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# The Court of Justice of the European Communities: The Scope of its Jurisdiction and the Evolution of its Case Law under the EEC Treaty

*Honorable Lord Alexander  
John Mackenzie Stuart\**

*The European Court of Justice, as the sole judicial institution of the European Communities, has evolved into a vigorous body asserting a strong cohesive influence upon the Member States through application of the principles asserted in the Communities' Treaties. In this article, Lord Mackenzie Stuart examines the jurisdiction of the Court in light of recent case law. In particular, Judge MacKenzie Stuart discusses doctrines of jurisdiction adopted by the Court and the application of these doctrines to recent developments involving free movement of goods and of persons within the Communities and other Treaty principles such as equal pay for men and women.*

## I. JURISDICTION OF THE COURT UNDER THE EEC TREATY

The Court of Justice first came into being in 1953 as the Court of Justice of the European Coal and Steel Community. The Court was at the time composed of six judges and two advocates general. In 1958, Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands established both the European Economic and the Atomic Energy Communities through the signing of the EEC and "Euratom" treaties, respectively. Those treaties expanded the Court's jurisdiction to encompass all three Communities. In 1973, Denmark, the Republic of Ireland, and the United Kingdom of Great Britain and Northern Ireland became Community members and were

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\* Judge on the European Court of Justice. The author would like to thank his Legal Secretary, Mr. Angus Mackay, for his kind assistance in the preparation of this article.

followed by Greece, who on January 1, 1981 became the tenth Member State of the European Economic Community.

At the present time, the Court consists of eleven judges, one from each Member State and an additional French judge, and is assisted by five Advocates General, one each from France, Germany, Italy, the Netherlands and the United Kingdom. Article 164 of the Treaty establishing the European Economic Community (the EEC Treaty) provides that "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."<sup>1</sup> The Treaty establishing the European Coal and Steel Community (the ECSC Treaty)<sup>2</sup> and the Treaty establishing the European Atomic Energy Community (the Euratom Treaty)<sup>3</sup> contain similar provisions. However, this article is confined to the EEC Treaty, since it is from this Treaty and from the regulations, decisions and directives issued pursuant to it, that the Court derives by far the greater part of its activities.

The scope of jurisdiction of the Court under the EEC Treaty is considerable. For example, apart from "actions" brought before it directly, and from references by national courts or tribunals for a preliminary ruling on the interpretation of a provision of Community law or on the validity of an act of a Community institution, the Court has jurisdiction under the Article 228 of the Treaty to give an opinion, at the request of the Council or minister of the European Commission or a Member State, as to whether an agreement envisaged is compatible with the provisions of the Treaty.<sup>4</sup> A recent instance of the exercise of this jurisdiction was an Opinion delivered, following a request from the Commission, as to whether the draft International Agreement on Natural Rubber which was the subject of negotiations in the United Nations Conference on Trade and Development (UNCTAD) was compatible with the Treaty, and more particularly, whether the Community was competent to conclude that agreement.<sup>5</sup> This function of giving advice to international institutions is, of course, a familiar one in classic international law.

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<sup>1</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered in force* Jan. 1, 1958) [hereinafter cited as EEC Treaty].

<sup>2</sup> Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (*entered in force* July 23, 1952) [hereinafter cited as ECSC Treaty].

<sup>3</sup> Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169 (*entered in force* Jan. 1, 1958) [hereinafter cited as Euratom Treaty].

<sup>4</sup> EEC Treaty, *supra* note 1, at art. 228. An agreement found to be incompatible with the provisions of the EEC Treaty may enter into force only under the conditions laid down in Article 236 of the EEC Treaty. *Id.*

<sup>5</sup> Re The Draft International Agreement on Natural Rubber (opinion 1/78), 22 O.J. EUR. COMM. (No. C 279) 3 (1979), [1979] E. Comm. Ct. J. Rep. 2871, [1979] 3 Comm. Mkt. L.R. 639.

