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## Symposium on the European Economic Community—An Introduction

*Dennis Thompson\**

The editors of the *Northwestern Journal of International Law & Business* are to be congratulated for commemorating the 25th anniversary of the founding of the European Economic Community with this issue. This issue brings together many distinguished experts to deal with the very diverse legal consequences of the Rome Treaty. From these contributions it will be seen that the new legal order in Europe has taken firm root.

Marc-Hubert Battaille examines proposals from the European Commission for worker participation in corporate policy and Dominique Brault compares French refusal to supply standards with those of the Community.

Elizabeth Freeman considers the interpretation of the Convention on Jurisdiction and Enforcement of Judgments prescribed by the Treaty under Article 200. Donald Holley writes on patent licensing, a topic not immediately apparent as being subject to the Treaty but which the Court has dealt with to revolutionary effect.

Walter Kolvenbach writes on the evolving labor relations legislation, thus showing the growing extension of Community jurisdiction,

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while Valentine Korah turns her attention to one of the more controversial issues under Article 85, the invalidity of contracts.

Professor Kurt Lipstein applies the classical conflict of law rules to certain problems of the Treaty, while Professor E.-J. Mestmäcker turns to the uncharted area of the competition rules in the free trade agreements with the EFTA countries. A.H. Peulinckx and H.A. Tielemans survey the various rules of the Member States with regard to the termination of agency and distributor agreements.

Lord Mackenzie Stuart, a judge of the Court, writes with authority on its working, while Hans van Houtte considers the capacity of the Community to sign international treaties.

For those readers unfamiliar with the structural workings of the Community, Dr. Utz P. Toepke offers an historical and practical profile.

Professor VerLoren van Themaat, a former Director General with the Commission for Competition and currently an Advocate General at the Court, and L. W. Gormley deal with quantitative restrictions on imports and exports, and this author's former colleague, Jean-Francois Verstryngne examines the "perfume" cases, which were perhaps treated a little too discreetly by the Commission.

These articles are illuminating and necessary for those involved with the legal problems of doing business in the Community. The articles are also valuable for any attempt to understand the Community's mechanisms which are so different in form, though perhaps not in substance, from equivalent procedures in the United States.

Since the authors gathered for this commemorative issue deal specifically with several diverse legal aspects of the Community, it is appropriate to consider generally the overall health of the Community. How far has it travelled along the path envisioned by its founders and which direction will the Community take in the future?

Considering first the internal growth of the Community, it is significant that many important developments have occurred only recently. Progress has been made towards the establishment of the European Monetary System; the Community successfully enlarged itself by including Greece in 1979; and the European Parliament reached a new level with the direct election of its members in 1979. As a result of this newly-acquired legitimacy, the Parliament is able to speak with greater authority. The responsibility of the Parliament to approve the Community budget, representing the surrender of a measure of power by the Member States, adds to the Parliament's importance in the functioning of the Community. By its control over certain of the Commu-

nity's own resources, which may well be extended, the Parliament exercises an independent authority in its own sphere, thus strengthening the Community's "supranational" element.

Perhaps an even more significant development has been in the field of political co-operation. It has been customary, over the past several years, for the heads of state or government of the Member States to meet and discuss matters of common interest, not only those within the framework of the Rome Treaty, but concerns outside the Treaty as well. Such activity is now formally institutionalized within the European Council, in the belief that "the strengthening of the Communities, the extension of political co-operation and the prospect of further enlargement have made the reinforcing of existing structures *imperative*."<sup>1</sup> The European Council consists of the heads of state or government, accompanied by the President or Vice-President of the Commission, thus giving the Community co-ordinate status with the Member States. The Council meets three times a year, and last year, in addition to discussing internal matters, also discussed the situation in the Middle East, the Iranian hostage crisis, Lebanon's internal strife, the Soviet invasion of Afghanistan, East-West relations and the tensions in Poland. These discussions, in turn, led to further consideration of foreign affairs in the Council of Ministers, ultimately resulting in the members of the Community taking a more highly co-ordinated position as to external affairs. This has perhaps been the most successful aspect of the recent U.K. Chairmanship of the Council.

