduction in tariffs. The first 'acceleration Decision' of 12 May 1960 [36] called for a supplementary reduction in basic duty across the board. Reference should be made to the table in point 12, which shows the pattern of this and subsequent reductions by making a comparison with the rate of reduction provided for by the Treaty. Favourable economic conditions and the positive response by business circles to the introduction of the common market were the principal factors which made it possible to accelerate the implementation of the Customs Union. [37]

At the time when the EEC Treaty entered into force, the abolition of quantitative restrictions on imports was due in large measure to the efforts of the OEEC (now OECD). At that time only a hard core of sensitive products, mostly agricultural products and foodstuffs (together accounting for about 10% of trade) were still subject to quotas. [38]

In accordance with the proposals in the Spaak Report and in contrast to the system of control by product recommended by the OEEC (now OECD), Article 33 of the Treaty

---

[31] OJ 33, 31.12.1958.

[32] OJ 4, 20.1.1961.

[33] Decision of 17 December 1958 (OJ 33, 31.12.1958).

[34] Case 41/76 *Donckerwolcke* [1976] ECR 1921, especially at p. 1936 et seq.

[35] Joined Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625, the 'milk products' case.

[36] Decision of Representatives of Governments of Member States of 12 May 1960 (OJ 58, 12.9.1960).

[37] *Third General Report EEC*, points 1 and 3.

[38] *Third General Report EEC*, point 99.

provided for a general and periodic percentage increase in the quotas still existing and for their total abolition at the end of the transitional period. Moreover, making the quotas more restrictive (Article 32) and introducing new restrictions (Article 31) have been prohibited since the EEC Treaty entered into force. [39]

Lists of products which had been liberalized were conveyed to the Commission in 1958 and consolidated, in accordance with the Treaty. [40] In the case of France this did not take place until the following year, because of the special economic situation in that country (suspension of liberalization). On 1 January 1959 existing quotas were converted to global quotas open to all Member States. At the same time the first measures to increase these quotas were enacted in accordance with Article 33 and followed by a second round of increases on 1 January 1960. The implementation of these measures raised more problems than the relatively simple abolition of customs duties. In the first place the application of the '3% rule' raised a problem; on 1 January 1959 the quotas were to reach at least 3% of national output and this percentage was subsequently to be increased every year (Article 33(2)). The Treaty does not set out the method to be used to calculate this percentage. In general the Commission based its calculations upon quantity. In addition, applying the provisions of Article 33 in the agricultural sector was made difficult by the fact that allowance had to be made for the provisions of Article 45. Pending implementation of a common organization of the market, Article 45 required for agricultural sectors benefiting from national protection that trade between Member States be promoted, in particular by entering into long-term contracts. A contract of this type was made in 1960 between France and the Federal Republic of Germany for wheat and feed grain.

In the acceleration Decision of 12 May 1960 referred to, the Member States agreed to an appreciable advance of the latest date for abolition of import quotas still in existence for industrial products, to 31 December 1961. It was decided to make an additional increase in existing quotas for agricultural products at that date. The Member States as a whole complied with these agreements within the time-limits provided.

The first stage ended on 31 December 1961, as the Council recorded in its Decision of 14 January 1962. [41] Export duties and charges having equivalent effect (Article 16) as well as quantitative restrictions on exports and measures having equivalent effect (Article 34) were to be finally abolished on that date. There was some delay in meeting the latter requirement.

B. The second stage (from 1 January 1962 to 31 December 1965) [42]

11. The Member States agreed to a fresh acceleration in tariff dismantling on 15 May 1962: on 1 July of that year customs tariffs for industrial products were reduced to half

---

[39] Case 7/61 *Commission* v *Italy* [1961] ECR 317.

[40] See *First General Report EEC*, point 66 et seq.; *Second General Report EEC*, points 76-82; *Third General Report EEC*, point 98 et seq. and *Fifth General Report EEC*, point 16 on this matter and on the actual progress of the first stage in general.

[41] EEC Council Decision of 14 January 1962 (OJ 10, 10.2.1962).

[42] *Fifth General Report EEC*, point 16; *Sixth General Report EEC*, point 16; *Seventh General Report EEC*, points 19 and 20; *Eighth General Report EEC*, point 3 et seq.

the basic duty. This was the second acceleration decision. [43] The first common organizations of the market (still temporary) were set up for a range of agricultural products during the same year. The regulations enacted for this purpose provided for the abolition of quantitative restrictions and measures having equivalent effect in existence for these products on 1 July 1962. The quotas remaining for a certain number of agricultural products still subject to national market organizations were increased. Some of these quotas were abolished in 1963 and 1964 by Commission decision pursuant to Article 33(4) because they had not been used up.

Encouraged by the success in setting up the customs union, the Commission took fresh initiatives in 1964 to bring about its speedy final implementation. On 16 January 1965 it submitted proposals to the Council aimed at completing the customs union on 1 July 1967.

Meanwhile, during the second stage of the transitional period, the Court delivered its first judgments in the field of free movement of goods. The Court recognized the direct effect in national legal systems of the 'standstill' obligations arising for Member States from Article 12 EEC (the *van Gend en Loos* judgment) [44] and Article 37(2) EEC (the *Costa* v *ENEL* judgment). [45] These first decisions are noteworthy for the importance attached by the Court to the implications of rules relating to free movement of goods as the basis of the Community and for the strict interpretation given to these rules in consequence. [46]

C. The third stage (from 1 January 1966 to 31 December 1969)

12. The Commission proposals aimed at achieving a customs union on 1 July 1967 do not seem to have reached completion in the Council. However, the Council succeeded in achieving a customs union for industrial products on 1 July 1968, an advance of 18 months on the timetable laid down by the Treaty. The Council ruled, by its Decision of 26 July 1966, [47] that customs duties for all products except agricultural products should be finally eliminated on the above date, with a further reduction of 15% in the basic duty on 1 July 1967. The customs duties still existing on a certain number of agricultural products were reduced by 25% of the basic duty on 1 July 1967, [48] then abolished during the third stage. A table showing the successive reductions in customs duties for industrial products, with the timetable laid down by the Treaty for comparison, is given below. [49]

Some (but not all) of the residual quotas applicable to agricultural products were eliminated during the third stage. The Commission took the view that quotas forming part of a national market organization and still in existence at the end of the transitional period

---

[43] OJ 41, 28.5.1962.

[44] Case 26/62 [1963] ECR 1.

[45] Case 6/64 [1964] ECR 1143.

[46] See also the '*pain d'épice*' case, Joined Cases 2 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 425, and the 'milk powder' case [1964] ECR 625 and Joined Cases 90 and 91/63, cited at footnote 35 above.

[47] Council Decision 66/532/EEC (OJ 165, 21.9.1966).

[48] Council Directive 67/364/EEC of 31 May 1967 (OJ 108, 7.6.1967).

[49] A. Sattler, 'Die Entwicklung der EG von ihrer Gründung bis zum Ende der EWG-Übergangszeit', *Jahrbuch des Öffentlichen Rechts*, 1970, p. 8.

Abolition of duties among Member States

Industrial products			Legal basis	Level	Duties remaining
	See EEC Treaty	Acceleration		(as a percentage of the basic duty at 1 January 1957)	
First stage	1 January 1959		Art. 14 EEC	10	90
	1 July 1960		Art. 14 EEC	10	80
		1 January 1961	First acceleration decision	10	70
Second stage	1 January 1962		Art. 14 EEC	10	60
		1 July 1962	Second acceleration decision	10	50
	1 July 1963		Art. 14 EEC	10	40
	1 January 1965		Art. 14 EEC	10	30
Third stage	1 January 1966		Art. 14 EEC	10	20
	1 July 1967		Council Decision of 26 July 1966	5	15
	1 July 1968		Council Decision of 26 July 1966	15	0

could remain in force pending establishment of a common organization of the market. [50]

D. Charges having an effect equivalent to import duties [51]

13. In contrast to their obligations regarding charges having an effect equivalent to export duties, which were to be finally abolished at the end of the first stage (Article 16), Member States had the whole of the transitional period available for the progressive abolition of their charges equivalent to import duties. The Commission would set the rate for abolition by means of directives, guided by the principles of Article 14 for the reduction of customs duties (Articles 13(2)).

[50] *Third General Report EC*, point 25.

[51] We refer to the *First General Report EEC*, point 71; *Fifth General Report EEC*, point 7; *Eighth General Report EEC*, point 6; *First General Report EC*, point 8; *Fourth General Report EC*, point 6; *Fifth General Report EC*, point 114 for the statistical data used in this paragraph.

The General Reports give the impression that at first the Commission underestimated the task facing it. In 1958 the Commission began to list the existing taxes having an effect equivalent to import duties and asked the Member States to provide the necessary information. The Commission gave notice before the end of 1958 of a first directive on this subject; this was subsequently seen to be somewhat optimistic. This notice was repeated in 1962, but the first directive was not to appear in the *Official Journal* until a year later. [52] The Commission issued a total of eight directives on this subject. [53] Data published in 1965 give some idea of the extent of the task which still faced the Commission in this field. On 1 February 1965 the Commission has on record 357 taxes which might prove to be charges having an equivalent effect to import or export duties. At that date 228 of these cases had been settled or were still in the process of being settled. In 1967 the Commission announced with regret that it was unable to give even an approximate date for the completion of its work in this field. The 1970 annual report refers to another 23 cases under review. This number increased in 1971 to about 30. Since then fresh cases have come to light every year.

E. Measures having an effect equivalent to quantitative restrictions [54]

14. Whereas measures having an effect equivalent to quantitative restrictions on exports were to be abolished at the end of the first stage (Article 34), measures having an effect equivalent to quantitative restrictions on imports were not to be abolished until the end of the transitional period. This is not expressly stated in the provisions of Articles 30 to 33 EEC, but follows from the general scheme of the Treaty, in particular from Article 8(7). The Court confirmed this interpretation during the 1970s. [55] The Commission derives its jurisdiction to issue directives for the elimination of measures having equivalent effect from Article 33(7).

At first the Commission recognized the difficulties involved in detecting and eliminating measures having equivalent effect. After initially devoting its energies to the abolition of quotas, the Commission announced in 1962 that it would give closer attention to these measures. It began to examine them in 1963, with national experts, anticipating that it would issue directives on this subject in the course of the same year. It finally published a directive in 1964 addressed to the Federal Republic providing for the abolition of a system of potato imports which prohibited imports during a specific period of the year and imposed quantitative restrictions during the rest of the year. [56] Two new directives addressed to all Member States followed in 1966. The first of these [57] aimed at abolishing

---

[52] Commission Directive 63/600/EEC of 15 October 1963 (OJ 156, 29.10.1963).

[53] The following Commission directives are involved, apart from those referred to in footnote 52:
- 65/328/EEC of 16 June 1965 (OJ 120, 5.7.1965);
- 65/400/EEC of 28 July 1965 (OJ 143, 7.8.1965);
- 66/723/EEC of 24 November 1965 (OJ 234, 21.12.1966);
- 67/126/EEC of 31 January 1967 (OJ 26, 15.2.1967);
- 68/31/EEC of 22 December 1967 (OJ L 12, 16.2.1968);
- 68/156/EEC of 12 March 1968 (OJ L 74, 26.3.1968);
- 68/157/EEC of 12 March 1968 (OJ L 74, 26.3.1968).

[54] For statistical data see *First General Report EEC*, point 69; *Fifth General Report EEC*, point 16; *Sixth General Report EEC*, point 16; *Second General Report EC*, point 8.

[55] Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279, especially at p. 1314.

[56] Commission Directive 64/486/EEC of 28 July 1964 (OJ 2253, 20.8.1964).

[57] Commission Directive 66/682/EEC of 7 November 1966 (OJ 3745, 30.11.1966).

'linked transactions': these are national provisions which make the import of a product conditional on the export, purchase or sale of the same national product or another national product. The second [58] aimed at eliminating any difference in the treatment of national products and imported products; an example of such a difference would be to make the grant of certain benefits conditional on the use of national products.

Written questions in 1967 by Mr Deringer, Member of the European Parliament, seem to have given a significant impetus to the development of the concept of measures having equivalent effect. [59] In the first question dating from that year, Mr Deringer emphasized that it was desirable for national authorities and for undertakings to know what was meant by this concept, which was expressed in terms as broad as they were ill-defined. The Commission first replied that it was going to carry out studies, which proves that the Commission itself was still in a state of uncertainty at that time. In its final reply to Deringer and again in a later reply to a fresh question from the same member, the Commission supplied the elements essential to a definition of this concept, upon which it proposed to base its policy in this area (see point 32 below). The Commission declared in the 1968 annual report that its task in relation to the matters at issue was still proving extremely delicate, particularly because of the problems of distinguishing between the scope of Article 30 and that of Article 36 EEC. At the last moment, just before its jurisdiction in this matter expired, the Commission published another two directives; [60] the last of these in particular, Directive 70/50 of 22 December 1969, throws important new light upon what in the view of the Commission is meant by 'measure having equivalent effect' (see point 32 below).

F. State monopolies of a commercial character (Article 37 EEC) [61]

15. Article 37 EEC provides that State monopolies of a commercial character shall be progressively adjusted so as to exclude any discrimination between the nationals of Member States in the conditions under which goods are procured or marketed at the end of the transitional period (paragraph 1). Reference has already been made to the 'stand-still' obligation laid down in Article 37(2) (point 11). Monopolies which control the production, purchase and/or sale of a product may have an appreciable effect upon intra-Community trade in that product. The insertion of this provision into the chapter dealing with suppression of quantitative restrictions among Member States was therefore allowed at the time. However, this is a delicate topic; it is therefore not surprising that the vagueness of Article 37, the result of a political compromise, [62] has given rise to a whole series of questions. These problems of interpretation and the solutions which have been found for them in Commission practice and in judicial decisions will be considered later (point 41 et seq.). The adaptation measures actually decreed during the transitional period and the policy followed by the Commission are all that concern us here. The only

---

[58] Commission Directive 66/683/EEC of 7 November 1966 (OJ 3748, 30.11.1966).

[59] Written question by Mr Deringer No 118/67 (OJ 9, 17.1.1967), with supplementary reply in OJ 59, 23.3.1967; written question No 64/67 (OJ 163, 25.7.1967).

[60] Directives 70/32/EEC and 70/50/EEC (OJ L 13, 19.1.1970).

[61] For the statistical data see *Third General Report EEC*, points 105-107; *Sixth General Report EEC*, point 17; *Seventh General Report EEC*, points 21-27; *Eighth General Report EEC*, point 30; *Ninth General Report EEC*, point 34; *Third General Report EC*, points 40 and 41.

[62] See Ehle-Meier, *EWG-Warenverkehr*, Cologne, 1971, pp. 185-187.

device available to the Commission for this purpose during the transitional period was the recommendation, a feeble weapon completely devoid of mandatory force (Article 37(6)). The Commission was not competent to issue directives as in the case of measures having equivalent effect; this is perhaps why action by the Commission in this field during the transitional period yielded such poor results.

The Commission began in 1960 by drawing up a list of the existing monopolies. These are found only in three Member States (France, Germany and Italy). They differ widely in economic importance, but as a whole the trade in products covered by these monopolies accounts for only a fairly limited proportion of total trade.

The Commission has reported 18 monopolies, the most important from the economic viewpoint apparently being monopolies in tobacco (Italy and France), in alcohol (Germany and France), and in petroleum (France).

During the first phase the Commission endeavoured to improve import opportunities for products subject to a monopoly, guided by principles identical to those in Article 33 EEC which it had applied to increase import quotas. At the same time it endeavoured to eliminate the most serious discriminations with respect to imported products, such as those regarding distribution and advertising. The Commission took the view that the recommendations which it issued on this subject, for example to France for tobacco in 1962 [63] and petroleum in 1963 [64] and to Germany for alcohol in 1963, [65] had some positive results.

In 1966 the Commission settled on a pragmatic approach. It worked out new proposals and recommendations, first of all to tackle the monopolies where adjustment was not too difficult (bananas, quinine, salt, etc.). The monopolies in tobacco (France and Italy) and alcohol (Germany and France) continued to raise problems, owing both to their taxation aspects and to the continued existence of national agricultural market organizations in these sectors. The adjustment of the French petroleum monopoly was extremely difficult, because the national energy policy was closely linked to the existence of the monopoly. In December 1969 the Commission addressed two fresh recommendations regarding alcohol to Germany and France, in which it endeavoured to reconcile the need to eliminate discrimination with national agricultural policy requirements in this sector. In addition, also at the end of 1969, the Commission addressed a number of other recommendations to France and Italy with a view to adjustment of monopolies of a commercial character for 10 products in total. [66] Taking account of all the efforts which had been made, the Commission came to the sad conclusion that none of the systems in force complied with the prohibition on all discrimination laid down in Article 37. As a matter of fact only the problems raised in Italy by four products had been finally solved during the transitional period, by the total abolition of the monopolies concerned (sulphur, newsprint, quinine and bananas).

---

[63] OJ 48, 23.6.1962.

[64] OJ 127, 20.8.1963.

[65] OJ 180, 10.12.1963.

[66] I.F. Hochbaum gives a list of these recommendations in von der Groeben, von Boeckh, Thiesing, *Kommentar zum EWG-Vertrag*, second edition, 1974, pp. 328 and 329.

G. Internal taxation and trade between States (Articles 95 to 97 EEC)

16. The Treaty forbids any discriminatory taxation on imports or refunds on exports in relation to the treatment for tax purposes of similar national products (Articles 95 to 97). The requirement was to prevent Member States from being tempted, after the abolition of tariff barriers to trade, to resort to fiscal devices in order to protect the home market from foreign competition. The prohibition on levying discriminatory taxes on imports was unconditionally applicable with effect from 1 January 1962 (Article 95(3)). [67]

The application of Articles 95 to 97 gave the Commission a great deal of work during the transitional period. It monitored a large number of specific cases relating to these provisions. [68] In addition the Commission had studies made from the beginning of the 1960s on the possibility of abolishing tax frontiers between Member States; these were a major obstacle to the movement of goods. The Commission concluded that harmonization in depth of both the systems of turnover tax and the conditions for exemption and the rates, not forgetting harmonization of excise duties, was indispensable for this purpose. [69] The first step on this long road, in 1968, was the issue of the first two directives relating to VAT. [70] This system of tax on turnover, which was a novelty to most of the Member States, makes it possible to calculate the tax burden exactly and consequently to make a precise comparison of the treatment of imported products and of national products for tax purposes. The classic system of cumulative multi-stage taxes did not meet these conditions and on that account was a source of tax discrimination.

H. Conclusions

17. The balance of positive and negative results obtained by action during the transitional period to achieve free movement of goods within the EEC is as follows. The accelerated introduction of the customs union for industrial products was a great success for the Community. Elimination of tariff and quantitative restrictions on the movement of goods among States went relatively smoothly. Good progress was also made in eliminating charges having an effect equivalent to import duties during the transitional period. This is less true in the case of measures having an effect equivalent to quantitative restrictions on imports, and much less true in the case of adjustment of State monopolies of a commercial character.

Thus the free movement of goods was achieved to a large extent during the transitional period. It should, of course, be understood that 'freedom' is a relative concept in this context. Although the tariff and non-tariff obstacles had for the most part disappeared, barriers to the movement of goods within the Community had not thereby been abolished. The fiscal and administrative frontiers, the latter due principally to all kinds of technical and health controls, etc., were still untouched at the end of the transitional period.

However incomplete the free movement of goods may be, its economic results were clearly apparent during the transitional period in the development of a network of trade

---

[67] Case 57/65 *Lütticke* [1966] ECR 205.
[68] *Second General Report EC*, points 48-50.
[69] *Fourth General Report EEC*, points 64 and 65; *Fifth General Report EEC*, point 60.
[70] Council Directives 67/227/EEC and 67/228/EEC (OJ 71, 14.4.1967).

among Member States. This phenomenon was unquestionably apparent from the very first years of the transitional period. Thus in 1960 trade among Member States increased by 25% over 1959 and by nearly 50% over 1958. [71] Figures covering the entire transitional period amply confirm this conclusion. [72]

¶ 2. *The 1970s*

18. 'The common market is not "opened", it is "established". In this respect the common market is the least simple thing in the world.' [73] This statement by Paul Reuter, made in 1953 about the ECSC, is entirely applicable to the developments in the 1970s regarding the common market of the EEC and the free movement of goods in particular. During this second decade of the EEC, progress (in so far as it was possible at all) proved to be extremely difficult, so much so that strenuous and constant efforts were required in certain sectors even to maintain the level of free movement of goods which had been achieved at the end of the transitional period.

The Commission observed in its General Report for 1974 that, in terms of the formalities applicable to international movement of goods, the customs union had reverted to a position comparable to that at the beginning of the 1960s. [74] This was due on the one hand to the problems raised by the accession of new Member States in 1973 (see point 19 below) and on the other hand (and this is an older problem) to the complex system of monetary compensatory amounts introduced at the time to cushion the common agricultural policy to some extent against the consequences of disruption of the international monetary system. To this was added the perennial problem of national protectionist measures, especially during the second half of the 1970s; these measures, in the guise of all kinds of extremely respectable aims such as the protection of health, the environment or the consumer, had the effect of protecting domestic markets, or at least made it more difficult for foreign products to reach them. During the symposium on the customs union in 1977 already referred to, Commission representatives spoke of a 'flare-up in neo-protectionism'. [75] The point at issue in these cases is observance of provisions prohibiting measures having an effect equivalent to quantitative restrictions (see point 20). On the other hand, the required progress was made in adjustment of State monopolies of a commercial character, to a greater extent than during the transitional period (see point 21).

An examination of the 1970s makes it clear that the extremely ambitious and sometimes unrealistic ideas of the 1960s had given way to a much more pragmatic attitude. Even in 1965 the Commission had announced a work programme in connection with its 'Initiative 1964' with a view to the complete abolition before 1970 of controls forming obstacles to intra-Community trade. [76] The Commission had fiscal controls, technical controls and plant, animal and other health controls in mind in particular. In the 1970s the

---

[71] *Fourth General Report EEC*, point 76.

[72] *Third General Report EC*, point 8; cf. also *Report of the Commission of the EC on the European Union*, Bulletin of the EC, Supplement 5/75, p. 15, note 1.

[73] P. Reuter, *La Communauté européenne du charbon et de l'acier*, Paris, 1953, p. 142.

[74] *Eighth General Report EC*, point 85.

[75] P. Schloesser, in *Union douanière*, cited at footnote 4 above, p. 31.

[76] *Eighth General Report EEC*, point 26.

approach became much less ambitious. [77] It was observed that the process, essential in this field, of harmonization of national laws, in particular at the fiscal level, was a long-term undertaking. These aims were pursued, but at the same time ever-increasing importance was attached to short-term measures aimed at facilitating the international movement of goods. This involved the simplification of customs formalities, the standardization of documents, completion of checks in the country of consignment rather than at the frontier, greater flexibility in the systems of guarantees, etc. The active part played by the European Parliament is striking. After expressing its concern on this point in resolutions in 1972 [78] and 1977, [79] the Parliament adopted in 1978, within the space of three months, two resolutions which contain a large number of specific suggestions to ensure the better functioning of the customs union and the internal market. [80] The fact that from this viewpoint there was still plenty of room for improvement, even at the end of the 1970s, is strikingly illustrated by the title of the multiannual programme for the *attainment* of the customs union published by the Commission in 1979. [81]

A. Accession of new Member States

19. The integration into the customs union of Member States which had acceded in 1973 was completed on 1 June 1977. It was thus a much more rapid process than the creation of the customs union among the six original Member States. This is due to the broad principle of accession, whereby the new Member States accept the Community and therefore also accept Community law as it is at the time of accession (Article 2 of the Act of Accession). It is true that the Act of Accession laid down a large number of transitional provisions aimed at facilitating this adaptation to the 'Community patrimony', but the time for expiry of these was in general set at the end of 1977 (Article 9).

Tariff and non-tariff barriers between the new Member States and between those States and the Community were eliminated as follows: import duties and charges having equivalent effect were eliminated in several stages, and completely on 1 July 1977 (Articles 32, 35 and 36 of the Act). [82] The corresponding date for export duties and charges having equivalent effect was 1 January 1974. Quantitative restrictions on imports and exports were eliminated on accession, and measures having an effect equivalent to these restrictions were eliminated on 1 January 1975.

With regard to State monopolies of a commercial character, Article 44 of the Act of Accession required that all discrimination should be abolished before 31 December 1977.

---

[77] See the communication from the Commission to the Council of 20 June 1973 (SEC(73)2334 final) regarding simplification of customs formalities and procedures; cf. also *Ninth General Report EC*, point 56 et seq.: *Eleventh General Report EC*, point 105; also A. Hazeloop, in *Union douanière*, cited at footnote 4 above, p. 35 et seq.

[78] Resolution of 9 October 1972 on checks on intra-Community traffic (OJ C 112, 27.10.1972).

[79] Resolution of 16 June 1977 on the free movement of goods (OJ C 163, 11.7.1977).

[80] Resolutions of 12 April 1978 on development of the customs union and the internal market (OJ C 108, 8.5.1978) and Resolution of 5 July 1978 on achieving the customs union and the internal market (OJ C 182, 31.7.1978).

[81] OJ C 84, 31.3.1979; see also the communication from the Commission to the Council of 31 December 1979, Bull. EC 12-1979, point 1.3.1.

[82] On the other hand, Ireland and the United Kingdom were authorized to retain some customs duties of a fiscal nature up to the end of 1977; *Seventh General Report EC*, point 114.

These provisions were to be applied to new Member States only in respect of monopolies still existing in the old Member States, because there were no such monopolies in the new Member States. [83] In Denmark, a monopoly of a commercial character in alcohol had been abolished before accession. [84] In 1974 and 1976 the Commission made recommendations to the governments concerned with a view to adjustment of the French and Italian commercial monopolies. [85]

B. Measures having an effect equivalent to quantitative restrictions [86]

20. The power of the Commission to issue directives pursuant to Article 33(7) EEC came to an end with the expiry of the transitional period. The prohibition on measures having equivalent effect became binding unconditionally with effect from 1 January 1970. If necessary, the Commission can compel Member States to comply with this prohibition by means of the procedure laid down in Article 169 EEC et seq. for cases of infringement.

This prohibition was infringed on an increasing scale during the 1970s. The Commission stated in 1973 that about 100 cases of suspected infringement were under investigation. In 1975 reference is made to numerous complaints lodged in this field. The Commission showed itself to be increasingly concerned by this matter in the General Reports which followed. In 1976 the number of complaints increased, nearly 300 cases being under investigation; in 1978 the Commission issued a serious warning to Member States because of the growth in protectionist trends. [87] Four hundred infringements cases were under examination at the end of 1978, four times as many as four years previously. The Commission took the view that this was 'still only the tip of the iceberg'. Import and export licensing systems, technical provisions or provisions relating to quality aimed at preventing or discouraging imports, maximum price systems, excessive customs checks, etc., are all typical examples of measures impeding trade.

The Commission amended its internal administrative procedures in order to be able to accelerate proceedings under Article 169 for infringements. However, the Commission pointed out that a solution could be found in most cases without the necessity for bringing the matter before the Court.

This shows that free movement of goods within a common market such as the EEC cannot be achieved at a stroke. On the contrary, the experience gained in the 1970s shows that unceasing work [88] is required, day after day, to maintain the status quo in this area.

---

[83] *Eighth General Report EC*, point 168.

[84] See Hochbaum, cited at footnote 66 above, p. 303.

[85] Recommendations of 20 October 1974 to France (alcohol) (OJ L 278, 18.11.1974) and to Italy (tobacco) (OJ L 326, 6.12.1974).

[86] See *Seventh General Report EC*, point 109; *Ninth General Report EC*, point 88; *Tenth General Report EC*, points 111 and 112; *Twelfth General Report EC*, point 102, for the material facts.

[87] Commission communication of 18 October 1978 on safeguarding free trade within the Community, Bull. EC 10-1978, point 2.1.14.

[88] See A. Spinelli, in *Union douanière*, cited at footnote 4 above, p. 60.

C. **The adjustment of State monopolies of a commercial character** [89]

21. In the 1970s the Commission was more successful in its efforts towards adjustment of commercial monopolies than it had been during the previous period. However, this was not an easy process. Several infringement proceedings were instituted pursuant to Article 169, for example, in 1972 against France (matches, tobacco, basic phosphates and alcohol) and Italy (matches). During this period some eight monopolies were abolished or adjusted in France (matches, potash, basic slag, explosive powders and materials) and Italy (lighters, flints, salt and cigarette paper). On the other hand, the work of the Commission was made easier by the clarification of a whole range of points of interpretation of Article 37 in decisions of the Court (see point 41 et seq.).

However, adjustment of the petroleum, alcohol and tobacco monopolies continued to raise extremely difficult problems. A striking illustration of the difficulties regarding tobacco is given by a Council resolution in 1970 which observed that France and Italy were ready, in accepting the common organization of markets in the tobacco sector, to abolish exclusive rights relating to imports and wholesale marketing on 1 January 1976 (sic) at the latest. [90] The Commission stated in the 1978 Report on Competition Policy it was hopeful that the adjustment procedures still in progress could be settled at the end of 1979, 10 years later. [91] An agreement had in fact been reached with France before that date on the delicate matter of the petroleum monopoly. Apparently, however, difficulties still existed at the end of 1979 regarding the French tobacco and alcohol monopoly and the Italian tobacco monopoly. [92]

¶ 3. *The concept of a charge having equivalent effect*

22. According to the decisions of the Court of Justice, the prohibition in the EEC Treaty on levying charges having an effect equivalent to customs duties takes effect directly in national legal systems. The parties concerned can therefore compel the authorities to comply with this prohibition by appealing, if necessary, to a national court. Regarding charges having an effect equivalent to export duties, this prohibition took effect directly from the start of the second stage of the transitional period on 1 January 1962 (Article 16). [93] The corresponding date for charges having an effect equivalent to import duties is 1 January 1970 (Article 9 jointly with Article 13(2)). [94] The decisions of the Court relating to the direct effect of these prohibitions were of vital importance for their strict observance. The supervision by interested parties in the Member States was apparently more effective than supervision by the Commission. Whereas the first judgments in this area in the 1960s were in the context of Article 169 proceedings, the relatively substantial amount of case-law in the 1970s essentially consists of preliminary rulings pursuant to

---

[89] See *Sixth General Report EC*, point 97; *Thirteenth General Report EC*, points 170 and 171, for the material facts.

[90] Resolution of 21 April 1970 (OJ C 50, 28.4.1970).

[91] *Report on Competition Policy*, 1978, p. 187.

[92] *Report on Competition Policy*, 1979, pp. 149-150.

[93] Case 18/71 *Eunomia* [1971] ECR 811; for agricultural products cf. Case 63/74 *Cadsky* [1975] ECR 281, especially at p. 291.

[94] Case 33/70 *Sace* [1970] ECR 1213; Case 77/72 *Capolongo* [1973] ECR 611, especially at p. 623; Case 94/74 *IGAV* [1975] ECR 699, especially at p. 712.

Article 177. The course of events is normally such that most cases of infringement are settled during the administrative phase and do not come before the Court.

23. From the outset the decisions of the Court have emphasized the fundamental nature of such prohibitions, coupling these statements with the requirements that exceptions to these prohibitions should be interpreted strictly. [95] In accordance with this general approach, the Court puts a broad interpretation on the concept of a charge having equivalent effect. This vague concept is supplemented in individual cases of interpretation by elements which are sufficiently specific for the principle of free movement of goods to be complied with to the greatest possible extent. The foundations of this body of case-law were laid by the first judgments dating from the 1960s. Subsequent judgments have added the necessary fine distinctions, but on the whole the case-law relating to this concept is noteworthy for its consistent strictness.

24. The first decision of the Court relating to the concept in question is found in the '*pain d'épice*' judgment in 1962, delivered in infringement proceedings against Luxembourg and Belgium. [96] The particular point at issue was the increase in a charge levied on the grant of import licences for *pain d'épice.* The Court emphasized that the prohibition on any charge having equivalent effect was a necessary supplement to the rule prohibiting customs duties, making the latter rule 'effective'. The expression 'charge having equivalent effect' shows an intention 'to prohibit not only measures which obviously take the form of the classic customs duty, but also all those which, presented under other names or introduced by the indirect means of other procedures, would lead to the same discriminatory results as customs duties'. Such a charge is then described, 'whatever it is called and whatever its mode of application', as a duty 'imposed unilaterally either at the time of importation or subsequently, and which if imposed specifically upon a product imported from a Member State to the exclusion of a similar domestic product, has, by altering its price, the same effect upon the free movement of products as a customs duty'.

This definition was considerably extended in one particular element in subsequent cases. The element represented by the protectionist or discriminatory effect of the charge was abandoned. [97]

This element had already disappeared in Case 7/68 [98] and was expressly ruled out in judgments delivered in 1969 on the Italian statistical duty [99] and on the Belgian import duty for the diamond-cutters' social fund. [100] The principal argument advanced by the Court in support of abandoning this element is that the prohibition on levying customs duties applies without making any distinction based upon whether competing products exist in the importing country or not. The definition of a charge having equivalent effect used in the two latter judgments lays stress above all upon the obstacle presented to the

---

[95] Joined Cases 90 and 91/63, cited at footnote 35 above; Joined Cases 52 and 55/65 *Germany* v *Commission* [1966] ECR 1593; Case 7/68 *Commission* v *Italy* [1968] ECR 623.

[96] Joined Cases 2 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 425.

[97] Except for Joined Cases 52 and 55/65, cited at footnote 95 above.

[98] See Case 7/68, cited at footnote 95 above, especially at pp. 627 and 628.

[99] Case 24/68 *Commission* v *Italy* [1969] ECR 193, especially at p. 201.

[100] Joined Cases 2 and 3/69 *Diamandarbeiders* v *Brachfeld* [1969] ECR 211, especially at pp. 222 and 223.

movement of goods by charges levied because the frontier is crossed, even if these are minimal. This appears to be the fundamental standard applied in subsequent cases, even if the Court does not always express itself in the same terms. In most of the judgments the existence of an obstacle to the movement of goods is inferred from the effect of the charge in terms of an increase in prices. [101] However, two judgments in 1974 do not take this element into account, taking the view that the obstacle arises above all from the administrative formalities made necessary by payment of the charge when the frontier is crossed. [102] In some later decisions these two elements, the effect in terms of an increase in costs on the one hand and the administrative formalities attendant on payment of the charge on the other, are referred to as a single factor in describing the concept of a charge having equivalent effect. [103]

As regards the application of provisions prohibiting any charge of this nature, the Court attaches importance solely to the effect upon movement of goods among Member States. The time of the imposition, for example at a stage in the marketing or processing of the product after crossing the frontier, [104] the destination of the charge (the Exchequer or an independent fund) [105] or the smallness of the amount, [106] are irrelevant. The position is the same with regard to the method of levying the charge (by central government or by an independent public body). [107] In the same way the purpose for which a charge is imposed can in no case be a ground for avoiding the prohibition. Thus the Court rejected the argument by the Italian Government claiming the need to protect the national cultural heritage as justification for levying a charge on export of works of art. [108] In the same way it is not enough to invoke reasons of public health, for which meat inspection on import or export had been established, to exclude health duties from the prohibition on charges having equivalent effect. [109] Apparently, therefore, the potential scope of this prohibition is enormous.

25. Three exceptions to the prohibition on levying charges on crossing the frontier have been recognized in the case-law over the years. The Court had already admitted in one of the earliest stages of development of its case-law that an exception could be made for fees for services rendered. However, in the judgment concerned (Joined Cases 52 and 55/65) the Court dismissed an action based on these grounds because the administrative act which was the subject of a charge in the case in point (the grant of an import licence) did not improve the position of the imported product on the market in the importing country, either directly or indirectly. [110] In later judgments the Court made the concept of fees for services rendered subject to particularly strict conditions. Apparently a charge can be regarded as a fee of this nature, and so avoid the prohibition on charges having equivalent effect, only if it can be regarded as consideration for a specific service actually ren-

---

[101] For example, Case 29/72 *Marimex* [1972] ECR 1309, especially at pp. 1318 and 1319, and Case 94/74, cited at footnote 94 above, especially at p. 709 et seq.

[102] Case 34/74 *Variola* [1973] ECR 981, especially at p. 989; Case 39/73 *Rewe* [1973] ECR 1039, especially at p. 1044.

[103] Thus, for example, Case 46/76 *Bauhuis* [1977] ECR 5, especially at p. 15.

[104] Case 78/76 *Steinike and Weinlig* [1977] ECR 595, especially at p. 614.

[105] See Joined Cases 2 and 3/63, cited at footnote 100 above.

[106] See Case 24/68, cited at footnote 99 above.

[107] See Case 94/74, cited at footnote 94 above.

[108] See Case 7/68, cited at footnote 95 above.

[109] See Case 29/72, cited at footnote 101 above.

[110] Joined Cases 52 and 55/65, cited at footnote 95 above.

dered to the importer. [111] For example, the Court took the view that this condition was not fulfilled in the case of a charge made for a quality inspection with a view to affixing a stamp of approval for export (*Cadsky* judgment, Case 63/74). [112] Although this system was calculated to promote exports and so was for the general benefit of exporters, the advantages in the case in point were too vague for there to be any question of consideration for a benefit individually conferred. A later judgment regarding health charges states that the costs involved in a system of health inspection established in the common interest must be borne by the authorities and not financed by levying health charges. [113] It is not surprising, given these extremely strict tests, that this possible exception has not yet been successfully invoked.

Charges levied on imported products on crossing the frontier may be justified if their purpose is to compensate for taxes levied on national products (Article 95). The existence of these compensatory charges is justified so long as the fiscal barriers between Member States have not been eliminated, in the absence of total harmonization of VAT and excise duty rates. The judicial decisions relating to application of Article 95 and the complex relationships between this Treaty provision and the prohibition on charges having equivalent effect will be dealt with separately below (point 26 et seq.).

Another class of exceptions to this prohibition has made its appearance in cases only quite recently. There are charges levied on crossing the frontier which somehow originate in Community law itself. First of all these charges include the monetary compensatory amounts already referred to, provided within the framework of the common agricultural policy. [114] They also include charges levied pursuant to 'Community' inspections such as those referred to in the *Bauhuis* judgment. [115] The charges involved are those levied for inspections made compulsory by EEC directive for harmonizing national systems. The Court takes the view that these inspections do not impede the movement of goods; on the contrary they promote movement by replacing differing national inspections. Inspections carried out in the exporting country can be accepted as sufficient; in general this harmonization makes later inspections in the importing country superfluous. The Court regards both these Community inspections and the charges levied pursuant thereto as compatible with the Treaty provided that the amount does not exceed the true cost. The *Bauhuis* judgment is a logical extension of earlier cases relating to the concept of a charge having equivalent effect in so far as the Court regarded the unilateral levying of a charge by a Member State as an element which should always be taken into account in deciding whether a prohibited charge was involved. However, the reasoning in the *Bauhuis* judgment does seem to be somewhat inconsistent. The fact that the inspection is authorized does not in itself justify the imposition of the corresponding duty. According to a consistent line of Court decisions, justification of inspection by invoking the provisions of Article 36 EEC is not enough to exclude charges corresponding to such inspection from the prohibition. [116] On the other hand, however, is not the effect of charges made for Community inspections to raise prices and are they not associated with all kinds of administrative formality, which corresponds to the two principal elements in the concept

---

[111] See Case 24/68, cited at footnote 99 above, and Case 39/73 [1973] ECR 1044, cited at footnote 102 above.

[112] Case 63/74 [1975] ECR 281, at pp. 290 and 291.

[113] Case 87/75 *Bresciani* [1976] ECR 129, especially at p. 139.

[114] For example, Case 5/73 *Balkan* [1973] ECR 1091, especially at pp. 1113 and 1114 and Case 136/77 *Racke* [1978] ECR 1245, especially at p. 1257.

[115] Case 46/76, cited at footnote 103 above; Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355.

[116] For example, Case 29/72, cited at footnote 101 above.

of a charge having equivalent effect? Why should national inspection duties be paid out of public funds and 'Community' inspection duties be paid by exporters? *Quod non licet bovi* (...)? The prohibitions and principles in the Treaty relating to the free movement of goods must be complied with by the institutions of the Community itself as well as by Member States. [117]

¶ 4. *Application of Article 95 EEC in the case-law*

26. The first paragraph of Article 95 EEC has been directly applicable since the end of the first stage of the transitional period. This declaration by the Court in the famous *Lütticke* judgment in 1966 gave rise to intense legal activity in Germany at the time. Importers instituted over 25 000 proceedings in the Finanzgerichte (financial courts) alleging that discriminatory charges were being levied on imports. The *Lütticke* case [118] emphasized the effectiveness of direct applicability as a means of allowing individuals to participate in ensuring compliance with Community law. The affair by the way blew over, because the problems raised fell within the scope of Article 97 on account of the multi-stage tax system in force in Germany at the time. In the *Molkereizentrale* judgment [119] delivered in 1968 the Court emphasized that Article 97 could not be regarded as directly applicable, a proposition already implicit in the *Lütticke* judgment. On the other hand the Court recognized the direct applicability of the second paragraph of Article 95 [120] in the *Fink Frucht* judgment, which also dates from 1968.

27. From the outset the Court has put a strict interpretation on the prohibition on levying discriminatory charges on imports and has applied it strictly. Problems of interpretation of this Treaty provision had also been resolved by reference to aims previously deduced from the Treaty, among which the maintenance of free movement of goods is of fundamental importance. The supplementary nature of Article 95 in relation to the prohibitions in Articles 9 and 12 EEC has been emphasized since the *pain d'épice* judgment dating from 1962. [121] The outflanking of the latter provisions by fiscal measures must be avoided. In itself Article 95 does not affect the sovereign right of Member States to levy taxes, [122] and yet this right must not be exercised in such a way as to protect the domestic market and to interfere with competition between foreign products and national products. [123] The Court emphasized in subsequent decisions that the levying of charges must be strictly neutral as regards movement of goods among Member States: in other words, the mere crossing of the frontier must not involve differences in treatment for tax purposes. [124]

28. The teleological nature of the interpretation of Article 95 is already apparent in the limits set to its scope in the case-law. The concept of 'internal charges' in the terms

---

[117] The Court so ruled in this judgment in Joined Cases 80 and 81/77 *Commissionnaires Réunis and Ramel* [1978] ECR 927, especially at pp. 946 and 947.

[118] Case 57/65, cited at footnote 67 above.

[119] Case 28/67 [1968] ECR 143.

[120] Case 27/67 [1968] ECR 223.

[121] Joined Cases 2 and 3/62, cited at footnote 46 above; Case 21/79 *Commission* v *Italy* [1980] ECR 1.

[122] For example, Case 31/67 *Stier* [1968] ECR 235.

[123] For example, Case 127/75 *Bobbie* [1976] ECR 1073, especially at p. 1085 et seq.

[124] For example, Case 142/77 *Statens Kontrol* v *Larsen* [1978] ECR 1543, especially at pp. 1557 and 1558.

of this provision is interpreted broadly. This prohibition on any discriminatory charge affects turnover taxes and excise duties as well as all kinds of parafiscal and special-purpose charges (charges levied on inspection). [125]

In order to avoid the prohibition on levying charges having an effect equivalent to import duties and to qualify for application of Article 95, an import charge must fall within a general system which consistently treats national products and imported products according to the same standards. [126] The chargeable event and the stage in marketing at which the charge is levied must be identical. [127] This also holds good for the detailed rules for levying the charge. Thus the Court declared that a system of excise duties applied in Ireland, whereby importers had to pay the duty immediately on import whereas in the case of domestic operations a time for payment of four to six weeks was allowed, was contrary to Article 95. [128] However, any difference in treatment in itself is not totally excluded, but the tax burden on the imported product and on national products must be the same. [129] This means that possible tax exemptions or other benefits must also accrue to imported products, without any distinction being made. [130] The Court is equally uncompromising on this point: the exemption must simply be abolished if there is no other way of avoiding discrimination. [131]

Do the provisions of Article 95 also apply to exports? No, according to the letter of the law. The Court has solved this problem by relying on the general aim of the fiscal provisions in the Treaty. If the aim is to guarantee strict neutrality in taxation systems within the framework of intra-Community trade, it is also essential to prohibit any discriminatory taxation on exports. [132] Such discrimination might occur when rare products or products for which the demand is particularly keen are exported. There was a substantial development in the decisions of the Court on this point in the 1970s. The *Demag* judgment in 1974 states in relation to a German special tax applied to exported products in order to check exports that Article 95 applies solely to obstacles intended to favour the domestic product. [133] The *van der Hulst* judgment went a step further in holding by analogy (sic) a discriminatory tax on exports as incompatible with the prohibition on discrimination laid down in Article 95. [134]

Does the equality required by Article 95 extend so far as to prohibit heavier taxation on domestic products than on imported products? In other words, is reverse discrimination also incompatible with Article 95? The Court declined to go so far, and on that account has somewhat mitigated the above-mentioned principle of neutrality. [135]

In February 1980 the Court delivered four important judgments on the interpretation of the second paragraph of Article 95 EEC following proceedings for infringement of the Treaty against France, Italy, Denmark and the United Kingdom because of

---

[125] See especially Case 20/76 *Schöttle* [1977] ECR 247, at pp. 258 and 259.
[126] For example, Case 29/72, cited at footnote 101 above.
[127] Case 132/78 *Denkavit* v *France* [1979] ECR 1923, at pp. 1934 and 1935.
[128] Case 55/79 *Commission* v *Ireland* [1980] ECR 481.
[129] Case 127/75, cited at footnote 123 above.
[130] Case 148/77 *Hansen* [1978] ECR 1787, especially at pp. 1807 and 1808.
[131] Case 21/79, cited at footnote 121 above.
[132] Case 142/77, cited at footnote 124 above.
[133] Case 27/74 [1974] ECR 1037, especially at p. 1046.
[134] Case 51/74 [1975] ECR 79.
[135] Case 86/78 *Peureux* [1979] ECR 897, especially at pp. 913 and 914.

discriminatory excise duties levied on imports of alcoholic beverages (wines and spirits). [136] The second paragraph of Article 95 prohibits the taxation of imported products with the intention of indirectly protecting other products of the importing country. This provision is much more difficult to apply than the first paragraph because it is essential to establish beforehand the extent to which products compete with each other. Here again the Court applies strict criteria. In deciding whether competition exists, both the present state of the market and possible changes in the context of free movement of goods must be considered; consideration must therefore also be given to changes in consumer habits which may result from free movement. The point at issue was the extent to which wine and beer were in competition on the British market. [137] The Court made a point of emphasizing that the fiscal policy of a Member State was not to be used to stabilize an existing pattern of consumption. The protectionist effect of the fiscal mechanism at issue does not have to be proved; it is sufficient to establish that the mechanism could have the effect claimed. However, while applying such strict criteria, the Court was somewhat cautious, confining itself to a limited control ('it is impossible reasonably to contest that without exception they are in at least partial competition'; 'the protective nature of the tax system ... is clear'). [138] The point at issue in the proceedings against France, Italy and Denmark was the comparison of various kinds of spirits, which had been placed in different taxation classes so that in the final analysis the tax levied on imported spirits was higher (sometimes several times higher) than on domestic products. The proceedings against the United Kingdom were much more difficult in that the products at issue (wine and beer) were very different.

If the purpose is to show that these two products compete with one another, what criteria should be used to compare the tax burdens on them? Here the Court reaches the limits of its jurisdiction; it is therefore not surprising that this case was left temporarily in abeyance pending the result of fresh discussions between the parties concerned.

29. Since its earliest decisions relating to Article 95 the Court has made a clear distinction between the scope of this provision and that of the prohibition on levying charges having an equivalent effect. Taxation which falls within the scope of Article 95 is not covered by the provisions prohibiting charges having an equivalent effect. [139] In this respect Article 95 is a *lex specialis* relative to Articles 9 and 12. If an import tax is to be defined as taxation within the meaning of Article 95 any proportion of the tax which exceeds the domestic taxation cannot be defined as a charge having an equivalent effect. [140] This is therefore discrimination prohibited by the provisions of Article 95.

In the 1970s the relationship between Article 95 on the one hand and Articles 9 and 12 on the other appeared more complex than the first judgments had led us to believe. In the *Capolongo* case the Court had its first encounter with a national fiscal mechanism in which the domestic product and the imported product were certainly subject to equal burdens but where the revenue was used to finance activities which gave a particular advantage to the domestic product. Is this really a discriminatory tax?

---

[136] Four judgments: Case 168/78 *Commission* v *France* [1980] ECR 347; Case 169/78 *Commission* v *Italy* [1980] ECR 385; Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417; Case 171/78 *Commission* v *Denmark* [1980] ECR 447.

[137] Judgment in Case 170/78, cited at footnote 136 above.

[138] Judgments in Cases 168/78, 169/78 and 171/78, cited at footnote 136 above.

[139] Case 57/65, cited at footnote 67 above.

[140] Case 25/67 *Milch-, Fett- und Eierkontor* [1968] ECR 20.

Such was not the Court's conclusion in the *Capolongo* judgment. [141] It took the view that Article 95 does not apply at all if the revenue from the tax is exclusively intended to finance such activities. On the contrary, the tax levied on imports must be regarded as an additional financial burden and therefore as a charge having an equivalent effect. It was stated in the later *IGAV* judgment (1975) that a fiscal mechanism of this kind has merely the appearance of a system of domestic taxation because the tax burden upon the domestic products is wholly or partly offset. [142] This doctrine was further defined in the *Cucchi* judgment in 1977. [143] The import tax must be regarded as a prohibited charge having an equivalent effect only if the tax burden on the domestic product is entirely offset as stated above. The conclusion seems to be that a partial offsetting should be considered in the light of Article 95. In this case the import tax should be compared with the burden on the domestic product after deducting this partial offsetting. This seems to be the correct solution, even though in practice this comparison might lead to extremely complex calculations. Case 73/79 seems to confirm this interpretation, but on the other hand it gives rise in turn to fresh uncertainty in so far as there is no express statement that the import tax must be regarded as a prohibited charge having an equivalent effect when the tax on the domestic product is completely offset. [144]

¶ 5. *The prohibition on measures having equivalent effect*

30. The practical enforcement and application of the prohibition on measures having equivalent effect by the Commission during the transitional period (point 14), and the still greater importance of this prohibition in Community legal practice during the 1970s have already been covered. The time has now come to make a more detailed examination of the content of the concept of measures having equivalent effect and its development in the administrative practice of the Commission and in decisions of the Court. Our starting point should be the premise that the practical importance of the prohibition on these measures in maintaining the free movement of goods can scarcely be overestimated. During periods of economic crisis, when protectionist tendencies develop by themselves so to speak, it is clearly tempting for Member States which can no longer resort to the classic range of tariff restrictions on trade and of quotas, to take steps to protect the market indirectly and in a less obvious fashion. Application of Articles 30 to 36 EEC shows that these steps may affect a very wide variety of legal areas. The first to come to mind are laws relating to goods, plant and animal health measures and manufacturing and safety specifications, but laws relating to medicinal products, environmental protection and price controls and intellectual property law may also be quoted. It is also apparent from this list, which is of necessity incomplete, that the prohibition in question affects a considerable range of national regulatory powers and may thereby involve unsuspected limitations on national sovereignty.

31. The significance of the prohibition in question was only gradually recognized. In 1967, in an innovative study of this subject, VerLoren van Themaat could still refer to 'a

[141] Case 77/72 [1973] ECR 611, especially at p. 624.

[142] Case 94/74, cited at footnote 94 above; Case 78/76, cited at footnote 104 above, is along the same lines.

[143] Case 77/76 [1977] ECR 987, especially at p. 1006; Case 105/76 *Interzuccheri* [1977] ECR 1029, especially at pp. 1042 and 1043, is along the same lines.

[144] Case 73/79 *Commission* v *Italy* [1980] ECR 1533.

problem of considerable practical importance neglected by legal writers'.[145] This situation came to an end quite soon after the publication of this article, particularly as a result of definition by the Commission of the concept of a measure having equivalent effect (see point 32 below). From the end of the 1960s up to the present there has been extensive discussion among legal writers, giving rise to a broad spectrum of definitions of this concept.[146] VerLoren van Themaat, whose view was endorsed by Waelbroeck in 1970,[147] is at one end of this spectrum with a very broad interpretation of the concept of freedom and, as a consequence, a strict interpretation of the prohibition of measures having equivalent effect. All measures and national administrative practices which form a barrier to imports or exports which might otherwise take place fall within the scope of the Article 30 prohibition. Thus not only measures which make imports or exports more onerous or more difficult than sale of domestic products on the domestic market but also those which, while applying without distinction to domestic trade and intra-Community trade, impede the latter, must be regarded as prohibited measures having equivalent effect. These measures 'applicable without distinction' may possibly escape prohibition by virtue of Article 36 EEC.

The discussion which developed among legal writers took a particularly sharp turn when these measures applicable without distinction were assessed for the purposes of applying the prohibition in question; among these measures can be mentioned regulations on the marketing of products, manufacture, quality, packing, labelling, weights and measures, etc. VerLoren van Themaat emphasizes that neither Article 30 nor any other Treaty provision provides for any exception for these measures. He takes the view that his interpretation is confirmed by Article 36, because most of the domestic measures which might be entitled to this exception will probably fall within the category of measures applicable without distinction.

At the other end of the spectrum are the views of a number of writers, mostly German,[148] who insist on treating the prohibition in question as essentially a prohibition on any discrimination. The most restrictive interpretation is that given by Seidel (1967), adopted and developed in 1973 by Graf, who regards only measures expressly involving discrimination as measures having equivalent effect. Measures applicable without distinction are in that view completely outside the prohibition. The same does not apply to interpretations which, like that proposed by Steindorff, make use of the concept of material discrimination.

It is useful to consider the intermediate view put forward by Ehlermann.[149]

In his view measures applied without distinction which impede imports or exports should not automatically be regarded as within the scope of the prohibition on measures having equivalent effect; this is precluded by the fact that Member States remain generally competent, pursuant to Article 100, to enact regulations dealing with internal trade. For the most part the objects of these regulations are perfectly legitimate ones, only some of which are referred to in Article 36. Interpreting the prohibition strictly will then

---

[145] P. VerLoren van Themaat, *Bevat art. 30 van het EEG-Verdrag slechts een non-discriminatie beginsel ten aanzien van invoerbeperkingen?* SEW, 1967, p. 633.

[146] C.D. Ehlermann in von der Groeben, von Boeckh, Thiesing, op. cit. at footnote 66 above, p. 254.

[147] M. Waelbroeck, in Louis, Vignes, Waelbroeck, *Le droit de la CEE*, Vol. 1, Brussels, 1973, p. 101.

[148] C.D. Ehlermann, loc. cit. at footnote 146 above.

[149] Loc. cit.; cf. also C.D. Ehlermann, *Die Bedeutung des Art. 36 EWGV für die Freiheit des Warenverkehrs*, EuR 1973, p. 1.

further a broad interpretation of Article 36, but this is contrary to the decisions of the Court (see point 35 below). That is why Ehlermann takes the view that measures applicable without distinction and acting as barriers to imports or exports should be regarded as prohibited only if a Member State violates the principle of proportionality; this is the case when the barrier to trade represented by the measure in question is not proportional to the (otherwise legitimate) purpose of the measure or when the same purpose could be achieved by a less restrictive measure.

32. The Commission applied the prohibition pragmatically during the 1960s, developing its theories step by step by reference to the actual cases which came before it. Thus in 1967 the Commission did no more, in its supplementary answer to the first question by Deringer on the purport of the concept of measures having equivalent effect, than give a series of examples, which incidentally included the case of a measure applicable without distinction. [150] To be sure the Commission had already issued a directive in 1964 and two directives in 1966 pursuant to Article 33(7) EEC aimed at eliminating certain categories of measures having an effect equivalent to quantitative restrictions on imports, but these directives related only to cases of express discrimination. [151] Deringer was not satisfied with the answer from the Commission and demanded clarification in a second question in 1967. The Commission answered by giving a more general outline of the concept of measures having equivalent effect but with no real clarification of the problem. [152] Its views were still undefined, particularly on the extent to which measures applicable without distinction should be regarded as prohibited. The answer was 'no in most cases'. The last two directives issued by the Commission at the end of 1969 pursuant to Article 33(7) give more details, in particular Directive 70/50 of 22 December 1969. [153]

First of all, Directive 70/50 gives important details on the concept of 'measures'. This should be taken to mean not only legislative and administrative provisions and regulations but also administrative instructions and all actions by a public authority, including exhortations ('buy Dutch...'). On the other hand, import formalities are not generally regarded as within the scope of the prohibition in question. [154] Article 2 of the directive contains a general definition of the concept of a measure having an effect equivalent to a quantitative restriction on imports which still excludes totally the category of measures applicable without distinction.

The measures involved are those which present barriers to imports which might take place if such measures did not exist, 'including those which make imports more difficult or onerous than marketing domestic products'. Article 2 then contains a list of examples illustrating these various measures. The definition in Article 2 shows more clearly than the recitals of the directive that a discriminatory effect relative to the situation on the domestic market is not an indispensable part of the concept of measures having equivalent effect. The definition given by the Commission also covers measures having equivalent effect, relating exclusively to imports where it is impossible to make a comparison with domestic products, e.g. because the product in question is not manufactured in the importing country.

---

[150] Written question No 118/67 by Mr Deringer (OJ 901, 29.3.1967).

[151] See point 14 above.

[152] Written question No 64/67 by Mr Deringer (OJ 169, 26.7.1967).

[153] OJ L 13, 19.1.1970.

[154] See on the contrary the approach of the High Authority in 1955, see point 4 above.

Directive 70/50 adopts a compromise with regard to measures applicable without distinction to domestic products and imported products. A clear category among these may, in well-defined circumstances, be regarded as measures having equivalent effect (Article 3 of Directive 70/50). [155]

This involves all provisions governing marketing of products which, in Community jargon, may lead to technical barriers to trade (provisions relating to shape, dimensions, weight, composition, etc.). These provisions must be regarded as prohibited if their 'restrictive effect upon free circulation of goods exceeds the proper scope of trade regulations'. Here the Commission seems to have in view cases of infringement of the principle of proportionality such as those to which we have referred when considering the Ehlermann thesis.

33. The development of case-law relating to Articles 30 to 36 EEC in general and to the concept of measures having equivalent effect in particular has been belated. Even in 1974 the Commission observed with surprise that developments in the case-law on this subject were still rare. [156] This seemed to the Commission to be in astonishing contrast to the importance of the prohibition and the great variety of national provisions and practices which might be affected thereby. There was a total of six judgments on this subject in the 1960s, and 15 in the period 1970-75. Moreover, the first decisions in the case-law were particularly concerned with the application of Article 36 to the law on industrial property. Only later, i.e. from 1974, did the concept of measures having equivalent effect arise. However, the body of case-law grew very quickly during the second half of the 1970s. More than 40 judgments have been given on this subject since 1 January 1976, most of which (over 80%) were preliminary rulings.

After the recognition in the *Salgoil* judgment that the standstill obligation laid down in Article 31 and the first paragraph of Article 32 was directly applicable, [157] there was quite a long wait, until 1976, before the Court expressly confirmed that the prohibition on measures having equivalent effect was directly applicable. [158] However, previous decisions had left very little room for doubt on this point.

The case-law subsequent to the transitional period has shown clearly that the principles of free movement of goods, and particularly the prohibition on quantitative restrictions and measures having equivalent effect, must also be applied to agricultural products. In the famous *Charmasson* judgment in 1974 the Court did not accept the Opinion of the Advocate-General and declared that since the end of the transitional period this prohibition was applicable in its entirety to agricultural products which were covered by a national market organization, pending the establishment of a common organization of the market. [159] The Commission had always supported the opposite view, in accordance with the prevailing view among commentators. An important point is that, with one exception, all the directives aimed at eliminating measures having an effect equivalent to

---

[155] See previously *Second General Report EC*, point 8.

[156] *Eighth General Report EC*, point 307.

[157] Case 13/68 [1968] ECR 453; see also Case 7/61 *Commission* v *Italy* [1961] ECR 317.

[158] Joined Cases 3, 4 and 6/76, cited at footnote 55 above, especially at p. 1314. Case 74/76 *Jannelli* [1977] ECR 559, especially at p. 575; regarding new Member States cf. Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, especially at p. 2374.

[159] Case 48/74 [1974] ECR 1383, especially at p. 1394; cf. in part Case 68/76 *Commission* v *France* [1977] ECR 515, especially at p. 531.

quantitative restrictions on imports pursuant to Article 33(7) provide a general exception for national measures which are an integral part of a national agricultural market organization. In a 1979 judgment [160] the Court applied the lesson from the *Charmasson* judgment to new Member States, declaring that any exception for agricultural products still covered by a national market organization to the principles of free movement of goods pursuant to Article 60 (2) of the Act of Accession had finally ended on expiry of the transitional period laid down in Article 9 of the Act of Accession on 1 January 1978.

34. In the first judgment (*International Fruit* in 1971) dealing with the concept of measures having equivalent effect the Court seemed to follow a stricter interpretation than the Commission. [161] Whereas Directive 70/50 did not in general regard import formalities as measures having equivalent effect, the Court took the view that any requirement for import or export licences was incompatible with the prohibition on these measures, even if such licences were issued automatically on request. In a later judgment the Court referred on this point to the waste of time which such formalities might involve and their deterrent effect upon importers and exporters. [162]

The 1974 *Dassonville* judgment gave a general definition of the concept 'measure having equivalent effect' for the first time. [163] Any national measures 'which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' are to be considered as such measures. About 20 of some 30 judgments given during the period 1974-80 in which this concept arises use this definition from the *Dassonville* judgment expressly or by implication. This definition gives the prohibition extraordinary scope. It requires no evidence of the actual existence of an obstacle to the circulation of goods among Member States; it is sufficient that a national measure *might* have this effect. [164]

In addition, the *Dassonville* judgment lays down no exception for measures applicable without distinction to domestic products and to imported or exported products. This is thus a very wide definition, but in practice it is often subject to necessary restrictions. The case-law here is particularly complex, and cannot readily be reduced to a consistent pattern: this account will confine itself to pointing out the general trends in its development.

The case-law on the concept of measures having equivalent effect can be subdivided into three main categories. The criterion used in this clarification is the strictness with which the prohibition is applied. The categories are as follows, in order of decreasing strictness:

(i) cases in which the *Dassonville* formula can be used without restriction (point 35);
(ii) cases in which the *Dassonville* formula can be applied with some adjustments (points 36 and 37);
(iii) the remainder, in which the *Dassonville* formula is not taken into account and where the concept of measures having equivalent effect is given a more limited content than that conferred upon it in the formula (point 38).

---

[160] Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447.

[161] Joined Cases 51 to 54/71 *International Fruit Company* [1971] ECR 1107; cf. also Case 53/76 *Bouhelier* [1977] ECR 197, especially at p. 204 and Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369.

[162] Case 68/76 *Commission* v *France* [1977] ECR 530.

[163] Case 8/74 [1974] ECR 837, especially at p. 851 et seq.

[164] Case 12/74 *Commission* v *Germany* [1975] ECR 181, especially at p. 199.

35. The Court seems to apply the *Dassonville* formula without restriction to national trade regulations affecting agricultural products for which there is a common organization of the market. However, application is not automatic when national price regulations are involved (point 36). Thus national regulations imposing quantitative limits on flowering bulb crops may, at least, potentially, have an unfavourable effect upon trade in this product among Member States (Case 190/73 *Van Haaster*). [165] On that account it is incompatible with the freedom of commercial transactions on which the common organization of the market is based. In these cases consideration of compatibility regarding the prohibition on measures having equivalent effect is linked with consideration of compatibility with regard to regulations which establish the common organization of agricultural markets. [166] The *Pigs and Bacon Commission* judgment (Case 177/78) also makes a point of emphasizing that the Treaty provisions relating to the abolition of tariff and commercial barriers to intra-Community trade are to be regarded as an integral part of the common organization of the market. [167]

An equally strict application of the *Dassonville* formula is to be found in two judgments relating to national inspection measures. In the *Simmenthal* case [168] and the *Denkavit* case [169] the Court took the view that regular frontier inspections of meat and animal feedingstuffs were incompatible with the prohibition on measures having equivalent effect, subject to the possible exceptions laid down in Article 36 EEC. These inspections involve delays and possibly extra transport costs, and may therefore make importing or exporting more difficult or more expensive. However, these cases are not consistent. In the *Rewe* [170] and *Bauhuis* [171] judgments the Court seemed to think that it was important to know whether such inspection measures were applicable in the same way to domestic products sold on the home market in order to rule on the application of the prohibition in question. Thus in the *Bauhuis* judgment unilateral national inspections on exports were not regarded as measures having equivalent effect if they were also applicable without distinction to products intended for the home market.

The *Bauhuis* judgment is also interesting from another aspect. 'Community' inspections, i.e. inspections based upon Community directives for approximation of laws, were not regarded in this judgment as measures having equivalent effect. On the contrary, the Court took the view that these inspections encourage the movement of goods among Member States. They replace differing national inspection systems and make it possible to settle for a single inspection within the exporting country. This decision might be criticized on the grounds that Community frontier inspections may also be the source of delays and increased costs. Another possible solution would have been to treat these inspections as measures having equivalent effect also but to exempt them from the prohibition on the basis of Article 36.

The obligation on the Community itself to comply with the principles of free movement of goods in its actions is a factor in favour of this solution (see point 25 above). [172]

---

[165] Case 190/73 [1974] ECR 1123, especially at p. 1134.

[166] See also Case 11/76 *Vanden Hazel* [1977] ECR 901; Case 83/78, cited at footnote 158 above; Case 94/79 *Vriend* [1980] ECR 327.

[167] Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161.

[168] Case 35/76 [1976] ECR 1871, especially at p. 1883.

[169] Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369.

[170] Case 4/75 [1975] ECR 843.

[171] Case 46/76, cited at footnote 103 above, especially at pp. 19 and 20.

[172] Joined Cases 80 and 81/77, cited at footnote 117 above, especially at p. 947.

36. The category of cases in which application of the *Dassonville* formula is adjusted to some extent relates firstly to application of the prohibition on measures having equivalent effect to national price regulations. The exception made by the Court here amounts in fact to a declaration that measures which apply without distinction to internal trade and to trade between Member States are authorized unless there is discrimination in material terms against the imported product *vis-à-vis* domestic products. Since the *Tasca* judgment in 1976 the classic expression of the case-law has been that national pricing provisions, e.g. maximum or minimum prices, which apply without distinction to domestic products and imported products, are not in themselves measures having equivalent effect. [173]

However, they may produce such an effect when they are set at such a level that marketing imported products becomes either impossible or more difficult than marketing domestic products. Here the Court actually applies a criterion of material discrimination. If in fact there is equal treatment, that treatment is in reality discriminatory because of the inequality existing between the imported product and domestic product, e.g. in the cost-price structure. A good example is to be found in the *van Tiggele* judgment. [174] If the cost-price of imported gin is below that of home-produced gin, a system of minimum prices set at a specific level is incompatible with the prohibition on measures having equivalent effect if the competitive advantage for the imported product is thereby neutralized.

If national price regulations also apply to agricultural products covered by a common organization of the market, they must be considered from the point of view of compatibility both with the prohibition in question and with that market organization, especially if the latter includes a price system. [175] Of course, a distinction must be made between these two types of scrutiny, although this is not always done in the cases. [176] If the domestic pricing measure is incompatible with Community regulations on prices, for example because it runs counter to common price formation, that measure is then in itself incompatible with the EEC Treaty and it becomes unnecessary to consider whether it is compatible with the prohibition on measures having equivalent effect. In the recent *Danis* judgment the Court rightly observed that the compatibility of a domestic pricing measure with a common organization of the market containing a price system must be assessed primarily by reference to that organization. [177] However, the absence of a common organization of the market has no effect either on the nature or on the extent of assessment of domestic pricing regulations from the point of view of their compatibility with the prohibition on measures having equivalent effect. [178]

37. It has been the rule since the *Cassis de Dijon* judgment in 1979 that application of the *Dassonville* formula to measures 'applicable without distinction' may be mitigated in

---

[173] Case 65/75 *Tasca* [1976] ECR 309; Joined Cases 88 to 90/75 *Sadam* [1976] ECR 340; Case 13/77 *INNO* v *ATAB* [1977] ECR 2115, especially at p. 2148; Case 82/77 *van Tiggele* [1978] ECR 39; Case 5/79 *Buys* [1979] ECR 3229; Joined Cases 16 to 20/79 *Joseph Danis* [1979] ECR 3339; Joined Cases 95 and 96/79 *Kefer et Delmelle* [1980] ECR 103.

[174] See previous footnote.

[175] *Tasca, Sadam, Buys* and *Danis* judgments, cited at footnote 173 above.

[176] For example, Case 31/74 *Galli* [1975] ECR 47 and the *Kefer* judgment, cited at footnote 173 above.

[177] See footnote 173 above.

[178] See the *van Tiggele* judgment, cited at footnote 173 above.

certain circumstances by resorting to a 'rule of reason'. [179] This 'rule of reason' applies to national trade rules during the period in which these are not yet covered by Community rules. 'Community rules' means a common organization of the market or harmonization of laws. National trade rules escape the prohibition on measures having equivalent effect if they apply without distinction to domestic products and imported products and if they are essential for the protection of certain interests which are such that they must take precedence over the requirements of free movement of goods. In the *Cassis de Dijon* judgment the Court gives public health, fair competition and consumer protection as examples of such interests. In that judgment the Court rejected such an argument, taking the view that a measure much less fundamental than a prohibition on imports would have been enough to protect these interests. In the case in question, imports of the French liqueur 'Cassis de Dijon' were refused admittance to Germany because this product did not meet the conditions imposed in the importing country relating to the percentage of alcohol in this type of liqueur. In order to take advantage of this 'rule of reason', a Member State must be able to prove that the measure before the Court is intended for the 'protection of a legitimate interest' and that the obstacle to trade among Member States is no more than is necessary for the adequate protection of that interest. There must therefore be a proper balance between the means chosen and the end in view.

The recognition of this 'rule of reason' did not come about at a stroke. In fact some indications were already to be found in earlier cases. The *Dassonville* judgment had stated that national measures reasonably intended for the protection of designations of origin ('Scotch whisky') were acceptable even if they might result in an obstacle to trade among Member States. [180] However, the Court still gave no answer to the question whether reasonable measures avoided the prohibition on measures having equivalent effect or whether they were to be entitled to the exempting provisions of Article 36 EEC. The *Kramer* and *Donckerwolcke* judgments [181] provide other examples of resorting to the 'rule of reason', though in covert form.

Cannot Article 36 EEC be used to arrive at the same result as the 'rule of reason'? Not always. The list of interests to be protected for which Article 36 authorizes exceptions to the prohibition on measures having equivalent effect is exhaustive. Article 36 does not refer to fair competition or consumer protection, which the Court referred to in the *Cassis de Dijon* judgment as proper subjects for the application of the 'rule of reason'.

The Commission formulated a series of guidelines based upon the action to be taken on the *Cassis de Dijon* and *Gilli* judgments, in a letter addressed to Member States at the beginning of October 1980. [182] The Commission takes the view that a Member State cannot block imports of a product which is lawfully offered for sale in the exporting Member State on the ground only that this product does not comply with technical or trade rules in the importing country. Such a refusal would be possible only if the conditions of sale for the imported product did not conform 'in a proper and satisfactory manner' to the interests which the different conditions of sale applied in the importing country were endeavouring to safeguard. In fact this amounts to checking on each occa-

[179] Case 120/78 *Rewe* [1979] ECR 649, especially at p. 662 et seq.; Case 788/79 *Gilli* [1980] ECR 2071; Case 27/80 *Fietje* [1980] ECR 3839.

[180] Case 8/74 *Dassonville*, cited at footnote 163 above.

[181] Joined Cases 3, 4 and 6/76 *Kramer*, cited at footnote 55 above; Case 41/76 *Donckerwolcke*, cited at footnote 55 above; cf. also the Opinion of Advocate-General Capotorti in the latter case, [1976] ECR 1942.

[182] OJ C 256, 3.10.1980.

sion whether the different rules in the exporting country arrive at equivalent results as the rules in the importing country from the point of view of protecting interests at stake relating to public health, safety, etc. The problem involved is different from that raised in the *Cassis de Dijon* judgment. The point under consideration in that judgment was whether the means chosen by the *importing* country (minimum alcoholic strength) was in proportion to the end in view: if not, its application to the imported products, which took effect as a prohibition on import, was not justified. However, one can agree with the Commission in stating that requirements imposed by the importing country upon the imported product, e.g. technical requirements, cannot be justified when the product already offers alternative guarantees sufficient to safeguard the interests to be protected. The real problem is whether judges will always be in a position to reach a decision on this point.

38. The examination of the above-mentioned two categories of cases is complete (points 35 to 37), leaving an ill-assorted group of judgments which cannot be assigned to either of these categories. These are cases in which the wording used by the Court refers to the use of an express discrimination criterion, with [183] or without [184] reference to the *Dassonville* judgment. In so far as the use of this discrimination criterion in these judgments leads to the conclusion that unequal treatment of the imported product and the domestic product is contrary to the prohibition on measures having equivalent effect, [185] there is no necessity for drawing conclusions for the interpretation of the concept of measures having equivalent effect in general from the wording used. From this point of view the *Rewe* and *Bauhuis* judgments raise further problems, in so far as they seem to wish to exclude national inspection measures 'applicable without distinction' totally from the prohibition, rejecting the reasoning followed in other judgments (see point 35).

Finally the judgment on horsemeat of 8 November 1979 [186] marks a departure from the approach which had been followed by the Court up to that time. This judgment relates to whether a national measure prohibiting any manufacturer of prepared meat products from stocking or processing meat of equine species with a view to protecting export markets in which the consumption of meat from equine species is restricted or prohibited amounts to a measure having an effect equivalent to a quantitative restriction on exports. The Court took the view that it was nothing of the kind, because the measure applied in exactly the same way to the domestic market. The *Dassonville* formula was not used in the judgment. It would have been logical, after the *Cassis de Dijon* judgment, to apply the 'rule of reason' in the case. However, final conclusions should not be drawn from the horsemeat judgment because it was not delivered by the Court in plenary session but given by a Chamber.

39. If the application of the prohibition in question in the case-law is compared with the principles stated by the Commission in Directive 70/50, it is apparent that the practical differences are not very great. [187] Moreover, the Court is fond of referring to this

---

[183] For example, Case 4/75 *Rewe Zentralfinanz* [1975] ECR 858; Case 53/76 *Bouhelier*, cited et footnote 161 above.

[184] For example, Case 12/74 *Commission* v *Germany* [1975] ECR 198; Joined Cases 89/74, 18 and 19/75 *Arnaud* [1975] ECR 1036; Case 15/79 *Groenveld* [1979] ECR 3409.

[185] Cases 12/74 and 89/74, cited at footnote 184 above; Case 13/78 *Eggers* [1978] ECR 1953 et seq.

[186] Case 15/79, cited at footnote 184 above.

[187] P. VerLoren van Themaat comes to the same conclusion in *De artikelen 30-36 van het EEG-Verdrag*, R.M. Themis, 1980, p. 405.

directive. [188] Broadly speaking the differences are as follows: the Court is stricter than the Commission, to the extent that it regards systems where import or export licences are issued automatically as falling within the prohibition.

With regard to national price systems applicable without distinction, the Court goes even further than Directive 70/50 seems to require. The 'rule of reason' as developed in the case-law is similar to Article 3 of Directive 70/50 in many respects. However, its scope appears to be more limited in that it does not permit the automatic acceptance of any and every objective contemplated by the national regulations. Whenever the 'rule of reason' is applied, that objective must be weighed against the advantage of free movement of goods.

40. Article 36 allows exceptions to Articles 30 to 34 EEC if these are justified on the grounds referred to therein (public morality, public policy or public security, protection of health and life of humans, industrial and commercial property, etc.). However, these exceptions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The Court has placed a strict interpretation on this exception from the outset. This is true above all in the case of interests the protection of which justifies application of Article 36. The Court emphasized in a judgment given as early as 1961 that Article 36 applied to non-economic situations and contained no general safeguard clause additional to that in Article 226. [189] Article 36 cannot be used to protect the domestic market against economic difficulties which temporarily affect a specific sector. On the contrary, application of this provision must be limited to the areas expressly referred to therein. This is confirmed by the *Eggers* judgment in 1978, which refused to extend the benefit of Article 36 to national regulations relating to quality descriptions because their purpose was not the protection of public health. [190]

In addition, Article 36 can only justify exceptions to Articles 30 to 34, not to other principles of free movement of goods such as the prohibition on levying charges having equivalent effect. While certain national provisions, such as inspections, are justified under Article 36, that article cannot also be used to justify charges levied in connection with those provisions. [191]

Finally Article 36 should not be regarded as a source of residual sovereignty for Member States in the sense that regulation of the areas referred to in that article would be permanently left within their jurisdiction. Harmonization of laws may reduce this jurisdiction appreciably, thereby narrowing the scope of Article 36. After harmonization, Member States have to remain within the limits set by that harmonization. Transgression of these limits can never be justified by resorting to Article 36. [192]

The principal area in which Article 36 has been the subject of case-law is that of intellectual property. The case-law on this subject shows that even if the true aim of national

---

[188] For example, Case 155/73 *Sacchi* [1974] ECR 427; Case 74/76 *Iannelli*, cited at footnote 158 above; Case 13/78 *Eggers*, cited at footnote 185 above.

[189] Case 7/61 *Commission* v *Italy* [1961] ECR 317.

[190] Case 13/78 *Eggers*, cited at footnote 185 above.

[191] Case 7/68 *Commission* v *Italy*, cited at footnote 95 above; Case 29/72 *Marimex*, cited at footnote 101 above.

[192] Case 35/76 *Simmenthal* [1976] ECR 1885; Case 5/77 *Tadeschi* v *Denkavit* [1977] ECR 1576; Case 148/78 Ratti [1979] ECR 1644.

regulations is the protection of an interest referred to in Article 36 and on that account they fall within the scope of that provision, this does not mean that the national legislator enjoys full powers in this respect. Article 36 contains a number of important restrictions, each of which is a touchstone for the judge, enabling him to exercise detailed supervision. Thus the exceptions to the free movement of goods aimed at protecting the interests listed in Article 36 must first and foremost be justified; they are justified only if essential to achieve the objective in question. This condition is not met where a less restrictive measure would have sufficed. The Court has no hesitation in pointing out in detail the conditions which must be met by a national measure in order to be justified under Article 36. [193]

The Court takes the view with regard to industrial property that the only authorized restrictions on free movement of goods are those essential to safeguard rights which are the specific subject-matter of that property. This is not the case if the owner of a trade mark or patent wishes to make use of his exclusive rights to prevent imports of a product which has been marketed in another Member State by or with the consent of that owner. [194] However, an infringement action for this purpose is justified, either against persons with no legal title, [195] or, for example, if the imported product bears a mark likely to cause confusion when there is no legal or economic link between the owners of the marks in question and in addition these marks do not have the same origin. [196] The *Grundig-Consten* judgment in 1965 [197] already provided the first elements of this distinction between the specific subject-matter of the exclusive right, which justifies exceptions to the free movement of goods under Article 36, and the mere exercise of the exclusive right, which must be subject to certain limitations in the interests of free movement.

