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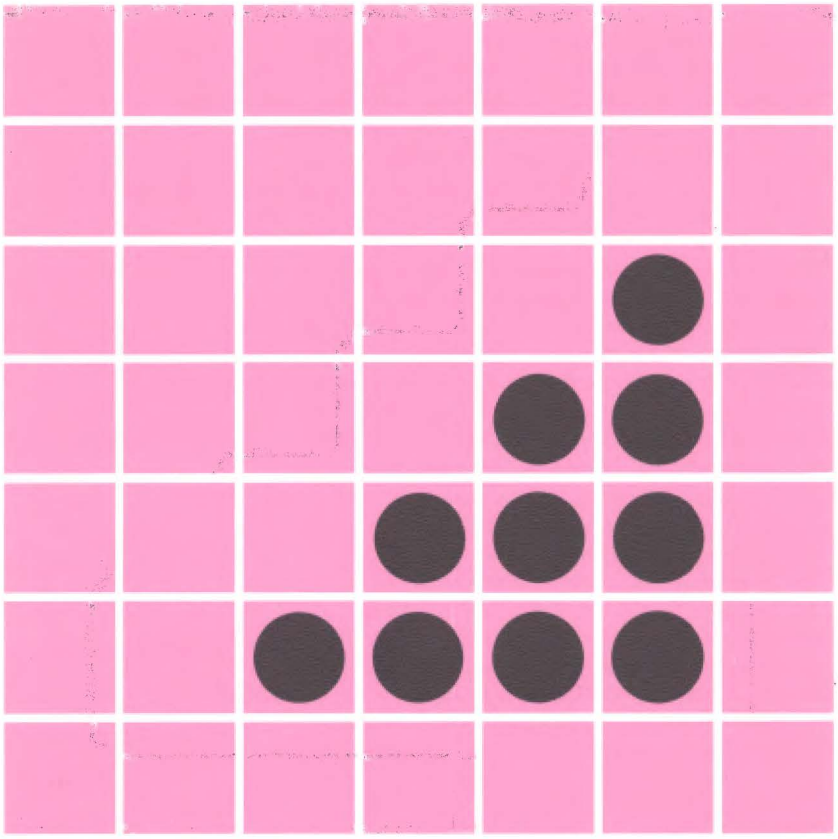
THE EUROPEAN COMMUNITY'S LEGAL SYSTEM



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I. The sources of Community law

1. *Written sources*

Foremost among the written sources of Community law is the so-called *primary legislation* of the European Community created directly by the Member States. It comprises the Community law contained in the Treaties establishing the European Communities themselves, including the annexes, schedules and protocols attached to the Treaties and the subsequent additions and amendments thereto. These include, i.a.:

- — Treaty establishing the European Coal and Steel Community (ECSC = European Coal and Steel Community) of 18 April 1951 — 'Treaty of Paris';
- — Treaty establishing the European Economic Community (EEC = Common Market) of 25 March 1957 — 'Treaty of Rome';
- — Treaty establishing the European Atomic Energy Community (EAEC = Euratom) of 25 March 1957 — 'Treaty of Rome';
- — Convention on certain Institutions common to the European Communities of 25 March 1957;
- — Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty) of 8 April 1965;
- — Treaty concerning the accession of the Kingdom of Denmark, Ireland, (the Kingdom of Norway) and the United Kingdom of Great Britain and Northern Ireland to the EEC and Euratom of 22 January 1972, including the Act concerning the Conditions of Accession and the Adjustments to the Treaties (Accession Treaty and Act of Accession);
- — Association Agreement with Greece of 9 July 1961, with Turkey of 12 September 1963, with the African, Caribbean and Pacific States (ACP countries) of 28 February 1975 (First Lomé Convention), etc.

The secondary legislation of the Community is a further written source of Community law. This consists of the law created by the Community institutions. It comes into being primarily as a result of the legal acts expressly provided for in the Treaties in so far as they concern binding rules. This is the case with regulations, directives, decisions addressed to individuals and States, and recommendations made under the ECSC Treaty.

International agreements concluded by the Community as an entity having international legal personality may be considered the final written source of Community law. The tariff and trade agreements concluded by the Community (see Arts 111 and 113 of the EEC Treaty) may be singled out in this connection. Whether such international agreements entered into by the Community rank as Community law or as *international* law in the

Community legal system has not yet be settled conclusively. In view of the Council's practice of implementing international agreements by means of secondary Community legal acts — regulations and decisions in particular — it must be assumed that the provisions of international agreements are thereby 'transformed' simultaneously into Community law. Such Community acts therefore are comparable to the rules which some of the Member States adopt when incorporating international agreements into their legal system.

2. *Unwritten sources*

The general principles of law are one unwritten source of Community law. The existence and validity of general principles of law as a form of Community law arise primarily from the second paragraph of Article 215 of the EEC Treaty, which refers to the general principles common to the laws of the Member States in the case of non-contractual liability. On the other hand, Article 164 of the EEC Treaty, Article 136 of the Euratom Treaty and Article 31 of the ECSC Treaty entrust the Court of Justice of the European Communities with the task of insuring that 'in the interpretation and application of this Treaty the law is observed'. This wording shows that, in performing its task, the Court is not restricted to written Community law, but also has to insure that unwritten law, and hence the general principles of law are observed. In its judgments, the Court also has applied the general principles of law in cases other than that referred to in the Treaty as non-contractual liability in order to close various loopholes. It has had recourse, especially in the field of general administrative law and of fundamental rights, to the general principles of law as a source of Community law.

Customary law is another unwritten source of Community law. This consists of law resulting from established practice, and the ensuing conviction that it represents the law. For example, in Community law *the right* of the European Parliament *to question* the Council derives from custom.

The *general rules of international law* may be considered to be only a *supplementary source* of Community law. Because of their generality they are of significance only in connection with the development of the principles embodied in Community law, and as specific expressions of the general principles of law. The Court of Justice has recourse to them especially when applying the principles of proportionality, good faith and legal certainty.

3. *Decisions of the representatives of the governments of the Member States meeting within the Council*

A further source consists in the *decisions of the representatives of the governments of the Member States meeting within the Council.*

The composition of the Council of the assembled representatives of the governments of the Member States is identical with the individuals who also form the Community institution known as the Council. The decisions taken by it are improperly called Council decisions.

Technically, they are governmental agreements and hence international conventions. Unlike the acts of the Community institutions, they are not taken as a result of the exercise of powers conferred by the Treaties but are based on the Member States' capacity to act under international law. Whether in view of their international origin they can be regarded as Community law is still an open question. At all events, there is a close connection with Community law, as the subject-matter and content of such 'Council' decisions relate to Community matters. This is borne out by the fact that such decisions are as a rule published in the *Official Journal of the European Communities.*

II. The legal nature of the European Community

In the years immediately following the foundation of the European Community, an attempt was made to model the legal nature of the Community on conventional inter-State associations.

Some regarded the Community as as international organization of the orthodox kind, because it had been created by international treaties, and performed functions which were normally carried out by international economic organizations.

This, however, overlooked the fact that the Community Treaties were acts establishing independent communities with their own sovereign rights and powers. As a result of these Treaties, the Member States have renounced part of their sovereignty in favour of the new Community.

Others saw this transfer of sovereignty by the Member States as a sign that the Community should already be considered a federal entity. This view, however, failed to take into account the fact that sovereign rights had been conferred on the Community only in a limited number of areas. Thus the Community lacks both the universal powers which characterize a State, and the right to create new powers (power-creating capacity).

A classification of the Community under the existing forms of inter-State associations gives unsatisfactory results. The Community's structural characteristics are such that it differs fundamentally from other inter-State associations.