The Parliament has also shown itself to be uninhibited in its wide-ranging surveys of foreign affairs and foreign policy. These activities lend support to those who believe that there will be a "spillover" effect from the strict obligations of the Treaty into unscheduled but necessary areas where common policies are required.

Another outstanding feature of the Community is its impact on the rest of the world. Not only is the Community party to free trade agreements with the remaining European Free Trade Association countries in Europe, but it additionally has a number of preferential trading agreements with Mediterranean countries, as well as India, Pakistan and other Asian nations, including the People's Republic of China. The Community has a trading agreement with Canada, another with Spain and is party to a number of world-wide commodity agreements and agreements relating to specific matters such as textiles, fibers and steel. Beyond these is the Second Lomé Convention, between the

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<sup>1</sup> E. NOEL, WORKING TOGETHER—THE INSTITUTIONS OF THE EUROPEAN COMMUNITY 34 (1979) (emphasis added).

Community and some sixty African, Caribbean and Pacific States (which include many of the world's least developed areas), providing for aid, trade and technical assistance to these countries.

Not the least important of the Community's external relations are those with the United States. The Community and the United States form two great pillars among the free market economy countries. Each is the other's best trading partner, with 24 per cent of U.S. exports going to the Community, and 16 per cent of the U.S. imports coming from the Community (second only to 19 per cent from Canada). The United States is the Community's best customer for exports (16 per cent) and the largest supplier of the Community's imports (13 per cent). They are also each other's best partner as far as direct investments are concerned.<sup>2</sup>

The number of long-term bilateral agreements between the Community and the United States are few, namely for the supply of nuclear fuels (1958), co-operation in the peaceful use of atomic energy (1959), an exchange of letters on co-operation in environmental matters (1974) and an agreement made in 1977 relating to fishing in U.S. coastal waters.

The main significance of the relationship, however, lies in the mutual support both provide in the wider trading and commercial agreements made with the General Agreement on Tariffs and Trade (GATT), the Organization for Economic Cooperation and Development (OECD) and other international organizations. The joint efforts of the Community and the United States led to the successful conclusion of the Tokyo Round, with its related agreements covering a number of nontariff issues. Although commercial differences have arisen from time to time over such issues as chickens, cheese, steel and Japanese automobiles (and perhaps soybeans in the future), these are minor irritations compared with the major interest that both the EEC and the U.S. have in maintaining the stability of world trade. The Community's common agricultural policy is not favored by the United States. It will no doubt be the focus of criticism from west of the Atlantic, but it is unlikely to lead to a serious confrontation.

As President Carter said in Brussels in 1978, his visit symbolized "America's abiding commitment to a strong and united Europe, and to the European Community." This policy is reflected in the number of unofficial contacts between members of the European Commission and the U.S. Administration, together with meetings between members of

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<sup>2</sup> EUROPE INFORMATION EXTERNAL RELATIONS—THE EUROPEAN COMMUNITY AND THE UNITED STATES (1980).

the European Parliament and U.S. Congressmen, as well as the meetings of the heads of state from the United States, Canada, Japan and Community countries. The common interest extends beyond purely economic relations to the maintenance of the NATO alliance for the defense of the United States and Europe.

Given how far the Community has now come, it is important to inquire where it was intended to go. The aim has frequently been expressed in terms of "European integration", "European union", or "European unity". Exactly what these concepts specifically imply has never been made clear. In 1946, Sir Winston Churchill spoke in Zurich of "a kind of United States of Europe". The resourceful Jean Monnet declared "*Nous ne coalisons pas des Etats, nous unissons des hommes.*" In seeking a union of peoples rather than states, it was clear when Monnet founded his Action Committee for the United States of Europe that his objective, shared by other visionary Europeans, was for a full European Federation. The main inspiration was the United States, a federation, which in the words long ago of Justice Samuel P. Chase, would lead to the creation of "an indestructable Union composed of indestructable States".