Proceedings before the Court are for ease of reference, usually divided into "direct" actions, on the one hand and references for a preliminary ruling made by national courts and tribunals, on the other. However, within these areas, the nature and extent of the Court's jurisdiction varies in many ways.

There are several Treaty provisions which confer jurisdiction upon the Court in many types of "direct" actions. Thus, in the event of disputes between Member States or Community institutions, the Court acts as a kind of international arbitration body although the law which is applied is by its nature common to the systems of the parties rather than wholly designed to regulate their relations *inter se*. For example, under Article 170, a Member State which considers that another Member State has failed to fulfill an obligation under the Treaty may bring the matter before the Court.<sup>6</sup> Such cases are very rare, but a recent one, which did result in a decision of the Court, was an action brought by the French Republic against the United Kingdom for a declaration that by bringing into force an Order prohibiting the use of certain small-mesh fishing nets within British fishing limits, the United Kingdom had failed to fulfill its obligations under the EEC Treaty.<sup>7</sup> After hearing the case, the Court made a declaration in the terms sought by the French Government.<sup>8</sup>

More frequently, in direct actions, the Court hears cases brought by Member States, the Council or Commission under Article 173,<sup>9</sup> contesting the legality of regulations, decisions or directives of the Council or the Commission.

Article 173, in its second paragraph, states that any natural or legal persons may institute proceedings against a decision addressed to them "or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern" to them.<sup>10</sup> Thus, the right of action for private persons to contest a Community act is defined very narrowly. Such persons, other than those to whom a decision of a Community institution is specifically

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<sup>6</sup> EEC Treaty, *supra* note 1, at art. 170. A Member State, however, must refer the matter to the Commission prior to instituting a proceeding against another Member State relating to an alleged infringement of the Treaty's obligations. *Id.*

<sup>7</sup> French Republic v. United Kingdom of Great Britain and Northern Ireland, [1979] E. Comm. Ct. J. Rep. 2923, [1980] 1 Comm. Mkt. L. R. 6.

<sup>8</sup> The Court in *French Republic v. United Kingdom of Great Britain and Northern Ireland* declared that, by bringing into force the fishing nets order of 1977, the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations under the EEC Treaty. *Id.* at 2943, [1980] 1 Comm. Mkt. L.R. at 24.

<sup>9</sup> EEC Treaty, *supra* note 1, at art. 173.

<sup>10</sup> *Id.*

addressed, find this requirement to be a formidable obstacle if they wish the Court to adjudicate the substance of an action for the annulment of a Community act. In order to comply with Article 173, a person must first persuade the Court that the act in question is a decision which, although taking the form of a regulation or a decision addressed to another person, is of direct and individual concern to them. Without citing from the copious case law on this point, suffice it to say that only in comparatively few cases have private persons overcome this initial hurdle regarding the "admissibility" of their action.

Article 173 is complemented by Article 175<sup>11</sup> which provides for actions, not against acts of the institutions, but rather against the institutions for failing to take action. The Article is in fact little used by the Council, Commission or the Member States. Private persons rarely attempt to bring an action against the Council or Commission for failing to address to them individually an act "other than a recommendation or opinion" because of the narrow wording of its third paragraph.<sup>12</sup>

Article 172<sup>13</sup> makes provision for appeals against penalties which are laid down by Community Regulations. For example, under Regulation 17/62 of the Council<sup>14</sup> which implements the antitrust legislation in the Common Market, the Commission may, among other things, impose fines and issue orders against undertakings which restrict competition in breach of the prohibitions delineated in Articles 85 and 86.<sup>15</sup> Against such penalties Article 172 provides an appeal of which the Court has unlimited jurisdiction, which means that the Court cannot only annul but can also alter the penalty imposed.<sup>16</sup>

The Court also has jurisdiction in actions for damages regarding the Community's contractual and non-contractual liability pursuant to Article 215<sup>17</sup> in conjunction with Article 178.<sup>18</sup> Contractual liability is

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<sup>11</sup> *Id.* at art. 175.