Firstly, the list of *tasks* assigned to the Community is more extensive than is normally the case with international organizations. Under the ECSC Treaty, the Community is responsible for the common administration of the European coal and steel industries, which play a key role in the national economies. Euratom has to carry out, in common, tasks in research into, and the use of, nuclear energy. Finally, unlike the other two Communities whose purpose it is to integrate certain areas of the economy, the EEC has as its task, by establishing a common market and progressively approximating national economic policies, to integrate all areas of the economy.

Secondly, Community law forms a special, *autonomous legal system,* independent of the legal systems of the Member States. This legal system is endowed with its own institutions on which its own sovereign rights have been conferred. As a result, in order to carry out their tasks, the institutions can adopt legal acts in complete legal independence from the

Member States. In order to take effect, Community law does not need to be incorporated into national law. Even in the Member States, it is applicable in its capacity as Community law.

Thirdly, Community law creates rights and obligations not only for the Community institutions and the Member States, but also for the latter's citizens. This effect of Community law is called '*direct applicability*'. Individuals, therefore, are governed by (at least) two legal systems — national law and Community law. In addition to his status as a citizen of a Member State, the individual thus acquires the status of a citizen of the European Community.

Regulations have such an effect as a direct result of the Treaty. The second paragraph of Article 189 of the EEC Treaty provides that a regulation 'shall be ...directly applicable in all Member States'. Rules which do not expressly give rise to rights and obligations for individuals are directly applicable where their structure and content so allow. According to the case-law of the Court, this is so where the rule is sufficiently clear and precise, is not subject to any substantive condition, and does not require for its effectiveness any further Community or national measures which are within the discretion of the Community institutions or of the Member States.

In the light of these criteria, the Court first of all confirmed the direct applicability of a number of Treaty provisions. In its judgment of 5 February 1963 in Case 26/62, van Gend en Loos, in which a Dutch firm invoked the standstill clause contained in Article 12 of the EEC Treaty in order to have an increase in customs duty declared illegal, the Court ascribed direct effect to that provision. The judgment of 15 July 1964 in Case 6/64, Costa v ENEL, attributes such effect to Article 53 of the EEC Treaty, whereby Member States may not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, and to Article 37, paragraph 2 of the EEC Treaty, which prohibits the introduction of any new measures discriminating against nationals of Member States.

Two further judgments may be singled out from the subsequently very extensive case-law of the Court on the direct applicability[1] of Treaty provisions. These are the judgments in Cases 2/74 (Reyners) and 33/74 (van Binsbergen) which involved *inter alia* the question of the direct effect of Articles 52 and 59 of the EEC Treaty, according to which restrictions on the freedom of establishment and freedom to provide services were to be abolished during the transitional period. The special feature of these two cases was the fact that both Articles required the repeal of national laws by the end of the transitional period, which had not entirely taken place. The Court decided that the prohibition, underlying both Treaty provisions, of the unequal treatment of nationals of other Member States was directly applicable since the end of the transitional period, as Article 52 and 59 contained obligations whose effects on the expiry of that period were well defined.

[1] Translator's note : The terms 'direct applicability' and 'direct effect' though strictly speaking distinct, have in practice been used interchangeably, even by the Court.

Since 1970, by way of development of its case-law on the direct applicability of Treaty rules, the Court has held that every provision of directives and decisions addressed to States may be directly applicable under the same conditions as Treaty rules. The decisive argument used by the Court is that the effectiveness of a directive or decision would be diminished if nationals of Member States could not invoke the directive or decision before the courts and if national courts were not bound to apply it as part of Community law.

In its judgment of 9 March 1978 in Case 106/77, Simmenthal II, the Court summed up its previous case-law on direct applicability as follows :

> '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. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law. 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'. It is not necessary 'for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules'.

Because of these unique features, the Community is neither a conventional international organization nor an association of States but an independent sovereign association with its own sovereign rights and a legal system independent of the Member States, to which both the Member States and their nationals are subject in the fields of activity assigned to the Community.

This view is shared by the Court. Its fundamental declarations on the legal nature of the Community are contained in its judgments in Cases 26/62 (van Gend en Loos) and 6/64 (Costa v ENEL). In van Gend en Loos it was held that

> 'The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.

The judgment in Costa v ENEL then omits any reference to international law:

> 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves'.

III. Powers

1. *Principle of limited individual powers*

The Treaties establishing the Community and their institutions do not confer upon them general powers but lay down in the respective Articles *individual powers* to act. This is shown particularly clearly by the first paragraph of Article 189 of the EEC Treaty and the first paragraph of Article 161 of the Euratom Treaty, which empower the Council and Commission to adopt legal acts only 'in accordance with the provisions of this Treaty'. The first paragraph of Article 14 of the ECSC Treaty also confers such powers on the Commission only 'in accordance with the provisions of this Treaty'. This principle is based on the concept of *partial integration,* which forms the basis of the establishment of the Communities. According to this concept, integration is restricted in scope to the establishment of a common market and the progressive approximation of the economic policies of the Member States. All fields unconnected with these tasks remain within the competence of the Member States.

According to the principle of limited individual powers, the Community institutions may neither legislate in fields which are not dealt with in the Treaties nor exceed their powers as specified in the Treaties. This, however, applies only to acts adopted by the institutions which are binding on the Member States or on citizens of the Common Market, for only such acts may restrict the sovereignty of the Member States.

The substantive extent of the individual powers varies according to the type of task entrusted to the Community. It is very extensive, for example, in the field of common transport policy, where any appropriate provisions may be laid down (Art. 75 (1) (c), EEC), of agricultural policy (Art. 43 (2), Art. 40 (3), EEC) and of freedom of movement (Art. 49, EEC). On the other hand the freedom of action of the Communities and their institutions is restricted, for instance, in the field of competition law (Arts 85 *et seq.*, EEC) by narrowly worded provisions.

2. *Subsidiary powers*

The special individual powers contained in the Community Treaties are not sufficient to attain the objectives specified in the Treaties themselves (see in particular, Arts 1, 2 and 3

of the ECSC Treaty; Arts 2 and 3 of the EEC Treaty and Arts 1 and 2 of the Euratom Treaty). In order to make good this deficiency, Article 235 of the EEC Treaty and Article 203 of the Euratom Treaty provide that:

> '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'.

The first paragraph of Article 95 of the ECSC Treaty confers the same power on the Commission, but it is worded somewhat more narrowly in that it does not refer in a general manner to necessary action but specifically to the adoption of legal acts.

The purpose of such authorizations to act is to create the necessary powers to take action which is not expressly provided for in the Treaties, but is the consequence of, or a precondition for, the attainment of a Treaty objective. These provisions, however, do not contain any general authorizations which would enable tasks lying outside the objectives laid down in the Treaties to be performed. They do not therefore apply, for example, to defence policy, foreign policy — with the exception of external economic policy — and most areas of cultural policy. Nor do they confer on the Community any power-creating capacity, i.e. the Community institutions are not authorized to extend their own powers at the expense of the Member States.

In practice, the opportunities afforded by the subsidiary powers have been used with increasing frequency. This is because nowadays the Community sets itself tasks which were not foreseen when the Treaties were signed and for which appropriate individual powers are therefore lacking in the Treaties. Reference should be made in particular to the fields of environment and consumer protection and to the numerous research programmes undertaken outside Euratom since 1973. Other important instances of the application of Article 235 of the EEC Treaty and the first paragraph of Article 95 of the ECSC Treaty are the directives extending mutual recognition of degrees and diplomas to cover employees, the 1973 Regulation on the monetary fund and the 1975 Regulation on the Regional Fund.

3. *Implied powers*

In addition to the subsidiary powers provided for in Articles 235 of the EEC Treaty, 203 of the Euratom Treaty and the first paragraph of Article 95 of the ECSC Treaty, powers which are not provided for in writing are conferred on the Community institutions under the 'implied powers' doctrine. According to this rule of international law — as applied to Community law — a power conferred on a Community institution authorizes it at the same time to take measures which are not expressly provided for in the Treaties but which are indispensable if the power is to be exercised effectively and usefully. In contrast to Article 235 of the EEC Treaty, Article 203 of the Euratom Treaty and the first paragraph of Article 95 of the ECSC Treaty, such powers are derived, not from Treaty objectives, but from existing Community powers, whose exercise they facilitate. This doctrine was

expressly recognized by the Court in Case 8/55 (Fédéchar) in which it held that Community measures based on implied powers were admissible under the ECSC Treaty.