With a federation or union as the aim, the far more difficult question was how this could be created from a number of fully sovereign States by peaceful means. The strategy adopted was to launch the pilot project which became the European Coal and Steel Community, whereby certain very limited powers were taken out of the hands of the national governments and entrusted to the High Authority, a European executive, which would order the enforcement of its measures by the Member States even if the latter did not consent to them.

This system showed promise, and gave new hope to an extension of the European idea. The more ambitious proposals for a European Defense Community and a European Political Community were rejected in the 1950's, however, and a more circumspect approach became necessary. Encouraged by the results of the Coal and Steel Community, the leaders of the six founding States decided to go ahead with plans for including the rest of their economies in a scheme for European unification. At the Messina conference in 1955 the six governments called for a fresh advance towards "the building of Europe," and they expressed their aim in a declaration as follows:

They consider that it is necessary to work for the establishment of a united Europe by the development of common institutions, the progressive fusion of national economies, the creation of a common market and the progressive harmonization of their social policies.

When it came to drafting the Treaty of Rome, the first paragraph of the

Preamble declared that the Member States were “[d]etermined to lay the foundations of an ever closer union among the peoples of Europe.”

These thorough-going Europeans never intended that the Treaty be an end in itself. They based their thinking on the conviction that if only a loose confederation acting through the Member States could once be created, it would inevitably develop (given the modern needs of government) into a full and effective federation, whereby the central institutions would have powers they could exercise independently of the Member States.

For those who saw the Treaty as the cornerstone of an eventual European Union, precedents were found in the historic developments of the United States, the German Reich and the Swiss Confederation. In the United States, the first independent constitution was enshrined in the Articles of Confederation of 1777. This was soon found insufficient, lasting only ten years before the Federal Constitution was introduced. In the same way, the *Zollverein* of 1818 started as a customs union between the German States under the auspices of Prussia (to the exclusion of Austria), and succeeded in bringing all the members within its net over the course of the following thirty years. In Switzerland, too, the confederation which was formed by the Perpetual League of the Cantons of Uri, Schwyz and Unterwalden in 1291 continued until 1848 when it was transformed into a federal type of constitution, although substantial powers were left in the hands of the Swiss Cantons.

The formulation of the Rome Treaty was a masterpiece of political strategy. The European Commission was given the power of presenting proposals to the Council of Ministers, but the over-riding power that had been given to the High Authority was not repeated. Decisions would be taken by the Council of Ministers, which had the duty to take certain decisions by a qualified majority vote. The Court of Justice was made the sole interpreter of the provisions of the Treaty, and the Parliament (not then directly elected) was given powers to review proposed legislation, examine the budget and, if necessary, to dismiss the members of the Commission *en bloc*. This arrangement left the Council in the dominant position, although there were some provisions giving the other institutions powers of a quasi-federal nature.

The initial results were less than some had hoped, due, in part, to those, such as France's General de Gaulle, who wished to establish a *Europe des patries* consisting simply of an association of States—each free to exercise full sovereign rights. The Commission was treated with less than full respect, and its right to make proposals to the Council was

largely ignored. Instead, the Council increased its secretariat and set itself up as a rival to the Commission in the formulation of policy. By the "Luxembourg Agreement" the principle of unanimity in the Council was established whenever an "essential interest" of a Member State was at stake, and, in fact, unanimity became the general rule. Of the Community's institutions, only the Court of Justice enhanced its reputation, establishing by a series of remarkably sure-footed judgments the pre-eminent position of the Treaty over national law. In this, the Court was greatly assisted by the rule that the Court gives only a single judgment. The rule provided the judges with the mantle of unanimity and ensured that, even if some doubts were reflected in the more Delphic paragraphs of the decision, there could be no outside dissemination of dissenting judgments.