<sup>12</sup> The third paragraph of Article 175 provides that "[a]ny natural or legal person may submit to the Court of Justice . . . a complaint to the effect that one of the institutions of the Community has failed to address to him an act other than a recommendation or an opinion." *Id.*

<sup>13</sup> EEC Treaty, *supra* note 1, at art. 172.

<sup>14</sup> Regulation 17/62, J.O. COMM. EUR. 204 (1962), O.J. EUR. COMM. 87 (Spec. Ed. 1959-62).

<sup>15</sup> Article 85, for example, prohibits agreements "likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. . . ." EEC Treaty, *supra* note 1, at art. 85. Article 86, on the other hand, prohibits "action by one or more enterprises to take advantage of a dominant position within the Common Market" to the extent to which trade between Member States will be affected. *Id.* at art. 86.

<sup>16</sup> EEC Treaty, *supra* note 1, at art. 172.

<sup>17</sup> *Id.* at art. 215.

<sup>18</sup> Article 178 provides that "[t]he Court of Justice shall be competent to hear cases relating to compensation for damages as provided for in Article 215, second paragraph." *Id.* at art. 178.

governed by the law applicable to the contract in question<sup>19</sup> and, therefore, disputes relating to that liability fall within the jurisdiction of the national courts. Thus, unless the Court is designated as the competent body by an arbitration clause in the contract, the Court of Justice will not consider such cases.

The non-contractual liability of the Community poses more difficult problems. The second paragraph of Article 215 provides that the Community shall "in accordance with the general principles common to the laws of Member States make reparation for any damage caused by its institutions or by its employees in the performance of their duties."<sup>20</sup>

In this connection, it is of particular interest that the Court determined that Community liability may be established by acts of a normative character, i.e. by a regulation. If a regulation constitutes a grave violation of a superior rule of Community law (for example, the principle of non-discrimination between producers of like products) which is designed to protect interests affected by that regulation, then compensation may be provided for any damage which results from the application of invalid legislation. Such actions, however, have rarely met with success.<sup>21</sup> In practice, however, this ostensibly liberal view has given little satisfaction to private litigants seeking damages on grounds of the non-contractual liability of a Community institution. The Court has often been at pains to point out that a finding that a legislative measure, such as a regulation, is null and void is insufficient by itself to create non-contractual liability for damage caused to individuals. According to the Court, the Community should not be held liable for legislative measures which involve choices of economic policy unless there has been sufficiently serious breach of a superior rule of law. The Court has taken into consideration the principles of the legal systems of the Member States governing the liability of public authorities for damages caused to individuals by legislative measures and concluded

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<sup>19</sup> *Id.* at art. 215, first para.

<sup>20</sup> *Id.*, second para.

<sup>21</sup> In *Compagnie Continentale v. Council*, [1975] E. Comm. Ct. J. Rep. 117, [1975] 1 Comm. Mkt. L.R. 578, for example, an exporter of French cereals sought compensation from the Council of the European Communities. The exporter's claim was based upon the fact that the Council, by regulation, had changed the value of the compensatory amounts payable in trade without safeguarding the position of traders who had relied on the Council's earlier stated values. The Court found the applicant to be a prudent exporter fully informed of the conditions of the market. As a result, the Court held that "the damage alleged (had) not been caused by the conduct of the Council." *Id.* at 136, [1975] 1 Comm. Mkt. L.R. at 606. See also *Comptoir National Technique Agricole (CNTA) v. Commission*, [1975] E. Comm. Ct. J. Rep. 533, [1977] 1 Comm. Mkt. L.R. 171.

that only under exceptional circumstances will public authorities incur liability for legislative measures involving economic policy. This restrictive view is supported by policy considerations because legislative authorities, even when the validity of its measures is subject to judicial review, should not be hindered in making economic decisions by the prospect of applications for damages whenever it adopts legislative measures for the public which may adversely affect an individual's interest.