While it is possible to justify a barrier to the movement of goods through exercise of a right of industrial property by invoking the specific subject-matter of that right, the two additional conditions laid down in Article 36 must still be complied with: there must be no arbitrary discrimination and no disguised restriction on trade between Member States. The latter condition in particular seems to lend itself to strict and detailed judicial supervision. Thus the Court took the view in the *Hoffmann-La Roche* case in 1978 that an infringement action against a parallel importer was justified in terms of Article 36 when the parallel importer had reaffixed the initial mark to the new packaging after repackaging the product. The result may nevertheless be a disguised restriction on trade between Member States in so far as the intervention by the owner of the mark plays a part in artificially walling off national markets. In this case the Court states three conditions which must be complied with for the parallel importer to be able to take advantage of the provisions of Articles 30 to 36 EEC: the original state of the product must not have been affected by repackaging, the owner of the mark must have been given prior notice that the repackaged product has been put on sale, and the new packaging must indicate by whom the product was repackaged. [198] The depth of the scrutiny in this strict assessment of conformity to the conditions laid down in Article 36 is therefore apparent.

---

[193] For example, Case 104/75 *De Peijper* [1976] ECR 635.

[194] Case 15/74 *Centrafarm* v *Sterling Drug* [1947] ECR 1162; Case 16/74 *Centrafarm* v *Winthrop* [1974] ECR 1194; Case 78/70 *Deutsche Grammophon* [1971] ECR 487.

[195] Case 192/73 *Van Zuylen* [1974] ECR 744.

[196] Case 119/75 *Terrapin* [1976] ECR 1039.

[197] Joined Cases 56 and 58/64 *Grundig* v *Consten* [1966] ECR 429.

[198] Case 102/77 *Hoffman-La Roche* v *Centrafarm* [1978] ECR 1164-1166.

¶ 6. *Adjustment of State monopolies of a commercial character*

41. Article 37 is not one of the clearest provisions in the EEC Treaty. [199] This has already been referred to when considering its application during and after the transitional period (points 15 and 21). What are the 'State monopolies of a commercial character' which are to be adjusted? What are the discriminations which this adjustment is to exclude? Is it possible to eliminate the discriminations in question without abolishing the monopoly? The Court referred in its first judgments regarding Article 37 to the 'complexity of the text' (Case 6/64 *Costa* v *ENEL*). [200] The lack of clarity in the wording of Article 37 is apparently due to unresolved differences of opinion which confronted the authors of the Treaty regarding what was to happen to State monopolies of a commercial character when the common market was established. [201] Moreover the Spaak Report itself does not define its position precisely on this point. It points to three possible solutions: the abolition of the monopoly, its adjustment to the common market or, if necessary, its replacement by a common organization. [202] Traces of this diversity of views are to be found in the recommendations issued by the Commission pursuant to Article 37(6).

42. It should in any case be acknowledged that the French petroleum monopoly has been the only one to raise practical problems in interpreting the concept of monopoly. This monopoly is based on a system of concessions whereby a certain number of undertakings are granted the exclusive right to import crude oil and finished products derived from it. [203] Although the reference to 'delegated State monopolies' which appears in Article 37(1) seems to have been aimed specifically at the French system, the Commission (in an unpublished recommendation dating from 1962) expressly leaves open the question whether this system falls within the scope of Article 37. [204] In a recommendation dated a year later the Commission seems to have abandoned its previous doubts on the matter. [205] In the very cautious judgment given in the *Albatros-Sopeco* case in 1965 the Court gave no ruling on a question raised on this point by the Italian judge, on grounds which were nevertheless admissible. [206]

However, the Court gave a general definition of the concept of State monopoly of a commercial character in the previous *Costa* v *ENEL* judgment in the following terms: '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'. [207] In accordance with this declaration, the Court came to the conclusion in a later judgment in the *Sacchi* case that a monopoly whose purpose was the provision of a service, specifically television broadcasts for advertising purposes, did not fall within the provisions of Article 37. [208]

---

[199] C.A. Colliard, *L'obscure clarté de l'article 37 du traité CEE*, D (Chr) 1964, p. 263.

[200] Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

[201] Ehle-Meier, op. cit. at footnote 62 above, p. 185 et seq.

[202] *Rapport des chefs de délégation aux ministres des affaires étrangères*, Brussels, 1956, p. 37.

[203] See on this point H. Smit and P.E. Herzog, *The Law of the EEC, a Commentary on the EEC Treaty*, New York, 1976, Vol. I, pp. 2-178.

[204] See *Fifth General Report EEC*, point 93.

[205] OJ 127, 20.8.1963.

[206] Case 20/64 *Albatros* v *Sopeco* [1965] ECR 29.

[207] Joined Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium*, cited at footnote 35 above, and Case 6/64 *Costa* v *ENEL*, cited at footnote 200 above.

[208] Case 155/73 *Sacchi*, cited at footnote 188 above.

43. At the end of the transitional period, monopolies of a commercial character were to be adjusted so as to guarantee that there is no discrimination between the nationals of Member States in procurement and marketing conditions. The Commission set out its views in detail on the scope of this provision in its first recommendations dating from the beginning of the 1960s. [209] In any event, measures limiting imports by reference to the openings existing on the national market were to be abolished. The position is the same for taxation measures which bear more heavily upon the imported product than upon the domestic product, and for price systems involving formal or substantive discriminations. Finally any discrimination against imported products in respect of conditions of sale, distribution, market surveys, advertising, etc., was to be abolished.

The final question is whether this discrimination can be abolished so long as exclusive monopoly rights exist. Does a prohibition on all discrimination have the required effect if the bodies concerned are in fact still in a position, by virtue of their exclusive rights of import and purchase or sale, to put products coming from other Member States at a disadvantage by their marketing and pricing policies? The Commission gives no express ruling on this point in its 1969 recommendations; it does draw attention to the fact that Article 37 is also aimed at making this substantive discrimination impossible. According to the Commission the best solution is to abolish the exclusive rights enjoyed by monopolies, particularly in so far as these rights affect imports and trade. [210] Thus the path chosen by the Commission here is one of compromise. It takes the view that the total elimination of State monopolies of a commercial character is not necessary to meet the requirements of Article 37. It even considers that, while the abolition of an exclusive right of import is the best solution, this does not necessarily follow from the prohibition on all discrimination set out in Article 37(1). This view is confirmed by the recommendation of 22 December 1969 regarding the French monopoly in petroleum products. The Commission admitted that the wide powers of intervention granted to the French minister competent for the monopoly in petroleum products might involve discrimination in certain circumstances, but that even so the monopoly did not have to be abolished. [211]

The Council Resolution of 21 April 1970 regarding State monopolies of a commercial character in manufactured tobacco products also provides a good illustration of this approach. [212] Under this resolution France and Italy undertook to abolish all discrimination arising from national tobacco monopolies and all exclusive rights relating to imports and wholesale marketing, the latter not later than 1 January 1976 (sic).

The Court of Justice also takes the view that the express prohibition on all discrimination in Article 37 need not necessarily involve the abolition of State monopolies of a commercial character. The Court took the view in the *Costa* v *ENEL* judgment in 1964 that the introduction of new commercial monopolies (the issue in the case in point being the standstill obligation set out in Article 37(2)) was prohibited only in so far as it might be a source of fresh discrimination. [213] Consequently the view of the Court was that the establishment of a new monopoly was not excluded *per se.* This view is confirmed by

---

[209] *Fifth General Report EEC*, point 18; cf. for example, the recommendation to France regarding tobacco products of 6 April 1962 (OJ 48, 23.6.1962).

[210] *Third General Report EC*, point 41; cf. for example, the recommendation to France regarding the alcohol monopoly of 22 December 1969 (OJ L 31, 9.2.1970).

[211] OJ L 31, 9.2.1970.

[212] OJ C 50, 28.4.1970.

[213] Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

later decisions. The Court stated expressly in the *Manghera* [214] and *Miritz* [215] judgments in 1976 that Article 37, though not requiring the abolition of monopolies, did impose the mandatory requirement that they should be adjusted so as to guarantee the complete abolition of discrimination.

On the latter point, however, the Court went much further than the Commission had done in its 1969 recommendations. The Court declared in the *Manghera* case that the exclusive right of import under the monopoly was discrimination prohibited by Article 37. In that case the Italian judge was faced with a case under criminal law of a businessman who had bypassed the monopoly when importing tobacco into Italy. Moreover, the Court acknowledged in the same judgment that Article 37(1) had been directly applicable since the end of the transitional period. Although the Court therefore rejects the exclusive import rights as incompatible with Article 37, it does seem to take the view that other exclusive rights are compatible with that article. The French alcohol monopoly is based on a system of production quotas and on the producers' obligation to deliver alcohol produced to the monopoly, which is in turn required to purchase it at officially fixed prices. The Court takes the view that this system is compatible with the prohibition on any discrimination laid down in Article 37(1) and with the prohibition on quantitative restrictions laid down in Article 37(2). [216]

The *Peureux II* judgment in 1979 showed clearly that it was the view of the Court that, even after the transitional period had expired, measures should be considered separately to see whether they complied with Article 37, at least when national measures relating to the specific function of a State monopoly of a commercial character were involved. [217]

On the other hand measures imposing taxes on imports in connection with the existence of a monopoly of a commercial character had been examined in previous judgments to assess their compliance with Article 37 and had been declared incompatible with that provision if there was discrimination against the imported product. [218] In the *Hansen* case in 1979 the Commission supported the proposition that Article 37 had spent its force at the end of the transitional period, with the conversion of State monopolies in accordance with that article. [219] Measures taken in the context of these monopolies affecting intra-Community trade should henceforth be assessed only in relation to their conformity with the normal provisions of the Treaty on this point, including Article 95. The Court did not adopt this view, assessing the measures in the cases brought before it in the light of their conformity both with the Treaty provisions at issue (Articles 30 and 95) and with Article 37. It is not completely clear how far this specific assessment of conformity with Article 37 would permit possible exemptions from the principle of free movement of goods, particularly the prohibition on measures having equivalent effect. The *Peureux II* judgment appears not to rule this out since, in contrast to what might be expected following the case-law relating to this prohibition, it regards a system of production quotas as admissible on the basis of Article 37.

44. Article 37(4) contains a special provision for monopolies of a commercial character relating to agricultural products. The adjustment of these monopolies must be accom-

---

[214] Case 59/75 [1976] ECR 100.

[215] Case 91/75 [1976] ECR 229.

[216] Case 119/78 *Peureux II* [1979] ECR 987; Case 120/78 *Cassis de Dijon*, cited at footnote 179 above; Case 86/78 *Peureux I* [1979] ECR 913.

[217] See previous footnote.

[218] Case 13/70 *Cinzano* [1970] ECR 1089; Case 45/75 *Rewe* [1976] ECR 199.

[219] Case 91/78 [1979] ECR 935.

panied by equivalent safeguards for the employment and standard of living of the producers concerned. This provision has been particularly useful in the case of the alcohol monopolies in France and Germany and the tobacco monopolies in France and Italy.

The Commission seemed to take the view in its first recommendations in 1962 and 1963 that Article 37(4) authorized exceptions solely in relation to the timetable and the procedures for adjustment, but not in relation to the principle of paragraph 1 whereby all discrimination was to be eliminated at the end of the transitional period. [220] However, the 1969 recommendations indicate an opposite view in so far as temporary exceptions to Article 37(1) were regarded as justified, even after the transitional period had expired, until a common organization of the market covering the agricultural products concerned entered into force. [221] Moreover, this approach was entirely in line with the Commission's views on application of the prohibition on measures having equivalent effect in agriculture (see point 33). The *Charmasson* judgment compelled the Commission to alter its views on the subject. [222] In the *Miritz* judgment in 1976 the Court adopted the Opinion of Advocate-General Trabucchi and confirmed that Article 37(4) could no longer be used (since the end of the transitional period) to justify exceptions to the direct unconditional effect of the prohibition on all discrimination laid down in paragraph 1 of that article. [223]

¶ 7. *Elimination of barriers to trade*

45. We have already considered technical and administrative barriers to trade, which became a particularly serious problem during the 1970s (point 18). This involves all national provisions relating to placing products on the market which give rise to standards and supervision in respect of manufacture, weight, composition, packaging, etc. The existence of differing standards in Member States may be a serious obstacle to the movement of goods. The position is the same if the procedures whereby a product (e.g. a medicinal product) is placed on the market differ from one Member State to another. It has already been pointed out in the paragraph dealing with the prohibition on measures having equivalent effect that technical and administrative barriers to trade may avoid this prohibition by the application of a 'rule of reason' or be exempted under Article 36 EEC. The Treaty provides for an approximation of laws in accordance with Article 100 to eliminate these barriers. In the case of agricultural products, Article 43 EEC is the relevant provision. How has the process of approximation progressed?

46. Since 1960 the Commission has taken an active interest in the problem of technical and administrative barriers to trade. [224]

---

[220] See the recommendation to France on tobacco of 6 April 1962 (OJ 48, 23.6.1962) and the recommendations to Germany and France on alcohol of 26 November 1963 (OJ 180, 10.12.1963).

[221] See the recommendation to France on alcohol of 22 December 1969 (OJ L 31, 9.2.1970).

[222] *Ninth General Report EC*, point 116.

[223] Case 91/75, cited at footnote 215 above.

[224] See *Third General Report EEC*, point 160; for the material data used in this paragraph cf. also *Fourth General Report EEC*, point 62; *Fifth General Report EEC*, point 57; *Second General Report EC*, points 9-11; *Fourth General Report EC*, points 17 and 18; *Fifth General Report EC*, points 127-131; *Sixth General Report EC*, point 73 et seq.; *Eighth General Report EC*, points 107-115; *Ninth General Report EC*, points 90 et seq.; *Tenth General Report EC*, points 115-130; *Eleventh General Report EC*, points 124-126; *Twelfth General Report*, points 104-106.

It announced in 1961 that it was going to draw up a programme of action, and sent a questionnaire to national governments for this purpose. In 1962 the Commission decided to give priority in harmonization to motor vehicles and agricultural tractors. It endeavoured to provide uniform technical rules for all Member States and to obtain mutual recognition for national inspection and approval procedures. Initiatives were taken at the same time to alter laws relating to foodstuffs and veterinary and plant health products. At the request of the European Parliament, the Commission provided in its General Report for 1965 a table showing the position with regard to harmonization of laws. It appeared that 29 directives in the field of technical barriers to trade were in preparation, nine of which related to motor vehicles. In the case of foodstuffs three directives had been issued, two proposals had been submitted to the Council, and 12 new proposals were being prepared. These tables were amended and supplemented annually up to the Fourth General Report for 1970. Since then they have been published at longer intervals as supplements to the *Bulletin of the European Communities.*

On 20 September 1965 the Commission made a recommendation to Member States with a view to obtaining prior notification of planned measures where enforcement might lead to new obstacles to trade. [225] In March 1968 the Commission submitted an ambitious programme to the Council for the elimination of technical barriers to trade. A programme of this type was drawn up on 28 May 1969 in the form of a decision and of four resolutions. [226] The first two resolutions contained a multi-phase programme providing for the adoption of a large number of harmonization directives. A special resolution established a procedure for adapting directives already issued to technical progress. Finally, a decision set out an agreement relating to the 'status quo' arrangements. This agreement aimed at preventing the adoption by Member States of new measures forming obstacles to trade in the products listed in the general programme, or at least at suspension of the national legislative procedure for a certain time in order to enable the Community to take a decision on approximation. [227]

Only a year after publication of the general programme the work was already so far behind schedule that it was no longer possible to catch up. However, considerable progress was made during this period; 1971 proved to be particularly fruitful, in that 11 directives were issued by the Council. In addition, harmonization was extended during this period to entirely new sectors; among these, protection of the environment and consumer protection were subjects of increasing concern. In 1970 the Commission proclaimed for the first time that safeguarding the environment and consumer protection were among the objectives of its harmonization work. In 1973 this interest also led to the adoption by the Council of a resolution supplementing the 1969 general programme. [228]

In the same year the Council adopted an industrial policy resolution [229] in which it took formal note of new timetables for the approximation of laws in the foodstuffs and industrial products sector, which had been put forward by the Commission in its industrial and

---

[225] OJ 160, 29.5.1965.
[226] OJ C 76, 17.6.1969.
[227] These regulations were amended by a Resolution of 5 March 1973 (OJ C 9, 15.3.1973).
[228] OJ C 38, 5.3.1973.
[229] OJ C 117, 31.12.1973.

technological policy programme for that year. [230] The Council undertook to do everything possible to bring its activities into line with this programme, but this again was a pious hope. None the less progress was made, especially in 1976, when the Council issued 22 directives.

It is hardly surprising, given the increasing number of directives, that the Commission found it more and more difficult during the 1970s to supervise their enforcement in Member States. The Commission had been drawing attention to the difficulties in this area since 1972. In 1974 the situation became alarming. Of the 30 directives which had been issued in the industrial products sector and for which the time-limit for enforcement had expired during the year, only one seemed to have been properly applied in all Member States. The Commission had instituted 34 infringement proceedings on this point. Supervising the enforcement of these measures was still costing the Commission much time and effort during the years which followed. There was a slight improvement in this situation in 1976.

A shift in priorities took place during the second half of the 1970s. The volume of new harmonization proposals fell and the Commission concentrated its efforts upon adoption by the Council of drafts that were still on the table. In addition, the Commission was devoting more and more time to the essential adaptation to technical progress of directives already in force, at the same time supervising their implementation.

During this period the Commission also took part in the international GATT negotiations on technical barriers to trade as part of the Tokyo Round. In 1979 the latter led to an agreement to which the Community also acceded. [231]

Up to 1 July 1980 the number of directives issued by the Council to eliminate technical barriers to trade had reached about 130. [232] About 50 of these directives dealt with motor vehicles and involved particularly the harmonization of technical standards applicable to the manufacture of all kinds of components, from towing gear to rear-view mirrors. Measuring instruments, electrical appliances, and dangerous products may be mentioned among other major sectors. The harmonization programme achieved in relation to foodstuffs and agricultural products is also very extensive.

47. The elimination of administrative barriers in the pharmaceutical sector was particularly slow and difficult to achieve. The Commission started work on this sector in 1960, [233] endeavouring to achieve mutual recognition by Member States of the national certificates required for marketing medicinal products.

This objective has not yet been fully achieved even now. In 1965 the Council issued the first directive relating to placing proprietary medicinal products on the market, [234] but eight years later it seemed that Member States had not yet met their obligations in this respect in full. [235] In 1973 a compromise was reached which ended in adoption of a

---

[230] Supplement 7/73 - Bull. EC.

[231] Council implementation Decision 80/45/EEC (OJ L 14, 19.1.1980) and proposal for a directive from the Commission (OJ C 54, 4.3.1980).

[232] See *Guide to EEC legislation*, TMC Asser Institute 1978, with 1980 supplement.

[233] See *Third General Report EEC*, point 160; *Sixth General Report EEC*, point 56.

[234] Council Directive 65/65/EEC of 26 January 1965 (OJ 369, 9.2.1965).

[235] See *Seventh General Report EC*, point 112.

second directive by the Council in 1975.[236] This directive provided for the establishment of a proprietary medicinal products committee responsible for facilitating cooperation between Member States in the issue of permits. However, the final decision rests with national authorities.

48. The award of public works contracts is always one of the most difficult areas from the point of view of intra-Community movement of goods. A national authority naturally tends to put works contracts or contracts for the supply of goods in the way of its own firms. In point 32 dealing with the prohibition on measures having equivalent effect, attention has already been drawn to a Commission directive issued pursuant to Article 33(7) EEC, prohibiting discriminatory treatment of goods coming from other Member States when supplying the public sector. The Commission has taken other initiatives to promote intra-Community movement of goods in this sector. After giving priority at first to drafting a directive prohibiting restrictions on the free provision of services in the area of public works contracts,[237] the Commission submitted a draft directive in 1971 covering the award of public supply contracts; this was adopted in 1976.[238] It follows the pattern of the 1971 directive relating to invitations to tender and contains procedural provisions especially aimed at guaranteeing that the required notice of these public contracts is given at Community level.

49. Strict interpretation by the Court of the prohibition on measures having equivalent effect has also been a factor in the harmonization of laws in relation to technical and administrative barriers to trade. Even if national measures are applied to national products and imported products without distinction, they fall within this prohibition if they are unreasonable; harmonization then becomes superfluous. Similarly, the way in which the Court handles the Article 36 EEC exceptions may amount to a significant restriction on national powers and so also make harmonization superfluous. This idea is perfectly illustrated by the *Hoffman-La Roche* judgment in 1978 which has already been considered (point 40). In such cases application of Articles 30 to 36 is sufficient to eliminate barriers to free movement of goods arising from national commercial regulations.

The Commission undertook a fresh analysis of this matter in the letter of October 1980, already mentioned in point 37, drafted following the *Cassis de Dijon* judgment. Goods produced and placed on the market in the country of origin in accordance with the requirements in force in that country cannot be barred as imports simply on the grounds that they do not conform to (different) technical or commercial requirements in the importing country. If they conform 'reasonably and satisfactorily' to the legitimate aims of safety, protection of the environment, consumer protection, etc., pursued by commercial regulations in the importing country, the prohibition on importing is no longer justified. This approach has much to recommend it. If a product complies with the standard of protection required in the importing country, even though other criteria are applied to establish compliance, strict application of the standards of the importing country to the imported product amounts to excessive adherence to formal requirements and is not genuinely necessary. Moreover, the cases relating to free movement of persons already provide examples of this approach. The Court of Justice has repeatedly regarded the

[236] Council Directive 75/319/EEC of 20 May 1975 (OJ L 147, 9.6.1975).
[237] Council Directive 71/304/EEC of 26 July 1971 (OJ L 185, 16.8.1971).
[238] Directive 77/62/EEC of 21 December 1976 (OJ L 13, 15.1.1977).

application of national regulations to nationals of another Member State as incompatible with free movement because that application could not be objectively justified. The Court has pointed out that the interest at issue could be regarded as sufficiently protected because the party concerned had complied with similar regulations in his own Member State. [239]

The Commission declared in its letter of October 1980 that it would oppose application of national provisions on imports which, in the light of the preceding analysis, were incompatible with the Treaty. It referred in particular to national regulations relating to composition, description, presentation and packaging of products as well as technical rules. The Commission would devote its main effort at harmonization to national provisions which, if applied to imports, could be regarded as compatible with the standards laid down in the *Cassis de Dijon* judgment.

¶ 8. *Temporary exceptions to free movement of goods*

50. It has been shown that the system of free movement of goods implies an appreciable and permanent loss of powers for the Member States. The Community legal system does not authorize unilateral infringement by Member States of the rule of free movement of goods. Member States cannot deliberately exclude certain sectors of economic activity from the scope of the EEC Treaty by pleading a difficult economic situation. The Court has always firmly rejected such unilateral protectionist measures by Member States, however sound the reasons relied upon to justify them. [240]

The Treaty itself lays down procedures to resolve special problems facing a Member State, e.g. by authorizing that State to adopt protective measures. If a Member State considers special measures conferring exemption from the normal system of free movement of goods to be indispensable, it can enact them only by resorting to these procedures and complying with the conditions which they impose. The procedure to be followed during the transitional period was that of the Article 226 protective clause; the corresponding provision for new Member States was Article 135 of the Act of Accession, which ceased to be valid on 31 December 1977. Exceptions are still possible, even after the end of the transitional period, on the basis of Article 103(2) and (4) EEC, or pursuant to Articles 108 and 109 in case of serious difficulties in the balance of payments. As regards commercial policy, Article 115 permits the enactment of protective measures relating to products originating from third countries. Finally, exceptional measures may also be taken pursuant to Articles 223 to 225 to safeguard the interests of national security and national defence. A brief survey of the application of these exceptions during the period in question is required.

51. Article 226 enabled Member States, with authorization from the Commission, to adopt protective measures where there were serious difficulties, which were likely to persist, in an area of economic activity and in the case of difficulties which might result in a serious deterioration in a regional economic situation. The purpose of this provision, which was valid only during the transitional period, was to assist Member States in

[239] Case 16/78 *Choquet* [1978] ECR 2293; Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35.

[240] For example, Case 7/61 *Commission* v *Italy*, cited at footnote 39 above; Case 38/69 *Commission* v *Italy* [1970] ECR 47; Case 232/78 *Commission* v *France* [1979] ECR 2738.

solving problems of adaptation which might arise from establishment of the common market. In general, Article 226 was used only infrequently. The only protective measures authorized were temporary measures applicable to specific products, although the validity of some of them was regularly extended. Italy in particular resorted successfully time and again to the provisions of Article 226.

The first requests for the application of this article reached the Commission in 1960. [241] Italy was authorized to adopt measures to protect sulphur, silk and derived products. Protective measures were also authorized in 1962 under Article 226 for the Italian lead and zinc markets. Protection of the Italian lead, zinc and sulphur markets was kept up until the end of 1967, and protection of the silk market continued to the end of the transitional period. In addition, Article 226 was applied repeatedly at the beginning of the 1960s in the foodstuffs sector to deal with problems arising from distorted competition due to great differences in raw material prices in Member States. Thus Germany was authorized to introduce a compensatory amount on bread and dough, until the Council solved these problems by the Decision of 4 April 1962 based on Article 235. [242] In 1963 France was authorized to levy a tax on imports of low-priced refrigerators from Italy for several months. [243] Article 226 was then applied again in 1968 in favour of France following the events in May that year, and in 1969 in favour of Germany following the revaluation of the mark.

The application of Article 226 did not give rise to many proceedings before the Court: a total of eight judgments has been given on the subject. In the cases the Court was at pains to ensure strict compliance with the conditions for application of this protective clause. A unilateral national measure incompatible with the Treaty could not be justified on the grounds that a request for the application of Article 226 had been made to the Commission. The measure could be enacted only after the Commission had authorized it, and this authorization could not make good a previous breach of the Treaty. [244] Where appropriate, the Court also considered whether the essential conditions for application of Article 226 had been complied with, although it granted the Commission, expressly or by implication depending on the case, full discretion in the matter and therefore limited its supervision to an objective and marginal examination of the Commission decision. [245]

The application of Article 135 of the 1972 Act of Accession, which for new Member States is equivalent to Article 226 EEC, was also quite limited. This provision made it possible to enact measures designed to protect the shoe industry in Ireland. Article 135 expired on 31 December 1977, at the end of the transitional period laid down in the Act of Accession.

52. In the context of the EEC Treaty, short-term economic policy has remained primarily the province of Member States, although Article 103 EEC gives the Community the necessary powers of coordination in this area. Nevertheless, this does not mean that a

---

[241] *Fourth General Report EEC*, points 36 and 37; cf. also *Fifth General Report EEC*, point 24; *Second General Report EC*, points 16 and 17; *Third General Report EC*, point 28; *Ninth General Report EC*, point 89; *Tenth General Report EC*, points 113 and 114 for the material data used in this paragraph.

[242] OJ 30, 20.4.1962; subsequently replaced by Regulation No 66/166/EEC (OJ 195, 28.10.1966).

[243] Case 13/63 *Italy* v *Commission* [1963] ECR 165.

[244] Joined Cases 2 and 3/62 *Commission* v *Belgium and Luxembourg*, cited at footnote 46 above.

[245] For example, Case 13/63 *Italy* v *Commission*, cited at footnote 243 above; also Case 37/70 *Rewe Zentrale* [1971] ECR 23; Case 72/72 *Baer Getreide* [1973] ECR 377.

Member State can enact measures, e.g. relating to prices, which conflict with the principles of free movement of goods under cover of short-term national economic policy. [246] However, it can readily be seen that the Council may decide, pursuant to Article 103(4) EEC, on distribution arrangements which do not conform to the system of free movement of goods when there is an acute shortage of certain products. In this connection the Council adopted a system in 1977 pursuant to Article 103(4) EEC, on the basis of which Member States may, where difficulties have arisen in the supply of crude oil and/or petroleum products, make trade among Member States in this sector subject to a system of licences, after obtaining appropriate authorization from the Commission. [247] This system was applied on several occasions in 1979 and 1980. [248]

53. If Member States pursue economic policies with insufficient coordination there is always a risk that different economic developments may finally jeopardize the functioning of the common market itself.

The existence of the common market therefore presupposes effective coordination of national economic policies. The Treaty provides a safety valve by authorizing urgent measures which may, if appropriate, take the form of protective measures when a Member State has a balance-of-payments crisis. The normal Community procedure for settling these problems is laid down in Article 108 EEC. If the difficulties persist in spite of formal consultations with the Commission and in spite of the measures which it recommends, the Council may grant mutual assistance in accordance with Article 108(2). The Commission authorizes the Member State to take protective measures only if mutual assistance is not granted or if the assistance granted seems to be insufficient. Article 109 lays down an emergency procedure for sudden balance-of-payments crises and when a Council decision regarding mutual assistance is not reached immediately. The Member State may then take the necessary protective measures itself. In recommending mutual assistance to the Council in accordance with Article 109(2) the Commission may take the initiative and set in motion the procedure laid down in Article 108.

Protective measures authorizing departures from the principle of free movement of goods pursuant to Articles 108 and 109 have remained exceptions. However, it must be stated that, on the rare occasions on which these procedures have been applied, they have not operated satisfactorily from the Community point of view. [249]

For the most part, protective measures have been taken by a Member State unilaterally and without any real prior consultation; after this there has been some difficulty in having them ratified by the Commission under Article 108(3). Exemptions from the rules of free movement of goods have been granted only twice under the procedure in question: [250] the first time was after the events of May 1968 in France, because of which it was decided to impose temporary quotas on imports in certain sectors; the second time was in 1974, when an Italian economic measure, requiring a deposit of 50% of the value

---

[246] For example, Joined Cases 88 to 90/75 *Sadam* [1976] ECR 341.

[247] Council Decision 77/186/EEC of 14 February 1977 (OJ L 61, 5.3.1977), amended by Decision 79/879/EEC of 22 October 1979 (OJ L 270, 27.10.1979).

[248] Commission Decision 79/126/EEC of 19 January 1979 (OJ L 30, 6.2.1979); Commission Decisions 80/373/EEC and 80/374/EEC of 31 March 1980 (OJ L 90, 3.4.1980).

[249] See H. Smit and P.E. Herzog, op. cit. at footnote 23 above, Vol. 3, pp. 619 and 621.

[250] See on this point C.D. Ehlermann in von der Groeben, von Boeckh, Thiesing, loc. cit. at footnote 56 above, p. 1402.

of imported goods without interest for a period of six months, was first adopted unilaterally pursuant to Article 109, then put on a proper footing by a Commission decision under Article 108(3).

54. The system of free movement of goods also applies to products originating in third countries, which are imported into a Member State and put into free circulation there (Article 9 EEC; see point 10 above). This logically presupposes a very high degree of uniformity in commercial policy measures because, if this is not the case, imports into the Community will be directed towards the Member State in which import conditions are most favourable. Article 113 meets this requirement by granting the Community the power to pursue a common commercial policy. However, so long as this Community commercial policy has not taken its final form, discrepancies may still exist between the commercial policies of Member States and there is a risk that these national policies will be jeopardized by indirect imports coming from other Member States. To resolve these difficulties, Article 115 EEC contains a protective clause enabling Member States to protect their national markets against such indirect imports, after obtaining permission from the Commission. During the transitional period Member States could themselves take the necessary steps in cases of emergency, subject to the exercise of a power of subsequent control by the Commission. Under Article 115 the Commission must make recommendations to the other Member States to seek their cooperation before authorizing protective measures. The obvious aim of this procedure is to arrive at harmonization of national commercial policies so as to eliminate the problems raised. This has never worked well in practice.

The Article 115 protective clause has been used repeatedly, both during and after the transitional period. The Commission mentioned in the 1960 General Report that various Member States had already applied Article 115;[251] apparently they had been too reckless in this respect, because the next year the Commission insisted in its Report that Member States should follow the normal procedure laid down in Article 115(1) instead of adopting unilateral measures under paragraph 2, unless the latter procedure was really justified. In 1961, 53 products qualified for the protective system in Article 115. In 1963 the number involved was 98, mainly extra-low-cost products coming from State-trading countries. This number reached a peak on 1 January 1966 with exceptional arrangements for 122 products, but the increasing liberalization of imports, which also extended to products coming from State-trading countries, brought about a reduction in this figure; it had fallen to 90 products on 1 January 1967. This is probably the last statement by the Commission in its General Reports on the practical effects of application of Article 115. Thereafter the Commission has remained silent, at least in its General Reports, regarding application of this provision, which has nevertheless been applied very frequently.

According to Ehle-Meier, recourse to Article 115 increased greatly during the period immediately following the end of the transitional period.[252] At that date the common commercial policy was far from being achieved. In 1971 the Commission published a decision setting out a system for application of Article 115.[253] This decision authorizes

---

[251] *Third General Report EEC*, points 352 and 353; cf. *also Fourth General Report EEC*, points 35 and 192; *Fifth General Report EEC*, point 26; *Seventh General Report EEC*, point 30; *Tenth General Report EEC*, points 315 and 316 for the material data used in this paragraph.

[252] Loc. cit. at footnote 68 above, p. 141.

[253] Commission Decision 71/202/EEC of 12 May 1971 (OJ L 121, 3.6.1971).

Member States, under certain conditions, to make imports from other Member States of products originating in third countries subject to a system of import licences. The issue of such a licence may be deferred within a specified period pending a reply by the Commission to a request for application of Article 115. Subsequent cases, particularly the *Donckerwolcke* judgment in 1976, raised serious doubts as to whether this system was compatible with the prohibition on measures having equivalent effect. [254] The Commission did not issue an amended decision until 1979; this made the establishment of intra-Community supervision in the form of a system of import licences subject to prior authorization by the Commission. [255] This authorization was in fact extended by a decision in 1980 to a large number of products, particularly textiles. [256]

Recourse to Article 115 has become much more frequent since 1978, especially with regard to measures to protect the domestic market against imports via other Member States of low-priced textiles originating in low-wage Asian countries and in State-trading countries. More than 180 decisions were taken in 1978 under Article 115, nearly 80% of which related to textiles. [257] The reasons given by the Commission for the increase in the number of these protective measures were economic difficulties in the sectors concerned, which were likely to be made even worse by indirect imports.

However, there is a common commercial policy in most of these cases, in the form of a Community quota subdivided into national quotas. Moreover, the Community has often made agreements with the Asian exporting countries concerned regarding these textile products, providing for exports to the Community to be restricted to limits allocated to the Member States. Can Article 115 still be applied when there are no longer any purely national commercial policy measures? The Commission thinks that it can, because 'total uniformity' has not yet been achieved in the Community system. [258]

The Court has repeatedly emphasized that the provisions of Article 115 are to be interpreted and applied strictly, because they represent an exception. [259] In the opinion of the Court the Commission has a measure of discretion in deciding which measures are necessary; this discretion must, of course, be properly exercised. The automatic grant of a request for protective measures as soon as a national import quota is used up is incompatible with this principle. [260] The Court took the view in another judgment that the provisions of Article 115 had been infringed because the protective measure authorized related to imports at an insignificant level compared with the effectiveness of the commercial policy measure in question. [261]

55. Articles 223 to 225 EEC permit exemptions from the Treaty system where justified for reasons of national security and national defence. These provisions do not seem to

---

[254] Case 41/76, see footnote 34 above; see also Cases 52/77 and 179/78 *Rivoira* [1977] ECR 2261 and [1979] ECR 1147.

[255] Decision 80/47/EEC of 20 December 1979 (OJ L 16, 22.1.1980).

[256] Commission Decision 80/605/EEC of 27 June 1980 (OJ L 164, 30.6.1980).

[257] C.W.A. Timmermans, *Troebel water ofwel de beschikkingenpraktijk ex artikel 115 EEC*, SEW 1979, p. 636.

[258] Answer to written question No 772/78, Albers and Patijn (OJ C 45, 19.2.1979).

[259] Case 62/70 *Bock* v *Commission* [1971] ECR 897; Case 29/75 *Kaufhof* v *Commission* [1976] ECR 442 et seq.

[260] *Kaufhof* case, cited at footnote 259 above.

[261] *Bock* case, cited at footnote 259 above.

have led to specific measures in the field of free movement of goods. However, in 1958 the Council drew up a list of products to which Article 223(1)(b) applies. This list is not published, but nationals of a Member State who can produce sufficient evidence of a legitimate interest can obtain copies from their national governments. [262]

[262] See H. Smit and P.E. Herzog, op. cit. at footnote 203 above, Vol. 5, pp. 6-179.

Chapter II — Free movement of persons, services and capital

by Georg Ress

Section I — Importance of the four basic freedoms in achieving the objectives of the Community

1. In addition to the free movement of goods, the 'Foundations of the Community' (Part Two of the EEC Treaty) extend to the free movement of persons (freedom of movement for workers and right of establishment), the freedom to provide services and the free movement of capital.[1] They are a fundamental and necessary element in a common market modelled on a liberal economy.

While the aim of the free movement of goods is the abolition of obstacles and barriers to trade in goods within the Community, the free movement of persons and capital is aimed at the greatest possible freedom of movement for other factors of production within the Community: employees and self-employed persons, services, occupations and capital. The abolition of obstacles to the free movement of persons, services and capital among Member States is listed among the activities of the Community in Article 3(c) EEC, whereby the Community is enabled to carry out the task assigned to it, namely: 'by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities ...' (Article 2 EEC). However, achieving the ultimate aim of economic union and the creation of close political relations among the States of the EEC which is at the root of the Treaties implies interdependence and ties among Member States which are practical and not merely legal. The free movement of persons, services and capital is an essential element in this development and in establishing these ties. On the one hand, the free movement of manpower as a factor of production is essential to the undertaking which has to decide upon the location for a place of business which is most favourable from the economic viewpoint and upon the way in which the factor of production consisting of capital is utilized. On the other hand, it offers economic and social advantages both to the worker and to the provider of services. The resulting personal mobility

[1] The prime subject of this account of the development of Community law is the rules in the EEC Treaty. The free movement of workers is covered by Articles 48 to 51 EEC (Article 69 ECSC) and by Article 96 Euratom. Rules dealing with the right of establishment appear in Articles 52 to 58 EEC, whereas freedom to provide services is the subject of Articles 59 to 66 EEC and free movement of capital is covered by Articles 67 to 73.

undoubtedly assumes considerable importance with regard to the aim of political union already mentioned. Since, however, final responsibility for the political, economic and social future of the population is still in the hands of the Member States of the European Community, as it was previously, [2] the inevitable result is a conflict between the extent of personal freedom of movement regarded as desirable in the EC and the requirements which Member States regard as essential for reasons of public policy and citizen loyalty, in a word for reasons of State. [3] Giving effect to the right of free movement of persons and services and the right of establishment implies a very high degree of freedom with regard to movements of capital and the payments relating thereto. The exercise of the freedoms is meaningless unless services are rendered in return for monetary consideration. It follows that the exchange restrictions which the EEC Treaty intends to abolish are themselves obstacles to the normal exercise of other freedoms. [4]

2. The three freedoms in question (free movement of persons, services and capital) as defined by Community law have a certain number of common features; these should be put into perspective before embarking on an account of the various stages in their development and a detailed analysis of all aspects of their implementation in law. The free movement of workers, freedom to provide services and freedom of establishment for self-employed workers take effect as fundamental rights, guaranteeing citizens of the Community the right to pursue an occupation and protecting them above all against any infringement of these freedoms by the sovereign power of the Member States. The Treaty provisions relating to free movement of persons and freedom to provide services (Articles 48, 52 and 59 EEC) are directly applicable in the Member States. They take precedence over national law and forbid any Member State to discriminate between nationals of other Member States and its own nationals regarding the exercise of these freedoms. [5]

3. The scope of these fundamental rights is confined to the movement of persons and services between the Member States. Restrictions which are purely national in character are not covered. [6] Having regard to the fact that it is a fundamental right, the free movement of persons must be liberally interpreted, and the right reserved to Member States to impose restrictions intended to protect public order or public security becomes exceptional in nature and varies according to the extent of the protection to be guaranteed. Community law embodies 'the concept of progressive introduction of a Community legal order'; [7] this is primarily a task for the Court of Justice, in the context of the Treaty objectives and of the advances which have been made towards integration. [8]

---

[2] See on this subject C. Sasse, in *Souveränitätsverständnis in den Europäischen Gemeinschaften*, ed. G. Ress, Baden-Baden, 1980, p. 118; Ress, ibid., p. 15; Geck, ibid., p. 113 et seq.

[3] K. Hailbronner, *Die Freizügigkeit im Spannungsfeld zwischen Staatsraison und europäischem Gemeinschaftsrecht*, DÖV, 1978, p. 857 et seq.

[4] Regarding the 'supplementary freedom' represented by free movement of payments see B. Börner, 'Die fünfte Freiheit des Gemeinsamen Marktes: der freie Zahlungsverkehr', in *Integration Europas*, 1965, p. 19 et seq.; Beutler, Bieber, Pipkorn, Streil, *Die Europäische Gemeinschaft — Rechtsordnung und Politik*, Baden-Baden, 1979, pp. 271-272.

[5] See footnote 6 below.

[6] Case 175/78 *Saunders* [1979] ECR 1129; T. Stein, *Strafgerichtliche Aufenthaltsbeschränkungen gegenüber eigenen Staatsangehörigen und EWG-Ausländern*, EuGRZ, 1979, p. 448.

[7] K. Hailbronner, op. cit. at footnote 3 above, p. 865.

[8] Regarding the key concept of 'progress in integration' see Case 33/76 *Rewe* [1976] ECR 1989; Case 61/79 *Denkavit* [1980] ECR 1205.

4. The freedoms in question have the common feature that Council directives (and regulations in the case of free movement of workers, Article 49) are required for their implementation. The aim of these is to sanction the principle of equal treatment and to ensure the necessary harmonization and amendments in national laws. [9]

If the legal acts designed to approximate and unify the laws of Member States are reviewed today, it is apparent that the position is not the same for all the fundamental freedoms. Having regard to the importance of the free movement of persons and capital, the practical results already achieved in giving effect to these two freedoms are evidence of the importance which is attached to progress in *economic* integration and, over and above the latter, in *political* integration, and emphasize the positive outlook in this area.

Section II — Freedom of movement for workers

¶ 1. *The concept of 'freedom of movement'*

5. Article 69 ECSC already laid down in general terms that there was a right of free movement limited to specialist employees in the coal and steel industry. However, it was impossible to limit the scope of the right to one or two sectors of the economy, once the aim was to extend the principle of freedom of movement for workers to the whole of the common market. Thus the first specific attempt came to be made to abolish obstacles to the mobility of labour as a whole, by the provisions of Articles 48 to 51 EEC.

6. Under the provisions of Article 48(2), freedom of movement for workers implies the abolition of all discrimination based upon nationality between workers from Member States regarding employment, pay and other working conditions. This means that no Member State may make any distinction between Community nationals from the point of view of employment, pay or other working conditions.

For the worker, freedom of movement implies free access to jobs available in all Member States, particularly where demand is high and where the wage levels and working conditions are better. The Community citizen may, on the same footing as any worker, call upon the courts and administrative authorities of any Member State (outside his country of origin) to enforce Article 48 EEC as a directly applicable provision granting him the right to equal treatment as regards pay, employment and other working conditions.

During a long and sometimes laborious development, the civil and public law of the Member States has been ajusted in a way to take account of this essential requirement of equal treatment. Aliens who are 'Community nationals' enjoy all the rights connected with pay, employment and other working conditions granted to workers under the national law of the State concerned, for example regarding dismissal and trade-union activities. Problems arise with regard to the criteria to be applied in defining the concepts of 'worker', 'employment' and 'other working conditions'. Since the obligation to grant equal treatment is relevant to these concepts, it stands to reason that the approach which

[9] See Beutler, Bieber, Pipkorn, Streil, op. cit. at footnote 4 above, p. 251.

can be deduced from the decisions of the Court of Justice and the national courts on this point is of fundamental importance.

7. Article 48 gives workers the following rights in addition to equal treatment:

(a) to apply for jobs actually offered;
(b) to move freely about the territory of the Member States for this purpose;
(c) to reside in one of the Member States in order to pursue employment there in accordance with the laws, regulations and administrative provisions governing the employment of national workers;
(d) to remain in a Member State after having held a job there, under conditions which will be the subject of implementing regulations drawn up by the Commission.

8. The grant of these rights is subject only to limitations justified by considerations of public order, public security and public health. It appears from the limitations laid down by Article 3 EEC that the EEC Treaty does not aim at complete equality of treatment with respect to nationals. In real terms, therefore, free movement of Community workers not only rests on Community law, but its true extent becomes fully apparent only through the regulations which may be adopted by Member States in the context of the limitations laid down in Article 48 (3) EEC. These are generally defined by legislation or regulations at national level within the limits set by Community law. Consequently a 'non-national' is no longer regarded as a 'guest' or an 'alien' (protected by the 'minimum standard' customary in international law) but as a 'Community national' (the term 'Community citizen' being premature). Under the provisions of Article 48(4), freedom of movement for workers does not apply to employment in the public service; this raises the controversial question whether this extends only to administration involving the exercise of official authority. [10] The measures essential to achieve free movement, the exchange of young workers and social security for workers are laid down in Articles 49 to 51; they are examined in detail below.

¶ 2. *Development of the right of freedom of movement for workers through Community legislative acts*

9. The Council has discharged its obligation to bring about, 'by progressive stages', freedom of movement for workers (Article 49 EEC) [11] by adopting three regulations.

Regulation No 15 [12] authorized any national of a Member State to take up paid employment in another Member State provided that no suitable worker was available (within a maximum period of three weeks from registration of the vacancy with the employment bureau) for the vacant post among workers on the regular employment market in the other Member State. These provisions still assumed that Article 48 was not directly applicable and that free movement could not be achieved without introducing the Council regulations and directives referred to in Article 48 EEC. According to Article 8 of Regulation No 15, the EEC worker was entitled not only to equal treatment regarding all

[10] The Court had the opportunity to express an opinion on this point in its judgment of 17 December 1980, Case 149/79 *Commission* v *Belgium* [1980] ECR 3881; see footnote 31 below.

[11] On a proposal by the Commission and after an Opinion from the Economic and Social Committee.

[12] Council Regulation No 61/15/EEC of 16 August 1961 (OJ 57, 26.8.1961).

conditions of employment and work, particularly as regards pay and dismissal, but also regarding membership of trade-union organizations and the right to vote in elections to bodies representing workers in the undertaking. Under the above regulation, any clause in a collective or individual agreement or in other collective regulations relating to employment, pay and other working conditions is automatically void in so far as it provides for or authorizes discrimination against workers who are nationals of other Member States.

10. The freedom of movement granted by Regulation No 15 was consequently limited, namely to cases in which no suitable worker was available for a vacant post on the labour market in a Member State. The directive issued on the same date [13] laid down administrative procedures and practices relating to the entry, employment and residence of workers and their families.

11. After these provisions, [14] which permitted no more than 'partial free movement', had entered into force, the principle of equal treatment of all Community workers was decisively endorsed by the Council by the adoption of Regulation No 38/64 [15] and Directive 64/240, [16] based on that regulation, on the abolition of restrictions on the movement and residence of workers from the Member States and their families within the Community. Regulation No 38/64 abolished the priority granted to national workers which had still been enshrined in Regulation No 15/61. Henceforth any national of a Member State had the right to take up paid employment in the territory of another Member State where the vacancy had been reported to the relevant employment bureau. However, this regulation also enabled any Member State to suspend the application of complete freedom of movement for Community workers on the grounds of an excess of labour in a specific region or trade; this could be done at the beginning of each quarter, or exceptionally in the course of the quarter if the balance in the employment market was seriously disturbed. This restriction apart, the equality of treatment with which the principle of free movement was coupled (Article 8) was guaranteed. It also extended to the right of entry to vocational training schools and rehabilitation centres (Article 12).

Henceforth the Community worker also had the right to be elected to bodies representing workers in the undertaking provided that he had been employed in the same undertaking for three years. This condition (employment in the undertaking for three years) was not abolished until the Council introduced Regulation No 1612/68 [17] which, with the associated Directive 68/360, [18] finally achieved freedom of movement for workers as laid down by Article 48 EEC. Council Regulation (EEC) No 1612/68 deals in Part I with the employment of workers, their performance of their work, and equality of treatment, on the basis of the statement that 'freedom of movement constitutes a fundamental right of workers and their families'. In accordance with Article 1(2), any national of a Member

[13] EEC Council Directive of 16 August 1961 (OJ 80, 13.12.1961).

[14] The application of Article 69 ECSC was the subject of the Decision of 8 December 1954 (OJ 367, 12.8.1957), by representatives of governments of Member States meeting in the Council and the arrangement of 16 July 1955 (OJ 498, 12.8.1957). Special work cards were thereby made available to specialized workers in the coal and steel industry to facilitate their recruitment throughout the territory of the ECSC.

[15] Council Regulation No 64/38/EEC of 25 March 1964 (OJ 62, 17.4.1964).

[16] Council Directive 64/240/EEC of 25 March 1964 (OJ 62, 17.4.1964).

[17] Council Regulation (EEC) No 1612/68 of 15 October 1968 (OJ L 257, 19.10.1968).

[18] Council Directive 68/360/EEC of 15 October 1968 (OJ L 257, 19.10.1968).

State is entitled to take up available employment in another Member State 'with the same priority as nationals of that State'. In addition, it is expressly provided that laws, regulations or administrative provisions or practices in a Member State which limit applications for employment, offers of employment, access to employment or its performance by foreigners or make these subject to conditions which do not apply to nationals cannot be implemented in the context of the regulation. This provision is aimed in particular at special procedures for the recruitment of foreign labour and all practices which have the effect of limiting publication of offers of employment or obstructing the recruitment of workers as individuals. Laws, regulations or administrative provisions which set quotas or limit the employment of aliens in numbers or in percentage terms, by undertaking, by economic activity, by region or at the national level are also discriminatory and so cannot be implemented (Article 4 of the regulation).

12. Under Article 5 of the regulation, a national of a Member State seeking employment in another Member State receives the same assistance there as is given by the employment bureaux to their own nationals seeking employment. The recruitment of Community nationals cannot be made subject to medical, professional or other criteria which are discriminatory by reason of nationality in relation to those applied to the Member State's own nationals. Article 7 gives specific shape to the principle of equality of treatment which must be guaranteed to all Community workers for all conditions of employment and work, particularly as regards pay, dismissal and reinstatement or re-employment should they become unemployed. Community nationals enjoy the same social and tax advantages as workers who are nationals of the Member State and are also entitled to instruction in vocational training schools and retraining or re-education centres on the same footing and under the same conditions as those workers. Article 7(4) expressly provides that any clause in a collective or individual agreement or other collective regulation is automatically void in so far as it discriminates against Community nationals.

According to Article 8, any Community worker is entitled to equal treatment as regards membership of trade-union organizations and the exercise of trade-union rights, including the right to vote. As regards accommodation, including the right to ownership of the accommodation which he needs, he is also entitled to all the rights and all the advantages granted to national workers. The spouse of a Community worker, and the dependent relatives in the ascending line of the worker and his spouse, have the right to set up home with him; under the provisions of Article 11 of the regulation these persons also have the right to enter any paid employment, even if they are not nationals of an EC Member State. The children of a Community worker are admitted 'to general educational, apprenticeship and vocational courses' under the same conditions as the children of national workers (Article 12).

As regards clearance of vacancies and the balance between jobs available and jobs wanted, Part II of Regulation No 1612/68 provides for the introduction of an intra-Community placement procedure: a clearing house. Lists of situations vacant and jobs wanted, which the national labour market has been unable to match up, are compiled and exchanged (Article 16). Restrictions may be imposed on freedom of movement for workers in exceptional circumstances and under the conditions laid down in Article 20, namely when the labour market in a Member State is suffering disturbances or when such disturbances can be foreseen, and where these may jeopardize the standard of living and level of employment in a region or an occupation. The clearing-house machinery may be stopped temporarily in this case if the Commission finds that the situation so requires. It

may be said that, with the adoption of the above regulation, the free movement of Community workers had been to a large extent achieved before the end of the 12-year transitional period laid down in Article 8 EEC.

13. The right of Community workers to remain in a Member State after having held a job there was sanctioned by Commission Regulation (EEC) No 1251/70, [19] which also extends the privilege to workers who have finally given up their occupations. [20] The same provision also granted the 'right to remain' to the members of a Community worker's family, even when such a worker died before retirement. The right to remain granted to workers is made subject to certain conditions under Article 2 of Regulation No 1251/70: at the time when he gives up work, the worker must have reached the age of retirement, he must have worked in the Member State in question for at least the last 12 months and must have continuously resided there for over three years. This period is reduced to two years when the worker gives up his job as a result of permanent incapacity. Finally, there is no condition as to period of residence if that incapacity is the result of an industrial accident or an occupational disease.

¶ 3. De facto *obstacles to freedom of movement*

14. In order to guarantee the implementation of the system of free movement thus created, an attempt had to be made to eliminate specific obstacles preventing Community workers from exercising the rights and freedoms linked to free movement. In particular, it was necessary to take measures pursuant to Articles 49 and 51 EEC, to attain the objectives laid down by Regulation No 1612/68, especially equal treatment for all Community workers and the members of their families regarding opportunities for training, and to promote 'harmonization of social systems' (Article 117(2) EEC).

15. This process has not yet been brought to a successful conclusion, in spite of measures taken pursuant to Article 49 EEC. To achieve this, further progress would have to be made towards a European political union. This could also be done 'in stages', for example by establishing the passport union proposed by the governments of the Member States in 1974 or by creating quasi-political rights of participation (right of Community citizens to vote in each Member State). [21] It is heartening to find that, in spite of these difficulties, all the measures prescribed by Article 49 EEC had been taken before the end of the transitional period, due to the adoption of the above-mentioned Community acts by the Council and the Commission and more particularly to Regulation No 1612/68, and that freedom of movement for workers can therefore be regarded as achieved as from that time. The importance of this event cannot be underestimated in view of the beneficial effect which free movement may have upon the process of Community integration

---

[19] Commission Regulation (EEC) No 1251/70 of 29 June 1970 (OJ L 142, 30.6.1970); Council Directive 72/194/EEC of 18 May 1972 (OJ L 121, 26.5.1972).

[20] To supplement the provisions of Directive 72/194/EEC, see Council Directive 75/34/EEC of 17 December 1974 (OJ L 14, 20.9.1975).

[21] See below on the proposals with a view to setting up a 'passport union'. See Karl A. Lamers, *Repräsentation und Integration der Ausländer in der Bundesrepublik Deutschland unter besonderer Berücksichtigung des Wahlrechts*, Berlin, 1977, on the problems raised by the legal implementation of this right of election. This work also includes a comparative study of the law in Community States at local authority level; see also Karl Doehring, Nationales Kommunalwahlrecht für europäische Ausländer?, in: Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift für Hans Kutscher, Baden-Baden 1981, p. 109 et seq.

even if, in the light of decisions of the Court of Justice [22] which we still have to assess, Article 48, in all its aspects, has become directly applicable since the end of the transitional period. As developments in the case-law of the Court of Justice and the national courts relating to Article 49 EEC et seq. will show, the tendency of Member States to invoke Article 48(3) (limitations for reasons of public policy) in order to give effect to national interests to the detriment of freedom of movement was by no means negligible. Irrespective of whether the conduct of Member States was in accordance with the Treaty or not it is apparent that other problems likely to limit the exercise of the right of free movement itself have been added to the difficulties arising in the field of social security (Articles 51 and 117 EEC). Today, as before, differences in personal economic conditions, social protection and vocational training or general education are still serious *de facto* obstacles impeding complete freedom of movement for Community workers. So long as the standards of living in Member States have not been brought more or less into line, the desired 'complete' freedom of movement will remain a mere ideal, and one which gives rise to difficulties. [23] This is because the introduction of equal access for all workers and the members of their families to paid employment as laid down by Regulation No 1612/68 may be the source of substantial financial burdens for Member States, more especially as the grant of equal access to foreign nationals will call for increases in expenditure, over and above that required in the employment of nationals, in particular because of language difficulties. This matter will be dealt with in the following chapter.

16. The adoption of rules of Community law as expressly laid down by Article 48 EEC is an accomplished fact. Article 16 et seq. of Regulation No 15/61 and Article 24 et seq. of Regulation No 38/64, like Article 13 of Regulation No 1612/68, require the central manpower services in Member States to cooperate closely with each other and with the Commission, particularly in the exchange of statistics and information; vacancy clearance properly so called remains the province of the national services.

17. Article 49 (b) and (c) EEC became devoid of purpose following the adoption of Regulation No 1612/68 and would have done so in any event as a result of the direct applicability of Article 48 EEC. [24] Provision was also made for contact and clearing-house machinery for jobs available and jobs wanted (Article 49(d) EEC) in Article 16 et seq. of Regulation No 1612/68.

18. It should be pointed out here that, in accordance with Article 49(d), the Commission may suspend the clearing-house machinery pursuant to Article 20 of the regulation when there are fears that the standard of living and level of employment in a specific region or activity will be jeopardized.

19. At present the purpose of initiatives to improve the system of free movement for Community workers is the coordination of labour law provisions. Article 7(4) of Regulation No 1612/68 already provided that any clause in a collective or individual agreement or in other collective regulations was void if it discriminated against nationals of other Member States; the Commission has gone further, drawing up other proposals

[22] See Case 167/73 *Commission* v *France* [1974] ECR 359.

[23] K. Hailbronner, op. cit. at footnote 3 above, p. 858.

[24] See the provisions of para. 19(1) of the Deutsches Arbeitsplatzförderungsgesetz on this subject.

(supplemented by the Opinion delivered on 19 February 1974 by the Technical Committee on the Free Movement of Workers) for the adoption of measures relating to conflicts of laws on the subject of relationships of employment within the Community and aiming at the adoption of legal provisions applicable to workers who move from one Member State to another [25] or measures to avoid differences in legal status regarding temporary work and to guarantee better social protection to the parties concerned. [26]

20. Another step was taken towards full implementation of freedom of movement for workers when the Council adopted Regulation (EEC) No 312/76 of 9 February 1976 giving workers from Member States of the EC access to executive positions in trade unions. [27] All Community workers were henceforth entitled by virtue of this provision to equal treatment regarding access to administrative or executive positions in trade-union organizations.

¶ 4. *Measures in the field of social security*

21. On the one hand, the social security and integration of Community workers and members of their families are based on the European system of aggregation of social security contributions laid down in Article 51 EEC. On the other hand, the Court of Justice has helped to promote the social integration of the members of Community workers' families by giving Regulation No 1612/68 a wide interpretation. In the particular circumstances of Case 76/72 [28] the Court extended the application of Article 12 of that regulation (which provides that children shall be admitted to courses of general education, apprenticeship, and vocational training under the same conditions as the nationals of the Member State where they reside) to measures to assist the handicapped, on the grounds that the purpose of the regulation was to achieve complete mobility of workers by the integration of their families into the host country. According to the interpretation given by the Court of Justice to Article 12 in the *Casagrande* case (1974), [29] the right of admission to education implies equal treatment regarding grants paid to encourage training, the point at issue being benefits intended to assist school training. In the case in point the responsible Bavarian authority had refused an 'education incentive' requested by a child of Italian parents wishing to attend a secondary school in Munich. The authority claimed that the Bavarian law on education incentives applied only to nationals. The Court rightly concluded in its judgment that there had been an infringement of Article 12 of Regulation No 1612/68. The Council Directive dated 25 July 1977 [30] laid down that Member States should take appropriate measures within four years to ensure that the children of migrant workers should be offered free instruction both in the language of the host country and in the children's mother tongue. Thereafter it has been stated in various judgments of the Court that the obligation of equal treatment of Community nationals extends equally to the protection of severely handicapped

[25] See *Sixth General Report EC*, point 206.
[26] See *Eighth General Report EC*, point 225.
[27] Council Regulation (EEC) No 312/76 of 9 February 1976 (OJ L 39, 14.2.1976).
[28] Case 76/72 *Michel S.* [1973] ECR 457.
[29] See Case 9/74 [1974] ECR 773. This decision was confirmed by Case 68/74 *Alaimo* [1975] ECR 109.
[30] Council Directive 77/486/EEC of 25 July 1977 (OJ L 199, 6.8.1977).

persons from dismissal [31] and that it applies to regulations whereby absence due to military service must not involve unfavourable consequences for the worker in terms of his occupation. [32]

22. Under Article 51 EEC the Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. For example, Article 51 provides for a system involving on the one hand the aggregation for purposes of acquiring and retaining the right to social security benefits and for calculating these benefits of all periods taken into account by the various national legal systems and on the other the payment of benefits to persons resident within the territories of Member States. The Council discharged this responsibility in 1958 by enacting Regulation No 3 on social security for migrant workers, [33] which was replaced in 1971 by Regulation No 1408/71. [34] The right to social security benefits granted by this regulation to the Community worker does not extend to the entire Community in a legally uniform fashion; the regulation confines itself to prescribing that periods of insurance completed in other Member States must be taken into account for calculating entitlement to benefit from social security agencies of Member States. In order to facilitate applications for jobs in Member States, Community workers who are unemployed also receive unemployment benefit for a limited period on the basis of the national legal provisions which were last applicable to them. Regulation No 1408/71 provided for the establishment of an administrative commission, attached to the Commission, to deal with the social security problems of migrant workers. The Court of Justice [35] in its decisions has gone beyond the limits laid down by Regulation No 1408/71. Under Article 46(3) of this regulation, the aggregate benefits paid by several Member States may be limited to the highest theoretical amount to which the worker would have been entitled if he had completed all the periods of insurance conferring entitlement to benefit in one Member State only. The Court of Justice has taken the view that this provision (Article 46(3)) was not compatible with Article 51 EEC, because the aims of Articles 48 to 51 would be thwarted if workers making use of their right to free movement were to lose their entitlement to social security advantages credited to them in any event by the law of one Member State only. This interpretation might cause Article 51 EEC to put the migrant worker in a more favourable position than a worker who had acquired his entitlement to benefit in one Member State only. Whether this extreme interpretation of Community law is justified and not itself a form of discriminatory treatment has been the subject of extensive debate. [36] The decisions of the Court of Justice on the interpretation of Regulations No 3/58 and No 1408/71 revolve around

---

[31] See, for example, Case 44/72 *Marsman* [1972] ECR 1243, regarding para. 14 of the German Law on severely handicapped persons.

[32] See, for example, Case 15/69 *Ugliola* [1969] ECR 363.

[33] Council Regulation No 3 of 16 December 1958 (OJ 30, 16.12.1958; Council Regulation No 4 of 16 December 1958, fixing the modes of application and completing the provisions of Regulation No 3 (OJ 30, 16.12.1958, p. 597).

[34] Council Regulation (EEC) No 1408/71 of 14 June 1971, relating to the application of social security schemes to workers and their families within the Community (OJ L 149, 5.7.1971); see on this subject Council Implementing Regulation (EEC) No 574/74 of 21 March 1972 (OJ L 74, 27.3.1972).

[35] See Case 24/75 *Petroni* [1975] ECR 1149.

[36] See the criticism on this point in Zacher, *Methodische Probleme des Sozialrechtsvergleichs*, 1977, p. 162; Beutler, Bieber, Pipkorn, Streil, op. cit. at footnote 4 above, p. 216, rightly emphasize that certain Member States are currently taking account of pensions paid by another Member State to calculate the pension paid under their national laws, in order to avoid undesirable complications: cf. on this subject the question by Mr Pisoni (No 306/76, OJ C 251, 25.10.1976).

Articles 49 to 51, the conclusion being that special or novel forms of social security system such as those taking account of self-employed workers and of a minimum guaranteed income could be taken into account in the Member States. [37]

¶ 5. *The development of the right of freedom of movement for workers by decisions of the Court of Justice and national courts*

A. The scope of the right of freedom of movement

23. The decisions of the Court of Justice have been ceaselessly shaping and defining the legal limits of freedom of movement for workers since the beginning of the decade 1960-70; this is a logical development in the light of the proliferation of directly applicable rules of secondary Community law. Thus the provisions of the EEC Treaty regarding the free movement of persons and freedom to provide services themselves also became *directly applicable*, in accordance with the judgment in the *van Duyn* case, [38] from the end of the transitional period. The Court emphasized in the grounds of that judgment that Article 48 EEC prescribes the abolition of any discrimination based on nationality between the workers of Member States regarding employment, pay and other working conditions. These provisions impose precise and clear obligations upon Member States; the proper performance of these requires no other steps by Community institutions or Member States, and the latter have no room for manoeuvre in carrying them out. Under this case-law the principle of treatment on the same basis as national workers also applies to relations between individuals. [39]

24. Since freedom of movement for workers had been achieved before the end of the transitional period by virtue of the above-mentioned enactments by Community institutions, the direct applicability of Article 48 EEC is hardly significant any longer in legal terms except for non-typical restrictions. [40]

25. On other matters such as, for example, the *concept of employed worker* the case-law of the Court of Justice has evolved from the outset along a course parallel to that of decisions by national courts, which have sometimes been favourable to European law, sometimes not. On 19 March 1964 [41] the Court of Justice ruled that the interpretation of the concept of 'worker' fell within the scope of Community law and not national law, because if it were otherwise Articles 48 to 51 EEC would be deprived of all scope. It follows that the concept of worker covers all those who are covered as such by the various national social security systems. The result of the Treaty provisions is that this interpretation of the term 'worker' covers both those actually working at present and those remaining in a Member State after having held a job there (Article 48). The judgment of the Court of 30 June 1966 [42] is also along these lines in so far as it states that, in

---

[37] See Case 19/68 *de Cicco* [1968] ECR 473, Case 1/72 *Frilli* [1972] ECR 457.

[38] See Case 41/74 [1974] ECR 1337; Case 118/75 *Watson* v *Belmann* [1976] ECR 1185.

[39] See Case 13/76 *Dona* v *Mantero* [1976] ECR 1333 regarding restrictions connected with the rules of a sporting association.

[40] See Beutler, Bieber, Pipkorn, Streil, op. cit. at footnote 4 above, p. 256.

[41] See Case 75/63 *Unger* [1964] ECR 177; Case 23/71 *Janssen* [1971] ECR 859.

[42] Case 61/65 *Vaassen-Göbbels* [1966] ECR 261.

accordance with the spirit and objectives of the Treaty, the concept of 'worker' also includes 'employees' in their capacity as employed workers.

26. Later decisions by the Court of Justice [43] are therefore based essentially on the aims of Article 51 EEC. There were many decisions up to 1974, among which reference should also be made while on the subject of 'measures in the field of social security' to various decisions by national courts showing a favourable approach to integration. The Court of Justice has taken account of the spirit and objectives of Article 51 EEC in its interpretation of regulations adopted pursuant to that article, thus preventing the system of protection for migrant workers from being frustrated as a result of certain organizational peculiarities in national systems. In the *de Cicco* case [43] the period of contribution by an independent craftsman to an Italian insurance institution for craftsmen was regarded as a period of insurance within the meaning of Regulation No 3 on social security for migrant workers. The Court decided that Regulation No 3 was applicable to employed workers and to all those treated as such (Article 4 of Regulation No 3) and that on these grounds Article 4 is based on a general trend in the social security law of Member States to extend social security entitlements to new categories of persons subject to like risks and changes in circumstances.

Subsequently, the Court of Justice also gave a broad interpretation to the definition of the material scope of this regulation, as it had done in the specific case referred to above regarding its scope *ratione personae.* In *Rita Frilli* v *Belgian State* [44] the Court decided that the 'old-age benefits' referred to in Article 2(1)(c) of Regulation No 3 were also to be understood as including the minimum guaranteed income granted to Belgian citizens, although this is hybrid in form, half-way between social security and national assistance (which was not within the scope of the regulation).

27. It has already been pointed out that the rules of Community law on social security can improve the position of migrant workers; moreover, this has also been acknowledged by national courts. Thus the Baden-Württemberg Landessozialgericht (Higher Social Court) [45] decided that one of the fundamental principles of Community social security law obliged social security agencies to extend their benefits beyond national frontiers to ensure that the right of freedom of movement could be achieved in full, and also that it was not contrary to European law to treat a Community national more favourably than a national worker. [46] According to a judgment by the Cour supérieure de justice (High Court of Justice) of Luxembourg, [47] the relevant Community regulations apply to all workers entitled to social security benefits in a Member State even if they are not migrant workers. Accidents giving rise to entitlement to social security benefits fall within the scope of Community law even if they do not occur during the period of employment or

[43] Case 19/68, cited at footnote 37 above.

[44] Case 1/72, cited at footnote 37 above.

[45] Judgment of 30 August 1968, unreported.

[46] The judgment provides the following, *inter alia*: 'Article 8 of Regulation No 3, whereby persons resident in a Member State... are subject to the obligations and entitled to the benefits of the laws... of any Member State under the same conditions as the nationals of that State... is aimed primarily at preventing any discrimination likely to put migrant workers at a disadvantage relative to nationals of the State of residence; on the other hand, however, it does not exclude the possibility that the application of Community law might put migrant workers in a more advantageous position.'

[47] *Pasicrisie Luxembourgeoise*, 1968, No 7-8, p. 443.

are not related to work in any way. It is not without interest now to refer on this point to the decision of the Marylebone Metropolitan Magistrate dated 25 March 1975 [48] whereby the concept of 'worker' was not applied to casual workers because the latter do not intend to pursue regular employment.

28. The development of the case-law relating to the proviso 'on grounds of public policy, public security or public health' referred to in Article 48(3) EEC is of particular importance. Since Member States are entitled on these grounds to impose limits on freedom of movement, it is most important to analyse the interpretation given to the essential content of the concept of public policy in European law. Whereas at first the national courts, particularly the courts of the Federal Republic of Germany (where there had been large-scale worker immigration), interpreted the concepts of public security and public policy in Article 48(3) EEC on the basis of national law criteria, [49] the Court ruled in its judgment of 4 December 1974 [50] that public security and public policy were concepts of *European law* subject to judicial supervision and were to be interpreted strictly. The statement by the Court of Justice was as follows: 'It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community.' Nevertheless, Member States have a measure of discretion in determining what appears to them to be a threat to public policy or public security and in providing appropriate means for maintaining these. Thus in *van Duyn* the Court decided that a restrictive interpretation of the area defined by Article 48(3) was desirable; at the same time the Court confirmed that Article 48 was directly applicable in its essentials in Member States. This judgment should be regarded as the first of a great body of cases in which the Court has considered the scope of Article 48 EEC; to date these cases have still not finally clarified the concept of public policy in European law. The development of the case-law on this particular point (the concept of 'public policy' within the meaning of Article 48(3) EEC) provides evidence of a constant concern for the precise definition of the requirements of Community law. This trend is more or less marked according to whether the factors involved are undesirable activities, political or otherwise, breaches of the criminal law, or merely breaches of regulations for the protection of public order such as laws on the registration of aliens. In *van Duyn* the Court had to give a ruling on the case of a Dutch national who wished to join a religious sect which was viewed with disfavour by the British authorities (who regarded it as socially dangerous) but not prohibited by law (the Church of Scientology) and who had for that reason been prohibited from entering the United Kingdom. The British authorities had no legal basis upon which they could prohibit the sect concerned but wished to prevent its numbers from being swelled by aliens. The Court took the view that this reliance on public policy was justified and stated that 'where the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization and where

[48] [1975] CMLR 383.

[49] Verwaltungsgerichtshof Baden-Württemberg of 9 September 1964, [1965] DVBl, p. 405 et seq.; Oberverwaltungsgericht Berlin of 15 May 1968 (No D/138), unreported; Landsgericht Wiesbaden of 14 November 1966, [1967] DVBl, p. 495 et seq.

[50] Case 41/74 *van Duyn*, cited at footnote 38 above.

... they have taken administrative measures to counteract these activities, the Member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances'. [51] This decision might give rise to the idea that in these circumstances Member States are free from constraints in terms of Community law and free to define the types of political or social activity which they regard as dangers to public policy in their territory. A year later, however, in the *Rutili* judgment, [52] the Court confirmed that the obligations arising from Community law must be complied with even in this area. The *Rutili* case dealt with restrictions on freedom of movement imposed by the French authorities upon an Italian born in France because of his participation in political activity organized by a trade-union movement during the parliamentary elections of 1967 and the events of May-June 1968. The French Government had issued a decree of prohibition of residence, limited to four departments. Although the Court again acknowledged in this judgment that in general Member States have the right to decide freely, on the basis of national necessity, which measures are essential to protect public policy, it nevertheless pointed out that the right of free movement of a Community national could be curtailed only if his ... conduct constitutes a genuine and sufficiently serious threat to public policy'. [53] The view of the Court was that restraints could not be imposed upon freedom of movement for reasons linked with the exercise of trade-union rights; the Court of Justice took the view that this arose by implication from Article 8 of Regulation No 1612/68, which guarantees equal treatment as regards membership of trade-union organizations and the exercise of trade-union rights. Hailbronner has rightly pointed out that the meaning of this wording was not obvious, [54] given that the guarantee under Community law relating to the exercise of trade-union rights enables aliens to exercise the right to participate in collective bargaining under the same conditions as nationals and to take part in collective action, but cannot be relied upon as grounds for the exercise of political activity in the general sense. On the other hand, the host country may not oppose the normal exercise of legitimate economic and social rights guaranteed by Community rules on the pretext of preserving its political neutrality. This is after all implicit in Directive 64/221/EEC of 25 February 1964, by which the Council decreed, first, that reasons of public policy or public security could not be invoked for economic purposes, secondly, that measures relating to public policy or public security must be based exclusively upon the personal behaviour of the individual concerned, and, thirdly, that the mere existence of criminal convictions does not automatically justify such measures. [55]

29. The importance of the *Rutili* judgment also lies in the fact that the Court quite simply declared measures of territorial scope restricting the right of residence to be unlawful, since the freedom of movement sanctioned by Community law is defined in

---

[51] See case cited at footnote 50 above, p. 1350; cf. also Hailbronner, op. cit. at footnote 3 above, p. 862 et seq.

[52] Case 36/75 [1975] ECR 1219.

[53] Case 36/75 [1975] ECR 1219, at p. 1231.

[54] Op. cit. at footnote 3 above, p. 863.

[55] Council Directive 64/221/EEC of 25 February 1964 (OJ 56, 4.4.1964). According to the Court in Case 41/74 *van Duyn*, cited at footnote 50 above, this directive is directly applicable to Community workers. Section 12 of the German Law on entry and residence of nationals of EEC Member States (1969 BGBl I, p. 928; 1974 I, p. 948) has been adopted by the Court almost word for word. According to para. 12 of this German Law expulsion, refusal of admission or any other adverse measure taken on the grounds of public security or public policy is lawful only if the presence of the Community national imperils major interests of the Federal Republic of Germany.

relation to the whole territory of the Member States, not certain parts thereof.[56] This approach is not entirely satisfactory in relation to the principle of proportionality. A less severe measure against threats to public security or public policy would be a prohibition on entry having limited territorial scope, a measure which nowadays is tending to be replaced by the more severe measure of expulsion. The Court has imposed what are clearly stricter requirements with regard to restrictions on freedom of movement based upon breaches of provisions governing entry and residence formalities. In the *Royer*,[57] *Watson and Belmann*[58] and *Sagulo*[59] cases the Court had to rule on the legality of penalties imposed by certain Member States for breaches of rules relating to the supervision of aliens (entry and residence). In the case of *Royer* (a Frenchman who had been expelled from Belgium for failing to comply with administrative formalities for supervision of aliens and thereby obtain a residence permit) the Court found that the mere fact that the provisions relating to supervision of aliens (formalities relating to entry, change of place of residence and the right of residence) had not been complied with could not be treated as behaviour constituting a threat to public policy and public security and that consequently expulsion or any other deprivation of freedom was not justified. This approach is based upon the correct assumption that the right of residence of Community nationals is conferred directly by the Treaty and that consequently its recognition by national law has a merely declaratory effect. However, compliance with the above-mentioned formalities can be ensured, if not by expulsion, at least by other appropriate sanctions. In the *Watson and Belmann* case (criminal penalties imposed by the Italian authorities for breaches of entry formalities) the Court confirmed the right of Member States to impose penalties for failure to comply with administrative formalities relating to supervision of aliens; however, it pointed out that the only lawful penalties were those laid down for similar breaches by nationals. Therefore penalties which would be out of all proportion to the gravity of the case and consequently likely to amount to a restriction on freedom of movement are to be excluded. The only point at issue in the *Sagulo* case was to what extent the Community rule prohibiting discrimination did not make the application of criminal provisions to Community nationals (e.g. those without a residence permit or passport) completely unlawful. The Court held that the undifferentiated application of formalities relating to residence permits to Community nationals on the same footing as to other aliens was contrary to Community law. In the case of Community nationals, breaches of provisions relating to authorization to reside (declaratory in character) in fact attract only a reasonable, that is non-discriminatory, penalty. On the other hand, where a passport or other identity document is invalid the penalties may be more severe than those which might be imposed upon nationals for similar breaches of provisions relating to identity documents.[60] It is vital to emphasize here that the principle that any discrimination is prohibited is becoming more and more important as a factor in consolidating the right of freedom of movement. In the *Sagulo* case the Court did indeed clearly state that the prohibition on discrimination could not be invoked against the fact that Community nationals are subject to criminal provisions different from those applicable to the nationals of Member States. However, the question which constantly recurs with regard to the rules applicable in Member States (e.g. relating to national driving

[56] Op. cit. at footnote 36 above, p. 1231.
[57] Case 48/75 [1976] ECR 497, especially at p. 518.
[58] Case 118/75, cited at footnote 38 above, p. 1185, especially at p. 1200.
[59] Case 8/77 [1977] ECR 1495.
[60] See the criticism on this point by Weber in [1978] EuGRZ, p. 157 et seq.

licences) is whether a discrimination affecting freedom of movement is involved; this can be justified only by the essential requirements of public security and public policy. The Court of Justice took the view in the *Choquet* judgment [61] that the requirement imposed by a Member State upon citizens of other Member States to obtain a national driving licence in order to drive motor vehicles was compatible with Community law. However, the Court added that even if there were no special provisions in Community law relating to the issue and mutual recognition of driving licences the national provisions on the point were likely to prejudice, directly as well as indirectly, the exercise of the right of freedom of movement, the right of freedom of establishment, or freedom to provide services as a whole. It follows that these national provisions must not be so prejudicial as actually to imperil the exercise of these rights. The position is the same with regard to all restrictions which cannot reasonably be reconciled with the needs of road safety. These cases also confirm the principle already referred to that a mere breach of formal requirements relating to the supervision of aliens, in particular those dealing with entry and identity documents, does not affect the freedom of residence sanctioned by Community law and is therefore not sufficient grounds for expulsion.