The Community system proved rigid enough to withstand the strains of nationalism and managed to survive, albeit in a somewhat lower key than was originally intended. The situation had relaxed somewhat by 1973 when the Community added three members—Denmark, Ireland and the United Kingdom. Other problems emerged on the world horizon in the seventies, however, with the increased price of oil, recession, unemployment and inflation. These pressures led to a tendency towards protectionism, with the Member States reluctant to indulge in further European advances. Although it was agreed in 1974 that unanimity should not always be required in the Council of Ministers, the Council nevertheless remains deeply attached to unanimous agreement. This, in practice, is to give Member States a right of veto. Thus, the Council, the Committee of Permanent Representatives (COREPER) and the other Council committees are often engaged in laborious and time-consuming attempts to secure unanimous agreement, based more on assembling a package accommodating the various national interests of the Member States than finding a solution which is in the interest of Europe as a whole. In spite of this obstacle the Council has weathered many controversial storms, including the recent questions of the United Kingdom's financial contribution, mutton and lamb production, fishery rights and other sensitive political issues.

Thus far, the Commission has not recovered its intended prestige. This may be its own doing, since the Commissioners have generally not acted as a collegiate body constituting a European "cabinet". Focusing on the administration of their particular portfolios, they have not concentrated on the formulation of a common position among themselves.

Examining the Community's status and position today, some of the more enthusiastic politicians have been disappointed. Signor

Emilio Colombo, the Italian Foreign Minister, speaking on behalf of his people, said recently:

We realise we have already achieved a great deal, and not without difficulty. We are not however satisfied . . . because we believe that Europe has lost its drive, and lost the ideals for which it was brought into being, and has today become a fount of fragile compromise, slow to be reached and not always fair to all.<sup>3</sup>

There are however reasons for taking a more optimistic view in the longer term. There is still a strong commitment to the concept of a European union. As recently as December 1978, the European Council appointed a committee of "Three Wise Men" to "consider the adaptation of the mechanisms and procedures of the Institutions which are necessary, on the basis of the Treaties and their institutional systems, to assure the harmonious functioning of the Communities *and the progress towards European Union.*"<sup>4</sup>

The "Three Wise Men" reported<sup>5</sup> their view that the Council must function more efficiently, and recommended a greater use of majority voting, even in the committees. They urged that a special sense of responsibility and initiative be assumed by the presiding Member State in the Council. As for the Commission, the "Wise Men" advocated a collegiate-type cabinet, with the Parliament responsible for ensuring co-operation between the Commission and the Council. On the issue of European union, which they regarded as "not so much of a definite goal as of a direction of movement", the "Wise Men" emphasized the need for cohesion in the Community to preserve what has already been achieved as well as preserving the capacity to make necessary modifications (perhaps as to the common agricultural policy). Their report stressed the need for the Member States to act together in facing the rest of the world, particularly vis a vis energy resources, the international division of labour and the Community attitude toward the developing countries. Only by facing its difficulties together, the authors concluded, can the Community avoid degeneration into national rivalries. As a result, the Commission has been charged with making an annual report to the Council on the progress towards European union.

Whether progress will be made in this direction remains to be seen. It may well be that a period of consolidation is required for the present decade. If so, the essential elements will be respect for the rule of law, particularly on the part of the Member States, and strict obser-

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<sup>3</sup> London Times, Apr. 7, 1981.

<sup>4</sup> Emphasis added.

<sup>5</sup> B. BIESHEVAL, E. DELL & R. MARJOLIN, REPORT ON THE EUROPEAN INSTITUTIONS (1979).

vance of the Treaty provisions. Then, perhaps, the Member States may eventually find it to be in their individual and collective best interests to strengthen the scope and authority of the institutions of the European Community.

So that this directional choice—and the myriad more specific choices facing rule-makers, politicians, lawyers and businessmen—may be made with a clear understanding of the Community's legal structure, this symposium issue of the *Northwestern Journal of International Law & Business* is presented to commemorate the 25th anniversary of the signing of the Treaty of Rome.