In the leading case of *Bayerische HNL Vermerhrungsbetriebe GmbH & Co. KG and Others v. Council and Commission*,<sup>22</sup> the Court concluded that individuals may be required, in sectors coming within the Community's economic policy, to accept within reasonable limits certain harmful effects on their economic interests resulting from legislative measure without being able to obtain compensation from public funds even if the measure has been declared null and void.<sup>23</sup> The Court went on to hold in the HNL case that in the legislative field the Community does not incur liability unless the institution manifestly and gravely disregarded limits on the exercise of its power.<sup>24</sup>

Thus, the application of such a rigorous precondition to the establishment of non-contractual liability in cases of invalid legislative measures involving economic policy in effect means that the economic operators of the Community will rarely succeed in recovering damages for a "legislative wrong" under the second paragraph of Article 215 of the Treaty.<sup>25</sup>

Article 179<sup>26</sup> of the Treaty also gives the Court what is in effect an administrative jurisdiction in disputes between Community institutions and their servants. These disputes are numerous and occupy an undue proportion of the Court's time, even though they are always heard by a Chamber (consisting of three judges) of the Court. However, it is conceivable that in the future an administrative tribunal of first instance will hear these cases and the Court of Justice will hear only an appeal on a point of law.

Under Article 169 the Commission may bring an action against a

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<sup>22</sup> [1978] E. Comm. Ct. J. Rep. 1209, [1978] 3 Comm. Mkt. L.R. 566.

<sup>23</sup> *Id.* at 1224, [1978] 3 Comm. Mkt. L.R. at 592.

<sup>24</sup> *Id.* In the HNL case, one of the chief features of the institution was the need for a great deal of discretion in order to implement a Common Agricultural Policy. Thus, the Court's holding allows the institutions to implement this policy free from liability within reasonable bounds.

<sup>25</sup> EEC Treaty, *supra* note 1, at art. 215.

<sup>26</sup> *Id.* at art. 179. Article 179 provides that "[t]he Court of Justice shall be competent to decide in any case between the Community and its employees, within the limits and under the conditions laid down by the relevant statute of service of conditions of employment." *Id.*

Member State if it "considers that a Member State has failed to fulfill an obligation under this Treaty."<sup>27</sup> The Commission must first deliver a reasoned opinion regarding the Member State concerned to fulfill its obligation within a certain period. If the State concerned does not comply with the Commission's opinion within the specified period, then the Commission may bring the matter before the Court. If the Court finds that the Member State has failed to fulfill a Treaty obligation then, according to Article 171, "such State shall take the measures required for the implementation of the judgment of the Court."<sup>28</sup>

In only one case, *Commission v. French Republic*, has there been what appeared to be a refusal by a Member State to comply with the Court's judgment that it was in breach of a Treaty obligation.<sup>29</sup> In its judgment of September 25, 1979, the Court declared that the French Republic by continuing to apply after January 1, 1978 its restrictive national system to the importation of mutton and lamb from the United Kingdom, had failed to fulfill its obligations under Articles 12 and 30 of the EEC Treaty.<sup>30</sup> Certain declarations in the French press gave the impression that the Court's judgment would not be complied with until the Community introduced a common organization of the market in mutton and lamb. Early in 1980, the Commission brought two actions before the Court for declarations that the French Republic, by neglecting to take the necessary steps to comply with the above-mentioned judgment, had failed to fulfill its obligations under Article 171 of the Treaty. In its defense, however, the French Republic argued *inter alia* that Article 171 implies that Member States are allowed a "reasonable period of time" for complying with judgments of the Court and that in the present circumstances that period had not expired. The problem, however, was solved at a political level with the introduction of a common organization of the market in sheepmeat. Furthermore, the additional cases brought by the Commission were withdrawn.

The most important aspect of the Court's jurisdiction is comprised of references by national courts and tribunals for preliminary rulings pursuant to Article 177 of the Treaty, which states:

The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of this Treaty;

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<sup>27</sup> EEC Treaty, *supra* note 1, at art. 169.