30. Restrictions on freedom of movement for breaches of the criminal law form another typical phase in the development of case-law by the Court of Justice, in which a balance has to be maintained between the requirements of Community law relating to free movement on the one hand and national interests involved in maintaining public security and public policy on the other. In the *Bonsignore* case [62] the Court, referring to Article 3(1) and (2) of Directive 64/221/EEC, declared that expulsion based on considerations of general prevention (deterrence) was unlawful, since measures for the maintenance of public policy and public safety must be based exclusively on the behaviour of the individual concerned. The Court defined its point of view on this subject more precisely in the *Bouchereau* case [63] (repeated breaches): in addition to the perturbation to the social order which any infringement of the law involves, the personal behaviour in question must give evidence of 'a genuine and sufficiently serious threat affecting one of the fundamental interests of society'. The Court will be in a position to exercise considerable pressure towards uniformity on national legal rules relating to aliens by its interpretation of the concept of a fundamental interest of society 'in the light of the requirements of Community law'. Nevertheless in some special cases [64] the authorities and the national judges of Member States will be inclined, as they have been in the past, to put the national interest in matters of public policy ('reasons of State') before the freedom of movement sanctioned by Community law. In so far as national courts fail to refer questions for preliminary rulings in these special circumstances as laid down in Article 177 EEC it is for the

[61] See Case 16/78 [1978] ECR 2293.

[62] Case 67/74 [1975] ECR 297; following this decision the Administrative Court of the Federal Republic of Germany accepted that the differing view which it had previously expressed on this point had been 'superseded': see [1975] DVBl, p. 790.

[63] Case 30/77 [1977] ECR 1999 (involving a Frenchman who had been expelled from the United Kingdom for repeated offences under the narcotics legislation).

[64] On the *Cohn-Bendit* case see the Council of State decision of 22 December 1978, [1979] AJDA, p. 41, and [1979] EuGRZ, p. 251, by which the Council overruled a decision by the Paris Administrative Court and refused to seek a preliminary ruling pursuant to Article 177 of the EEC Treaty, pointing out that 'since the administrative measures taken by the French Government in accordance with directives issued by the Council of the European Communities are perfectly legal (the matter involved was the expulsion order), the decision on the application by Mr Cohn-Bendit can in no way be dependent upon an interpretation of the Directive of 25 February 1964'.

Commission to secure freedom of movement for workers as laid down in Article 48 EEC by setting in motion the procedure provided by Article 169 EEC.

B. The material scope of freedom of movement

31. Given the existence of restrictions on residence imposed by criminal law both upon nationals and upon Community citizens, the question whether Article 48 EEC was also applicable to restrictions on freedom of movement which were strictly national or whether its application was entirely limited to movements of workers from one Member State in the Community to another has been relatively late in arising. This problem can be tackled and resolved only by reference to the purport and objectives of the rules on freedom of movement. In the *Saunders* case [65] the Court formulated the approach that 'purely national' restrictions on residence were not within the scope of Article 48 EEC. It is not the intention of this article to restrict the right of Member States to impose upon any person within their jurisdiction restrictions on freedom of movement applicable on their own territory and pursuant to their national criminal law. Following this approach, the existence of a general standard in matters of freedom of movement which also governs purely national conditions in Member States in this field cannot be deduced from Article 48 EEC. It could be argued against this case that Articles 7 and 48 et seq. EEC confine themselves to prohibiting discrimination based on nationality without reference to any intra-Community concept (such as the fact of passage from one Member State to another). However, this concept of 'intra-Community' mobility is implicit in Article 48, and to deny it would be tantamount to regarding workers' military service as discriminatory and therefore prohibited. Such service is based exclusively upon nationality and so could be justified only by way of the exempting provision relating to public policy and public security (Article 48(3) EEC). The answer to the above question is quite different when a State takes measures restricting the right of residence not against its own nationals, but against nationals of other Member States. In this case the mere fact of residence in the territory of another Member State in order to pursue paid employment there necessarily implies a reference to the concept of 'intra-Community mobility'. In such a situation purely 'national' measures are no longer involved and it is consequently necessary to check the legality of such a measure in relation to Community law in the light of Article 48 (3) EEC (public policy).

32. There are some problems for which the cases provide no answer: these are the problems which arise when an attempt is made to fix the point at which an alien wishes (and is able) to take up employment; the entire question of the conditions pertaining to the exercise of the right of freedom of movement is at issue here. Is it possible to deny the status of worker to candidates for immigration when it is definitely established that there are no jobs available on the labour market? In such a case can such candidates be compelled to give up their intention to pursue employment? The Court has not yet expressed a view on these questions. Another point which has long remained open is the interpretation to be given to the concept of employment in the public service as set out in Article 48(4) EEC; the Community rules sanctioning the right of freedom of movement do not apply to jobs covered by the above provision. It must be acknowledged that a

[65] See Case 175/78 [1979] ECR 1129; cf. the concurring opinion by T. Stein in [1979] EuGRZ, p. 448.

Community legal standard, the interpretation of which would not be left to the discretion of Member States, is also essential for interpretation of the concept of public service. The Court of Justice acknowledged this in its judgment of 17 December 1980 (*Commission* v *Belgium*). [66] It ruled that Article 48(4) did not extend to any and every job offered by the official authorities, but only to those 'which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities'.

33. In conclusion, the decisions of the Court of Justice may be regarded as an essential contribution to achieving the right of freedom of movement, by virtue of the direct application of Article 48 EEC and the regulations referred to above, the restrictive interpretation of provisions relating to public policy, and the adjustment of national laws relating to aliens which has followed from it. It is to be hoped that the initiatives now being taken to improve employment services and to find a solution to the problem of mutual recognition of diplomas, certificates and other evidence of formal qualifications will be successful.

34. The proposal for a Council directive dated 4 November 1976 [67] aimed at combating illegal immigration of workers from third countries into the Community is an indication of the fact that the difficulties which stand out along the road to integration of the labour market in the Community are not solely internal.

¶ 6. *Are we on the way towards creating European citizenship?*

35. It is true that freedom of movement for workers, which should help to increase the speed of rise in living standards and 'improved working conditions and an improved standard of living for workers' (Article 117 EEC), involves various matters connected with the incorporation of workers into the social structure in the Member State where they reside but implies no right for them to exercise political activities as active citizens. The particular importance attached to the efforts made to give all nationals of the Community a special status in the context of a 'European citizenship' [68] is understandable in that a substantial number of Community workers live and work for many years, with the members of their families, in a Member State other than their country of origin pursuant to the right of freedom of movement and enjoy the same social advantages in that State (a nationality which in some cases they do not wish to acquire or can acquire only after fairly long residence). The EEC Treaty works on the assumption that Member States may apply distinctions based upon nationality as regards political rights: Article 7 in fact prohibits discrimination based on nationality only within the scope of the EEC Treaty, which makes no provision for the establishment of Community nationality, the creation of a *civis europaeus*. The creation of this status of European citizen depends upon progress made towards a political union of Member States. The starting points from which

[66] See Case 149/79 [1980] ECR 3881.

[67] OJ C 277, 23.11.1976; proposal amended on 5 April 1978 (OJ C 97, 22.4.1978).

[68] See Streil, in Beutler et al, op. cit. at footnote 4 above, p. 251; Grabitz, *Europäisches Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft*, Köln, 1970, p. 9.

progress will be made along these lines are the social objectives of the Treaty, Europe's common heritage of fundamental rights [69] which has already found expression in the European Convention on Human Rights and Fundamental Freedoms [70] and the implementation of the European right to vote (election of the European Parliament by direct universal suffrage). [71] Belgium and Italy had already proposed at the meeting of Community Heads of State or Government in 1972 that all Community nationals should be entitled to rights of voting and election at commune level. [72] The creation of a passport union with the aim of harmonization in stages of laws relating to aliens and the abolition of passport checks within the Community [73] was announced at the Paris Summit in December 1974. To date this passport union has still not been achieved. However, the efforts with a view to progressive harmonization of national provisions relating to aliens have led to the drafting of a proposal for a directive by the Commission [74] relating to a general right of residence anywhere in Community territory for nationals of Member States whether they are workers or not, and it is to be hoped that this will soon be adopted by the Council. Progress has also been made in the formulation of 'special rights' for citizens of the European Communities. Shortly after the Commission submitted its report of 3 July 1975 [75] on 'citizens' Europe', the European Parliament adopted a resolution dated 16 November 1977 [76] inviting the Commission to draft proposals regarding conferment of civil and political rights, notably the right of individual resort to the Court of Justice, the right of petition, rights of vote and of election, the right of citizens who have resided in a Member State for over 10 years to take up public duties at local level, the right of meeting and association, the right to vote in trade-union organizations, the right of residence, the right to use the national language and free access to education. Regarding the legal basis for the conferment of 'special rights', the European Parliament referred to the general provision of Article 235 EEC and to the procedure for amendment of the Treaty in Article 236. Another resolution, dated 13 April 1978, [77] adopted by the European Parliament, and the round-table conference it held at Florence from 26 to 28 October 1978 on 'special rights' and a draft 'European charter of citizens'

---

[69] Regarding fundamental rights in the European Community see the Report of the Commission on protection of fundamental rights in the EC, Supplement 5/76-Bull. EC; Mosler, Bernhardt Hilf, *Grundrechtsschutz in Europa*, Berlin, 1977, bibliography; K.M. Meesen, *Grundrechte für Europa*, [1978] Eur-Arch, p. 641; on decisions of the Court of Justice see A. Bleckmann, *Zur Entwicklung europäischer Grundrechte*, [1978] DVBl, p. 457 et seq.; see also the Common Declaration by the European Parliament, the Council and the Commission regarding fundamental rights of 5 April 1977, (OJ C 103, 27.4.1977), and Hilf on this subject in [1977] EuGRZ, p. 158 et seq.

[70] On the links between the European Community and the European Convention on Human Rights see C. Sasse in Mosler, Bernhardt, Hilf, op. cit. at footnote 69 above, p. 51 et seq.; H. Golsong, *Grundrechtsschutz im Rahmen der EG*, in [1978] EuGRZ, p. 346 et seq.; Nickel, Bieber, *Europäische Grund- und Bürgerrechte*, in [1979] EuGRZ, p. 21 et seq.; Commission Memorandum on accession of the EC to the European Convention on Human Rights, Supplement 2/79 — Bull. EC.

[71] Regarding elections by direct universal suffrage, the Decision and 'Act' of the Council dated 20 September 1976 (OJ L 278, 8.10.1976) and their effect upon the position of working citizens, see the contributions by H. Hilf, p. 30 et seq. and A. Bleckmann, p. 68, in *Souveränitätsverständnis in den Europäischen Gemeinschaften*, op. cit. at footnote 2 above; C. Zorgbibe, *Rechtliche Probleme der Einigung Europas*, 1979, pp. 107 et seq. and 118 et seq; see also footnote 21 above.

[72] See on this subject R. Bieber, *Besondere Rechte für die Bürger der Europäischen Gemeinschaften*, [1978] EuGRZ, p. 204.

[73] *Eighth General Report EC*, Final Declaration, point 10.

[74] Bull. EC 7-8/1979, point 2.1.14.

[75] Supplement 7/75 — Bull. EC.

[76] EP Doc. No 346/77; see on this subject the EP debates, OJ Annex No 223, p. 126 et seq.; cf. also [1978] EuGRZ, p. 202 et seq.

[77] EP Doc. No 52/78 (OJ C 108, 8.5.1978).

rights' also follow these lines. [78] The slow process[78a] which is to lead to the creation of a common European heritage of fundamental rights for all Community nationals without regard to their places of residence and including the drafting of a list of rights and freedoms attaching to active political participation in public life is only just beginning. [79] In so far as it relates to loyalty between citizens and Member States the process raises fundamental problems affecting the legal position of Member States within the Community and up to the present it has not gone beyond the stage of a detailed schedule. [80] It also raises thorny problems in constitutional law for the various Member States, which is why the Council has to date been unable to reach a decision on the adoption of a 'charter of special rights for Community citizens'.

Section III — Freedom to provide services and the right of establishment of self-employed workers

¶ 1. *The concepts of 'freedom to provide services' and 'freedom of establishment'*

36. The purpose of freedom of establishment (Article 52 EEC et seq.) and freedom to provide services (Article 59 EEC et seq.) is to advance economic and social development within the Community in the field of self-employed occupations. Those wishing to provide services or to establish themselves in any Member State must have the opportunity to do so, subject to the same conditions as nationals of that Member State. Here also, as in the case of freedom of movement for workers, the basic principle is equality of treatment with State nationals, which is, of course, supplemented by the progressive coordination of rules governing access to and pursuit of self-employed activities and the mutual recognition of certificates and diplomas. Freedom of establishment involves access to and pursuit of self-employed activities and the establishment and operation of undertakings, in particular companies or firms within the meaning of Article 58 EEC, under the conditions laid down by the law of the country of establishment for its own nationals, subject to the provisions of the chapter relating to capital; it also extends to what is called secondary freedom of establishment, that is, the creation of agencies, branches or subsidiaries (Article 52, first paragraph, second sentence). Since freedom of establishment also holds good for companies and firms (Article 58 EEC), the Treaty indicates in outline (taking account of the fact that companies or firms do not have nationality in the true sense) the specific elements making up the preconditions for regarding them as Community nationals. These are that the company or

---

[78] See on this subject Nickel, Bieber, *Europäische Grund- und Bürgerrechte*, in [1979] EuGRZ, p. 21 et seq.

[78a] See the debate in the European Parliament of 16 January 1979 on the present state of the procedure (OJ C 39, 12.2.1979, p. 20); EuGRZ, p. 183 et seq.

[79] See *Thirteenth General Report EC*, point 592.

[80] See on this subject *Thirteenth General Report EC*, point 592; in this context will be found an analysis of a particular aspect of this matter on the legal position of children of foreign workers in Europe: see footnote 28 above on this subject, also J.A. Frowein in [1980] EuGRZ, p. 147 et seq. The problems raised in the Federal Republic of Germany by the integration of foreign workers, especially of Turks, entailed two Federal Government decisions (of 2nd December, 1981, and of 3rd February, 1982; see Bulletin of the Press and Information Office 1982, p. 88) which were aimed at modifying the entire realization of the free movement of workers between the Member States of the Community and Turkey—which, according to Art. 36 of the Protocol of 23rd November, 1970 (PE Doc. 189 of 25 January, 1971) in addition to the Association Agreement of 23rd December, 1963, between the EEC and Turkey (JO 3685/64, 29th December, 1964) should take effect on 1st December, 1986.

firm must be formed in accordance with the laws of a Member State and must have a registered office, central administration or principal place of business within the Community. However, only companies or firms which maintain close relations with the economy of a Member State, in addition to having a place of business there in the proper form, can be regarded as established in the Community.

37. On the other hand, freedom to provide services is concerned with the provision of services for payment, which is not governed by provisions relating to the free movement of goods, capital and persons; in the circumstances, therefore, the particular activities involved are industry, commerce, the craft trades and the professions (second paragraph of Article 60). The person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals (third paragraph of Article 60). Freedom to provide services may therefore be linked with temporary changes of premises but need not necessarily involve this element, as is the case with the activities of consultants or banking services. The distinction between freedom of establishment and freedom to provide services obviously raises considerable problems, particularly when the specific activity of the enterprise includes precisely provision of services beyond national frontiers. In such a case the duration, extent and basic scope of the activity as well as the nature of the installation will be determining factors in establishing the distinction. [81] It is also obvious that freedom of establishment and the free movement of services involve substantial difficulties when (and in so far as) national legal provisions both in the State of origin and in the host State or State of establishment must be complied with (second paragraph of Article 52, third paragraph of Article 60). In this area mere equality of treatment with nationals of the State will not overcome obstacles due to legal and material requirements relating to occupational training and the pursuit of the occupation; the only effective measure for this purpose will be progressive harmonization of the preconditions for pursuing the occupation.

38. In order to guarantee at least equality of treatment with nationals, Articles 52 and 59 EEC provide that restrictions on freedom of establishment and the freedom to provide services shall be progressively abolished during the transitional period with respect to nationals of Member States. The position is the same for companies or firms formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community. Articles 53 and 62 EEC prohibit the introduction of new restrictions on freedom of establishment or on the freedom to provide services. Equality of treatment with nationals, that is, the elimination of restrictions on these two freedoms, was to be implemented progressively. The first paragraph of Article 54(1) and the first paragraph of Article 63(1) EEC required that general programmes which were to be applied by way of Council directives should be issued before the end of the first stage. A detailed list of some of the restrictions to be abolished, such as those which strike particularly at the development of production and trade and those relating to the acquisition and use of land and buildings is to be found in Article 54(3) EEC. In order to facilitate access to and pursuit of self-employed activities, Article 57(1) imposed an obligation on the Council to issue directives during the transitional period 'aimed at the mutual recognition of diplomas, certificates and other evidence of formal qualifications'. Even before this period expired the Council was to issue directives pursuant to Article 57(2) aimed at coordinating the legislative and administra-

[81] Streil, in Beutler *et al.*, op. cit. at footnote 4 above, p. 264.

tive provisions and regulations in Member States regarding access to and pursuit of self-employed activities. These coordination measures and regulations, which go beyond formal equality of treatment with nationals and deal with the mutual recognition of documents which certify the competence of the persons concerned, certainly raise considerable problems, but represent real progress towards a European mobility accessible also to self-employed persons. The social and political impact of regulations in this area is clearly shown by the fact that at the end of the first stage in the transitional period only a qualified majority of the Council is necessary (Articles 57(1) and (2) and 63(2)) but that unanimity is required for matters 'which are the subject of legislation in at least one Member State and concerned with the protection of savings, in particular the granting of credit and the exercise of the banking profession, and with the conditions governing the exercise of the medical and allied, and pharmaceutical professions in the various Member States (Article 57(2) EEC, second sentence).

39. Safeguard clauses taking account of special needs based on 'reasons of State' like those encountered in the regulations on free movement of workers in Article 48(3) EEC also appear in the provisions of Article 56 relating to freedom of establishment. These are also applicable pursuant to Article 66 EEC to the freedom to provide services. These involve the same possibility of restrictions 'justified on grounds of public policy, public security and public health'. In the same way Article 55 EEC provides that activities connected permanently or occasionally with the exercise of official authority are excluded from this freedom, by analogy with the provisions of Article 48(4) EEC.

¶ 2. *Development of freedom of establishment and freedom to provide services through Community legislative acts*

40. First of all the Council approved (on 18 December 1961) general programmes [82] with a view to achieving freedom of establishment and freedom to provide services during the transitional period as laid down by Articles 54 and 63 EEC. These listed only a few discriminatory provisions and practices, obviously by way of example, and moreover were limited to tracing the broad outlines of the rest of the procedure to be followed in this area. Thus liberalization was achieved first by separate measures such as, for example, the Council Directive of 2 April 1963 relating to the agricultural sector [83] and the Directive of 31 May 1963 [84] on payments relating to the free provision of services.

Many directives were issued in 1964; [85] these were designed on the one hand to regulate the general preconditions relating to all branches of self-employed persons' occupations

---

[82] General programmes for the abolition of restrictions on freedom of establishment and freedom to provide services dated 18 December 1961 (OJ 2, 15.1.1962, pp. 32 and 36).

[83] Council Directive 63/26/EEC of 2 April 1963 (OJ 63, 20.4.1963) laying down the procedure for achieving freedom of establishment in agriculture in a Member State for nationals of other Community countries who have worked as agricultural employees in that Member State for two years continuously.

[84] Council Directive 63/340/EEC of 31 May 1963 (OJ 86, 10.6.1963) regarding abolition of restrictions on payments relating to the provision of services when the exchange of services is limited only by these restrictions on payments.

[85] See OJ 56, 4.4.1964, pp. 845-880, particularly the provisions dealing with:

(i) elimination of restrictions on movement and residence of nationals of Member States within the Community in connection with establishment and the provision of services;

(ii) achievement of freedom of establishment and freedom to provide services in wholesale trading;

(iii) achievement of freedom of establishment and freedom to provide services as agents in trade, industry and crafts.

and on the other to achieve liberalization in particular occupations in commerce, the craft trades, industry and agriculture. The purpose of Directive 64/220/EEC [86] already referred to was to eliminate barriers existing at national level relating to preconditions for entry and residence (which also affected freedom of establishment and freedom to provide services). [87] While major advances had been made at the end of the transitional period in abolishing restrictions on freedom of establishment and the free provision of services in commerce, the craft trades, industry and agriculture, [88] the same cannot be claimed for the professions properly so called and activities in the fields of credit and insurance. One success can certainly be claimed: by Directive 64/427/EEC of 7 July 1964 [89] the Council, after considering the major differences in regulations governing access to the craft trades in the various Member States, had ruled that it was sufficient in each particular branch of the craft trades to have pursued the craft without interruption for a specific number of years in order to be authorized to pursue it in any Member State. These regulations must be seen as a step forward having regard to the previous situation, in which the requirements differed among the various Member States, some regarding a test of skill or the independent pursuit of a trade as essential for formal admission thereto [90] whereas others imposed no such requirements. The Member States did not consider it possible to maintain strict conditions for admission to and pursuit of a trade for their own nationals while waiving these conditions for nationals of other Member States: the solution arrived at, a 'partial coordination', was therefore a substantial compromise which was naturally deeply resented by many national representatives of the occupations in question.

41. The development of regulations relating to recognition of evidence of professional competence and coordination of legislative and administrative provisions and regulations [91] was much slower. In 1967 the Commission had submitted proposals relating to three Council directives on achieving freedom of establishment and freedom to provide services, the mutual recognition of diplomas and other evidence of professional competence and the coordination of legislative and administrative provisions and regulations relating to self-employed architects. In the same way, proposals for directives relating to engineers, lawyers, doctors, nurses, midwives and dentists made their appearance in 1969, as did a proposal relating to veterinary surgeons in 1970. These involved not only the formulation of minimum conditions relating to training and of provisions relating to mutual recognition of diplomas and, in the case of medical specialists, of evidence of professional competence, but also the probationary period, required in Germany alone, before a doctor may take persons covered by social security insurance as his patients.

---

[86] Council Directive of 25 February 1964 for the abolition of restrictions on movement and residence of nationals of Member States within the Community in connection with establishment and the provision of services (OJ 845, 4.4.1964).

[87] Reference can be made to views on Articles 48 to 51 EEC and, for the sake of completeness, to the list of diseases which may give rise to restrictions on movement.

[88] See Streil, in Beutler *et al.*, op. cit. at footnote 4 above, p. 266; as at 31 January 1970 a total of 25 directives relating to the abolition of specific restrictions had been issued; cf. Maestripieri, *Liberté d'établissement et libre prestation des services dans la CEE au lendemain de la période de transition*, in [1971] RMC p. 48 et seq.; see also A. Tizzano, *Circolazione dei servizi nei paesi della CEE*, in *Novissimo Digesto Italiano*, 1979, regarding development in this area.

[89] Council Directive 64/427/EEC of 7 July 1964 (OJ 117, 23.7.1964).

[90] On the definition and importance of German craft workers as 'pillars of the law and the State' see BVerfGE 13, 97, p. 107 et seq.

[91] See M. Colomes, *Le droit d'établissement et des investissements dans la CEE*, Paris, 1971, pp. 131 et seq. and 163 et seq. on the developments which have been sketched out in this area.

Special adaptation proposals were required for Italy because in that country prior training as a doctor was required for training as a dentist. At the end of the transitional period the EEC was still far from the Treaty objective of elimination of restrictions; in particular there had been little movement towards regulations for the recognition of evidence of professional competence. The Commission had to give up listing the legal provisions which were still outstanding in its General Reports, given the size of the areas still not covered by Community rules. Thus in April 1969 the Commission had indeed submitted seven proposals for directives relating to activities of self-employed persons in producing and dealing in pharmaceutical products [92] with a view to their coordination, but the general directives issued up to now on this subject by the Council with a view to the approximation of legislative and administrative provisions and regulations relating to proprietary medicinal products have been incorporated into the national laws of a few Member States only. [93] Seven Council directives [94] in the areas of retail trade, foodstuffs, the manufacture of beverages, retail sales of beverages and the hotel trade made their appearance for the first time in October 1968; these also embodied transitional regulations on the mutual recognition of evidence of professional competence. [95] It was necessary to adopt directives to eliminate technical barriers to trade in the motor vehicle, textile and measuring instrument industries. [96] The seven directives relating to measuring instruments were particularly important in establishing free movement of goods because the barriers to free movement of goods arising from technical requirements were becoming more and more serious in many areas of industry after the dismantling of customs duties. Reference should also be made to the four directives issued by the Council in 1971 relating to wholesale trade in coal, film production, agricultural services and horticultural services.

In 1971 the Council finally issued the two fundamental directives, [97] based on proposals submitted by the Commission as early as 1964, in the highly controversial area of liberalization of public works contracts. The final objective here was to be access by all undertakings in Member States to orders for public works on a basis of equality. Liberalization in these areas had encountered very great difficulties because the interdependence of undertakings in the public sector and the private sector is particularly important in orders for public works. Under the directives issued, orders for public works amounting to over 1 million units of account must be published in the *Official Journal*. Undertakings from all Member States must be considered when contracts are awarded, and the awards must be based upon objective criteria. The Council decision dated 26 July 1971

---

[92] OJ C 54, 28.4.1969.

[93] Council Directive 65/65/EEC of 26 January 1965 (OJ 22, 9.2.1965).

[94] Council Directives 68/363/EEC (retail trade); 68/364 (transitional provisions for independent workers in the retail trade); 68/365 (food and beverage manufacturing industries); 68/366 (transitional provisions relating to Directive 68/365); 68/367 (personal services); 68/368 (transitional provisions); 68/369 (film distribution); directives published in OJ L 258, 21.10.1968.

[95] Up to the end of the transitional period there were only six provisional regulations relating to the recognition of diplomas and evidence of qualifications; in accordance with Council Directive 64/222/EEC of 25 February 1964 (OJ 857, 4.4.1964), relating to transitional provisions in the wholesale trade, these provided that evidence of actual and regular pursuit of the activity concerned in the country of origin was accepted pending recognition of evidence of qualification effective in a foreign country.

[96] Council Directives 71/320/EEC of 26 July 1971 (OJ L 202, 6.9.1971); 71/316/EEC to 319 (OJ L 202, 6.9.1971); 71/347/EEC to 349 (OJ L 239, 25.10.1971).

[97] Council Directives 71/304/EEC of 26 July 1971 (OJ L 185, 16.8.1971); 71/305/EEC of 26 July 1971 (OJ L 185, 16.8.1971).

also made provision for a consultative commission for public works orders. At the end of 1976, after much hesitation, a Council directive was finally issued requiring all those placing public works contracts to give notice of calls for tenders for orders for public supplies amounting to over 200 000 units of account. However, the links between national undertakings and responsible State services are clearly still so close that there is no question of a true liberalization in the field of construction, even after publication of this directive. [98]

We should not fail to observe that in 1976 Italy had still not complied with the obligations imposed upon it by Directive 71/305 to put an end to national restrictions and that as a result the Court of Justice had delivered a judgment [99] against Italy following proceedings for infringement of Treaty provisions. Subsequent developments make it essential to refer here to the judgments given by the Court of Justice in 1974 in the *Reyners* [100] and *van Binsbergen* [101] cases, which mark an epoch in the case-law. Faced by delays in liberalization by way of Council legislative acts, the Court took a radical line, going far beyond the interpretation of Articles 52 and 59 EEC in so far as they provide for equal treatment with nationals and for this principle to be directly applicable at the end of the transitional period. According to these cases the prohibition on discrimination in establishment and the movement of services applies even where directives relating to the procedure for access to and pursuit of self-employed activities in another Member State have not yet been issued. Previously the question of immediate applicability had always given rise to controversy because Articles 52 and 59 EEC provide for progressive abolition of restrictions 'within the framework of the provisions set out below'. These provisions refer to the coordination measures laid down in Articles 54, 56 and 66; this reference leads to the assumption that the validity of the prohibition on discrimination should be dependent upon the enforcement of legislative acts (directives). According to the above decisions of the Court of Justice such directives have become superfluous. Thus, like the right of free movement of workers, the right of free establishment and the right of free movement of services are adjudged to be directly conferred by the Treaty and essentially independent of those embodied in the legislation in force in the various Member States. The request for a preliminary ruling pursuant to Article 177 EEC therefore becomes decisive in proceedings with a view to further liberalization in the field of establishment and provision of services. These cases will be assessed in the next chapter. The Commission withdrew 11 proposals for directives relating to abolition of restrictions on freedom of establishment and the freedom to provide services [102] at the end of 1974, following the judgments in the *Reyners* and *van Binsbergen* cases.

42. The two judgments given by the Court of Justice guaranteed the direct applicability of equal treatment with nationals, but not the mutual recognition of evidence of professional competence or the coordination of legal provisions relating to liberalization of the professions. Little had been achieved in this field up to 1974, and no directive had been issued except that relating to the film sector. The judgment in the *Reyners* case was important to the professions only to the extent that the persons concerned were granted free establishment in any Member State for the pursuit of their professions, but only if

---

[98] See *Ninth General Report EC*, point 98.
[99] See Case 10/76 *Commission* v *Italy* [1976] ECR 1371.
[100] See Case 2/74 [1974] ECR 631 relating to freedom of establishment.
[101] See Case 33/74 [1974] ECR 1299 relating to freedom to provide services.
[102] *Eighth General Report EC*, point 22.

they satisfied the preconditions for access to the profession in force in the Member State in question (for example, the possession of graduate qualifications granted by the country in question as in the *Reyners* case), apart from the condition of nationality. Therefore, in so far as the Member State made access to the profession dependent upon the award of national graduate qualifications, the judgment did not benefit those who were not so qualified. However, the real problem lies in the fact that the mobility in the pursuit of self-employed activities sought by the EEC Treaty can be achieved only if Member States grant mutual recognition in each case to evidence of professional competence. The directives adopted by the Council [103] for the first time in 1975 (despite very strong resistance by Belgium) relating to mutual recognition of diplomas and the coordination of legislative and administrative provisions and regulations on the work of doctors are therefore decisive. The directives contain *inter alia* a list of the medical diplomas which are generally recognized (recognition of evidence of professional competence submitted in a form corresponding to that prescribed in the coordination directive and prescribing the minimum requirements for the professional training of doctors [104]). The directives do not cover the reimbursement of expenses incurred by insured persons for services rendered by doctors established in another Member State. Having regard to the major differences which exist in the organization of national health services in Member States, more extensive coordination will depend upon regulations relating to the incorporation of doctors into each system of social security insurance. [105]

43. As regards the legal profession, there was no progress worth recording during the next period either. The Council confined itself to issuing a directive on 22 March 1977 to facilitate the actual exercise by lawyers of the freedom to provide services [106] containing rules relating to recognition and coordination. According to this directive, a lawyer may pursue activities connected with the representation and defence of his clients in any Member State under the same conditions as lawyers established in that State. In so doing he is subject to the conditions laid down in the host State, including the rules of the Bar or similar regulatory body. No regulations have yet been laid down which also guarantee the free establishment of lawyers in the Member States of the Community.

44. Up to the present, the fact that the training of lawyers and the pursuit of their profession are governed by various national legal systems has been an obstacle to the general recognition of evidence of competence in the field of law. [107] Even the judgments of the Court in the *Thieffry* [108] and *Patrick* [109] cases have done no more than extend the *Reyners* judgment to the interpretation of equality of treatment in relation to nationals. However, the Court of Justice has tried to temper the effect of the delays which have

---

[103] EEC Council Directives on recognition of diplomas and coordination of 16 June 1975 (OJ L 167, 30.6.1975). See the interpretation in Case 246/80 *Broeckmeulen* [1981] ECR 2311.

[104] According to the coordination directive, those concerned must have adequate knowledge in the various fields of medicine and general training in this field of at least six years' duration.

[105] See on this subject Wägenbaur, [1976] CDE, p. 707 et seq.; see also A. Tizzano, op. cit. at footnote 88 above, p. 28.

[106] Council Directive 77/249/EEC of 22 March 1977 (OJ L 78, 26.3.1977).

[107] See Nicolaysen, *Europäisches Gemeinschaftsrecht*, Stuttgart, 1979, p. 116; L. Schneider, *Anwaltsrecht im EG-Raum*, Köln, 1979; P. Laguette, *L'avocat dans les neuf États de la Communauté européenne*, Versailles, 1978.

[108] See Case 71/76 [1977] ECR 765.

[109] See Case 11/77 [1977] ECR 1199, especially at p. 1206.

arisen in the procedure for adoption of directives by deciding that the opportunity for establishment must also be granted to persons whose foreign diploma is already recognized as equivalent under the national law in force, as for example in the *Patrick* case, pursuant to a bilateral convention, and that a failure by the Bar Council or similar regulatory body to regard a final diploma in law, issued abroad and recognized as an equivalent qualification by the authorities of the national university, as valid evidence of professional competence (the *Thieffry* case) may also be regarded as discriminatory.

45. New directives, still dealing with the harmonization of training courses and the mutual recognition of final certificates, were issued in 1977, 1978 and 1980 [110] in connection with the medical professions (doctors, dentists, veterinary surgeons, nurses and midwives). One directive endeavoured to define the sphere of activities of dentists. Since this profession was not recognized in Italy without a full course of training as a doctor, Italy was exempted for a period of six years from this obligation to achieve uniformity in the law. [111] The Council issued a similar directive for the profession of veterinary surgeon in January 1978. [112] Member States made an express declaration in this connection in which for the first time they waived their right to resort to Article 55(1) EEC, so that veterinary surgeons could also carry out public duties (for example, the inspection of meat) in any Member State if they were nationals of another Member State. During the period preceding the time-limit set for Member States to take the necessary steps to comply with Directives 78/1026/EEC and 78/1027/EEC, nationals of a Member State obviously cannot rely upon these provisions to pursue the profession of veterinary surgeon in that Member State under conditions differing from those prescribed by national legislation. [113]

46. In the professions properly so called, progress in liberalization has been most rapid in the medical sector, whereas there are no facilities for the free establishment of lawyers, as has already been mentioned. However, more extensive coordination of law relating to the medical profession is still encountering major difficulties because of the differences between national public health systems. The development of freedom of establishment for architects is also typical as regards the difficulties facing the adoption of directives on mutual recognition of evidence of professional competence. The Commission submitted proposals for a directive in 1967 on achieving freedom of establishment and freedom to provide services for self-employed architects and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in this field; [114] this directive has not been adopted as yet. That is why the European Parliament requested the Council in a

---

[110] Council Directive 78/686/EEC of 25 July 1978 (OJ L 233, 24.8.1978) regarding the mutual recognition of diplomas, certificates and other evidence relating to access to the profession of dentist and measures to facilitate exercise of the right of establishment and the right of free provision of services; see on this subject the Coordination Directive 78/68/EEC of 25 July 1978 (OJ L 233, 24.8.1978); Council Directive 77/452/EEC of 27 June 1977 (OJ L 176, 15.7.1973) regarding the mutual recognition of diplomas, certificates and other evidence of qualifications required for general nursing; see on this subject Council Coordination Directive 77/452/EEC of 27 June 1977 (OJ L 176, 15.7.1977). These directives were adopted jointly with a Council Decision of 27 June 1977 (OJ L 176, 15.7.1977); for completeness, Council Directive 80/154/EEC of 21 January 1980 (OJ L 33, 11.2.1980) and Council Directive 80/155/EEC of the same date (published in the same OJ, p. 8).

[111] See Directive 78/687/EEC referred to at footnote 110 above.

[112] Council Directives 78/1026/EEC and 78/1027/EEC of 18 December 1978 (OJ L 362, 23.12.1978).

[113] See what the Court said on the subject in its judgment of 7 February 1979 in Case 136/78 *Auer* [1979] ECR 437, see below.

[114] EP Doc. No 65/67.

resolution on 17 October 1980 to re-submit the amended text of this directive to the Parliament for consideration. [115]

47. More or less substantial advances have been made in progressive liberalization in the field of insurance, banking and companies. The first step along the road to achieving a common market in insurance was taken by the two directives of 24 July 1973 [116] relating to the coordination of legislative and administrative provisions and regulations on access to and pursuit of the business of direct insurance (with the exception of life assurance) and also covering the abolition of restrictions on freedom of establishment for these insurance undertakings. The only event worth mentioning in the previous period is the directive relating to reinsurance and retrocession. [117] The Council issued a directive in 1976 on measures suitable to facilitate the actual exercise of freedom of establishment and free movement of services by insurance agents and insurance brokers, [118] followed in 1978 by a directive on coordination of Community co-insurance. [119] A decisive step was finally taken towards creation of a common market in insurance in 1979 by Council Directive 79/267/EEC, [120] which extended the facilities for freedom of establishment (subject to certain conditions) to life assurance, which had been excluded up to that point from developments towards actual liberalization. These regulations also apply to insurers working in the Community even if their registered places of business are in third countries. It remains to be seen whether the restrictions which still exist on the provision of indemnity insurance services will be abolished (the 1973 directive affects only freedom of establishment). Under Article 61(2) EEC the liberalization of banking services and of insurance services linked to movements of capital must be harmonized with the progressive liberalization of capital movements. The difficulties encountered in indemnity insurance arise principally from the fact that, as in the field of banking, [121] differing systems of State control exist in the various Member States. The admission of foreign undertakings presupposes that the protection of savers and policy-holders with respect to these should be guaranteed to the same extent as in the case of national institutions; neither must there be any advantage in competition arising from reduced control requirements. The Council Directive of 12 December 1977 [122] on the coordination of legislative and administrative provisions and regulations governing access to and pursuit of the functions of credit institutions therefore lays down minimum conditions for admission, particularly in relation to own resources, minimum capital, management and reliability.

48. Freedom of establishment in the sense of equal treatment with nationals raises considerable problems for companies and legal persons carrying on business, which are placed on an equal footing with nationals of Member States by Article 58 EEC. This

---

[115] [1980] EuGRZ, p. 688.

[116] Council Directives of 24 July 1973 (OJ L 223, 11.8.1973); cf. on this subject the amendment introduced by the Directive of 29 June 1976 (OJ L 189, 13.7.1976).

[117] Council Directive 64/225/EEC of 25 February 1964, (OJ 56, 4.4.1964).

[118] Council Directive 77/92/EEC of 13 December 1976 (OJ L 26, 31.1.1977).

[119] Council Directive 78/473/EEC of 30 May 1978 (OJ L 151, 7.6.1978).

[120] Council Directive 79/267/EEC of 5 March 1979 (OJ L 63, 13.3.1979).

[121] The first Council Directive in the field of banking, 73/183/EEC issued on 28 June 1973, aimed to achieve equality of treatment in relation to nationals, to abolish restrictions on the right of establishment and freedom to provide services in relation to self-employed activities of credit and other financial institutions (OJ L 194, 16.7.1973).

[122] Council Directive 77/780/EEC of 12 December 1977 (OJ L 322, 17.12.1977).

occurs firstly because, in the case of companies created under a foreign law, equal treatment with nationals also presupposes observance of national laws, and secondly because the protective provisions in the national laws of Member States differ widely. That is why Article 54(3)(g) provides for the coordination, so far as is necessary and with a view to equality, of the guarantees required of companies or firms in Member States in order to protect the interests of both members and third parties. The Commission and the Council have shown considerable activity in this field, applying themselves from the outset to achieving coordination of all the law relating to companies, not merely to the elimination of direct legislative obstacles to freedom of establishment. The Commission has also taken particular account in its proposals of the structure of the board of directors and the supervisory board and employee participation in the latter. [123] The first Directive of 9 March 1968, [124] on the publication of information on companies with a share capital also governed the power of representation (validity of obligations entered into by companies with a share capital) and nullity of companies. The second Directive of 13 December 1976, [125] dealt with the formation of companies with a share capital and the preservation of and alterations to their capital (provisions relating to minimum capital, consideration in kind, increases and reductions of capital, distribution of dividends, acquisition of own shares, and equal treatment of shareholders). Finally, there came a third Directive, on 9 October 1978, on mergers of public limited liability companies [126] and a fourth, on 25 July 1978, [127] on the annual accounts (structure, content and publication) of certain types of company.

Other directives, not all of which have yet been adopted, will deal with the structure of public limited liability companies and decision-making by their agencies (the presence of workers on the board of management), [128] the prospectus published on admission of securities issued by companies to official stock-exchange quotation (Sixth Directive), [129] group accounts (Seventh Directive), [130] and the appointment of statutory auditors (Eighth Directive). [131]

---

[123] See on these problems Pipkorn, in Beutler *et al.*, op. cit. at footnote 4 above, p. 326 et seq.; commentaries on this subject will be found in M. Lutter, *Die Entwicklung des europäischen Gemeinschaftsrechts*, [1975] EuR, p. 55.

[124] Council Directive EEC of 9 March 1968 (OJ L 65, 14.3.1968); see on this subject M. Lutter, [1969] EuR, p. 1 et seq.

[125] Council Directive 77/91/EEC of 13 December 1976, regarding coordination of safeguards relating to formation of public limited liability companies and the maintenance and alteration of their capital (OJ L 26, 31.1.1977).

[126] Council Directive EEC of 9 October 1978 (OJ L 295, 20.10.1978); this directive on public limited liability company mergers coordinates safeguards relating to creditors, shareholders and employees and governs problems of legal applicability in international mergers. See on this subject Pipkorn, *Zur Entwicklung des europäischen Gesellschafts- und Unternehmensrechts*, in [1977] ZHR, p. 340, bibliography.

[127] Council Directive 78/660/EEC of 25 July 1978 on annual accounts (OJ L 222, 14.8.1978).

[128] Proposed directive submitted by the Commission (Fifth Directive) dated 9 October 1972 on the structure of public limited liability companies and the powers and obligations of their organs (OJ C 131, 13.12.1972). Worker representation on the supervisory board will be mandatory in public limited liability companies with 500 employees or more. By its Resolution of 21 January 1974 the Council incorporated in the Community 'social action programme' the progressive encouragement of participation by workers or their representatives in the life of undertakings in the Community (OJ C 13, 12.2.1974). See also on this subject the EC Commission Green Paper on *Worker participation and the structure of firms* published in November 1975, Supplement 8/75 — Bull. EC.

[129] Proposed directive by the Commission (Sixth Directive) (OJ L 131, 13.12.1972), adopted as Directive 80/390/EEC of 17 March 1980 (OJ L 100, 17.4.1980).

[130] Proposed directive by the Commission (Seventh Directive) (OJ C 121, 2.6.1976).

[131] Proposed directive by the Commission (Eighth Directive) (OJ C 112, 13.5.1978).

49. In addition, the Commission had already submitted a revised proposal to the Council on 30 May 1975 [132] for a regulation on the status of European public limited liability companies (*societas europea*), based on Article 235 EEC. This regulation has not yet been enacted by the Council. The freedom of movement of companies across frontiers would be greatly facilitated by such a unified European company. European public limited liability company structure and decision-making must be geared exclusively to Community law; it should be possible for companies with a share capital and for legal persons in Member States and engaged in business to create such companies, under Court supervision, with a minimum capital of 100 000 units of account. The business activities of European public limited liability companies and their taxation will obviously always be dependent upon the national laws of Member States: company taxation is governed by the place from which the business is actually managed, and in legal terms its transactions must be in accordance with the legal provisions of Member States. Some impression of the difficulties encountered in this area by the development of the law of European companies can be gained if one considers that the Convention signed on 28 February 1960 by Member States on the mutual recognition of companies and legal persons [133] has not entered into force to date, the Netherlands having failed to ratify it. A convention for international mergers of public limited liability companies has not yet gone beyond the stage of the December 1972 draft.

50. Attention should be drawn at the end of this section to a problem which has not yet been solved. The Council takes the view on the basis of Article 1 of Directive No 73/148 [134] that tourists, in their capacity as persons receiving services, may also avail themselves of the protection of Article 59 EEC. Restrictions on travel and residence should therefore also be abolished in the case of nationals of Member States who wish to go to another Member State as persons receiving a service. This wide interpretation of Article 59 of the Treaty would no doubt be advantageous to persons supplying services which are directly protected because in certain circumstances they would have more customers. However this 'negative' freedom to provide services [135] may cause problems because it would make Article 48 EEC et seq. superfluous, as Advocate-General Trabucchi rightly pointed out in the Opinion which he submitted on the *Watson and Belmann* case. [136] The Court has not yet had to define its position on this matter.

¶ 3. *Right of establishment and freedom to provide services in the light of decisions of the Court of Justice and national courts*

51. The Court had already ruled on 15 July 1964 [137] that Article 53 EEC, by which Member States undertook not to impose new restrictions on the right of establishment,

---

[132] Supplement 4/75 — Bull. EC; see on this subject Pipkorn, op. cit. at footnote 126 above, p. 358.

[133] See Supplement 2/69 — Bull. EC on the Convention on the mutual recognition of companies; see Supplement 13/73 — Bull. EC regarding the draft convention on international mergers of public limited liability companies.

[134] Council Directive 73/148/EEC of 21 May 1973 (OJ L 172, 28.6.1973).

[135] See Schweitzer-Hummer [1980] EuR 226.

[136] Case 118/75, cited at footnote 38 above.

[137] Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

amounted to a subjective right directly applicable in favour of individuals. When set against the backcloth of the prohibition on discrimination, this right must be taken to mean that the establishment of nationals of Member States must not be made subject to new provisions which are stricter than those governing the establishment of nationals. On the other hand, the course followed by national courts is open to dispute. While the High Court of Justice of Luxembourg [138] regards Article 62 EEC as a directly applicable rule of law (Article 62 being regarded as parallel to Article 53), the Hamburg Oberverwaltungsgericht took the view in a judgment of 29 April 1966 [139] that Article 52 EEC et seq. were not directly applicable and thereby found itself to be at variance with the views of the Münster Oberverwaltungsgericht and the Mannheim Verwaltungsgerichtshof. [140]

52. The epoch-making judgments of the Court in the *Reyners* and *van Binsbergen* cases [141] already referred to were delivered in 1974; in these judgments the Court declared that Articles 52, 59 and 60(3) EEC were directly applicable. In addition, in the *Reyners* judgment the Court had been required to define its position on Article 55 EEC and ruled (contrary to a decision by the Hamm Ehrengerichtshof in 1973 [142]) that a restrictive interpretation should be placed upon Article 55 EEC and that it did not apply to the legal profession because this profession did not involve direct and specific participation in the exercise of official authority.

53. The Court decided in the *van Binsbergen* judgment that exercising freedom of establishment did not require the person providing services to reside permanently in the host State because otherwise this freedom would be devoid of any value. [143] It is important to note that the Court ruled in the same year in Case 36/74 [144] that the prohibition on discrimination appearing in Article 59 EEC (as in Article 48 EEC) was indeed limited to the scope of the Treaty but that it extended to the activities of employed persons even if of a sporting nature, and that in such cases the Community citizen could also claim that collective agreements in the field of services were of no effect when they amounted to a breach of the prohibition on discrimination. This decision is on all fours with the Court's view that activities of an artistic nature which are outside the narrow field of economic activity in the traditional sense, such as for example the retransmission of television broadcasts, [145] are services within the meaning of Article 59 EEC. The decisions of the Court of Justice on the direct applicability of the principle of equal treatment with nationals as regards the right of establishment and freedom to provide services and on the material scope of these freedoms are an important step towards the objectives of the European Economic Community, having regard to the difficulties encountered in the approximation of laws. As has already been mentioned, no fewer than 11 proposals for Commission directives have become devoid of object following these decisions.

---

[138] Judgment of 2 December 1970, *Stefanetti*, Europäische Rechtsprechnung, [1970] 246.

[139] OVG Hamburg, [1967] MDR 524.

[140] OVG Münster, 29 October 1963 and 10 September 1963, [1964] EVBl 593; VGH Mannheim, 9 September 1964, [1965] EVBl 405.

[141] See footnotes 100 and 101 above.

[142] Ehrengerichtshof Hamm, 17 October 1973, [1974] AWD des BB 491.

[143] The matter was not defined until later, in Case 39/75 *Coenen* [1975] ECR 1554.

[144] See Case 36/74 *Walrave* [1974] ECR 1405, at p. 1408; rules of a sports association relating to competitions organized outside the Community also.

[145] See Case 155/73 *Sacchi* [1974] ECR 428; in truth the central point of the decision related to Article 30 et seq. of the EEC Treaty (free movement of goods).

54. In order to assess subsequent developments, reference should be made first of all to decisions by some national courts. The Liège Magistrates' Court decided in a judgment dated 6 May 1975 [146] that the rules relating to free movement of workers in, particularly, Article 52 EEC et seq. and the corresponding directives took precedence over incompatible national laws, with the result that national judges could not apply the latter. The French Court of Cassation decided in a judgment of 15 December 1975 [147] that the provisions of French law whereby the activities of an agricultural undertaking are made subject to authorization cannot be applied to nationals of other Member States. Other national courts have also taken the view that Article 52 EEC was directly applicable, [148] following the decisions of the Court of Justice in this respect.

55. In 1976 and 1977 the Court developed the principles of case-law initiated by the judgment in the *Reyners* case. In the *Donà* case [149] the Court extended free movement of services to professional sport, as it had already done in the *Walrave* case. The *Royer* case [150] gave the Court of Justice the opportunity to confirm the obligation imposed upon Member States pursuant to Articles 53 and 62 EEC to refrain from repealing liberalization measures which had already been enacted to give effect to obligations arising from Community law.

56. The distinguishing features of the cases decided in 1977 regarding the establishment of persons pursuing professions properly so called are that the parties concerned (an architect and a lawyer), unlike the lawyer Reyners, could not produce any certificate from the Member State where they wished to establish themselves but that on the other hand that State had acknowledged that documents giving evidence of professional competence from the interested parties' countries of origin were equivalent to its own diplomas. In the case of the British architect Patrick, [151] who wished to set up in practice in France, relying on the fact that his diploma was recognized by France, the Court had relatively little difficulty in rejecting the French objection that permission to set up in practice was granted only in exceptional cases. Where the application is based on the principle of freedom of establishment, that can in no case be refused when the domestic law does not oppose it.

57. On the other hand the *Thieffry* case, [152] in which a Belgian national wished to set up in practice in Paris as a lawyer, gave rise to greater difficulties. The Belgian qualification

---

[146] Unreported; subsequently the decisions of the Court of Justice relating to the direct applicability of Article 52 EEC et seq. continued in 1976; Case 118/75 *Watson and Belmann* cited at footnote 38 above.

[147] The *von Kempis* case, [1976] D (JR) 33; on the French case-law see D. Baumgartner, *Der Vorrang des Gemeinschaftsrechts vor französischem Recht*, 1977 DVBl, p. 70 et seq. and G. Ress, *Der Rang völkerrechtlicher Verträge nach französischem Verfassungsrecht*, [1975] ZaöRV 445, at p. 483 et seq.

[148] See Brussels Appeal Court, 27 January 1975, the *Konyk-Igor* case, [1975] JT 204; Comptroller of the Patent Office, 21 February 1975, [1976] CMLR 491.

[149] Case 13/76, cited at footnote 39 above. The fact that in the A.J. Webb case (CJCE, 17.12.1981, Case 279/80) the Court extended the term 'provision of services', of Art. 60 EEC Treaty to the 'leasing out of manpower' in the sense of the Netherlands' 'wet op het ter beschikking stellen van arbeidskrachten' is of certain interest. The permission of enterprises to lease out manpower against payment as provided for in the Netherlands' law is, in the opinion of the European Court of Justice, compatible with the provisions of Art. 59 EEC Treaty insofar as the Member State where the service is rendered refrains from any discriminatory treatment when considering the application for permission by virtue of the nationality and residence of the person rendering the service and acknowledges all guarantees and certificates submitted by this person in view of rendering the service, certificates which he has obtained in the Member State where he has his domicile.

[150] Case 48/75, cited at footnote 57 above.

[151] Case 11/77, cited at footnote 109 above.

[152] Case 71/76, cited at footnote 108 above.

of Doctor of Laws was indeed recognized by a Paris university as equivalent to the French *licence en droit*, but this recognition was effective only at the academic level. It is true that the Belgian national had obtained a 'certificate of professional competence for the legal profession' issued in France; this, however, could not take the place of the *licence*. The party concerned therefore fell short of one of the prior conditions required to set up in practice as a lawyer in France, due solely to the fact that recognition of his qualification was limited to the academic field. The Court took the view that the refusal of establishment was contrary to the Treaty, the limitation of the effect of recognition to the academic level being irreconcilable with the principles of Article 52 EEC because it was not based upon objective considerations and consequently resulted in discrimination against nationals of other Member States.

58. The statement already made above that the principles set out in the *Reyners* judgment do not eliminate the necessity for new directives on the mutual recognition of diplomas and evidence of professional competence was confirmed in the *Auer* case (judgment of 7 February 1979), [153] in which a French national submitting a veterinary diploma obtained in Italy and wishing to pursue the profession of veterinary surgeon in France after acquiring French nationality was not allowed to invoke Article 52 EEC before expiry of the time-limit for adaptation (up to 1981) imposed upon Member States by directives relating to the profession of veterinary surgeon. This case, like the decision in the *Knoors* case [154] given the same day, also raised the question whether provisions relating to free establishment and the free movement of services were valid in the context of relations between Member States and their own nationals. The Court of Justice answered this question in the affirmative. This interpretation does not, of course, emerge directly from the text of Articles 52 and 59 EEC et seq. However, the Court based its approach upon the general prohibition on discrimination which appears in Article 7 EEC. In the *Knoors* case the party concerned, an installer of heating installations, was able to rely upon Directive 64/427, which removes restrictive conditions on access to and pursuit of a whole range of industrial and craft activities and refers in general terms to nationals of Member States established within the Community as beneficiaries.

59. The Court ultimately had to deal with the extension of free movement of services to television broadcasts across frontiers in two judgments given on 13 March 1980. [155] The Court of Justice took for granted that the rights of an artistic performer are to be respected in the context of free movement of services, and it acknowledged that a licence has territorial limits. On these grounds the firm Cine Vog, which had an exclusive licence to show a French film in Belgium, was able to prevent the firm Coditel from relaying this film from a German television station and from showing it to subscribers to its television programme distribution network. In its second judgment the Court of Justice held that a Belgian Royal Decree whereby cable television operators cannot retransmit or relay to their viewers programmes including advertising broadcasts was compatible with freedom to provide services. Since the prohibition on television advertising also applies to Belgian radio and television stations and consequently provides for the equal treatment of nationals and aliens, such a prohibition, applicable in a Member State and adopted in the public interest, is justified in the absence of harmonization of national laws.

---

[153] Case 136/78 [1979] ECR 437.
[154] Case 115/78 [1979] ECR 399.
[155] Case 62/79 *Coditel* v *Cine Vog* [1980] ECR 881; Case 52/79 *Coditel* [1980] ECR 833.

Section IV — Free movement of capital

¶ 1. *Free movement of payments and capital*

60. The free movement of payments (Article 106 EEC) [156] is an essential complement to the free movement of goods, persons, capital and services. If it were impossible for a worker to transfer his wages or salary, for a professional person to transfer his fees, or for a firm to transfer its earnings to another Member State these fundamental freedoms would lack the essential monetary aspect and their exercise would be severely obstructed. Article 106(1) therefore requires each Member State to undertake to authorize payments relating to movements of goods, services and capital in the currency of the Member State in which the creditor or beneficiary resides, as well as transfers of capital, salaries and wages to the extent that there is free movement of goods, services, capital and persons among Member States. The free movement of payments also covers the technical progress of payment operations, so that 'interference with progress in the movement of payments between banks, difficulties created in international exchanges, etc., are also prohibited, as are currency manipulations which lead to the distortion of exchange rates and consequently disrupt patterns of movement'. [157] Any Community national may raise the matter of this free movement of payments before national courts as directly applicable law. [158] Legal provisions on currency in Member States (in so far as they exist) have been progressively abolished as regards the movements of goods, services and capital by Council Directive 63/340 dated 31 May 1965 [159] to abolish any prohibition or constraint on payment for services when the movement of services is limited only by restrictions on payments relating thereto. With regard to 'invisible transactions' such as tourism, the carriage of goods and passengers, all kinds of advertising, levies, building contracts, dividends and participation certificates, etc. (see Annex III to the EEC Treaty), Member States must introduce no new restrictions on transfer and existing restrictions must be progressively abolished in accordance with Council Directive 63/474/EEC of 30 July 1963. [160]

61. On the other hand, unlike Article 106 which guarantees the movement of payments directly connected with the free movement of goods, services and persons as an addition to these freedoms, the system of free movement of capital referred to in Article 67 et seq. deals with independent financial transactions which are not linked to deliveries of goods or payment for services rendered or work done (movements of capital of all kinds). The purpose of Article 67 EEC et seq. is to abolish, at least in part, restrictions on movements of capital in the field of exchange regulations etc., for example those relating to investments.

---

[156] See Case 7/78 *Thompson* [1978] ECR 2247 on the distinction between the concepts of goods and capital.

[157] According to A. Bleckmann, op. cit. at footnote 71 above, p. 327.

[158] Ehlermann, in von der Groeben, von Boeckh, Thiesing, *Kommentar zum EWG-Vertrag*, second edition, 1974, Article 106.

[159] Council Directive 63/340/EEC of 31 May 1963 (OJ 86, 10.6.1963).

[160] Council Directive 63/474/EEC of 30 July 1963 (OJ 125, 17.8.1963) regarding liberalization of transfers pursuant to invisible transactions not connected with the free movement of goods, services, capital and persons.

62. Since the modulation of international capital movements is still an important measure available to Member States in the context of their economic and monetary policies and since, moreover, the Member States have retained appropriate powers in this respect (Articles 105(2) and 107 EEC on exchange rates and Articles 108 and 109 on the balance of payments), substantial difficulties are met with in the total liberalization of capital movements. Article 67 EEC et seq. were therefore formulated with certain reservations. Thus Article 67(1) of the EEC Treaty, apart from equality of treatment with nationals of Member States (prohibition on discrimination), provides for the abolition of restrictions on capital movements only to the extent necessary for the proper functioning of the common market.

It has been concluded from this wording that Article 67 EEC is not directly applicable. [161] Member States must, in granting exchange authorizations, 'be as liberal as possible' in the area of capital movement (Article 68(1)).

The reserved approach of the EEC Treaty is also apparent in Article 71, whereby Member States must merely 'endeavour' not to strengthen existing restrictions on exchange. Finally, Article 73 provides for possible protective measures when the operation of the capital market is disrupted, even after the end of the transitional period, but authorization from the Commission is required for adoption of these measures. The Member State may nevertheless itself impose provisional protective measures directly, on grounds of security or emergency. Reference should also be made to the exception provided by Article 68(3) whereby loans intended to finance a Member State or its regional or local authorities, directly or indirectly, can be issued or invested in other Member States only when the States concerned have come to an agreement on the subject.

¶ 2. *Development of Community law in the area of free movement of capital*

63. The progressive abolition of restrictions on movements of capital laid down in Article 69 EEC has been implemented by Council directives. The first two Council directives [162] did indeed provide for abolition of exchange restrictions, but their principal effect was to consolidate the liberalization already achieved in all Member States at the point when these directives were adopted. It is provided in particular that the necessary exchange authorizations must be granted for direct investments, movements of personal capital, and transactions in securities dealt in on stock exchanges. Member States have been left free each to adopt, on the basis of a fundamental principle calling for progress towards liberalization, different regulations for transfers of holdings in investment companies and credits not connected with commercial transactions, that is for operations which are purely financial in nature. The directive allows a Member State to retain or re-establish exchange restrictions in existence on 31 December 1972 where the economic policy of that State is endangered; [163] in addition, a Council Directive dated 31 March

---

[161] Streil, in Beutler *et al.*, op. cit. at footnote 4 above, p. 272.

[162] Council Directive EEC dated 11 May 1960 (OJ 43, 12.7.1960); Directive 63/21/EEC of 18 December 1962 (OJ 9, 22.1.1963).

[163] There are exceptions relating, *inter alia*, to the United Kingdom based on the decision taken by the Commission on 23 July 1975 deriving from Article 108 EEC (OJ L 211, 9.8.1975), with a view to preventing the outflow of currency.

1972 [164] to regulate international financial movements and to eliminate their harmful effects upon internal liquidity provides for exemptions from the fundamental principle of liberalization. The reason for these regulations, which are based on the provisions of Articles 70 and 103 EEC, lies in the serious disturbances connected with capital movements, originating from the Eurodollar market, which were a heavy burden on foreign exchange markets in Member States at the beginning of the 1970s. [165]

64. Up to that point it was hardly possible to say that there had been real liberalization of capital movements in the relatively narrow context of Article 67 et seq. [166] Liberalization had been relatively effective in the case of direct investments, property investments, movements of personal capital, short-term and medium-term credits connected with commercial transactions, payments pursuant to insurance, and the acquisition of national or foreign securities dealt in on the stock exchange (excluding holdings in unit trusts). Restrictions remained in force in the area of foreign exchange regarding issues of securities, the acquisition of securities not dealt in on the stock exchange or of bonds made out in the national currency and issued abroad, and regarding loans and short-term credits not connected with commercial transactions.

65. An advance was made, at least in part of this area, by a directive [167] adopted by the Council in July 1969 on harmonization of indirect taxes affecting the raising of capital (abolition of stamp duty on securities). Of course, the problem of double taxation, like the risk arising from exchange rates, is an obstacle to achieving movement of capital which is really free and without obstacles. An attempt was made in the report by a group of experts set up by the Commission (the Segré Report of 1966) to evolve principles with a view to the formation of a unified European capital market, based on considerations of political economy. Up to the present it has not been possible to apply these principles. The hope that the Council would soon adopt a third directive with a view to liberalizing movements of capital, which had been put forward by the Commission at the same time as the other two, dealing particularly with the issue and stock-exchange quotation of securities of other Community States, has not been fulfilled up to the present. Additional difficulties have arisen in this area from the French Law of 28 December 1966. [168] Under this law, foreign investments in France and French investments abroad were subject to State control and prior authorization was required for any issue or placing of foreign securities in France. France has only recently amended its legislation on these matters, [169] being the last Community country to move in this direction, so that investments originating from or intended for France no longer require any authorization within the Community. A declaration is all that is required, and the investment can be refused only when there is a risk that public security or public order could be affected. Previously, the French Government had given way only in relation to licensing contracts, by the aboli-

---

[164] Council Directive 72/156/EEC of 21 March 1972 (OJ L 91, 18.4.1972).

[165] See on this subject M. Seidel, 'Schutzmaßnahmen auf dem Gebiet des Zahlungs- und Kapitalverkehrs', in *Schutzmaßnahmen im Gemeinsamen Markt*, Köln, 1977, p. 29 et seq.

[166] In the Federal Republic of Germany, capital movements were entirely free pursuant to para. 1 of the Foreign Trade Law dated 28 April 1961 (BGBl I, p. 481); under para. 23 (protection against excessive inflows of currency) the possible restrictive measures are either entirely in accordance with the provisions of the directive or do not affect economic activities coming within the scope of liberalization.

[167] Council Directive 69/335/EEC of 17 July 1969 (OJ L 249, 3.10.1969).

[168] Law No 66/1008 (28 December 1966) (JORF, 29.12.1966, p. 1621).

[169] See the report published in the *Süddeutsche Zeitung* on 7 August 1980.

tion in 1970 of the previous requirement of declaration regarding licensing contracts for protected rights abroad. [170]

66. In 1977 the Commission drafted a recommendation [171] for a code of conduct governing dealings in marketable securities. A Council Directive of 5 March 1979 [172] provided for coordination of the conditions for admission of marketable securities to stock exchanges in Community Member States. The process of liberalization in the movement of capital, which up to that point had extended mainly to exchange regulations, received a setback from three noteworthy Commission Decisions dated 20 June 1975, 29 September 1976 and 22 December 1977: Italy was authorized to retain restrictions on certain capital transactions, [173] while Denmark, Ireland and the United Kingdom were authorized to take protective measures pursuant to Article 108(3) of the Treaty relating to dealings in securities. [174]

67. It is to be hoped that the initiatives now being taken, particularly the proposed Council directives on the placing of stocks on the market and the coordination of legislative and administrative provisions and regulations on collective investment in marketable securities, will soon yield results. As in the past, the areas of difficulty are still the differences between the tax systems of Member States, with the possibility of double taxation which that implies, risks in connection with rates of exchange, and finally the freedom of establishment of financial institutions. Here the problems arise from differences in legislative and administrative provisions and regulations relating to supervision and control of commercial activities.

68. A special examination of decisions of the Court or of courts of Member States would not provide much clarification in the area of Article 67 EEC et seq. There has only recently been a Court judgment on the direct applicability of provisions relating to free movement of capital; [175] this is in no way surprising, because according to Articles 67 to 73 EEC there can be no question of direct application apart from the prohibition on discrimination set out in Article 68(2). This matter was the subject of proceedings before the Brussels court of first instance, which gave judgment along these lines in 1973. [176] Under these conditions there is little possibility of future judicial decisions likely to promote integration, since the development of free movement of capital cannot be compared with that of free movement of persons and services, having regard to the opportunities afforded to the various States by the protective measures laid down in Article 73 EEC. [177]

---

[170] Decree No 70/441 of 26 May 1970 and the Order of the same day (JORF, 29.5.1970, p. 4991 et seq.).

[171] Commission Recommendation 77/534/EEC of 25 July 1977 (OJ L 212, 20.8.1977).

[172] Council Directive 79/279/EEC of 5 March 1979 (OJ L 66, 16.3.1979).

[173] Commission Decisions 75/355/EEC of 20 June 1975 (OJ L 158, 20.6.1975) and 76/773/EEC of 29 September 1976 (OJ L 268, 1.10.1976).

[174] Commission Decisions 78/152/EEC and 78/153/EEC and 78/154/EEC of 22 December 1977 (OJ L 45, 16.2.1978); the decision relating to the United Kingdom was repeated in December 1980.

[175] Judgment of 11 November 1981 in Case 203/80 *Casati* [1981] ECR 2595. The Court stated that Article 71 is not directly applicable. See also M. Seidel, 'Freier Kapitalverkehr und Währungspolitik', in *Festschrift für Hans Kutscher*, Baden-Baden, 1981.

[176] Judgment of 28 December 1973 (Az 73.97.784/72), unreported; the case involved criminal proceedings for breaches of Belgian laws on dealings in securities.

[177] Denmark made use of Article 73 for the first time in February 1979. The Court stated in the *Casati* judgment, cited at footnote 175 above, that non-application of the Article 73 procedure as regards restrictions on movements of capital, which Member States are not bound by Community law to liberalize, is not an infringement of the Treaty.

Chapter III — The rules on competition

by Giorgio Bernini

Section I — The historical and economic background to the Treaty rules and to Community competition policy

¶ 1. *The Treaty rules seen in historical perspective*

1. The system of rules for governing competition contained in the ECSC and EEC Treaties make a cardinal distinction between rules affecting undertakings directly (Articles 65 and 66 ECSC and 85 to 90 EEC) and rules covering aids granted by States (Articles 4(c) and 67 ECSC and 92 to 94 EEC). During the transitional period Article 91 on dumping was also in force.

These rules on competition seen as a whole in historical perspective, appear to be the logical consequence of the very premises which gave rise to European economic integration.

2. To limit this historical survey to essentials, it will suffice to recall the principles which, as early as 1945, inspired the 'Proposals for Consideration by an International Conference on Trade and Employment'. These proposals were the source of the current of opinion that in course of time found expression at the Havana Conference where it was decided to set up the International Trade Organization (ITO).

Even though the principles expressed in the ITO charter were never put into operation by the States concerned, since their avowed purpose was to develop trade at world level, they present a special interest for European countries, as they constitute a clear advance on the economic theory which prevailed before the Second World War.

At that period, the laws in force, based on the control theory, started from the premise that industrial consortia were not by nature harmful and might, especially in crisis situations, prove to be essential instruments for carrying out economic policy. Post-war theory, however, is based on the notion that so-called private planning of the economy is unlawful, free competition being the instrument for protecting consumers' interests and technological progress.

This change in ideological position may, at least to a certain extent, be described as a consequence of the developments which marked the economic system of the principal European countries in the period following the Second World War.

3. In addition to this economic and legal evolution, Europe was markedly affected by clear and direct penetration of American principles regarding free competition and monopolies; this is one particular aspect of the more general influence exerted on the Western world at that period by the United States, especially in connection with the implementation of major economic assistance plans.

The ideology which lies at the root of US antitrust legislation is closely linked to the history of that country where free competition is considered, on the basis of an absolute value judgment, to be inseparable from the idea of political democracy that characterizes the 'American way of life'.

4. In the ECSC and EEC Treaties, on the other hand, the protection of free competition cannot be considered as an end in itself. The rules in question arise within the context of the Treaties' general objectives so that their implementation has laid the foundations for a genuinely Community antitrust philosophy. [1]

¶ 2. *Developments in Community action on competition*

5. The form in which the Community institutions have implemented the rules in question must be analysed in historical perspective, with special regard to Commission decisions and judgments of the Court of Justice. This case-law is indispensable for understanding and analysing the value judgments and choices which directed and still direct the practical implementation of the necessarily general rules contained in the Treaties.

Further sources are the acts binding on undertakings and/or States (regulations and directives) adopted by the Council and the Commission in implementation of the Treaties' provisions, and the statements of principle delivered by the supranational executive in the form of acts with no binding force (notices and opinions).

However, if developments in Community action are to be correctly reconstructed, special attention must be given to the sources connected with actual cases (decisions and judgments). The statements of principle mentioned above can, at most, indicate general positions and trends which should be accepted with certain reservations, as the text of the respective acts makes clear.

6. The action in this field carried out by the Community organs for attaining the objectives set by the Treaties during the 30-year period in question, was guided by principles and strategies which well deserve the use of the expression 'competition policy'. It should be recalled, in this connection, that in 1971 the European Parliament asked the Commission to produce a special report each year on developments in competition policy.

An annual report on competition policy has been published since that date; this is of the greatest importance in assessing the evolution of this policy, which continues to attract the attention of the European Parliament.

---

[1] On this general problem see Bernini, *La tutela della libera concorrenza e i monopoli*, Milan, 1963; 'Common Law e legislazione antitrust statunitense', I, p. 2 et seq.; 'Comunità europee e legislazione degli Stati membri', II, p. 1 et seq.

¶ 3. *The objectives of Community competition policy*

7. In the eyes of the Commission the institution of a system for ensuring undistorted competition is 'a prerequisite for the proper functioning of the common market, which is the rock on which economic integration is to be founded'. [2]

The fact that the competition rules are intended to be instrumental in attaining the objectives laid down in the EEC Treaty, a fact remarked upon by the Court of Justice in the *Continental Can* case, [3] provides the justification for taking account, when interpreting them, of the economic and social context in which the rules are to operate. Such a context, which genuinely constitutes a standard of reference, is, by its very nature, in a constant state of flux: historically, the implementation of the competition rules follows a similar course, as will subsequently be shown when the various problems arising are discussed individually.

8. At present, the principal phases of competition policy may be outlined as follows:

(a) During the 1960s, especially as regards problems raised by exclusive distribution agreements, interpretation of the competition rules seems to have had as its chief objective attainment of a single common market. Subsequently, when faced by more complex cases, the Commission and the Court interpreted very broadly the concept of an adverse effect on intra-Community trade, thus widening the field in which Articles 85 and 86 may be applied. Concurrently the need to open the Community effectively to international trade at world level became pressing and the tendency to reduce the ambit of activities concerning solely the various national markets was consolidated.

(b) The sphere of Commission intervention has grown: its traditional activity aimed at preventing and suppressing agreements restricting competition and discriminatory or wrongful acts by undertakings has been increased, especially in the second half of the 1970s, by the constant care taken to maintain the market's competitive structure, even with regard to excessive concentrations of economic power.

(c) In the *Ninth General Report,* the Commission, adopting the phrase 'fairness in the market place', [4] described the following three aspects as of prime importance:
   (1) Equality of opportunity must be preserved for all commercial operators in the common market, especially as regards aid granted by States to firms in their own countries and the transparency that should exist in financial relations between States and public sector undertakings.
   (2) Community competition law should be adapted in favour of small and medium-sized firms which lack market strength.
   (3) Competition policy must take account of the legitimate interests of workers, users and consumers and should pay special attention to the development of employment prospects.

(d) On the other hand, to continue quoting the Commission, the proper functioning of the market mechanism is not in itself sufficient to ensure that other objectives are attained beyond those of improving the productivity and competitiveness of Community firms. To promote greater economic and social justice other Community policies are necessary which will have to be reconciled with competition policy.

---

[2] *Ninth Report on Competition Policy*, Introduction, p. 9.

[3] Case 6/72 *Continental Can and Europemballage* v *Commission* [1973] ECR 215.

[4] Op. cit. at footnote 2 above, Introduction, p. 10.

(e) Following the recent debate as to the advisability of granting exemptions from the competition rules in times of sectoral crisis, the Commission reaffirmed its unwavering faith in competition and its consequent hostility to 'self-sufficient isolation' which 'would simply aggravate the situation beyond redemption by deepening the trauma of the structural changes thrust upon Europe by the shifting patterns of world trade'.[5]

(f) Community policy developed as the rules on competition contained in the EEC and ECSC Treaties were implemented. The provisions of Articles 85 and 86 EEC, when compared with those of Articles 65 and 66 ECSC, are, however, differently worded, which affects their scope. This is partly due to the different position that these rules occupy in the context of their respective Treaties, which, in their turn, are distinguished by the different fields for which they make provision. The coal and steel market, because of its sectoral nature, is conceived as a single unit, so that the Community executive, which has been granted very wide regulatory powers, enjoys exclusive competence. Furthermore, historical examination shows that the ECSC rules on competition have, from the beginning, been implemented with special reference to the particular requirements and structures of the coal and steel market.

(g) The tendency to give greatest weight to the economic factor was further strengthened as a result of the crisis in the coal and steel sectors: here too the actions of the High Authority (and of the Commission after the merger of executives) display individual characteristics which often makes it impossible to generalize.

Section II — The ECSC rules on competition

¶ 1. *The scope of the provisions contained in the ECSC Treaty*

9. In the ECSC Treaty Articles 4(d), 65 and 66 regulate agreements and concentrations expressly; for the purposes of this study they are therefore sources of prime importance. In order to be quite complete, mention should also be made of Article 60 which, in the context of price regulation which characterizes the ECSC Treaty, prohibits unfair and discriminatory practices affecting competition.

Uniform application of rules on competition is facilitated, in a single-sector market, by the very great opportunities available to a supranational executive for checking certain fundamental data, such as the structure of the market, the number and size of undertakings, the fluctuations of supply and demand, the geographical conditions and the distances involved. In other words, in the coal and steel sector, the High Authority/Commission reached a definition of a certain level of competition essential for practical and consistent application of Articles 65 and 66 to the changeable (and frequently changed) conditions prevailing in that sector.

10. In a first judgment given on 15 July 1960 in the cases of *Präsident and Others*,[6] the Court, though in actual fact it rejected the appeal brought by the coal firms of the Ruhr (an appeal against the High Authority's express refusal to authorize one sole organization

[5] Ibid., Introduction, p. 11.

[6] Joined Cases 36 to 38 and 40/59 [1960] ECR 859.

for the sale of coal), had already emphasized that the oligopolistic structure of the coal market met the modern need for concentration at both production and distribution levels.

The Court's position is made even more explicit in a subsequent judgment [7] rejecting an appeal by the Dutch Government against the High Authority's authorization of two joint sale outlets in the Ruhr basin. In this connection the Court took note of the fact that on an oligopolistic market, where there is a system for publicizing prices and transport tariffs, thus inevitably ensuring transparency of prices, the various economic entities of comparable strength practise a relatively stable prices policy, even if they are operating in a competitive system. However, 'this immobility of prices in the market does not, in itself, contravene the Treaty if it results not from an agreement, even tacit, between the parties concerned, but from the interplay of the strengths and strategies of independent and opposed economic units on the market'. [8]

The degree of competition desired by the Treaty, the Court continues, can vary considerably, depending on market conditions and the varying importance of the resulting needs. Accordingly, 'it is conceivable that in a period characterized by strongly increased competition from coal substitutes the rationalization requirements of the production and sale of the product which is thus placed at a disadvantage are of primary importance in the market economy and prevail over the maintenance of a high degree of competition between undertakings in difficulty, although this does not involve the elimination of all competition in the coal market'. [9]

Explicit recognition is thus given to the need for protecting European coal producers in the face of oil producers in order to prevent or diminish the adverse effects on mining undertakings that might result from competition with other sources of energy.

11. In the steel sector the principles behind the Commission's action were defined at the beginning of the 1970s in the 'general outlines of a competition policy relating to the structures of the iron and steel industry'. [10]

Bearing in mind the development of previously existing structures, the need for rationalization, technological developments and international competition, the Commission considered that 'the development, by means of the re-grouping of enterprises towards an oligopoly of about a dozen large groups or independent enterprises, the largest of which would be allowed up to 13% of the Community's output of crude steel, fitted in with the maintenance of effective competition within the common market and with an improvement in the competitivity of the enterprises'. [11]

The restructuring of the iron and steel sector, entailing the closure of a certain number of establishments, and the financial participation by various Member States, falls within the system of aid to be discussed later. [12]

---

[7] Case 66/63 *Netherlands* v *High Authority* [1964] ECR 533.
[8] Ibid., especially at p. 549.
[9] See footnote 8 above.
[10] OJ C 12, 30.1.1970.
[11] *First Report on Competition Policy*, point 97.
[12] See Section VI below.

¶ 2. *The authorization system*

A. **Agreements**

12. Article 65(2) restricts the possibility of authorizing agreements which are contrary to the prohibition contained in Article 65(1) to the class consisting of specialization agreements or joint-buying or joint-selling agreements and to another class, not yet specifically defined, namely agreements 'strictly analogous in nature and effect to those referred to above, having particular regard to the fact that this paragraph applies to distributive undertakings' (Article 65(2)(c)).

Even by reference to interpretations given in individual cases, it proves hard to identify, in unambiguous terms, the class of agreements 'strictly analogous' to specialization agreements or 'joint buying or selling' agreements. Moreover, the reference to distributive undertakings restricts the scope of this analogy still further.

This is especially true in the case of joint-buying agreements, despite the existence of precedents authorizing agreements between retailers and wholesalers in the coal sector intended to limit their respective spheres of activity. Indeed, to take a more general view of the phenomenon, there can be no doubt that joint-buying or joint-selling agreements between distributive undertakings cannot be all-inclusive without entailing loss of individuality for each of the undertakings in question. This would not, however, be true in the case of production undertakings.

In conclusion, apart from cases like those above, which, moreover, fall within the more general class of limits set to direct access by certain categories of buyer to various types of distributive undertakings, it would appear that the reference to analogy applies basically to specialization agreements.

The difficulty here is not made any less by the fact that it hardly seems possible to extend the idea of analogy beyond reasonably plausible limits.

13. Perhaps the most delicate problem, however, is that of patent licensing agreements.

Under the terms of Article 65(2), contracts which fall within the ambit of the prohibition have no chance of exemption, whereas they could, in principle, be authorized pursuant to Article 85(3).