In this case, the Fédération Charbonnière de Belgique brought an action for annulment of a decision of the High Authority (Commission) whereby the latter had unilaterally drawn up a price list for types of coal in which, for certain types of coal, prices had been fixed at a level lower than that sought by the applicant.

The applicant argued, *inter alia*, that 'it is clear from the Treaty that it is not for the High Authority but... for the producers themselves to draw up that list'.

With regard to this question of competence, the Court stated in its judgment that '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'. Moreover, the High Authority 'enjoys a certain independence in determining the implementing measures necessary for the attainment of the objectives referred to in the Treaty'.

A specific instance of the application of the implied powers doctrine is the derivation of *Community powers to conduct external relations* where these are not expressly provided for in the Treaties — as they are, for example, in the field of tariff and trade policy (Arts 111, 113, EEC), with regard to relations with international organizations (Art. 229, second paragraph, EEC) and with regard to the conclusion of association agreements (Art. 238, EEC).

In its judgments in Case 22/70 (AETR Agreement) and Case 6/76 (Kramer), and in its Opinion 1/76 on the conclusion of an agreement establishing a European laying-up fund for inland waterway vessels, the Court held that the Community may also enter into international commitments in fields in respect of which no express powers to conclude international agreements have been conferred on the Community, in so far as this is necessary for the exercise of Community powers within its internal system. The external powers therefore should be regarded as an implied complement to the internal powers.

In its judgment in Case 22/70 on the conclusion of the AETR Agreement, which governs the hours worked by persons engaged in international road transport, the Court derived the Community's power to conclude this international agreement from its responsibility for transport policy.

In its Opinion 1/76, the Court likewise based the Community's power to conclude an agreement establishing a European laying-up fund on its internal powers in the transport policy sphere.

Case 6/76 (Kramer) concerned the competence of the Community to cooperate with international bodies in fixing catch quotas in sea fishing and, if necessary, to enter into appropriate international commitments. The Court derived the requisite external powers of the Community from its responsibility for fisheries products under the common agricultural policy.

IV. Legal acts

1. *Legal acts provided for in the Treaties*

In the Community Treaties the legal acts are listed which the Community institutions have at their disposal when carrying out the tasks conferred on them (Art. 189, first paragraph, EEC; Art. 161, first paragraph, Euratom; Art. 14, first paragraph, ECSC). Although the acts enumerated and described therein are given different names in the EEC and Euratom Treaties on the one hand and in the ECSC Treaty on the other, they may be classified according to their legal effects and 'addressees' as follows :

(a) Regulations and general ECSC decisions

A regulation is described in the second paragraph of Article 189 of the EEC Treaty and the second paragraph of Article 161 of the Euratom Treaty as a legal act which has general application, is binding in its entirety and is directly applicable in all Member States. The second paragraph of Article 14 the ECSC Treaty merely provides that general ECSC decisions are binding in their entirety. A more precise definition has, however, been given by the Court of Justice, according to which general ECSC decisions also are generally and directly applicable in the Member States.

General applicability means that the act is addressed to an indeterminate category of individuals and covers a multitude of unspecified circumstances. *Binding effect* means that the acts confer rights and impose obligations on those to whom they are addressed. The statement that regulations and general ECSC decisions are binding *in their entirety* serves to distinguish them from directives and ECSC recommendations, which are binding only as to the result to be achieved.

Direct applicability means that the legal effects occur without any intervention by Member States or their institutions. Regulations and general ECSC decisions therefore apply not only *to,* but also *in,* the Member States.

Because of their general and abstract character, regulations and general ECSC decisions have the same structure, as far as their content is concerned, as national laws. The Court therefore stated in Case 8/55 (Fédéchar), with regard to general ECSC decisions, that such acts are 'quasi-legislative measures'.

In their capacity as general legislative acts of the Community, regulations and general ECSC decisions are *instruments for securing the uniformity of laws*. Regulations are used chiefly to establish and develop market organizations for agricultural products. Other important ECSC measures have also been adopted in the form of regulations, e.g. Regulation No 17 of 6 February 1962 on restrictive practices and Regulation No 1612/68 of 15 October 1968 on freedom of movement.

(b) **Directives and ECSC recommendations**

Directives and ECSC recommentations are binding as to the result to be achieved upon each Member State and, in the case of ECSC recommendations, on citizens of the Common Market as well. The Member States are obliged to take steps to ensure that the result is achieved. The choice of the form of the measures and methods used in achieving the results required under Community law is left, on the other hand, to the national authorities (Art. 189, third paragraph, EEC; Art. 161, third paragraph, Euratom; Art. 14, third paragraph, ECSC).

As rule, only the achievement of the actual result prescribed by Community law by means of national measures gives rise to direct rights and obligations, both for and against Community citizens. By way of exception, however, provisions of directives and ECSC recommendations may also be directly applicable.

The main area of application of directives is the field of the *approximation of laws* (see Art. 100 of the EEC Treaty).

(c) **EEC and Euratom decisions, individual ECSC decisions**

These acts are directed exclusively at individual determinable addressees. Addressees may — according to the rules applicable in the EEC — be one or more Member States, or one more individuals in the Member States. Their content may be expressed either in concrete or in abstract terms. Decisions are binding in their entirety, and in this respect they differ from directives and ECSC recommendations. According to the case-law of the Court, decisions addessed to Member States are directly applicable in the same way as directives.

Decisions are the usual means whereby the Community institutions deal with individual cases. To this extent they are comparable to administrative measures taken pursuant to national law.

(d) **EEC and Euratom recommendations, opinions**

The recommendations provided for in the EEC Treaty and the Euratom Treaty (Art. 189, fifth paragraph, EEC; Art. 161, fifth paragraph, Euratom) and the opinions common to all

the Treaties (Art. 189, fifth paragraph, EEC; Art. 161, fifth paragraph, Euratom; Art. 14, fourth paragraph, ECSC) differ from other acts in that they are not binding and therefore give rise to no legal obligations on the part of the addressees. The addressees are for the most part Member States. Only in a few cases specified in the Treaties may they also be addressed to individuals or undertakings (see Art. 92 (1) of the EEC Treaty and Art. 54, fifth paragraph, of the ECSC Treaty).

Recommendations and opinions differ from each other in that recommendations are generally made on the initiative of the Community institution issuing them, whereas opinions are delivered as a result of an outside initiative.

The purpose of a recommendation is to suggest that the addressee take a specific course of action without legally obliging him to do so. An opinion either contains a general assessment of certain facts or prepares the ground for subsequent legal proceedings (see Arts 169 and 170 of the EEC Treaty and Arts 141 and 142 of the ECSC Treaty).

The importance of recommendations and opinions is — because of their lack of binding force — primarily political and psychological.

(e) **Adoption of legal acts**

Several Community institutions work together when drawing up binding legal acts.

In areas covered by the EEC and Euratom Treaties, the Council takes decisions in response to a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee *(proposal procedure)*. This procedure bears the imprint of cooperation between the Council and the Commision. By virtue of its right of initiative the Commission draws up legislative proposals which it submits to the Council together with a comprehensive explanatory memorandum. This proposal serves as a basis for the measure that is to be taken and determines, in particular, its content and form. Without a suitable proposal from the Commission, the Council is not permitted to legislate. The Commission's right to make proposals ensures that Community interests are safeguarded during the legislative process. The Council's initiative is restricted to requesting the Commission, under Article 152 of the EEC Treaty and Article 122 of the Euratom Treaty, to submit to it any proposals which the Council considers desirable for the attainment of the common objectives.