<sup>28</sup> *Id.* at art. 171. It is interesting to note that there have been more cases brought by Member States against the Community institutions than cases brought by the Commission against Member States.

<sup>29</sup> [1979] E. Comm. Ct. J. Rep. 2729, [1980] 1 Comm. Mkt. L.R. 418.

<sup>30</sup> *Id.* at 2740, [1980] 1 Comm. Mkt. L.R. at 433.



- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.<sup>31</sup>

It should be emphasized that the Court of Justice is not the only tribunal called upon to interpret and apply Community law. Since problems of Community law are often raised at first instance before national tribunals, the courts in the Member States also interpret Community law.

In order to ensure uniformity in the interpretation and application of Community law, Article 177 provides that the Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of "acts" (which effectively means regulations, decisions and directives) of the Community institutions. Article 177, thus, constitutes a vehicle for judicial co-operation between the Court of Justice and the national courts and tribunals for the purpose of ensuring, as far as possible, the uniform interpretation of Community law throughout the ten Member States.

The importance of Article 177 lies not only in the fact that it constitutes a mechanism for achieving the uniform interpretation of Community law within the limits of judicial cooperation, but also in the fact that the Court of Justice frequently decides points of law arising in disputes between private persons and between private persons and national authorities charged with the implementation of Community regulations.

It is interesting to note that, in the latter category of disputes in particular, it is frequently open to the private person to contest before his national court the validity of a Community regulation and to ask that court to refer the question of validity to the Court of Justice under Article 177. If the Court rules that the regulation in question is not valid, the plaintiff will have achieved indirectly what he probably could not have achieved by means of a direct action for annulment under Article 173<sup>32</sup> against the institution that issued the regulation. That

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<sup>31</sup> EEC Treaty, *supra* note 1, at art. 177.

<sup>32</sup> Article 173 of the EEC Treaty provides that:

lawyers in the Member States are becoming increasingly aware of this, is evidenced by the steadily growing number of references from national courts asking the Court of Justice for a preliminary ruling, not on the interpretation of a regulation, but on their validity.

Furthermore, the Court, as a result of cases brought before it under Article 177 has been able to expressly formulate two fundamental principles of Community law which have given a powerful impulse towards "European integration." First, the Court has developed the doctrine that provisions of the Treaty and of acts by the Community institutions can have *direct effect*, that is to say, they can create rights for private persons which that person can invoke before their national courts' and which those courts are bound to protect. Secondly, the Court developed a doctrine of the primacy of Community law over national law. In other words, a provision of Community law will prevail over a conflicting provision in the national law of the Member States.

The first doctrine regarding the direct effect of Community created rights was expressly stated in the Court's judgment in *van Gend & Loos v. Nederlandse Administratie der Belastingen*.<sup>33</sup> This case arose in the following way. Article 12 of the Treaty provides:

Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relation with each other.<sup>34</sup>

That Article took effect on January 1, 1958, the date on which the EEC Treaty entered into force. Subsequently, by a protocol<sup>35</sup> entered into at Brussels between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands on July 25, 1958, a new customs nomenclature was established. This protocol was ratified in the Netherlands by a law on December 16, 1959. On September 9, 1960, the plaintiffs in the Netherlands court, *van Gend & Loos*, im-

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[a]ny natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.

EEC Treaty, *supra* note 1, at art. 173.

<sup>33</sup> [1963] E. Comm. Ct. J. Rep. 1, [1963] Comm. Mkt. L.R. 105 (reference for preliminary ruling).

<sup>34</sup> EEC Treaty, *supra* note 1, at art. 12.