The problem engendered by the absence of any provision for exemption, which thus leaves a gap to be filled in the ECSC Treaty provisions, gives rise to perplexing questions. On the one hand, the answer is perhaps to be found in the text of the Treaty, especially Article 95, which makes provision for concerted action by the High Authority and the Council to supplement and amend the rules in special situations. On the other hand, it would be theoretically possible simply to have direct recourse to Article 85 and the regulations implementing it, on the grounds of the absence of appropriate provisions in the ECSC Treaty. The latter solution, which appears no less beset with uncertainties than the former, would nevertheless provide a possible answer to the more general problem of the relationship between the EEC, ECSC and Euratom Treaties. Such a solution, already envisaged by legal writers, would consist in applying the rules of the EEC Treaty to

questions concerning goods covered by the other Treaties, when the latter contained no provisions applicable to the problem in question. [13]

14. In a sector which has to meet special requirements with regard to restructuring, the reference to the types of agreement mentioned above is particularly relevant. They allow an improvement in production or distribution judged essential for the purpose of restructuring: the improvement, however, according to the terms of Article 65(2), must be substantial; and the same article goes on to state that the agreement must not be more restrictive than is necessary for the purpose or be 'liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market'.

The Commission, therefore, has at its disposal an instrument giving it discretionary power to authorize certain agreements within the classes described in Article 65(2) ECSC and which restrict competition, thus recognizing them as lawful, provided the advantages to be gained outweigh the ensuing damage to free competition. The ensuing damage in this connection must, it will be noted, be measured by reference to a standard of competition described as 'effective' by the article in question; the intention accordingly is to prevent undertakings which are parties to the agreement from creating a monopolistic or quasi-monopolistic power.

These conclusions seem to correspond with the observations about distinguishing, on the coal and steel market, the standard of 'workable competition' that characterizes sectors with an oligopolistic structure.

15. As regards the implementation of Article 65(2), an analysis of cases on the subject shows that the following aspects are among the most important.

(a) Specialization agreements, after an initial assessment of their effect on the products as a whole, must be judged by reference to the position which the undertakings occupy on the market in the goods concerned. [14]

(b) In the context of joint-selling agreements concerned solely with the distribution of certain specific products (as opposed to selling all or almost all the products), the question of defining the 'relevant market' remains open, the question being whether the respective markets for each of the products should be considered independently or as elements to be evaluated when an agreement is assessed overall.

(c) In assessing joint-buying agreements, the quantity of goods affected by the agreement must be compared with the quantities bought individually by other independent undertakings.

(d) In many of the cases where decisions have been given, the distinction between specialization agreements (which clearly predominate in the steel sector) and joint-buying or selling agreements appears to be blurred so that it is sometimes difficult to discern

---

[13] See, *inter alia*, Reuter, 'Rapport des trois traités entre eux', *Droit des Communautés européennes*, edited by Ganshof van der Meersch, Brussels, 1969, p. 83.

[14] Schröter, 'Le marché en cause', in *La réglementation du comportement des monopoles et entreprises dominantes en droit communautaire*, Bruges Week 1977, p. 474; Bernini, introduction to the chapter 'Ententes et concentrations', in *Commentario al Trattato istitutivo della CECA*, edited by Quadri, Monaco, Trabucchi and others, Milan, 1970, II, p. 864.

the peculiar features of each type of agreement in the context of an overall assessment of its scope for the purposes of a possible grant of authorization.

(e) The extent of the authorization granted pursuant to Article 65(2) corresponds, both qualitatively and quantitatively, with the general attitude expressed by the Commission regarding the needs of the coal and steel sector and shows that the Commission has adopted a very liberal stand on the matter.

B. Concentration and abuse of a dominant position

16. The structural crisis in the coal and steel market led to an increase in concentrations which, since High Authority Decision No 25-67 of 22 June 1967, [15] may be granted exemption, pursuant to Article 66(3), from the requirement of prior authorization, on the basis of certain quantitative limits regarding the total annual production achieved by all the undertakings involved in the concentration. This exemption mechanism was confirmed and to a certain extent modified by Commission Decision 78/2495/ECSC of 20 October 1978. [16] Article 66(2) lays down the conditions for authorizing concentrations between undertakings.

In short, the same is true in this case as in the case of agreements: to justify a refusal of authorization, the restrictive effects of the operation must be serious, that is to say likely to create genuine problems of a monopolistic or quasi-monopolistic nature. The standard of reference remains the protection of 'effective' competition which the Treaty itself considers as characteristic of the coal and steel sector.

17. In the context of present-day restructuring, the number of concentrations authorized seems fairly high. An examination of cases reveals certain aspects which illuminate the most representative factors in this development.

(a) The forms that concentration assumes may range from merger in the strict sense [17] to group control. [18]

(b) Concentrations develop not only horizontally, but also vertically.

(c) When examining individual cases, the Commission, in accordance with a principle already established, [19] verifies, where circumstances so require, that the operation in question is compatible with the provisions of Article 86 EEC. [20]

(d) The evolution of the criteria adopted for defining the 'relevant market' reveals a tendency to broaden this market and consequently to restrict the field within which prohibitions are applicable, thus increasing the number of authorizations.

In an initial phase, particularly in the well known cases on scrap iron, authorization was refused on the ground that the market in scrap iron must be considered as the relevant market, independent of the other commodity markets of the iron and steel industry. [21]

---

[15] OJ 154, 14.7.1967.

[16] Commission Decision No 78/2495, *Usinor and Others* (OJ L 300, 27.10.1978).

[17] Commission Decision of 20 June 1979, *Usinor and Others*, Bull. EC 6-1979, point 2.1.34.

[18] Commission Decision of 11 December 1979, *Sacilor-Davum*, Bull. EC 12-1979, point 2.1.44.

[19] *First Report on Competition Policy*, point 97.

[20] *Ninth Report on Competition Policy*, point 127.

[21] High Authority Decision No 28-55 dated 20 July 1955 (OJ 18, 26.7.1955). Commission Decisions 70/118/ECSC dated 11 January 1970 (OJ L 29, 6.2.1970); 74/77/ECSC dated 22 January 1974 (OJ L 52, 23.2.1974); cited by Schröter, op. cit. at footnote 14 above, especially at p. 480.

In the *RBV* case, [22] the Commission had established the existence of a dominant position by reference to the markets for lignite briquettes only, without considering whether they might be replaced by competing products. In the later *NCC* case, [23] however, the Commission avoided dividing the coke market into two sub-markets, stating that different uses, industrial and domestic, did not affect the unity of the market in coke.

From a geographical viewpoint, the relevant market for steel and semi-finished products, as regards large producers and distributors, is the whole of Community territory, with the possible exception of some regional sub-markets as regards small-scale distribution.

Oil and coal are to be considered as elements of a single energy market, so that even a concentration as substantial as Ruhrkohle AG (90% of the Ruhr basin's coal production) could be granted authorization by the Commission on the ground that 'on the energy supply market, a coalmining enterprise, whatever its size, is no longer able to avoid effective competition'. [24]

18. Article 66(7) contains provisions to be applied in cases where there is abuse of a dominant position; unlike the provision contained in Article 86 EEC, it does not, however, expressly prohibit such an abuse. But the High Authority (Commission) is given the power to make recommendations (in the ECSC Treaty a recommendation is equivalent to a directive in the EEC Treaty) in order to prevent a dominant position from being used for purposes contrary to the objectives of the Treaty. If the recommendations are not satisfactorily implemented, it is for the High Authority (Commission), in consultation with the government concerned, to impose penalties on the undertakings and determine the prices and conditions of sale to be applied or to draw up production or delivery programmes to be carried out by the undertakings in question.

Section III — The EEC rules on competition

¶ 1. *Identifying the rules: the common factors*

19. Articles 85 and 86, under the conditions that they lay down, prohibit both agreements likely to restrict competition and the abuse of a dominant position.

Unlike the ECSC Treaty, the EEC Treaty contains no provision expressly prohibiting concentration of undertakings. However Article 86, which is the cornerstone of the competition rule system, has been employed with regard to certain forms of concentration.

A. The concept of affecting trade between Member States

20. By contrast with the 'indivisibility' which is characteristic of the coal and steel market, the common market, which is subject to regulation by the powers conferred on

[22] The case is explained by Schröter, op. cit. at footnote 14 above, especially at p. 471.
[23] On this case see Schröter, op. cit. at footnote 14 above, especially at p. 472.
[24] *First Report on Competition Policy*, point 96.

the Community organs, coexists, in the institutional design of the Treaty of Rome, alongside zones of exclusive influence reserved for the various national markets: these, unlike the common market, come within the orbit of the Member States' sovereignty.

Application of Articles 85 and 86 is accordingly subject to the condition that the practice in question is capable of affecting trade between Member States: a broader or narrower interpretation of the concept of affecting intra-Community trade thus leads to extending or limiting the field in which the Community provisions apply.

At the beginning of the 1960s, in the well-known cases *Société Technique Minière* [25] and *Grundig,* [26] the Court adopted a relatively cautious interpretation of the concept of affecting trade between Member States, giving predominant importance to considering 'whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States'.

That principle appears more restrictive than the definition adopted by the Commission in the *Grundig* case where it was held that to establish that trade is affected, it is enough to show that a restriction of competition causes trade between Member States to develop otherwise than would have been the case in the absence of that restriction. [27]

The Commission then fell in line with the precedents established by the Court [28] and, after some initial doubts, legal writers also accepted that position. [29]

21. The importance attached to the attainment of a single market as the essential objective to be safeguarded has caused some uncertainty among legal writers with regard to the status of exclusive distribution contracts when these apply throughout common market territory. Invoking the principle described above and the provisions of Article 1(a) of Commission Regulation No 67/67 where 'a defined area of the common market' is in question, [30] some writers have held that such agreements cannot affect trade between Member States in so far as the Community is to be considered as a single economic entity; [31] others [32] have maintained that Article 85(1) is applicable, with individual exemptions possible, but not block exemptions, in accordance with the provision of Regulation No 67/67 mentioned above. [33]

22. The argument outlined above in fact constitutes only one aspect of a more general problem: the problem of the importance, for the purpose of applying the competition rules, of agreements and abuses that have repercussions on the (import and export) trade between the EEC and third countries.

---

[25] Case 56/65 [1966] ECR 235.

[26] Joined Cases 56 and 58/64 [1966] ECR 299.

[27] Commission Decision 64/566/EEC dated 23 September 1964, *Grundig-Consten* (OJ 161, 20.10.1964).

[28] Commission intervention for ending an agreement between manufacturers of nitrogenous fertilizers, *Sixth Report on Competition Policy*, points 126-128.

[29] For a broader view see Steindorff, *Kartelle und Monopole im modernen Recht*, 1961, I, pp. 157, 162; Schlieder, BB 1962, p. 305. For a more restrictive view stressing the necessity of an obstacle to intra-Community trade see Deringer, *The Competition Law of the European Economic Community*, 1968, No 144; Oberdorfer, Gleiss, Hirsch, *Common Market Cartel Law*, New York, 1971, para. 30.

[30] Commission Regulation No 67/67 dated 22 March 1967 (OJ 57, 25.3.1967).

[31] Mailänder, *Le règlement d'exemption de catégories d'accords d'exclusivité*, CDE 1968, p. 38 et seq.

[32] Spormann, *Konturen einer Europäischen Wettbewerbspolitik*, AWD des BB 1968, p. 131.

[33] See footnote 30 above.

Earlier, the Commission had already claimed that it was possible for prohibitions on exports into the common market to be applied to undertakings based in third countries. [34] Furthermore, in the well-known opinion given in October 1972 regarding imports of Japanese goods, [35] the Commission, in general terms, stated its basic principle as follows: the fact that some or all of the undertakings which are parties to an agreement have their headquarters outside the Community does not, in itself, prevent Article 85(1) from applying. The existence of such an agreement, therefore, can only become lawful after exemption pursuant to Article 85(3) following notification.

This theory has now been applied in a whole series of decisions which indicate a clear position on the part of the Commission. [36]

The attitude of the Court of Justice is, frankly, less easily discernible.

In the *Frubo* judgment on 15 May 1975, [37] regarding an agreement for importing goods originating in third countries into a Member State, it was held that trade between Member States may be affected when a given restrictive practice is likely to divert the natural flow of trade, without specifying that the trade in this connection must be trade between Member States.

However, in a judgment delivered shortly afterwards, on 26 November 1975, in the 'wallpaper' case, [38] the Court reverted to a literal interpretation of the condition to be satisfied in this connection, making it of prime importance that the agreement should have a direct incidence on the freedom of intra-Community trade. This was contrary to the Opinion of Advocate-General Trabucchi, who, after emphasizing the uncertainty surrounding the subject, maintained that a literal interpretation would not prove satisfactory.

23. The problem is, accordingly, not easy to solve. However, it is clear that a reasonably certain conclusion can be drawn from these divergent opinions: whilst interpretation over the years has not yet reached the point where the precondition in question (the existence of an obstacle to trade between Member States) can be considered superfluous, there are clear signs of readiness to accept a wider formula in the future. Under such a formula, the concept of affecting trade between Member States could be considerably extended until its technical connotations eventually vanish. Indeed, in individual cases which the Commission considers dangerous for reasons connected with general competition policy, it will be quite difficult, if the broader view described above is adopted, to construct a defence based on the absence of any adverse effect on trade between Member States. A further consequence of this increasingly broad view is the possible inclusion within the field of application of Articles 85 and 86 of agreements and abuses on the part of Community undertakings which have repercussions on exports to third countries.

This extension in scope can be justified on the basis of the argument that, in such cases, undertakings that are strangers to the agreement or that suffer the effects of an abuse may

---

[34] Commission Decision 72/238/EEC, *Raymond-Nagoya*, dated 9 June 1972 (OJ L 143, 23.6.1972).

[35] Commission Opinion regarding the import of Japanese goods subject to the provisions of the Treaty of Rome (OJ C 111, 21.10.1972).

[36] Commission Decisions 74/634/EEC dated 29 November 1974, *Franco Japanese agreement with regard to ball bearings* (OJ L 343, 21.12.1974); 75/77/EEC, *preserved mushrooms from Taiwan* (OJ L 29, 9.2.1975).

[37] Case 71/74 [1975] ECR 563.

[38] Case 73/74 [1975] ECR 1491.

have their export prospects affected. [39] Furthermore, if attention is directed more particularly to the effect that agreements have on prices and the practical possibilities of marketing a product abroad, there is an artifical obstruction to a certain quantity of goods coming onto the market in Member States, which alters the natural flow of trade within the EEC.

A final consequence of this trend in interpretation is to be found in the tendency to attach growing importance to the incidence on the Community of national agreements, for the purposes of applying Article 85. [40]

24. These phenomena, which have as their common denominator an extension of the field in which the competition rules apply, are different aspects of a twofold, but convergent, evolutionary current. On the one hand, there is the assessment of the role played by competition beyond the Community area, in an 'open' common market, as it were, integrated into the wider field of the international economy; on the other hand, the gradual reduction of the ambit of national markets, as a necessary consequence of increased integration and growing awareness of the effect on the Community of national agreements.

B. The concept of appreciable restriction of competition

25. The all-embracing nature of the common market, differentiated by sector, makes it impossible to distinguish, for the purposes of interpretation, one single model or standard for measuring competition when the rules on the subject are to be applied. However, in the context of the EEC Treaty, the Commission, like the Court, established the principle that below certain quantitative limits a restriction of competition does not amount to infringement of the prohibition contained in Article 85(1); this principle has given rise to a class of agreements of so-called 'small importance'.

In the *Völk* judgment, the Court adopted a criterion, already employed by the Commission, by which an agreement escapes the prohibition contained in Article 85(1) where 'it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question'. [41]

The 'insignificant' character will naturally have to be assessed by reference to the two conditions for applying Article 85, namely the likelihood on the one hand of affecting trade between Member States and, on the other, of preventing, restricting or distorting competition within the common market.

In the *Béguelin* case, the Court expressed itself in positive terms: '... in order to come within the prohibition imposed by Article 85, the agreement must affect trade between Member States and the free play of competition to an appreciable extent'. [42]

---

[39] Joined Cases 6 and 7/73 *I.C.I.* v *Commission* [1974] ECR 223; Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *sugar case*, [1975] ECR 1663.

[40] *Inter alia* see Commission Decisions 72/22/EEC dated 16 December 1971 (OJ L 13, 17.1.1972); 72/68/EEC dated 23 December 1971 (OJ L 22, 26.1.1972); 72/390/EEC dated 20 October 1972 (OJ L 264, 23.11.1972).

[41] Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295.

[42] Case 22/71 [1971] ECR 949.

The definition of such expressions as 'appreciable restriction on competition' and 'appreciable influence on trade' have been repeated subsequently in Commission decisions and Court judgments; this makes it possible to distinguish a series of guidelines although it is still difficult to generalize.

To provide more secure standards of reference the Commission, employing the precedent afforded by the *Völk* case cited above, published a notice on 27 May 1970 concerning agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community.[43] This communication had the express object of promoting cooperation between small and medium-sized firms and gives guidelines enabling the limits of an appreciable restriction below which an agreement is to be considered lawful to be defined in terms of products and turnover.

This attempt at defining in quantitative terms the limits of the class of agreements considered to be of insignificant or minor importance is clearly valuable. There is, however, room for doubt as to the practical effect of the definition thus proposed. The Commission itself states that its definition has no absolute value. The conclusion is that an *a priori* definition of the limits within which an agreement may be said to escape the application of Article 85 can never have anything but indicative value.

26. The restrictive effect of an agreement can indeed be assessed only by reference to the circumstances of each case, taking account, firstly, of the 'relevant market' factor, namely the market or part of a market where the undertakings are in competition. This depends on assessments in terms of geographical zones and product zones (and any substitutions that can be made in each case) without which it is impossible to determine the data required for measuring the importance of the agreement's effect on trade and the restriction caused by it.

C. The 'relevant market' concept

27. Any attempt to find whether trade between Member States is affected and/or the extent of the restriction on competition, which are prior conditions for the application of Articles 85 and 86, depend upon identifying the market which the agreement or abuse of a dominant position may concern.

In other words, a definition must be given of the market ('relevant market', *marché en cause*) on which the analyst is to concentrate his examination for the purpose of discovering (a) whether the action of the undertaking(s) falls within the ambit of the prohibition, and (b) in the case of an agreement that satisfies the conditions for falling within the ambit of the prohibition, whether it may nevertheless be authorized pursuant to Article 85(3). In short, the definition of the 'relevant market' is the yardstick for measuring the field in which the competition rules apply: the more restricted the relevant market, the wider will be the field of application, and the latter will tend to shrink as the definition of the relevant market is enlarged.

This definition appears to be inextricably bound up with the circumstances of each individual case, so that any generalization on the subject becomes difficult or even impossible.

---

[43] Commission Notice of 27 May 1970 (OJ C 64, 2.6.1970).

It is, however, possible to pick out the factors which have received most attention from the Commission and from the Court and to acquire further information by studying the way in which interpretation has developed.

To assess the relevant market it is necessary to define its geographical boundaries and the products involved.

28. In terms of geography, any attempt at a unitary definition of the market would be impractical. The precedents show that in some cases it has been treated as the common market in its entirety and in others as the world market.

In further cases, sub-markets have been identified on a more restrictive basis, corresponding to the territory of nation States or the 'substantial' or 'important' parts of Community territory.

29. As to 'the products in question', the text of Article 85(3) explicitly refers to them in connection with authorizations. But although there is no express mention made with regard to implementing prohibitions, here too the identification of products has an essential role to play in determining the level of restriction on competition.

Once again Community practice shows great flexibility in interpretation, perhaps because the Community executive, following a similar practice to that which has already been noted in respect of the ECSC, [44] relied substantially upon the identification of the products composing the relevant market as its chief tool for determining, in practice, the sphere in which it may take action under the competition rules, whether in the form of individual decisions or regulations. In the same way the Court, both on the occasion of appeals brought against Commission decisions and in preliminary rulings under Article 177, has established various rules on the subject.

These sources, when taken together, make it possible, purely by way of example, to list the following definitions of 'the products in question':

(a) 'goods to which the contract relates'; [45]
(b) 'products which are the subject of the agreement'; [46]
(c) 'goods which compete with the goods to which the contract relates'; [47]
(d) 'products considered by consumers to be similar by reason of their characteristics, price or use'; [48]
(e) 'similar goods at the same stage of distribution as that of the exclusive dealer'; [49]
(f) 'products covered by the same mark'; [50]
(g) 'raw materials necessary for manufacturing a specific product'; [51]
(h) 'spare parts for a given product'. [52]

---

[44] See Section II above.
[45] Commission Regulation No 67/67, see footnote 30 above.
[46] Commission Notice of 27 May 1970 (OJ C 64, 2.6.1970).
[47] Commission Regulation No 67/67, Article 2(1a), see footnote 30 above.
[48] Commission Notice of 27 May 1970, cited above; Commission Regulation (EEC) No 2779/72, Article 3(1a) (OJ L 292, 29.12.1972).
[49] Regulation No 67/67, cited at footnote 45 above.
[50] Joined Cases 56 and 58/64 *Grundig-Consten* v *Commission*, cited at footnote 26 above; Case 5/69, cited at footnote 41 above.
[51] Joined Cases 6 and 7/73, cited at footnote 39 above.
[52] Case 22/78 *Hugin* v *Commission* [1979] ECR 1869.

This list shows how difficult it is to apply, on a uniform basis, principles that are inevitably general and often contradictory. An examination of Community practice confirms the fact that it is impossible to trace any coherent or logical evolution; indeed it is common to find hesitation, and even withdrawal from positions that seemed at the time to be well established.

While admitting that the situation presents objective difficulties, it is not possible to overlook the very serious consequences that the resultant uncertainty entails for operators who are forced to make a prior judgment as to whether the practices in which they wish to engage are or are not permissible.

A special source of potential risk that must be pointed out is the very frequent tendency to restrict the relevant market to an excessive degree, either geographically or with regard to the products in question, which has the result of extending the ambit of the prohibitions in a totally unforeseeable way.

Further uncertainty occurs where, owing to the inclusion of clauses long held to be unlawful, the seriousness of the infringement seems to eclipse all consideration of the relevant market, thus virtually abolishing any defence based on an accused firm's lack of market strength.

This occurred, for example, in the *Miller* case, [53] where the Court, when considering a prohibition on exports, stated that any such clause, by its very nature, constituted a restriction of competition capable of affecting trade between Member States and thus providing grounds for the imposition of fines under Article 15 of Regulation No 17. Such a conclusion brings back into the ring the old and seemingly worn-out argument as to the possibility of holding certain typical anticompetitive practices, such as those listed in Article 85(1), to be unlawful in themselves because of their object without any need to examine their effect.

¶ 2. *The range of matters covered by the competition rules*

A. **Agriculture**

30. The rules on competition apply to production of and trade in agricultural products only to the extent determined by the Council (Article 42 EEC).

Under Regulation No 26, [54] made by the Council for that purpose, Article 85(1) does not apply to agreements, decisions and practices which form 'an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty'.

Other limits, set by the above-mentioned regulation concern agreements between farmers and agricultural associations belonging to a single Member State, where these meet the requirements of the regulation.

The Commission and the Court have been able to state their position, in well-known cases, regarding the interpretation of these rules, with special reference to:

---

[53] Case 19/77 *Miller International Schallplatten* v *Commission* [1978] ECR 131.

[54] Council Regulation No 26 of 4 April 1962 (OJ 30, 20.4.1962).

(i) the meaning of farmer, which excludes a fruit trader;
(ii) the definition of increased 'agricultural productivity';
(iii) a more accurate definition of what is to be understood by 'a fair standard of living for the agricultural community';
(iv) the circumstances that a market can be so heavily regulated that only a modest residual margin is left for competition. [55]

B. Transport

31. Council Regulation No 141 provides that Regulation No 17 is not to apply in the transport sector (Article 1), and requires appropriate provisions to be taken with regard to transport by rail, road and inland waterways (Article 2). This was done by Council Regulation (EEC) No 1017/68 and the regulations that subsequently supplemented it. [56]

It was debatable whether, in the absence of implementing regulations, Articles 85 and 86 EEC nevertheless applied automatically to sectors not covered by the provisions of Regulation (EEC) No 1017/68 cited above, that is to say to air and sea transport.

The judgment delivered by the Court on 4 April 1974 [57] answered that question in the affirmative.

The gaps in the rules are in the process of being filled through the work being done in the Commission on draft regulations dealing with air and sea transport respectively.

C. Banks

32. The Commission has adopted the position that the rules on competition and the regulations implementing them apply, in general, to the banking sector. [58] It is, however, undeniable that this sector, which to a varying degree falls outside the ambit of national rules on competition, presents aspects of special difficulty owing to its obvious connection with monetary and financial problems of a more general order.

In spite of numerous requests in the past for sectoral measures under Article 87(2)(c), no special exemption exists in this branch of the economy. Moreover, the Commission has recently stated its intention of carefully examining 'the compatibility with the competition rules of cooperation agreements linking banks in several countries, of certain terms governing the cashing of cheques and of the terms for access to the British foreign exchange broking market'. [59]

It is to be expected that in the future the rules on competition will be more and more vigorously applied, as Community directives relating to various aspects of banking in general, which have been under consideration for some time, reach fruition.

---

[55] See footnote 37 above, *Frubo* case; footnote 39, *sugar case*; footnote 36, *Taiwan preserved mushrooms*; more generally, regarding national organization of market, Case 48/74 *Charmasson* [1974] ECR 1383.

[56] See Council Regulations Nos 62/141/EEC of 26 November 1962 (OJ 124, 28.11.1962) and 68/1017/EEC of 19 July 1968 (OJ L 175, 23.7.1968).

[57] Case 167/73 *Commission* v *France* [1974] ECR 359.

[58] *Second Report on Competition Policy*, points 50-53; *Eighth Report on Competition Policy*, point 32.

[59] See footnote 58 above.

¶ 3. *Agreements*

A. Distribution contracts

33. In the course of the 1960s, Community policy on agreements was directed towards exclusive dealing clauses in distribution contracts. Considerations of two kinds seem to have prompted the interest taken in these agreements, which, although capable of distorting free competition, do not, as such, figure among the restrictive practices affecting mutual competition.

In the first place, the fact that it was not thought advisable, at the time of making Regulation No 17, [60] to exempt from obligatory notification a type of contract so widespread resulted in a large accumulation of files with the Community authorities; consequently the problem had to be tackled, quite apart from any value judgment regarding the dangerous character of these agreements, if only to enable pending business to be completed.

In the second place, there can be no doubt that exclusive dealing clauses, and especially territorial protection clauses, make for the erection of barriers between Member States and present an obstacle to the unification of markets that constitutes one of the principal objectives of the Treaty of Rome.

For this reason, the Commission, from the outset, followed by the Court, accepted the requirements of distribution at Community level only within the limits of so-called 'simple' (or 'zonal') exclusive dealing, that is to say limited to the grantor's obligation to supply exclusively the concessionaire in a given area, or to the concessionaire's obligation to obtain supplies exclusively from the grantor or to reciprocal obligations with regard to furnishing and obtaining supplies.

The Commission, in Regulation No 67/67/EEC, as subsequently amended, went so far as to provide for block exemption of agreements containing simple exclusive dealing clauses; a draft amendment of this regulation is at present under examination and will be further improved.

I. Clauses granting absolute territorial protection

34. The prohibition of territorial protection clauses remains as the outstanding achievement of Community antitrust operations in the early years.

While there can be no doubt of the necessity for it from a chronological viewpoint, the indiscriminate prohibition of any form of territorial protection seems to call for further reflection now that a more advanced stage of integration has been reached, accompanied by considerable economic changes.

This prohibition is likely to make it harder for producers to penetrate export markets under EEC rules because of the difficulties their firms are likely to experience in finding exclusive distributors who are willing to tolerate parallel imports. The situation of small and medium-sized firms is particularly difficult, as they have no prospects of vertical integration: their bargaining power is usually insufficient to induce a foreign concessionaire to undertake the initial expenses (advertising, warehousing, sales network) and risks

[60] Council Regulation No 17 of 6 February 1962 (OJ 13, 21.2.1962).

(if the product is not already established on the market), without high remuneration and a correspondingly higher selling price which would immediately attract parallel importers. Furthermore, it is not always possible for small and medium-sized firms to have recourse to agency or commission contracts, which in principle escape the prohibition contained in Article 85(1), especially in view of the Commission's notice of 24 December 1962.[61] In many States national laws governing such contracts apparently provided excessive guarantees in cases where, as often happens, the producer is in a weaker economic position than the distributor; the producer then experiences genuine hardship in being bound by contracts that are particularly onerous in respect of termination, repayment of distributor's costs and fidelity rebates.

One effect of prohibiting absolute territorial protection is the creation of a rather rigid distributive system, favouring the large firm, with a tendency towards oligopolistic distribution in a large number of key sectors. To use abstract terms, the choice is between a policy aimed at promoting the integration of national markets at producer level and a policy pursuing the same aims at distribution level. As always, the truth lies between the two extremes: far from wishing to defend the indiscriminate authorization of absolute territorial protection clauses, the intention here is merely to stress the need for a more flexible policy that is more ready to take account of the individual circumstances and, in particular, more aware of the needs of small-scale and medium-scale industry.

II. Selective distribution systems

35. Selective distribution systems serve a genuine purpose in many sectors (motor vehicles, clocks and watches, perfumery, luxury articles in general, household electrical goods, consumer electronics, to name but a few), which the Commission has not refused to recognize in principle, even though the selection of sales points entails, by its very nature, quantitative and qualitative restrictions, concerning the number and the professional competence of distributors. The principal objectives of selective distribution broadly amount to safeguarding the quality of the product and/or maintaining efficient guarantee and after-sales services provided by distributors. The pursuit of these objectives, lawful in itself, in so far as it corresponds to a particular interest on the users' part, can, nevertheless, be abused, especially (but not exclusively) when manufacturers occupy a dominant position. This is why the Commission, after an initial display of tolerance, gradually came to make a more rigid distinction between restrictive clauses that are admissible and clauses that exceed the reasonable requirements of selective distribution, involving a restriction on trade, with the consequent 'closure' of markets and artificial manipulation of resale prices in the various Community countries, sometimes accompanied by a drastic reduction of competition in a given make.

36. Admittedly, the case-law does not yet promise reliable, distinctive criteria, chiefly because it often proves impossible to apply to certain sectors principles established by the Commission and the Court in cases relating to other sectors.

The Commission seems to be well aware of this and, in the interests of greater clarity, has started work on projected block exemptions on a sectoral basis. In this connection, priority will have to be given to the motor vehicle sector, where the *BMW* case, which constitutes an important precedent, is one of the best known to have come before the

[61] OJ 139, 24.12.1962.

Court. [62] In the more distant future, it is to be expected that regulations will also be made covering other sectors.

37. The following principles seem to be accepted as representing the law:

(a) Clauses providing for purely qualitative selection escape the prohibition contained in Article 85(1), that is to say selection based on a concessionaire's professional qualities or on special features required at resale premises, provided that those restrictions are not improperly imposed in order to refuse to supply dealers who export the products. [63]

(b) On the other hand, except in cases where authorization is granted under Article 85(3), restrictive clauses based on quantitative criteria are caught by the prohibition, that is to say clauses designed to limit the number of concessionaires by reference to a given geographical area, whether directly, or indirectly by imposing on concessionaires heavy obligations with regard to the stocks or ancillary services. [64]

(c) The Court, in substance, confirmed the Commission's position in its judgment in *Metro* v *Saba,* which displays reasonable caution on the subject of price competition, in accordance with the more recent conclusions reached by economists. With regard to possible restrictions on intra-brand competition and the likely repercussions on price competition, the Court declared that such competition, important as it is, does not merit absolute priority, since it is not the only effective form of competition. Similarly, as regards choosing dealers, the Court has accepted that selection is lawful, provided the qualification requirements are assessed objectively without discrimination. This means that a wholesaler's obligation to supply authorized dealers only is legally binding and enforceable by the producer concerned. [65]

B. Patent licensing agreements

38. At an initial stage, the Community institutions displayed a basically tolerant attitude towards agreements concerned with industrial property rights. Pursuant to Article 4(2)(2)(b) of Regulation No 17 this type of agreement between two parties is not notifiable, unless it imposes obligations on the party granting the licence. However, in the light of subsequent interpretation, the scope of this rule appears to be somewhat reduced. Whilst the Commission originally stated, in its notice of 24 December 1962 (the so-called 'Christmas message'), that the grantor's obligation to regard the licence as exclusive to the licensee was not caught by the prohibition contained in Article 85(1), it subsequently modified its position, especially in some decisions taken in 1971 and 1972. [66] The effect of these is that a clause granting exclusive rights is not 'inherent' in the exploitation of an industrial property right by granting licences.

---

[62] Regarding this case see Commission Decisions 75/73/EEC of 13 December 1974 (OJ L 29, 3.2.1975); 78/158/EEC of 23 December 1977 (OJ L 46, 17.2.1978); CEJC judgment in Joined Cases 32, 36 to 82/78 *BMW Belgium* v *Commission* [1979] ECR 2435.

[63] Commission Decisions 70/332/EEC of 30 June 1970, *Kodak* (OJ L 147, 7.7.1970); 70/488/EEC of 28 October 1970, *Omega* (OJ L 242, 5.11.1970); 75/73/EEC of 13 December 1974, *BMW*, cited at footnote 62 above; 76/159/EEC of 15 December 1975, *Saba* (OJ L 28, 3.2.1976).

[64] See footnote 63 above; decisions in the *Omega*, *BMW* and *Saba* cases.

[65] Case 26/76 *Metro* v *Commission* [1977] ECR 1875.

[66] See footnote 61 above; also Commission Decisions of 22 December 1971, *Burroughs-Delplanque* (OJ L 13, 17.1.1972); 22 December 1971, *Burroughs-Geha* (OJ L 13, 17.1.1972); 9 June 1972, *Davidson Rubber* (OJ L 143, 23.6.1972); 9 June 1972, *Raymond-Nagoya*, cited at footnote 34 above.

This principle clearly renders the exemption from obligatory notification meaningless for all practical purposes, and individual notification with all its resulting disadvantages becomes necessary once again.

39. The problems noted above, at least as initially formulated, turn on the distinction between the existence and the exercise of an industrial property right. Any unitary solution, in itself debatable on grounds of expediency, is made even more remote by the fact that such a right has its source in national law (Article 36 EEC), whilst the way in which it may be exercised is governed by Community law.

Without going into detail regarding these problems, one basic fact is evident: the need for notification in practice has made the Commission take steps towards adopting a draft regulation concerning the application of Article 85(3) to some categories of patent licensing agreements.

The progress of the draft regulation has not been easy: even in its final version, it continues to arouse lively criticism from interested circles and from experts.

This is not the place to analyse the fundamental choices to be found in the text of the draft: the comments below are designed merely to stimulate reflection on the advisability of employing the framework regulation method in a sector like that of patent licences, even in the form of block exemption. There is a potential conflict between allowing an industrial invention to be exploited only under licence and protecting free competition. General regulations governing the subject are accordingly difficult to propose, because, as always when there is a conflict between two positions which, in principle, are equally deserving of protection, the problem is not so much to find the best general solution as to recognize, in each individual case, which interest should prevail. A practical examination of comparative law, especially the practice of the USA, will lend support to this evaluation, since the 'licence market' cannot be artificially confined to the Community context.

The existence outside the Community of countries with a high level of technology provides an inducement for reducing to a minimum the lack of harmonization between legal systems which is likely to prove an obstacle both to import and to export of technology.

In this connection, an opinion recently expressed by American experts points to a marked difference in the systems: 'As demonstrated above, the proposed group exemption will effectively prevent companies with both patented and unpatented technology from engaging in a wide variety of practices that are legal under United States law and that generally serve significant, legitimate commercial and social purposes.' [67]

Further doubts may arise as to the practical results that may be expected from a draft regulation with such extremely detailed and complex provisions: it includes a list of typical clauses, some compatible and others incompatible with exemption, and a series of cumulative conditions to be satisfied as regards the duration of the contract and modes of sale.

---

[67] Handler and Blechman, 'An American View of the Common Market's Proposed Group Exemption for Patent Licences', *The International Lawyer*, 1980, p. 427. The draft regulation was published in OJ C 58, 3.3.1979.

It is doubtful whether business firms are in a position to make *a priori* judgments with adequate certainty regarding compliance or non-compliance with the regulations governing block exemption: it is certainly open to question whether, in this particularly complex field, the block exemption technique is the right instrument for ensuring genuine clarification of the various problems and thus relieving the Commission of the burdensome task of examining each case individually.

C. **Concerted practices**

40. As already indicated, the Commission, at the outset, concerned itself predominantly with distribution contracts, which fall within the vertical agreement category. In comparative law, on the other hand, it is usually found that in implementing antitrust regulations attention is focused on horizontal agreements.

No study of the phenomenon can be complete without an examination of the cases handled by the Commission during this period; these were all cases involving written agreements, which accordingly presented no problem from an evidential point of view. Proof of the existence of an agreement can, however, constitute one of the most delicate problems to be encountered in applying the rules on competition, when an agreement is implemented not by way of a written agreement but by way of a concerted practice.

Disregarding the theoretical arguments concerning the nature of the concerted practice, it is enough merely to note that concerted practices raise special problems regarding definition and identification. These problems were tackled by the Commission and the Court from the beginning of the 1970s, particularly in the well-known dyestuffs case and the case concerning the European sugar industry. [68] The question at issue here was that of horizontal agreements which had not been the subject of formal agreements for that specific purpose.

According to the principles laid down on this point, a concerted practice is found to exist when two or more undertakings adopt a series of actions that are found to coincide objectively and appear on the evidence which may be of varying kinds, to be the result of coordinated activity by the undertakings or of conscious adaptation of action by each of the undertakings to correspond to that of the other or others. In practical terms, in the absence of documentary proof provided by the text of an agreement between the undertakings, the finding that a concerted practice exists depends on the criteria employed in assessing the evidence available for the purpose of showing the conscious or intentional nature of the action, as mentioned above.

Assessment becomes especially delicate when the case in question contains elements which are attributable to special features of the economic sector concerned and can explain, on grounds other than concertation, the fact that the undertakings' actions coincide objectively.

The most revealing case in this connection is that of a marginal undertaking, marginal, at least, in terms of percentage control of the market, that is to say a firm of relatively modest size that operates inside a specific slot in a wider market with an oligopolistic structure where other firms of greater size and strength are operating.

---

[68] Cases 48, 49, 51 to 57/69 *I.C.I., BASF and Others* v *Commission* [1972] ECR 69. On this subject see Bernini, 'Le regole di concorrenza e la realtà economica: autonomie e possibili contrasti emergenti dalla recente pratica comunitaria', *Proceedings of Siena Conference*, 1977, p. 88.

In such cases, it can be difficult to distinguish a deliberate intention to take part in concerted action with others, especially where this takes the form of consciously adopting an identical behaviour pattern, from an independent decision, lawful in itself, to fall in line with the pricing policy practised by the leader or leaders.

Such a decision results from a realistic assessment of the situation: a minor firm that acted otherwise, by declaring a price war, would soon disappear.

This example serves to give additional proof of the need for constant reference to the facts of life in the economic sector concerned and provides an opportunity to add that further difficulties will arise when a restrictive behaviour pattern makes its effects felt in more than one sector.

D. Cooperation between undertakings

41. This subject has attracted the attention of the Community institutions since the 1960s. The rules on competition—which, taken to an extreme, might act as a disincentive to any form of cooperation between firms—had to be prevented from setting up an obstacle to integration between undertakings from different Member States. Such cooperation is in fact necessary, at least within certain limits, for meeting competition from third-country undertakings.

The problems that arise in this field are clearly analogous to those which will be discussed later in connection with concentrations of undertakings.

It was during the period when the Commission was showing itself most ready to accept the need to reinforce European industry, even as regards the size of undertakings, that it gave the most encouragement to all forms of cooperation, even between large firms. Proof of this is to be found in the notice dated 29 July 1968, [69] as well as in a steady stream of regulations and a large number of decisions [70] in which Article 85(1) was held not to apply or which granted authorizations under Article 85(3) for various types of cooperation, without special safeguards and irrespective of the size of the firms involved.

42. The change of principles and objectives in the industrial policy proposed by the Commission resulted in a corresponding change in its initial approach to the subject of cooperation between firms; this change was also due in part to more mature consideration, in the light of experience, of the adverse effects such cooperation might have on competition.

In the first place, greater emphasis was put on the necessity for distinguishing cooperation between small and medium-sized firms from cooperation between large firms. Once the myth of large size as an element desirable in itself had been dissipated, the Commission took every opportunity of reaffirming its decisive preference for small and medium-sized firms to which reference has already been made, extending it into the field of cooperation between firms.

---

[69] OJ L 75, 29.7.1968.

[70] Commission Decisions 67/454/EEC of 27 June, *Transocean Marine Paint* (OJ 163, 20.7.1967); 68/128/EEC of 26 February 1968, *Eurogypsum* (OJ L 57, 5.3.1968); 68/319/EEC of 17 July 1968, *ACEC-Berliet* (OJ L 201, 12.8.1968); 69/242/EEC of 22 July 1969, *Jaz-Peter* (OJ L 195, 7.8.1969); 72/41/EEC of 23 December 1971, *Henkel-Colgate* (OJ L 14, 18.1.1972).

Evolution of the principles for interpreting the rules led to a corresponding extension of the field in which Article 85(1) was held to apply, chiefly to enable the Commission to exercise direct control over participation agreements notified by the parties (and to make them subject to certain conditions). In this context, priority was given to examining all the factual circumstances surrounding an agreement rather than its content, as seemed to have been done previously.

The Commission even considered that joint-buying agreements fell within the ambit of Articles 85 and 86, despite the advantages that these agreements often present for the consumer. [71]

43. Another problem that arises in connection with cooperation agreements concerns the formation of joint undertakings, on a temporary or permanent basis.

In this context, depending on the special features of the individual case, the Commission either held that the rules governing agreements were applicable, or else treated the joint enterprise as a concentration, at least in part, entailing the possible, and sometimes cumulative, application of Articles 85 and 86.

The distinctive criterion was whether the regrouping only affected certain of the founder firms' functions, such as buying, selling, research and development, or whether it created an independent economic unit carrying out all the functions of a firm, with the constituent firms themselves withdrawing from the market in question. When the constituent firms continue to coexist alongside the new joint undertaking, it becomes necessary, as regards competition, to examine the respective positions of the various undertakings and their position *vis-à-vis* third parties, especially with a view to the possible application of Article 85(3).

E. **Authorizations granted pursuant to Article 85(3) of the EEC Treaty**

44. The provision in Article 85(3) EEC, which introduces a derogation from the general prohibition on agreements, is of capital importance, especially as regards the future, for reasons which will be repeated at the end of this study.

The text of the article is detailed. It provides that the prohibition may be lifted when agreements, decisions by associations of undertakings or concerted practices, considered in isolation or as a class, contribute 'to improving the production or distribution of goods or to promoting technical or economic progress'. Besides verifying the existence of positive conditions, for the purposes of authorization it will also be necessary to ensure the absence of the negative indications laid down in the Treaty, where it is expressly stated not only that consumers must be allowed a fair share of the resulting benefits, but that the agreements in question must not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

---

[71] *First Report on Competition Policy*, point 40; Commission Decision 69/240/EEC of 16 July 1969, *Quinine agreement* (OJ L 192, 5.8.1969); Cases 41, 44, 45/69 *Chemiefarma* v *Commission* [1970] ECR 661; Commission Decisions 68/318/EEC of 17 July 1968, *Socemas* (OJ L 201, 12.8.1968); 75/482/EEC of 14 July 1975, *Intergroup* (OJ L 212, 9.8.1975); Commission intervention to set aside a Belgian agreement in the industrial timber sector, Bull. EC 10-1975, point 2104; similar action with regard to international associations of department stores, *Ninth Report on Competition Policy*, point 89.

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission and the Court, accordingly, enjoy a wide discretion when interpreting these requirements with regard to the circumstances surrounding each individual case, since the requirements, let it be noted, have to be assessed in markedly economic terms, thus involving real value judgments on firms' behaviour viewed in the light of the Treaty's general objectives.

45. Without repeating the terms of an analysis that is already well known, one substantial difference between the scope of Article 85(3) and that of the 'rule of reason' which evolved in the context of United States antitrust work should be pointed out.

In the case of the EEC, it is not a question of justifying agreements on the basis of the reasonableness of the motives behind their creation; the test provided for under Article 85(3) is clearly a comparative one, in the sense that they can qualify for authorization only if the negative aspects of an agreement restricting competition are outweighed, in the case in question, by the benefits set out in the Treaty.

There is, accordingly, an 'efficiency' test which is not to be found in United States antitrust work.

This is why the case-law on the subject of Article 85(3) shows signs of being influenced by considerations of market structure, by future implications for competition policy and even by the recognition of general or special interests thought to merit protection.

It is scarcely necessary to recall a recent case (*Métro* v *Saba*) where the Court [72] held that the definition of technical and economic progress must include the maintenance of employment as a stabilizing factor, especially in a difficult economic climate.

46. The Commission has such wide powers under Article 85(3) that a word of caution is called for, on grounds which will be explained in the general assessment of the future prospects for competition policy which forms the conclusion to this essay.

Apart from this general observation, it must also be remembered that to operate the individual authorization mechanism promptly imposes a considerable workload on the Commission, involving administrative difficulties which will also be discussed. Incentives for future development should, therefore, include proposals for a system under which firms' expectations of a minimum degree of certainty would be met, not by attempts at block exemption which have proved unsatisfactory as a substitute for individual notification, but rather by means of notification which, in the absence of objection by the Commission within a reasonable time, would give the agreement definitely valid status.

The need for this makes itself especially felt every time an irreversible situation is created by the execution of an agreement (for example, creation of joint undertakings, divulging industrial secrets, transfer of technology), so that any subsequent declaration of the agreement's unlawful character would cause one of the parties irreparable damage.

---

[72] See footnote 65 above. On this subject in general see Joliet, *The rule of reason in antitrust law*, Liège, 1967, p. 109 et seq.

47. A further subject for reflection is the tendency already noted, now making its effects felt in the EEC, to provide a double set of rules, or, as the Americans put it, to distinguish between 'the law of the big' and 'the law of the small'. It is understandable that the Commission watches large firms more closely and applies the rules more rigorously where they are concerned. This attitude, however, entails increased costs in terms of departmental efficiency, particularly where Article 85(3) is to be applied. This watchfulness, if not carefully exercised, could occasion delays and uncertainties likely to penalize firms in an unacceptable manner.

In order to minimize these uncertainties and resultant difficulties, the Commission adopted the practice of sending informal letters ('comfort letters', *lettres de réconfort*) without any official standing, stating, in substance, that in the present state of affairs the agreement notified does not appear to infringe Article 85(1). Such letters are often sent towards the end of negotiations during which firms agree to modify an agreement in the manner required by the Commission.

These letters, as the recent 'perfumes' case makes especially clear, do not eliminate uncertainty, since they pose serious problems, particularly as regards their standing in law and the protection that they provide for firms before national courts. [73]

¶ 4. *Abuse of a dominant position and concentration of undertakings*

48. One of the most characteristic features of European antitrust work in the 1970s is to be found in the abundance and diversity of the actions brought under Article 86; these had a direct influence on market structure owing to the control exercised over the use of dominant economic power and, within certain limits at least, over concentrations of undertakings.

An analysis of case-law makes it clear that the objectives in applying Article 86 amount to elimination of abuses concerning price differentials within the Community, refusal to sell, discriminatory treatment of suppliers and consumers, and imposition of excessive prices.

The *Continental Can* case established, moreover, that an abuse can consist in an undertaking in a dominant position taking over a competitor and thus strengthening its position to the point where the degree of domination thus acquired represents a substantial obstacle to competition, leaving in existence only firms which have their actions dictated by the dominant undertaking.

A. **Determining the existence of a dominant position**

49. The field in which Article 86 is applied has been considerably extended owing to the prevailing tendency to reduce the degree of market strength necessary for establishing the existence of a dominant position.

---

[73] Joined Cases 253/78 and 1 to 3/79 *Guerlain, Rochas and Others* [1980] ECR 2327.

Such a position is accordingly not confined to a monopoly or quasi-monopoly situation but can also be found in cases like that of the United Brands Company, whose market share is about 40%. [74]

However, market share is not, in itself, enough to prove the existence of a dominant position. In the case mentioned above, the Court applied a more flexible concept of dominant position, stating that the market share must not be negligible, but also taking into account, as an additional factor, obstacles to market access by third parties. The Court held, moreover, that in establishing the existence of a dominant position, consideration may similarly be given to the firm's allegedly wrongful acts. Finally, still on the subject of evidence to prove a dominant position, the Court ruled that a firm's economic strength is not to be measured by its profitability; a modest profit margin, or even a short-term loss, is not incompatible with a dominant position, just as large profits can coexist with effective competition. [75]

B. Article 86 EEC and concentration of undertakings

50. A characteristic feature of developments in interpreting Article 86 is its extension to cover concentrations between undertakings, for which there is no express provision in the EEC Treaty.

This omission is no accident even taking into account the different characteristics of the new Community when compared with the ECSC, traditionally heavily concentrated. Moreover, concentration of undertakings was considered at the time as an instrument enabling firms to adapt their size to an enlarged economic zone requiring economies of scale. Intra-Community concentrations were still welcomed in 1970, at the time when the celebrated report on Community industrial policy, known as the 'Colonna Report' [76] appeared.

The possible relevance of concentration when implementing the rules on competition did not, however, escape the Commission: already in the mid-1960s, after setting up working parties on the relationship between policy on agreements (Article 85) and on concentration of undertakings, the Commission, in a memorandum on the subject, [77] reached the conclusion that Article 85 ought not to be construed as applying to concentrations. This choice seems to have been dictated mainly by the general conviction at the time, that European industry was insufficiently concentrated.

From the point of view of legal technique, there was no necessity for this conclusion, which resulted in a lost opportunity for competition policy; it restricted the Commission's power to act just at the time when the tendency to concentration (especially with extra-Community firms) was at its greatest.

Nowadays the situation has changed. It is common knowledge that concentration has been the subject of a critical reappraisal, after the almost unanimous favour that it enjoyed in earlier years. The return to favour of the small or medium-sized undertaking,

---

[74] Case 27/76 *United Brands Co.* v *Commission* (the 'banana case') [1978] ECR 207.

[75] Ibid.

[76] Commission, *Memorandum on the Community's industrial policy*, Brussels, 1970.

[77] The positions on Article 85 and concentrations expressed in the Commission's memorandum are repeated in Commission, *The problem of concentrations in the Common Market*, Studies, Competition series, No 3, 1966.

on the other hand, is also well known; the vital role played by this type of firm is once again fully recognized even in the field of technological development and innovation. Deprived of the use of Article 85, the Commission had to fall back on Article 86 for exercising control over concentrations; but this control remains limited solely to situations where there is an undertaking in a dominant position.

Serious doubts remain as to the efficacy of such control. It is perhaps revealing that after the *Continental Can* case, which was in effect limited by the Court to a mere statement of principle, the Commission never again found in any well-known case that the necessary conditions existed for a decision to prohibit. One may well ask whether the conclusion would have been the same if these cases had been examined in the light of Article 85.

51. This is the background of the draft regulation on prior control of concentrations; it was submitted for the first time in 1973, but has still not been adopted owing to various objections that it has encountered from the Member States. The attitude adopted in the draft is in itself understandable and is the logical consequence of the Commission's belief that 'the right amount of competition' must exist 'in order for the Treaty's requirements to be met and its aims attained'. [78]

However, the introduction of an institutionalized system of preventive control, based solely on the principle of preserving a competitive environment, leaves the way open to a series of reflections which will be resumed, in more general terms, at the end of this study.

Random intervention by the Commission in the case of manifestly unhealthy concentrations can only be conceived in the context of applying the rules on competition. General institutionalized control of concentration, however, appears a genuine instrument of economic policy. In this context, a value judgment based solely on the likelihood of a concentration having an adverse effect on competition would be particularly crippling, especially in the present period of economic crisis. Concentration is a means for attaining objectives like restructuring, division of labour, protection of social values, which call for the support of all the parties concerned and should be incorporated into the framework of an overall policy at Community level.

Section IV — Problems arising from application of the competition rules in the ECSC and EEC

52. Quite apart from the intrinsic novelty of their content by comparison with ideas previously current in European countries, the competition rules provided for in the two Treaties are an inherent part of a legal system which does not constitute a complete whole in the same way as national laws and regulations.

It is therefore understandable that implementing these rules caused difficulties which often extended beyond the competition sector itself and involved other branches of law, such as international law, constitutional law, administrative law and procedural law, to name only the principal ones.

---

[78] *Ninth Report on Competition Policy*, Introduction, p. 10.

¶ 1. *'Extraterritorial' application of the competition rules*

53. One of the first and most important questions in this connection regards the 'extraterritorial' application of the competition rules.

This problem is the leitmotiv of a frequent argument with colleagues from the other side of the Atlantic. Fair play accordingly requires the text of a recent opinion from Smit [79] to be quoted here: 'The Europeans were in the forefront of those who accused the United States of extending its antitrust laws extraterritorially in violation of international law. There is every indication that the EEC is prepared to go equally far.'

This opinion does not appear to be altogether correct theoretically. Within the EEC, the so-called 'effects doctrine' was not in fact accepted as unreservedly as in United States case-law. To be more exact, the Court of Justice has so far avoided giving an opinion on this doctrine, which belongs to the realm of public international law. Like the Commission, the Court has confined itself to considering the parent company (foreign to the Community) and the subsidiary company it controls (formed in the Community) as constituting one and the same entity. [80] This position, moreover, accords with the principles already explained regarding competition within firms, whereby a restrictive course of action established between parent company and subsidiary does not amount to a restriction of competition when it simply represents a division of tasks within one and the same economic entity, provided, of course, that the subsidiary has no effective economic independence.

To impute to an extra-Community parent company actions by its Community subsidiary on instructions by the former is merely to apply *mutatis mutandis* the principle set out above.

54. The actual text of Articles 85 and 86 lends support to the extraterritorial scope theory, since it refers to restrictions of competition 'within the common market' (Article 85) or 'within the common market or in a substantial part of it' (Article 86). The fact that the undertakings responsible have their headquarters outside the Community is accordingly quite irrelevant.

From the practical angle, extraterritorial application of the competition rules is thus an accepted fact in the Community orbit.

The position is, moreover, perfectly understandable when it is realized that the competition rules would otherwise be quite meaningless if firms could elude the jurisdiction of the Community authorities by relying on territorial factors.

This, of course, applies to all laws on competition. At international level the problem thus becomes extremely complex; two or more legal systems could indeed be held to have jurisdiction over the same course of action on the part of one or more firms where the effects are felt in several economic zones.

Application of the competition rules raises further problems still when it entails taking proceedings in other States.

---

[79] Smit, 'Recent Developments in the EEC — Antitrust and the Court of Justice', AJCL, 1980, p. 338 et seq.
[80] *Inter alia* see Joined Cases 6 and 7/78, cited at footnote 39 above.

In conclusion, once this fact has been recognized, strenuous efforts will have to be made in the future to ensure at least a minimum of coordination at international level. [81] Otherwise, extraterritorial application of competition rules, justifiable as it is, will bring about extremely confused and hazardous situations with consequent injustice and inconvenience for firms.

¶ 2. *The relationship between Community law and the domestic law of Member States*

55. This problem arises, of course, in the EEC, because of the coexistence of Community rules alongside rules belonging to the sovereign domain of the Member States, both affecting competition.

The subject is highly topical, especially since the recent 'perfumes' case.

In the well-known *Wilhelm* case, [82] the Court admitted the general principle whereby one act (in this case an agreement) may constitute a breach of both Community and national rules. Accordingly two sets of proceedings could conceivably be started concurrently for enforcing two sets of rules.

The Court, however, admitted that although the possibility of twofold proceedings logically implied cumulative penalties, 'a general requirement of natural justice ... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed'. [83]

In the above case it was also established that concurrent application of a national system 'may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it'. [84]

Consequently, national law may entail prohibitions that are not provided for in the Treaty, even where there has been negative clearance under Article 2 of Regulation No 17. On the other hand, if national authorities were to refrain from implementing a prohibition contained in the Treaty and to rely on less rigorous domestic provisions, this would constitute a breach of the Treaty.

When, however, authorization has been granted under Article 85(3), national authorities may not impose penalties for the practice in question on the ground that it is unlawful under the provisions of a more rigorous domestic rule. The same answer should apply when an agreement is exempt pursuant to a regulation applicable to certain classes of agreements, although this aspect was not discussed in the *Wilhelm* case.

56. The problem is different when a prohibition is deemed to be inapplicable as a result of one of those informal letters from the Commission described above. [85] The 'perfumes' case seems to indicate that an intention on the part of the Commission to take no action

---

[81] The OECD from time to time does some work on cooperation between member countries on restrictive practices affecting international trade. See *Ninth Report on Competition Policy*, point 33.

[82] Case 14/68 [1969] ECR 1.

[83] Case 14/68 [1969] ECR 1, at p. 16.

[84] Case 14/68 [1969] ECR 1, at p. 15.

[85] See point 47 above.

regarding certain practices cannot preclude the application of more rigorous national rules, where such intention has not been embodied in a formal act equivalent to a decision.

The theory of the primacy or supremacy of Community law appears to be firmly anchored in terms of principle; the final results of the principle, however, have still to be made clear in case-law, as no doubt they will be in the course of time.

¶ 3. *Pecuniary sanctions for infringing the competition rules*

57. The pecuniary sanctions provided for in cases where the competition rules are infringed (Article 65(5) and Article 66(6) and (7) ECSC; Articles 15 and 16 of Regulation No 17) are not of a criminal law nature.

Regulation No 17, in Article 15 (on fines) and Article 16 (on periodic penalty payments), envisages two different types of infringement by firms:

(a) failure to comply with obligations of a procedural nature (absence of reply, incorrect reply, refusal to submit to investigations ordered pursuant to a Commission decision);

(b) failure to observe the prohibitions contained in Articles 85(1) and 86.

With regard to the latter type of infringement, Article 15 makes infliction of a fine depend upon the infringement being committed deliberately or negligently.

Case-law shows that the Court of Justice has interpreted this condition by reference essentially to common sense criteria, such as a firm's structure and professional competence, the real likelihood of an adverse effect on competition resulting from the practice introduced or the fact that the course of action held to constitute an infringement of Articles 85 and 86 also infringes the provisions of national laws on the subject.

However, in the *Commercial Solvents* case and the *European sugar industry* case, [86] the Court refused to accept as a valid excuse the fact that neither a refusal to sell nor a fidelity rebate had in the past ever been declared contrary to Article 86. On the other hand, in the *General Motors* case, the Court decided that there is no infringement of Article 86 when a company in all good faith does not know that its price is excessive and remedies the matter without delay. In connection with the imposition of fines, Advocate-General Mayras stated that the use of the term 'intentionally' necessarily implies 'that the author of the infringement has acted intentionally with the will to commit an act which he knew to be unlawful and prohibited by the Treaty and conscious of the unlawful consequences of his behaviour'. [87]

58. These elements have to be assessed within a body of case-law—cases on competition—where prohibitions are, so to speak, drafted line by line, as the Commission and the Court encounter fresh cases, more complex situations, and test cases often chosen for the purpose, intended to further the development of Community competition law.

That is why it is so important to know—or to be in a position to know—what constitutes an unlawful act which warrants a finding of infringement and imposition of a fine. It

[86] See footnote 39 above.

[87] Opinion given on 29 October 1975 in Case 96/75 *General Motors* v *Commission* [1975] ECR 1367, at pp. 1382 and 1389.

cannot be denied that with time, particularly as antitrust law has developed so rapidly, situations have arisen where a given undertaking acted in good faith in introducing a practice which was later censured. This is also demonstrated by the fact that, in the field of competition, many firms have made a point of obtaining approval from their legal advisers before putting into effect practices which the Commission, many years later, condemned.

Not only has the Commission failed to recognize such a move as proof of good faith, it has even taken the opposite point of view and argued that, in the face of doubt, the firm should have shrunk from putting the disputed practice into effect. [88] Caution must be exercised in this respect, not as regards the overall assessment of precedents, which are quite reasonable, but as regards the attitude thereby adopted.

59. Nowadays, in drawing up their plans, companies are increasingly obliged to observe *vis-à-vis* antitrust law what the Americans would call 'self-compliance'. This requirement imposes specific responsibilities on managers, legal and economic advisers and even, as emphasized by Temple-Lang, on auditors. [89]

Since the responsibility rests on these people, it must be recognized how difficult it is for them to anticipate what might subsequently be held to be illegal, bearing in mind the continual development of case-law.

This is why it is desirable that in assessing the element of negligence or of intention to infringe Articles 85 and 86 greater account should be taken of the circumstances just discussed.

¶ 4. *The rights of the defence*

60. As the competition rules came to be implemented, problems arose with regard to protecting the rights of the defence. These problems are not only concerned with the procedural system laid down by the combined provisions of the Treaty and Regulations No 17 and No 99/63 [90] (the system in question being, it must be admitted, rather rudimentary), but also, and more particularly, with recognition of a general constitutional principle regarding the rights of the defence.

These problems, important as they are, have been polarized, firstly by the Commission which stressed the administrative character of the procedure contained in the texts and later on by firms' lawyers who went so far as to claim the safeguards typical of a criminal jurisdiction.

Quite apart from any value judgment, this is entirely contrary to the logic of a procedure which is essentially an enquiry, in the course of which it is the Commission's duty to assemble the evidence in the absence of the parties, initially at least, and to define the points in dispute by means of a statement of objections. Even after this statement has been delivered and the formal procedure begun it retains, without a shadow of doubt, an essentially administrative character, even though the parties are permitted to submit their written observations and to develop them at the hearings.

---

[88] See footnote 71 above, *Quinine agreement*, and footnote 39 above, *sugar case*.

[89] Temple-Lang, 'Compliance with the Common Market's Antitrust Law', *The International Lawyer*, 1980, p. 491 et seq.

[90] See footnote 60 above; also OJ 127, 20.8.1963.

If it is thought desirable to preserve the existing institutional context, it will be necessary to moderate claims for fuller recognition of defence rights, if the system is to preserve its logical coherence.

61. It is undeniable that the situation has improved over the years. The turning point was perhaps the *Commercial Solvents* case, where the shortness of the period that the firms were allowed for lodging their written reply actually evoked adverse criticism from the advocate-general. [91]

Since then the Commission has shown itself more inclined to apply common sense criteria during the various procedural stages, especially as regards the length of time allowed for written replies, access to files and organization of hearings.

62. A more difficult problem is, however, presented by the protection of 'professional privilege', a concept to which many countries attach a wider meaning than is given to professional confidence. This problem has been the object of discussions in which professional bodies have taken part. The Commission is beginning to show a certain reluctance to produce, as evidence of alleged infringements, documents of a strictly legal nature drafted for the purposes of obtaining or giving legal advice on the case in question or for preparing a defence. But the Commission has not abandoned the practice of taking copies of such documents, maintaining that it is entitled to take note of their nature, under the control of the Court of Justice.

Such an attitude cannot, frankly, be considered satisfactory, for obvious reasons. Nevertheless, in the *AM and S Europe Limited* case, [92] the Commission reaffirmed its point of view in a decision.

The case is at present before the Court. To judge from the Opinion given by Advocate-General Warner, the Court might dissociate itself from the position adopted by the Commission and provide for cases to be referred to national courts if the confidential nature of a particular document is in dispute. National courts in their turn will, when necessary, bring matters before the Court of Justice under Article 177.

¶ 5. *The conduct and duration of proceedings: possible future developments*

63. An objection often brought against the Commission by firms and corroborated by the facts concerns the dilatory nature of proceedings. This contributes to creating a cli-

---

[91] See footnote 39 above. On the question of defence rights and, more generally, procedure before the Commission regarding the application of Articles 85 and 86, see Bernini, 'The procedure of the European Commission in cases involving Articles 85 and 86, EEC Treaty', *Études du droit européen en l'honneur de Riccardo Monaco*, 1977; Davidson, 'EEC Fact Finding Procedures in Competition Cases: An American Critique', CML Rev., 1977, p. 175; Van Bael, 'EEC Antitrust Enforcement and Adjudication as seen by Defence Counsel', RSDIC, No 7, 1979; Ehlermann-Oldekop, Community report, 'Due process in the administrative procedure', Report of 8th FIDE Conference, 22 to 24 June 1978; Ferry, 'Procedure and Powers of the EEC Commission in Antitrust Cases', proceedings of the European Study Conference, London, 7 December 1978; Temple-Lang, 'The procedure of the Commission in Competition Cases', CML Rev., 1977, p. 155.

[92] Commission Decision 79/670/EEC of 6 July 1979 based on Regulation No 17, Article 14(3) (OJ L 199, 7.8.1979).

mate of tension between firms and the Community; it is a well-known elementary principle of legal sociology that the proper functioning of a system depends upon sanction following closely upon offence. The reason for this dilatoriness that the Commission often puts forward with sound reason is its shortage of staff. [93] But this is not the complete explanation, valid as it is at practical level; there are also more complex reasons. In the future, therefore, this phenomenon should be studied in greater depth.

The very nature of the competition rules, which entail particularly long and complex application procedures, the enormous expenditure of time and money involved by the need to provide translations into all the official languages, the claims advanced by firms' legal advisers for accusatorial-type proceedings, however legitimate they may be, the delaying tactics often adopted by accused firms, are all factors which must be examined if the system is to be improved.

64. Searching comparative law for possible solutions is not very encouraging. In the United States, where, as is commonly known, the prevailing system is accusatorial, disputed antitrust proceedings have disadvantages which are well known even outside the expert circles involved. The delays are excessive and the costs prohibitive. It is not possible to study such a complex problem more deeply here. It must suffice merely to indicate a pointer already becoming apparent as the result of some observations made above. For effective action with a reasonable chance of success, it is not enough to tinker with the disputes procedure: the principal need is to ensure the availability of tools to render such procedure unnecessary, at least as a general rule.

65. In this connection, some interesting trends can be found, mainly in the form of general principles, in express statements made by the Commission on various occasions.

(a) More frequent use can be expected of the block exemption device pursuant to a regulation. This seems desirable provided drafting technique is simplified and formulas avoided that—dare it be said—sometimes amount to real grammatical and syntactical acrobatics.

(b) For at least some types of agreements, there is a likelihood that regulations will be introduced which would grant such agreements provisional validity upon notification. If the Commission raises no objection within a fixed period, the agreement would be considered valid for an undefined period.

    The principle to be applied here has already been adopted in the draft regulation on control of concentrations; it would without doubt contribute to creating a climate of greater certainty for firms.

(c) General rules on the subject of applying the competition rules need to be set out as clearly and simply as possible. Indisputably this is a wise objective, even though, in the present state of affairs, it is impossible to foresee the practical repercussions.

(d) The Commission will have to concentrate its resources on cases involving matters of fundamental importance, especially as regards laying down principles.

---

[93] See op cit. at footnote 89 above, especially at p. 496.

This proposal goes some way towards meeting various criticisms and, as such, it seems acceptable. It must, however, coincide in practice, as stated above, with the introduction of devices to eliminate the intolerable uncertainty for firms that results from notifications which have not yet been examined by the Commission.

'Provisional validity', as already stated, provides insufficient protection in its present form.

(e) The Community executive nowadays follows with growing interest the application of the competition rules by national courts.

Reference to national courts is principally of interest to parties seeking damages from firms liable on the ground of infringing Article 85(1) or Article 86. In the past, litigation on this subject was rare, chiefly because the availability of an action for damages of this type had not yet been clearly upheld by legal writers and case-law in Member States. On the other hand, as regards the interpretation of Community provisions, the Court of Justice appeared to favour such actions, holding that Articles 85 and 86 have direct effect and accordingly confer on the parties concerned rights which national courts are bound to protect. The Court further stated, apropos the prohibitions contained in Article 86, that these have direct effect for the purposes of Article 90. [94]

The problem posed by a claim for damages in these terms provides ample scope for reflection in the future: quite apart from this specific problem, it is clear that some decentralization capable of affording some relief to the Commission's overloaded calendar might well result from national courts hearing cases connected with the application of the prohibitions in question. This must, however, be taken with the proverbial grain of salt. The jurisdiction of national courts is limited, of course, to enforcing the prohibitions, since authorizations pursuant to Article 85(3) fall within the exclusive jurisdiction of the Commission.

To avoid situations of manifest imbalance to the detriment of firms it would, accordingly, be necessary to encourage initiatives for harmonization of national rules on competition, where these exist, and for enacting a law for the purpose in Italy, where no rules so far exist. The harmonization should reduce disparities between Community regulations and national regulations, thus affording firms the most homogeneous possible set of provisions. The need for this will become all the more acute as the trends in interpretation already noted [95] will have the effect in the future of reducing the scope of action adversely affecting competition but held to have only a national effect and therefore to fall through the net of Articles 85 and 86. Coordination, at both Community and national level, would certainly be facilitated as regards application of competition rules, with a consequent gain in clarity; greater clarity is, moreover, indispensable for coherent and complete attainment of the objectives in Articles 85 and 86.

(f) Examination of Community antitrust experience shows that the Commission is more particularly interested nowadays in situations that affect market structure most directly. In times of crisis, allowing competition a free rein is likely to result in strengthening oligopolies.

---

[94] Case 155/73 *Sacchi-Telebiella* [1974] ECR 409, especially at pp. 430 and 432; Case 127/73 *B.R.T.* v *SABAM* [1974] ECR 51, especially at pp. 62 and 63.

[95] See Section III, 1, A, above.

The pursuit of 'undistorted' competition cannot therefore be used as an excuse for disregarding the pressures exerted by social needs and sectoral reorganization needed to protect the very foundations of the market economy system. Such are the problems visualized by the Commission when taking an overall view. The rules applicable to public undertakings and to State aid are also involved; the final part of this study will be devoted to this aspect.

Section V — Applicability of the competition rules to public undertakings

¶ 1. *The Treaty rules*

66. Article 90(1) EEC establishes the principle of equal treatment for all undertakings carrying out their activities within the common market. This is the gist of the provision forbidding Member States to enact or maintain in force 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights' any measure contrary to the rules contained in the Treaty, 'in particular to those rules provided for in Article 7 and Articles 85 to 94'.

The express inclusion of this principle was rendered necessary by the existence, in the economy of certain Member States, of a public sector which in some cases is substantial.

The presence within the Community of public undertakings alongside private firms was already noted in the ECSC Treaty, Article 83 of which provides that 'the establishment of the Community shall in no way prejudice the system of ownership of the undertakings to which this Treaty applies'. Article 222 EEC sets out a provision that is similar in substance, although undertakings are not expressly mentioned in it. Furthermore, Article 66(7) ECSC provides that action by the High Authority may be taken with regard to both public and private sector undertakings that are using a dominant position for purposes contrary to the objectives of the Treaty.

The prohibition imposed on Member States under Article 90(1) EEC is supplemented by further provisions contained in paragraphs 2 and 3.

Paragraph 2 provides that the Treaty rules, and especially the competition rules, shall apply 'to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly ... 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'. The same paragraph also states that 'the development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

Finally, paragraph 3 provides that 'the Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States'.

A. The equal treatment principle

67. The first problem that arises with regard to interpretation is that of establishing whether the equality principle contained in Article 90(1) imposes an obligation on Member States alone or whether it also entails obligations for undertakings—in other words whether the competition rules mentioned there do or do not apply to public undertakings directly.

According to the more restrictive view, which, it is suggested, is incorrect, public sector undertakings could only be made to observe these rules by indirect means, through the obligation imposed on Member States pursuant to Article 90(1). The better theory is that based on the opinion expressed by the Commission, and supported by legal writers of authority, that 'the only valid solution that can be found for the problem under examination is to admit that the Treaty rules applicable to undertakings extend their full effects to public undertakings'. [96]

This preliminary point having been made, it remains to define more clearly the undertakings which fall within the ambit of Article 90(1) mentioned above.

This is not the place for a detailed examination of the numerous theories which have been advanced on this subject; it is sufficient to recall that the Commission, followed in this respect by the Court of Justice, has usually interpreted the concept of a public sector undertaking in the widest sense, without adopting any of the nationally-inspired theories which are often divergent, if not actually contradictory. The nub of this definition of a public undertaking for the purposes of applying the competition rules consists in the existence of a basic feature, namely 'a sufficiently close link with the public administration, to which the undertaking belongs or on which it is dependent, to allow it to be described as public, or else a particular situation—the enjoyment of special or exclusive rights—granted to the undertakings by virtue of an act of State'. [97]

In the final analysis, therefore, this dependent connection is shown by the fact that the State and other public bodies can 'determine an undertaking's economic course by virtue of a special relationship giving them supremacy over it'. [98] This is the element correctly considered decisive for identifying public undertakings within the meaning of Article 90(1), without recourse to lengthy arguments over their legal nature.

B. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly

68. It has rightly been said that paragraphs 1 and 2 of Article 90 do not constitute a rule and an exception to that rule, since the first refers to measures taken by Member States in the case of certain undertakings, while the second is directly concerned with the actions of certain undertakings. [99]

---

[96] Pappalardo, 'Regole di concorrenza', *Commentaire au traité CEE*, edited by Quadri, Monaco, Trabucchi, 1965, II, p. 678.

[97] Ibid., p. 680.

[98] Ibid., p. 684.

[99] Ibid., p. 690.

However, it appears undeniable that undertakings falling within the definition in paragraph 2, that is to say undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, partially escape the equality principle contained in paragraph 1. They are, indeed, only subject to the rules contained in the Treaty, and in particular to the competition rules, in so far as the application of these rules does not obstruct, in law or in fact, the performance of the particular tasks assigned to them—provided always that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.

The concept of an undertaking as defined above must be interpreted in isolation, in the light of the Treaty, once again repulsing any temptation to have recourse to any nationally-inspired theories. Consequently, as regards the first category of undertakings, their public or private character is of little moment; the decisive factor, on the other hand, is that they should be entrusted with operating services of the type mentioned and, accordingly, with the performance of particular tasks. It has been said with good reason [100] that the fact of being entrusted with services constitutes a first condition requiring the grant of an official authorization to that undertaking.

69. The concept of a revenue-producing monopoly is rather easier to interpret. Despite the variety of formulas applied at national level, a revenue-producing monopoly possesses these two characteristics:

(a) the exclusive rights inherent in the concept of a monopoly;
(b) the objective of raising money for the treasury.

There are, however, some intermediate areas between revenue-producing and non-revenue-producing monopolies; these consist of monopolies intended not only to bring in revenue but also to run a more profitable service. [101] Following the Court's case-law, it may be said that in the majority of cases public and private sector monopolies are nowadays on a substantially equal footing. [102]

Public sector monopolies do, however, pose the problem, still unsolved though much debated, of deciding whether the equality described above is limited by Article 37, which refers to 'State monopolies of a commercial character'. Discussion of this problem would fall outside the ambit of this study, which is merely intended to provide an outline sketch of the chosen topic.

C. The Commission's supervisory powers

70. Article 90(3) raises several problems of interpretation. This paragraph concerns directives or decisions to be addressed to Member States, whereas Article 90(2) is clearly addressed to the undertakings to which it is directly applicable. However, the special powers contained in Article 90(3) do not limit the general ambit of the powers conferred on the Commission by Articles 155 and 169 of the Treaty. The Commission has, however, not made much use of them. In reply to Parliamentary Question No 701/77 from

---

[100] Colliard, 'Le régime des entreprises publiques', *Droit des Communautés européennes*, cited at footnote 13 above, p. 859.

[101] Op. cit. at footnote 95 above, especially at p. 696.

[102] Pappalardo, 'Monopoles publics et monopoles privés', in op. cit. at footnote 14 above, p. 55.

Mr Müller-Hermann in 1977, it stated that there were various technical difficulties in bringing formal charges against States for infringing Article 90.[103] The situation is nevertheless changing as shown by the recent directive on financial relationships between States and public sector undertakings and, in a more general way, by the implementation of the rules on State aid.

D. Transparency of financial relations between States and public undertakings

71. This is the stated objective of the Commission Directive of 25 June 1980,[104] which encountered opposition from certain Member States and has been referred by them to the Court of Justice.

The directive in question is based directly on Article 90(3), but it states explicitly in the recitals that it does not prejudice the application of the other provisions of the EEC Treaty, and in particular Articles 90(2), 93 and 223.

The consideration behind the directive concerns the influence that public authorities are able to exercise over the actions of public sector undertakings.

Competition between undertakings can be distorted by allocating public funds to public undertakings, quite apart from any direct grant of resources. Such action may amount to an infringement of the rules in the Treaty or, on the other hand, may be based on grounds which satisfy the requirements for the derogations permitted pursuant to Article 90(2); hence the need for Commission supervision over the allocation of public funds to public undertakings.

It would be superfluous to comment on the reasons for the reaction of certain Member States to the directive, which represents an instrument providing Community control over a sector where Member States are reluctant to relinquish their exclusive prerogatives. On the other hand, the means employed in the directive on transparency seems to be the only way actually practicable unless one is prepared to abandon the logic of the system established by the Treaty and give up all control by the Community over intervention in the public sector which is liable to distort the free play of competition.

A directive is the most appropriate means for attaining the desired result, since it allows States to employ the form of legislation best suited to the systems under which their public undertakings operate.

72. As regards the text of the directive, it is interesting to note:

(a) the adoption of a much wider definition of a public undertaking, not based on its legal form, but stressing all the means of control, even apart from financial participation, through which a subject of public law may be able to dominate an undertaking, even indirectly;

(b) the very broad definition of financial provision, which includes covering losses, even where this takes the form of increasing capital, granting loans on preferential terms and State waiver of the normal return on capital investment;

---

[103] Written question from Mr Müller-Hermann to the Commission (OJ C 42, 20.2.1978).

[104] Commission Directive 80/723/EEC of 25 June 1980 (OJ L 195, 29.7.1980).

(c) the submission of particulars to the Commission on express request only, in order to avoid any superfluous provision of information;
(d) the exemption from the requirement to provide information, to the extent and on the conditions provided for in Article 4 of the directive.

Section VI — Control of State aid

¶ 1. *The competition rules applicable to undertakings and the system for controlling aid*

73. The interaction of these two sets of rules is very clearly brought to light in the First Report. 'The activities of the Community shall include ... the institution of a system ensuring that competition in the common market is not distorted' (Article 3(f) of the Treaty). Such a system in fact constitutes a factor essential to economic progress. It assumes that undertakings enter the market on the basis of their own resources and that State aid does not reduce the scope of free movement and interfere with the ideal allocation of factors of production.

However, State intervention is a necessary instrument of structural policy when, left to itself, market forces do not allow (or not within a reasonable time) certain development targets which are the result of a legitimate desire for improved quantitative or qualitative growth to be attained, or when they would give rise to unacceptable social tensions. Hence the exceptions from the incompatibility principle which allow the Community authorities to adopt a basically realistic attitude to the control of aid and to permit measures which contribute to the attainment of the general objectives in Article 2 of the Treaty. [105]

This explains why the Commission and the Council, when implementing the rules in question, have been influenced by the wish to maintain a reasonable balance between the prohibition of aid liable to distort competition and the derogations provided for to allow for the pursuit of objectives equally deserving of protection in the light of the general aims of the Treaties.