If a Commission proposal is before the Council, the latter refers it for consultation purposes to the *European Parliament* and, if necessary (e.g. under Art. 54 (2) of the EEC Treaty in case of freedom of establishment), to the Economic and Social Committee as well. In some cases, consultation is expressly provided for in the Treaties and is hence obligatory, while in others it is optional, i.e. the Council decides to initiate the consultation procedure without being obliged to do so by the Treaties.

Apart from this right to be consulted under the Treaties, the European Parliament has no general right to be involved in the decision-making process. Nor was this situation changed by the Joint Declaration of the European Parliament, the Council and the

Commission of 4 March 1975, whereby a conciliation procedure was agreed upon. This procedure is designed merely to bring the views of the Council and Parliament closer together before acts having financial implications are adopted.

The end-product of Parliament's cooperation is its opinion, which is transmitted to the Council and may also contain proposals for amendments, although these are not legally binding on the Council when it takes its final decision.

Within the Council the proposal is discussed by working parties of experts. Then the Committee of Permanent Representatives of the Member States (COREPER — Comité des Représentants permanents) examines the proposal. The legislative process is concluded from the substantive point of view when the Council takes its decision.

Implementing measures carrying acts adopted by the Council into effect are enacted by the Council and the Commission. The Council reserves for itself the right to adopt any acts having political overtones.

The Commission may take implementing measures after the Council has conferred on it the necessary powers (see Art. 155, fourth subparagraph, of the EEC Treaty and Art. 124, fourth subparagraph, of the Euratom Treaty).

As a rule, however, the Council confers such powers on the Commission only through the agency of committees. Under the so-called Management Committee procedure, a Management Committee consisting of representatives of the Member States, which has existed since the first regulations on agricultural market organizations were made in 1962, has to be heard prior to the adoption of implementing provisions. The Commission may, irrespective of whether the Committee adopts a position or of the conclusions it reaches, immediately take enforceable measures. Only if the Committee delivers an opinion which conflicts with the Commission's draft measures may the Council amend or repeal, within a period of one month, a measure decided upon by the Commission. This expedited procedure is used particularly in the case of the — often urgent — measures connected with day-to-day management. Where sufficient time is available for the adoption of implementing measures, the *Committee on Rules procedure* is initiated. Under this procedure, in order to adopt the necessary implementing measures, the Commission requires a favourable opinion from the so-called *Committee on Rules.* Otherwise it must propose the intended measures to the Council, which has to take a decision within three months. If the Council fails to act before this period expires, the Commission again has the authority to adopt the implementing measures.

Under the *ECSC Treaty,* the power to adopt legal acts is largely vested in the Commission (formerly the High Authority), whereas the Council merely has a right of assent. This enables the Council, however, to veto Commission measures.

A number of articles of the ECSC Treaty also provide that, prior to the final adoption of a decision by the Commission, the European Parliament, the Economic and Social Committee, and the Advisory Committee (which exists only in the ECSC sphere) must be heard.

Those acts which have no legal effects — i.e. recommendations and opinions — may, according to the EEC and Euratom Treaties, be adopted by both the Council and the Commission. The Commission, in this, is not restricted solely to the cases provided for in the Treaties, but may make recommendations and deliver opinions whenever it considers it necessary (Art. 155, first paragraph, second subparagraph, EEC; Art. 124, first paragraph, second subparagraph, Euratom).

The ECSC Treaty expressly stipulates that an opinion may be delivered only by the Commission.

Under the first sentence of the first paragraph of Article 191 of the EEC Treaty, the first sentence of the first paragraph of Article 163 of the Euratom Treaty, and the third paragraph of Article 15 of the ECSC Treaty, after a decision has been taken, regulations, general ESCS decisions, and general ECSC recommendations must be published in accordance with the legal principle of *publicity* common to all Member States. Publication is effected in the *Official Journal of the European Communities,* the first edition of which was issued on 20 April 1958 and which also replaces the *Official Journal of the ECSC,* which was published between 30 December 1952 and 19 April 1958. It is published by the Office for Official Publications of the European Communities in Luxembourg.

EEC and Euratom directives and decisions and individual decisions and recommendations of the ECSC do not need to be published under the Community Treaties. This does not prevent the Community institutions, however, from publishing such acts also in the *Official Journal.* Extensive use is made of this possibility in practice and directives and decisions addressed to Member States are, in particular, published in the *Official Journal.*

The rights and obligations resulting from an act, i.e. its legal effects, arise only at the time of its *entry into force.*

As regards *regulations,* the second sentence of the first paragraph of Article 191 of the EEC Treaty and the second sentence of the first paragraph of Article 163 of the Euratom Treaty provide that they 'enter into force on the day specified in them or, in the absence thereof, on the twentieth day following their publication'. The ECSC Treaty, on the other hand, is silent about the time of entry into force of *general decisions and recommendations.* According to the fourth paragraph of Article 15 of the ECSC Treaty, this matter is to be settled by implementing provisions to be adopted by the High Authority (Commission). These provisions are contained in High Authority Decision 22/60 of 7 September 1960, Article 6 of which provides for a rule corresponding to the second sentence of the first paragraph of Article 191 of the EEC Treaty and the second sentence of the first paragraph of Article 163 of the Euratom Treaty.

EEC and Euratom *directives* and *decisions* (Art. 191, second paragraph, EEC Treaty; Art. 163, second paragraph, Euratom) and *individual ECSC decisions* and individual *ECSC recommendations* (Art. 15, second paragraph, ECSC) take effect upon notification.

The act is deemed to have been notified when the addressees are placed in a position to take cognizance thereof.

2. *Other legal acts*

In addition to these acts, which are listed and described in the Treaties, the Community institutions have many other means of action at their disposal.

The following deserve to be mentioned:

- Acts which find that certain steps towards integration provided for in the Treaty have been taken (e.g. the finding that determines the transition from one stage to another under Article 8 (3) of the EEC Treaty);
- Acts adopting the budget of the European Communities;
- Acts laying down the rules of procedure and the staff organization of the Community institutions;
- Acts governing relations with non-member countries and international organizations (e.g. trade agreements, association agreements);
- Acts drawing up and announcing Community programmes of action — e.g. determining the stages of liberalization in the context of freedom of establishment (Art. 54(1), EEC) and of freedom to provide services (Art. 63(1), EEC) and, e.g., the Community Social Action Programme of 21 January 1974.

Where such acts are to have legal effects, they are drawn up in the form of a *decision*. Statements outlining programmes, on the other hand, are made in the form of a *resolution*.

V. The relationship between Community law and national law

The statement made in the introduction that Community law is an independent legal system, distinct from the legal systems of the Member States, raises the question of the relationship between Community law and national law. This relationship is characterized, on the one hand, by an *interplay* between Community law and national law and, on the other hand, by a *conflict* between Community law and national law.

1. *The interplay between the legal systems*

An interplay between the legal systems takes place first of all where Community law refers to the legal systems of the Member States to complete one of its own requirements. This is the case, for example, in Articles 48 and 52 of the EEC Treaty, whereby freedom of movement and the right of establishment are granted only to nationals of the Member States, the criterion of nationality being determined by the law of the relevant Member States.

In some cases Community law makes use of the legal institutions provided for by national law to supplement its own rules. This is particularly evident in the case of the rules on the enforcement of judgments of the Court of Justice. Under Article 187 of the EEC Treaty, the judgments of the Court of Justice are enforceable under the conditions laid down in Article 192 of that Treaty. Article 192, for its part, refers expressly to the legal systems of the Member States and provides that enforcement is to be governed by the rules of civil procedure in force in the State in the territory of which it is carried out.