<sup>35</sup> Protocol between Belgium, Luxembourg and The Netherlands instituting a new schedule of import duties, July 25, 1958, 352 U.N.T.S. 3 (*entered into force* Mar. 1, 1960). These three countries had joined together in the Benelux union in 1948 which contained many aspects later reflected in the EEC such as a customs union and free movement of goods, capital and manpower. The protocol was designed to ensure a common customs nomenclature which did not exist for the community as a whole at that time.

ported from Germany a quantity of a substance which I need not detail here. On January 1, 1958, the product was classified under one customs heading and was charged with *ad valorem* import duty of 3%. In the customs list which was established on March 6, 1960, by reason of the December 16, 1959 law that heading was replaced by a new heading. Instead of applying a uniform duty for all the products falling within the old heading, a subdivision was created under the new one which contained the product in question and applied an import duty fixed at 8%. Van Gend & Loos objected to paying the increased rate of duty and appealed to the inspector of customs and excise. Their objection was dismissed by the inspector and they appealed to the Tariefcommissie Amsterdam on April 4, 1961. That tribunal referred the following question to the European Court for a preliminary ruling *inter alia*:

- (1) Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether . . . [nationals of such a State] can, [on the basis of the Article in question] lay claim to individual rights which the courts must protect.<sup>36</sup>

Apart from the plaintiff and the Commission of the European Communities, the Netherlands Government, the Belgium Government and the Government of the Federal Republic of Germany submitted observations to the Court. All three governments concluded that Article 12 of the Treaty did not constitute a legal provision directly applicable in Member States. In their view, it imposed an international obligation which must be implemented by national authorities endowed with legislative powers and the obligation laid down applied only as between the Member State concerned and other Member States. The plaintiff and the Commission argued in favor of direct applicability. The Court, however, held that Article 12 created individual rights which could be brought by an individual directly and furthermore which national courts are bound to protect.<sup>37</sup>

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<sup>36</sup> van Gend & Loos v. Nederlandse Administratie der Belastingen, [1963] E. Comm. Ct. J. Rep. at 3, [1963] Comm. Mkt. L. R. at 108.

<sup>37</sup> The Court in *van Gend & Loos*, in holding that Article 12 created individual rights, emphasized that:

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is 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. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer them rights which become part of their legal heritage. These rights arise not only where they are

The second doctrine developed by the Court involves rare cases in which direct conflicts arise between a provision of national law and a provision of Community law and gives rise to an issue in litigation before national courts. As Judge Pescatore stated:

as regards the *solution of such conflicts*, from the point of view of Community law the position is simple and clear-cut: Community law cannot fulfill its function if it is incapable of prevailing purely and simply, in case of conflict, over provisions of national law. In other words, for Community law primacy over national law is a genuinely "existential" requirement, and for this reason absolute and imperative, on which it cannot yield on pain of ceasing to be itself.<sup>38</sup>

The doctrine that Community law prevails over conflicting national law was clearly expressed in the Court's judgment in *Costa v. ENEL*.<sup>39</sup> This reference for a preliminary ruling arose out of a dispute before a Milan court on the compatibility of an Italian law which nationalized the production and distribution of electrical energy, with certain provisions of the Treaty. The Italian government intervened in the

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expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

. . . The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition the argument based on Articles 169 and 170 of the Treaty put forward by the three governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subjects to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

*Id.* at 12-13, [1963] Comm. Mkt. L.R. at 129-30.

<sup>38</sup> Pescatore, *Community Law and the National Judge*, [1973] LAW GUARDIAN No. 87.

<sup>39</sup> [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L.R. 425 (reference for preliminary ruling).

proceedings before the Court of Justice and argued that the reference was inadmissible because the sole function of the national judge was to apply domestic law. In reply to this objection, the Court defined the primacy of Community law in terms which have become classic. It said *inter alia*:

. . . 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 . . . .

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 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 transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently, Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.<sup>40</sup>

Subsequent Court decisions demonstrate that the doctrines of *direct effect* and of the primacy of Community law over a conflicting provision of national law constitute the keystones of the Court's "integrationalist" jurisprudence. The re-affirmation of these doctrines essentially occurs in the context of preliminary rulings by the Court on questions referred to it by national courts under Article 177.