The subject of aid is covered in the ECSC Treaty by Article 4(c) and in the EEC Treaty by Articles 92 to 94.

¶ 2. *The system in the ECSC Treaty*

74. Under the terms of Article 4(c), 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever' are recognized as incompatible with the common market for coal and steel and accordingly 'prohibited within the Community, as provided in this Treaty'.

The somewhat rigid formulation of this article distinguishes it from Articles 92 to 94 EEC which lay down criteria under which derogations are possible from the prohibition on aid granted by Member States.

---

[105] *First Report on Competition Policy*, point 132.

The limits set by Article 4(c) have in practice been very flexibly interpreted, relying, where appropriate, on other rules in the ECSC Treaty.

The Court of Justice in Case 30/59 distinguished between aid falling under Article 4(c) and financial aid granted by the High Authority or on express authorization by it. [106]

Following the same line of reasoning, the High Authority and the Council have held that the article in question, rather than prohibiting financial aid being granted to ECSC undertakings, is intended to ensure that no Member State has the power to intervene *sua ratione* to modify the natural facts of competition. [107]

In accordance with this premise, the Eighth Report [108] states that the Commission, pursuant to the second subparagraph of Article 67(2), may authorize a grant of aid on conditions to be determined. Under the same Article 67(3) the Commission may, after consulting the Consultative Committee and the Council, make recommendations to Member States with a view to remedying measures that they have taken under their reserved powers, when, that is to say, the effects of such measures are liable to reduce production cost differentials, by granting special advantages or imposing special burdens on undertakings.

While not abandoning the right to make such recommendations, the Commission declared them inadequate for dealing with current problems. Recourse to Article 95 was found necessary to ensure that action taken by Member States under their reserved powers is compatible with the common interest and to authorize the grant of 'aids and subsidies which would otherwise be prohibited by Article 4(c) of the Treaty'. [109]

This was the procedure adopted in the case of the draft decision approved by the Council on 18 December 1979, which established Community rules on aid to the iron and steel industry. The actual decision was taken by the Commission on 1 February 1980. [110]

¶ 3. *The system in the EEC Treaty*

A. **Types of aid**

75. The rules in this Treaty derive from Article 3(f) which provides for 'the institution of a system ensuring that competition in the common market is not distorted'. Article 92(1) consequently provides that any aid granted by a State or through State resources shall be incompatible with the common market where such aid

(a) affects intra-Community trade,
(b) favours certain undertakings or the production of certain goods, or
(c) distorts or threatens to distort competition.

---

[106] Case 30/59 *Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 91 (the judgment was preceded by orders on 18 February 1960, [1960] ECR 91, and 24 March 1960, [1961] ECR 95).

[107] High Authority Decision No 3-65 of 17 February 1965 (OJ 31, 25.2.1965), regarding intervention by Member States in favour of the coal industry, cited by Olivier in *Commentario al Trattato istitutivo della CECA*, op. cit. at footnote 14 above.

[108] *Eighth Report on Competition Policy*, point 196.

[109] Ibid.

[110] Commission Decision 80/257/ECSC of 1 February 1980 (OJ L 29, 6.2.1980).

Incompatibility on these grounds, in principle, entails prohibition, although this is not expressly stated in the text of Article 92(1), which in this respect differs from Articles 85(1) and 86. However, the prohibition is tempered by the provision for two possible categories of exceptions.

76. The first category provided for under Article 92(2) includes the following cases where aid is held to be compatible with the common market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurrences;
(c) aid granted to the economy of certain areas of the Federal Republic of Germany, in so far as necessary to compensate for the economic disadvantages caused by the division of Germany. In the above-mentioned cases the aid is stated to be compatible as such, even if it affects trade between Member States and distorts competition.

77. The second category listed in Article 92(3), on the contrary, provides for cases where aid satisfying the required conditions 'may be' considered to be compatible with the common market. It is accordingly for the Commission or the Council, within the ambit of their respective powers analysed below, to decide whether certain aid may be declared compatible with the common market although it affects trade between Member States and distorts or threatens to distort competition.

The types of aid that may be declared compatible with the common market under Article 92(3) are to a large extent determined under (a), (b) and (c) of that paragraph; provision is made under (d) for adding such other categories of aid as may be specified by decision of the Council, acting by a qualified majority on a proposal from the Commission.

The aid provided for in the Treaty can be classified by reference to the purposes indicated. Accordingly, the aid in question is intended

(a) to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
(b) to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; special provisions apply concerning aids granted to shipbuilding as of 1 January 1957. [111]

The Council has employed its powers, regarding the categories of aid to be specified under Article 92(3)(d), by issuing directives to support the shipbuilding industry.

B. The powers of the Commission

78. The above summary shows that the Commission possesses a very wide discretionary power for determining whether various types of aid granted by States are compatible with the common market.

---

[111] Case 730/79 *Philip Morris Holland BV* v *Commission* [1980] ECR 2671. The Court in this case stated that aid granted to a cigarette manufacturer as an additional premium for large projects was unlawful, as this did not satisfy the conditions for granting exemption pursuant to Article 92(3).

This power can be seen in action as the Commission constantly strives to achieve generalized Community control over aid granted or proposed by States; this control is exercised in cooperation with the Member States and in accordance with the procedures described below.

I. Existing aid

79. Commission control takes the form of a constant review; this is the reason States are under an obligation, also arising under Article 5, to keep the Commission informed regarding the individual application of aid schemes which they have already initiated (Article 93(1)).

Despite the ambiguity of the text, the Commission is in the habit of consulting not only the Member State concerned, but also the other Member States who, in the final analysis, suffer the repercussions if one of them adopts a system of subsidies. After this consultation, it is the Commission's duty to propose any appropriate (or advantageous) measures required 'by the progressive development or by the functioning of the common market'; these measures may, depending on the case, require that the aid in question be altered to make it compatible with the common market or that it simply be abolished. Legally the measures described above take the form of a recommendation within the meaning of Article 189, that is to say they have no binding force on Member States.

If the State concerned fails to comply with the Commission's proposals, the latter commences the procedure laid down, in Article 93(2), which can lead to a decision binding upon the Member State to which it is addressed, again under the terms of Article 189. The Commission accordingly prescribes a fixed period within which the parties concerned may submit their comments.

The 'parties concerned' are not only Member States, but also undertakings and associations of undertakings which do or may benefit or suffer under the system of subsidies in dispute. Widely interpreted, interested parties could be held to include workers employed by the undertakings in question, their trade unions and consumers or users of the goods or services provided by the undertakings. [112]

The limits to be set to this wide interpretation, the justification of which is open to doubt, are not at all clear. It would indeed be quite possible to include in the category of interested parties, not only consumers' associations, but people holding a wide range of other interests likely to be even remotely affected, for good or ill, by the subsidies in question: interests concerning ecology, the environment, labour in the wide sense, likely to be affected by any reinforcement of economic infrastructures, land development, etc. The obligation to give interested parties notice to submit their comments is an indispensable preliminary which, if omitted, might cause the subsequent decision regarding the subsidies to be declared void by the Court of Justice pursuant to Articles 173 and 174.

[112] *Commentaire du traité CEE*, edited by von der Groeben, von Boeckh, Thiesing, pp. 1201 and 1202. The restrictive view is given by Leanza, 'Aiuti concessi dagli Stati', in op. cit. at footnote 96 above.

80. However, Article 93(2) says nothing about the form which this notice is to take. While States and specific undertakings pose no problem in this connection, the modes and forms of notice as regards other parties concerned are very unclear.

Since 1966 the Commission has therefore adopted the practice of giving notice to the parties concerned by regular publication in the *Official Journal.* The more restrictive theory, that the Commission is bound to act through Member States in order to assemble the comments of undertakings or persons concerned, because of the difficulty of getting in touch with them directly, should probably be rejected. [113]

If the State concerned does not comply with the decision, the Commission or any State concerned may refer the matter to the Court of Justice directly, without going through the preliminary procedure laid down in Articles 169 and 170 for cases of alleged infringement by a Member State.

A system of aid that has been declared incompatible must be abolished or altered within the period prescribed by the Commission, which will take account of the legitimate interests of undertakings benefiting from such aid in order to allow them to adapt, in so far as is practicable, to the new situation.

On various occasions the Commission has, however, taken decisions requiring aids to be abolished immediately, despite the objections aroused or liable to be aroused by this practice.

It would seem reasonable for the Commission, bearing in mind the features of the individual case and without prescribing improper time-limits, to pay some attention to practical considerations, principally connected with the type of measures (administrative or legislative) that a State must take in order to comply with the decision.

Whether Commission decisions are or are not to have retroactive effect raises special problems which are the subject of academic discussion.

II. Plans to grant new aid or alter existing aid

81. As regards plans to grant new aid or alter existing aid, Article 93(3) imposes an express obligation on Member States to inform the Commission in sufficient time before implementing such plans. If the Commission considers that a plan is not compatible with the common market by virtue of Article 92(2), it may without delay initiate the procedure provided for in Article 93(2). The Member State concerned may not put its proposed measures into effect until that procedure has resulted in a final decision.

In this connection, attention should be drawn to the Commission communication of 30 September 1980, [114] in which the Commission reminded Member States that they are required to give notice in good time of any plans to grant or alter aid, before putting them into effect. In Case 120/73, [115] the Court of Justice decided that Member States should allow the Commission two months for assessing the compatibility of their proposed

---

[113] Op. cit. at footnote 112, especially at p. 1203. The restrictive position is defended by Leanza, op. cit. at footnote 96 above.

[114] Commission communication of 30 September 1980 (OJ C 252, 30.9.1980).

[115] Joined Cases 120 to 122/73 *Lorenz and Others* [1973] ECR 1471.

measures. The Commission in its turn, while regretting the frequency with which Member States had failed to discharge their duties in some recent cases, formally announced its intention 'to use all measures at its disposal' to ensure observance.

The Commission has recently restated the principle established by the Court in Case 77/72: [116] 'for projects introducing new aids or altering existing ones, the last sentence of Article 93(3) establishes procedural criteria which the national court can appraise'.

C. The powers of the Council

I. The Council's power to act in individual cases

82. The third subparagraph of Article 93(2) reserves a special supervisory function for the Council. On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered compatible with the common market, notwithstanding Article 92 or the regulations provided for in Article 94, if such a decision is justified by exceptional circumstances.

An application to the Council by the State concerned has the effect of suspending any procedure that may have been initiated by the Commission. It is, however, the Commission that decides the case if the Council does not make its attitude known within three months.

This Council action with regard to aid should be judged in the context of the function, entrusted to it under Article 145, of ensuring coordination between general Community policy and the economic policies of the Member States. It should, however, be noted that the Council has made relatively little use of these powers.

II. The power to make regulations

83. Another power reserved for the Council under Article 94 has special interest because of its general scope and the developments it might make possible. By virtue of this article the Council, acting by a qualified majority on a proposal from the Commission, may make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure.

Under the terms of Article 189, a regulation is 'binding in its entirety and directly applicable in all Member States'.

When regulations are to be made on a proposal from the Commission, the Council, if it wishes to amend the proposal, must act unanimously.

The formula employed by Article 94 for giving the Council power to make regulations differs from that of Article 87, which imposes an obligation to adopt any regulations or directives necessary for the purposes there laid down.

---

[116] Case 77/72 *Capolongo* v *Maya* [1973] ECR 611, ground 6.

The use of a regulation, rather than a directive which would leave States more freedom regarding the form and means for attaining the required result, emphasizes the intention of the draftsmen of the Treaty to reserve exclusively for the Commission the task of supervising the aid systems. The scope of the regulations that can be made under Article 94 reflects their objective, which is to promote the application of Articles 92 and 93.

According to one sound interpretation, this 'utility' concept assumes that regulations provide solutions for specific cases rather than definitions of general concepts in the abstract. This is the reason that it does not seem particularly useful to set out a general definition of 'aid' in a regulation, although legal writers are divided on the advisability of this. [117]

84. Another point of controversy among legal writers is whether regulations made pursuant to Article 94 may or may not exempt certain categories of aid from the prohibition envisaged by Article 92. On balance, it seems that they may not, since it is not possible to amend Article 92(2) by means of regulations made pursuant to Article 94, extending the ambit of the categories of aid which are, as such, compatible with the common market; any extension of the categories of aid which may be considered compatible with the common market should be effected by means of a Council decision pursuant to Article 92(3)(d) rather than by a regulation under Article 94.

¶ 4. *The development of Community policy with regard to aid*

85. The problem of Community control of State aid to undertakings is, without any doubt, the most likely among those resulting from coordination of economic policies to create conflict. The reason for this is, of course, the natural incompatibility between the Member States' reliance on aid schemes as a means of controlling the economy and the Community's interest in tempering the opposite requirements set out above.

This conflict of interests becomes particularly serious when the economic climate is bad. An economic crisis always entails an increase in requests for State aid likely to accelerate the aid spiral to the point at which the system established by the Treaty is put at risk.

The Community is only too well aware of the problem; the wish to resolve it may, in a certain sense, be said to be the principal guideline directing the actions undertaken by the Community executive in pursuit of the objectives described previously. As evidence of this, it will help to give a panoramic view of the development of Community policies in three different directions: regional aid, sectoral aid and aid of a general character. This subdivision of aid makes it possible, in so far as is practicable, to determine the principles and modes governing aid of a general character that are applicable to aid with the same characteristics presenting kindred problems.

[117] For the definition see Leanza, op. cit. at footnote 95 above, p. 769. Beyond the definition see op. cit. at footnote 112 above, pp. 1221 and 1222.

A. Aid for regions

86. As regards regional aid the Commission, as early as 1968, proposed to Member States the adoption of a system of advance notification of important cases where general aid schemes were to be implemented for regional purposes. [118]

This solution clearly had considerable advantages on the practical plane, but it encountered opposition from certain Member States, which preferred principles and programmes of a general nature to be set out.

The Commission gave way to this demand, informing the Council that fixed principles would have to be applied with regard to general aid schemes for regional purposes. As a result the Council, on 20 October 1971, approved the First Resolution on General Regional Aid Systems. [119]

Subsequently, the principles set out here by the Commission and the Council were progressively modified by other formal acts on the part of the Commission alone (communication to the Council) in 1973, [120] 1975 [121] and 1978. [122]

The coordination system established by the 1978 communication came into force on 1 January 1979; the initial duration was to be three years.

87. The development of the coordination principles instituted by the Commission as time goes by provides interesting signs that a Community regional development policy is coming into being and becoming ever more clearly distinguishable; it has recently led to the establishment of priority development areas and equalization systems. Very important too was the innovation introduced by the 1978 general principles, the fixing of an aid ceiling per job created, to be superimposed on the aid ceiling, typical of the 1971 principles, expressed as a percentage of flat-rate investment.

This modification proved necessary in order to encourage development schemes featuring labour-intensive industrialization in regions with long-standing underdevelopment and high unemployment. This solution is undoubtedly correct for regions like the Mezzogiorno where it is easy to assess the mistakes made by hasty capital-intensive industrialization concentrating on heavy industry; however, such a system also has considerable drawbacks. Firstly, there is the risk of an increase in the actual value of the aid which could have too great an effect on market mechanisms; secondly, the system might encourage ill-considered 'capital saving' development opposed to the production pattern of developed countries.

It therefore became necessary to regulate aid for job-creating investments more carefully by fixing ceilings which vary according to the level of development in the areas under consideration.

This kind of discrimination with regard to high unit value intervention is explained by the greater risk that such intervention represents for competition and also by the favour-

---

[118] *First Report on Competition Policy*, point 143.
[119] *First Report on Competition Policy*, point 145.
[120] *Third Report on Competition Policy*, point 83.
[121] *Fifth Report on Competition Policy*, point 85.
[122] *Eighth Report on Competition Policy*, point 151.

able attitude evinced by the Commission's preference for the dynamic effect of small and medium-sized firms.

B. Aid for sectors

88. The Commission has avoided rigid control of such a complex and changing subject as sectoral aid policy, retaining the freedom to react as circumstances demand, by means of action under Article 93, when schemes worked out by Member States appear contrary to the general principles for implementing the Treaty.

Although there have been plenty of general statements on the topic, [123] the Community has accordingly refrained from consolidating its policy on sectoral aid, and with good reason; for whereas regional imbalances caused by natural and historical factors require long-term intervention, sectoral imbalance is often the result of sudden short crises calling for rapid and timely intervention which necessitates a more flexible system.

This choice plainly results from the exclusively qualitative character of the general principles, the quantitative criterion appearing at the stage where action is taken in the various individual cases; in accordance with these principles, an aid system that is to be authorized must result in developing, and not merely maintaining, the existing situation, must provide for the aid to be progressively reduced as restructuring progresses, must be proportionate to the gravity of the problems to be solved and have no effect on relations between Member States.

C. General aid

89. The alleged incompatibility of aid of a general character with the aims of the Treaty has created serious problems.

It is not included among the aid compatible as such with the common market (Article 92(2)), nor among the aid which 'may be considered to be compatible with the common market' (Article 92(3)); in the light of paragraph 3(c), making provision for aid 'to facilitate the development of certain economic activities or of certain economic areas', it can only be concluded that aid of a general character is contrary to the Treaty because it fails to satisfy the specialist criteria provided for in that article.

Such an interpretation would, however, have created insurmountable political problems, since States were not, and are not, prepared to relinquish such an important economic policy instrument (for example, making social charges payable out of general taxation).

This is why the Commission [124] agreed that general aid schemes could be examined in the light of their regional and sectoral effects. Where such assessment cannot be carried out on the basis of general principles, the principal individual cases where aid schemes are to be implemented must be notified to the Commission, which will then take a decision.

---

[123] *Eighth Report on Competition Policy*, points 172 and 179.

[124] *Second Report on Competition Policy*, points 116-121; *Fifth Report on Competition Policy*, point 135; *Ninth Report on Competition Policy*, points 183-188.

Section VII — The future development of the competition rules

90. To complete this overall view of the development of competition policy some attention should be paid to the future. The Commission has already carried out a tremendous task, tackled new problems, taken initiatives, and gradually accelerated the rate of progress in a field where consciousness of principles initially quite new in European affairs is slowly growing.

The Commission's work has, to a large extent, been upheld and supplemented by the Court which, in its turn, has contributed, independently and often decisively, to developing value judgments and normative principles with regard to questions of general or special interest. In this way rules and precedents have been laid down which, to borrow an American phrase, can be described as European antitrust experience.

The Commission has played and still plays a fundamental part in this process of development, so that one may ask whether the current situation of economic downturn does not require the Commission to undertake a series of tasks beyond merely implementing rules of law.

91. It is not possible to answer this question without first specifying the rules of law in question.

The expression 'competition policy', which is too often indiscriminately employed, unfortunately tends to confuse the various types of rule that form the foundation of the Commission's powers in that field. When assessing the problem it must not be forgotten that the Commission's powers and corresponding duties vary according to the nature and scope of the rules to be applied.

The competition rules in the strict sense concern firms, and the interest that they protect is essentially the maintenance of a competitive structure in a unified market. When the Commission seeks to safeguard interests of a more general order, such as those of consumers, users and workers, what legal instruments should it then employ?

It has already been demonstrated how the competition rules, the rules on public undertakings and the rules on State aid complement one another in practice. On the one hand, free competition has to be maintained, but on the other hand, free competition must not be allowed to go to extremes in a period of social need exacerbated by the economic crisis, thereby bringing about its own destruction by accentuating the oligopolistic character of many markets, as this would prove disastrous for small and medium-sized firms.

To meet this twofold requirement, new policies have to be implemented, based on rules that apply not only to undertakings but also to States; this entails dialogue, with clear political overtones, for the purpose of negotiating and implementing the necessary aid schemes.

92. It cannot be denied that the Commission, assisted by decisions of the Court, has already made sure of some important coercive instruments in the actual context of applying Article 90 and Articles 92 to 94. It is also true, however, that on many occasions, States, either directly or through a public sector undertaking, have proved formid-

able adversaries. The same cannot, of course, be said of private sector firms, often through force of circumstances compelled to take the line of least resistance.

The situation becomes still more serious where the Commission does not already have at its disposal, in its own arsenal, all the binding legal instruments needed for implementing its policies, but must call upon the Council for further measures. Community experience in this connection makes all too apparent the lack of harmony at practical level between action taken by the Commission in the exercise of powers which it possesses under existing regulations and action which can be undertaken only after new rules have been adopted by the Council.

In the former case the Commission was able to act without any appreciable break in continuity, mainly because of compromises reached in order to resolve certain internal conflicts.

In the second case, on the other hand, sometimes no action is taken and sometimes opposition is displayed towards the options championed by the Commission. Examples of this are provided by the new measures concerned with implementing the competition rules as such, or the measures relating to matters closely connected with them, such as commercial policy, technical barriers and harmonization of laws in sectors which have direct influence on the structure and conduct of firms (company law, consumer protection, tax provisions).

Two discrepancies may be discerned:

(1) firstly, as regards the effectiveness of Commission measures that directly concern private sector firms as compared with measures addressed to public sector undertakings and to States;
(2) secondly, as regards the different speed with which powers are exercised depending upon whether they belong to the Commission or the Council respectively. This constitutes a serious danger likely to have a damaging effect on the development of competition policy and its coordination with other Community policies.

The likelihood of such damage appears all the greater because, in the Commission's scale of values, all Community policies must be compatible with the philosophy of Articles 85 and 86, that is with the protection of a Community competition system, the only instrument capable of bringing about the structural changes made necessary by the continuing economic crisis.

93. Expressed in abstract terms, the principle can only be discussed at the level of purely theoretical debate. On the subject of the future development of competition policy one may, however, wonder what measures the Commission will take to honour the social bargain that it made by claiming 'fairness in the market place'.

In theory, work on two different planes is possible. 'Crisis' measures can be introduced at sectoral level, though within the framework of a specific programme for a limited period, or else the matter can be left solely to the discretionary judgment of the Commission, exercised pursuant to Articles 85 and 86 and Articles 92 to 94.

The Commission squarely rejected the former alternative. It can therefore be expected that the necessary measures for combating the crisis will in future have to be sought solely within the framework provided by applying the above-mentioned rules, and more particularly by interpreting in a social context the concept of 'technical or economic

progress' contained in Article 85(3) and by assessing the lawfulness of aid granted by States according to its compatibility with the maintenance of a system of undistorted competition.

94. This conclusion gives rise to very serious doubts indeed.

(a) It would seem that applying the competition rules inevitably entails adopting flexible interpretation patterns with the inherent risk of diluting their technical content. It is of course quite possible that such an approach might provide fair and just solutions for certain individual cases since it enables the objective circumstances necessarily circumscribing firms' conduct to be evaluated. This approach, however, introduces possible exceptions to the prohibition which are unpredictable, even though probably fair in an individual case, and therefore undermines all certainty as to the limits of the prohibition. The risk is all the greater where Article 86 is concerned because it contains no express exception to the prohibition.

It also remains to be seen to what extent the Commission will (or can) reconcile an interpretation alive to social needs with statements, some of them quite recent, in which it reaffirms the almost mystical quality of the principles of interpretation followed in applying the competition rules: as witness the words of Advocate-General Warner himself, in the *Distillers* case:

'The Commission appears to be saying that it does not care whether or not DCL products are distributed in continental Member States; that observation of its own policy with regard to parallel imports is more important.' [125]

(b) With regard to Commission control over aid granted by States, there has been no lack of serious conflict in the past.

It is only to be expected, therefore, that needs considered imperative by one Member State may give rise to divergent assessments as to the compatibility of certain aid with the maintenance of a system of undistorted competition. In such a case, the Commission can, of course, make use of its powers to oppose the infringement committed by the State in question. As a general rule, taking into account the worsening crisis, this course of action, especially if repeated with any frequency, might well have explosive repercussions. The Commission could therefore conceivably adopt more flexible interpretation criteria, allowing certain aids that in fact distort or threaten to distort competition. The consequences of this alternative would be no less disastrous: observance of principle would be reduced to mere lip service, which would provoke an understandable reaction against a principle that was not observed in practice.

Finally it is impossible to anticipate the differences of opinion that might arise between the Commission and the Council, since the latter body also possesses considerable powers with regard to implementing the rules on State aid.

95. These observations are intended to provoke reflection on the advisability of a rigid position, based on abstract premises according to which, despite the persisting economic crisis, safeguarding the competition mechanism is presented as a principle that admits of no exception and to which all others must be subordinated.

---

[125] Cited in the Editorial, *The Ninth Report on Competition Policy*, point 95.

Without embarking on a theoretical examination of the validity of the principle itself, it is clear that applying such a principle in the overall context of Community activity could produce discrepancies and contradiction between various policies which ought to be coordinated harmoniously.

Indeed, differences of theory apart, economic and social factors exert pressure with varying intensity in different Member States; periods of crisis are therefore closer for some and more distant for others. In terms of *Realpolitik,* this only serves to accentuate the difficulty of the dialogue with (and between) States that nevertheless constitutes an essential preliminary to harmonious coordination of all the policies which the Commission has clearly promoted. It is precisely to meet the needs of such overall coordination that the competition mechanism might possibly be partially abandoned in individual cases by means of *ad hoc* regulations. Such regulations, though scarcely desirable in themselves, would nevertheless demonstrate a clear and precise awareness of problems a solution to which cannot be deferred. They would, moreover, reduce the danger of worsening interpretation of the competition rules and even of contradictions in the process of applying these rules in their entirety.

In the final analysis, voluntary renunciation of the competitive mechanism, within these limits, should be looked upon merely as a temporary waiver of the fundamental principles so often recalled by the Commission rather than as an alternative to those principles; the waiver would be simply for the purpose of achieving structural reforms, on the need for which as an ultimate objective everyone appears to be agreed. [126]

[126] For a critical assessment of the general problems regarding competition, see the European Parliament's Report on the *Ninth Report on Competition Policy*, Documents of the sitting, Document 1-867-80. No account could be taken of the *Tenth Report on Competition Policy* which was published after the manuscript was sent to the editor. That Report does not appear to contradict the general conclusions in this chapter.

Chapter IV — Commercial policy and development policy

by Maurice Flory

Section I — Foundation of the common commercial policy: Community competence

¶ 1. *Definition of the common market*

1. Article 2 of the Treaty of Rome states that the Community shall have as its task a harmonious development of economic activities; Article 3 indicates the means by which this is to be achieved, via the establishment of what is popularly known as the common market. This complex structure has two aspects: the formation of an internal market, and that market's relations with the outside world.

Internally, the common market requires the elimination between Member States of customs duties, quantitative restrictions and all other measures having equivalent effect (Articles 12 to 17 and 30 to 37 EEC). This was achieved over a 12-year transitional period.

Externally, the common market involves the introduction of a common customs tariff (Articles 18 to 29 EEC); this distinguishes it from a free trade area, and, according to Article XXIV (5) of the General Agreement on Tariffs and Trade (GATT), makes it a customs union. [1] The EEC Treaty also calls for the establishment of a common commercial policy, to cover matters coming under the Euratom Treaty as well. The earlier ECSC Treaty had made no such provision, restricted as it was to two industries alone.

The common market, with its two aspects, came into being in an already existing international economic order defined and regulated by the GATT (from 1948). This liberal order it therefore aimed to uphold, in the first instance by ensuring freedom of competition within its own confines. The unification of import arrangements resulting from the existence of the Common Customs Tariff, which has uniform incidence on commodity import prices, is an important factor in the alignment of conditions of competition and costs between businesses in the different Member States. [2]

---

[1] See D. Carreau, P. Juillard and T. Flory, *Droit international économique*, second edition, Paris, 1980, p. 256 et seq.

[2] J. Bourrinet, M. Torelli, *Les relations extérieures de la CEE*, PUF, 1980.

The European Community is the world's largest exporter; competition between exporting firms must likewise, therefore, be fairly conducted. Article 112 accordingly stipulates that Member States must harmonize the systems whereby they grant aid for exports to third countries; the Commission has attempted to draw up an inventory of such aid, and has done what it can to iron out the major distortions, such as those relating to export credit and credit insurance terms.

2. The establishment of a market and common policy for agriculture implied that the Community's trade in this sector should also be harmonized, thus making agriculture an integral part of the common commercial policy. The basic principle here is that of Community preference, using the familiar import levy/export refund machinery to compensate for the difference between Community and world prices. This special sector of the common market is served by a common economic policy owing its existence to a desire to protect the incomes of farmers. The agricultural policy is accordingly more protectionist, less liberal than the rest of the commercial policy, and has inevitably attracted criticism, notably from the United States. [3]

¶ 2. *The common commercial policy*

3. In establishing the common market the Member States hoped to contribute to the development of world trade. The rules dictating commercial policy for the EEC are nevertheless different from those in the ECSC. The ECSC Treaty (Article 71) stipulates that the Member States retain their powers to organize commercial relations with third countries within limits set by the Community, and subject to Community supervision. This is the approach adopted by that Treaty in respect of customs tariffs (Article 72), quantitative restrictions (Article 73) and commercial agreements (Article 75). The ECSC has wider powers to protect the Community market (Article 74), and moves are now under way to put commercial policy on a partly Community footing by adopting a unified tariff, in accordance with recommendations by the High Authority.

The EEC Treaty provides, following a transitional period (Articles 111 and 112), for a commercial policy run on common lines (Article 113), to be devised and implemented by Community institutions and based on uniform principles, in conformity with the liberal economic approach defined by GATT—non-discrimination, tariff reductions and regional integration. However, for one category of country—the 'overseas countries and territories'—it was intended from the inception of the Community that there should be special treatment; Part Four of the Treaty of Rome inaugurated a new style of international relations, paving the way for the Yaoundé and Lomé Conventions.

¶ 3. *Community competence*

4. Development of a common commercial policy is subject to the extent of the powers conferred for this purpose on the Community, which is empowered by Articles 113 and

[3] See T. Flory, 'Chronique de droit international économique', AFDI, 1976, p. 600; J.H. Jackson, 'US-EEC trade relations', CML Rev., 1979, p. 453.

114 of the EEC Treaty to conclude trade agreements, and by Article 238 to conclude association agreements.[4]

It has not really proved possible to deal with commercial policy in isolation. Articles 110 and 113 indicate the minimum scope of this area, but not its outer limits. By virtue of its very size and impetus, EEC commercial policy can involve economic and political considerations going beyond the strictly commercial. The Community will therefore tend to overstep the limits of the powers conferred on it by Article 113, and, correspondingly, a Member State contracting bilateral ties will inevitably touch on commercial matters which are within the Community's jurisdiction. In each case the issue is the division of powers between the Community and its Member States.

Once it has overstepped the limits of its competence, the Community can no longer rely solely on Article 113; it must secure the involvement of the Member States as such. Thus where EEC policy touches on fields which go beyond commercial policy and do not come within the sphere of any other Community powers (e.g. under Article 43, 75 or 100), it will be administered in accordance with a composite procedure involving both the Community as an organization and the Member States as such.

This 'mixed' procedure causes a number of problems, complicating negotiations and leading to delays, since all Member States have to ratify the results. Enlargement is bound to slow things down even more. To avoid postponing implementation of the texts, interim agreements are needed (the procedure used for the agreements with the Maghreb countries provides an example of this). The composite approach also puts the whole *communautaire* principle at risk in that the Member States, as parties to an agreement, may be tempted to take the opportunity of clawing back certain powers that have been transferred to the Community, as well as casting doubt, in the eyes of non-member countries, on the Community's international status.

There has been, predictably, a difference of opinion on this point between the Member States and the Council on the one hand, and the Commission on the other. The Court of Justice, in its judgments and in opinions requested by the Commission under Article 228, has been working towards a clarification of the situation.

5. The current situation[5] is set forth in the Court's Opinion 1/78, which holds that the Community has the legal powers needed to conduct a coherent commercial policy. 'It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms ... the Treaty ... does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a

---

[4] See Part One, Chapter IX of the present work and bibliography. See also J. Raux, *Les relations extérieures de la Communauté économique européenne*, Paris, 1966; J. Boulouis, 'La jurisprudence de la CJCE relative aux relations extérieures des Communautés', RCADI, 1978, II, p. 339.

[5] The extension of Community powers in the external relations field is part of a development going beyond the sphere of commercial policy, the different stages of which can be traced in judgments dated 12 July 1973 (Case 8/73 *Massey Ferguson* [1973] ECR 1135) and 15 December 1976 (Case 41/76 *Donckerwolke* [1976] ECR 1921), Opinion 1/75 of 11 November 1975 in [1975] ECR 1353, and a number of other rulings including judgments dated 15 July 1964 (Case 6/64 *Costa* v *ENEL* [1964] ECR 1141), 31 March 1971 (Case 22/70 (*AETR*) *Commission* v *Council* [1971] ECR 263), and 14 July 1976 (Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279), plus Opinions 1/76 (26 April 1977 [1977] ECR 741) and 1/78 (4 October 1979 [1979] ECR 2871), and Ruling 1/78 (14 November 1978 [1978] ECR 2151).

regulation of the world market for certain products rather than at a mere liberalization of trade.' The Court also held that while economic policy was considered primarily as a question of national interest, it was envisaged in certain provisions (Articles 103 to 116) as being a matter of common interest (paragraph 47 of the Opinion). This justifies the view that commercial policy may draw to itself certain aspects of general economic policy without making it necessary to use the 'mixed' procedure. It is therefore likely that the Community will acquire further areas of exclusive power in the economic policy field.

6. When it comes to the signing of agreements, there are three possible answers to the jurisdiction problem: either the Community is not party to the agreement at all, or it and the Member States are all parties, or the Community is party and not the Member States.

In the first type of situation, e.g. where the Community has not yet made full use of its internal powers, it should nevertheless coordinate the Member States' positions and work out the joint action they are to undertake (Article 116 EEC). [6]

In the second situation the Community as such is an actor in the proceedings, taking part in negotiations, signing agreements and sometimes helping administer them, as a member of certain organizations. In these circumstances the Community's participation is governed either by the agreement itself [7] or by the normal rules of international law. [8]

In the third situation the Community enjoys exclusive powers; the Member States as such are not among the participants, their involvement remaining at the level of internal Community procedures. An example of this is the Olive Oil Agreement signed in Geneva on 30 March 1979, the first commodity agreement for which the Community exercised its sole powers and signed in lieu of the Member States. According to Opinion 1/78 of the Court of Justice, it should have had sole powers in respect of the Rubber Agreement too, had it been provided that the new intervention fund would be financed entirely by the Community budget, but this was not the case. Again, most of the Tokyo Round agreements were concluded by the Community alone, on the basis of Article 113, whereas prior to Opinion 1/78 they would probably have been regarded as coming within the scope of other EEC Treaty provisions as well and would have been concluded by the Member States too, as was in fact the case with the agreement on technical barriers to trade and the civil aircraft agreement; the Member States also concluded the tariff protocol in respect of ECSC products. Regarding Community participation in the bodies set up by the multilateral agreements to administer the various codes, a compromise was struck: the Community is a member of the signatories' committees, in accordance with its usual practice in the GATT, but it is accepted that in exceptional circumstances a Member State's delegate may speak as a representative of that State. [9]

7. The jurisdiction rules applying to relations with non-member countries also apply to developing countries once they have attained independence. For such countries, however,

---

[6] See CJEC Joined Cases 3, 4 and 6/76 (*Kramer*), cited at footnote 5.

[7] For example Article 19 of the Convention on the Prevention of Marine Pollution, 21 February 1974.

[8] See J.P. Jacque, 'La participation de la CEE aux organisations internationales universelles', AFDI, 1976, p. 924; E. Grillo-Pasquarelli, 'La participation de la CEE aux accords multilatéraux' in *La CEE dans les relations internationales*, Nancy, 1972; M. Rott, *La participation de la CEE à la gestion des accords multilatéraux*, thesis, Toulouse, 1979.

[9] See T. Flory, 'Chronique de droit international économique', AFDI, 1979.

the Community pursues a policy which is not purely commercial, but designed to foster their development. Action on this scale raises other legal questions, which will be dealt with in Section III.

Section II — The content of the common commercial policy

¶ 1. *The Common Customs Tariff*

8. The key to the Community's whole commercial policy is the Common Customs Tariff. The existence of such a tariff has encouraged trade within the customs union, so that the Member States' trade among themselves has grown much faster than their trade with the rest of the world. [10] From the external standpoint, as regards the initial level of customs protection, which was to act as the basis for subsequent tariff negotiations, Article 19 EEC provided that the new tariff should be established 'at the level of the arithmetical average of the duties applied in the four customs territories' which made up the Community in 1957 (the Benelux being a single customs territory), in accordance with the timetable and procedures set out in Articles 18 to 28 EEC. The tariff was introduced under GATT supervision, pursuant to Article XXIV. Since this article stipulates that the formation of a customs union should not adversely affect the position of non-member countries, the Community was obliged to enter into negotiations with its various trading partners, and in the event the new tariff was slightly beneath the strict arithmetical average, certain concessions being offered as compensation.

The accession of the United Kingdom, Ireland and Denmark again involved the Community in negotiations with the new members' trading partners for compensation in the form of tariff concessions, as required by GATT Article XXIV (6). The upshot was the creation of a free trade area between the Community and the members of the European Free Trade Association (EFTA), which the new Community members had to leave. Three had left to become members of the Community; there could be no question of asking them to re-erect long-abolished customs barriers against their former EFTA partners. In July 1974, the EEC concluded bilateral agreements with 13 other countries (Ceylon, South Africa, Japan, Poland, Brazil, New Zealand, the United States, Australia, Yugoslavia, Argentina, Pakistan, Romania and Uruguay) offering tariff concessions on 30 different products. [11]

9. Mindful of the 'Joint declaration on cooperation with the States Members of International Organizations', annexed to the Treaty of Rome, the Community took part from its earliest days in the major GATT multilateral negotiations to cut tariffs across the board—the Dillon Round from 1960 to 1962, the Kennedy Round from 1964 to 1967, which resulted in a lowering of tariffs by almost 50%, and latterly the Tokyo Round (1973-79), which will cut tariffs by a further 30% over an eight-year period. These sweeping measures of liberalization also apply to agricultural products, as do the numerous

[10] N. Vaulont, *The Customs Union of the European Economic Community*, European Perspectives, Brussels, 1980; J. Bourrinet and M. Torelli, *Les relations extérieures de la CEE*, op. cit. at footnote 2 above, p. 76.

[11] See T. Flory, 'Chronique de droit international économique (Commerce)', AFDI (see e.g. 1974 AFDI, p. 682) and reports by J. Raux, RDTE.

bilateral tariff agreements (with Argentina, Uruguay, Brazil and the Mediterranean countries) or regional accords (the EFTA and Lomé agreements). These tariff concessions on agricultural produce have silenced some of the objections to the CAP voiced by the EEC's partners; GATT too has acknowledged the measure of liberalization granted by postponing the introduction of the multilateral framework for agriculture devised during the Tokyo Round and deciding for the moment not to bring in special arrangements for monitoring agricultural policies.

The Common Customs Tariff enables the Community to adjust its policies at need. The Council can authorize temporary though renewable derogations in the Community's economic interests, or to improve the supply position, and can also decide to negotiate tariff changes; subject to compliance with GATT requirements, these may be of a preferential nature.

¶ 2. *Trade protection*

A. **Common trade protection measures**

10. The existence of a Common Customs Tariff in itself is not sufficient as a foundation for an external policy; the extensive dismantling of customs protection as a result of the multilateral negotiations means that trade protection measures must be available. It is the job of the Community to take the necessary defensive measures in implementation of the common commercial policy (Article 113 EEC), be they of a familiar variety or specially developed to meet changing circumstances. [12]

Article 113 provides the basis for common Community rules for imports from GATT members and countries accorded like treatment (Regulation (EEC) No 926/79), [13] State-trading countries (Regulation (EEC) No 925/79) [14] and China (Regulation (EEC) No 2532/78). [15]

There is a Community notification and consultation procedure for monitoring import flows, and should their impact on a Community market constitute a threat, further surveillance measures are available. Safeguards can be introduced where imports cause, or threaten to cause, substantial injury to Community industry. Only in an emergency are the Member States entitled, under Community supervision, to take protective action themselves. The question of national safeguards is a knotty legal problem to which no satisfactory solution has yet been found (Article 14 of Regulation (EEC) No 926/79).

Under Article 74 of the ECSC Treaty trade policy has also to some extent been put on a Community footing, by means of Recommendations 77/328, 77/329 and 77/3004 addressed to the Member States' governments. [16] There is also an ECSC unified customs tariff (not actually provided for by the Treaty), which was established as a result of

---

[12] See A. Manin, 'À propos des clauses de sauvegarde', RTDE, 1970, p. 1; Talgorn, 'Les mesures de sauvegarde dans les accords externes de la CEE', RTDE, 1979, p. 694. For a discussion of the agricultural safeguard clause in the Community's scheme of generalized preferences, see N. Kleeman, 'La politique préférentielle de la CEE' in *La CEE dans les relations internationales*, Nancy, 1972 p. 259.

[13] Council Regulation (EEC) No 926/79 of 8 May 1979 (OJ L 131, 29.5.1979, p. 15).

[14] Council Regulation (EEC) No 925/79 of 8 May 1979 (OJ L 131, 29.5. 1979, p. 15).

[15] Council Regulation (EEC) No 2532/78 of 16 October 1978 (OJ L 306, 31.10.1978, p. 1).

[16] OJ L 144, 5.5.1977, pp. 4 and 6; OJ L 352, 31.12.1977, p. 13.

decisions taken by the representatives of the Member States meeting within the Council.

In a recession any active trade policy is likely to be viewed askance. There is therefore a risk that the Community may be accused of failing to comply with the rules of international trade, and then find itself the object of anti-dumping measures. Where action judged to be unwarranted has been taken against a Member State's producers, it is up to the Community to organize retaliation, as was the case in March 1980, for example, when the Commission reacted to the US measures to block European steel exports.

B. Safeguard clauses and voluntary restraint agreements

11. When negotiating agreements the Community customarily inserts the necessary safeguard clause; all the association agreements contain such clauses, as does the Lomé Convention. As a rule, safeguard clauses in agreements work both ways and can be used by either party, but developing countries may be allowed special safeguards. The Community's bilateral trade agreements habitually incorporate safeguards. [17] In the highly-sensitive textiles sector, multilateral negotiations in GATT led in 1974 to the Multifibre Arrangement (MFA). [18] The Community, one of the MFA signatories, waited some time before invoking Article 4 of the Arrangement to conclude bilateral voluntary restraint agreements (with India and Pakistan: end 1975; with Asian exporting countries: 1976), and then on a purely selective basis, covering only a handful of sensitive products. A considerable proportion of the Community's textile imports therefore came in free of any restriction, and the only available defences, other than GATT Article XIX, which can be used by any contracting party, were the 'compulsory consultation clause' in the voluntary restraint agreements, or the MFA Article 3 selective safeguard clause.

12. It was also open to the Community to try to make more effective use of the voluntary restraint agreement, and this it did after the MFA was extended for a further four years from 1978. In 1977 and 1978, the Commission, using the Article 113 procedure, negotiated 24 new bilateral agreements. In 1979, further agreements were concluded with China, Poland and Bulgaria. This new series of agreements covers a wide range of products and controls are tighter. The exporting country must undertake to restrict its exports of sensitive products to agreed levels, while for other, non-restricted products consultations with a view to the adoption of voluntary restraint measures are provided for once imports exceed certain thresholds. In return the Community undertakes not to apply any other restrictions, for example under GATT Article XIX or Article 3 of the MFA. [19] The exporting countries undoubtedly agreed only reluctantly to the voluntary restraint undertakings, which constrict the developing countries' export capacity, but as the Commission pointed out in reply to a written parliamentary question, 'when the arrangements were negotiated, particular account was taken of the interests of countries covered by prefer-

---

[17] See for example Articles 20 to 27 of the EEC-Switzerland Agreement of 22 July 1972 (OJ L 300, 31.12.1972, p. 189).

[18] OJ L 118, 30.4.1974, p. 1.

[19] T. Flory, 'Chronique de droit international économique', AFDI, 1977, p. 669 and AFDI, 1978, p. 614. Several Council regulations were needed to implement these agreements; see for example Regulation (EEC) No 3059/78 of 21 December 1978 on common rules for imports of certain textile products originating in third countries (OJ L 365, 27.12.1978, p. 1) and Regulation (EEC) No 1176/79 of 12 June 1979 amending that regulation (OJ L 149, 18.6.1979, p. 1).

ential agreements and consequently recourse to the safeguard measures provided for in those agreements should not be required'. [20]

The objection that the voluntary restraint pacts were permanent safeguards was countered with the agreement that the use of safeguard clauses was actually more damaging than agreements since it put exporters in a position of considerable uncertainty. [21]

13. Voluntary restraint agreements have also been negotiated outside the GATT framework. Starting in 1978, the Community concluded a number of non-MFA voluntary restraint arrangements for textiles with Mediterranean countries linked to it by preferential agreements. Flexible in application and with a limited lifetime, these arrangements are necessarily informal, given the existence of preferential concessions.

During the same period, similar agreements were signed with the Mediterranean countries, which undertook to freeze their exports of certain processed agricultural products (fruit salad and tomato concentrate). It is the exporting countries themselves which ensure compliance with such undertakings, through national bodies which monitor the trade flows planned. Such an approach is the outcome of a spirit of cooperation which, in difficult times, represents an attempt to uphold the free-trade principle by introducing a measure of organization, and it has provided a means of helping the Mediterranean countries maintain their existing levels. [22]

14. Also in 1978, the Community concluded bilateral voluntary restraint agreements under the ECSC Treaty with 17 steel-exporting countries. These again are informal arrangements based on an exchange of letters between the exporting country's ambassador to the Communities and a Commission representative. They are valid for a year, and are renewable. In 1980 the Community concluded similar agreements with 12 exporting countries (five State-trading countries, four EFTA members, Australia, Spain and Japan), allowing them to undercut European steel firms' published list prices by 6% for ordinary steel and 4% for special steels in order to retain a 'margin of penetration'.

C. **Harmonizing defensive action**

15. It is not always easy, however, to apply the rules in such a sensitive area at a time of recession, and some Member States have taken unilateral safeguard action. In 1977, for instance, France, feeling that the Community was applying the MFA too liberally, decided to make unilateral use of the GATT Article XIX safeguard clause and impose quotas on four sensitive products. The French measures were subsequently replaced by Community regulations. [23]

Safeguards are in any case always subject to international supervision. Where the Community is concerned the Commission usually has full powers to act alone. The Court can

---

[20] Written question No 1796/78 of 22 November 1978 by Mr Dankert (OJ C 113, 7.5.1979, p. 5).

[21] Written question No 53/79 of 6 April 1979 by Mr Cot (OJ C 185, 23.7.1979, p. 9).

[22] J. Raux, report in 1978 RTDE 467.

[23] Council Regulation (EEC) No 1827/77 of 5 August 1977 (OJ L 202, 9.8.1977, p. 2) ratified the measures taken by the Commission in two regulations dated 14 July 1977. See T. Flory, 'Chronique de droit international économique', 1977 AFDI 670.

always be asked to pronounce on the legality of protective clauses, [24] and the whole system is under GATT supervision.

The revision of Article XIX of GATT (emergency action against particular imports) was one of the items on the agenda for the Tokyo Round. The negotiations are still going on, one difficulty being the lack of consensus on selective application, which is advocated by the Community and others as a means of enabling the contracting party affected to confine defensive action to the exporting countries actually responsible for disruption of its market.

D. **Anti-dumping measures**

16. Dumping is an illicit trade practice which may pose a threat to Community manufacturers. At a time of recession there is a tendency to extend the definition of dumping to embrace any 'aggressive' commercial practice, and various employment-related or monetary policies are wrongly termed 'dumping'. The Community sticks to the definition formulated by GATT (Article VI(1)), which has also drawn up an anti-dumping code that came into force in 1968 and was renegotiated during the Tokyo Round. Since 1970, anti-dumping measures have come under the common commercial policy and are subject to Community rules which broadly correspond to the GATT code. When an anti-dumping procedure is initiated, the Commission opens an investigation which often culminates in a price-increase arrangement rather than the introduction of a provisional anti-dumping duty. Subsequently the Council may, if necessary, impose a definitive duty. [25]

17. There are always problems in applying this procedure to State-trading countries, because of their particular internal structure and the absence of any normal concept of domestic consumer prices. The Community rules have had to resolve this problem. [26]

¶ 3. *Contractual commercial policy*

A. **Trade agreements**

18. With its customs tariff and increasingly harmonized import, export and protective rules, the Community has the means to conduct a foreign trade policy [27] based on the

---

[24] See for example, Joined Cases 41 and 44/70 *International Fruit* v *Commission* [1971] ECR 412.

[25] See H. Lesguillon, *Le régime antidumping de la CEE. Droit et pratique du commerce international*, 1978, p. 459. The earliest regulation (Regulation (EEC) No 459/68, OJ L 93, 17.4.1968, p. 1) was replaced by Regulation (EEC) No 3017/79 (OJ L 339, 31.12.1979, p. 1), which gives effect to the Tokyo Round agreement. The 1968 regulation was amended by Regulation (EEC) No 1681/79 (OJ L 196, 12.8.1979, p. 1), following the judgment of the Court in the 'ball-bearing' cases (Cases 113 and 118 to 121/77 [1979] ECR 1185).

[26] Article 3 of Commission Regulation (EEC) No 459/68 of 5 April 1968 (OJ L 93, 17.4.1968, p. 24), as amended by Council Regulation (EEC) No 1681/79 of 2 August 1979 (OJ L 196, 1.8.1979, p. 1). The relevant provision is now Article 2(5) of Council Regulation (EEC) No 3017/79 of 20 December 1979 (OJ L 339, 31.12.1979, p. 1). See also T. Flory, 'Chronique de droit international économique', 1977 AFDI 664.

[27] See the Council Decision dated 25 September 1962 on a programme of action in matters of common commercial policy (OJ 90, 5.10.1962, p. 2353).

formulation of 'uniform principles' for the fields listed, though not exhaustively, in Article 113.

It is not easy to strike a balance between a strengthening of the market within the walls of the Common Customs Tariff and liberalization of the tariff itself; this calls for an active, flexible trade policy making use of a range of agreements all of which must comply with GATT requirements and take account of the existing situation and links with other non-member countries (GATT Article XXIV and Article 234 EEC). [28]

19. The ordinary type of trade agreement poses no problem, but it is not the most commonly used; the trend at Community level is increasingly towards the preferential agreement, whereby concessions are granted to a particular State (e.g. the 29 June 1970 agreements with Spain and Israel). In theory such agreements are not compatible with GATT rules and would require a waiver, but Article XXIV allows exceptions for free-trade areas and customs unions. Until 1964, unless a waiver was authorized, association agreements [29] could only make preferential concessions within a free-trade area [30] and this was the approach adopted with the First Yaoundé Convention (20 July 1963).

Subsequently, however, Part IV (Trade and development) was added to the General Agreement, widening the Community's scope for action by providing a more suitable basis for preferences granted to developing countries under multilateral (Yaoundé II, Lomé I and II) or bilateral agreements. [31]

Other European States can also join the Community customs union, as the United Kingdom, Ireland, Denmark and Greece have done; other countries are at an earlier stage of the process, with association agreements providing for eventual customs union (e.g. Turkey: agreement dated 12 September 1963; Malta: 5 December 1970; Cyprus: 19 December 1972).

As well as agreements, the Community makes use of 'autonomous' measures to implement agreements (e.g. regulations activating the safeguard measures in preferential agreements, see Regulation (EEC) No 3059/78), give effect to MFA bilateral accords, set out the (unilateral) generalized preferences and to offer or adopt arrangements to apply, in the absence of an agreement, to dealings with non-member countries (e.g. Eastern bloc countries).

B. **Relations with State-trading countries**

20. The Community offered the State-trading countries a model agreement that was rejected by all except China and Romania. In the absence of contractual provisions, it authorized the Member States to continue to apply their own quantitative restrictions on imports, though subject to certain Community rules. [32]

Setting aside the German Democratic Republic, which is a special case, the State-trading countries' relations with the Community, as with GATT (which Yugoslavia, Poland,

---

[28] See for example the situation of the German Democratic Republic and the Protocol on German Internal Trade annexed to the Treaty of Rome.

[29] Luchaire, 'Les associations à la CEE', 1975 RCADI 1/295.

[30] R.S. Imhoof, *Le GATT et les zones de libre échange*, Geneva, 1979.

[31] See Section III, ¶ 5 et seq.

[32] Council Regulation (EEC) No 3286/80 of 4 December 1980 (OJ L 353, 29.12.1980, p. 1).

Romania and Hungary joined in 1966), have made slow progress. The USSR takes the view that the first step should be the conclusion of a Community-Comecon agreement; the Community, though it entered into negotiations with Comecon in 1977, considers that, in the field of trade policy proper, bilateral agreements can be made with Comecon members, and has just concluded a non-preferential agreement with Romania, the first trade pact with a Comecon country to go beyond the purely 'sectoral' approach. [33] The agreement suspends existing quantitative restrictions, or increases quotas, on a list of products, while in return Romania undertakes to increase and diversify its purchases from the Community.

The Community has also concluded a trade agreement with the People's Republic of China. [34]

C. The Community's participation in multilateral agreements

21. Multilateral agreements also form part of Community commercial policy. [35] In addition to the primary aim of securing tariff concessions, negotiations are concerned with the removal of practices contrary to GATT rules. The Community has taken part in all the big multilateral trade negotiations, has signed the various codes, drawn up in the recent Tokyo Round talks, on subsidies and countervailing duties, customs valuation, government procurement, import licensing and technical barriers to trade. It is also a party to the various commodity agreements on coffee, tin, wheat, olive oil and natural rubber.

It was involved in the negotiation of the Cocoa Agreement, and is taking part in the work being done on other commodity agreements (on copper, tea, cotton, jute, hard fibres, oilseeds, tropical woods, meat and tungsten) to give effect to the Unctad integrated programme.

¶ 4. *Community coordination of national policies*

22. In areas outside the Community's jurisdiction the Member States continue to conduct their own foreign policies. But just as the common commercial policy may spill over into areas of national competence, Member States' individual policies may impinge on the common policy. In this situation, a coordination procedure is necessary. During the transitional period the procedure was that set out in Article 111; and coordination is still needed where Community powers are lacking, or where the absence of a harmonized trade policy means that Member States act on a national basis. Initially the Council asked Member States, when concluding, renewing or amending bilateral trade agreements, to incorporate the following clause: 'Should those obligations under the Treaty establishing the European Economic Community which relate to the gradual establishment of a common commercial policy make this necessary, negotiations shall be opened as soon as

[33] Council Regulation (EEC) No 3338/80 of 16 December 1980 and Annex (OJ L 352, 28.12.1980, p. 1).
[34] Council Regulation (EEC) No 946/78 of 2 May 1978 and Annex (OJ L 123, 11.5.1978, p. 1).
[35] For the Community's status and powers in this respect see point 6.

feasible in order to amend this present agreement as appropriate.' [36] However, it was subsequently decided that either such agreements would not be renewed (in the case of State-trading countries), or their extension (for a maximum of one year) would be subject to Council authorization. [37]

23. The question of Community coordination arises in the case of bilateral 'cooperation' agreements concluded by Member States. In a communication to the Council dated 3 October 1973, the Commission called for such agreements to be brought within the Community's sphere of competence, but this the Council was unwilling to do. Under a Decision dated 22 July 1974, based on Articles 113 and 235, Member States are required to notify both the Commission and the other Member States when such agreements are planned, and Community consultations may be held in connection with the conduct or conclusion of negotiations, to check that they are consistent with common policies. [38] A more advanced form of coordination is seen when the Community concludes a framework agreement with a particular country, thus providing Community guidelines for bilateral cooperation measures to be undertaken by the Member States themselves (see the EEC-Canada Agreement which came into force on 1 October 1976; in the end the Member States refused to agree to coordination of Community and national measures). [39]

¶ 5. *An incomplete common commercial policy*

24. The common commercial policy has moved beyond the transitional phase (Articles 111 and 112 EEC), but it is still incomplete; the Community does not have the sole powers it is eventually intended to enjoy. More specifically, two areas of policy can be distinguished.

The first is that in which the Community has, and exercises in full, exclusive powers: this area takes in the negotiation and signing of agreements with non-member countries, including agreements covering products not subject to uniform import or export rules (e.g. the bilateral textile agreements concluded within the MFA framework, and the agreement with Romania on industrial products), the lists of products liberalized, for imports and exports, throughout the Community (Regulations (EEC) Nos 925 and 926/79 and Regulation (EEC) No 2603/69) and anti-dumping or anti-subsidy measures (Regulation (EEC) No 459/68, replaced by Regulation (EEC) No 3017/79).

The second area is that in which the Community jurisdiction rule applies in part, and it includes binding or recommended Community framework measures, certain prerogatives retained by Member States in the essentially Community-run field of commercial policy (e.g. the triggering of national protective measures: Regulation (EEC) No 926/79, Article 14; Regulation (EEC) No 925/79, Article 9) or in fields not yet brought under Community jurisdiction, including the introduction or modification of import quotas on goods from State-trading countries (Regulation (EEC) No 3286/80), changes in import arrangements for goods originating in countries other than State-trading countries (Regulation

[36] 20 July 1960. See *Fourth General Report*, EEC, p. 196.
[37] Council Decision 69/494/EEC of 16 December 1969 (OJ L 326, 29.12.1969, p. 39).
[38] Council Decision 74/393/EEC of 22 July 1974 (OJ L 208, 30.7.1974, p. 23).
[39] See J. Bourrinet and M. Torelli, op. cit. at footnote 2 above, p. 30 et seq.

(EEC) No 926/79, Article 17), or the notification of decisions to extend credit to non-member countries on terms departing from Community guidelines (Council Decision 73/391/EEC).

Section III — Economic relations with developing countries

25. In a world made up of countries at different stages of development a single set of rules cannot ensure the smooth expansion of international trade. The Havana Charter, which formed the basis for the first version of GATT, was drawn up by a group of countries at more or less the same level of development. But with 129 of the 150 independent States classified as developing countries, the liberal GATT system was supplemented in 1964, under pressure from Unctad, by the addition to the General Agreement of Part IV. This effectively introduced a separate set of rules [40] and created a 'double standard'. [41] The Community, with the full approval of GATT, set out to adopt the same approach to its relations with the developing countries. [42]

From the outset, in the Treaty of Rome, the Community opted for a selective policy. It decided to concern itself primarily with a number of countries having special relationships with Member States, which meant that the emphasis was on Africa. However, while Community policy towards the developing countries started out with non-European territories linked to certain Member States, it did not stop there. The Community has always been keen to develop its trade with the rest of the world as a whole, and it has gradually diversified its approach to the developing countries to include a scheme of generalized tariff preferences, improved year by year, participation in commodity agreements, trade cooperation through non-preferential agreements, trade promotion, various types of financial transfer, industrial and technical cooperation and food aid.

¶ 1. *From Part Four of the Treaty of Rome to Yaoundé and Lomé*

26. At the time when the Treaty of Rome was being negotiated four of the countries involved—France, the Netherlands, Belgium and Italy—maintained special relationships, including preferential trade arrangements with certain overseas countries or territories. This could be handled in one of two ways: the status quo could be preserved and cast in a new mould, or the special relationship ended in order to avoid giving one group of countries preferences not accorded to other non-member States. France, in particular,

---

[40] See Part IV of the General Agreement on Tariffs and Trade, in particular Article XXXVI(1) and (8).

[41] For a discussion of this idea see G. Feuer, *Les principes fondamentaux dans le droit international du développement*, SFDI seminar, Aix, Paris, 1974; and M. Flory, 'Souveraineté des États et coopération pour le développement', RCADI 1974, I, p. 255.

[42] For an account of Community policy *vis-à-vis* the developing countries see e.g. *Memorandum from the Commission on a Community policy on development cooperation*, Supplement 2/72 — Bull. EC; *Memorandum of the Commission to the Council on the future relations between the Community, the present AASM States and the countries in Africa, the Caribbean, the Indian and Pacific Oceans referred to in Protocol No 22 to the Act of Accession*, Supplement 1/73 — Bull. EC; *Development aid — Fresco of Community action tomorrow*, Supplement 2/74 — Bull. EC.

favoured the first approach, and this was the one finally adopted, in the form of an association scheme set out in Part Four of the Treaty, to last initially for five years. This early decision influenced all subsequent developments, and the preferential treatment accorded to a group of countries became, in one form or another, a permanent policy feature. The association was felt by both sides to be a good thing, and the dependent countries and territories kept the Part Four arrangements in being. For the countries which had gained their independence, association was to take the form of a convention. The first, the Yaoundé Convention between the six Community Member States and 18 independent African States (including Madagascar), was concluded on 20 July 1963 and renewed for five years on 29 July 1969. On 24 September 1969, the Arusha Convention brought English-speaking African States onto the scene for the first time, and several years later negotiations between the enlarged, nine-member Community and 46 African, Caribbean and Pacific States (known as the ACP States) produced the first Lomé Convention, signed on 28 February 1975 and succeeded five years later by a second of the same name.

27. The basic framework has remained unchanged since 1957. In the Lomé agreements the association concept has been dropped, but apart from the introduction of more flexible arrangements to replace the Yaoundé Court of Arbitration, the institutional structure is still the same. The Community organizes its relations along highly pragmatic lines; each successive convention has contained substantive changes wherever the experience of the various joint institutions which administer the system has shown a need for streamlining.

As a result of the United Kingdom's entry into the Community, and also as a concession to the globalist views which had continued to be espoused by other Member States, the number of beneficiaries more than trebled, rising from 18 to 60 or almost half of all developing countries. The newcomers' 'economic structure and production', to quote the formula used in Yaoundé and now incorporated in Article 186 of the Second Lomé Convention, was required to be 'comparable' to that of the original associates. This entailed a certain selectivity in respect of former British dependencies, with only African, Caribbean and Pacific States accepted as qualifying for the Lomé preferential system (Annex IV and Protocol No 22 to the Treaty of Accession of the United Kingdom, Denmark and Ireland signed on 22 January 1972).[43]

A. **Trade provisions**

28. The cornerstone of the system, which may be defined by reference to Article XXIV and Part IV of the GATT as a preferential free-trade area, consists of trade concessions. From the outset, all products originating in one of the signatory States, with the exception of products covered by the common agricultural policy and hydrocarbons, for which special arrangements exist, were given free access to the common market. Thus a one-way preferential area is created, for the associated States may continue to impose customs

[43] For an account of these developments, see D. Vignes, *L'Association des EAMA à la CEE*, Paris, 1970; J.W. Zartman *The politics of trade negotiations between Africa and the EEC*, Princeton, 1971; N. Delorme, *L'Association des EAMA à la Communauté européenne*, Paris, 1972; J. Bourrinet, *La coopération économique euro-africaine*, Paris, 1976.

duties, charges having equivalent effect or even import quotas in order to protect their infant industries or raise revenue.

The Yaoundé Conventions did in fact provide for reciprocal concessions to the Community Member States; one of the biggest changes made for the benefit of the developing countries was the decision to abandon reciprocal preferences under Lomé, so that free trade flows northwards only.

A further improvement has been the more generous concessions offered on products covered by the common agricultural policy—maize, rice, beef and rum under Lomé I plus tomatoes, onions and carrots under Lomé II.

29. In operating a free trade area, rules of origin are particularly important. In the Lomé Convention, the Community has agreed to a relaxation of the origin rules so that the ACP States are now deemed to constitute a single customs territory for this purpose. This means that the processing of a product can now be split up between several ACP States. The Community is also willing to consider requests for temporary waivers in the interests of industrial development.

30. The ACP States' only obligation is to refrain from discrimination between Member States and to accord them most-favoured developed nation treatment in the fields of trade (Article 9) and investment (Article 157). They may, however, apply more favourable treatment among themselves, or towards other developing countries (Article 9 of Lomé II). This is another instance of the 'double standard' designed to broaden both Euro-African and South-South relations.

B. Financial provisions

31. The facilities offered by the Community to this favoured group of States go beyond trade to embrace financial aid and cooperation, which have evolved and diversified in the shape of the European Development Fund (EDF). Despite the Commission's wishes [44] the EDF does not come under the Community budget; it is made up of contributions from the Member States, assessed according to an established Community scale. The Fund has grown from 581 million units of account (under the Treaty of Rome) to 5 227 million ECU, to which should be added European Investment Bank loans. Changes in the way EDF money is spent reflect the increasingly precise approach to development problems. Under the first EDF, priority was given to productive investments and economic and social infrastructure. Subsequently its scope was extended to cover technical assistance and industrial cooperation, in line with each ACP State's own particular priorities. Today EDF money is also set aside for Stabex, mining projects, regional cooperation and emergency aid.

32. Stabex, established by the First Lomé Convention and improved under the second, is a novel system for the stabilization of export earnings. Covering 44 agricultural commodities or processed products which constitute the bulk of economically-significant ACP farm output, it provides for financial transfers to exporting countries whose actual

[44] See the Commission proposal of 12 June 1973 and D. Strasser, *Les finances de l'Europe*, Paris, 1975, p. 249 et seq.

earnings from a year's exports to the Community fall below a reference level. Stabex terms have become less rigorous, with the dependence and trigger thresholds lowered from 7.5 to 6.5%. For the 47 out of 58 ACP States classified as least-developed, land-locked or island States there are concessionary 2% thresholds.

Special arrangements obtain for sugar (Lomé II, Chapter 2 of Title II and Protocol No 7, which incorporates Protocol No 3 to Lomé I); these are more favourable than the Stabex guarantees in two respects. In the first place, there is a guaranteed minimum price at which ACP States can sell their sugar, unless higher prices can be obtained on the world market. The guaranteed price is negotiated each year and is virtually indexed, as it is linked to the internal Community price system. The second advantage is the existence of a reciprocal undertaking to purchase and deliver an agreed total quantity of 1 400 000 tonnes of sugar.

33. A new system known as 'Sysmin', a feature of the Second Lomé Convention, is designed to achieve similar ends to Stabex in the mining sector, though it operates rather differently. Sysmin covers eight mineral commodities, and does not have the resources to offer compensation for loss of export earnings; it is simply a means of helping an ACP State 'maintain its production plant or export capacity' when exports are lost either because of exceptional local circumstances or a fall in world market prices. When this happens, soft loans can be given to enable a mine to continue operating.

C. Technical cooperation

34. In addition to these special features of EEC-ACP cooperation, the pursuit of economic development takes other forms as well. With the aim of helping ACP exports, the First Lomé Convention, to back up the preferential advantages available, made provision for a number of trade promotion measures which could be paid for by the Community, including technical assistance to ACP export marketing bodies, training in marketing and commerce, support for ACP participation in trade fairs, market research studies and follow-up and the dissemination of commercial information.

A new world economic order cannot be based on present trade patterns; the Third World must be enabled to add value to the commodities it produces, and it is demanding a place in the new international division of labour. The signatories of the First and Second Lomé Conventions declared themselves 'resolved to ... establish a model for relations between developed and developing States which is compatible with the aspirations of the international community towards the establishment of a new, more just and more balanced international economic order'.[45] Lomé I and II both include a title dealing with industrial cooperation, for which EDF money is available, as well as investment capital; Title IV of the Second Lomé Convention encourages private investment. Industrial cooperation is to take place within a framework of interdependence, with the Community taking due account of the needs of the ACP countries in formulating policies designed to adapt its industrial fabric to changing world circumstances. Consultation machinery is established for this purpose, under a Committee on Industrial Cooperation, which in turn

[45] F. Alting von Gensau, *The Lomé Convention and a New International Economic Order*, Leyden, 1977.

reports to the Committee of Ambassadors. Industrial cooperation is also provided with a 'practical operational instrument' in the form of the Centre for Industrial Development, set up to promote viable industrial projects geared to the needs of the ACP States. Special emphasis is placed on 'exploitation of the possibilities of joint ventures and subcontracting, ... the potential of small and medium-sized industries ... and consolidation of regional industrial projects'.

Unlike Lomé I, Lomé II has a separate title on agricultural cooperation, designed to help ACP States resolve problems relating to rural development and the improvement of agricultural production for domestic consumption and export. Article 84 suggests a variety of cooperation schemes. Special technical and financial assistance is made available, and provision is made for the establishment of a Technical Centre for Agricultural and Rural Cooperation to provide better access to relevant information and research. Annexed to Lomé II are various joint declarations which open up further avenues of cooperation in new areas of importance for development, such as the problem of migrant workers (Annex XV), fisheries (Annex XVIII) and shipping (Annex XIX).

¶ 2. *Mediterranean policy*

35. The selective regional approach has not applied only to Africa, and subsequently the Caribbean and Pacific States, but also to the Mediterranean countries. The first major agreements were those creating an association between the Community on the one hand and Greece (9 July 1961) and Turkey (12 September 1963) on the other. Based on Article 238 EEC, they envisaged the eventual accession of the two countries in stages, though with very different timetables.

The Greek Act of Accession was signed on 28 May 1979 and on 1 January 1981 Greece became the 10th Member State of the Community. Trade agreements were concluded with Spain and Portugal in 1970 and 1971 respectively, and accession negotiations are under way with both countries. Association agreements also link Malta (5 December 1970) and Cyprus (19 December 1971) to the Community.

36. Not until the Paris Summit on 19 and 20 October 1972, however, did the Community stress the importance it attached to 'the fulfilment of its commitments to the countries of the Mediterranean basin with which agreements have been or will be concluded, agreements which should be the subject of an overall and balanced approach'. This approach, following the Malta and Cyprus accords, resulted in the signing of agreements with the three Maghreb countries (April 1976), four Mashreq countries (Egypt, Syria and Jordan in January 1977 and Lebanon in May 1977) and Israel (11 May 1975 and 8 February 1977). Other than the agreement with Israel, which is based on reciprocal concessions, all the accords are similar and are analogous to those with the ACP States, though less far-reaching. Falling short of creating a free-trade area, they nevertheless offer preferences extending in some cases to free access, and here again this is a non-reciprocal arrangement (except of course for Israel). For the first time migrant workers are guaranteed equality with European workers in matters such as pay, terms of employment and social security. This principle was subsequently incorporated in Lomé II (Annex XV). Unlike the first-generation agreements which had been concluded with Morocco and Tunisia five years earlier, the newer Mediterranean agreements provided for economic, technical and financial cooperation backed up by aid. The agreement signed with

Yugoslavia on 25 February 1980, which again provides for trade preferences and financial aid, means that the Community now has contractual links with all but two (Albania and Libya) of the Mediterranean countries. In addition, the Community is a signatory of the Barcelona Convention (February 1976) on prevention of pollution in the Mediterranean, along with 12 out of the 18 coastal States.

¶ 3. *The Euro-Arab Dialogue*

37. With its active Mediterranean policy, the Community decided to try something new and, building on its ties with certain Arab countries, attempted to launch a dialogue with the Arab world as a whole.[46] The Euro-Arab Dialogue really dates back to a meeting between four Arab ministers, despatched as envoys from the Arab Summit in Algiers, and the President of the Council. On 11 February 1974 the Council gave its agreement in principle to the Dialogue. Although for political reasons, mainly to do with Arab reaction to the Camp David agreements, the Dialogue has produced little in the way of results, it represents an original approach to relations with a group of developing countries. The format chosen reflects the desire to break new ground, with governments, though they are involved, staying well in the background and the contacts taking place between two regional organizations, the European Community and the Arab League. The meetings are not negotiations and simply produce statements or agreed minutes, not formal agreements. Clearly this means that, like the North-South Dialogue, the Euro-Arab Dialogue is essentially 'complementary' to existing channels (see for example the Cairo memorandum of 15 June 1975). Despite the disappointing results, the Dialogue is an interesting departure for both the Community and the Arab countries, and undoubtedly has life in it yet.

¶ 4. *Generalized preferences*

38. While the Community would appear to have placed the emphasis on the regional approach, it has not jettisoned the 'globalism' favoured by several Member States, notably the United Kingdom. There is, of course, a certain contradiction between the two tendencies, since any concessions offered across the board may devalue preferences granted on a regional basis.

The most broadly-based concession on offer to developing countries is the Community's scheme of generalized preferences, the first such scheme to be established in line with the Unctad II recommendations; it has been in operation since 1971. The generalized system of preferences (GSP) constitutes a framework within which the developed countries are invited to offer non-reciprocal and non-discriminatory trade preference on manufactured and semi-finished imports from developing countries.

The Community GSP scheme incorporates a system of ceilings and quotas on sensitive imports, and 'maximum country amounts' designed to allow the least-developed countries to gain a foothold on the market. The Community had in 1977 recognized 111

[46] See the work carried out at the Centre de Recherche International et Communautaire, Aix-en-Provence, under J. Bourrinet, published as *Le dialogue Euro-Arabe*, Paris, 1979.

countries [47] as eligible for GSP, but in 1974 a mere 10 countries took up 72% of the total Community preference between them. The scheme has undergone continual improvements for the benefit of the developing countries, and China has recently joined the countries eligible for the system.

Each year the number of 'sensitive' products is reduced, and preferences are offered on a greater number of processed agricultural products. Origin rules have been adjusted to encourage regional economic groupings. However, this positive development has been stalled by the threat posed by GSP to certain Community industries such as textiles, at a time when the economic situation is particularly unhealthy.

¶ 5. *Aid to non-associated countries*

39. The broader Community stance towards the developing world as a whole is not confined to tariff preferences. Under pressure from the United Kingdom, which in June 1974 refused to agree to the volume of aid to ACP countries until it was also agreed to provide aid for non-associated countries, the Community decided to include in its development policy financial and technical cooperation with the poorest non-associated developing countries. The legal basis for this aid was provided by Article 235 of the Treaty of Rome, but so far its administration has remained on an *ad hoc* footing.

The original appropriation for aid to non-associated countries was 20 million units of account, but two years later it was up to 70 million units of account. In allocating this aid priority is given to rural projects aimed at boosting food production and raising the living standards of the poorest members of society. The Indian subcontinent takes half the aid, a quarter going to India alone.

The Community also participates in specific schemes financed not from the EDF but under Title 9 of the general budget (Cooperation with developing countries). In 1974, for example, aid went to the Sahel States (a group of seven countries, including Ethiopia) and to Palestinian refugees, and a contribution was made to the UN international emergency programme to help the developing countries most seriously affected by the recent international price fluctuations.

Programmes of this type, particularly for the benefit of non-associated countries, have expanded and the budgetary allocation increases year by year.

¶ 6. *Food aid*

40. Since 1967, the Community has also been a major donor of food aid; today it provides almost a quarter of total world food aid, ranking second only to the United States and ahead of Canada. How has this activity developed? The Treaty of Rome is silent on the subject of food aid, which is admittedly a subject of controversy. [48] A discussion of the desirability of food aid, the risk of dependency, the 'food weapon', clearly goes beyond the scope of the present study, and in fact this appears to be a field

[47] By 1981 the number of countries eligible for GSP had risen to 123.

[48] J.L. Laurens, *L'aide alimentaire de la CEE aux PVD*, thesis, Toulouse, 1976.

which the Community has approached pragmatically, rather than in pursuit of any grand design. From time to time the Member States are faced with the need to dispose of surpluses, which can be used to help meet the demand for food aid.

41. Community food aid has developed along two separate channels, one for cereals and one for other products. Aid given in the form of cereals comes under the Food Aid Convention concluded in 1967 at the end of the Kennedy Round and subsequently incorporated in the International Wheat Agreement of 18 August 1968. Under this agreement, on the basis of the commercial policy provisions of the Treaty of Rome, the Community and its Member States undertook to provide the developing countries with a million tonnes of cereals a year. The agreement was renewed in 1971 and 1974 and the quota increased to 1 287 000 tonnes, 720 500 tonnes of which come from the Community as such and 566 500 tonnes from the Member States.

The picture is rather different for other types of food aid—skimmed-milk powder, butter-oil, sugar and dried eggs. Such aid is given unilaterally, on an *ad hoc* basis, and only by the Community as such. Deemed to be a form of stock management, it has its legal basis in the provisions governing the common agricultural policy (Article 43).

A special procedure has been developed to deal with emergency food aid, which must not exceed 5% of the food aid programmes voted annually by the Council. The Commission, once it has consulted the Member States, can allocate such aid directly to countries hit by disaster and in these circumstances food aid may include transport and distribution costs, and even the provision of trucks and storage facilities.

42. On 22 March 1977 the Council laid down three criteria for the allocation of food aid: basic food requirements, per capita income below USD 300 a year, and the balance of payments. Aid can either be sent to applicant countries direct, or go via international organizations such as the WFP, Unicef or UNRWA, which must obtain Community approval for any operation in a country.

43. The scale of Community food aid and emergency aid today has shown up the makeshift, fragile nature of its legal basis. The Court, in its judgments in the *AETR* (22/79) and *Kramer* (3, 4 and 6/76) cases, and in Opinions 1/76 and 1/78, has called on the Community to equip itself with the necessary legal machinery to frame a genuine food aid policy. A number of suggestions have been advanced, but Articles 131 and 238 on association are too restrictive, and reducing the issue to one of agricultural policy (Article 43) or commercial policy (Article 113) is precisely what ought to be avoided. This seems to leave Article 235, which authorizes the Council to take appropriate measures to attain one of the objectives of the Community where the Treaty has not provided the necessary powers.

¶ 7. *The development of relations with Asia and Latin America*

44. Geographically, the Community has attempted to balance the concessions accorded to Africa by paying greater attention to Asia and Latin America.

A Joint Declaration of Intent concerning certain Asian countries was annexed to the 1972 Act of Accession, and preferential trade agreements were subsequently signed with India

(1973),[49] Sri Lanka (1975), Pakistan (1976) and Bangladesh (1976). Agreements have also been concluded with two countries not mentioned in the Declaration of Intent; a trade agreement with Iran dates from 1963, and there is a non-preferential trade agreement with China (1978) which predates the agreement with Romania [50] and was thus the first bilateral trade agreement between the Community and a planned-economy State-trading country.

On 7 March 1980 the Community signed a framework cooperation agreement with the Association of South-East Asian Nations (ASEAN), whose members are Indonesia, Malaysia, the Philippines, Singapore and Thailand. This non-preferential agreement is intended to usher in a new era in trade and development cooperation between the two regional groups, but a Parliament resolution dated 14 March 1980 points out that the agreement is incomplete and contains no independent financial provision; it is tied to the necessarily modest volume of aid which the Community can provide under the heading of development cooperation with non-associated countries.

It is important that this agreement should succeed, since the Commission is apparently keen to hold it out as a future model for cooperation and to conclude similar 'second-generation' agreements with other regions, notably Latin America. An ordinary trade agreement was concluded with Brazil in 1973. Framework cooperation agreements were signed with Mexico in 1975 and with Brazil in 1980. Negotiations are currently under way for a similar framework agreement with the member countries of the Andean Pact (Colombia, Bolivia, Ecuador, Peru and Venezuela).

Regardless of the economic climate, the Community endeavours to diversify its trade relations and devises new legal instruments which are appropriate to its policy decisions.

[49] A new cooperation agreement with India was initialled on 14 April 1981.
[50] See point 20.

Chapter V — Progress towards economic and monetary union

by Bryan M.E. McMahon

Preliminary remarks

1. Economic and monetary union can in its widest formulation cover almost every topic dealt with in the Treaty of Rome. Article 2 of the EEC Treaty provides that 'the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it'.