Finally, attention should be drawn to those cases in which, in order to give form to its own general provisions, Community law refers to all the legal systems of the Member States. An example of this is provided by the second paragraph of Article 215 of the EEC Treaty, which, in order to give specific expression to the concept referred to in its provision of liability, refers to the general principles common to the laws of the Member States.

2. *Conflicts between Community law and national law*

A conflict arises between Community law and national law where a provision of Community law creates direct rights and obligations for citizens of the Common Market, i.e. is directly applicable in the Member States, and is inconsistent in its substance with a rule of national law. A conflict between Community law and national law can be resolved only if one of the legal systems withdraws so that the other may apply.

Written Community law contains no express rule governing this set of circumstances. In none of the Community Treaties is there a provision to be found which states, for example, that Community law ranks above national law, or that it is inferior to national law.

Nevertheless, conflicts between Community law and national law can be resolved in the long term only by giving Community law precedence over national law.

This follows from the fundamental principle of Community law: *the ability of the Communities to function.* The Member States have provided the Community with legislative powers to enable it to perform its tasks. The Community would be unable to perform those tasks if the acts adopted by it were not binding *per se.* If the Member States had the power to annul Community measures at any time by means of conflicting national measures, the continued existence of Community law, and hence of the Community itself, would be called into question. A basic precondition for the existence and functioning of the Community is therefore the uniform and consistent application of Community law in all Member States. Community law, however, has this effect only if it takes precedence over national law. A legal consequence of this precedence is the fact that any provision of national law which conflicts with Community law is invalid.

This principle is confirmed in various provisions of the Community Treaties, in particular the second paragraph of Article 189 of the EEC Treaty, the second paragraph of Article 161 of the Euratom Treaty and the second paragraph of Article 14 of the ECSC Treaty, whereby regulations and general decisions have *general* application. They have this quality, however, only if they cannot be encroached upon by (partial) national law. The same result ensues from the obligation of national courts to refer questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty, Article 150 of the Euratom Treaty and Article 41 of the ECSC Treaty. Under the preliminary ruling procedure, the Court also has to decide on the validity of Community acts where this is at issue in proceedings before a national court. In case of conflict, however, the question of the validity of Community law can arise only if it takes precedence over national law.

The Court of Justice has itself acknowledged the primacy of Community law. In its landmark judgment of 15 July 1964 in Costa v ENEL, it held that:

> 'The integration into the laws of each Member States of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference

to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories....

The precedence of Community law is confirmed by Article 189.... This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal 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 Court in its subsequent judgments has consistently confirmed the precedence of Community law. It has, in fact, developed it further in one respect. While in Costa v ENEL it had to consider only the question of the precedence of Community law over subsequent national (ordinary) law, in Case 11/70 (Internationale Handelsgesellschaft) and Case 4/73 (Nold) it confirmed the principle of primacy also in respect of the relationship between Community law and national constitutional law.

National courts have in principle concurred with this view of the Court. In The Netherlands, no difficulties can arise anyway, since the precedence of Treaty law over national statutes is expressly provided for in the Dutch constitution (Arts 66 and 67). In the other Member States, the principle of the precedence of Community law over ordinary national laws has been acknowledged in the same way by the national courts. The constitutional courts of the Federal Republic of Germany and Italy, however, make an exception to this principle where Community law conflicts with constitutional guarantees. In the view of these courts, a conflict in such cases should be resolved in favour of the fundamental rights.

VI. **Fundamental rights**

1. *Existence of fundamental rights in the law of the European Community*

Although the Community Treaties contain neither a catalogue of fundamental rights nor a general fundamental rights clause — as was provided, for example, in the Treaty establishing the European Defence Community of 27 March 1957 — individual provisions are included in the Treaties which correspond substantively to certain constitutional guarantees afforded by Member States.

This is true in particular of the numerous prohibitions on discrimination which give expression to specific aspects of the general principle of equality. Worthy to note are, *inter alia,* Article 7 of the EEC Treaty prohibiting any discrimination on grounds of nationality, Articles 48, 52 and 60 of the EEC Treaty placing citizens of the Common Market on an equal footing in the fields of the right to employment, the right of establishment and freedom to provide services, and Article 119 on equal pay for men and women.

The Community rules creating the four fundamental freedoms of the Community, which guarantee fundamental freedoms in professional life, may be regarded as constituting a Community fundamental right to freedom of movement and freedom to engage in any trade or profession. These rules are the provisions on freedom of movement for workers (Art. 48, EEC), freedom of establishment (Art. 52, EEC), freedom to provide services (Art. 59, EEC) and the free movement of goods (Art. 9, EEC).

The constitutionally guaranteed right to *economic liberty,* in the sense of entrepreneurial freedom of action, is laid down in Community law in the Treaty objectives, and finds explicit expression above all in the provisions on freedom of competition (Art. 85, EEC), goods and movement of capital (Arts 9 and 67, EEC), establishment (Art. 52, EEC), services (Art. 59, EEC) and movement (Art. 48, EEC).

Finally, other areas of fundamental rights are expressly acknowledged in individual provisions of the Community Treaties. These include:

— the right of association (Art. 118, first paragraph, EEC; Art. 48, first paragraph, ECSC);

— the right of petition (Art. 48, second paragraph, ECSC);
— the right to protection for business and professional secrecy (Art. 214, EEC; Art. 194, Euratom; Art. 47, second and fourth paragraphs, ECSC).

These guarantees of fundamental rights enshrined in the primary legislation have, in some cases, been given practical expression in rules of secondary legislation, and in others, been extended even further. Most noteworthy are the provision of Regulation No 1612/68 guaranteeing the right of employees to join a trade union and the directives guaranteeing free access to schools and other educational establishments.

These guarantees embodied in Community law as represented by the Community Treaties and a number of supplementary rules of secondary legislation nevertheless cover only some of the safeguards built into Member States' constitutions. Since Community law can enforce its claim to precedence over national law only if it is also able, without the help of an outside agency, to afford a protection of fundamental rights which is equivalent to that afforded by national constitutions, there is a need for a protection of fundamental rights going beyond the guarantees provided for in the Treaties.

The case-law of the Court of Justice takes this into account. In the beginning the Court rejected all arguments based on fundamental rights, on the ground that it was not empowered to deal with questions which fell within the ambit of national constitutional law. Since 1969, however, it has recognized the existence of a separate system of protection of fundamental rights enshrined in Community law.

This line of cases started with the judgment of 12 November 1969 in Case 29/69 (Stauder). The case concerned the question whether the sale of 'welfare butter' could be made conditional on divulging the names of beneficiaries to retailers. This was stipulated in the German and Dutch versions of the disputed decision, whereas the other language versions required only that the coupons bear some reference to the beneficiary.

After it had first interpreted the provision at issue as not requiring the disclosure of beneficiaries' names, the Court concluded that the provision contained 'nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law protected by the Court'.

The Court hereby acknowledged for the first time that fundamental rights are integral part of the general principles of the Community legal system. The case still left open, however, the question of the manner in which the substance of these general principles should be determined.

The first indication of this was given in the Court's judgment in Case 11/70 (Internationale Handelsgesellschaft). In this case the Court had to consider a Community rule which provided that the grant of an export licence for certain agricultural products was conditional on the lodging of a deposit, which was forfeited in the event of failure to export the goods during the period of validity of the licence. The plaintiff argued that the system of deposits was contrary to the fundamental right of property and the principle of proportionality.

In its decision, the Court first of all confirmed its finding in the Stauder judgment of the existence, in the Community legal system, of general principles of law regarding the protection of fundamental rights, and went on to state 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 Court thus made it clear that, in formulating fundamental Community rights, it has recourse to the common bases of the constitutions of the Member States, but does not judge the validity of a Community measure or its effect within a Member State in the light of the constitution of that State or of the principles of its constitutional structure.