It should be added that the Court has not established any requirements regarding the form of wording of the questions referred to it. Although the Court accepts preliminary referrals, it may find it necessary to make it clear that it only has the power to interpret the law or to pronounce on the validity of an act by a Community institution. The assessment of the facts and the evaluation of the scope of national provisions alleged to be incompatible with national laws are matters for the national court. In addition, the Court of Justice has refused to consider whether the questions referred to it are relevant to the issues in the case before the national court.

It should be said, however, that in a recent controversial judgment, *Foglia v. Novello*,<sup>41</sup> the Court ruled that it did not have jurisdiction to

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<sup>40</sup> *Id.* at 594, [1964] Comm. Mkt. L.R. at 455.

<sup>41</sup> [1980] E. Comm. Ct. J. Rep. 745, [1981] 1 Comm. Mkt. L.R. at 45.

give a preliminary ruling on certain questions referred to it by an Italian court regarding the compatibility of certain French fiscal legislation with Article 95 of the Treaty. It refused jurisdiction *inter alia* on the basis that in its view the dispute pending before the Italian court was not a genuine legal dispute, but an artificially contrived case, the object of which was to procure condemnation by the Court of Justice of French fiscal legislation as applied to certain Italian liqueur wines, pursuant to proceedings before an Italian court.<sup>42</sup>

## II. THE SCOPE OF THE CASE LAW OF THE COURT IN THE CONTEXT OF THE EEC TREATY

The broad goals of the Common Market are set forth in Article 2 of the Treaty. This Article states that it:

[s]hall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between its Member States.<sup>43</sup>

Article 3 provides that for the purposes set out in Article 2, the activities of the Community shall include, as provided in the Treaty, and in accordance with the timetable set out therein, certain *common policies*, among them belong:

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect;
- (b) the establishment of a common customs tariff and a common commercial policy towards third countries;
- (c) the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital; . . .
- (f) the establishment of a system ensuring that competition shall not be distorted in the Common Market;<sup>44</sup>

It is principally in these fields that contentious issues arise and come before the Court by way of direct actions or by way of questions referred by national courts or tribunals for a preliminary ruling.

From these areas I will endeavour to select certain aspects which are among the most important in the activities of the Court and particularly those aspects in which it is possible to trace a certain evolution in the case law of the Court since the Treaty came into being.

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<sup>42</sup> *Id.* at 759, [1981] 1 Comm. Mkt. L.R. at 57-59.

<sup>43</sup> EEC Treaty, *supra* note 1, at art. 2.

<sup>44</sup> *Id.* at art. 3.

*A. The Achievement of a Common Market Relating to Freedom of Trade and the Free Movement of Goods*

*1. Customs Duties and Charges Having Equivalent Effect*

Part Two of the Treaty is entitled "Foundations of the Community" and Title I of that Part is the "Free movement of goods". Within the provisions of that title, Article 9 provides:

[t]he Community shall be based upon a customs union covering the exchange of all goods and comprising both the prohibition as between Member States, of customs duties on importation and exportation and all charges with equivalent effect and the adoption of a common customs tariff in their relations with third countries.<sup>45</sup>

Article 12 requires Member States to "refrain from introducing, as between themselves, any new customs duties on importation and exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial selections with each other."<sup>46</sup>

Periodically Member States have sought to restrain imports, not by directly imposing a customs duty, but by levying a charge resulting in an equivalent effect. A leading case in this respect is the so-called "gingerbread" case, *Commission v. Grand Duchy of Luxembourg and Kingdom of Belgium*<sup>47</sup> in which the Court sets forth *in extenso* the reasons for the incompatibility of a duty on import licenses for the product at issue with the Treaty requirements.

According to the terms of Article 9, the Community is based on a customs union founded on the prohibition of customs duties and of 'all charges having equivalent effect'. By Article 12 it is prohibited to introduce any 'new customs duties on imports . . . or charges having equivalent effect' and to increase those already in force.