Apart from being concerned with the free movement of goods and the free movement of persons, services and capital, the Community also interests itself in the establishment of common policies in fiscal and monetary matters, agriculture, industry, transport, consumer protection, energy, protection of the environment as well as applying itself to the solution of the most serious social and regional problems. Although the Treaty is not consistent in dealing with these matters (and indeed in some cases scarcely mentions them at all) a discussion of economic and monetary union might legitimately deal with all of these matters. It is not intended, however, in this chapter to be so discursive, and, as many of these topics are dealt with elsewhere in this work, primary attention is given here to the coordination and convergence of short-term economic policies as well as to progress achieved in integration in monetary matters. In particular, this chapter is primarily (though not exclusively) concerned with Articles 103 to 109 of the Treaty of Rome.

2. It is proposed to outline, at the beginning, the legal framework provided for by the Treaty and then, to examine the progress that has been made between the years 1957-80 (a) in the convergence of economic policies and (b) in monetary integration.

Section I — The legal framework laid down by the Treaty

¶ 1. *The meaning of economic and monetary union*

3. Before doing so, however, a word is required about the meaning of economic and monetary union (EMU).

A lot of discussion in recent years within the EEC has been related to the dynamics of integration. Some people argue that the progression in the joint venture embarked on by the Member States of the EEC commences with a customs union (with an internal free movement of goods and a common external barrier), proceeds towards economic and monetary union (where free movement of persons, services and capital are added to common policies and possibly a common currency), until it ultimately arrives at some sort of political union (whether federal or confederal). There has been a good deal of discussion about the proper sequence and the speed at which the integration process should proceed once the customs union has been established. It has been suggested, for example, that economic convergence should take place before monetary integration and that one cannot hope for economic and monetary integration without a degree of political interpenetration and a large infusion of political will. Whatever the proper sequence may be, it is now generally agreed first, that European monetary union is an objective which the Member States of the Community should strive to achieve and second, that a gradualist approach to such a union is to be preferred.

4. It would also seem to be accepted, and this is important from the point of view of definition, that economic and monetary union 'implies the following principal consequences:

(i) the Community currencies will be assured of total and irreversible mutual convertibility free from fluctuations in rates and with immutable parity rates, or preferably they will be replaced by a sole Community currency;
(ii) the creation of liquidity throughout the area and monetary and credit policy will be centralized;
(iii) monetary policy in relation to the outside world will be within the jurisdiction of the Community;
(iv) the policies of the Member States as regards the capital market will be unified; [1]
(v) the essential features of the whole of the public budgets, and in particular variations in their volume, the size of balances and the methods of financing or utilizing them, will be decided at the Community level;
(vi) regional and structural policies will no longer be exclusively within the jurisdiction of the member countries;
(vii) a systematic and continuous consultation between the social partners will be ensured at the Community level.' [2]

This indicates a third point of importance: progress towards economic and monetary union inevitably involves the relinquishment by Member States of some powers and a greater centralization at Community level of the decision-making function in relation to economic and monetary matters.

5. To some extent the EMU aspiration involves a commitment over and beyond that contained in the Treaty of Rome (monetary union is not expressly provided for in the Treaty) and, if it is to be realized in its fullest form, will eventually necessitate a Treaty amendment.

Until this is done progress will be limited by the Treaty itself (in particular by Articles 103 to 109 and 235) and by the degree of voluntary cooperation, outside the Treaty, that

[1] As to the free movement of capital, see Part Two, Chapter II.
[2] *Werner Report*, Supplement 11/70 — Bull. EC.

can be elicited from the Member States. Where countries are in the process of economic integration common economic policies are essential because a crisis in one country easily spreads to another and traditional defences such as quotas or customs duties being no longer freely available render the associating countries more vulnerable. Resort in such circumstances to devaluation etc., invites retaliation and ultimately results in a reduction of trade. Conscious, however, of strong feelings of national sovereignty, especially in the wake of the abortive EDC proposal, the draftsmen of the Treaty of Rome were understandably cautious in making provision for these matters as an examination of the relevant articles bears out.

¶ 2. *Treaty provisions*

6. With regard to economic convergence, Article 2 of the Treaty provides that the principal task of the EEC shall be achieved 'by establishing a common market and progressively approximating the economic policies of the Member States', and Article 3(g) stipulates that the activities of the Community shall include 'the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied'. Article 6 is relevant too, in that it obliges the Member States in general terms to coordinate, in close cooperation with the institutions of the Community, their respective economic policies to the extent necessary to attain the objectives of the Treaty.

Two further general articles are relevant. Article 145 declares that the Council shall 'ensure coordination of the general economic policies of the Member States' while Article 235 provides the Council (acting unanimously on a proposal from the Commission and having consulted the Assembly) with power to take appropriate measures if it is necessary to attain one of the objectives of the Community and specific powers are not provided for in the Treaty.

These general provisions relating to coordination and harmonization of economic policies are reinforced by the more specific provisions contained in Title II (Economic policy), Chapters I and II of the Treaty. Chapter I contains only one article (Article 103) on conjunctural (short-term) policy while Chapter II contains six articles (Articles 104 to 109) under the heading of 'Balance of payments'.

A. **Conjunctural policy** [3]

7. Article 103 obliges the Member States to regard their conjunctural policies 'as a matter of common concern'. It also enjoins them to consult (presumably on a continuous basis) each other and the Commission on measures which individually they may take in

[3] Conjunctural or business policy has been defined as 'the sum total of all actions that, while providing a sufficient rate of employment, are designed to secure to all individuals working as employees or in a self-employed capacity a rate of increase in their real income that varies as little as possible from the rate that is sustainable over a period of substantial duration' (Smit and Herzog, *The Law of the European Economic Community*, Vol. 3, p. 559). Conjunctural measures can be distinguished from general economic policy measures by their immediate and temporary nature, and although conjunctural measures can include preventive measures more frequently they are reactions to business fluctuations.

the light of prevailing circumstances. The consultations have been institutionally facilitated by the establishment in 1960 of the Conjunctural Policy Committee and since 1974 by the establishment of a successor in the Economic Policy Committee. But the obligation to consult does not imply a duty to abide by the suggestions made by those consulted. The Council of Ministers may, on a proposal from the Commission, and acting unanimously, decide upon the measures appropriate to the situation and can issue (by qualified majority on a proposal from the Commission) directives to give effect to these principles.

The article was originally designed to cope with crisis situations and situations where goods are in short supply but the final version, while clearly applying to crisis and shortage situations (Article 103(4) was applied during the 1973/74 energy crisis), is by no means confined to such circumstances. From this it is clear that even in conjunctural policy there is no attempt made to implement a Community policy, and while provisions are made to encourage and facilitate cooperation and coordination, economic policy is still basically, in the absence of Council decisions, a matter very much within the competence of the Member States. Article 103 nevertheless does impose a legally binding obligation on both central and local authorities (and perhaps on others also), and to this extent Member States, on the one hand must consider the impact their decisions have on other Member States, while on the other hand, they are entitled to monitor and to complain about the activities of other Member States in this area.

8. It has now been held that the Council can exercise its powers under Article 103 only where there are no common rules already in existence.[4] Accordingly, if specific procedures are provided for in the Treaty, e.g. in agricultural policy, transport policy, etc., then these specific measures must be used to the exclusion of Article 103, although as an exception to this, the Council may in an emergency and as an interim measure make use of Article 103 in these circumstances.[5] Article 103 permits[6] the Council to act by way of regulation, directive or decision and all three forms of action have been used from time to time.[7] Occasionally, the Council has also sought to exert 'moral suasion' by issuing recommendations which, of course, have no legal effect.

B. Balance of payments

9. Chapter 2 of Title II which contains Articles 104 to 109 is headed 'Balance of payments', and while all the articles in question have some relevance to balance of payments they deal with various economic policy matters in a not too orderly fashion.

---

[4] Case 31/74 *Ex parte Filippo Galli* [1975] ECR 47; Case 5/73 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091; Case 9/73 *Firma Carl Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135; Case 10/73 *Rewe-Zentral AG* v *Hauptzollamt Kehl* [1973] ECR 1175.

[5] *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof*, cited at footnote 4 above. See also *Schlüter* case and *Rewe-Zentral AG* case to same effect, also cited at footnote 4 above. See also Smit and Herzog, *The Law of the European Economic Community*, Vol. 3, at pp. 565, 569 and 572.

[6] The Council is not obliged to act. Article 103 gives it a broad discretionary power which it must exercise 'in the common interest' and not in the individual interest of a particular group of market participants. Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement, de Transport et de Crédit SA et al.* v *Commission* [1972] ECR 391. Case 43/72 *Merkur-Außenhandels-GmbH* v *Commission* [1973] ECR 1055.

[7] See Smit and Herzog, op. cit. at footnote 3 above, Vol. 3, p. 564 et seq.

Article 104 stipulates the economic objectives which should be pursued by the Member States: equilibrium of balance of payments, a high level of employment and stable prices. For the attainment of these objectives Member States undertake to coordinate their economic policies and to make provision for cooperation between their appropriate administrative departments and between their central banks (Article 105(1)). The Commission is entrusted with the task of making concrete proposals to the Council for the better realization of this cooperation. Moreover, to promote coordination in monetary matters a Monetary Committee with specified tasks is established (Article 105(2)). In Article 106 the Member States undertake to authorize certain payments associated with the establishment of the common market and further commit themselves to undertake liberalization of payments in specified circumstances.

Article 107 echoes Article 103 in declaring that each Member State shall treat its policy with regard to rates of exchanges as 'a matter of common concern'. Protective measures by one Member State may be sanctioned by the Commission in certain circumstances where another Member State has altered its rate of exchange in a manner inconsistent with the objectives of Article 104.

Provision for the granting of mutual assistance to a Member State which is experiencing (or is threatened with) difficulties in its balance of payments is made in Article 108. Somewhat elaborate procedural safeguards, however, involving the Member State, the Commission, the Monetary Committee and the Council must be complied with before the mutual assistance will be forthcoming. Article 109 authorizes Member States to take protective measures should a sudden crisis in the balance of payments occur.

Section II — Convergence of economic policy, 1957-80

10. It is convenient to deal with developments in this matter under two headings: (a) institutional developments and (b) substantive developments.

¶ 1. *Institutional developments*

A. The Community institutions

11. Apart from the special institutions specifically established to promote economic cooperation, the Commission and the Council also advanced the objective of closer conjunctural policies by various recommendations containing guidelines for Member States in the matter of cyclical policies. [8]

B. Monetary Committee

12. As already noted above, Article 105 of the Treaty itself establishes the Monetary Committee. This Committee, which has advisory status only, and is composed of two

[8] See C.C.H. *Common Market Reporter*, Vol. 2, point 3622.13, p. 2832; Recommendation 64/246/EEC of 15 April 1964 (OJ 1964, p. 1029).

members from each Member State and two members from the Commission, is entrusted with the task of reviewing, reporting and giving opinions to the Council and the Commission on the monetary and financial situation and on the general payments system of the Member States. By Decision of 18 March 1958[9] the Council enacted the rules governing the Monetary Committee. Since then the Committee has effectively contributed to the exchange of ideas and information between the Member States and the Commission. The Committee's functions were extended in relation to cooperation in the field of international monetary relations by Council Decision in May 1964.[10]

C. Committee of the Governors of the Central Banks

13. Article 105 explicitly recognizes the important role that the central banks in the Member States play in influencing economic policy and specifically enjoins the Member States to 'provide for cooperation between ... their central banks'. The Council by Decision of 8 May 1964[11] gave recognition to this and set up the Committee of the Governors of the Central Banks.

D. European Monetary Cooperation Fund

14. Established by Council Regulation (EEC) No 907/73[12] of 3 April 1973, this fund will be more appropriately discussed below in the context of monetary integration.

E. Economic Policy Committee

15. Duplication of effort and overlapping together with a shortage of personnel led to the fusion in 1974 of the Budgetary Policy Committee,[13] the Conjunctural Policy Committee[14] and the Medium-term Economic Policy Committee.[15]

The new Committee, the Economic Policy Committee (four representatives from each Member State and four from the Commission), was established by Council Decision of 18 February 1974[16] and took over all of the functions of the three committees it replaced. In particular it was charged with the following functions: assisting in coordinating economic policies, comparing Member States' budgetary policies and implementation of same, preparing medium-term economic programmes, reviewing medium-term economic policies of Member States to see if they are compatible with the Community's medium-term programme, and analysing the developments of the economies to seek the reasons for divergence from the programme.

---

[9] OJ 1958, p. 390. Amended by Act of Accession, Annex I, point vii (1).

[10] Council Decision 64/301/EEC of 8 May 1964 (OJ 1964, p. 1207). By declaration on the same day the Representatives of the Member States agreed to consult with each other in the event of a proposed change in a rate of exchange (OJ 1964, p. 1226).

[11] Council Decision 64/300/EEC of 18 May 1964 (OJ 1964, p. 1206).

[12] See OJ L 89, 5.6.1973, p. 2.

[13] Council Decision of 9 March 1960 (OJ 31, 9.5.1960, p. 764).

[14] Council Decision 64/299/EEC of 18 May 1964 (OJ 1964, p. 1205).

[15] Council Decision 64/247/EEC of 15 April 1964 (OJ 1964, p. 1031).

[16] Council Decision 74/122/EEC (OJ L 63, 5.3.1974, p. 21).

F. Role of the institutional arrangements

16. The above shows that the institutional arrangements promoting economic and monetary cooperation were comprehensive. Their total impact, however, during the period 1957-80 was not impressive and it is difficult to disagree with the conclusions on this matter put forward in a joint study in 1977:

'This machinery of coordination was comprehensive and ambitious. It provided for regular consultation between the Commission and the Member States concerning short and medium-term economic policy. It sought to establish common guidelines at Community level for fiscal, monetary and other macro-economic variables. And it provided for annual reports on the convergence of the Member States. Yet its achievements were disappointing. The political will necessary for success was absent: there was little disposition on the part of the member countries to modify national policies, or even at times to forego party political advantage, in the interest of wider Community objectives. Thus although increasing numbers of Committee meetings took place at all levels, in practice the process of coordination was a formality which did not seriously constrain the policies of the member countries.

In particular the member countries did not always observe the Council's recommendations concerning the sort of conjunctural policies to be adopted or make much effort to comply with the specific monetary and budgetary guidelines which had been agreed. The Commission was never publicly critical of member countries in breach of Council recommendations. And the recommendations of the Marjolin and Tindemans Reports, designed to advance EMU, were not followed up.' [17]

¶ 2. *Substantive developments in convergence of economic policies, 1957-80*

17. The only noteworthy attempts made by the Council of Ministers up to 1969 in its attempts to promote coordination in the short-term cyclical policies of the Member States relate to a series of recommendations which laid down guidelines to be followed by the Member States in the formulation of their short-term policies (less than one year). In July 1969, Council Decision 69/227 on the coordination of the short-term policies of the Member States provided for prior consultation where a Member State's proposed policy could affect the economies of the other Member States or could affect the internal or external balances of the Member States involved, or could cause a gap between the Member State's performance and the Community's medium-term targets. (The procedures for such consultations were established by Council Decision on 16 February 1970.) [18] In March 1971, the Council issued a further decision (Decision 71/141) on the strengthening of coordination of short-term economic policies of the Member States. [19] According to this the Council had to devote three sessions a year to studying the economic situation in the Community. Moreover, on the basis of a Commission

[17] Fratianni, Van Zonnenweld, Buffet, Cavanagh and Christie, 'A Progress Report on Convergence and European Monetary Union', Doc. No II-G/29, September 1977.

[18] See *Fourth General Report*, point 97.

[19] OJ L 73, 27.3.1971, p. 12.

memorandum the Council had to adopt short-term policy guidelines. (Replaced now by Council Decision 74/120.) [20]

The Council issued three resolutions between 5 December and 13 December 1973 setting out guidelines to reduce the rise in consumer prices and maintain a high level of employment, [21] and these may be seen as specific attempts at Community level to combat inflation.

18. The relatively stable economic conditions of the first decade of the EEC enabled progress to be made on many fronts in spite of the weak Treaty provisions relating to economic convergence. However, the May 1968 internal labour problems forced France to devalue its currency unilaterally in 1969 and later in the same year Germany revalued the German mark. These independent actions highlighted the weakness of the Community system and emphasized the need for greater cooperation if progress at Community level was to be made. Various discussion documents and reports were issued on the need for greater economic and monetary union by the Commission (e.g. the 1969 Barre Report) and by individual Member States, and the move towards such cooperation was generally endorsed by the Hague Summit Conference of the Heads of State in December 1969. Following further proposals and plans the Council requested the Member States and the Commission to consider the whole problem within a special committee to be chaired by Mr Pierre Werner, the Prime Minister and Finance Minister of Luxembourg.

19. The Werner Report was issued in October 1970. The report examined and outlined the problems associated with economic and monetary union and proposed that, given the necessary political will, EMU could be achieved through gradual stages by 1980. The recommendations of the Werner Committee, modified to take account of political realities and taking account of earlier studies, formed the basis of the Resolution of the Council and the Representatives of the Governments of the Member States on 22 March 1971. [22]

The blueprint envisaged by this resolution contemplated the achievement within a period of 10 years not only of a union where goods, persons, services and capital would move freely, but also where decisions on economic matters would be taken at Community level and where, in monetary matters, there would be total and irreversible convertibility of currencies, the elimination of margins of fluctuation in rates of exchange, the irrevocable fixing of parity ratios and the total liberalization of movements of capital. Apart from urging greater coordination on all fronts the resolution did not specify details of a plan for the attainment of its objectives over the decade in question. Specific concrete proposals were indicated only for the first three-year stage (flexibility was to be maintained for the later stages) and these included greater convergence in short-term economic policy, a commitment to some tax harmonization, plans for further liberalization in capital movements and a commitment to take action in relation to structural and regional policy.

Moreover, at the institutional level in monetary matters the Council agreed that the Monetary Committee and the Committee of the Governors of the Central Banks should

---

[20] Decision of 18 February 1974 (OJ L 63, 5.3.1974, p. 16).
[21] See OJ C 133, 23.12.1972, p. 12; OJ C 75, 19.9.1973, p. 1; OJ C 116, 29.12.1973, p. 22.
[22] See OJ C 28, 27.3.1971, p. 1.

hold more frequent compulsory meetings and that the central banks should be encouraged to observe on a voluntary basis Council guidelines (narrower than those permitted at international level) relating to currency fluctuations. Such *de facto* unification would, it was hoped, pave the way for a *de jure* unification at a later date.

Two other measures taken in February 1971 helped to complete the total picture of the Council's plan for the first stage of economic and monetary union. The first was the adoption of the third medium-term economic programme for the period 1971-75, and the second was the provision of a scheme of medium-term financial aid for Member States in difficulties with their balance of payments.

20. The dollar crisis of 1971 meant that the planned progress to EMU ran into early difficulties and, for various political and monetary reasons, agreement could not be reached by the Council at the end of 1973 to proceed to the second stage. Absence of such a formal decision did not, however, prevent all progress and in February 1974 the Council adopted the following measures:

(1) Council decision on the attainment of a high degree of convergence of the economic policies of the Member States; [23]
(2) Council directive on stability, growth and full employment in the Community; [24]
(3) Council decision setting up an Economic Policy Committee. [25] This has already been noted above;
(4) Council resolution concerning short-term monetary support. [26] This invited the Board of Governors of the European Monetary Cooperation Fund to increase the amount of support available to each central bank.

21. A brief word needs to be said about (1) and (2) above as they represent current practices and procedures.

The 'convergence' decision stipulated that the Council should set aside one day a month for meetings on economic and monetary matters. Three times a year the Council is to examine the economic situation in the Community and on the basis of a Commission communication adopt economic guidelines which the Community and the Member States must observe.

These two documents represent the present framework within which economic convergence takes place. Work, however, continues at Community level to perfect coordination procedures and to achieve still better convergence in economic performance. [27] On 17 March 1980 the Council took note of a Commission communication on improvement of the coordination of economic policies.

---

[23] Decision 74/120/EEC (OJ L 63, 5.3.1974).
[24] Directive 74/121/EEC (OJ L 63, 5.3.1974).
[25] Decision 74/122/EEC (OJ L 63, 5.3.1974).
[26] See OJ C 20, 5.3.1974, p. 1.
[27] See *Thirteenth General Report*, 1979, points 95 et seq.

Section III — How events and ideas developed in the monetary field, 1957-80

¶ 1. *Background*

22. The 1960s, in monetary and financial matters, may be characterized as a period of stable exchange rates. Narrow margins of fluctuation on either side of a currency's parity against the US dollar were permitted within the International Monetary Fund's scheme and this resulted in a system that was said to be 'stable but adjustable'. [28] Towards the end of the 1960s, however, currency upheavals on the international scene became more frequent and the dollar's performance began to show a tendency to spells of weakness. In 1969 difficulties in France obliged it to devalue the franc and later the same year Germany was obliged to revalue the German mark. The instability of the period resulted in countries resorting to a system of floating exchange rates which had ultimately to be retroactively approved by the Second Amendment to the IMF Statutes in 1978. Disenchantment with the floating exchange system together with a greater theoretical appreciation of the problems associated with European monetary union (which resulted from the renewed debate in the late 1960s and early 1970s) impelled the Member States of the Community to look for greater coordination in monetary matters.

The Werner-inspired Council Resolution of March 1971 which proposed the measures to be taken in the first stage of EMU contemplated greater coordination of monetary and credit policies through more frequent compulsory consultations within the Monetary Committee and the Committee of the Central Banks and through the harmonization of monetary policy instruments. Moreover, the central banks were requested on a voluntary basis to operate narrower fluctuation margins for Community currencies than those which resulted when the US dollar was used as the reference point. This narrower margin was to be maintained through joint action against the dollar. Further progress towards European monetary union might be contemplated in particular in the switch from a *de facto* to a *de jure* system of concerted action and in the light of periodic reports which the Committee of the Governors of the Central Banks was to make to the Council and the Commission. These reports were to cover such matters as interventions in Community currencies and the further narrowing of fluctuation margins between Community currencies.

¶ 2. *European Monetary Cooperation Fund*

23. The Council Resolution of 22 March 1971 made provision for the establishment of a European Monetary Cooperation Fund to be integrated at a later stage into a Community organization of central banks. The Council Regulation of 3 April 1973 [29] sets up the

---

[28] Only two developments of importance occurred in the period 1957 to 1971. The first was a declaration of the Representatives of the Governments of the Member States when they met in Council on 8 May 1964 and which requires the governments to consult together before changing exchange parities. The second was a Council decision of the same date on cooperation between Member States in the field of international monetary relations (64/301) and which obliged the Member States to engage in consultations within the Monetary Committee before taking important decisions in the field of international monetary relations. See *Eighth General Report*, point 134.

[29] Regulation (EEC) No 907/73. The legal basis is Article 235 of the EEC Treaty.

Fund and entrusts it with the task of promoting: (a) the proper functioning of the progressive narrowing of the margins of fluctuation of the Community currencies against each other; (b) interventions in Community currencies on the exchange markets; and (c) settlements between central banks leading to a concerted policy on reserves (Article 2). The responsibilities entrusted to the Fund are seen as merely a first stage in the progressive development of the Fund and the Statutes make provision for the scope of its activities to be gradually extended. Article 3 of the regulation states that the functions of the Fund shall include responsibility for: (i) the concerted action necessary for the proper functioning of the Community exchange system; (ii) the multilateralization of positions resulting from interventions by central banks in Community currencies and the multilateralization of intra-Community settlements; and (iii) the administration of the very short-term financing and the short-term monetary support provided for by agreements between the central banks in 1972 and 1970 respectively, and the regroupment of these mechanisms in a renewed mechanism. A Member of the Commission, or his alternate, is entitled to take part in the proceedings of the Board of Governors.

The Fund has full legal personality and capacity and is managed by a Board of Governors composed of the members of the Committee of Governors of the Central Banks of the Member States of the EEC established in 1964 and a member of the Luxembourg currency authorities.

24. The regulation establishing the European Monetary Cooperation Fund is also important in that it defines officially, seemingly for the first time, the monetary characteristics which the European monetary union will have in its final stage: either the total and irreversible convertibility, at irrevocable parities, of Community currencies against each other or the introduction of a common currency.

The pressure of an unstable international scene resulted in wider margins of fluctuations being introduced within the International Monetary Fund in December 1971. The Community countries, however, considered these new margins to be too broad and the Council and the Representatives of the Governments in March 1972 adopted a resolution which limited the margin of fluctuation between European currencies to 2.25% (i.e. half the maximum tolerated in the International Monetary Fund). This approach came to be known as the 'Snake-in-the-tunnel'—the Community currencies forming the Snake and the outer bands permitted by the International Monetary Fund being the tunnel. The three applicants to the Community, the United Kingdom, Ireland and Denmark, joined the Snake in May 1972, but being unable to endure the discipline were obliged to withdraw within a couple of months. By early 1974 Italy and France had also left the Snake, reducing it in effect to a small group of German-dominated currencies. The second stage of progress towards European monetary union under the Werner Plan was deferred.

25. The collapse of the Snake led to further analyses and discussion. The shortcomings of the system were noted: an over-dependence on the German mark, a lack of flexibility (no alternative to the strict discipline of the narrow margins), and preventive intervention (i.e. intervention before currencies reached their divergence limits) was not possible. Moreover, the dollar in the intervention process began to dominate and the system in its operation placed an undue burden on the weaker currencies.

Although instability in the international monetary scene continued unabated from 1974 to 1978, and was marked by the continuation of the oil crisis, the failure of the Snake did not permanently damage the dream of monetary union. A system of floating currencies

within a highly integrated community area such as the EEC had proved to be ineffective. The disadvantages associated with free floating included currency speculation which brought currency instability and economic uncertainty in its wake, and helped to distort competition.

Growth was impaired and high trading countries were especially affected by international currency instabilities in a free floating situation. For these and for other reasons, policy-makers in Europe, towards the end of 1977, [30] renewed their efforts to achieve more intensive monetary cooperation and, if possible, European monetary union.

In April 1978 the European Council agreed in principle to the creation of a zone of monetary stability in Europe and in July it agreed on the main lines of a European Monetary System. In December the European Council declared:

'The purpose of the European Monetary System is to establish a greater measure of monetary stability in the Community. It should be seen as a fundamental component of a more comprehensive strategy aimed at lasting growth with stability, a progressive return to full employment, the harmonization of living standards and the lessening of regional disparities in the Community. The European Monetary System will facilitate the convergence of economic development and give fresh impetus to the process of European Union. The Council expects the European Monetary System to have a stabilizing effect on international economic and monetary relations. It will therefore certainly be in the interests of the industrialized and the developing countries alike.' [31]

¶ 3. *European Monetary System*

26. The European Monetary System was established on 13 March 1979 and the set of texts on the new system which repeal and replace the provisions relating to the 'Snake' are given in the Appendix to this chapter. The new European Monetary System was designed to promote European monetary stability and was regarded as being one aspect only of a comprehensive strategy which aimed at sustained inflation-free growth, progressive restoration of full employment, harmonization of living standards and narrower regional disparities within the Community. [32]

The new system tries to remedy the deficiencies of the 'Snake' and the novel features of the system have been said to include the following:

'(a) (the) introduction of the ECU in the Community exchange rate scheme, and its role in fixing central rates, thereby making it possible, among other things to identify the currency which is tending to diverge from the others (principle of the divergence indicator);

(b) the divergence indicator, which is designed to prevent strains appearing in the system by providing, for the first time, an objective basis on which to trigger consultations and by introducing, before the bilateral limits are reached, a 'presumption to act', i.e. to make adjustments, on the part of the different countries;

---

[30] Mr R. Jenkins's address in Florence in September 1977 is frequently mentioned in this connection. The Tindemans Report on European Union of December 1975 also kept the idea of deeper economic and monetary cooperation alive.

[31] 'Conclusions of the Presidency of the European Council, 4 and 5 December 1978 in Brussels'. Extract.

[32] See *Twelfth General Report*, point 96.

(c) a substantial increase in the volume, and/or an extension of the duration of credits;
(d) the possibility of wider margins (6%) for the countries whose currencies were floating when the system was introduced;
(e) the diversification and strengthening of ways to promote economic convergence, the coordination of economic policies should be strengthened by the consultations which are to be held when the divergence thresholds are crossed; in addition, the transfer of resources should help to boost the productivity of resources and ease inflationary strains in the less prosperous countries and regions of the Community and should provide a back-up to their domestic measures.' [33]

27. At the centre of the system is the new European monetary unit called the European currency unit (ECU) which is at present set at a value identical with the European unit of account. The European currency unit serves four different functions: (i) it acts as a *numéraire* in that each currency has a central rate expressed in this unit; [34] (ii) as a central point of reference it indicates when currencies are spreading apart from each other ('divergence indicator'); (iii) it acts as a denomination through which intervention and credit is extended by the authorities; and (iv) it acts as a means of settlement between the Community's monetary authorities.

Since each currency is expressed in terms of European currency units the relationship between any two currencies at any given time is readily established. One is therefore able to establish a series of bilateral central rates in the form of a parity grid for each currency. Currencies are permitted a fluctuation margin of $\pm 2.25\%$ as against each other. When the market exchange rate for a currency deviates by as much as 2.25% in either direction from its cross parity against another currency then intervention is called for. The central banks of the two currencies involved intervene to buy the weak currency and to sell the strong currency.

Countries which were not members of the Snake immediately before the establishment of the European Monetary System could opt for a wider band of fluctuation of $\pm 6\%$ until economic conditions permit it to move to the narrower band. Unlike the Snake however, the new system also permits preventive action by the monetary authorities before the compulsory intervention stage is reached. When the appreciation or depreciation in the market rate of the European currency unit in terms of a given currency reaches 75% of its maximum spread (i.e. when the currency passes its 'divergence threshold') there is a presumption that the authorities will correct this situation by appropriate measures such as changes in central rates, diversified interventions or other measures in domestic policy, etc. If no intervention takes place reasons must be furnished and consultations within the Community bodies will take place.

28. The existing credit mechanisms within the Community, namely, the very short-term financing (VSTF), the short-term monetary support (STMS) and the medium-term financial assistance (MTFA), are incorporated into and expanded by the European Monetary System. The first two are the responsibility of the central banks while the third is

[33] Commission of the European Communities, *European Economy*, No 3, July 1979, p. 74.
[34] The European currency unit is a composite monetary unit, consisting of a weighted basket of each Community currency, including sterling. The United Kingdom has joined the European Monetary System, but has decided not to participate for the present in the planned exchange rate mechanism.

granted by the Council. Very short-term credit facilities are provided by the central banks to each other through the European Monetary Credit Facilities to permit interventions in Community currencies, whereas short-term monetary support is designed to assist countries faced with unforeseen financial difficulties in their balance of payments. The amount of credit available in short-term monetary support is based on a system of debtor and creditor quotas and the level of these quotas was raised when the European Monetary System was formally introduced in 1979. MTFA refers to mutual assistance within the meaning of Article 108 of the EEC Treaty. The mechanism was first established in 1971 but the lending resources available were raised by the Council in 1978 to meet European Monetary System requirements. The loans are made in European currency units, are repayable within a period of between two and five years and are normally circumscribed by economic and monetary conditions.

Conclusion

29. Since 1957 there has been substantial, if not remarkable, progress in economic and monetary cooperation within the European Economic Community.

Greater economic convergence, the development of a comprehensive consultative institutional framework and the successful launching of the European Monetary System are but some of the notable achievements that must be recorded. Some progress, though arguably not enough, can also be noted in the related areas of social policy and regional policy. The great aspiration, however, of a full economic and monetary union by 1980 has not been realized and if this has caused some concern the failure (if such it was) must not be exaggerated. [35] Failure to reach targets in the economic and political arenas may not always spell disaster, and failure to reach port on schedule should not deter the ship's captain from plotting a course for his next voyage. Neither will failure by the Community to achieve full European monetary union by 1980 deter renewed efforts for closer economic and monetary cooperation. It may be that international turbulence has caused the steady planned approach to European monetary union to be replaced by a 'stop-go' approach and that the Member States and the Community, instead of dictating the pace, must, for the time being, be content to react to events. This, however, should be seen as the nature of the game, rather than as a failure of the players. Similarly, the inability to successfully make the transition to European monetary union in one large leap and to be forced to consider progress in a step-by-step gradualist way, may not be disastrous. Major transitions in international politics or economics are rarely made quickly and without difficulty. In any event, it is submitted that the progress achieved in economic and monetary matters in the period 1957-80 has been significant and should not cause those who cherish dreams of more intensive integration to despair. Indeed, when one realizes how little power the Treaty gives to the Community and how much power the Member States have reserved to themselves, the cooperation and the convergence that have occurred in this period have been considerable.

---

[35] Part of the failure must be attributed to the sheer number of consultative bodies that involved onerous commitments from senior administrators in the Member States. Part must also be attributed to the failure of the Commission to establish credibility as an advisory body and as an initiator of policy. 'There was also a tendency for enthusiasm to wane, for consultation to become a substitute for collective action and for lack of achievement to become self-reinforcing.' See Fratianni et al., op. cit. at footnote 17 above.

It would seem, in this area at least, that the absence of legal provisions in the Treaty facilitating monetary union, for example, will not prevent such a development if external economic and political factors indicate the desirability of such a development, and if the political will is present. [36]

[36] The absence of the influence of the Court of Justice in the above developments is noteworthy and calls for explanation. First, one may say that economic and monetary policies relate primarily to governmental activity and rarely impinge directly on the individual. The injured individual or enterprise, such an active litigant in other areas, is not much in evidence in the areas which are the concern of this chapter. Second, because the Member States have retained so much power to themselves, progress is frequently dependent on unanimity in the Council. In such circumstances when a Community measure is ultimately adopted it is less likely to lead to litigation subsequently. Finally, a good deal of progress in this area has been made by way of resolutions and these do not create legal obligations in the Community legal system. See Case 9/73 *Firma Carl Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135; Case 10/73 *Rewe-Zentral AG* v *Hauptzollamt Kehl* [1973] ECR 1175.

Chapter VI — Energy policy

by Gillian M. White

Section I — Coal

¶ 1. *Crisis in the 1950s*

1. Article 4(c) of the ECSC Treaty prohibits any national subsidies or aids, or any special charges imposed by Member States in respect of the products and industries covered by the Treaty. The governments had to notify the High Authority of all such subsidies or aids, and unless the Authority agreed to their continuance they were to be withdrawn. [1] Recognizing the special difficulties confronting the Belgian coal industry, the Convention on the Transitional Provisions enabled the Belgian Government to continue subsidizing coalmines during the transitional period and provided for Community financial aid from an equalization levy. [2] When the transitional period ended on 9 February 1958 it was not found possible to integrate the Belgian coal industry fully into the common market. [3] The High Authority agreed to the Belgian Government's proposed subsidies, under Article 26(4) of the Transitional Convention, but on condition of receiving assurances concerning the reorganization of the industry.

2. However, the situation in Belgium became grave in 1959 when coal prices in the Community rose sharply relative to prices of imported coal. Competition from oil contributed to the difficulties.

Belgian coal prices were higher than those elsewhere in the common market, so that Belgian producers found it impossible to sell their coal. Production cuts and short-time working were introduced, and reorganization plans were adopted by the government in 1959 providing for the closure of several pits. Industrial unrest, a large coal surplus and other economic difficulties in Belgium worsened. Various proposals of the High Authority, based on Article 38 of the Treaty, to regulate coal imports, freeze stocks and regulate production failed to secure the necessary majority in the Council of Ministers. Finally, in November 1959 the Belgian Government asked the High Authority to act under Article

---

[1] Convention on the Transitional Provisions, Article 11.

[2] Articles 25 and 26(2). The subsidy system was modified in 1955 and 1957, see *Sixth General Report ECSC*, 1957-58, Vol. II, points 17-19.

[3] *Sixth General Report ECSC*, points 35 and 36.

37 of the Treaty. [4] After obtaining the necessary approval from the Council, the Authority issued its Decision on 23 December 1959. [5]

3. This decision aimed to make Belgian coal competitive in the common market without assistance or protection. To this end, plans to reduce capacity had to be revised and speeded up, but to avoid causing undue economic and social hardship it was necessary to isolate, temporarily, the Belgian coal market from the rest of the Community. Sales in Belgium of coal from other Member States and from third countries were restricted, as were deliveries from Belgium to other Member States. [6]

4. Decision No 25-60 continued the provisions of the 1959 Decision for 1961 [7] and Decision No 13-61 prolonged the measures for 1962. [8] The High Authority authorized Belgian Government subsidies to the industry in 1959 and the early 1960s to aid in carrying out the reorganization. [9]

5. During 1958 to 1961 the High Authority was unable to secure the Council's agreement to its proposals for reducing the use of coal imported from third countries, or for maintaining consumption of coal as against oil. But some measures were taken during this period, including the amendment of Article 56 of the Treaty in 1960 [10] so as to extend possibilities for intervention by the High Authority and the provision of Community aid for readaptation, retraining and industrial redevelopment in case of fundamental changes in market conditions for the coal or steel industries. [11]

¶ 2. *First steps towards a common policy*

6. In April 1964 a Protocol of Agreement on Energy Policy was concluded between the governments of Member States meeting under a special Council of ECSC Ministers. [12] The broad objectives agreed upon were cheapness and security of supply, fair conditions of competition among different sources of energy, and freedom of choice for consumers. For coal, the Protocol called for a coordinated system of State aids or subsidies, financed from national budgets but scrutinized by the High Authority and authorized by it according to Community criteria. Because of the prohibition on State aids in Article 4(c) of the Treaty, legislation was required to meet the needs which had arisen.

7. Decision No 3-65 [13] was based on Article 95 of the Treaty which allows the High Authority to take decisions in cases not expressly provided for in the Treaty when action

---

[4] *Eighth General Report ECSC*, points 64-72.
[5] Decision No 46-59 (OJ 67, 31.12.1959).
[6] *Eighth General Report ECSC*, points 72-74. The Belgian Government enacted implementing Decrees in December 1959, *Eighth General Report ECSC*, point 75; *Ninth General Report ECSC*, points 181 and 185.
[7] *Ninth General Report ECSC*, points 186-191.
[8] *Tenth General Report ECSC*, point 206.
[9] *Ninth General Report ECSC*, points 192-196; *Tenth General Report ECSC*, points 212-214.
[10] In pursuance of Article 95.
[11] See point 2 of Article 56, added by the amendment (OJ 33, 16.5.1960).
[12] OJ 69, 30.4.1964. Text also in E. Stein and P. Hey, *Law and Institutions in the Atlantic Area: Readings, Cases and Problems*, Indianapolis, 1967, p. 910.
[13] OJ 31, 25.2.1965.

is necessary to fulfil a Community objective. Under this decision, which remained in force to the end of 1970, the High Authority (from July 1969 the Commission) had to scrutinize, in particular, contributions to social security costs and aid for rationalization. Aid was not allowed to defray more than the abnormal costs of social security resulting from reductions in manpower. Aid for rationalization was allowed in so far as it enabled the industry to adjust to new market conditions by pit closures, improvements in efficiency, schemes for training and retraining, etc. The criteria included:

(i) the degree to which aids enabled mines to adjust to the new market conditions;
(ii) the degree to which aids helped to prevent unemployment and economic disturbances;
(iii) the degree to which competition between mines might be distorted.

8. Decision No 3-65 was replaced in December 1970 by Commission Decision 3-71 [14] which remained in force to the end of 1975. The Commission was empowered to authorize aids for:

(i) concentration of production at the most efficient and productive mines best suited to supplying the Community's energy needs;
(ii) adaptation of the industry in so far as serious effects on economic and social life were not caused in regions offering insufficient opportunities for development and other employment. Where such effects would be felt, the Member State was allowed to give further help.

9. The present law on State aids to the coal industry is contained in Commission Decision 76/528/ECSC, [15] effective from 1 January 1976 for 10 years. It may be revoked or amended after 31 December 1980 on the initiative of a Member State or of the Commission. [16] It may be suspended at any time if its operation threatens to cause a major disturbance in the common market for coal, or a deterioration in general supplies or in the economic situation of a region. [17]

10. The Commission may approve various types of aid, with the consent of the Council. These include:

(i) aids to maintain or extend production capacities in areas where economic conditions are favourable;
(ii) aids to improve returns from existing mines;
(iii) help with costs of recruitment, training and adaptation of labour;
(iv) aids to building up and holding security stocks of coal and coke against interruptions in energy supplies;
(v) aids to unprofitable coalfields in order to maintain production capacity necessary in the long term to ensure the Community's energy supply from profitable coalfields. [18]

---

[14] OJ L 3, 5.1.1971.
[15] OJ L 63, 25.2.1976; see also Commission Decision 76/2514/ECSC of 30 September 1976 (OJ L 292, 23.10.1976).
[16] Article 18.
[17] Article 15. Suspension is also allowed if appreciable changes in the conditions of sale of intra-Community trade on the coal market alter the economic circumstances which formed the basis for the decision (ibid).
[18] For an example of application of the decision see Commission Decision 79/22/ECSC (OJ L 9, 13.1.1979), approving aids from the United Kingdom for the coal-mining industry, for the marketing year 1978/79.

11. Finally, the Commission's memorandum to the Council in 1968, 'Initial guidelines for a Community energy policy', [19] called for measures to improve security of supplies. In regard to coal, the Commission declared that a coordinated import policy was essential to achieve the necessary domestic production to ensure security. Measures adopted in pursuance of this policy include a Council Decision of 11 November 1977 [20] to improve the collection of information on imports of coal from third countries intended for use in generating electricity.

To ensure continuity of electricity supplies from thermal power stations, Member States must see to it that electricity producers are required to keep sufficient stocks of fossil fuel at such stations at all times to provide electricity supplies for at least 30 days. [21]

Section II — Nuclear energy: Euratom Treaty — Hopes and disappointments

12. The Preamble to the Euratom Treaty declares the resolve of Member States 'to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources ...'. Article 1 gives the Community (Euratom) the objective, *inter alia,* of 'creating the conditions necessary for the speedy establishment and growth of nuclear industries'. As one of its tasks, Euratom has to facilitate investment and ensure, by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community. [22] Euratom is also charged with the creation of a common market in specialized materials and equipment.

¶ 1. *The supply provisions*

13. Chapter VI of the Treaty [23] established a Supply Agency under the supervision of the Commission, with the exclusive right to conclude contracts for supply of ores, source materials and special fissile materials coming from inside the Community or from outside. [24] In the absence of any likely shortage in the Community of nuclear ores and other materials, the supply rules were modified in December 1960. Certain delivery contracts can be directly concluded between interested parties. [25] Small-quantity transfers, whether within the Community or imports or exports, were also freed from the scope of the rules. [26] The Agency has played its full role in negotiating the supply of fissile materials from outside the Community. [27]

---

[19] EC Commission, December 1968, Supplement 12/68 — Bull. EC.

[20] Decision of the Representatives of the Government of the Member States of the ECSC, 77/707/ECSC (OJ L 292, 16.11.1977).

[21] Council Directive 75/339/EEC of 20 May 1975 (OJ L 153, 13.6.1975).

[22] Article 2(c).

[23] Articles 52-76.

[24] Articles 52(2)(b) and 53.

[25] OJ 12, 22.2.1960; *Fifth General Report Euratom,* point 133.

[26] Commission Regulation of 29 November 1961 (OJ 82, 19.12.1961).

[27] For example, agreements with the USA (OJ 17, 19.3.1959; OJ 6, 15.1.1961; OJ L 139, 22.4.1974). Agreement with the United Kingdom (OJ 17, 19.3.1959).

14. In 1965 the Commission decided to revise certain articles in Chapter VI, but the Council failed to agree and the matter remains unresolved. The main changes proposed would confirm the procedure allowing direct negotiation between producer and consumer for ores, would substitute 'non-discrimination' for 'equality of access' to nuclear material and would amend Article 70 to make the Agency directly responsible for the execution of a common supply policy. The applicability of the unamended provisions of Chapter VI pending agreement on their revision was challenged by France. In *Commission* v *France* [28] the Court upheld the applicability of these provisions and held France to be in breach of its obligations thereunder by concluding contracts for the importation of enriched uranium without consulting the Agency and by failing to notify it of the existence of an undertaking relating to the processing of imported uranium.

15. In 1979 and 1980, French proposals for radical amendments to Chapter VI were considered by the Commission together with a group of experts. [29] The extension of the programme supporting uranium prospecting to non-Community countries, and any Community solution or regulation of the problems of nuclear fuel storage depend on agreement for the revision of Chapter VI. Euratom has given financial support since 1976 to uranium exploration within the Community. [30]

16. Research and development programmes for the peaceful uses of nuclear energy remain largely a national responsibility and Member States have tended to give priority to national projects. A unanimous decision of the Council is required. [31] However, the Community has established the European Joint Research Centre in four sections, based within existing national installations, in Belgium, Germany, Italy and the Netherlands. [32]

¶ 2. *The power reactor participation programme*

17. The Euratom Treaty does not envisage the direct participation of the Community in industrial operations. The Commission took the view in 1960 and 1961 that the economic and technical risks associated with the development and use of nuclear technology were so great that the electricity producers in the Community could not be expected to make much progress unassisted. On the basis of Article 1 of the Treaty, quoted above, the Commission suggested cost-sharing schemes. It proposed that part of Euratom's research budget be used as a contribution towards the costs of manufacturing fuel elements and reactor components and towards underwriting the starting costs of selected nuclear enterprises. Other electricity producers in the Community, and researchers, would have access to experience gained in constructing and operating the plants. [33] This proposal was accepted by a qualified majority decision of the Council in July 1961. [34]

---

[28] Case 7/71 [1971] ECR 1003.
[29] Bull. EC 9-1979, point 2.1.76.
[30] Council Regulation 76/2014/Euratom (OJ L 221, 14.8.1976).
[31] Euratom Treaty, Article 7.
[32] The establishments are located at Geel in Belgium, Karlsruhe in the Federal Republic of Germany, Ispra in Italy and Petten in the Netherlands.
[33] *Fifth General Report Euratom*, points 108-114.
[34] Bull. EC 7-1960, point 15.

18. By Council Decision of 9 September 1961 the first joint undertaking, the Société d'énergie nucléaire franco-belge des Ardennes (SENA) was established under this scheme. [35] Others were established by decisions in 1963, 1964, 1966, 1974 and 1975. [36] The JET research project (Joint European Torus) was also established as a joint undertaking, in 1978. [37] Joint undertakings may be granted special fiscal and other advantages by a separate decision, which is not necessarily published. [38] The undertakings must make available to the Commission all information acquired regarding construction and operation of the plant. All non-patented information may be disseminated by the Commission.

In the matter of State aids, financial relations between public authorities of Member States and public undertakings as regards activities in the energy area, including nuclear energy, are exempt from the provisions of a Commission Directive of June 1980, adopted under Article 90(3) of the EEC Treaty. Such relations would otherwise have to be transparent.

¶ 3. *Loans for the construction of nuclear power stations and financial support for uranium prospecting programmes*

19. Under Council Decisions of 1977 and 1979, the Commission may make loans up to a specified amount for assistance in the construction of nuclear power stations. [39] A Council Regulation of 1976 authorizes the Commission to grant support, in the form of direct financial participation, to uranium prospection programmes in the Community which could make a major contribution to its supply of uranium. It should be noted that, pursuant to a Directive of 1975, [40] the construction of new power stations running solely or mainly on oil fuels, or the conversion of existing stations to run on such fuels, is subject to the authorization of the Member State concerned. Authorization may be given only in specific, clearly defined cases.

Section III — Hydrocarbons

20. In general, the market in crude oil and petroleum products is covered by the EEC Treaty, as a market in 'goods'. The general rules of the customs union therefore apply to trade in these products between Member States, as does the common external tariff. Discrimination in such trade on grounds of nationality is prohibited by Article 7. The competition provisions apply to the production, supply and distribution of hydrocarbons. [41] State aids are permitted only in accordance with Articles 92 and 93. In contrast

[35] OJ 65, 9.10.1961.

[36] See OJ, 22.6.1963, p. 1745; OJ 214, 24.12.1964, OJ 147, 9.8.1966, OJ L 165, 1974, OJ L 314 and OJ 251, 1975.

[37] Decision 78/741/Euratom (OJ L 151, 7.6.1978).

[38] See Euratom Treaty, Article 48 and Annex III.

[39] The ceiling of 500 million EUA fixed in 1977 was raised to 1 000 million EUA in 1979: Council Decisions 77/271/Euratom (OJ L 88, 6.4.1977), 80/29/Euratom (OJ L 12, 17.1.1980 and Commission Regulation (Euratom) No 2014/76 (OJ L 221, 14.8.1976 (uranium prospecting)).

[40] Directive 75/405/EEC (OJ L 178, 9.7.1975).

[41] On the application of Article 86, 'abuse of a dominant position', in relation to circumstances of the 1973 oil supply emergency, see Case 77/77, *Benzine en Petroleum Handelsmaatschappij BP and Others* v *Commission* [1978] ECR 1511; [1978] 3 CML Rep. 174.

to the position of coal, publication of prices of hydrocarbons is not prescribed. Recent measures require the giving of certain information on prices to the Commission, but the latter has obligations of confidentiality. [42]

21. There is, as yet, no common energy policy of the Communities, [43] but some measures have been adopted since the late 1960s with a view to the eventual establishment of such a policy. These measures may be classified into four groups:

(i) security of supply;
(ii) provision of information to the Commission;
(iii) reduction in consumption of primary energy sources;
(iv) support for future development of the hydrocarbons sector.

The earliest measures aimed to improve security of supply and to give the Commission fuller information on supplies of hydrocarbons within the Community. Since 1973 measures have been taken to achieve some reduction in demand, and to give Community financial support to certain projects in the hydrocarbons sector.

¶ 1. *Security of supply*

22. This was a major objective for a common energy policy, recognized by the governments of Member States in the 1964 Protocol on Energy Policy [44] and repeated in the Commission's memorandum, 'Initial guidelines for a Community energy policy', submitted to the Council in December 1968. [45] In relation to oil, the memorandum called for adequate stockpiles and for a Community supply policy. The Community should monitor the pattern of imports of hydrocarbons into the Community to see whether it was sufficiently diversified. The Council approved the outlines of this memorandum in November 1969.

23. The first measures adopted were a Directive and a Decision of 20 December 1968 relating to maintenance of minimum stocks of crude oil and petroleum products. [46] These measures were based on Article 103 of the Treaty under which the Council may take appropriate measures 'if any difficulty should arise in the supply of certain products'. The preamble to the directive declares that any difficulty having the effect of reducing supplies of these products from third States could cause serious disturbances in the economic activity of the Community, and that the Community should be in a position to offset or diminish harmful effects. Member States were obliged to adopt such laws or other measures as would maintain at all times their stocks of petroleum products at a level corresponding to at least 65 days' average consumption. This amount was raised in 1972 to 90 days' consumption. [47] If supply difficulties arise, the Commission is to arrange consultation between the Member States, prior to which they must refrain, save in cases

[42] See footnote 26 above.
[43] See footnotes 36 and 39 above.
[44] See footnote 6 above.
[45] See footnote 11 above.
[46] Council Directive 68/414/EEC (OJ L 308, 23.12.1968); Council Decision 68/416/EEC (OJ L 308, 23.12.1968).
[47] Council Directive 72/425/EEC (OJ L 291, 26.12.1972).

of particular urgency, from drawing on their stocks so as to reduce them below this minimum level.

24. More specific obligations in the event of supply difficulties are imposed by a Directive of July 1973.[48] Member States must take all necessary measures to empower competent authorities to draw on emergency stocks, to impose restrictions on consumption and give priority to certain groups of users, and to regulate prices so as to prevent abnormal price rises. In 1977, the Commission was empowered to make intra-Community trade in certain oil and petroleum products subject to a system of licences, to be granted automatically by the exporting Member State.[49] If a shortfall in supply, actual or imminent, creates an abnormal increase in trade in crude oil or petroleum products between Member States the Commission may, at the request of a Member State, authorize it to suspend the issue of licences for 10 working days, to the extent necessary to prevent the abnormal trade. An indefinite suspension is permissible if the shortfall is likely to seriously endanger the supply of these products in a Member State. Under a Council Decision of 1979,[50] revocation of export licences may be authorized to prevent any abuse prejudicial to the supply of one or more Member States 'provided that traditional trade patterns are maintained as far as possible'.[51]

¶ 2. *Provision of information to the Commission*

25. In May 1972 a Council regulation was made, obliging Member States to give the Commission information, obtained from persons or undertakings, on imports of crude oil and natural gas for each half-year, and at the end of the year on planned imports for the following 12 months.[52] Articles 5 and 213 of the Treaty are the basis for this and many of the measures in this group. Article 2 of this regulation appears to have direct effect on any person or undertaking having imported or intending to import into the Community 100 000 tonnes or more per annum of crude oil or natural gas. They must notify the Member State concerned. Information forwarded to the Commission is treated as confidential but general information or summaries not containing particulars concerning individual undertakings may be published. Council Regulation (EEC) No 388/75[53] has similar provisions regarding exports of such products to third countries.

26. Following the approval by the Council in 1975 of a consumer price policy based on transparency of costs and prices of hydrocarbons,[54] Council Directive 76/491 establishes a Community procedure for information and consultation on prices of crude oil and petroleum products.[55] This measure, based on Article 213 of the Treaty, requires Mem-

---

[48] Council Directive 73/238/EEC (OJ L 228, 16.8.1973).

[49] Council Decision 77/186/EEC (OJ L 61, 5.3.1977).

[50] Council Decision 79/879/EEC (OJ L 270, 27.10.1970).

[51] Article 3. See also Council Decisions 79/126/EEC, 79/135/EEC and 79/589/EEC on export of crude oil or petroleum products between Belgium, France, the Netherlands, Luxembourg and Italy, respectively, and other Member States. Such trade is subject to a system of authorization granted automatically by the exporting State (OJ L 30, 32 and 160, 1979).

[52] Regulation (EEC) No 1055/72 (OJ L 462, 25.5.1972).

[53] OJ L 45, 1975. See also Regulation (EEC) No 1068/73 (OJ L 113, 28.4.1973); Regulation (EEC) No 3254/74 (OJ L 346, 24.12.1974); Regulation (EEC) No 2678/75 (OJ L 275, 27.10.1975).

[54] Council Resolution of 13 February 1975 (OJ C 153, 9.7.1975).

[55] OJ L 140, 28.5.1976.

ber States to give the Commission on a quarterly basis information including fob and/or cif prices for each type of crude, or petroleum product imported either from third countries or from Member States. [56] They are to take all necessary steps to ensure that undertakings whose activities fall within their jurisdiction provide information so that they can fulfil these obligations. [57]

27. A further step towards greater transparency of the market in crude oil and petroleum products was the introduction by Council Regulation (EEC) No 1893/79 [58] of registration for such products imported into the Community. This regulation, based on Article 103 of the Treaty and intended to implement decisions of the 1979 Tokyo Summit meeting of Community States, the USA, Canada and Japan, imposes a direct obligation on any person or undertaking importing such products from third States to furnish the importing State with the characteristics of each import. Member States then have to give the Commission 'such information as will enable a true picture to be obtained of developments in the conditions under which imports have taken place'. [59] This information is to be circulated to the other Member States. [60]

28. Council Regulation (EEC) No 1729/76 [61] relates to the general energy supply situation in each Member State and in the Community, and is not limited to hydrocarbons. Member States must give the Commission twice yearly their figures for the preceding six months and forecasts for the current half-year. Under Council Regulation (EEC) No 1056/72, [62] Member States must inform the Commission of investment projects scheduled to start within three years, for the petroleum and natural gas sectors, and within five years, for the electricity sector. Projects covered include those for production, storage or distribution. Persons and undertakings concerned are obliged to give details of their contemplated projects to the Member State on whose territory the project is planned. [63]

¶ 3. *Reduction in consumption of primary energy sources*

29. Two directives of 1975 restrict the use of natural gas and petroleum products, respectively, in power stations. [64] In 1977 the Council took a decision empowering the Commission to set a target for reducing consumption of petroleum products in the Community by up to 10% of normal consumption, in the event of supply difficulties in one or more Member States. [65] On expiry of a two-month period after such action has been

---

[56] Article 1.

[57] Article 2. For implementing Commission Decisions including model questionnaire and detailed tables, see Decisions 77/190/EEC (OJ L 61, 5.3.1977) and 79/607/EEC (OJ L 170, 9.7.1979).

[58] OJ L 220, 30.8.1979, amended by Council Regulation 80/1149/EEC, OJ L 118, 9.5.1980.

[59] Article 2.

[60] Rules concerning crude oil imports were laid down by Council Regulation (EEC) No 2592/79 (OJ L 297, 24.11.1979). Implementing Commission Regulation (EEC) No 2279/79 (OJ L 314, 10.12.1979).

[61] Council Regulation (EEC) No 1729/76 (OJ L 198, 23.7.1976).

[62] OJ L 120, 25.5.1972, as amended by Council Regulation (EEC) No 1215/76 (OJ L 140, 28.5.1976) and Council Regulation (EEC) No 3025/77 (OJ L 358, 31.12.1977).

[63] Article 1(2).

[64] Council Directive 75/404/EEC (OJ L 178, 9.7.1975); Council Directive 75/405/EEC (OJ L 178, 9.7.1975).

[65] Council Decision 77/706/EEC (OJ L 292, 16.11.1977).

taken, the Commission may propose to the Council a 10% reduction differentiated according to the situation of the Member States. Quantities saved are to be shared among Member States. In the event of a larger shortfall, a higher target may be set, which may be extended to other forms of energy. To enable the Commission to make recommendations on sharing resources, it needs accurate knowledge of the energy situation in Member States and of national measures to reduce consumption. Commission Decision 70/638 [66] has provisions for these matters.

30. In March 1979 the Council agreed—among other things—to implement the specific measures needed to attain the objective of limiting oil consumption in that year to 500 million tonnes. [67]

31. Community financial support for demonstration projects offering substantial improvement in efficient use of energy was made available under a Council Regulation of 1978. [68] From May 1976 the Council has made several recommendations for the more efficient use of energy resources, by thermal insulation of buildings, more efficient heating systems for buildings, and use of waste heat. [69] A Directive of 1978 deals with performance of heat generators for space heating and production of hot water in new or existing non-industrial buildings, and with insulation of heat and hot-water distribution in such buildings. [70]

¶ 4. *Support for future development*

32. In 1973 the Council made a regulation providing for financial support for technological developments in this sector, connected with oil or gas prospecting, production, storage and transport. [71] A Regulation of 1979 supports a hydrocarbon exploration project in Greenland. [72]

Section IV — Other sources of energy

33. A Council Regulation of June 1978 allows the grant of Community financial support for projects to exploit new sources of energy, such as geothermal sites, liquefaction of solid fuels, wave or tidal energy and solar energy. [73] Various projects are being supported under this scheme.

---

[66] Commission Decision 79/639/EEC (OJ L 183, 19.7.1979).
[67] Bull. EC 3-1979, points 1.1.6 and 2.1.108.
[68] Regulation (EEC) No 1303/78 (OJ L 157, 16.6.1978); Commission Regulation (EEC) No 725/79 (OJ L 93, 12.4.1979).
[69] Recommendations 76/492-496 (OJ L 140, 4.5.1976); Recommendations 77/712-714 (OJ L 295, 8.11.1977); Recommendation 79/167 (OJ L 37, 1979).
[70] Council Directive 78/170/EEC (OJ L 52, 23.2.1978).
[71] Regulation (EEC) No 3056/73 (OJ L 312, 13.11.1973).
[72] Regulation (EEC) No 1038/79 (OJ L 132, 30.5.1979).
[73] Regulation (EEC) No 1302/78 (OJ L 158, 16.6.1978).

Section V — Towards a global policy

34. Reference has been made to the 1964 Protocol of Agreement on Energy Policy and to the Commission's memorandum, 'Initial guidelines for a Community energy policy', of 1968. [74] These were not the first steps in the efforts to achieve a common energy policy for the three Communities. A Protocol of 1957 made the ECSC Council of Ministers responsible for establishing such a policy. [75] The Protocol of 1964 and the 'Initial guidelines' proposed identical objectives, namely cheapness and security of supply, fair conditions of competition among different energy sources, and equality of access for consumers.

35. In light of the crisis in oil supplies from the Middle East in 1973 and 1974, in 1974 the Commission issued a memorandum 'Towards a new energy policy strategy for the European Communities' [76] in which it submitted that the Community must reduce its dependence on imported oil by energy saving, promotion of the development of nuclear energy, stabilization of the production of solid fuels, and the achievement of greater security of supply. The Council Resolution of 17 September 1974 [77] approved the principles of the Commission's strategy, but set a more conservative target for reducing demand. Various conservation and energy diversification measures were approved by Council Resolutions of 17 December 1974. [78]

36. Subsequently, the Commission issued other communications on energy policy, principally the guidelines for 'Community financing of energy policy' [79] and 'Main foci of a policy for developing energy resources in the Community and within the framework of international cooperation'. [80]

The most recent communication was issued in 1979: 'On energy objectives for 1990 and convergence of policies of Member States'. [81] It has been observed that since the spring of 1979, the Council has accepted that efforts to find common ground will be confined largely to areas of policy in which agreement can be seen to be necessary and acceptable to all Member States. The approach will be to encourage the convergence of national policies. [82]

37. The possibility has been mooted of a minimum 'floor price' for crude oil to protect Community production (i.e. production from the UK continental shelf) in the event of a

---

[74] See footnotes 6, 11 and 22 above.

[75] See van der Esch, 'Legal aspects of a European energy policy', 2 CML Rev. 139, 1964; several reports of the Committee on Energy of the European Parliament, e.g. Doc. 70/1963/64, Doc. 78/1963/64, Doc. 142/1961/62, Doc. 34/1964/65 and resolutions of the Parliament urging the Council to act, e.g. OJ 24, 8.2.1964; OJ 81, 27.5.1964. See also M. Palmer et al., ed., *European Unity: A Survey of European Organisations* (for Political and Economic Planning, London 1968), pp. 271-274.

[76] Supplement 1/74 — Bull. EC.

[77] OJ C 153, 9.7.1975. See D. Swann, *The Economics of the Common Market,* Penguin Modern Economics Texts, fourth edition, 1978, p. 321.

[78] OJ C 153, 9.7.1975. See also Resolution of 13 February 1975, Bull. EC 2-1975, point 1402.

[79] Bull. EC 6-1975, point 1409.

[80] Bull. EC 6-1975, points 1407 and 1408.

[81] Communication 79/7662; this document has not yet been considered by the Council.

[82] 35th Report of House of Lords (UK) Select Committee on the European Communities, *Report on EEC Energy Policy*, Session 1979-80, H.L. 166, February 1980, para. II.

fall in world oil prices to an extent rendering British production costs unacceptably high. However, no proposal for any such scheme has been made by the Commission. As has been noted, the Council has taken decisions to set a limit on oil consumption in the Community for the years 1980 to 1985. [83]

38. The Community has undertaken some promotion and support of projects for the production of nuclear energy, [84] and has enacted schemes to permit various national aids and subsidies to the coal industry. [85]

39. Accordingly, some elements of a common energy policy can be said to exist. But the governments have not yet been able to agree on a coherent global policy, preferring to keep decisions on many of these vital matters within the national sphere of competence. [86]

Further progress came in June 1980 when the Council adopted two resolutions dealing, respectively, with energy objectives for 1980 and convergence of the policies of Member States, [87] and with energy saving, setting out new guidelines for Community action and for Member States. [88] The Member States are asked to submit to the Commission, annually, their energy programmes up to 1990. The Commission is to assess these policy programmes and determine their convergence in relation to Community objectives. The resolution contains detailed guidelines for these determinations, including the reduction to 0.7 or less of the average ratio for the Community as a whole of the rate of growth of gross primary-energy consumption to the rate of growth of gross domestic product. Oil consumption in the Community should be reduced to 40% of gross primary-energy consumption. The guidelines also declare that a pricing policy for energy aimed at achieving Community energy objectives should be pursued. The Commission is to report annually, and make proposals to increase the convergence of Member States' energy policies, and to adapt the Community's energy objectives to long-term economic trends and to energy supply conditions.

40. The second resolution records the Council's agreement that Member States should, where necessary, adapt their energy-saving programmes so that by the end of 1990 each State has a programme covering all main sectors of energy use and an appropriate energy pricing policy. An annex sets out guidelines for pricing and other recommended measures to encourage the rational use of energy.

41. The Commission sent a further communication on 'Energy and economic policy' to the Council in October 1980. [89] On pricing policy, the Commission suggests that, so far as the Member States can influence price formation, the aim should be to prevent a trend in consumer prices which discourages energy saving. Implementation by Member States should be monitored regularly by the Commission, and an annual review by the Council is suggested. The Council is asked to approve a hierarchy of prices consistent with overall

[83] See footnote 30 above.
[84] See footnotes 17-19 above.
[85] See footnotes 7-10 above.
[86] See footnote 36 above.
[87] OJ C 149, 18.6.1980.
[88] OJ C 149, 18.6.1980.
[89] Bull. EC 10-1980, points 1.2.2.-1.2.4.

energy policy and to prevent unjustified excessive differences in price structures between Member States. The Commission will make proposals for attaining these objectives, including the harmonization of taxation. On economic policy in relation to energy, the Commission referred to the Resolution of June 1980 (above) in which the Council decided to assess national energy programmes annually at Community level. Encouragement of investment to meet the targets of national energy programmes is now suggested. Some contribution could be made from Community resources.

The Council was still considering this communication at the end of 1980. [90]

[90] Bull. EC 12-1980, point 2.1.129.

Chapter VII — Transport

by Trevor C. Hartley

Introduction

1. The economic importance of transport in the Community is twofold: on the one hand, it plays an essential role in other industries—especially where transnational economic activities are involved—and, on the other hand, it is a major industry in its own right. The importance of transport for the economy as a whole is particularly marked with regard to the establishment of a common market between the Member States. The higher the transport costs are between Member States, the more difficult it will be for industries in different countries to compete with each other. For this reason the establishment of a common market requires that transport costs should be kept to a minimum. The common transport policy should, apart from promoting the efficiency of the industry, ensure that all costs not economically justifiable should be eliminated; in particular, there should be no discrimination on economically irrelevant grounds such as nationality.

It is also desirable that there should be free and fair competition between different undertakings and between different modes of transport throughout the Community. This is in the interests of the transport industry itself, as well as those of the user. It follows from this that operating conditions in all Member States and for all modes of transport, should be as near as possible the same. Unjustified restrictions and subsidies should be eliminated and all users treated equally: special benefits should not normally be given to particular industries or particular classes of users.

Originally the transport industries of the Member States presented a picture which ran counter to these principles in many ways. Some modes of transport, especially the railways, were subsidized by the government. In part this was necessitated by inefficient operation, in part by the fact that they were required to provide uneconomic services as a result of the policy of regarding transport as a public service. In some cases tariffs also contained an element of subsidy for certain industries or certain classes of passengers. Thus the State subsidized the railways and the railways subsidized certain users. Another difficulty was that infrastructure costs were not met to the same extent by each mode of transport: railways had to provide and maintain their own track, but roads and inland waterways were built and maintained out of general funds. Regional policy, as well as social, environmental and safety factors, created further problems. Foreign carriers were usually subject to severe restrictions and nationalistic sentiments caused many distortions.

2. This was the situation that faced the authors of the Treaties. In the case of the first Community Treaty, that establishing the ECSC, they did not deal with transport as an industry in its own right but only as a factor in the coal and steel industries. For this reason the relevant provision, Article 70 ECSC, is concerned only with ensuring that rates and conditions for the carriage of coal and steel are such as to afford comparable price conditions for comparably placed consumers. [1] Any discrimination based on the country of origin or destination of the products transported is prohibited and consequently the same rates must be applied to the carriage of coal and steel between different Community countries as apply to the internal carriage of such products within a given Member State. In order to ensure the elimination of such discrimination, Article 70 requires that all rates and tariff rules relating to the carriage of coal and steel, both within and between Member States, must be published or brought to the knowledge of the High Authority (Commission). Special internal rates in the interests of particular coal or steel producers require the prior agreement of the High Authority which will be given only if they conform to the principles of the Treaty. The criteria to be observed by the Commission in giving its agreement have been settled by the Court of Justice, [2] which has also indicated what constitutes a special tariff. [3] It should be noted that discrimination between producers or between consumers is also forbidden by Article 4(b) ECSC. It is finally provided by Article 70 that, subject to these provisions, transport policy remains a matter for the Member States.

The implementation of Article 70 was dealt with by Article 10 of the Convention on the Transitional Provisions, which provided for the setting-up of a committee of experts designated by the Member States to consider proposals to be made to the national governments. These were to fall into three categories: measures to eliminate discrimination, measures to establish international tariffs and measures to harmonize rates and conditions. Negotiations were to be conducted with the Member States to obtain their agreement to these measures, but it was laid down by Article 10 that measures in the first category would enter into force at the latest on the date of the establishment of the common market in coal. Measures in the other two categories were to enter into force when agreed by the national governments but it was provided that if such agreement was not forthcoming within two and a half years after the setting-up of the High Authority they would come into effect on a date to be determined by the High Authority.

3. The implementation of these provisions gave rise to certain difficulties. One of the best-known examples relates to the publication of tariffs for the carriage of coal and steel by road. Attempts to secure agreement between the Member States proved unsuccessful and on 12 August 1958 the High Authority wrote to the Member States requesting them to take the necessary action to ensure publication of these tariffs. The latter suggested three ways in which this could be done and invited the national governments to choose one of them. This request did not meet with a satisfactory response and on 18 February 1959 the High Authority took Decision 18/59 [4] on the publication of tariff rules for the

[1] Joined Cases 3 to 18, 25 and 26/58 [1960] ECR 173, Case 19/58 [1960] ECR 225. The latter phrase refers to the comparability of situations from the point of view of transport.

[2] Case 19/58 [1960] ECR 225, Joined Cases 27, 28 and 29/58 [1960] ECR 241, Case 28/66 [1968] ECR 1.

[3] Case 19/58 (cf. footnote 1 above) and Joined Cases 24 and 34/58 [1960] ECR 281.

[4] OJ 14, 7.3.1959.

carriage of coal and steel by road. This required the Member States to pass the necessary implementing measures by 30 June 1960.

Two of the Member States, Italy and the Netherlands, brought action to annul this decision, which was based on various Treaty provisions, including Articles 70 and 88.[5] In its judgment, the Court considered the nature of Article 70; it concluded that the third paragraph of Article 70, which lays down the rule that transport tariffs for coal and steel must be published, 'although it establishes a concrete rule with regard to transport valid both for the Member States and for the High Authority, requires implementing measures for it to be applied to the subjects of the European Coal and Steel Community'.[6] In other words, the provision was binding on Member States but was not—to use modern terminology—directly effective.

Did the High Authority have power to adopt the necessary implementing measures? The Court held that it did not have power to enact what it called 'regulations'. By this term it appeared to mean what today would be called directly applicable measures, such as EEC regulations or ECSC general decisions. Since Decision 18/59 fell into this category, and since it could not be regarded as a 'reasoned decision' in terms of Article 88 ECSC, the Court annulled it. The Court indicated in its judgment that, although the third paragraph of Article 70 was binding on the Member States, the High Authority could not limit the choice which the national governments had as to the ways in which it could be implemented. This represented a set-back for the High Authority but it was not the end of the story.

It was established by this judgment that Article 70, third paragraph, could not be enforced against individual undertakings until it had been implemented and that it had to be implemented by the Member States. The High Authority's next step was to make a recommendation (analogous to an EEC directive) to require the Member States to adopt the necessary measures. This was Recommendation 1/61[7] which stated simply that Member States had to adopt 'all appropriate general or special measures' to ensure publication of tariffs regarding the carriage of coal and steel both within and between Member States by all modes of transport. Member States were specifically required to take the necessary steps to ensure that the measures they adopted were enforced. The deadline laid down for the implementation of the recommendation was 31 December 1961.

Annulment proceedings were brought by the Netherlands Government.[8] It was argued that the High Authority had no power to adopt recommendations for the implementation of Article 70, since this power was not expressly conferred by the Treaty. The Court, however, held that the High Authority was obliged under Articles 5(6) and 8 ECSC to ensure the observance of the rules laid down by the Treaty. Since it could not do this by directly applicable measures, it had to resort to recommendations. The Court said that such recommendations could 'specify' the obligations under the Treaty but could not impose any new obligations which had no basis in the Treaty.[9] By this the Court meant that the recommendation had to be limited to 'defining and clarifying the extent of the

[5] Case 20/59 *Italy* v *High Authority* [1960] ECR 325; Case 25/59 *Netherlands* v *High Authority* [1960] ECR 355.

[6] Case 25/59 [1960] ECR 335.

[7] OJ 18, 9.3.1961.

[8] Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213.

[9] Ibid., at p. 232.

duty of Member States under the third paragraph of Article 70'. [10] Since Recommendation 1/61 did not limit the choice of methods open to Member States to attain the objectives of this provision, it could not be regarded as a disguised decision. The Court also held that the setting of a time-limit did not constitute a new obligation but merely gave 'concrete form to a pre-existing obligation'. [11] The application was dismissed.

This judgment is of special interest, since it appears to recognize that the Commission has a general power to make recommendations under the ECSC Treaty in order to carry out the duty imposed by Articles 5(2) and 8.

This will apply whenever the High Authority does not have the power to pass regulatory measures. The Court appeared, however, to adopt a very narrow concept of a recommendation: it can only clarify, and make more specific, obligations imposed by the Treaty but cannot limit the Member States' choice of methods for attaining the objectives laid down by the Treaty.

Thanks to this and to other favourable decisions, the High Authority was eventually able to achieve full implementation of Article 70. Tariffs were published, discrimination abolished, uniformly degressive through rates established, [12] and special internal rates either authorized by the High Authority (on the ground that they were in conformity with the principles of the Treaty) or eliminated.

Section II — Common transport policy

¶ 1. *The Treaty provisions applicable to transport*

4. The EEC Treaty is not concerned with just a limited sector of the economy but with all sectors not covered by the ECSC or Euratom Treaties. It therefore deals with transport as an industry in its own right and not merely as an adjunct to other industries. The provisions on transport in the EEC Treaty are fuller than those in the ECSC Treaty and the whole of Title IV of Part Two (Articles 74-84) is devoted to it. In contrast to the ECSC Treaty, however, it does not apply to all modes of transport: only transport by rail, road and inland waterway falls automatically within its scope, but Article 84 empowers the Council, acting unanimously, to lay down appropriate provisions for sea and air transport. This appears to mean that transport by other modes, for example by pipeline—and possibly by hovercraft as well—is excluded altogether from Title IV.

5. In brief, the content of Title IV is as follows: Article 74 provides for the establishment of a common transport policy; Article 75 empowers the Council to adopt the necessary measures to put this into effect, in particular with regard to common rules for international transport within the Community and the operation of transport services by non-resident carriers; Article 76 is a standstill measure prohibiting Member States from making their national legislation more restrictive regarding carriers from other Member States; Article 77 deals with State aid; Article 78 requires Community measures to take

[10] Ibid., at p. 233.

[11] Ibid., at p. 237.

[12] By this is meant that the rate per kilometre decreases as the total distance covered increases, regardless of the crossing of national frontiers.

account of the economic circumstances of carriers; Article 79 deals with discrimination; Article 80 prohibits special rates established to protect particular undertakings or industries, unless those are authorized by the Commission; Article 81 requires the reduction of charges resulting from the crossing of a frontier; Article 82 allows special measures to be taken in Germany to compensate for the division of that country; Article 83 provides for the setting up of an Advisory Committee consisting of experts designated by the Member States; and Article 84, as was mentioned above, is concerned with the scope of Title IV. The most important of these provisions will be discussed further below; first, however, something must be said about the relationship between Title IV and the rest of the Treaty.

6. Do the general provisions of the Treaty apply to transport or does the fact that special provisions are devoted to it automatically exclude the application of the rest of the Treaty? For example, do the provisions regarding competition (Articles 85-90) or the right of establishment (Articles 52-58) apply to transport? In particular, does the existence in Title IV of special provisions on State aid or discrimination preclude the application of general provisions on these topics? Or do these general provisions still apply to the extent to which they do not conflict with the special provisions? Finally, are air and sea transport in the same position in this regard as transport by rail, road and inland waterway?

Arguments drawn from the provisions of the Treaty may be advanced on both sides. For example, the existence of Article 78, which requires the special situation of the transport industry to be taken into consideration when measures affecting rates and conditions are adopted, could be taken as evidence that the authors of the Treaty did not intend the general provisions to apply to transport; otherwise, how could the special position of transport be taken into account? Moreover, Article 74 speaks only of a common transport policy: there is no reference in Title IV to a common market for transport. This contrasts with the position regarding agriculture: Article 38 expressly provides that the common market covers agriculture.

On the other hand, Article 61(1) provides the foundation for an argument on the opposite side. This provision is found in the chapter of the Treaty dealing with freedom to provide services and states that freedom to provide services in the field of transport is governed by the provisions of Title IV. This would not have been necessary if the Treaty as a whole did not apply to transport. Moreover, why was it necessary for Article 77 to say that State aid to transport would be compatible with the Treaty in certain cases if the general provisions declaring State aid to industry incompatible with the common market did not apply to transport?

Although these general arguments seem on balance to favour the view that the whole of the Treaty applies to transport, there were in fact many protagonists for the opposite point of view and the question remained controversial until it was settled by the Court of Justice in 1974. This was in *Commission* v *France* ('merchant seamen' case).[13] The background to this case was that various provisions of French law laid down that a certain proportion of seamen on board French merchant ships had to be French nationals. This clearly discriminated on the ground of nationality against seamen from other Member States who wanted to work on French ships and was thus contrary to Article

[13] Case 167/73 [1974] ECR 359.

48(2) EEC which prohibits 'discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

The Commission brought an enforcement action under Article 169 EEC against France but it was argued by the French Government that the general rules of the Treaty, including Article 48, did not apply to transport. This contention was supported by some of the arguments outlined above. In the French Government's view, the rules in the Treaty regarding free movement of workers would apply to transport only if measures to this effect were adopted by the Council within the context of a common transport policy. The French Government claimed that this was especially so in the case of shipping in view of the fact that, in the absence of a decision by the Council, transport by sea and air is excluded by Article 84 from the ambit of Title IV. They considered that this also meant that these modes of transport were excluded from the Treaty as a whole.

These arguments were rejected by the Court. It began its consideration of the point by placing Title IV in the context of the general system of the Treaty. It took the view that the establishment of the common market, which is treated by Article 2 of the Treaty as one of the major objectives of the Community, applies to the whole economy. It also considered that the provisions of Part Two of the Treaty (which include the rules on the free movement of workers) constitute the basic foundation of the common market and consequently are applicable to all economic activities in the absence of an express provision to the contrary. No such general provision exists with regard to transport. In the opinion of the Court, the object of the rules relating to the common transport policy, far from involving a departure from the fundamental principles of the Treaty, is to implement and complement them.

The Court therefore concluded that the general rules of the Treaty must be applied to transport in so far as they lead to the realization of the objectives of the Treaty.