The judgment of 14 May 1974 in Case 4/73 (Nold) consolidated this case-law. In this case, a coal wholesaler — the Nold undertaking — brought an action, based on the right of property protected by the German constitution, for annulment of a decision of the High Authority (Commission) laying down minimum sales conditions in order to obtain direct supplies of coal from producers. In addition to the already familiar principles, this judgment contains two new aspects : firstly, the Court states that it 'cannot uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States'; secondly, it points out that international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law.

> The Court expressed this still very generally worded statement in more precise terms in Case 36/75 (Rutili) in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950, which France, the last Community country to do so, ratified on 3 May 1974. In this judgment, the Court recognized that the limitations placed on the powers of the Member States in respect of aliens are a specific manifestation of a general principle enshrined in the ECHR and in the fourth protocol thereto, which provide, in identical terms, that 'no restrictions in the interests of national security or public safety shall be placed on the rights secured... other than such as are necessary for the protection of those interests in a democratic society'.

In subsequent years, the Court was to refer repeatedly to these principles in order to develop fundamental rights in the Community context. In addition to the above-mentioned right of property, general right of privacy, economic and professional freedom and the principle of proportionality, which formed the subject matter of the Stauder, Internationale Handelsgesellschaft and Nold judgments, the Court has recognized the freedom of association, the freedom to manifest one's religion or beliefs, and a general principle of equality, as the Community's own fundamental rights.

Apart from these specific fundamental rights, it also has evolved a number of principles. These include :

— the principle of the legality of administration;
— the principle of proportionality;
— the need for legal certainty;
— the protection of good faith;

— the protection of legitimate expectations;
— the protection of vested rights;
— the principle of *audi et alteram partem.*

In spite of this extensive case-law on the issue of fundamental rights, it should not be forgotten that there are limits to this procedure for the creation of 'European fundamental rights' by the Court of Justice. The Court is able to continue giving specific expression to the general principles of law only if a matter is referred to it which provides it with suitable opportunity. Even so, the Court is restricted to the case in point and is therefore scarcely in a position to define the content and scope of the protection of fundamental rights in sufficient breadth and depth.

The German Federal Constitutional Court regarded the resulting legal uncertainty as a ground for stating, in its decision of 29 May 1974, that the protection of German fundamental rights against infringements by the Community was a matter for German judicial bodies *so long as* the Community did not itself have at its disposal a system of protection of individual rights corresponding to the Basic Law. The Federal Constitutional Court nevertheless restricted this interpretation in its decision of 25 July 1979 by expressly pointing out that the competence it had claimed in its decision of 29 May 1974 to review Community law in the light of fundamental rights did *not* extend to Treaty law. The Italian Constitutional Court expressed similar views on the same subject in its judgment No 183 of 18-27 December 1973.

How far national constitutional courts are to maintain their positions will depend to a large extent on progress made in the process of integration, especially in the field of the protection of fundamental rights in the Community. The Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977 was a major step in the right direction. In its declaration, the Community institutions solemly declared their respect for fundamental rights in the following words:

> 'The European Parliament, the Council and the Commission,
>
> Whereas the Treaties establishing the European Communities are based on the principle of respect for the law;
>
> Whereas, as the Court of Justice has recognized, that law comprises, over and above the rules embodied in the Treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based;
>
> Whereas, in particular, all the Member States are Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,
>
> have adopted the following declaration:
>
> 1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
> 2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights'.

This declaration is not a Community legal act which individuals may invoke against the Community. It is more of a declaration of intent. It has legal signifiance, however, as a universal recognition of fundamental rights by the Community institutions. But its importance resides above all in the fact that it sums up, confirms and generalizes the results achieved by jurisprudence in guaranteeing fundamental rights. It also demonstrates the complete agreement of the Community institutions on the approach to be adopted to the question of fundamental rights within the Community.

2. *The 'addressees' of fundamental rights*

The guarantees of fundamental rights in the Community legal system are primarily designed to protect citizens of the Common Market against possible infringements of fundamental rights by the *Community institutions.*

When legislative and decision-making powers were conferred on the institutions, the possibility also arose that the exercise of these powers might lead to infringements of the fundamental rights and freedoms of the individual. In view of the tasks performed by the Community institutions, this concerns principally the fundamental rights of industrial property, the freedom to engage in a trade or profession, equality, the principle of proportionality, legal protection and procedural safeguards.

In addition, however, the *Member States* must also be regarded as 'addressees' of fundamental rights, since, in view of the direct effect of Community law, the possibility cannot be ruled out that fundamental rights defined and protected by Community law might be infringed by measures taken by the Member States. In practice, this problem has risen in particular where Member States have taken the opportunity afforded them by Treaty reservations to restrict, on the basis of requirements in the fields of public order or security, the rights flowing from freedom of movement for workers and freedom of establishment.

Community citizens have on a number of occasions pleaded that measures taken as a result of this possibility, such as, for example, expulsion orders, and the ensuing loss of freedom or restrictions on the right of residence constitute an unlawful encroachment on a legal position protected by Community law. In its judgments — especially in Cases 36/75 (Rutili), 41/74 (van Duyn), 48/75 (Royer) and 8/77 (Sagulo) — the Court stressed two aspects of this problem: on the one hand, it recognized the need for Member States to determine the requirements of public policy and public security within their territory according to their own political and ethical standards, while on the other hand it indicated clearly that this power is limited by Community law and hence also by the Community's own fundamental rights. As a result, the fundamental rights and freedoms of the Community legal system must also be taken into account by the Member States in their dealing with Community citizens.

3. *Legal protection against infringements of fundamental rights*

Even a protection of fundamental rights, comprehensive in terms of its content, is of no use to the individual if there is no procedure for dealing with infringements of such rights. In keeping with the lack of a catalogue of fundamental rights, the Community Treaties provide for no specific legal remedy against infringements of fundamental rights. In particular, there is no scope for lodging *individual complaints*. Instead, Community citizens can defend themselves against infringements of their fundamental rights only by making use of the possibilities for actions in general terms.

VII. The system of legal protection

1. *Jurisdiction and functions of the Court of Justice of the European Communities*

The Treaties establishing the Communities laid down in identical provisions (Art. 164, EEC; Art. 136, Euratom and Art. 31, ECSC) the general tasks of the Court of Justice. These consist in the *interpretation, application* and *development* of Community law. The respective individual powers are exhaustively enumerated in individual articles of the Treaties.

Thus the Court has jurisdiction in:

- Actions brought by Member States against the Council and Commission or by one of the latter institutions against the other (Art. 173, first paragraph, EEC; Art. 146, Euratom; Art. 38, ECSC: Art. 175, first paragraph, EEC: Art. 148, Euratom; Art. 35, ECSC);
- Actions brought by the Commission or by Member States for an infringement of the Treaties by a Member State (Arts 169, second paragraph and 170, first paragraph, EEC; Art. 142, Euratom; Art. 33, ECSC);
- Actions brought by individuals against the Community (Arts 173, second paragraph and 175, third paragraph, EEC; Arts 146 and 148, Euratom; Arts 35 and 38, ECSC);
- Actions for damages brought against the Community (Art. 178, EEC; Art. 151, Euratom; Art. 34, second paragraph, ECSC);
- Disputes between the Community and its servants (Art. 179, EEC; Art. 152, Euratom);
- Disputes between Member States referred under special agreements (Art. 182, EEC; Art. 153, Euratom: Art. 42, ECSC);
- Preliminary ruling on proceedings initiated by national courts (Art. 177, EEC; Art. 150, Euratom: Art. 41, ECSC);
- Opinions as to the compatibility of international agreements concluded by the Community with the Community Treaties (Art. 228 (1), second subparagraph, EEC);
- In the ECSC, the Court also participates in the procedure for making minor amendments to the Treaty (Art. 95, fourth paragraph, ECSC).

This survey of the powers of the Court of Justice shows that, as the only judicial body at Community level, the Court has to intervene in various fields of law. It thus performs a multitude of functions which, in the legal systems of the Member States, are divided among various branches of the judiciary, namely constitutional courts, administrative courts, civil courts and industrial tribunals.

2. *Types of actions*

(a) **Action for annulment (Art. 173, EEC; Art. 146, Euratom; Art. 33, ECSC)**

An action for annulment is brought with a view to obtaining a declaration of nullity by the Court cancelling binding legal acts of the Community institutions.

(aa) *Action for annulment brought by the Community institutions and the Member States*

The *right* of the Member States, the Council and the Commission *to bring an action* stems from the first paragraph of Article 173 of the EEC Treaty and the first paragraph of Article 146 of the Euratom Treaty.

Only binding legal acts may form the *subject matter of an action.* Consequently, the action lies mainly against regulations, directives and decisions.

The *causes of action* are listed exhaustively in the above-mentioned provisions. An action for annulment may accordingly be brought only on grounds of lack of competence, infringement of an essential procedural requirement, infringement of primary or secondary legislation, or misuse of powers. The need for legal protection is assumed in such cases. This means that the Member States may bring an action against an act even where it is not addressed to them and does not concern them directly.

If an infringement of Community law is established, the Court declares the act concerned to be void *with retrospective effect* pursuant to Article 174 of the EEC Treaty and Article 147 of the Euratom Treaty.

(bb) *Actions for annulment brought by Community citizens*

The *right* of Community citizens *to institute proceedings* stems from the second paragraph of Article 173 of the EEC Treaty and the second paragraph of Article 146 of the Euratom Treaty. Unlike the Member States and the Community institutions, Community citizens may bring an action for annulment only against a decision addressed to them or against a decision which, although addressed to another person, is of direct and individual concern to the applicant. This means that Community citizens cannot bring actions for the annulment of regulations and directives.

Otherwise there are no differences as regards the causes of action and effects of the judgment compared with actions for annulment brought by Member States or Community institutions.

(bb) *Actions brought by Community citizens*

The right of inviduals to bring an action is provided for in the second paragraph of Article 175 of the EEC Treaty and the second paragraph of Article 148 of the Euratom Treaty.

In this case also, the *preliminary procedure* must be carried out. The *subject matter* of an action for failure to act brought by an individual is, according to the third paragraph of Article 175 of the EEC Treaty and the third paragraph of Article 148 of the Euratom Treaty, limited to an application for a declaration that a Community institution has failed, in violation of the Treaty, to address an act to the complainant. In addition, therefore, to opinions and recommendations, which are expressly excluded, directives and regulations are also ruled out, since directives may be addressed only to Member States and regulations apply to an indeterminate number of individual cases. Hence the only eligible act is a decision addressed to the complainant.

With a regard to the *effect* of the judgment, the same remarks may be made as in the case of an action for failure to act brought by Member States and Community institutions.

(cc) *Special features of the ECSC Treaty*

The only special feature of the ECSC Treaty compared with the two other Treaties is the fact that, under the ECSC Treaty, the action for failure to act is an action for the annulment of the Commission's decision not to adopt the act in question (Art. 35). Consequently, the details regarding the 'action for failure to act' provided for in the ECSC Treaty are the same as for the action for annulment dealt with above.

(c) **Action for infringement of the Treaties**

An action for infringement of the Treaties is designed to establish that Member States have failed to fulfil obligations placed on them by Community law. This action provides the Commission with an effective means of fulfilling its function as 'guardian of the Treaties'.

(aa) *EEC and Euratom Treaties (Arts 169-171, EEC; Arts 141-143, Euratom)*

Only the Commission and the Member States are entitled to bring an action for an infringement of the Treaties.

Before the matter can be brought before the Court, however, a *preliminary* procedure must be carried out. In the case of an *action brought by the Commission,* the latter must first address itself to the Member State accused of having infringed the Treaty so that it may answer the accusation. This procedure has proved to be very useful in practice. It helps to shed light on the facts, which are frequently very complex, and hence to avoid unnecessary legal proceedings. Only if the Commission is still convinced that the Treaty

has been infringed does it deliver a reasoned *opinion* calling upon the State concerned to remove the cause of the infringement within a certain period. If the Member State does not comply with this opinion, the Commission may bring the matter before the Court of Justice with a request that the latter find that the Member State has failed to fulfil an obligation under the Treaty.

In the event of *an action being brought by one Member State against another Member State* on the ground of an infringement of the Treaties, the Commission must likewise first consider the matter. The procedure is that the Member State notifies the Commission of its intention to bring an action and of the grounds which, in its opinion, constitute an infringement of the Treaty, whereupon the Commission initiates the same procedure as it does prior to one of its own actions against a Member State. In particular, it must deliver a reasoned opinion in this case also. Only where this does not take place within a period of three months may the Member State bring an action against the other Member State in the absence of a reasoned opinion of the Commission.

The *subject matter* of the action for an infringement of the Treaties is the application by the Commission or the Member State for a finding that the Member State has failed to fulfil 'an obligation under this Treaty'.
Obligations under the Treaty are not only obligations stemming from primary Community legislation but also those which are imposed on Member States by secondary Community legislation.

Member States often seek to justify themselves by claiming that the Community or Member States have, for their part, infringed the Treaties, or refer to domestic political or legal difficulties. The Court of Justice has always rejected such arguments and rigidly upheld the rules and procedures embodied in Community law.

If the Court upholds the application by the Commission or the Member State and finds that the Treaty has been infringed, the State concerned has to take the measures necessary to comply with the Court's judgment (Art. 171, EEC; Art. 143, Euratom). The judgment itself can, on the other hand, neither formally oblige the Member State to rectify the unlawful state of affairs nor itself undertake to abolish the measure complained of. Even penalties cannot be imposed in such circumstances. Past experience has shown that, as a rule, Member States take the measures necessary to remedy the infringement, although owing to political or technical difficulties — e.g. where special legislation has to be passed — this often takes some time. An exception was the recent case between France and the United Kingdom involving French measures restricting imports of British mutton and lamb, which France deliberately maintained even after the Court had delivered its judgment.

(bb) *The ECSC Treaty (Art. 88, ECSC)*

In contrast to the rules contained in the other Community Treaties, the first paragraph of Article 88 of the ECSC Treaty provides that infringements of the Treaty are established *directly by the Commission* after the Member State concerned has been given an

opportunity to submit its comments. The Member State may then appeal against the Commission's decision to the Court of Justice.

A further difference is that penalties may be imposed, payments due to the Member State in question suspended and protective measures taken (see Art. 88, third paragraph, subparagraphs (a) and (b) of the ECSC Treaty).

(d) **Preliminary ruling procedure (Art. 177, EEC; Art. 150, Euratom; Art. 41, ECSC)**

This procedure is intended to ensure uniform application of Community law by national courts. Although the application of Community law in individual cases is a matter for national courts, the interpretation and examination of the validity of Community laws are the preserve of the Court of Justice.

(aa) *Reference via the national courts*

The national court hearing the action is alone empowered to make a reference to the Court of Justice. Neither litigants nor other parties to the proceedings may themselves request the Court to give a preliminary ruling.

Under the EEC and Euratom Treaties, it is in principle *left to the discretion* of the courts whether or not to make a reference. An *obligation* to make a reference is imposed only on those courts against whose decisions there is no judicial remedy under national law (Art. 177, third paragraph, EEC; Art. 150, third paragraph, Euratom). Under Article 41 of the ECSC Treaty, on the other hand, there are no exceptions to the obligation to make a reference.

Pursuant to the second paragraph of Article 177 of the EEC Treaty and the second paragraph of Article 150 of the Euratom Treaty, national courts may raise, as the subject matter of a reference, the question whether a *provision of secondary Community legislation* which it has to apply is *valid,* and/or how such secondary Community legislation *and* the Community Treaties should be interpreted. Under Article 41 of the ECSC Treaty, however, only an examination of the *validity of acts of the Council and of the Commission* is admissible. The validity of provisions of the Community Treaties may under no circumstances be examined in preliminary ruling procedures.