As far as transport by sea is concerned, the Court stated—quite logically—that the effect of Article 84 was only to remove sea and air transport from the scope of Title IV: it remains subject to the other provisions of the Treaty to the same extent as other modes of transport.

After considering certain other arguments put forward by the French Government, the Court concluded that France had failed to fulfil its obligations under Article 48 EEC.

Though it constituted a great step forward in the clarification of the law, this judgment nevertheless contains certain ambiguities which gave rise to doubts, as to whether the Court considered that only the basic rules contained in Part Two of the Treaty (which has the title 'Foundations of the Community') apply to transport or whether, on the other hand, the provisions in the other parts of the Treaty, especially Part Three (entitled 'Policy of the Community'), also apply. The latter view seems preferable—there is no real reason to limit the judgment to Part Two of the Treaty—and this was confirmed by the Court in 1978 when it held in *Commission* v *Belgium* [14] ('Belgian Railways' case) that the general rules in the Treaty on State aid to industry, which are contained in Part Three of the Treaty, apply to transport.

[14] Case 156/77 [1978] ECR 1881.

In view of Article 232 EEC, the transport provisions of the ECSC Treaty are left intact by those of the EEC Treaty, though the last paragraph of Article 70 ECSC, which states that transport remains within the jurisdiction of the Member States except to the extent to which it is dealt with in the ECSC Treaty, has been deprived of practical effect by the transport chapter of the EEC Treaty. Article 234 EEC states that the EEC Treaty does not affect prior agreements between one or more Member States and third countries, but that Member States shall take steps to eliminate any incompatibilities between them and the EEC Treaty. It follows from this, therefore, that such international treaties as, for example, the Act of Mannheim (transport on the Rhine river) preserve their effects, subject to later modifications.

¶ 2. *Implementation of the common transport policy*

7. The establishment of a common transport policy is one of the tasks of the Community. This is made clear by Articles 3(e) and 74 EEC. Article 75 EEC gives the Council the power to put this into effect by adopting appropriate measures. The procedure is the normal one: a proposal is made by the Commission, the Economic and Social Committee and the European Parliament are consulted, and the Council then adopts the measure. Since the end of the second stage, it acts by a qualified majority, except that it must be unanimous with regard to measures concerning the regulatory system for transport which could have a 'serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities'.

The scope of this power was considered by the Court of Justice in *Schumalla.* [15] This case concerned Regulation No 543/69, which was adopted by the Council in 1969. [16] The purpose of the regulation was to harmonize social legislation relating to transport and the particular provisions in question related to maximum driving periods and minimum rest periods for road haulage crews. The main purpose of these provisions was the promotion of road safety, though they were also aimed at preventing the exploitation of road transport workers and eliminating disparities which could distort competition. Did the Council have power to adopt such measures under Article 75? The Court held that it did. The harmonization of national legislation was, the Court said, an essential part of the common transport policy, which it referred to as 'one of the foundations of the Community'. [17] For this reason, Article 75 gives the Council 'wide legislative powers' [18] and these include the power to adopt measures relating to social policy and road safety.

Considerable progress has been made towards the realization of the common transport policy and a large number of measures have been adopted under Article 75. There are far too many of these for it to be possible to discuss individual measures but among the topics covered are: the transportation of passengers and goods by road, including provisions to give non-resident carriers greater access to the market by the establishment of a quota system for permits for the international carriage of goods, and the liberalization of certain categories of transport provisions requiring the introduction of either reference tariffs or maximum and minimum rates (rate bracket system); access to the profession;

[15] Case 97/78 [1978] ECR 2311.
[16] OJ, English Special Edition, 1969 (I), p. 170.
[17] Paragraph 4 of the judgment.
[18] Ibid.

harmonization of technical requirements for motor vehicles (for example, standards for exhaust emission and noise level); the termination of obligations resulting from the concept of transport as a public service (for example, an obligation to apply uneconomic rates); the coordination of investment and the cost accounting; the taxation of motor fuel; and provisions establishing a Community driving licence.

Regulation No 543/69 introduces an important system of provisions harmonizing the conditions of work of drivers of goods vehicles. This has given rise to a series of cases concerned with the interpretation of its provisions. [19] A connected regulation [20] requiring commercial vehicles to install tachographs (automatic recording devices) which are particularly useful for ensuring the application of the social provisions in Regulation No 543/69, resulted in an enforcement action under Article 169 EEC being brought against the United Kingdom when, as a result of trade union pressure, the British Government failed to take the necessary implementing measures. The European Court gave judgment against the United Kingdom [21] and the implementing legislation was then passed.

8. Although the competition provisions of the EEC Treaty apply to transport, the Council originally exempted it from the application of Regulation No 17. [22] In 1965, however, a regulation was adopted applying special rules of competition to transport by rail, road and inland waterway. [23] The idea of this measure was that, while restrictive agreements and the abuse of a dominant position should be prohibited, undertakings should be allowed to enter into arrangements with each other where these will lead to improved technology, standardization, cooperation between small enterprises in order to achieve economies of scale and the establishment of through tariffs. The special position of transport is, therefore, taken into account.

Sea and air transport are not covered by this regulation, though they are not exempted from the provisions of the Treaty relating to competition.

9. The relationship between the general provisions of the Treaty, as applied to transport, and the measures adopted under Article 75 is illustrated by the judgment of the Court of Justice in *Choquet.* [24] This case concerned a Frenchman resident in Germany who was prosecuted for driving without a German driving licence, although he had a French one. Under German law, foreigners were obliged to obtain a German licence after they had been resident in the Federal Republic for a year. Choquet claimed that this rule inhibited his freedom to work in Germany and thus infringed Article 48 EEC on the free movement of workers. At the time a Commission proposal for a directive on driving licences was before the Council but had not been adopted.

The Court held that the non-recognition of a driving licence issued in another Member State could affect the enjoyment of the rights of freedom of movement for workers and freedom of establishment; however, the national rules on the issuing of driving licences were, in the absence of harmonization, too diverse to allow automatic recognition.

---

[19] Case 69/74 [1975] ECR 171, Case 65/76 [1977] ECR 29, Case 76/77 [1977] ECR 2485.
[20] Council Regulation (EEC) No 1463/70 of 20 July 1970 (OJ L 164, 27.7.1970).
[21] Case 128/78 *Commission* v *United Kingdom* [1970] ECR 419.
[22] Council Regulation No 62/141/EEC of 26 November 1962 (OJ 124, 28.11.1962).
[23] Council Regulation (EEC) No 1017/68 of 19 July 1968 (OJ L 175, 23.7.1968).
[24] Case 16/78 [1978] ECR 2293.

Nevertheless, national provisions requiring citizens of other Member States to obtain a local driving licence, though not in principle contrary to the Treaty, could infringe it if they caused such difficulties to Community immigrants that they hindered the exercise of the rights granted in the Treaty. Insistence on a driving test which clearly duplicated one taken in another Member State, linguistic difficulties arising out of the procedure for enforcement or the imposition of exorbitant charges, said the Court, could all be examples of this. Such obstacles to the recognition of a driving licence issued by another Member State would not be required in the interests of road safety. Thus Article 48 imposed certain limits on the powers of Member States in this regard but full recognition of driving licences issued in other Member States would have to wait for the enactment of measures under Article 75.

10. State aids and subsidies have traditionally played an important part in transport, especially in the case of the railways. It is hardly surprising, therefore, that Title IV contains a special provision on this topic. This is Article 77 which states that aids are compatible with the Treaty 'if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'. This consequently provides an exception to Article 92 which lays down a general rule prohibiting State aids which distort competition. Article 77 has been supplemented by various measures adopted by the Council, in particular Regulation No 1107/70, [25] which laid down detailed rules regarding the circumstances in which aids are permissible under Article 77, and Regulation No 1191/69 [26] which defined the concept of a public service obligation and required Member States to compensate railway undertakings on which such obligations were imposed.

11. Article 79 requires the abolition of discrimination which takes the form of carriers charging different rates or imposing different conditions for the carriage of goods on the basis of the country of origin or destination of the goods. In this respect it parallels Article 70 ECSC; however, in contrast to that provision it specifically empowers the Commission to lay down implementing rules. Moreover, it is expressly stated in Article 79(4) that the Commission has the power to investigate cases of discrimination and to take the necessary decisions.

Article 79 was implemented in 1960 by the adoption of Regulation No 11. [27] Under this, Member States are obliged to inform the Commission of all discriminatory rates. Carriers must issue a transport document for each contract of carriage; this contains details of the contract which will enable the authorities to ascertain whether discrimination has taken place. Although the primary duty of enforcement rests on the Member States, the Commission is also empowered to take action and Regulation No 11 gives Commission officials the right to require transport undertakings to disclose information relevant to these investigations. The Commission has the power to impose penalties on undertakings which refuse to give such information or which give false information. Penalties may also be imposed if the Commission finds a firm guilty of discrimination.

12. Article 80 EEC forbids Member States to impose rates on carriers which involve any element of support or protection for a particular undertaking or industry unless

---

[25] Council Regulation (EEC) No 1107/70 of 4 June 1970 (OJ L 130, 15.6.1970).
[26] Council Regulation (EEC) No 1191/69 of 26 June 1969 (OJ L 156, 28.6.1969).
[27] Council Regulation No 60/11/EEC of 27 June 1960 (OJ 52, 16.8.1960).

authorized by the Commission. The purpose of this, like the parallel provision in Article 70 ECSC, is to prevent Member States from subsidizing certain firms or industries by means of cheap transport rates. For this reason it is complementary to the general prohibition of State aid to industry in Article 92.

When the Commission examines rates and conditions of carriage for the purpose of deciding whether they may be authorized, the Commission must take into account 'the requirement of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances on the one hand, and of the effects of such rates and conditions on competition between the different modes of transport on the other'. This requires the Commission to weigh up regional considerations against economic ones. (The reference to areas affected by political circumstances is mainly concerned with the division of Germany and the need to assist areas near the frontier with East Germany.) In *Italy* v *Commission* [28] the Court of Justice held that Article 80 gives the Commission a large measure of discretionary power in deciding whether or not to authorize rates; it is not precluded from taking into account considerations other than those listed in Article 80 and, if it grants authorization, it may do so subject to conditions or for a limited time only.

13. It should finally be mentioned that the common transport policy can also involve the Community's entering into international agreements with non-member States. In the *European Road Transport Agreement* case [29] the Court held that it has the power to do this and, though the parties to that agreement were the Member States, the Court made clear that in future the appropriate party for similar agreements would be the Community. In 1976 the Commission and some of the Member States completed negotiations with Switzerland for the establishment of a fund to pay compensation to owners of inland waterway vessels on the Rhine who laid up their boats during periods of over-capacity. This involved the setting-up of an institutional structure in which the Member States and Switzerland were represented and, though the Court ruled that certain of its features rendered it incompatible with the EEC Treaty, it did not rule out in principle the establishment of decision-making bodies on which third countries were represented, provided that the proper institutional relationships of the Community were respected. [30]

[28] Case 1/69 [1969] ECR 277.
[29] Case 22/70 *Commission* v *Council* [1971] ECR 263.
[30] Opinion 1/76 [1977] ECR 741.

Chapter VIII — The common agricultural policy

Preliminary remarks

1. In Part Two of the EEC Treaty, which concerns the foundations of the Community, a whole title is devoted to agriculture (Articles 38 to 47) and Article 3, one of the introductory articles, which lays down a non-exhaustive list of activities to be undertaken by the Community, announces in point (d) the adoption of a common agricultural policy.

Why this importance or this special place accorded to agriculture? Were the general rules of the Treaty insufficient?

Article 38 provides that the common market is to extend to agriculture and trade in agricultural products (customs union, free movement of persons), but specifies that the 'general' rules apply to agricultural products only if not otherwise provided in Articles 39 to 46. It also adds that the operation and development of the common market must be accompanied by the establishment of a common agricultural policy.

2. The situation of agricultural products was very different from that of industrial products. In order to ensure free movement, it was not enough to remove customs or quota barriers. Free movement achieved in the same conditions as for industrial products would have had disastrous consequences for the economy in general and for farmers in particular.

This was because the differences within the Community in the prices of agricultural products were not the result of customs duties (which was largely the case for industrial products) but arose mainly from the existence of *national* agricultural *policies* designed to protect farmers' incomes, to safeguard consumers' interests and to guarantee a certain level of self-sufficiency.

3. Because of the economic conditions in European agriculture the Member States had been intervening to assist farmers for a long time. However, the objectives were given a different order of priority in the various Member States, depending on the particular features of their agriculture and its importance in their economy. In addition, the various countries had used different techniques. Thus, with regard to wheat production, 'protectionist' countries could, like Belgium, require the incorporation of a variable percentage of home-grown wheat in breadmaking or, like France, introduce a State production monopoly and guarantee the producer a minimum price. Another measure could consist in

closing the frontiers to foreign produce during the period when national production was being placed on the market. Other more liberal countries such as Germany could both guarantee high prices to their producers and import the balance of their requirements at low prices, while setting the consumer price at an intermediate level.

4. At all events, there was no question of the Member States abandoning the principle of directing agriculture by means of an agricultural policy.

In these circumstances, there were two possible solutions:

(i) not to include agriculture in the common market. Such an approach, which was comparable to that adopted in EFTA, was likely to cause distortions in the operation of the common market. Moreover, the 'agricultural' countries, such as France, could not accept such a solution, which ran counter to their belief that an increase in their agricultural exports would offset the inevitable rise in imports of industrial products from their partners who were more productive in this field;

(ii) to include agriculture in the common market and replace the national policies by a common policy.

This, of course, was the solution chosen by the authors of the Treaty.

The objectives of this policy are listed in Article 39.

These objectives are very general and some of them are, if not contradictory, at least hard to reconcile, such as those set out in point 1(b) and (e). The Court of Justice has been asked to rule on this subject. It appears to give priority to the interests of producers over those of consumers [1] but accepts that, depending on circumstances, a specific objective may be given priority [2] provided another objective does not suffer unreasonable prejudice. [3]

5. The institutions have received very extensive powers for the attainment of these objectives. The content of the agricultural policy and the mechanisms for achieving the objectives are merely sketched in the Treaty: for the common organization of agricultural markets, Article 40 proposes a choice between three methods. The same article provides that the common organization may include all measures required to attain the objectives set out in Article 39 and gives a non-exhaustive list of these. [4] Article 41 contains only a few outlines of structural policy. Lastly, Article 40(4) makes provision for Community financing.

---

[1] Joined Cases 106 and 107/63 *Toepfer* v *Commission* [1965] ECR 405; Case 5/73 *Balkan* [1973] ECR 1091; Case 113/75 *Frecassetti* [1976] ECR 983.

[2] Case 5/67 *Beus* [1968] ECR 83; Joined Cases 54 to 60/76 *Compagnie industrielle et agricole du Comté de Loheac* v *Council and Commission* [1977] ECR 645.

[3] Case 5/73 *Balkan*, cited at footnote 1 above, and Case 9/73 *Schlüter* [1973] ECR 1135.

[4] See for example, the judgment of the Court in the 'co-responsibility levy' case, Case 138/78 *Stölting* [1979] ECR 713, and in the 'production quotas — isoglucose' cases, Joined Cases 103 and 145/77 *Royal Scholten-Honig and Tunnel Refineries* [1978] ECR 2037, Joined Cases 116 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497 and Case 143/77 *Scholten-Honig* v *Council and Commission* [1979] ECR 3583.

Section I — The common organization of agricultural markets

by Michel Melchior

6. The common organization of markets aims principally to ensure free movement of agricultural products within the Community in the same conditions as in a national market. This involves unifying prices within the Community (single market principle).

From the inception of the common agricultural policy, whose foundations were laid at the Stresa Conference in 1958, it was agreed that it would be based on the principle whereby agricultural income should be derived mainly from market receipts (market principle). This principle implies prices at a level which provides a sufficient return for farmers.

7. However, the structural element must also be taken into consideration. There can be no question of the price mechanism ensuring the survival of just any agricultural holding; prices must be calculated for economically viable concerns. A connection must therefore be established between market policy and structural policy. Structural policy must seek to contribute to the creation of holdings with sufficient capital and technical resources to produce an income comparable to that from other occupations. Although this aspect was neglected in the first phase of implementation of the common agricultural policy, it was given increased importance from 1968 onwards ('Agriculture: 1980 programme' — Second Mansholt Plan); this resulted in 1972 in the adoption of the structural reform directives. Since then, the annual decisions on agricultural prices always refer to the concept of a viable holding. Nevertheless, parallelism between these two aspects of agricultural policy is not strictly observed; thus the annual price levels are set to take account of social considerations which result in the maintenance, on a somewhat precarious and unsatisfactory basis, of submarginal family farms.

¶ 1. *Basic components of the market organizations*

A. The 'market principle'

8. The texts setting up the agricultural market organizations are based on a fundamental economic policy choice: in principle farmers must obtain their income from sales on the market. This explains the importance given to prices in Community rules.

The 'market principle' means that farm income support is not based primarily on a system of subsidies from public funds. In other words the consumer, rather than the taxpayer, is the principal guarantor of farm income.

This principle has, however, been departed from to take account of special regional or social situations or the deficit in certain products. Moreover, for some time now the market principle has been called into question: it provides a windfall for industrial-scale agricultural holdings and a barely-sufficient income for many traditional family farms which it is difficult to modernize or to convert.

However that may be, making market receipts the major and almost the sole source of farm income does not mean that that income is satisfactory or equitable for the producer. On the contrary, there are several factors which in combination would ruin Community agriculture if precautions were not taken to reduce and contain their effect.

Therefore, in order for prices to be at a level close to that sought by the Community institutions, it was necessary to introduce mechanisms to regulate the play of market forces. On the one hand, the public authorities would be authorized to intervene on the internal markets in the most important agricultural products and to adjust supply and demand so that prices remained at an optimum level (system of intervention on the internal market). On the other hand, Community agriculture would be protected at the external frontiers of the Community against agricultural products from non-member countries which were most frequently offered at prices below those considered desirable in the Community; in this connection the principle of Community preference would also come into play. In addition, by facilitating exports, the Community would obtain a greater share in world trade (trade arrangements with non-member countries).

Lastly, it was agreed that the financial costs of these measures would be borne, in principle, by the Community (principle of Community financing).

B. **Principle of 'Community preference'**

9. This principle is not expressly laid down in the Treaty, except for a marginal reference in Article 44(2), which provides that the (transitional) system of minimum prices must not be applied so as to form an obstacle to the development of a 'natural preference between Member States'.

Nevertheless, this principle greatly influences the common agricultural policy. It was particularly important during the transitional period when the market organizations were being gradually implemented and was confirmed as a legal principle by the Court of Justice.[5] It is also found in the 1971 Act of Accession (Protocol No 16).

10. Generally speaking, this principle means that the organization of markets is designed to favour intra-Community trade by making Community products less expensive and more attractive than comparable products from non-member countries. In view, however, of the extensive discretionary power of the Community institutions in the management of the common policies—which must also take the Community's commercial interest into account—it is impossible to apply this principle rigidly.

C. **Principle of Community financing**

11. The implementation of an agricultural policy necessarily implies expenditure by the public authorities. This is obvious in the case of measures to improve structures. It is also true as regards the management of market organizations, in spite of what we have called the 'market principle'. Intervention on the internal market will be inevitable and agricultural exports will have to be subsidized.

---

[5] Case 5/67 *Beus*, cited at footnote 2 above.

It was quite logical, and taken for granted from the beginning, that the Community's financial responsibility should, at least in principle, cover the financial consequences of measures adopted at Community level. Although this 'financial solidarity' is not properly speaking a legal principle, it must be regarded from 1962 [6] as a component of the common agricultural policy.

Agricultural expenditure is charged to a special chapter of the Community budget, the EAGGF, which is administered by the Commission (see Section III below).

12. However, a distinction must be made according to the nature of the expenditure. The organization of markets has taken the form of a centralized policy, whose rules have been laid down, almost in their entirety, by the Community. [7] Therefore in this field its financial responsibility is complete and it bears all expenditure. The structural policy, on the other hand, has been carried out in a 'decentralized' way, on the basis of common measures involving the Member States and the Community (see Section II below). Financial responsibility for such measures therefore had to be shared. This is what has happened, with the Community generally bearing between one fifth and one quarter of the expenditure.

The principle of 'financial solidarity' is coming in for increasing criticism, mainly on account of the excessive level of agricultural expenditure resulting from surpluses. This has led to a call for a 'ceiling' on such financing. However, while it is legitimate to seek ways of limiting this expenditure and preventing it from placing unacceptably unequal burdens on the Member States, [8] we must be wary of calling the principle itself in question, thereby undermining one of the foundations of the common agricultural policy.

D. The different concepts of the 'price' of agricultural products

13. The fact that the major part of farmers' income must come from receipts from the sale of their produce on the market justifies the importance given to the price of agricultural products.

However, the agricultural rules use various concepts which are described as 'prices' but which diverge considerably from the concept covered by the usual meaning of the word. These include target prices, intervention prices, guide prices, reference prices, basic prices, buying-in prices, withdrawal prices, threshold prices, sluice-gate prices, etc. These are components of the market organizations, reference values *linked* to the prices/receipts to be guaranteed to farmers, but they only rarely correspond to the amount of money necessary to induce the farmer to part with his produce.

For those products which were important economically and from the point of view of the overall build-up of farmers' incomes, the technique chosen was to ensure that the price *actually* received by the farmer was within a bracket comprising a minimum (below which the producer's income could no longer be regarded as equitable) and a maximum

---

[6] Council Regulation No 62/65/EEC of 4 April 1962 (OJ 30, 20.4.1962, p. 991).

[7] See in particular Council Regulation (EEC) No 729/70 of 21 April 1970 (OJ L 94, 28.4.1970, p. 13), on the financing of the common agricultural policy.

[8] See in this connection the 'corrective mechanism' designed to reduce the burden on the United Kingdom: Council Regulation (EEC) No 1172/76 of 17 May 1976 (OJ L 131, p. 7) and Council Regulation (EEC) No 2743/80 of 27 October 1980 (OJ L 284, p. 1).

(beyond which prices would be at a level which could no longer be regarded as reasonable for producers and users).

14. The two ends of the bracket have different names depending on the product and the degree of sophistication of the market organization techniques.

Thus the 'floor value' may be referred to as the intervention price (the most frequent term, used in the cereal, milk and sugar sectors), the buying-in price (pigmeat, wine), the withdrawal price (fruit and vegetables) or the reference price (wheat for breadmaking).

This is a price level at which the producer will be able to sell his produce to a public agency if it is impossible for him to obtain a higher price in the course of ordinary commercial transactions. Depending on the product, the obligation to purchase is either permanently incumbent on the intervention agency or else arises only when the Commission finds that certain conditions provided for in the rules are met or where it simply considers it advisable to have recourse to the system.

The 'ceiling value' is called either a target price (e.g. cereals), a guide price (e.g. beef and veal) or a basic price (pigmeat). Normally this level cannot be exceeded, for two reasons: imports from non-member countries may be purchased at this price (see below), and the intervention agency will offer quantities of the products in question in its possession on the internal market at this price. In both cases the supply curve is affected.

15. Lastly, there are other reference values, also called 'prices', which are so to speak the *reflection at the frontier* of the price guarantees given to Community producers. They include concepts such as threshold price (e.g. cereals), reference price (e.g. fruit and vegetables) and sluice-gate price (e.g. eggs and poultrymeat).

These refer to the minimum price at which a product of non-Community origin may be imported into the Community. Their role is to provide a double guarantee in the market stabilization mechanism. For producers they mean that the frequently low prices prevailing in international trade will not be able to affect the price level which it has been considered desirable to maintain within the Community. For consumers and users they have the result that, in normal conditions, the prices prevailing in the Community are not above the level regarded as the maximum desirable within the common market.

E. The different types of market organization

16. The common organization of the markets in agricultural products is not a homogeneous whole in that the *same* rules do not apply to *all* products.

Legally speaking, there are at present some 20 market organizations. Only a few home-grown products, such as potatoes and agricultural alcohol, are not yet subject to such rules. Each of these organizations forms a unit: its rules are peculiar to the products listed in a preliminary provision. However, several systems may coexist within one market organization or one agricultural sector.

An overall survey of all these rules allows certain conclusions to be drawn.

17. The organization (i.e. the rules) is the most developed, the most rigid and the most 'protective' in the case of products which are an important component of farm income

and of family farming as a whole. For these products there are internal and external mechanisms of farm income support, although this does not preclude different degrees of protection and support (cereals, rice, sugar, milk products, olive oil and some oilseeds, tobacco and some beef and veal). [9]

On the other hand, for products which are of little economic importance in the Community as a whole or which are produced in quantities well below consumption requirements and have to be imported on a large scale from non-member countries, the guarantee given to producers will not be absolute and will not be so high. The obligation to intervene is conditional in the case of pigmeat, some beef and veal, wine, some fruit and vegetables, some species of fish and sheepmeat. [10] For other sectors there is no intervention within the common market and protection results from the frontier mechanisms (poultrymeat, eggs) [11] or even, as for industrial products, simply through the Common Customs Tariff (e.g. products covered by the 'remnants' regulation, [12] subject to implementation of protective clauses).

Sometimes, in addition to the guarantee provided by the intervention system, internal financial support measures are introduced. This is the case with products which are of little significance for the Community as a whole but which are important locally or regionally (durum wheat, olive oil, sheepmeat). [13]

18. The existing market organizations can therefore be grouped and classified according to the extent and degree—or the absence—of market support. The distinction in Article 40(2) of the Treaty between (a) common rules on competition, (b) compulsory coordination of national organizations, and (c) a European market organization properly speaking has not been taken up as such by the Community legislator: the expression 'common organization of the market' is used without distinction in all the basic regulations on markets, in which the different forms of organization mentioned by the Treaty are often found mixed up together. At present the type of organization referred to in Article 40(2)(b) exists nowhere in its pure form.

F. **Rules on competition**

19. The effect of the rules on competition on the functioning and maintenance of the common market is well known. Article 42 of the Treaty provides that these rules are to

---

[9] Council Regulations: (EEC) No 2727/75/EEC of 22 October 1975 (OJ L 281, 1.11.1975, p. 1); (EEC) No 1418/76 of 12 June 1976 (OJ L 166, 25.6.1975, p. 1); (EEC) No 1396/78 of 20 June 1978 (OJ L 170, 27.6.1978, p. 1); (EEC) No 804/68 of 27 June 1968 (OJ L 148, 28.6.1968, p. 13); No 136/66/EEC of 22 September 1966 (OJ 172, 30.9.1966, p. 3025); (EEC) No 727/70 of 21 April 1970 (OJ L 94, 28.4.1970, p. 1); (EEC) No 805/68 of 27 June 1968 (OJ L 148, 28.6.1968, p. 24).

[10] Council Regulations (EEC) Nos: 2759/75 of 29 October 1975 (OJ L 282, 1.11.1975, p. 1); 805/68 of 27 June 1968 (OJ L 148, 28.6.1968, p. 24); 337/79 of 5 February 1979 (OJ L 54, 5.3.1979, p. 1); 1035/72 of 18 May 1972 (OJ L 118, 20.5.1972, p. 1); 100/76 of 19 January 1976 (OJ L 20, 28.1.1976, p. 1); 1837/80 of 27 June 1980 (OJ L 183, 16.7.1980, p. 1).

[11] Council Regulation (EEC) No 2777/75 of 29 October 1975 (OJ L 282, 1.11.1975, p. 77).

[12] Council Regulation (EEC) No 827/68 of 28 June 1968 (OJ L 151, 30.6.1968, p. 16).

[13] Council Regulations: (EEC) No 2727/75 of 29 October 1975 (OJ L 281, 1.11.1975, p. 1); No 66/136/EEC of 22 September 1966 (OJ 172, 30.9.1966, p. 3025); (EEC) No 1837/80 of 27 June 1980 (OJ L 183, 16.7.1980, p. 1).

apply only to the extent determined by the Council. This reservation is justified, as regards agreements, by the need to make provision for special treatment to take account of the importance of cooperation in agriculture. As regards aid, this precaution is explained by the economic and above all social importance of this type of measure in agriculture.

Nevertheless, Regulation No 26 of 4 April 1962 [14] made Articles 85 to 90 and the secondary legislation thereunder applicable to agricultural support. Thus in 1975 penalties were imposed on a number of sugar producers pursuant to Article 85 [15] and in 1977 the cauliflower marketing practices of a Breton producers' organization were also declared illegal. [16] On the other hand, the above-mentioned regulation permits agreements, decisions and practices referred to in Article 85(1) which form an integral part of a national market organization (outdated in practice) or are necessary for attainment of the objectives of the common agricultural policy.

Thus some market organization regulations encourage the creation of producers' associations and even entrust them with certain functions in the management of the markets in question (fruit and vegetables, hops, fish [17] and the horizontal regulation on producer groups; [18] see also the provisions introduced into Regulation (EEC) No 804/68 to permit the maintenance of the Milk Marketing Boards in the United Kingdom [19]).

20. As regards aid, the combination of Regulation No 26 and the market organization regulations has the effect of making Articles 92 to 94 of the Treaty applicable to agriculture, with certain adjustments. Thus, in the milk sector, the effect of the general rules was actually reinforced by the introduction of a ban on certain types of aid considered *a priori* as incompatible with the objectives of the market organization (Article 24 of Regulation (EEC) No 804/68). In addition, certain types of aid are to be regarded as incompatible as such with the mechanisms of the common organization (e.g. national intervention, export subsidies [20]).

21. Although it is incontestable that, pursuant to Article 42 of the Treaty, it is the Council's task to determine to what extent the rules on competition are applicable to agriculture, [21] a further question is whether the fundamental objectives of the Treaty—and in particular the principle set out in Article 3(d)—do not require that a minimum of competition should be maintained in the field covered by the common agricultural policy, and that competition should not be restricted more than is necessary. A recent ruling of the Court appears to have put an end to this debate by stressing unequivocally 'the

---

[14] Council Regulation No 26 of 4 April 1962 (OJ 30, 20.4.1962, p. 993).

[15] Joined Cases 40 to 48, 50, 54 to 56, 111, 112 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663.

[16] Commission Decision 78/66/EEC of 2 December 1977 (OJ L 21, 20.1.1978, p. 23).

[17] Council Regulations (EEC) Nos 1035/72 of 15 May 1972 (OJ L 118, 20.5.1972, p. 1), 1696/71 of 26 July 1971 (OJ L 175, 3.8.1971, p. 1) and 100/76 of 19 January 1976 (OJ 20, 28.1.1976, p. 9).

[18] Council Regulation (EEC) No 1360/78 of 19 June 1978 (OJ L 166, 23.6.1978, p. 1). Producer groups and associations thereof have been made responsible for granting and administering the production aid for olive oil (Council Regulations (EEC) Nos 1562/78 of 29 June 1978 (OJ L 185, 7.7.1978, p. 1) and 1917/80 of 15 July 1980 (OJ L 186, 19.7.1980, p. 1)).

[19] Council Regulation (EEC) No 1421/78 of 20 June 1978 (OJ L 171, 28.6.1978, p. 12).

[20] Case 83/78 *Pigs Marketing Board* [1978] ECR 2347; Case 177/78 *Pigs and Bacon* v *Commission* [1979] ECR 2161; Case 10/79 *Toffoli* [1979] ECR 3301.

[21] See for example, Article 14 of Council Directive 72/159/EEC of 17 April 1972 (OJ L 96, 23.4.1972, p. 1).

precedence the agricultural policy has over the aims of the Treaty in relation to competition'. [22]

G. Interaction of the internal and external mechanisms affecting price formation

22. Attention is given below to two mechanisms, (a) the rules for the operation of the internal market, and (b) the trade arrangements with non-member countries. It is essential to emphasize that these two are not independent but that they interact to affect price formation. Thus, while the export refund is undoubtedly part of the trade arrangements, it is evident that by permitting the export of home-products it reduces domestic supply and thus enables prices on the internal market to reach a higher level.

H. Harmonization of laws

23. The harmonization of national measures—sometimes to the extent of unification—may be undertaken as part of the market organization (e.g. quality standards) or as part of the structural policy, but it may also be the subject of specific rules. An impressive number of Community legal provisions [23] have come into being—usually in the form of directives—particularly in the fields of veterinary, plant health and foodstuffs legislation, which is constantly being perfected (see for example, for veterinary legislation, OJ C 189 of 1975). The importance of this area of Community law should not be underestimated. In the absence of such harmonization the free movement of agricultural produce would be impeded since it would always be possible for Member States to invoke Article 36 of the Treaty. [23]

¶ 2. *The functioning of the internal market*

A. Free movement of agricultural products and monetary phenomena

24. It is important to stress that the principle of the free movement of agricultural products—after the end of the transitional period—is absolute in two ways: it does not allow any exceptions on the grounds either of the common agricultural policy being incomplete (maintenance of a national market organization) [24] or of difficulties involved in implementing that policy for a particular sector or for a part of the agricultural population, [25] and the principle of free movement is binding not only on Member States but also on the Community legislator, who may not infringe it. [26]

25. However, a substantial inroad has had to be made into this principle because of the effects of currency fluctuations on the system of common prices. It should be

---

[22] Case 139/79 *Maizena* [1980] ECR 3393.

[23] On the limits of harmonization see, however, Case 128/78 '*Cassis de Dijon*' *(Rewe)* [1979] ECR 649.

[24] Case 48/74 *Charmasson* [1974] ECR 1383.

[25] Case 232/78 '*Mutton and lamb*' (*Commission* v *France*) [1979] ECR 2729; Case 231/78 '*Potatoes*' (*Commission* v *United Kingdom*) [1979] ECR 1447.

[26] Joined Cases 80 and 81/77 *Ramel* [1978] ECR 927.

remembered that free movement of agricultural products within the Community was achieved within a policy based on price unification. This does not mean that for each product there is only a single price valid for the whole Community but that the frontiers no longer have any influence on price levels and that prices are supposed to vary, as in a national market, only according to the natural conditions of price formation. For example, prices in a production zone are normally lower than those charged in a consumption zone, mainly because of the costs of transport to the latter.

The various components of the Community price system outlined above are fixed at Community level in units of account for the whole Community and, in order to be operational, they must be converted into national currency. Originally, the agricultural unit of account was defined as a certain weight of gold; since at the time the national currencies were defined in the same way, conversion into national currency was easy and was done by reference to the parities declared to the International Monetary Fund.

Difficulties were, however, likely to arise if there was a change in the value of one or more national currencies. If a currency is devalued, the price of agricultural products expressed in national currency rises (it is increased by the devaluation percentage). Conversely, if a currency is revalued the internal price of agricultural products falls.

These 'logical' consequences, however, are likely to be badly received since the prices of agricultural products are thus subject to changes which are not caused by purely economic factors. Internally, the price received by the producer changes: in the event of devaluation the price rises, which may stimulate inflation; in the event of revaluation the price falls and the farmer is penalized without there being an 'agricultural' reason.

26. The situation arose for the first time in 1969 for France (devaluation) and Germany (revaluation). It was not considered possible to adjust the prices expressed in national currency automatically. Therefore it was necessary, for the purposes of trade, to offset the lack of internal change in agricultural prices by introducing compensation at the frontier. In the case of a devalued currency a tax is levied on exports and a subsidy is granted on imports; in the opposite situation (revalued currency) exports are 'subsidized' while imports are 'taxed' so as not to undercut home-produced products excessively.

Such situations could have been merely exceptional and have been followed by the progressive 'normalization' of agricultural prices expressed in national currency (degressive aid being granted to farmers who were victims of the *de facto* revaluation of their national currency). [27]

However, since 1971 the monetary system has been in complete disarray and, even after the introduction of the European Monetary System and the adoption of the ECU, the system of monetary compensatory amounts is still applied. It is still based on Regulation (EEC) No 974/71, which has been amended several times. [28] It does not concern all agricultural products but only those which are the subject of intervention measures and those whose price depends on them.

---

[27] Council Regulation (EEC) No 2464/69 of 9 December 1969 (OJ L 312, 12.12.1969, p. 4).

[28] Council Regulation (EEC) No 974/71 of 12 May 1971 (OJ L 106, 12.5.1971, p. 1). See also Council Regulation (EEC) No 652/79 of 29 March 1979 (OJ L 84, 4.4.1979, p. 1), extended until 31 December 1981, on the application of the ECU in the common agricultural policy.

At present the monetary amounts mechanism is intended to make up the difference between the actual rates of exchange of national currencies applied in international trade and artificial, *ad hoc* conversion rates used only in connection with the common agricultural policy. [29] These 'green' rates are fictitious rates intended to keep agricultural prices expressed in national currency at an acceptable level; real price unity will thus be re-established by adjusting the green rates to reflect the real situation.

This has resulted in a new fragmentation of the common market and conformity of the situation with the Treaty in the long term is questionable. The Court of Justice agreed in 1973 that the system could be justified since the disturbances to trade caused by monetary disparities could be more dangerous for the general interest than the division of the common market for monetary reasons. [30] In more recent cases it has been more critical, without however going so far as to condemn the system. [31] For its part the Commission has tried, so far in vain, to get the Council (and the Member States) to agree to the adoption of an automatic mechanism for the progressive dismantling of monetary compensatory amounts. Some progress was, however, achieved in 1979. [32]

B. **Prices set freely on a contractual basis**

27. The prices fixed by the Community authorities include price objectives (target prices, guide prices). These are fixed at a level which is considered adequate for the farmer and they should enable him to plan his production. They are fixed annually by the Council in accordance with the Article 43(2) procedure. The basic regulations do not lay down the criteria for determining prices. The authorities therefore have fairly extensive discretionary power, which is used in the light of socio-political, rather than strictly economic, considerations.

Nevertheless, these price objectives, which are fixed at the wholesale purchasing stage, are in no sense prices which are mandatory in commercial transactions. Real prices are formed freely on the market, as the result of supply and demand, fluctuations in demand being kept within certain limits. This free price formation, which is a feature of most market organizations, has important legal consequences in that it is opposed to mechanisms which are likely to guarantee a fixed price level. [33]

There are some exceptions to this principle, the most important being in the sugar and oilseeds sectors. In the sugar sector a minimum purchase price for beet is fixed by the Community. This is because the intervention mechanism applies to sugar, which is a processed product. If no precautions were taken, the sugar price guarantee enjoyed by the industrial producer would not necessarily be passed on to the sugarbeet grower.

Sugar manufacturers are therefore obliged to pay beet suppliers at least the minimum price. There are similar provisions in the oilseeds and tobacco sectors.

---

[29] See for example, Council Regulation (EEC) No 878/77 of 26 April 1977 (OJ L 106, 29.4.1977, p. 27).

[30] Case 9/73 *Schlütter* [1973] ECR 1135 and Case 10/73 *Rewe* [1973] ECR 1175.

[31] Joined Cases 80 and 81/77 *Ramel*, cited at footnote 26 above; Case 49/79 *Pool* [1980] ECR 569 and in particular the conclusions of Advocate-General Reischl, at p. 583, in that case.

[32] *Thirteenth General Report*, point 313.

[33] Case 83/78 *Pigs Marketing Board*, cited at footnote 20 above; Case 10/79 *Toffoli*, cited at footnote 20 above.

28. Compatibility of the Community agricultural price system with national price control mechanisms, particularly those fixing maximum prices for certain products, is worthy of consideration. The Court of Justice has given a ruling on the subject. [34] Member States may not intervene in the price formation mechanism resulting from the common organization, at least not in a way prejudicial to attainment of the price objectives. The risk of conflict is great if the national rules relate to the same marketing stage as Community law (wholesale purchasing); it is less but still exists if the national rule concerns a later stage (such as sale to the consumer). The maximum price could, by a reflex effect, prevent the farmer from selling his produce at a price close to the Community objective.

Moreover, a national system of maximum prices could be regarded as a measure with equivalent effect to quantitative restrictions if prices formed at a level which made imports from other Member States impossible.

This problem could be compared with the problem of the extent to which the power of Member States to introduce taxes on the value of agricultural products is limited by Community rules. There again the Court has recently found that such taxes are incompatible in so far as they interfere with the mechanisms for the formation of common prices and the regulation of market supplies. [35]

C. **Intervention with direct effect on prices**

29. Intervention measures have not been introduced for all agricultural products but only for those products which were considered to be of major importance in the structure of farm income. The measures are of various kinds.

1. Withdrawal from the market

Products are temporarily or permanently withdrawn from the internal market. This may be achieved by buying-in by an intervention agency (designated by the Member States but essentially applying Community rules). Buying-in takes several forms. For some products such as cereals, butter and sugar the guarantee is permanent, as the agency is obliged to purchase the quantities offered to it; for other products (meat in particular) the guarantee is less secure as the agency is obliged to purchase only if market prices are below a certain level. Withdrawal may also be carried out by producers' organizations, as for fruit and vegetables or for fish.

What happens to these products? Perishable products which cannot be stored are destroyed unless an additional outlet is found which does not reduce existing market demand. Other products are stored, and placed on the market again in such a way that the desired level of prices in the Community is not affected.

These stocks help to regulate the market over a period of time and/or as between countries. If it appears impossible to market them normally within the Community,

---

[34] Case 31/74 *Galli* [1975] ECR 47; Case 65/75 *Tasca* [1976] ECR 291 and Joined Cases 88 to 90/75 *Sadam* [1976] ECR 323; Case 154/77 *Dechmann* [1978] ECR 1573; Case 223/78 *Grosoli* [1979] ECR 2621; Case 10/79 *Toffoli*, cited at footnote 20 above; and Joined Cases 16 to 20/79 *Danis* [1979] ECR 3327.

[35] Joined Cases 36 and 71/80 '*Irish taxes*' [1981] ECR 735. See also Case 77/76 *Cucchi* [1977] ECR 987.

additional outlets will be sought, for example by exporting them from the Community either on a commercial basis or as food aid. It is sometimes also possible to use them to meet additional internal demand, as in the case of 'social beef' and 'Christmas butter' programmes.

2. Storage aid

A form of intervention fairly frequently provided for is private storage aid, which is intended to enable the marketing of the product in question to be phased.

3. Denaturing

The 'denaturing' of certain products is made possible by a grant comprising the difference between the intrinsic value of the product, which is normally intended for human consumption, and the lower selling price paid when it is marketed as a product intended for animal feed (e.g. wheat, milk products) or for industrial use (e.g. sugar for the chemical industry). The distillation of wine serves the same aim of reducing stocks of a surplus product.

D. **Intervention with indirect effect on prices**

30. This heading covers three types of measure which may be regarded as 'intervention' in a broad sense.

1. Common production standards

There are common production and marketing standards for fruit and vegetables, eggs and floricultural products, for example. These standards must be complied with in internal trade (national and intra-Community) and in trade with non-member countries. They have the effect of removing poor-quality products from the market and channelling production in a direction which is more likely to meet consumers' requirements. The result is a new balance between supply and demand, at a satisfactory price level for the producer.

2. Producers' organizations

The creation of producers' organizations is also a means of market structuring. These organizations may have the task of facilitating the adjustment of supply to market requirements, have some power to regulate production and intervene in the preparation, processing and marketing of agricultural produce. [36]

[36] See point 19.

3. Market guidance measures

Lastly, there are the market guidance measures. These are measures of a hybrid nature, coming under both the structural policy and the market policy, which seek to restore balance on the market in certain products by removing a cause of structural surpluses. They include the systems of premiums for the non-marketing of milk, [37] for the conversion of cattle herds [38] and for the grubbing of fruit trees. [39]

E. Mechanisms derogating from the market principle

1. Production aid

31. In the case of fairly marginal products the producer may sell his produce at a price which the Community knows is not economic. These are products to which, for legal reasons (duties bound under GATT) or economic reasons (low level of self-supply in the Community, presence of substitute products), it has been considered impossible to apply the 'market principle'. Therefore production aid is granted to make up the difference between what is regarded as an economic price and the actual market price. These are in fact deficiency payments, which may be either 'pure' (e.g. flax, hemp, hops) or supplementary, i.e. additional to the market price support measures (durum wheat, olive oil).

2. Production refunds

32. The situation is broadly similar to that described above in the case of production refunds (e.g. starch, maize for brewing). These are a form of financial aid which is intended either to enable industries which use certain agricultural products as basic products to obtain supplies in the Community at real costs which are comparable to those of their foreign competitors or their Community competitors using imported products, or to enable certain agricultural products to compete with industrial chemical products which can be substituted for them. The industrialist buys the agricultural product at a 'high' price and receives a compensatory subsidy, usually after supplying proof of payment.

In introducing such aid the Community legislator must respect the principle of equality of treatment—particularly as regards competing products—or risk the consequences before the Court. [40]

---

[37] Council Regulation (EEC) No 1078/77 of 17 May 1977 (OJ L 131, 26.5.1977, p. 1).

[38] Commission Regulation (EEC) No 1353/73 of 5 May 1973 (OJ L 141, 13.6.1973, p. 17).

[39] Council Regulation (EEC) No 2517/69 of 9 December 1969 (OJ L 318, 18.12.1969, p. 15).

[40] See the following series of cases:

(a) 'Quellmehl' cases, examination for validity: Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753; liability proceedings: Case 238/78 *Ireks-Arcady* v *Council and Commission* [1979] ECR 2955; Joined Cases 261 and 262/78 *Interquell-Stärke Chemie and Others* v *Council and Commission* [1979] ECR 3045;

(b) 'maise grits' cases, examination for validity: Joined Cases 124/76 and 20/77 *Moulins de Pont-à-Mousson and Others* [1977] ECR 1795; liability proceedings: Joined Cases 241, 242 and 245 to 250/78 *Deutsche Getreideverwertung and Others* v *Council and Commission* [1979] ECR 3017.

3. Aid to producers in less-favoured regions

33. Another exception to the market principle is one of fundamental importance. This is the aid to offset permanent natural handicaps, introduced by the Directive of 26 April 1975 on mountain and hill farming and farming in certain less-favoured areas. The aid consists of an income supplement granted to farmers in such regions on the basis of standard, objective criteria.

4. Measures to limit production

34. Reference should also be made in this context to the measures which limit the free play of market forces by imposing various restrictions, ranging from obligations to use or incorporate certain products to limits and even bans on production. Community law, and in particular Article 40(3) of the Treaty, permits such measures in principle, provided that fundamental rights and the general principles of law are not infringed.

(a) **Quota system**

35. There is a quota system for sugar [41] which, although it does not limit production as such but only the price guarantee for sugar produced within the quotas, in fact leads to a limitation of production. The system, which was initially introduced for a transitional period, has recently been extended again and appears to have proved its worth in curbing the over-production which is a feature of this sector. Although it undoubtedly affects competition, this system appears to be compatible with the Treaty; in fact, the Court held that a similar system introduced for isoglucose was legal. [42] Of course, such a system must be designed so as not to conflict with the principles of free movement and equality of treatment. [43]

(b) **Ban on planting**

36. A system which limits production—which could affect the fundamental right to property and the free exercise of a profession—may legally be introduced if it meets the objectives of Article 39 and respects the principle of proportionality. Mention should be made in this connection of the Court's judgment concerning the ban on planting vines in certain areas, a measure which was also introduced to curb over-production. [44]

(c) **Measures to absorb surpluses**

37. In order to absorb the surpluses of milk powder, the Council introduced a measure in 1976 providing for the obligatory use of milk powder in feedingstuffs. The Court held

---

[41] Council Regulation (EEC) No 1785/81 of 30 June 1981 (OJ L 177, 1.7.1981, p. 1).

[42] Cases 138/79 *Roquette* [1980] ECR 3333 and 139/79 *Maizena*, see footnote 22 above.

[43] The Court had declared a previous measure introducing taxes on isoglucose invalid because it was incompatible with the principle of equality; Joined Cases 103 and 145/77 *Royal Scholten-Honig and Others*, cited at footnote 4 above.

[44] Case 44/79 *Hauer* [1979] ECR 3727.

that this measure infringed the principles of proportionality and of equality of treatment (as between the various agricultural sectors).[45] However, it does not follow from this judgment that such measures are, as a matter of principle, incompatible with the Treaty; the Court seems to have recognized this itself in its later judgment in which it dismisses applications for damages on the grounds that the measure does not constitute a 'sufficiently serious breach of a superior rule of law'.[46] The Court also allowed the co-responsibility levy in the milk sector on the grounds that it was a measure to absorb surpluses.[47]

¶ 3. *Trade arrangements with non-member countries*

38. The system of trade in agricultural products with non-member countries is much more complicated than that applicable to industrial products. It seeks, to varying degrees, to protect the attainment of the general objectives of the common agricultural policy by using a vast range of techniques for regulating trade with non-member countries.

For those products which are regarded as the most important for Community agriculture, very effective permanent protection has been introduced, admittedly at the price of rather cumbersome administrative machinery. For other, less essential products basic *ad hoc* protection is established and is supplemented in abnormal circumstances by additional safety measures. Lastly, for other products there is only the Common Customs Tariff (although, as we have seen, internal support measures may be adopted).

Whatever the arrangements, protective clauses—which are of course administered solely by the Community authorities—make it possible to remedy any unforeseen circumstances which affect certain agricultural sectors or Community regions.

The mechanisms for regulating trade with non-member countries were designed on the assumption that prices on the world market would be lower, and often much lower, than the prices considered desirable within the Community. However, the opposite situation can arise, as was the case for some products such as wheat and, in particular, sugar. Therefore *ad hoc* 'scarcity' clauses have been inserted in the rules to enable the Community to take appropriate measures in such situations.

Lastly, the system of monetary compensatory amounts can also be applied in trade with non-member countries, in addition to the system of levies and refunds.

A. **Measures applicable to imports**

1. Customs duties

39. In some cases (e.g. beef and veal, wine, tobacco) the market organizations use the traditional method of protecting goods against imports, namely customs duties. Those applicable to agricultural products are generally (except in the case of tobacco) *ad valorem* duties, expressed as a percentage of the value of the imported goods.

---

[45] Joined Cases 114, 116, 119 and 120/76 '*Milk powder I*' (*Bela Mühle*) [1977] ECR 1211.
[46] Joined Cases 83 and 94/76 and 4, 15 and 40/77 '*Milk powder II*' (*HNL*) [1978] ECR 1209.
[47] Case 138/78 *Stölting*, cited at footnote 4 above.

2. Tariff quotas

40. A tariff quota is a quantity of goods which, as an exception to the normal tariff system, may be imported at a reduced or nil duty. The market organizations have made very little use of this system (mainly beef and veal).

3. Quantitative restrictions on imports

41. This type of measure does not constitute one of the basic components of the trade system. Generally speaking, if quotas are mentioned in the texts setting up the market organizations it is simply to reject them. However, such restrictions could also be introduced by voluntary restraint arrangements with non-member countries (as recently in the beef and veal sector).

4. Levies

42. Levies are the most characteristic feature of the market organizations: they are variable taxes on imports. Generally speaking, they amount to the difference between the price prevailing on the internal market of the importing territory and the offer price on import, which in principle is the lower of the two. As a protective measure they are therefore much more effective and flexible than customs duties: in principle they automatically make up for the difference in prices and adjust to any change; they help provide constant support to the product to which they apply. Levies can therefore be described as variable import taxes, equal to the difference between prices on the internal and external markets.

43. However, this is only a general concept. In order for it to be applied various factors have to be precisely determined, in particular the two points between which the difference is to be made up, the extent to which the mechanism is automatic, the degree of protection, etc. The concept can be applied in many different ways and the market organization regulations have introduced many types of levy, which requires classification.

(a) Simple and compound levies

44. The levy is calculated according to rules which differ considerably according to the degree of market organization and the nature of the product in question. There are two types of levy: simple levies and compound levies.

(i) Simple levies

The rules for calculating these levies correspond most closely to the general concept, described above, of a difference between two prices, i.e. the difference between the price of the product on the world market and a reference price representing the price of the product in the Community.

This reference price is often called a threshold price. The image is a good one, for this price represents the minimum price level at which a foreign product is allowed to compete with home-produced products. This price constitutes an income guarantee for the national producer since it prevents a sharp fall in prices. It also represents a guarantee for the user of Community products since internal prices cannot rise above this threshold because of the regulatory effect of imports.

The rules for determining the threshold price and the import price must be precisely defined. The import price is determined by the Commission on the basis of the best terms for purchase on the world market. The simple levy is thus fixed on a standard basis and does not take into account the prices fixed in private import contracts or the quality of the imported product.

(ii) Compound levies (or imperfect levies)

For processed products which, in addition to being agricultural products, have the characteristics of industrial products, or which are seen as the result of natural processing of basic products (such as pigmeat and eggs in relation to cereals) there must be a measure which takes into account both the need to protect the processing industry and the material, quantitative link between the processed product and the basic product from which it is derived. As an industrial or agricultural processing activity, which must be protected, is involved, it is not sufficient to convert the processed products into the quantity of basic products necessary for their manufacture and to apply to them the levy applicable to that quantity. [48]

The levy applicable to these products reflects these two requirements. It is in fact a compound, variable import duty which comprises the following two basic elements:

- a fixed component specifically intended to protect the processing activity. This component is similar to a traditional customs duty;
- a variable component which corresponds to the effect on the cost of manufacturing the processed product of the difference between the price of the basic product in the Community and on the world market. The variable component contains the basic idea behind the levy concept.

(b) **Basic levies and derived levies**

45. This classification is based not on the nature of the products but on the need to avoid complicating the levy system by incorporating an infinite number of levies, threshold prices, etc. It makes a distinction between basic levies and derived levies. Basic levies are calculated according to the principles set out above. Derived levies are calculated from the basic levies by applying processing or corrective coefficients to represent the difference in value between the products to which the basic levies apply and other products in the same category.

[48] Also in this category are the charges introduced under the rules on processed products not covered by Annex II, laid down on the basis of Article 235 EEC (cf. Regulation (EEC) No 3033/80 of 29 November 1980, OJ L 323, p. 1).

(c) **Ordinary levies and supplementary or safety levies**

46. Lastly, there is a third classification which distinguishes between ordinary levies, which are the basic market protection measures, and supplementary or safety levies. For certain products, in addition to the ordinary levies (or the customs duties) there is a supplementary variable tax called either an 'additional amount' (eggs and poultrymeat), a 'levy' (beef and veal) or a 'countervailing charge' (fruit and vegetables, wine). This tax is levied only on imports effected at an abnormally low offer price; it is intended to offset the difference between this price and the 'normal' offer price, which is generally fixed by the Community in the form of a sluice-gate price or a reference price.

Such measures apply to products which are subject to compound levies, fixed on a standard basis (components calculated on the basis of averages, amount fixed for a fairly long period), [49] and to those agricultural products to which only customs duties are applied but which are nevertheless very important to farmers, such as fruit and vegetables.

In principle they apply to all imports. However, when imports at abnormally low prices come only from specific non-member countries, they may be applied only to imports from those countries.

(d) **Import subsidies**

47. Such measures are exceptional and are applied only when world prices are higher than Community prices and the Community has insufficient supplies. They can be adopted on the basis of 'scarcity clauses'. This possibility has been used only once, for the supply of sugar to the United Kingdom and Italian markets, by awarding import authorizations to those operators who undertook to perform the operation in return for the subsidies which placed the least burden on the Community. [50]

(e) **Suspension of imports**

48. This type of measure, which could cause serious difficulties with non-member countries, is conceivable only as a protective measure. It has been applied in the beef and veal sector and for certain fruit and vegetables. The Court of Justice has defined the rules according to which such protective measures are permissible. [51]

B. Measures applicable to exports

1. Export refunds

49. In order to bring about a permanent reduction in the supply on the internal market of products for which the Community self-supply rate is very high, it was decided to

---

[49] See for example in the eggs sector Article 4 of Council Regulation (EEC) No 2771/75 of 29 October 1975 (OJ L 282, 1.11.1975, p. 49).

[50] Council Regulations (EEC) Nos 608/72 of 28 March 1972 (OJ L 75, 28.3.1972, p. 5) and 2931/74 of 18 November 1974 (OJ L 311, 22.11.1974, p. 8).

[51] Joined Cases 21 to 24/72 *International Fruit Company and Others* [1972] ECR 1219; Case 40/72 '*Tomato concentrates*' (*Schroeder*) [1973] ECR 125.

encourage exports of agricultural products to non-member countries. Such exports are only possible if they can be effected on the basis of world market prices, which are generally lower than Community prices, and this requires a subsidy which is known as an export refund. The institutions, in particular the Commission, have considerable room for manoeuvre when it comes to determining which products should benefit from the system, fixing the amount of the refund and differentiating the amount according to the destination of the exports. These refunds are in a sense reverse levies, but they are by no means confined in the fairly rigid framework established for the levies.

2. Food aid

50. Fairly large quantities of agricultural products of Community origin are distributed to developing countries as food aid. This aid is given in a spirit of international solidarity which is sometimes expressed in the conclusion of international agreements. It also arises from a concern for proper management of the agricultural markets, since it reduces surpluses which are likely to impede the internal achievement of the Community's price objectives.

3. Export levies, suspension of exports

51. These two types of measure are adopted only under 'scarcity clauses' when, exceptionally, prices on the world market are higher than prices in the Community. [52] In such a situation there is a risk that operators will be tempted by the prospect of additional profit and will supply products which are indispensable in the Community to the world market, thus threatening Community supplies. In these circumstances it is therefore legitimate for the Community authorities to be authorized to take measures to protect the general interest, either by making the exports in question less attractive by taxing them or, more radically, by simply prohibiting them.

C. **Administrative procedures**

1. Advance fixing

52. Logically, the levy or refund to be applied to an import or export operation should be that in force on the day the operation is carried out. [53] Since the value of these customs measures varies with time and it is impossible to predict the extent of these fluctuations, it was decided, in order to meet the legitimate interests of operators, to permit them to apply for advance fixing of the levy or the refund. However much these vary, operators are guaranteed that they will pay or receive only the amount in force on the day when their application for advance fixing was submitted, although there may be an adjustment if the Community price changes between that date and the day of import. This certainty represents an obvious advantage for importers and exporters. It is coun-

[52] See for example in the cereals sector Council Regulation (EEC) No 2747/75 of 29 October 1975 (OJ L 281, 1.11.1975, p. 82).

[53] For details see for example Case 35/71 *Schleswig-Holstein* [1971] ECR 1083.

terbalanced by the requirement to pay a security which is considerably higher than if they had not requested this facility. For similar reasons, the advance fixing system has been extended to external monetary compensatory amounts.

2. Licences

53. Import and export of a large number of products are subject to the possession of an import or export licence which not only confers entitlement to carry out the operation within a certain period but also makes it obligatory. Otherwise, except in cases of *force majeure*, the operator is penalized by loss of the security which he had to provide in order to obtain the licence. The system of licences and securities enables the Commission to exercise better management of the markets in agricultural products by allowing it to forecast the market trend and, in the case of advance fixing, to prevent speculation. It, and in particular the system of securities, has been the subject of many decisions by the Court of Justice. The Court has in principle considered the system to be compatible with the principle of proportionality, but it has indicated certain limits. [54] Release of the security and extension of the period of validity in cases of *force majeure* are important factors in assessing the legality of the system.

3. Tendering

54. Levies and refunds are usually fixed by regulation. However, in the event of uncertainty regarding fluctuations on the world market, the Commission often uses the technique of awarding import, or, more usually, export authorizations on the basis of the best highest bid (highest levy, lowest refund). This is done through invitations to tender published in the *Official Journal.*

'Horizontal' regulations [55] have been adopted to deal with these matters and they apply to all agricultural products, although further specific provisions may be adopted for certain products.

Section II — Structural policy

¶ 1. *Need for and beginnings of a Community structural policy*

55. It was certainly intended that a *structural policy* should be developed within the framework of the common agricultural policy, for Article 39(1)(a) of the Treaty states that one objective should be 'to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour'.

---

[54] See in particular Case 11/70 *Internationale Handelsgesellschaft* [1980] ECR 1125 and Case 122/78 *Buitoni* [1979] ECR 677.

[55] Commission Regulations (EEC) Nos: 2730/79 of 29 November 1979 (OJ L 317, 12.12.1979, p. 1); 193/75 of 17 January 1975 (licences) (OJ L 25, 31.1.1975, p. 10); 645/75 of 13 March 1975 (export levies) (OJ L 67, 14.3.1975, p. 16).

In the Council Decision of 4 December 1962 on the coordination of policies on the structure of agriculture, [56] the Community opted for the time being for the non-compulsory coordination of the policies pursued by Member States; this coordination was to be undertaken by the Commission, which was instructed to examine draft national laws and to chair a 'Standing Committee on Agricultural Structure'.

The Community could also have stimulated and influenced national policies through the EAGGF Guidance Section (cf. Article 11 of Regulation No 17/64/EEC of 5 February 1964 on the conditions for granting aid from the EAGGF). [57]

But the 'Community programmes' for which this regulation provided and of which any projects should have formed part did not materialize, with the result that the Fund simply followed the traditional lines taken by national policies.

56. Obviously, such limited measures could only have limited results. By the end of the 1960s, agricultural structures were clearly inadequate. They could not provide the great majority of farmers with a standard of living comparable to that which persons in other occupations had come to enjoy thanks to the economic expansion which had begun 20 years before and was expected to continue for a long time.

The Mansholt memorandum on agricultural reform (which the Commission forwarded to the Council on 21 December 1968) [58] saw the restructuring of Community agriculture as the only solution to the problem. The Mansholt programme was intended to enable European farmers to take their place in the economy and society of the late 20th century.

Lengthy debates preceded the adoption of Directives 72/159, 72/160 and 72/161/EEC on 17 April 1972, which represented the first important Community legislation on structural policy. [59]

¶ 2. *Specific measures*

A. **Modernization of farms**

57. Holdings have to be modernized if those who choose to continue farming are to have an adequate income and to enjoy working and living conditions appropriate to modern society. This is the purpose of Directive 72/159/EEC on the *modernization of farms.* 'Member States shall introduce a system of selective incentives to farms suitable for development' (Article 1(1)).

'The development plan ... must show that, upon its completion, the farm undergoing modernization will be capable of attaining as a minimum, in principle for either one or two man-work units, a level of earned income comparable to that received for non-agricultural work in the region in question' (Article 4(1)).

---

[56] OJ 136, 17.12.1962, p. 2892.

[57] OJ 34, 27.2.1964, p. 586.

[58] COM(68)1000, Part A of 18 December 1968, Supplement 1/69 — Bull. EC. See S.L. Mansholt et al., 'L'agriculture européenne à un tournant', RMC, 1969, p. 587.

[59] OJ L 96, 23.4.1972, p. 1.

Several incentives are offered for the modernization of holdings (Article 8), the most important being the allocation of land released by farmers leaving agriculture pursuant to Directive 72/160/EEC, investment aid for carrying out the development plan and the provision of guarantee for loans.

To make these incentives more effective, provision is also made for dissuasive measures such as a prohibition on investment aid for farms not earmarked for development (Article 14(2)). This prohibition does not, however, apply to aid:

(i) where the interest remaining payable by the beneficiary (if the aid is granted in the form of interest-rate subsidies) or the equivalent (if the aid is given in some other form) amounts to not less than 5% per year;

(ii) which is granted on a temporary basis to farmers who are not capable of attaining the 'comparable earned income' and who, because of their age, are not yet eligible for the annuities for the cessation of farming as provided for in Directive 72/160/EEC;

(iii) which is granted under special schemes 'in certain regions where the maintenance of a minimum level of population is not assured and where a minimum amount of farming is essential in view of the need to conserve the countryside'.

The latter exemption is intended to help protect the environment and improve the quality of life.

Moreover, a special effort should be made in the less-favoured areas 'to promote throughout the Community a harmonious development of economic activities', which is one of the aims of the EEC (Article 2 of the Treaty). [60]

With this in mind, the Council subsequently adopted Directive 75/268/EEC on mountain and hill farming and farming in certain less-favoured areas, [61] which provides for more substantial measures than just the national investment aids authorized under the special schemes mentioned above: aid granted pursuant to the directive qualifies for a financial contribution from the Community; alongside the investment aid, provision is also made for a 'compensatory allowance' to supplement the incomes of those who decide to continue farming in such regions (cf. point 33 above).

B. Measures to encourage the cessation of farming

58. The programme submitted on 21 December 1968 ('Agriculture 1980') and the Commission proposals of 5 May 1970 both pointed out that in the late 1960s, 80% of European farms had less than 20 hectares of land and that 75% gave employment to only three-quarters of a man-work unit (MWU), that is, the person or persons living on the farm were permanently underemployed. It was necessary to facilitate the incorporation of the smaller and poorer holdings into larger units by encouraging the persons operating such farms, especially elderly persons, to cease farming; farmers and farmworkers aged 55 or over were to be offered an annuity, whilst farmers of all ages were also to be offered a 'premium' for their contribution to the improvement of farm structures, that is, for the release of their land. This land was to be made available to those who undertook to

[60] See the Declaration on hill farming attached to the Act of Accession of Denmark, Ireland and the United Kingdom.

[61] OJ L 128, 19.5.1975, p. 1.

establish modern farms. Farmers were thus to be encouraged both to acquire more land and to employ fewer workers; the latter were to be used more rationally and were to receive improved wages.

These measures were intended to facilitate the inevitable further reduction in the European farming population, whose numbers had already declined from 15 million in 1960 to 10 million in 1970.

Directive 72/160/EEC, while taking up these proposals, leaves the Member States greater freedom of action and limits the Community contribution towards the costs. The annuity is paid only until the age of 65 (it is then replaced by the retirement pension); the amount of the annuity is not specified and it may be varied, or even withheld, depending on the age and income of the beneficiary. The maximum EAGGF contribution is 900 u.a. in the case of a married farmer or 600 u.a. in the case of a single farmer. The structural improvement premium may also be varied or withheld, depending on certain factors; there is no Community contribution.

Not all the land released need be incorporated into modern farms. Some land should be permanently withdrawn from agricultural use and re-allocated for afforestation or for use as recreational areas or natural parks. Where marginal land unsuitable for agriculture is put to such use, it cannot be taken over by small-scale farmers whose holdings would then require assistance if they were to remain viable.

C. **Socio-economic guidance**

59. Directive 72/161/EEC assigns to the 'services providing socio-economic guidance' the task of informing the agricultural population 'as to the possibilities open to them for improving their socio-economic situation'.

Moreover, persons engaged in agriculture and aged 18 or over were given the opportunity of attending 'centres' or 'courses' providing basic or advanced vocational training, so that they could acquire new *agricultural skills* or improve those which they already possessed and thus play their part in modern agriculture.

D. **The inadequacy of the results**

60. These directives have achieved only some of the results which were hoped for. The world economic crisis which followed shortly after their adoption prevented many farmers and farmworkers from transferring to non-agricultural work; such a transfer was necessary if the directives were to achieve success. The directives had particularly little effect on the less-favoured areas of the Community (even if one overlooks the fact that their implementation was greatly delayed in Italy because of a controversy concerning the respective powers of the State and the regions).

The Community attempted to compensate for these shortcomings not only with the above-mentioned Directive 75/268/EEC on mountain and hill farming and farming in certain less-favoured areas but also through a number of measures to assist the less-favoured areas, such as Regulation (EEC) No 1362/78 of 19 June 1978 on collective irrigation works in the Mezzogiorno, Regulation (EEC) No 1760/78 of 25 July 1978 on the improvement of public amenities in the Mezzogiorno and southern France, Regula-

tions (EEC) No 269/79 and (EEC) No 270/79 of 6 February 1979 on forestry measures in certain Mediterranean zones and on the development of agricultural advisory services in Italy, Directives 79/173/EEC and 79/174/EEC of 6 February 1979 on collective irrigation works in Corsica and the flood protection programme in the Hérault Valley, and Regulations (EEC) No 1820/80 and (EEC) No 1821/80 of 24 June 1980 on agricultural development in the west of Ireland and sheep farming in Greenland. [62]

E. Market structures

61. As regards *market structures,* Regulation (EEC) No 355/77 of 15 February 1977 [63] on common measures to improve the conditions under which agricultural products are processed and marketed made it possible to continue the financing of projects as provided for in Regulation No 17/64/EEC (see footnote 57), which had now expired. Regulation (EEC) No 1361/78 of 19 June 1978 [64] introduced particularly favourable terms for projects carried out in the Mezzogiorno and southern France.

The regulations on fruit and vegetables, fishery products and hops also encourage the formation and regulate the activities of '*producers' organizations*', making it compulsory for their members to observe a certain code of conduct, particularly where marketing is concerned. The regulations on live plants, beef and veal, pigmeat, and eggs and poultrymeat similarly encourage trade and inter-trade initiatives aimed at matching supplies to the quantities and qualities required by the market. Lastly, the proposal for a regulation on producer groups and associations thereof [65] advocated that recognition of such groups and associations should be extended to all areas of the common agricultural policy, with appropriate 'marketing' codes for the various sectors. Following a lengthy procedure, this text was finally adopted, but the regulation applied only to those geographical areas where agricultural supply structures were particularly inadequate (Italy, southern France and Belgium). [66]

Section III — Institutional and financial aspects of the common agricultural policy

¶ 1. *Community institutions and Member States*

62. In the sphere of agricultural policy (at least where the organization of markets is concerned), the role of the Member States is merely to *implement* the Community rules (for special structural-policy arrangements, see Section II above). The Community institutions not only define the basic policy but also normally lay down any general or substantive provisions necessary for its implementation. The Member States, of course, do

[62] OJ L 166, 23.6.1978, p. 11; OJ L 204, 27.7.1978, p. 1; OJ L 38, 14.2.1979, pp. 1, 6, 15 and 18; OJ L 181, 15.7.1980, pp. 1 and 9.
[63] OJ L 51, 23.2.1977, p. 1.
[64] OJ L 166, 23.6.1978, p. 9.
[65] Presented by the Commission on 21 January 1967 (OJ 50, 18.3.1967, p. 757), and amended in 1970 and 1971.
[66] Council Regulation (EEC) No 136/78 of 19 June 1978, see footnote 18 above.

more than simply apply the Community rules to particular cases; they have the power to adopt the necessary implementing measures, including legislation. In doing so, however, the Member States may not reduce the scope of Community provisions, as the Court has ruled on a number of occasions. [67] Thus, the legislation adopted by the Member States usually merely settles administrative and procedural questions. The Member States are also empowered to lay down *penalties*; they are even obliged, under Article 5, to impose penalties to ensure fulfilment, by individuals, of obligations arising from measures taken by the Community institutions.

63. In the agricultural sector, the application of the Community rules to particular cases is usually a matter for the Member States. The reason is that the Community's administrative infrastructure is not comparable in size with that of the Member States, which therefore has to be used to a great extent. In principle, however, there is nothing to prevent decisions on individual cases being taken at Community level.

The Commission has no hierarchical power over the national authorities responsible for implementing the Community rules; thus, the Commission can only influence the manner in which these rules are implemented in the Member States by means of official enquiries, the findings of which are final, particularly to deal with individual cases. The infringement procedure laid down in Article 169 may be said to take the place of such legal powers, to some extent, but it is too ponderous to ensure, particularly in individual cases, that the rules are implemented rapidly and in accordance with Community requirements. This explains why the Community rules (particularly those governing agricultural matters) tend to be framed in very precise and detailed regulations. Only such regulations create the conditions in which the rules can be applied as uniformly as possible. The permanent contacts which the Commission maintains with the national authorities responsible for implementation have made it possible in practice, however, for the Commission to acquire some sort of investigative powers. One reason for this development lies in the fact that the Member States have to bear the financial consequences of any irregular implementation of the Community rules in the agricultural sector. [68]

64. Jurisdiction over basic issues may also be given to the Member States in areas subject to Community legislation. This is subject, however, to legal limits: it must not reduce the powers of the Community to the point where the basic principles of the common market and the objectives of Article 39 are jeopardized. The Community institutions cannot shirk their explicitly designated tasks by leaving the definition of essential principles to the Member States. [69]

¶ 2. *Powers of the Community institutions*

A. The Council

65. The basic rules of the common agricultural policy (the 'basic' regulations and directives) are adopted by the Council in accordance with the procedure provided for in the

[67] See judgment of 17 December 1970, Case 34/70 *Synacomex* [1970] ECR 1233; judgment of 28 June 1977, Case 118/76 *Balkan* [1977] ECR 1177; judgment of 26 June 1978, Case 177/78 *Pigs and Bacon Commission* [1979] ECR 2161.

[68] See Articles 2 and 3 of Regulation (EEC) No 729/70, quoted at footnote 7 above, and Cases 11 and 18/76 *EAGGF* [1979] ECR 245 and 343.

[69] Judgment of 30 October 1975, Case 23/75 *Rey Soda* [1975] ECR 1279.

third subparagraph of Article 43(2). These basic rules confer the power to issue implementing provisions either on the Council itself under a simplified procedure (without consultation of Parliament) or on the Commission, in accordance with the last indent of Article 155.

Under the system currently applied, the Council usually assumes responsibility for implementing measures at primary level (general rules and criteria, e.g. for export refunds) whilst the Commission is entrusted with the implementing measures at secondary level (detailed rules, technical rules, fixing of amounts, etc.). Implementing measures of great importance (such as the annual fixing of basic prices), however, still have to be adopted by the Article 43 procedure on account of their political significance.

Occasionally the Council also assumes responsibility for detailed rules, even in cases where the delegation of powers to the Commission would seem in order and would remove some questions of minor importance from the Council agenda. But on the whole it is fair to say that, in the agricultural sector, the Commission has been given powers of discretion over substantial areas of economic policy (e.g. protective clauses, export refunds, compensatory amounts).

B. The Commission

66. As for the Commission's powers, a distinction should be made between cases where the Commission alone takes the decision (after consulting a committee, if need be) and cases where the Commission decision is taken under a 'committee procedure' and subject to special conditions. Of these committee procedures, particular mention should be made of the management committee procedure, which requires that any measure planned by the Commission must first be submitted for the approval of a committee responsible for the sector in question and consisting of delegates from the Member States. If this committee delivers an unfavourable opinion (by a qualified majority), the Commission measure may be cancelled or amended by the Council. This is the normal procedure for the common organization of markets, but it is also used in other areas of the common agricultural policy (structural policy, financing). It has proved a sound procedure in practice, enabling decisions to be reached rapidly and a fair balance to be struck between Community and national interests. [70] Committee procedures of a different kind, giving a more important role to the Council, are used for the approximation of legislation (e.g. veterinary legislation).

The Commission cannot adopt measures on its own except in cases of special urgency (e.g. where export refunds have to be altered at short notice) or where the decisions to be taken involve no margin of discretion.

¶ 3. *The financing of the common agricultural policy: the principles*

67. The implementation of the common agricultural policy necessarily entails heavy expenditure; that is why the problem of financing has been an important political factor from the outset. The cost of the agricultural policy represents a high percentage of all

[70] The Court of Justice deemed this a legitimate procedure: Case 25/70 *Köster* [1970] ECR 1161.

Community expenditure (some 70% of total expenditure in recent budgets). This shows how integration has advanced further in the agricultural sector than elsewhere and how the agricultural policy has proved more expensive than other Community policies, if only because of intervention costs. The heavy expenditure results mainly from the financing of the markets policy (EAGGF Guarantee Section), with only 11% being allocated for the structures policy in 1980 (EAGGF Guidance Section).

68. A basic feature of the financing of the markets policy is the absence of any ceiling on expenditure. The amount spent results solely from the application of the market organization mechanisms ('compulsory' expenditure).

Expenditure on structures policy, on the other hand, is subject to an annual ceiling, which may, however, be raised (Article 6 of Regulation (EEC) No 729/70, see footnote 7 above). The cost of common measures is estimated in the legislation adopting them (cf. for example, Article 16 of Directive 72/159/EEC, see footnote 59 above).

¶ 4. *The EAGGF*

69. The Treaty made provision for setting up one or more agricultural guidance and guarantee funds as financing instruments (Article 40(4)). It was initially planned to set up two separate funds but in the end it was decided to set up a single fund divided into two 'sections' (Guarantee and Guidance) broadly reflecting the distinction between markets policy and structures policy.

70. The European Agricultural Guidance and Guarantee Fund (EAGGF) is not an autonomous fund; it is an integral part of the general budget of the Communities. All (gross) expenditure entailed by the common agricultural policy must accordingly be entered in the budget as 'expenditure' whilst the agricultural levies, which count as the Community's 'own resources' by virtue of Article 2 of the Decision of 21 April 1970, must be shown as budget 'revenue'. Only certain items of revenue collected by the intervention agencies in the Member States (e.g. proceeds from resale of products bought in and stored) are deducted from the intervention costs financed by the EAGGF which then appear in the budget as net expenditure.

The financing of the common agricultural policy, first introduced by Council Regulation No 25 of 14 April 1962 [71] and gradually amplified during the EEC's transitional period, is now governed by Regulation (EEC) No 729/70 of 21 April 1970. [72] Unlike the previous system, this regulation is based on the principle of direct financing by the Community. The Member States thus act merely as paymasters, the necessary financial resources being advanced by the Community.

Conclusions

71. The common agricultural policy has to a great extent achieved the main objectives assigned to it by the Treaty: free movement of agricultural products within the Commu-

[71] See footnote 6 above.
[72] See footnote 7 above.

nity, a sizeable share of world trade for the agricultural population, security of supplies and stable prices, in the interests of both consumers and producers.

There are, of course, some negative aspects of the common agricultural policy. Unlimited price guarantees have encouraged the production of surpluses, particularly of dairy produce. Prices are guaranteed regardless of the scale of production and this has been of greater benefit to large than to small-scale producers; since they have been awarded more frequently in the cereal and sugar sectors and in respect of the livestock production in northern and central Europe, price guarantees have been of greater benefit to prosperous regions than to less-favoured regions. Lastly, the financial cost of the common agricultural policy has tended to rise too rapidly in real terms and sharp criticism has been voiced concerning the manner in which money is spent on disposal of surpluses. Some changes are therefore essential.

Much serious consideration has been given to this matter since 1979 and 1980, when a crisis arose from the United Kingdom's refusal to accept a severe long-term imbalance between the financial advantages and disadvantages of its membership of the Community. This imbalance stemmed from the preponderance of agricultural expenditure in the Community budget and the difficulties of obtaining Community finance for other policies which would benefit the less prosperous Member States, the Community budget having expanded to such an extent that the ceiling of 1% of VAT revenue set by the 'own resources' decision had almost been reached.

On 30 May 1980, having finally achieved a compromise on the United Kingdom's financial contribution, the Council instructed the Commission to examine 'the development of Community policies, without calling into question ... the basic principles of the common agricultural policy', in order to 'prevent the recurrence of unacceptable situations'. [73]

The Jenkins Commission then undertook a study of this problem and published its 'Reflections on the common agricultural policy' [74] on 5 December 1980.

Reasoning from the facts outlined above, the Commission took the view that the adjustments to be made to the common agricultural policy must reconcile three main objectives: (a) to maintain the fundamental principles of the single market, Community preference and financial solidarity; (b) to hold in check the expenditure on production surpluses; (c) to concentrate financial resources on the least-favoured farms and regions.