(bb) *Relevance of the decision*

A further precondition for the reference is that the question to the Court must be relevant to the proceedings pending before the national court (see Art. 177, second paragraph, of the EEC Treaty and Art. 150, second paragraph, of the Euratom Treaty). This is a matter for the national court to decide and needs no further substantiation. Since the relevance of the question to the decision is a matter for the national legal system, the Court of Justice is not empowered to examine the grounds for the reference or their appropriateness.

(cc) *Effects of the preliminary ruling*

The judgment given by the Court of Justice under the preliminary ruling procedure is binding, as regards the validity or the interpretation of the provisions of Community law at issue, only on the national courts which have to reach a decision in the national proceedings in question. In addition, however, such a judgment has far-reaching *practical implications*. Thus it is, for example, hardly conceivable that an authority acting in conformity with its duty will still apply a provision of Community law despite the fact that it has been declared invalid by the Court of Justice.

(e) **Liability for damage**

(aa) *EEC and Euratom Treaties (Art. 215, EEC; Art. 188, Euratom)*

The *non-contractual liability* of the Community and its servants is dealt with in the second paragraph of Article 215 of the EEC Treaty and the second paragraph of Article 188 of the Euratom Treaty in a rather fragmentary manner. As a precondition for liability, these provisions mention only the causing of damage by institutions or servants of the Community in the perfomance of their duties. The legal consequence specified is compensation by the Community for any damage. Beyond this, the Court of Justice is required to develop the further principles of liability from the general principles common to the laws of the Member States.

According to the case-law of the Court, liability for damage is subject to the following conditions:

— unlawful action of an institution or servant of the Community in the performance of a duty;
— damage caused thereby;
— existence of a causal link between the damage alleged and the conduct of which the institution is accused.

Since 1971, the Court has also recognized in a series of judgments liability for damage caused by legislative measures, subject, however, to the strict condition that the measures must result in a 'sufficiently flagrant infringement of a superior rule of law for the protection of the individual'. This means that actions for damages based on legislative measures of the Community rarely succeed.

(bb) *ECSC Treaty (Art. 40)*

According to the present version of the ECSC Treaty, the Community is liable for 'a wrongful act or omission on the part of the Community' (first paragraph) and for 'a personal wrong by a servant of the Community in the performance of his duties' (second paragraph). In both cases, the Court of Justice has jurisdiction to order the Community to pay the injured party pecuniary compensation.

Table of cases

— 36/75 — Rutili (1975) ECR 1219-1244
(Equal treatment; reference to the ECHR)
— 175/73 — Amalgamated European Public Service Union (1974) ECR 917-925
(Freedom of association)
— 130/75 — Prais (1976) ECR 1589-1599
(Freedom to manifest one's religion or beliefs)
— 117/76 — Quellmehl (1977) ECR 1753, 1770 *et seq.*
(Principle of equality)
— 48/75 — Royer (1976) ECR 497
(Freedom of movement; right of residence; safeguard of public policy, public security and public health)
— 8/77 — Sagulo (1977) ECR 1495
(Freedom of movement; right of entry and residence; right directly conferred by Community law)
— 166/73, 146/73 — Rheinmühlen I,II (1974) ECR 33-48 and 139-150
(National courts bound by rulings of superior courts)

Further reading

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On sale :

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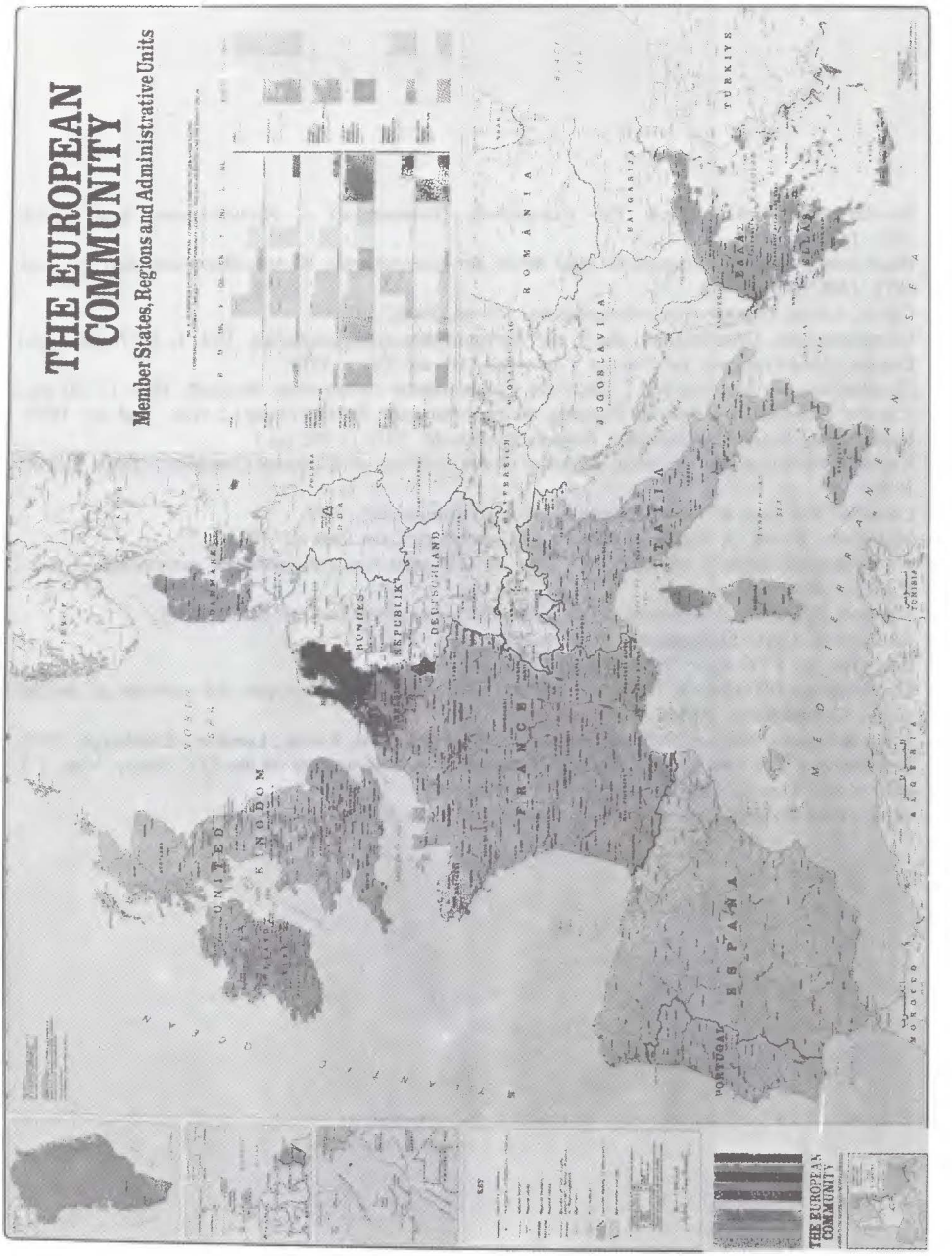

To mark the second enlargement of the European Community with the accession of Greece on 1 January 1981 a new map has been published. It shows the new Community with its ten member countries (Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, The Netherlands and the United Kingdom) and two applicant countries (Spain and Portugal).

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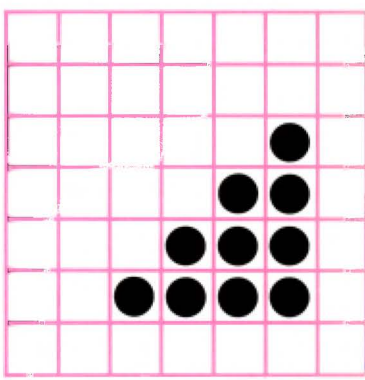

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