The Commission proposed that the overhaul of the common agricultural policy should proceed along three lines: (a) the principle of producer co-responsibility or financial participation should be introduced into a number of market organizations; (b) a new approach should be taken to the Community's policy on external trade in agricultural products, both on the import side ('it is unjustifiable to criticize the operation for political or other reasons') and on the export side (it is necessary to provide the CAP 'with instruments similar to those enjoyed by the major agricultural exporting countries, in particular the ability to conclude long-term agreements'); (c) there should be some readjustment of structural policy (with a view to increasing productivity and making a particular effort on behalf of regions in difficulties).

---

[73] Council conclusions of 30 May 1980 (OJ C 158, 27.6.1980, p. 1).
[74] COM(80)800 final of 5 December 1980.

'The time has come for the common agricultural policy to make a new start. This new start must be made on a sound basis.'

The Thorn Commission had then to complete the task in hand and submit its report before the end of June 1981.

Chapter IX — The fisheries policy

by Albert W. Koers

Introduction

1. The Treaty establishing the European Economic Community provided for the adoption of a common agricultural policy [1] which would also cover fishery products. [2] The development of the common fisheries policy may be traced in the *General Reports on the Activities of the European Communities.* Until 1970 fisheries were rarely mentioned; from 1970 to 1977 emphasis was placed on the common organization of the market in fishery products; by 1977, however, fisheries had clearly become such an important issue that it merited a separate section in the *General Report.* [3] Let us examine the background to this development.

Section I — The common organization of the market in fishery products

¶ 1. *Regulations (EEC) Nos 2141/70 and 2142/70*

2. On 6 June 1968, the Commission presented to the Council proposals for a common structural policy in the fisheries sector and for a common organization of the market in fishery products. This initiative led to the adoption, on 20 October 1970, of two Council regulations, namely Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry and Regulation (EEC) No 2142/70 on the common organization of the market in fishery products. [4] Both these regulations came into force on 1 January 1971.

---

[1] Article 3(d) of the Treaty.

[2] Article 38(1) of the Treaty.

[3] *Second General Report*, point 188; *Third General Report*, point 176; *Fourth General Report*, point 202; *Fifth General Report*, point 308; *Sixth General Report*, point 267; *Seventh General Report*, point 308; *Eighth General Report*, point 288; *Ninth General Report*, point 286; *Tenth General Report*, point 34; *Eleventh General Report*, points 357-361; *Twelfth General Report*, points 388-392; *Thirteenth General Report*, points 347-350.

[4] Council Regulation (EEC) No 2141/70 of 20 October 1970 (OJ L 236, 27.10.1970) and Council Regulation (EEC) No 2142/70 of 20 October 1970 (OJ L 236, 27.10.1970), subsequently replaced by Council Regulation (EEC) No 100/76 of 19 January 1976 (OJ L 20, 28.1.1976), and Council Regulation (EEC) No 101/76 (OJ L 20, 19.1.1976).

3. Regulation No 2141/70 provided that common rules should be laid down for fishing in maritime waters and that specific measures should be taken to coordinate the structural policies of the Member States in this sector. To achieve such coordination, the Member States were to supply the Commission each year with certain information, whilst the Commission was to present an annual report to the Parliament and the Council. It was also stipulated that the necessary measures could be adopted in accordance with the procedure laid down in Article 43(2) of the Treaty. This procedure would also be used for fixing the conditions for granting financial aid. The regulation also set up a Standing Committee for the Fishing Industry.

4. The main provisions of Regulation No 2141/70 were, however, contained in Article 2, whereby the rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction are not to lead to differences in the treatment of other Member States. This means, in particular, that the Member States must ensure that all fishing vessels flying the flag of a Member State and registered in Community territory have equal conditions of access to, and use of, the fishing grounds located in the maritime waters coming under their sovereignty or within their jurisdiction. [5] Derogations from this principle of equal access were still possible until 1 January 1977, but only in special cases and on the basis of a Council decision.

5. Regulation No 2142/70 laid down the rules applicable to the setting of marketing standards, as regards aid to encourage the formation and to facilitate the operation of producers' organizations, and as regards the common price system intended to stabilize the market and trade with non-member countries. The price system included withdrawal prices, whilst, as regards trade with non-member countries, provision was made for the application of Common Customs Tariff duties, the removal of quantitative restrictions and a system of reference prices.

¶ 2. *The 1972 Act of Accession*

6. Chapter 3 of Title II of the Act of Accession of Denmark, Ireland and the United Kingdom deals with fisheries. The chapter is mainly concerned with the derogations made (at the request of the new Member States) to the principle of equal access as defined in Article 2 of Regulation No 2141/70. Under Articles 100 and 101 of the Act of Accession, the Member States are authorized until 1 January 1983 to restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of six or 12 nautical miles calculated from the baselines of the coastal Member State, to vessels which fish traditionally in those waters and which operate from ports in that area. These provisions were not, however, to prejudice any special fishing rights enjoyed on 31 January 1971. Another important provision is contained in Article 102, which states that 'from the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing (...)'.

[5] Article 2.

¶ 3. *Developments outside the Community*

7. Such were the rules of the common fisheries policy when, in 1976, profound changes in the international law of the sea occurred in a broader context. There was a market policy and the beginnings of a structural policy, but there was no common policy on the conservation of marine biological resources, whilst the principle of equal access enshrined in Regulation No 2141/70 and applicable until 1983 had lost much of its importance in practical terms because of the derogations provided for in the Act of Accession. In 1976, however, it became clear (before the final outcome of the Third United Nations Conference on the Law of the Sea) that more and more countries were planning to extend their fishing limits to as much as 200 nautical miles offshore. [6]

In the North Atlantic, Iceland had taken such a decision in 1975 and in 1976 the United States, Canada and Norway announced that they in turn were preparing to extend their fishing limits. This being the case, the Member States of the Community had to decide what attitude they should adopt.

8. One thing was clear: the principle of equal access as established by Regulation No 2141/70 applied to all maritime waters under the sovereignty or jurisdiction of Member States and, consequently, to the new fishing zones which extended up to 200 nautical miles. Under the traditional law of the sea, which provided for fishing zones not exceeding 12 nautical miles, the principle of equality had only limited significance until 1983 because of the derogations which would apply to the 12-mile zones until that date under the Act of Accession, but it would be of great importance under the new law of the sea which was being drawn up and would provide for fishing zones of up to 200 nautical miles.

If this principle had been put into practice, a Community fishing zone would have been established outside the 12-mile limits. Moreover, if the Member States decided to extend the limits of their fishing zones, the Community would have to devise a policy for the conservation of marine biological resources.

Section II — A new fisheries policy

¶ 1. *The efforts of the Council and the Commission*

9. On 6 October 1976, the Commission presented to the Council proposals for new Community legislation on the internal and external aspects of fisheries policy. Such an initiative was necessary, for on 30 October 1976 the ministers attending the special meeting in The Hague were to draw up a resolution (approved via written procedure by the Council on 3 November) to the effect that, as from 1 Jnauary 1977, the Member States should, by means of concerted action, extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts. [7] The resolution also stated that

[6] See Articles 55-74 of the Draft Convention on the Law of the Sea (unofficial text) resulting from the Third United Nations Conference on the Law of the Sea.

[7] Bull. EC 10-1976, points 1501-1505; for the text see Case 61/77 *Commission* v *Ireland* [1978] ECR 417 et seq., especially at p. 440 et seq., ground 3 et seq.

fishing within these zones by non-member countries would be governed by agreements between the Community and the countries concerned, whilst the Community for its part was to obtain for its own fishermen access to the zones belonging to non-member countries by concluding appropriate agreements with the latter. In Annex VI to the resolution adopted at The Hague (which was subsequently to be of great importance) the Council stipulated that Member States must not adopt any unilateral measures. If, however, the measures required for 1977 were not adopted within the framework of international fisheries organizations or at Community level, the Member States were authorized to take appropriate measures, provided that these were temporary and non-discriminatory. The Member States were also required to obtain Commission approval.

10. Despite this resolution, it proved impossible to adopt, before 1 January 1977, Community measures for the conservation of biological resources in the fishing zones of the Member States. In December 1976, therefore, it was decided as a provisional arrangement that in 1977 the same measures would apply as in 1976. This was the beginning of the uncertainty which has surrounded the common fisheries policy ever since.

11. As regards internal policy, no final legislation has yet been adopted despite the fact that since 1977 the Commission has submitted several proposals to the Council. In 1977 the main opposition to the Commission proposals came from Ireland and the United Kingdom, who requested, in defiance of the principle of equal access, recognition of an exclusive 50-mile fishing zone for their own fishermen. In January 1978, however, at a special ministerial meeting in Berlin, eight Member States agreed on the essential points for an internal settlement. The United Kingdom was unable to support this agreement for the following reasons:

(a) it requested an exclusive fishing zone of 12 nautical miles without recognition of pre-existing historic rights;
(b) it requested 'dominant preference' for its own fishermen in a zone extending from 12 to 50 nautical miles, particularly where the various quotas were concerned.

The UK position has so far prevented any decision being taken on internal arrangements. This does not mean, however, that nothing has happened in the fisheries sector since 1976. The 1976 situation has been altered by temporary measures, national measures, transitional measures and arrangements concerning less controversial matters.

12. In 1977, several temporary measures were adopted, the most important being the ban on the fishing of certain herring stocks which were particularly threatened. Measures were also taken on the use of certain types of fishing gear and on the size of by-catches.

All these measures were of a temporary nature but their validity has been (and still is being) regularly extended. Although the Council has failed to reach agreement on the common fisheries policy, particularly as regards quotas, the situation has accordingly changed somewhat since the end of 1976.

13. Another factor has been the system of national measures applied since 1978 and based on the above-mentioned Annex VI to the Hague Resolution which was adopted in late 1976. Since 1978 the Member States have been required to submit any planned national measures for the prior approval of the Commission, which examines such measures in the light of the criteria defined in Annex VI. Since eight Member States are,

generally speaking, in agreement with the Commission proposals, the adoption of national measures does not usually give rise to any problems. On the other hand, the Commission has had to withhold its approval from certain UK national measures, with subsequent initiation of the procedure provided for in Article 169 of the Treaty.

In this way it has at least been possible to prevent the adoption of certain measures from undermining the foundations on which the common fisheries policy must one day be based.

14. Early in 1979 an opportunity arose to break new ground when the Council adopted interim measures [8] whereby the Member States were to conduct their fisheries in such a way that the catches of their vessels were consistent with the total annual catches proposed by the Commission and with the share of such catches allocated to non-member countries. It was also stipulated that the Member States should continue to apply the same technical measures for the conservation and surveillance of fishery resources as had been applicable on 3 November 1976 and the national measures taken in accordance with Annex VI to the Hague Resolution. Since 1979, the period of validity of these interim arrangements has also been regularly extended.

15. Early in 1980 the Council reached agreement on total allowable catches and on certain measures relating to the recording of catches. During the second half of 1980, agreement in principle was reached on certain technical measures (mesh sizes, by-catches, etc.) and on measures to ensure that fishermen complied with the legislation in force.

16. The *external* fisheries policy has also been faced with problems. Since the agreements provided for in the Hague Resolution could not be concluded in the short term, the fishing activities of non-member countries in the fishing zones of Member States have been governed by autonomous Community measures since the beginning of 1977.

Negotiations have, however, begun with a large number of countries, with a view to concluding outline agreements, i.e. agreements laying down the procedures for annual arrangements on reciprocal fishing rights.

17. As regards the attitude of non-member countries towards the Community, it should be noted that in 1977 negotiations were also held with some Eastern European countries. These negotiations failed to achieve any specific results, however, and the Community brought to an end the fishing activities of these countries in the maritime waters of the Member States. Positive results were, however, achieved in negotiations with other countries. An agreement with the United States came into force on 9 June 1977. [9] In the same year agreements were signed with the Faeroe Islands and with Sweden, whilst negotiations with Norway, Finland, Spain and Canada reached a successful conclusion in 1978. In 1979, the negotiations with Senegal and Guinea-Bissau led to draft agreements whereby the Community obtained fishing rights in exchange for financial compensation. In 1979 talks were also held with Tunisia, Yugoslavia, the Seychelles and Mauritius.

18. Despite all these negotiations, only a limited number of fisheries agreements exist between the Community and non-member countries. In addition to the above-mentioned

[8] Bull. EC 12-1978, point 2.1.124; these transitional arrangements were adopted in the light of Article 102 of the Act of Accession.

[9] OJ L 141, 9.6.1977.

agreement with the United States, there are two short-term agreements with Canada. [10] This derives from the fact that the United Kingdom considers that, as a matter of principle, no agreement should be concluded with non-member countries until an internal fisheries policy has been defined. Thus, some agreements have been awaiting signature [11] for a considerable time, whilst others, already signed, have not been approved. [12] Only recently has any progress been made towards breaking this deadlock, with the United Kingdom accepting that a certain number of outline agreements should be concluded. [13] This situation is, of course, harmful to the international credibility of the Community. Admittedly, most of these outline agreements are being applied by the (future) signatories, although on a provisional basis and as a *de facto* arrangement. Consultations are regularly held on reciprocal fishing rights as provided for in the outline agreements. These consultations give rise, in turn, to formally autonomous measures.

19. The Community has also entered into multilateral negotiations on fisheries questions and has, as a result, become a party to a treaty on multilateral cooperation on fishing in the North-West Atlantic. A new treaty concerning the North-East Atlantic was signed on 18 November 1980, although the Soviet Union was initially reluctant to acknowledge the Community as a signatory. The Community also plans to join other multilateral organizations dealing with fishery matters. [14]

¶ 2. *Rulings of the Court of Justice*

20. Even before the decision on the extension of fishing zones was taken in late 1976, the Court has been confronted with the problem of the Community's competence on fisheries. At the beginning of 1976, two Netherlands judges requested a preliminary ruling as to whether the Community had exclusive powers to contract international obligations in the fisheries sector. In its ruling of 14 July 1976 in the *Kramer* case [15] (Joined Cases 3, 4 and 6/76), the Court found that the Community had 'on the internal level, the power to take any measures for the conservation of the biological resources of the sea' and that this rule-making authority also extended '—in so far as the Member States have similar authority under public international law—to fishing on the high seas'.

Since fishery legislation cannot be effective or equitable unless it is also binding on non-member countries, the Court concludes that the Community has authority to enter into international commitments for the conservation of the biological resources of the sea. The Court also considers that the Community has not yet 'fully exercised its functions in the matter' and concludes that the Member States also have the power to enter into international commitments of this kind. This power of the Member States is, however, only of a temporary nature and will come to an end 'from the sixth year after accession at the latest' since the Community institutions must by then have satisfied the provisions of Article 102 of the Act of Accession of Denmark, Ireland and the United Kingdom.

---

[10] An agreement for 1979 finally came into force on 4 December 1979 and in January 1980 two agreements were signed for 1980; Bull. EC 12-1979, point 2.1.119 and Bull. EC 1-1980, point 2.1.56.

[11] Agreements with Norway, Spain and Finland.

[12] Agreements with Sweden, the Faeroe Islands and Senegal.

[13] OJ L 226, 29.8.1980, pp. 1, 7, 11, 16, 33, 47 and 51; regulations on the conclusions of agreements with Norway, Guinea-Bissau, Sweden, the Faeroe Islands, Senegal and Canada.

[14] Baltic fisheries, tunny-fisheries in the Atlantic and Antarctic fisheries.

[15] Joined Cases 2, 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

21. This ruling was important in that it defined the powers of the Community before any political decisions were taken concerning the new common fisheries policy. It at least provided a more sharply-defined legal framework in which decisions could be taken.

22. In 1977 another fisheries case was referred to the Court. In July that year, Ireland had unilaterally decided to prohibit certain vessels from fishing within a zone to the west of Ireland. The Commission, taking the view that this prohibition was discriminatory and contrary to the Treaty, initiated against Ireland the procedure laid down in Article 169. The Commission also asked the Court to order Ireland to lift the prohibition in question provisionally. This was the first such request in the history of the Community. On 13 July 1977, the Court acceded to the Commission's request and ordered Ireland to suspend the prohibition with effect from 18 July and until judgment had been given in the main action. [16] This judgment was given on 16 February 1978. [17] Rejecting the Irish arguments, the Court ruled that the extension of fishing limits, as decided in late 1976, automatically entailed a corresponding extension of the scope of the Community legislation on fisheries. Since the Council had not adopted the necessary measures in good time, the Court held that Ireland was empowered to adopt measures provided that these complied with the Community rules. This was not the case, however, if the Irish measures were of a discriminatory nature. The Community rules prohibit not only overt discrimination on grounds of nationality but also all covert forms of discrimination which lead in fact to the same result.

23. Having delivered this detailed judgment, the Court was able to deal more rapidly with a subsequent case. When a request for a preliminary ruling was submitted by the Irish judge before whom a number of Dutch fishermen were to appear on charges of infringing the above-mentioned unilateral Irish measure, the Court answered the questions put concerning Ireland's powers in this matter by referring to the judgment given in Case 61/77. [18]

24. On 3 July 1979 the Court delivered in response to a request by a Dutch judge for a preliminary ruling, a judgment concerning the meaning of the words 'from the sixth year after accession at the latest' in Article 102 of the Act of Accession. The meaning of these words is important since the period in question determines the allocation of powers between the Community and the Member States (see point 20 above). The Court ruled that the period referred to in Article 102 expired on 31 December 1978. [19]

25. The provisional measure resulting from Case 61/77 is not, however, the only precedent set by the Court's decisions on fisheries questions. On 4 October 1979 the Court delivered its first judgment on the basis of Article 170 of the Treaty. [20] In June 1978 France asked the Court to rule that the United Kingdom had failed to fulfil its obligations under the Treaty by adopting the 'Fishing Nets (North-East Atlantic) Order 1977'. France took the view that the United Kingdom had failed to fulfil its obligations under Annex VI to the Hague Resolution of 3 November 1976. The Commission supported the

---

[16] Case 61/77 *Commission* v *Ireland* [1977] ECR 1411 (Order of 13 July 1977).
[17] Case 61/77 *Commission* v *Ireland* [1978] ECR 417.
[18] Case 88/77 *Schonenberg* [1978] ECR 473.
[19] Joined Cases 185 to 204/78 *Van Dam* [1979] ECR 2345.
[20] Case 141/78 *France* v *United Kingdom* [1979] ECR 2923.

French point of view. In the judgment given on 4 October 1979, the Court ruled that the United Kingdom had failed to fulfil its obligations under Article 5 of the Treaty, under Annex VI and under Articles 2 and 3 of Regulation (EEC) No 101/76.

26. Other fisheries questions have since been brought before the Court. Under the Article 169 procedure, the Commission requested the Court on 27 February 1979 to give a ruling on three national measures adopted by the United Kingdom, whilst on 9 November 1979 the Commission, acting again under Article 169, referred to the Court a number of measures taken by the United Kingdom as from 1 July. Here again, the central issue was the compatibility of national measures with Community rules, and in particular Annex VI to the Hague Resolution.

In its judgment of 10 July 1980 [21] the Court confirmed that the United Kingdom had acted contrary to the Community rules, and on 14 October 1980 it gave a preliminary ruling on the obligations of the Community and its Member States towards Spanish fishermen under Article 234 of the Treaty. [22]

Conclusion

27. Since 1976 a number of abortive attempts have been made to draft a common policy on the conservation of the biological resources of the sea. For some years, one country (the United Kingdom) has prevented any substantial progress by invoking the Luxembourg compromise, in the case of signature of an outline agreement with an African country in whose waters no British fisherman has ever taken a single catch. At the same time, it must be acknowledged that the United Kingdom occupies a special position where fisheries are concerned and that this may explain its differences of opinion with the other Member States. The prolonged deadlock is not only harmful to the fishing industry: it also harms the Community as a whole. One root cause of the deadlock has probably been the fact that events since 1976 have not been of the Member States' own making but have been imposed on the Community from outside. The extension of fishing zones was a development initiated by non-member countries and the Community had no choice but to follow suit.

28. In these circumstances, the Commission and the Court have done their best to prevent the erosion of what the Community has achieved so far. Where no further progress has been possible, efforts have been made to consolidate the present position. In this respect, Annex VI to the Hague Resolution has been an important instrument, defining as it does the Community framework for any national measures. Even so, in the fisheries sector the *de jure* situation within the Community differs greatly from the *de facto* situation. By way of example, we may cite the outline agreements with non-member countries which have not come into force but which are nevertheless applied in practice; the autonomous measures which are nevertheless based on agreements with non-member countries; and the national measures based on proposals from the Commission.

[21] Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403.
[22] Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787.

29. This situation, together with the extensive application of the Luxembourg compromise, shows that recent developments in the common fisheries policy give a rather negative picture of the Community decision-making process. This is also borne out, unfortunately, by the fact that on 30 May 1980 the Council promised to introduce a common fisheries policy by 1 January 1981 and that this deadline expired without the desired result having been achieved.

Chapter X — Industrial policy, research and training policy, investment policy

by Isi Foighel and Claus Gulmann

Preliminary remarks

1. One of the main tasks of the institutions is to adapt Community law to the changing needs of the times and of society. In the course of the past 30 years, the economic, technological and social situations have changed profoundly, sometimes at an alarming rate. The proof of the Treaties' vitality will always be that they have set up institutions and endowed them with the appropriate legal and other means to deal with the problems that arise from the vagaries of the times.

The need for such adjustments can be seen, in particular, in the field of industrial policy and in those of research and training policies. While the ECSC and Euratom Treaties provided for considerable powers in the fields of industry and research, the powers provided for by the EEC Treaty are few. Whereas during the 1950s it was not possible to foresee the true significance of these fields for European integration, subsequent events have underlined their importance.

The part played by the Commission in these areas has been a considerable one. Through its numerous initiatives it has highlighted the nature and seriousness of the problems and indicated how the Community institutions could contribute to their solution. It has demonstrated clearly how the measures taken by the Member States could and should be coordinated at Community level; it has proposed a large grant for aid to investment and for other economic aids with a view to the implementation of projects of Community interest; it has presented numerous proposals for legislative acts that are of importance to the Member States and their citizens in the sectors concerned. Often, however, the political will to follow the Commission proposals has been lacking. Without doubt, there has been some measure of alignment of national positions, owing largely to the exchanges of views held by the numerous working committees set up in these areas and to the fact that the Community aid to investment and research projects has helped to produce important results; nevertheless, in a number of cases, the Council's action in the examination of the Commission's proposals for legislative acts has been disappointing. There are several reasons for this. Often, extremely difficult harmonization of national statutory provisions is called for. Because the Member States are not always convinced of the need for supranational regulation within the sectors in question, doubts have sometimes arisen whether the Treaties provide an adequate basis for the proposed regulations.

Consequently, Community action in these areas has so far been essentially indirect. On the whole, the work done by the Community is not immediately evident to the general public. Community measures should not, however, be in any way underestimated. It has taken time to formulate and apply Community measures, but their practical significance continues to grow and there is no doubt that in years to come the importance of the Community, precisely in the fields of industry and research, will become ever greater and ever more manifest. The hitherto indirect character of Community action has consequently meant that the influence of the Court on the development of law in the above-mentioned fields has been limited.

Section I — Industrial policy

¶ 1. *Main developments*

2. As regards industrial policy, the EEC Treaty does not contain any general provisions which empower the institutions to enact Community regulations, as is the case in the agricultural sector. This has proved to be a deficiency.

The removal of existing barriers to trade has not in itself been sufficient to ensure that the structural advantages of the common market thus created are fully exploited. European firms do not appear to be able to compete effectively with American ones and there was hardly any cross-frontier cooperation between European companies. It was obvious to the Commission that there was a need for measures relating to industrial policy.

In 1970 the Commission accordingly presented to the Council a report which analysed the problems of industrial structures within the Community and included a general plan outlining the objective and resources for improving conditions for industrial growth. The report proposed measures in the following areas:

(i) *realization of the common market:* firms must be able to take full advantage of the enlarged market; this calls for the removal of all technical barriers to trade, the ending of all discrimination in the award of public contracts and the abolition of tax barriers at internal Community frontiers;

(ii) *establishment of a common legal, tax and financial system:* the necessary structures must be set up to enable undertakings who so wish to collaborate or work in association with undertakings in other Member States; to this end, tax barriers must be abolished and the financial structures required for such forms of association must be improved;

(iii) *industrial restructuring:* a higher level of concentration is an acceptable goal provided that a system of fair competition is maintained, particularly in the advanced technology sectors;

(iv) *solution of the problems associated with manpower transfers and modernization of industry:* measures are necessary in order to solve the problems that arise as a result of job losses and to enable industry to take rapid advantage of innovations; steps must be taken to improve the training of managers and the methods of business management;

(v) *development of Community solidarity* vis-à-vis *third countries:* this is dependent on the development of the common commercial policy.

The Commission report provided a tentative appraisal of the problems of industry and the contribution that the Community could make towards solving them. A number of proposals were aimed solely at enabling more effective use to be made of the powers provided by the Treaty, while others related to the development of new legal, economic and social instruments.

In the early 1970s, after assessing the programme presented by the Commission, the Council adopted the first industrial and technological policy programme. [1]

The five main points of this programme are as follows:

(i) abolition of technical barriers to trade,
(ii) gradual and effective liberalization of access to public works and supplies contracts,
(iii) encouragement of competitive undertakings on a European scale,
(iv) encouragement of advanced-technology industries,
(v) setting-up of a department to promote cooperation between undertakings.

Some of the measures envisaged in this action programme have been carried into effect. Mention must be made of the substantial efforts to ensure the removal of technical barriers to trade, more than 100 directives having been adopted in this field. From a legal point of view, the two directives concerning the award of public works and supplies contracts [2] are likewise of great significance, even if on a practical level their effects still appear hypothetical. The signing of the European Convention on Patents and of the Convention on the Community Patent are also worthy of mention. Successful too, on the whole, were the Community efforts towards harmonization of national laws on companies and stock-exchange dealings. A number of important directives have been adopted and others are in the pipeline. The department set up by the Commission to promote cooperation between enterprises in different Member States has also proved its worth. [3] But many of the proposals put forward by the Commission have not yet been adopted by the Council, one striking example being the proposal for a regulation on the statute for European companies. [4]

The efforts aimed at implementing the Commission's initial views concerning an overall industrial policy are continuing in many fields. For example, industrial policy considerations are playing a part in the Community's energy, economic and regional-aid policies. But the circumstances of the last few years have to some extent diverted attention from the general programmes of the Commission. It may have been noted that European industry was proving to be largely capable of waging its own battle against American and Japanese competition. Other, more urgent, problems have arisen: they stem from the energy crisis and the associated world economic recession.

The persistence and the structural nature of the crisis have compelled the Commission to devote its efforts in recent years to consolidating and reinforcing the unification of the internal market and to facilitating the adaptation of the various industrial sectors to the changed conditions of international competition.

---

[1] OJ C 177, 31.12.1973.
[2] Council Directive 71/304/EEC of 26 July 1971 (OJ L 185, 16.8.1971, p. 1) and Council Directive 77/62/EEC of 21 December 1976 (OJ L 13, 15.1.1977, p. 1).
[3] *Twelfth General Report*, point 123.
[4] Supplement 4/75 — Bull. EC.

¶ 2. *The iron and steel industry*

3. The need for adaptation of Community policy has become more apparent in the iron and steel industry than in any other sector. The strict regulation of this sector under the ECSC Treaty was justified by the fundamental importance attached to it in the rebuilding of Europe after the war. The Treaty rules were formulated at a time when the general belief prevailed that in the long term there would be a shortage of steel.

Consequently, the first objective was to ensure that the producers did not take advantage of the situation at the expense of the consumers. In the early 1960s, however, it was already apparent that the market situation had changed. Supply began to exceed demand and international competition was increasing. The last few years have been marked by serious economic problems for this sector, which has a strong tendency—likewise of structural origin—towards surplus production.

The institutions experienced difficulty in adapting the considerable means of intervention provided for in the ECSC Treaty to situations for which they had never been designed. Nevertheless, the problems that arose in this respect were dealt with in a generally satisfactory manner.

In the early years the problems related chiefly to the Treaty rules concerning the publication of prices, the supply of certain raw materials and the regulation of competition.

With regard to this last area, there was a trend towards increasing acceptance of mergers. It became clear that the competition situation in the iron and steel sector called for distribution of production among a relatively small number of undertakings none of which alone, however, would be able to exercise a dominant influence on the market.

The economic crisis of the last few years has necessitated direct and far-reaching intervention in the sector. Since 1 January 1977, the crisis has led to the adoption of a number of measures relating to the preservation of the unity and openness of the market, the stabilization and modernization of production capacities, the improvement of the market situation and the occupational rehabilitation and retraining of the workforce. Especially noteworthy were the measures relating to market improvement. To a certain extent the market situation was improved by voluntary cooperation between undertakings, but it was also necessary to introduce price regulation in several sectors and to institute a measure of protection against imports. The Court of Justice acknowledged the legality of a general decision by the Commission fixing minimum prices for concrete-reinforcing bars. The Court emphasized that this decision was essential for keeping the iron and steel industry and the user industries competitive and also that it was justified on grounds of European solidarity for certain undertakings to be called upon to bear heavier burdens than others. [5]

The latest developments in the steel industry have shown, however, that the crisis has deepened in spite of the measures taken up to now. The demand for steel has continued to fall and in October 1980 the Commission had to admit that the Community was confronted with a period of manifest crisis. The Commission therefore deemed it necess-

[5] Joined Cases 154, 205, 206, 226 to 228, 263, 264/78, *SpA Ferriera Valsabbia and Others* v *Commission* [1980] ECR 907.

ary to establish a system of mandatory and detailed production quotas in accordance with Article 58 in order to restore orderly market conditions. [6]

¶ 3. *Other specific sectors*

4. The Commission has various means at its disposal for promoting structural changes in the industries affected by the crisis and for stimulating the development of advanced-technology industries. Substantial aid for occupational rehabilitation and vocational training can be granted by the European Social Fund, while considerable investment aid can be provided by the European Investment Bank for the purpose of carrying out structural changes and making new investments. As will be further explained in the next section, the Community also has at its disposal a range of means for the promotion of technological development through aid to research. In addition, the Community can influence the market situation through a number of measures in the field of commercial policy, while the Commission has wide powers to act on the aid systems of Member States.

Textiles and shipbuilding are examples of crisis-affected sectors in which efforts are being made to resolve the problems at Community level.

The 'Multifibre Arrangement' (Council Decision of 21 March 1974) concluded by the Community with a number of Third World countries was an important measure as far as the textile industry is concerned. [7] This arrangement served as a framework for the conclusion of bilateral agreements with several low-wage countries for the purpose of regulating imports of textile goods into the Community. These agreements will enable the Community industry to adapt to the new conditions of competition and to intensify its efforts to bring about structural changes.

The international crisis has also had a serious effect on the shipbuilding industry. The Council has adopted a resolution concerning the improvement of this sector [8] whereby all interested parties, both public and private, are urged to carry out internal adjustments designed to ensure the continued existence of a healthy and competitive industry and at the same time to safeguard the maritime interests of the Community. The Council directive on aid to shipbuilding [9] is an important measure intended to provide a Community framework for Member States' aid to shipyards. The Commission thereby hopes to restrict direct aid to a reasonable level and to ensure that it results in a restructuring of this sector.

Data processing is an example of an advanced-technology sector with large research and investment requirements. As early as 1974 the Council adopted a resolution on the pursuit of a Community policy in this sector with the aim of making the European data-processing industry viable and competitive. [10] A multiannual programme adopted by the Council in 1979 provided for a number of general activities (standardization, public contracts, etc.), as well as for specific activities intended to promote the design and

[6] Decision 80/2794/ECSC of 30 October 1980 (OJ L 291, 31.10.1980, p. 1).
[7] OJ L 118, 30.4.1974, p. 1, renewed several times.
[8] OJ C 229, 27.9.1978, p. 1.
[9] Council Directive 78/338/EEC of 4 April 1978 (OJ L 98, 11.4.1978).
[10] Council Resolution of 15 July 1974 (OJ C 86, 20.7.1974, p. 1).

execution of projects in the field of data processing. At the same time, the Council adopted a regulation on Community support for these activities whereby criteria were laid down for the selection of projects to be subsidized. [11]

The Euratom Treaty conferred on the Community institutions extensive powers in the fields of market organization and structural policy, in order to create the conditions necessary for a powerful nuclear industry. It is well known that the hopes that had been cherished as regards the effects of the Treaty have not been realized. The reasons for this are the continued importance of other energy sources after the Treaty entered into force and the difficulties of an essentially political nature that hindered the utilization of the instruments provided by the Treaty.

However, there are now clear signs that the Community is being called upon to play a more important role in this field, particularly as regards the promotion of research, which will be discussed in the next section.

The Court of Justice has rarely had occasion to concern itself with the Euratom Treaty, but when it has had to do so it has stressed the decisive role that the Treaty has assigned to the Community. It did so for the first time in its judgment of 14 December 1971 in Case 7/71 (*Commission of the European Communities* v *French Republic*), [12] when it confirmed that Chapter VI of the Treaty concerning the common supply policy for ores, source materials and special fissile materials had not lapsed, even though the Council had not been able, as laid down in Article 76, to confirm the existing provisions or, acting unanimously, to adopt new provisions. The Court held that Member States had agreed to establish a Community of unlimited duration, having permanent institutions invested with real powers stemming from the transfer of powers from the Member States to that Community. Powers thus conferred could not, therefore, be withdrawn from the Community or restored to Member States except by virtue of an express provision of the Treaty. Court Ruling 1/78 of 14 November 1978 [13] sets out, in the light of a detailed analysis of the tasks which the Treaty confers on the institutions, the considerable powers that the Community possesses as regards the conclusion of agreements with non-member countries and international organizations.

Section II — Research policy

5. The importance of research to European integration has become more and more apparent in the past 30 years. In the field of nuclear energy, the importance of research was already recognized when the Euratom Treaty was being drawn up. It can even be said that research is a cornerstone of that Treaty. The first of the tasks assigned to the Community under Article 2 is to promote research and ensure the dissemination of technical information. The ECSC Treaty, too, conferred powers on the Community in matters of research. Article 55 states that the High Authority shall promote technical and economic research relating to the production and increased use of coal and steel and to occupational safety in the coal and steel industries. The EEC Treaty, on the other hand, contains no provisions expressly relating to research except where agriculture is concerned. This

[11] Council Regulation (EEC) No 1996/79 of 11 September 1979 (OJ L 231, 13.9.1979, p. 1).
[12] [1971] ECR 1003.
[13] [1978] ECR 2151.

lacuna, however, has not prevented the taking of joint action on research on the basis of the Treaty. Such action was taken through provisions adopted pursuant to Article 235. In later years, moreover, efforts were made to integrate the research projects being carried out by the Community in the fields covered by the three Treaties, into an overall Community research policy. A sign of this integration is that the Joint Research Centre, which originally worked only on nuclear research, was subsequently assigned projects in other fields.

About the middle of the 1960s, the Community began to consider the possibility of Community research action outside the areas of the Euratom and ECSC Treaties. But it was only through the Council Resolution of 14 January 1974 on the coordination of national policies and the definition of projects of interest to the Community in the field of science and technology that a more formal basis was created for a general policy on research at Community level. [14]

In the Community context, notably in the Scientific and Technical Research Committee (CREST), discussion takes place on a regular basis concerning the research tasks best suited to Community action.

A number of mechanisms are available for promoting activities on which agreement is reached, namely:

(i) *direct-action projects,* carried out by the Community through its Joint Research Centre;
(ii) *indirect-action projects,* wholly or partly managed, coordinated and financed by the Commission;
(iii) *coordinated joint projects,* carried out at national level without financial support from the Community, but planned and coordinated at Community level, the resulting information being disseminated through the Commission;
(iv) *COST projects,* carried out jointly with 10 other European countries within the framework of 'European cooperation in the field of scientific and technical research' (COST) and with the participation of both the Community and the Member States.

As stated above, recent years have seen healthy development in the field of nuclear energy, particularly when allowance is made for the fact that the Joint Research Centre had previously passed through a prolonged crisis. In 1977 agreement was reached on setting up the JET Joint Undertaking, the first real 'joint undertaking' within the meaning of the Euratom Treaty, [15] and in March 1980 the Council adopted a multiannual programme for the Joint Research Centre covering the period 1980-83. [16]

It would be impossible to enumerate here the many projects being carried out at Community level. It must, however, be pointed out that some of the most important projects are centred on the energy and environment fields.

The Community has also taken steps to improve the means for the dissemination of information. In 1975 and 1978 the Council adopted action programmes in the field of scientific and technical information. [17] An important practical measure in this field is the

[14] Council Resolution of 14 January 1974 (OJ C 7, 29.1.1974, p. 1).
[15] Council Decision 78/471/Euratom of 30 May 1978 (OJ L 151, 7.6.1978, p. 10).
[16] Council Decision 80/317/EEC, Euratom of 18 March 1980 (OJ L 72, 26.3.1980, p. 17).
[17] OJ L 100, 21.4.1975, p. 18; OJ L 311, 4.11.1978, p. 1.

setting-up of Euronet to provide areas throughout Europe with direct access to scientific and technical research data banks. Another important project is the computerization of legal documentation concerning Community law (Celex).

Section III — Training policy

6. The Treaties contain few provisions concerning training. Nevertheless, great importance attaches to Article 57 of the EEC Treaty, which relates to the mutual recognition of diplomas and provides for some degree of harmonization of national requirements regarding training. The Treaty provisions on social policy likewise provide for certain powers with a view to the definition of general principles for the implementation of a common policy on vocational training. The Community has succeeded in its efforts to adopt directives on the mutual recognition of examinations and on the approximation of training courses for the medical and various other professions. These efforts were supported by a Court judgment of 28 April 1977 (*Thieffry* v *Conseil de l'ordre des avocats à la Cour de Paris*) [18] in which it was held that the competent authorities of Member States are obliged up to a certain point to recognize foreign examinations even if no Community directives have been issued in the field in question.

The limited extent of the powers expressly provided has not prevented Community initiatives from being taken as regards training. The Ministers for Education meeting within the Council in June 1974 confirmed the need to institute European cooperation in the field of education. [19] A number of priority sectors for action were designated: provision of better cultural and vocational training facilities for Member State nationals and nationals of non-member countries, encouragement of freedom of movement for teachers, students and researchers between Member States, and establishment of equal opportunity of access to all forms of education. On 9 February 1976 the Council adopted a new programme of action. [20] Although there have been some positive results, such as the Council directive on the education of the children of migrant workers, [21] cooperation in this area is still far from attaining the desired objectives. A number of important proposals are being considered by the Ministers for Education, notably resolutions concerning the improvement of language teaching and the encouragement of educational activities with a European and Community content. However, the adoption of these resolutions is being delayed because of the doubts that exist regarding the Community's competence in the field of education.

An important event for European integration took place in 1972, when the Member States signed the agreement concerning the establishment of the European University Institute in Florence. The Institute, which has been functioning since October 1975, offers students an opportunity to concentrate on studies of Community interest, particularly in the field of law.

---

[18] [1977] ECR 765.
[19] OJ C 98, 20.8.1974, p. 1.
[20] OJ C 38, 19.2.1976, p. 1.
[21] Council Directive 77/486/EEC of 25 July 1977 (OJ L 199, 6.8.1977, p. 32).

Section IV — Investment policy

7. The three Treaties make provision for investment aid as an important instrument in the management of the Community.

The role played by the Community in this field has therefore been a considerable one. This applies first and foremost to the activity of the European Investment Bank, which in 1979 granted loans amounting to more than 3 000 million units of account. Thanks to the funds placed at its disposal by the Member States and to its own borrowings, this body can grant loans for investments of Community interest, principally in the context of regional policy. The Bank's sphere of activity has been enlarged on several occasions. Under the Lomé Convention it was empowered to promote the execution of projects in the developing countries covered by the Convention. Another instance is the task assigned to it as regards the management of the new borrowing facilities introduced by the Council Decision of 16 October 1978. [22] Pursuant to this decision, it is the Community (represented by the Commission) which, as such, contracts the loans and, for this purpose, benefits from the credit standing it enjoys. The proceeds of these loans are used to finance investment projects which contribute to the convergence and further integration of the economic policies of the Member States.

Similar rules were introduced by the Council Decision of 29 March 1977 concerning Euratom. [23] The proceeds of loans contracted by the Commission in the name of the Community are to be used to finance investment projects relating to nuclear electricity generation and fuel-cycle installation.

Article 54 of the ECSC Treaty likewise assigns to the Commission important tasks as regards the granting of loans to undertakings in the coal and iron and steel sectors. The Community participates in the financing of projects which help to increase production, reduce production costs or facilitate sales of the products concerned.

[22] Council Decision 78/870/EEC of 16 October 1978 (OJ L 298, 25.10.1978, p. 9).
[23] Council Decision 77/271/Euratom of 29 March 1977 (OJ L 88, 16.4.1977, p. 11).

Chapter XI — Towards a more fairly balanced and better quality of life

by Finbarr Murphy

Introduction

1. The policies reviewed in this chapter are to a great extent complementary. They are designed to contribute to harmonious development of the common market by reducing structural and regional imbalances and by improving the living standards and working conditions of the citizens of the Member States. With the exception of social policy, these are new policies in that they were not expressly included in the activities assigned to the institutions by the Treaties. They have been developed by the Commission largely in response to the declaration of the Heads of State or Government at the Paris Summit meeting of 1972. Up to the end of 1980 there had been little jurisprudence of the Court of Justice concerning these policies. This review will therefore concentrate on Community policy-making and its legislative implementation.

Section I — Social policy

2. The social policy of the Community is provided for in Part Three, Title III of the EEC Treaty. Title III has two parts: Chapter 1 (Articles 117 to 122) entitled Social Provisions; and Chapter 2 (Articles 123 to 128) on the European Social Fund. There are cognate provisions elsewhere in the Treaty, e.g. Articles 48 to 51 concerning the freedom of movement of workers and social security for migrant workers.

¶ 1. *The social provisions of the EEC Treaty*

3. Article 117 of the Treaty notes the agreement of the Member States on the need to improve the working conditions and living standards of workers, and the conviction that this will result from the functioning of the common market and the approximation of administrative and legislative measures. Article 118 lists the areas in which the Commission is to promote cooperation between the Member States by delivering opinions and by carrying out studies. These are: employment; labour law and working conditions; vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association and collective bargaining between employers and workers. Article 121 empowers the Council to assign further tasks to the Commission

particularly concerning social security for migrant workers. Article 122 obliges the Commission to prepare a separate chapter on social developments in the annual report to Parliament; this now appears as an addendum to the annual *General Report* of the Communities. Of the social provisions only Article 119, on the principle that men and women should receive equal pay for equal work, and Article 120 on the maintenance of existing equivalence between paid holiday schemes, deal with specific social concerns and only Article 119 imposes a definite obligation on Member States. In the second *Defrenne* case [1] the Court of Justice held that Article 119 created direct effects (but only prospectively) and in the *Macarthys* case [2] the Court held that the equal pay principle is not confined to situations in which men and women are contemporaneously doing equal work for the same employer. Article 119 defines 'pay' as the ordinary basic wage or salary and other considerations in cash or kind, received directly or indirectly by the worker in respect of his employment from his employer. In the other *Defrenne* cases the Court gave a narrow interpretation to the meaning of 'pay': it does not include mandatory pension retirement schemes [3] or other working conditions applicable to men and women. [4]

¶ 2. *Community action in the field of social policy*

4. During the 1960s the Commission carried out studies and issued recommendations on topics covered by Article 118. However, it was the declaration of the summit meeting of October 1972 that provided the major incentive for Community social policy development. The final communiqué called for the preparation, before the end of 1973, of a social action programme, to be implemented within the framework of the reformed Social Fund. [5] This was drafted by the Commission in 1973 and approved by the Council in January 1974. [6] The Commission's draft outlined measures—accorded varying degrees of urgency—which were needed to achieve three objectives: full and better employment in the Community; improved living and working conditions; increased participation of both sides of industry in the economic and social decisions of the Community and of workers in the conduct of firms. In its resolution the Council undertook to act on a series of priority measures submitted by the Commission and noted that the Commission would be submitting further proposals for rapid implementation.

5. Progress in achieving these objectives may be summarized as follows:

(1) Full and better employment:

(a) In 1975, in the recession that followed the oil crisis, the Commission reconvened the Standing Committee on Employment, which had been set up in 1970 [7] with a consultative brief. Similarly, regular meetings of the Tripartite Conference have been held; [8] this conference, attended by representatives of the Community and

---

[1] Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.
[2] Case 129/79 *Macarthys* v *Smith* [1980] ECR 1275.
[3] Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445.
[4] Case 159/77 *Defrenne* v *Sabena* [1978] ECR 1365.
[5] *Sixth General Report*, point 11.
[6] For the Council Resolution see OJ C 13, 12.2.1974.
[7] Council Decision 70/532/EEC (OJ L 253, 17.12.1970, p. 25).
[8] *Ninth General Report*, point 199.

the Member States and by labour and employer representatives, discusses the social and economic problems facing the Community.

(b) The task of creating new jobs and alleviating youth unemployment has also been tackled in consultation with the Advisory Committee for Vocational Training, which was set up by the Council in 1963 under the terms of Article 128. In 1975 the Commission established the European Centre for the Development of Vocational Training, located in Berlin.[9] In 1977 the Commission addressed a recommendation to the Member States on vocational preparation for persons under 25 who were unemployed or faced with unemployment.[10] In 1978 the Council, taking account of a Commission memorandum on youth unemployment, adopted a regulation extending aid from the Social Fund to persons under 25.[11]

(2) Improved living and working conditions:

(a) The implementation of the equal pay principle has given rise to three Council directives on equal pay;[12] on equal access to employment, vocational training, promotion and other conditions of employment;[13] and on equal treatment in matters of social security.[14]

(b) In the fight against poverty the Council authorized a programme of pilot schemes and studies[15] and adopted a decision on action by the Social Fund for persons affected by unemployment difficulties.[16]

(c) In 1976 the Council approved an action programme in favour of migrant workers and their families.[17] Since then the Council has adopted a regulation on trade union rights for migrant workers,[18] and a directive on the education of the children of migrant workers.[19]

(d) In 1974 the Council established an Advisory Committee on Safety, Hygiene and Health Protection at Work,[20] and adopted an action programme on the same topic in 1978.[21] Other Council measures have included a directive on safety information at places of work,[22] a framework directive on exposure to chemical, physical, and biological agents at work,[23] a directive on exposure to vinyl-chloride monomer,[24] and a directive on electrical equipment for use in explosive atmospheres.[25]

(e) In 1975 the Council addressed a recommendation to the Member States on the

---

[9] Council Regulation (EEC) No 337/75 (OJ L 39, 13.2.1975).
[10] OJ L 180, 20.7.1977.
[11] OJ L 361, 23.12.1978.
[12] Council Directive 75/117/EEC (OJ L 45, 19.2.1975).
[13] Council Directive 76/207/EEC (OJ L 39, 14.2.1976).
[14] Council Directive 79/7/EEC (OJ L 6, 10.1.1976).
[15] Council Decision 75/458/EEC (OJ L 199, 30.7.1975); most recently, Decision 80/1270/EEC (OJ L 375, 31.12.1980).
[16] Council Decision 75/459/EEC (OJ L 199, 30.7.1975), amended by Decision 80/1117/EEC (OJ L 382, 10.12.1980).
[17] OJ C 34, 14.2.1976.
[18] Council Regulation (EEC) No 312/76 (OJ L 39, 14.4.1976).
[19] Directive 77/486/EEC (OJ L 199, 6.8.1977).
[20] Council Decision 74/325/EEC (OJ L 185, 9.7.1975).
[21] OJ C 165, 11.7.1978.
[22] Council Directive 77/576/EEC (OJ L 229, 7.9.1977).
[23] Council Directive 80/1107/EEC (OJ L 327, 3.12.1980).
[24] Council Directive 78/610/EEC (OJ L 197, 22.7.1978).
[25] Council Directive 79/196/EEC (OJ L 53, 20.2.1979).

application of the principle of the 40-hour week and four weeks' annual paid holiday, [26] and set up the European Foundation for Living and Working Conditions in Dublin. [27]

(3) Participation of both sides of industry in economic and social decisions and of workers in the conduct of firms. The establishment of the Standing Committee on Employment and the Tripartite Conference has been referred to above. Employee participation in the decision-making structure of companies was proposed by the Commission in the draft directive on the structure of limited liability companies. [28] This concept of industrial democracy was further elaborated in what has become known as the 'Green Paper' published by the Commission in 1975. [29] Measures designed to safeguard workers' interest have included Council directives on mass redundancies, [30] on the retention of rights in the event of a merger or takeover, [31] and the protection of employees in the event of the insolvency of their employer. [32]

¶ 3. *The European Social Fund*

6. The Social Provisions of the Treaty aim at improving living and working standards in the Community. The European Social Fund, established by Article 123 with the object of improving employment opportunities and increasing the geographical and occupational mobility of workers, is a more dynamic instrument of employment policy and complements other Community funds, such as the European Agricultural Guidance and Guarantee Fund and the European Regional Development Fund, whose objects include the reduction of regional disparities. The purposes for which the Fund could be used, as originally set out in Article 125, were quite restrictive; on application by a Member State the Fund could meet 50% of the expenditure incurred by public authorities (a) on projects aimed at ensuring the productive re-employment of workers by means of vocational retraining or resettlement allowances, or (b) on tideover allowances for workers in the event of the conversion of an undertaking to other productive purposes. Payments for vocational retraining and resettlement could only be made if the workers had been in productive employment in their new occupation or place of residence for at least six months, and assistance for workers in the event of the conversion of an undertaking could only be granted, if the workers had been employed in that undertaking for at least six months.

7. These limitations were largely eliminated by the reform of the Fund, envisaged in Article 126, which enabled the Council, after the expiry of the transitional period, to rule that the forms of assistance referred to in Article 125 should no longer be granted. In February 1971 the Council adopted Decision 71/66/EEC [33] in which new tasks for the Fund were outlined. Implementing regulations were adopted in November 1971. [34] The revised categories of intervention were defined in Articles 4 and 5 of the decision.

---

[26] Council Recommendation 75/457/EEC (OJ L 199, 30.7.1975).
[27] Council Regulation (EEC) No 1365/75 (OJ L 139, 30.5.1975).
[28] Supplement 10/72 — Bull. EC.
[29] Supplement 8/75 — Bull. EC.
[30] OJ L 48, 22.2.1975.
[31] OJ L 61, 5.3.1977.
[32] OJ L 246, 17.9.1980.
[33] OJ L 28, 4.2.1971.
[34] Council Regulations (EEC) Nos 2396, 2397 and 2398/71 (OJ L 249, 10.11.1971).

Assistance from the Fund under Article 4 may be provided when the operation of Community policies, such as the common agricultural policy, affects or threatens to affect the labour market, or when common action appears to be necessary to ensure a balance between manpower supply and demand, e.g. where large numbers of workers are obliged to change jobs or acquire new skills. Action under Article 4 can only be taken on the basis of special Council decisions which are usually of limited duration and must be renewed from time to time. In this context aid from the Fund has been provided for: the retraining of workers leaving agriculture to take up employment in other sectors; [35] the retraining of workers leaving the textile and clothing industries; [36] the retraining and integration of migrant workers, [37] the retraining of handicapped persons; [38] the employment of young persons who are unemployed or are seeking employment; [39] the vocational training and retraining of women. [40]

Article 5, in its original form, made provision for aid to combat unemployment or underemployment resulting indirectly from the operation of the common market. Expenditure under Article 5 is concentrated on backward areas or areas in decline as identified in the regional policy of the Community and, according to Article 9, not less than 50% of the total resources of the Fund in any year must be reserved for projects under Article 5. Article 3 of Decision 71/66/EEC introduced a further innovation in that self-employed persons may now receive aid from the Fund.

8. The Fund is administered by the Commission, assisted by a Fund Committee which must be consulted before a decision is made on any request for aid. Applications must be submitted by Member States, although a project may be sponsored by public authorities or by private institutions. As a general rule a project must be supported by public funds in the relevant Member State; the Fund pays 50% of the eligible expenditure. In 1977, in a review of the operation of the new system, required under Article 11 of Decision 71/66/EEC, the rate of intervention from the Fund for assistance under Article 5 was raised by 10% [41] and the areas of intervention were redefined in view of trends on the labour market. [42] At the same time the Council approved Commission proposals to streamline administrative procedures. [43] The Fund is endowed from the general budget of the Communities. Expenditure is 'non-obligatory': consequently the European Parliament has a significant role in determining annual Social Fund appropriations. Resources allocated to the Fund have increased greatly from nearly 223 million u.a. in 1973 to 909.5 million EUA in 1980, when demands for assistance exceeded available resources by 85%.

---

[35] Council Decision 72/428/EEC (OJ L 291, 28.12.1972), amended by Decision 77/802/EEC (OJ L 337, 27.12.1977).

[36] Council Decision 76/206/EEC (OJ L 39, 14.2.1976), amended by Decision 80/1117/EEC, (OJ L 332, 10.12.1980).

[37] Council Decision 74/327/EEC (OJ L 185, 9.7.1974), last amended by Decision 80/1117/EEC, see footnote 36 above.

[38] Council Decision 74/328/EEC (OJ L 185, 9.7.1974), since lapsed.

[39] Council Decision 75/459/EEC (OJ L 199, 30.7.1975), amended by Decision 80/1117/EEC.

[40] Council Decision 77/804/EEC (OJ L 337, 27.12.1977), amended by Decision 80/1117/EEC.

[41] Council Regulation (EEC) 2895/77 (OJ L 337, 27.12.1977).

[42] Council Decision 77/801/EEC (OJ L 337, 27.12.1977).

[43] Council Regulation (EEC) No 2894/77 (OJ L 337, 27.12.1977).

¶ 4. *The ECSC social provisions*

9. Under Article 46 of the ECSC Treaty the High Authority (now the Commission) was empowered to '... take part in studying the possibilities for re-employing, in existing industries or through the creation of new activities, workers made redundant by market developments or technical changes ...' and to enquire into '... the possibilities for improving working conditions and living standards for workers in the industries within its province, and the threats to those standards'. Article 55 provided, *inter alia,* that the High Authority was to promote occupational safety in the coal and steel industries. The Mines Safety and Health Commission, established in 1957, [44] and the Steel Industry Safety and Health Commission, established in 1964, [45] have been active in promoting research into health and safety problems, particularly respiratory diseases connected with the coal and steel industries. Under Article 56 of the Treaty the High Authority was empowered to extend aid for tideover allowances, resettlement allowances, and vocational retraining if new technology caused large-scale redundancies. A second paragraph was added to Article 56 under the *petite révision* procedure in Article 95 of the Treaty. This provided for the payment of allowances to workers made redundant as a result of fundamental changes not connected with the operation of the common market, e.g. the development of alternative and cheaper sources of energy. Much use has been made of these provisions in an attempt to remedy the consequences of the coal slump of the 1950s and the more recent crisis in the steel industry. By the end of 1980 expenditure on readaptation exceeded 500 million EUA which was used to assist over 700 000 workers. [46]

Another area of ECSC concern has been the financing of low-cost housing for workers. Under powers contained in Article 54 of the Treaty, the Commission has advanced nearly 250 million EUA at low rates of interest for the construction or conversion of housing for coal and steel workers. A total of 30 million EUA was allocated for the first instalment of the ninth scheme (1979-81). [47]

Section II — Regional policy

10. The need to eliminate regional disparities is implicit in Article 2 of the EEC Treaty which speaks of '... a harmonious development of economic activities' and '... a continuous and balanced expansion'. Other provisions of the Treaty also touch upon regional problems of an economic nature. [48] The development of regional infrastructures and the elimination of disparities were initially financed by various Community Funds, including the European Agricultural Guidance and Guarantee Fund, the European Social Fund and the European Investment Bank, but the creation of a coordinated regional policy was not seriously considered until the summit meeting held in Paris in October 1972 where it was noted that '... priority should be given to the aim of correcting, in the Community, the structural and regional imbalances which might affect the realization of economic and

[44] OJ 487, 31.8.1957; OJ (Special Edition), 1952-58, p. 50.
[45] *Fourteenth General Report ECSC*, point 426.
[46] General Reports *passim.*
[47] *Thirteenth General Report*, point 232.
[48] Article 39(2)(a); Article 80(2).

monetary union'.[49] The institutions were invited to establish a Regional Development Fund before 31 December 1973, but it was not until 1975 that the Council, acting under Article 235 of the Treaty, adopted a regulation establishing a Regional Development Fund[50] and a decision setting up a Regional Policy Committee.[51] The Fund had a three-year endowment of 1 300 million u.a., out of which each Member State was assigned a quota, taking into account the relative gravity of each Member State's regional problems. The regulation provided for a review of the operation of the system before 1 January 1978, and on the basis of a Commission communication concerning guidelines for regional policy, incorporating draft changes in the regulation,[52] the Council adopted an amending regulation in February 1979.[53]

The Fund[54] now consists of two sections: a 'quota' section under which aid is allocated as follows—Belgium 1.11%, Denmark 1.06%, Germany 4.65%, Greece 13.00%, France 13.64%, Ireland 5.94%, Italy 35.49%, Luxembourg 0.07%, the Netherlands 1.24%, the United Kingdom 23.80%; a new 'non-quota' section, comprising 5% of the total Fund, which is being used to finance specific Community regional development measures.[55] The Fund is now endowed annually by the budget of the Communities, infrastructural investment projects are defined more flexibly, and decision-making procedures for projects costing less than 10 million EUA have been simplified.

11. In order to benefit from partial financing from the Fund a project must be submitted by a Member State and must relate to industrial, handicraft, or service activities or infrastructure development. Such schemes must fit within a regional development programme which Member States have to submit to the Commission and bring up to date annually. Priority in the distribution of the Fund is determined in the light of the schema laid down in the Commission's 'Guidelines on regional policy',[56] with the peripheral regions of the Mezzogiorno, Ireland, Northern Ireland, Greenland, and the French overseas departments as principal recipients. The Fund is administered by the Commission, assisted by a Fund Committee which operates in much the same manner as a management committee. The Regional Policy Committee, set up in 1975, is a consultative body made up of senior civil servants and Commission officials; its principal function is to examine the regional development programmes submitted annually by the Member States, but it may also study other regional policy problems either on its own initiative or at the request of the Council or the Commission. One of the primary features of the Fund is that national aids should complement aid from the Fund. Article 4 of the regulation, as amended, lays down the percentage contributions from the Fund.

A further important feature of regional policy is its connection with the rules of competition laid down in the Treaty. In 1978 the Commission issued a communication informing the Member States of the principles it intended to apply under Articles 92 to 94 of the Treaty to national and regional aid systems already in force or to be established.[57]

---

[49] *Sixth General Report*, point 11.
[50] Council Regulation (EEC) No 724/75 (OJ L 73, 21.3.1975).
[51] Council Decision 75/185/EEC (OJ L 73, 21.3.1975).
[52] OJ C 161, 9.7.1977.
[53] Council Regulation (EEC) No 214/79 (OJ L 35, 9.2.1974).
[54] Council Regulation (EEC) No 3325/80 (OJ L 349, 23.12.1980), in anticipation of Greek accession.
[55] For the first such measures, see OJ L 271, 15.10.1980.
[56] Supplement 2/77 — Bull. EC.
[57] OJ C 31, 3.2.1979.

12. Although the adoption of an environmental policy is not expressly included in the activities of the Community listed in Article 3 of the Treaty, at the Paris Summit meeting in October 1972 the Heads of State or Government noted that 'economic expansion is not an end in itself ... It should result in the improvement of the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind'. The declaration invited the institutions to establish a programme of action on the environment accompanied by a precise timetable. [58] The Commission, which had already submitted a communication on the environment to the Council on 24 March 1972, [59] prepared and submitted to the Council on 17 April 1973 a programme of environmental action of the European Communities. [60] This was adopted on 22 November 1973 in the form of a Declaration of the Representatives of the Governments of the Member States meeting in the Council, [61] and envisaged the completion of specified projects within a period of two years. The objectives of the programme involved three broad categories of action:

(i) action to reduce and prevent pollution and nuisances;
(ii) action to improve the environment and the quality of life;
(iii) Community action or, where applicable, common action by the Member States in international organizations dealing with the environment.

The programme also listed general principles of Community environment policy (including the principle that the cost of preventing and eliminating pollution must be borne by the polluter) and described in detail action to be taken over the next two years. Earlier in 1973 the Representatives of the Governments of the Member States meeting in the Council had agreed that the Member States should inform the Commission immediately of any draft legislative or administrative measures which were likely to affect the functioning of the common market or were relevant to the Community programme. Such measures could only be adopted if within two months the Commission did not notify the governments of its intention to submit to the Council proposals for Community measures on the same topic. [62]

13. In May 1977 the Representatives of the Governments of the Member States meeting in the Council, acting on a Commission proposal, [63] prolonged the Community environment programme and reaffirmed its principles. [64]

Earlier in 1977, in its 'First Report on the State of the Environment', the Commission reviewed the state of progress in the environment programme as of 15 September 1976. Numerous proposals had been forwarded to the Council and many had been given legislative form—based either on Article 100 or Article 235 of the Treaty or both.

---

[58] *Sixth General Report*, points 8 and 12.
[59] Supplement 5/72 — Bull. EC.
[60] Supplement 3/73 — Bull. EC.
[61] OJ C 112, 20.12.1973.
[62] OJ C 9, 15.3.1973, supplemented by the Agreement of 15 July 1974 (OJ C 86, 20.7.1974).
[63] *Environment programme 1977-81*, Supplement 6/76 — Bull. EC.
[64] OJ C 139, 13.6.1977.

14. The measures which had been adopted at that date principally related to pollution control. The Council adopted three directives on the prevention and reduction of water pollution: on the quality required of surface waters intended for the abstraction of drinking water; [65] on the pollution of fresh and sea bathing water; [66] on dangerous substances discharged into the aquatic environment. [67]

As regards atmospheric pollution the Council adopted directives on: exhaust gases from motor engines; [68] the approximation of laws relating to the sulphur content of certain liquid fuels. [69] A Council decision established a common procedure for the exchange of information on the monitoring of pollution caused by sulphur compounds. [70]

The Council adopted three directives on waste: on the disposal of waste oils; [71] a framework directive on wastes; [72] on the disposal of polychlorinated biphenyls and polychlorinated terphenyls. [73]

The Council adopted three directives on chemicals in the environment: on detergents; [74] on methods of testing the biodegradability of anionic surfactants; [75] and on the marketing and use of certain dangerous substances and preparations. [76]

During the period under review the Council also adopted a decision establishing a common procedure for the establishment of an inventory of sources of information on the environment [77] and adopted a recommendation regarding cost allocation and action by public authorities on environmental matters (the 'polluter pays' principle). [78]

15. As regards the improvement of the environment, the principal development was the creation of the European Foundation for the Improvement of Living and Working Conditions [79] located at Dublin. The Foundation's work will concentrate on three topics:

(i) the organization of work, particularly measures designed to humanize working conditions;
(ii) problems peculiar to certain categories of workers, particularly school-leavers;
(iii) the relationship between work and leisure time.

In 1979 the Commission published its 'Second Report on the State of the Environment'. It noted a change in the direction of environmental policy with 'a second generation of longer-term policies, aimed at promoting a qualitatively superior form of economic growth as a foundation for the future ... taking over from the first generation of, often, *ad hoc* legislation.' [80]

---

[65] Council Directive 75/440/EEC (OJ L 194, 25.7.1975).
[66] Council Directive 76/160/EEC (OJ L 31, 5.2.1976).
[67] Council Directive 76/464/EEC (OJ L 129, 18.5.1976).
[68] Council Directive 74/290/EEC (OJ L 159, 15.6.1974).
[69] Council Directive 75/716/EEC (OJ L 307, 27.11.1975).
[70] Council Decision 75/441/EEC (OJ L 194, 25.7.1975).
[71] Council Directive 75/439/EEC (OJ L 194, 25.7.1975).
[72] Council Directive 75/442/EEC (OJ L 194, 25.7.1975).
[73] Council Directive 76/403/EEC (OJ L 108, 26.4.1976).
[74] Council Directive 73/404/EEC (OJ L 347, 17.12.1973).
[75] Council Directive 73/405/EEC (OJ L 347, 17.12.1973).
[76] Council Directive 75/769/EEC (OJ L 262, 27.9.1976).
[77] Council Decision 76/161/EEC (OJ L 31, 5.2.1976).
[78] Council Recommendation 75/436/EEC, Euratom, ECSC (OJ L 194, 25.7.1975).
[79] Council Regulation (EEC) No 1365/75 (OJ L 139, 30.5.1975).
[80] Council Directive 79/409/EEC (OJ L 103, 25.4.1979).

This change in orientation includes work on the rational management of natural resources. In this context the Council adopted a directive on the conservation of wild birds [81] and approved a proposal for a regulation prohibiting the import of certain whale products. [82] A second branch of the reoriented policy covers measures designed to back up and reinforce an active environmental policy, including environmental education and research. In March 1976 the Council approved a new multiannual research and development programme in the environment field (indirect action) which replaced an earlier programme [83] and in June 1978, in the wake of the *Amoco Cadiz* disaster, the Council adopted a resolution setting up an action programme on the control and reduction of pollution caused by hydrocarbons discharged at sea. [84] In addition, the Commission established a Committee on Waste Management [85] and a Scientific Advisory Committee on the toxicity and ecotoxicity of chemical compounds. [86] The Community is also actively cooperating with non-member States and international organizations on environmental problems. Apart from regular participation in bodies such as the UNEP, OECD, ECE, WHO and FAO, the Community has also ratified, signed or negotiated international conventions on environmental topics. For example, on 21 June 1977 the Council authorized the Commission to negotiate the Community's accession to the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area. [87] In 1978 the Council concluded for the Community the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution and its First Protocol [88] and the Bonn Convention for the Protection of the Rhine against Chemical Pollution. [89] In 1979 the Community signed the European Convention on European Wildlife and Natural Habitats and the Convention on Long-range Transboundary Air Pollution. [90] In addition, the Community now conducts bilateral consultations on environmental matters with Austria, Canada, Japan, Sweden, Switzerland and the United States. [91]

16. But despite this diversified approach, reduction of pollution is still a major concern and by the end of 1980 the Council had adopted five more directives on water pollution, [92] three more directives on air pollution, [93] four directives on noise pollution, [94] three more directives on waste control [95] and one decision on chemicals (chlorofluorocarbons) in the environment. [96]

---

[81] 'Second Report on the State of the Environment', 1979, p. 6.
[82] *Fourteenth General Report*, point 313.
[83] 'First Report on the State of the Environment', 1977, p. 233.
[84] OJ C 162, 8.7.1978.
[85] Commission Decision 76/431/EEC (OJ L 115, 1.5.1976).
[86] Commission Decision 78/618/EEC (OJ L 198, 22.7.1978).
[87] Bull. EC 6-1977, point 2.1.70.
[88] Council Decision 77/585/EEC (OJ L 240, 19.9.1977).
[89] Council Decision 77/586/EEC (OJ L 240, 19.9.1977).
[90] *Thirteenth General Report*, point 284.
[91] *Fourteenth General Report*, point 322.
[92] Council Directives 78/659/EEC (OJ L 222, 14.8.1978); 79/869/EEC (OJ L 271, 29.10.1979); 79/923/EEC (OJ L 281, 10.11.1979); 80/68/EEC (OJ L 20, 26.1.1980); 80/778/EEC (OJ L 229, 30.8.1980).
[93] Council Directives 77/537/EEC (OJ L 220, 29.8.1977); 78/611/EEC (OJ L 197, 22.7.1978); 80/779/EEC (OJ L 229, 30.8.1980).
[94] Council Directives 77/311/EEC (OJ L 105, 28.4.1977); 78/1015/EEC (OJ L 349, 13.12.1978); 70/113/EEC (OJ L 33, 8.2.1979); 80/51/EEC, (OJ L 18, 24.1.1980).
[95] Council Directives 76/403/EEC (OJ L 108, 26.4.1976); 78/176/EEC (OJ L 54, 15.2.1978); 78/319/EEC (OJ L 84, 31.3.1978).
[96] Council Decision 80/372/EEC (OJ L 90, 3.4.1980).

Further proposals have been made by the Commission on such matters as environmental impact assessment, accidents in connection with certain industrial activities and the discharge of particularly dangerous substances into the aquatic environment of the Community.

17. In general, the Member States have appeared willing to implement the environment programme. At the end of 1980 there had been 236 notifications to the Commission under the 1973 'Information Agreement' (which was expressly stated to be a 'gentlemen's agreement'). [97] However, the Commission did bring cases against Italy under the procedure in Article 169 of the EEC Treaty for failure to implement the directive on detergents and the directive on the sulphur content of certain liquid fuels.

In both cases the Court held that Italy had failed to fulfil its obligations under the Treaty. [98] In both cases the Court stressed that directives on the environment may be based on Article 100 of the Treaty, since provisions which are made necessary by considerations relating to the environment and public health may be a burden on the undertakings to which they apply and if there is no harmonization of national provisions on the matter competition may be appreciably distorted.

Section IV — Consumer protection

18. Although the development of consumer policy is not specifically listed among the objectives of the Community in Article 3 of the Treaty, specific reference to consumer interests is none the less made in Article 39 and Articles 85 and 86 of the Treaty and, as early as 1962, the Commission set up a Consumer Contact Committee. However, the main impetus for consumer policy derives from the 1972 Paris Summit meeting; the Heads of State or Government invited the institutions to draw up action programmes in the fields of social policy and consumer protection before 1 January 1974. [99] The preliminary programme of the European Community for a consumer protection and information policy, drawn up by the Commission in 1973, was approved by the Council in April 1975. [100] Progress in the implementation of the programme may be summarized in terms of the five major objectives of Community policy towards consumers.

(1) Protection of consumer health and safety. Numerous directives have been adopted concerning: preservatives and additives in foodstuffs; industrial products; textiles; motor vehicles and their use; medicinal products and cosmetics; and the classification, packaging and labelling of dangerous substances. Most of these directives have been issued in the framework of the programme of approximation of laws designed to ensure the elimination of technical barriers to trade. Other directives have been adopted within the context of the common agricultural policy. Appendix 2 of the Commission's 'First Report on Consumer Protection and Information Policy' (1977) lists approximately 80 directives (exclusive of amendments) issued as of 31 December 1976. Proposals have been sent to the Council on a system of information on accidents in the home involving products and a system for the rapid exchange of information on dangers arising from the use of consumer products.

---

[97] *Thirteenth General Report*, point 285; *Fourteenth General Report*, point 323.

[98] Case 91/79 *Commission* v *Italy* [1980] ECR 1099; Case 92/79 *Commission* v *Italy* [1980] ECR 1115.

[99] *Sixth General Report*, points 11, 12.

[100] Council Resolution of 14 April 1974 (OJ C 92, 25.4.1975).

(2) Protection of the economic interests of consumers. Draft directives have been published on product liability, sales made away from business premises (doorstep selling), consumer credit and unfair advertising.
(3) Advice, help, and redress. Measures adopted by the Commission include the organization of a symposium on the subject of consumer redress and the financing of a pilot scheme in Scotland to facilitate easy access to the courts in small claims cases.
(4) Consumer information and education. In 1979 the Council adopted a directive on consumer protection in the indication of the prices of foodstuffs [101] and a directive on the indication by labelling of the energy consumption of domestic appliances. [102] Other activities have included surveys and consumer education projects in schools.
(5) Consultation and representation. Consumer interests in the Community are now represented by the Consumer Consultative Committee, set up by the Commission when Community measures are being prepared; it also sends representatives to other consultative committees set up by the Commission, e.g. the Advisory Committees on Customs Matters and Veterinary Matters.

[101] Council Directive 79/581/EEC (OJ L 158, 26.6.1979).
[102] Council Directive 79/531/EEC (OJ L 145, 13.6.1979).
[103] Commission Decision 73/306/EEC (OJ L 283, 10.10.1973).

European Communities – Commission

Thirty years of Community law

Luxembourg: Office for Official Publications of the European Communities

1983 — 498 pp. — 17.6 × 25.0 cm

The European Perspectives series

DA, DE, GR, EN, FR, IT, NL, ES, PT

ISBN 92-825-2652-6

Catalogue number: CB-32-81-681-EN-C

Price (excluding VAT) in Luxembourg
ECU 15.00 BFR 670 IRL 10.30 UKL 8.50 USD 15.50

Salg og abonnement · Verkauf und Abonnement · Πωλήσεις καί συνδρομές · Sales and subscriptions Vente et abonnements · Vendita e abbonamenti · Verkoop en abonnementen

BELGIQUE / BELGIË

Moniteur belge / Belgisch Staatsblad

Rue de Louvain 40-42 / Leuvensestraat 40-42
1000 Bruxelles / 1000 Brussel
Tél. 512 00 26
CCP/Postrekening 000-2005502-27

Sous-dépôts / Agentschappen:

Librairie européenne / Europese Boekhandel

Rue de la Loi 244 / Wetstraat 244
1040 Bruxelles / 1040 Brussel

CREDOC

Rue de la Montagne 34 / Bergstraat 34
Bte 11 / Bus 11
1000 Bruxelles / 1000 Brussel

DANMARK

Schultz Forlag

Møntergade 21
1116 København K
Tlf: (01) 12 11 95
Girokonto 200 11 95

BR DEUTSCHLAND

Verlag Bundesanzeiger

Breite Straße
Postfach 10 80 06
5000 Köln 1
Tel. (02 21) 20 29-0
Fernschreiber:
ANZEIGER BONN 8 882 595

GREECE

G.C. Eleftheroudakis SA

International Bookstore
4 Nikis Street
Athens (126)
Tel. 322 63 23
Telex 219410 ELEF

Sub agent for Northern Greece:

Molho's Bookstore

The Business Bookshop
10 Tsimiski Street
Thessaloniki
Tel. 275 271
Telex 412885 LIMO

FRANCE

Service de vente en France des publications des Communautés européennes

Journal officiel

26, rue Desaix
75732 Paris Cedex 15
Tél. (1) 578 61 39

IRELAND

Government Publications Sales Office

Sun Alliance House
Molesworth Street
Dublin 2
Tel. 71 03 09

or by post

Stationery Office

St Martin's House
Waterloo Road
Dublin 4
Tel. 78 96 44

ITALIA

Licosa Spa

Via Lamarmora, 45
Casella postale 552
50 121 Firenze
Tel. 57 97 51
Telex 570466 LICOSA I
CCP 343 509

Subagente:

Libreria scientifica Lucio de Biasio - AEIOU

Via Meravigli, 16
20 123 Milano
Tel. 80 76 79

GRAND-DUCHÉ DE LUXEMBOURG

Office des publications officielles des Communautés européennes

5, rue du Commerce
L-2985 Luxembourg
Tél. 49 00 81 - 49 01 91
Télex PUBLOF Lu 1322
CCP 19190-81
CC bancaire BIL 8-109/6003/300

NEDERLAND

Staatsdrukkerij- en uitgeverijbedrijf

Christoffel Plantijnstraat
Postbus 20014
2500 EA 's-Gravenhage
Tel. (070) 78 99 11

UNITED KINGDOM

HM Stationery Office

HMSO Publications Centre
51 Nine Elms Lane
London SW8 5DR
Tel. 01-211 8595

Sub-agent:

Alan Armstrong & Associates

European Bookshop
London Business School
Sussex Place
London NW1 4SA
Tel. 01-723 3902

ESPAÑA

Mundi-Prensa Libros, S.A.

Castelló 37
Madrid 1
Tel. (91) 275 46 55
Telex 49370-MPLI-E

PORTUGAL

Livraria Bertrand, s.a.r.l.

Rua João de Deus
Venda Nova
Amadora
Tél. 97 45 71
Telex 12709-LITRAN-P

SCHWEIZ / SUISSE / SVIZZERA

FOMA

5, avenue de Longemalle
Case postale 367
CH 1020 Renens / Lausanne
Tél. (021) 35 13 61
Télex 25416

Sous-dépôt:

Librairie Payot

6, rue Grenus
1211 Genève
Tél. 31 89 50
CCP 12-236

UNITED STATES OF AMERICA

European Community Information Service

2100 M Street, NW
Suite 707
Washington, DC 20037
Tel. (202) 862 9500

CANADA

Renouf Publishing Co., Ltd

2182 St Catherine Street West
Montreal
Quebec H3H 1M7
Tel. (514) 937 3519

JAPAN

Kinokuniya Company Ltd

17-7 Shinjuku 3-Chome
Shiniuku-ku
Tokyo 160-91
Tel. (03) 354 0131

More than 30 years have elapsed since Robert Schuman's declaration of 9 May 1950 and the signature on 18 April 1951 of the Treaty of Paris establishing the European Coal and Steel Community. The time has come for the European Community to take stock. Both as a unique economic and human experiment, and as a reality endowed with powerful legal instruments, this singular phenomenon needs to be examined from the standpoint of history.

The establishment of the Community was completed with the conclusion of the Treaties of Rome creating the European Economic Community and the European Atomic Energy Community. Its institutions have undergone several stages of development, including the merger of the executives, the creation of own resources, the extension of Parliament's budgetary powers and the creation of a Court of Auditors. At the same time the Community was putting into effect the fundamental principles of free movement of goods, persons, services and capital, and developing the common policies which are laid down in the Treaties or which proved necessary in order to attain, in the course of the operation of the common market, one of the objectives of the Community. On two occasions it has been enlarged by the accession of further European States, first Denmark, Ireland and the United Kingdom, and subsequently Greece. It has also commenced negotiations with a view to the admission of Spain and Portugal.

The progress made by the Community is reflected in a vast range of legislation binding on Member States, firms and individuals, and in the body of case-law built up by the Court of Justice in Luxembourg.

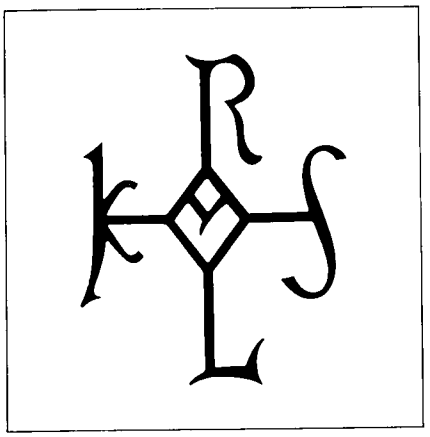
The Commission wished to provide a work of reference for lawyers which did not assume any familiarity with questions of Community law. It asked eminent specialists in the subject from the various Member States to make individual contributions to *Thirty years of Community law* so as to trace the development of the Community, summarize the progress achieved in the various sectors and examine the difficulties which the Community has had to face. Each author was allowed the fullest freedom of expression. Neither the Commission nor readers will necessarily share all the points of view expressed, but they will at least have the benefit of a full and frank discussion.

ISBN 92-825-2652-6

Price (excluding VAT) in Luxembourg
ECU 15.00 BFR 670 IRL 10.30 UKL 8.50 USD 15.50

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L-2985 Luxembourg



Monogram of Charlemagne

Price (excluding VAT) in Luxembourg
ECU 15.00 BFR 670 IRL 10.30 UKL 8.50 USD 15.50

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L - 2985 Luxembourg

ISBN 92-825-2652-6

9 789282 526521