. . . a charge having equivalent effect within the meaning of Articles 9 and 12, whatever it is called and whatever its mode of application, may be regarded as a duty imposed unilaterally either at the time of importation or subsequently, and which, if imposed specifically upon a product imported from a Member State to the exclusion of a similar domestic product, has, by altering its price, the same effect upon the free movement of products as a customs duty.<sup>48</sup>

In subsequent cases, the Court has given a very wide definition to the concept of "a charge having equivalent effect to a customs duty". In *Cadsky v. Istituto Nazionale per il Commercio Estero*, the Court stated that:

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<sup>45</sup> *Id.* at art. 9.

<sup>46</sup> *Id.* at art. 12.

<sup>47</sup> [1962] E. Comm. Ct. J. Rep. 425, [1963] Comm. Mkt. L.R. 199 (joined cases 2 and 3/62).

<sup>48</sup> *Id.* at 432, [1963] Comm. Mkt. L.R. at 215-16.

[a]ny pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on domestic goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect . . . even if it is not imposed for the benefit of the State.<sup>49</sup>

## 2. *Discrimination in Taxation*

Member States frequently seek to protect their domestic production by imposing internal taxation on imported products in excess of that imposed on similar domestic products. Such practices are prohibited by the first paragraph of Article 95<sup>50</sup> of the Treaty, a provision which the Court held in 1966 as having direct effects so that a private person may invoke it before his national courts.<sup>51</sup>

It is often difficult to distinguish between a charge having the equivalent effect of a customs duty, which is incompatible with Articles 12 and 9, and a discriminatory internal tax which is incompatible with Article 95. However, the distinction is an important one. Charges which have an effect equivalent to a customs duty are *wholly* prohibited, while discriminatory internal taxes are prohibited only to the extent imposed on imported products.

Such discriminatory internal taxation takes a variety of forms, and the Court is frequently confronted with cases of considerable technical difficulty as well as of great economic importance. Three cases brought by the Commission against France, Italy and Denmark for infringements of Article 95 in the first of internal taxation of alcoholic beverages illustrate the complexity of discriminatory tax schemes. In *Commission v. French Republic* the Court invalidated a French fiscal

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<sup>49</sup> *Cadsky v. Istituto Nazionale per il Commercio Estero*, [1975] E. Comm. Ct. J. Rep. 281, 290, [1975] 2 Comm. Mkt. L.R. 246, 255 (case 63/74). See also *Commission v. Italian Republic*, [1968] E. Comm. Ct. J. Rep. 617, [1969] Comm. Mkt. L.R. 1 (where the Court found a charge levied on the issue of an authorization to export works of art as having an effect equivalent to a customs duty); *Commission v. Italian Republic*, [1969] E. Comm. Ct. J. Rep. 193, [1971] Comm. Mkt. L.R. 611 (where the Court found a statistical levy on imported goods as having an effect equivalent to a customs duty); *Marimex v. Italian Finance Administration*, [1972] E. Comm. Ct. J. Rep. 1309, [1973] Comm. Mkt. L.R. 486 (reference for preliminary ruling) (case 29/72) (where the Court found a levy for sanitary inspection at the frontier as having an effect equivalent to a customs duty); and *Variola v. Italian Finance Administration*, [1973] E. Comm. Ct. J. Rep. 981, [1975] COMM. MKT. REP. (CCH) ¶ 8226 (preliminary ruling) (case 34/73) (where the Court found an unloading charge as having an effect equivalent to a customs duty).

<sup>50</sup> EEC Treaty, *supra* note 1, at art. 95. The first paragraph of article 95 provides that "[a] Member State shall not impose, directly or indirectly, on the products of other Member States any internal charges of any kind in excess of those applied directly or indirectly to like domestic products." *Id.*

<sup>51</sup> *Lütticke v. Hauptzollamt Saarlouis*, [1966] E. Comm. Ct. J. Rep. 205, [1966] Comm. Mkt. L.R. 378 (reference for preliminary ruling).



measure which had the effect of favoring French products such as cognac, armagnac and calvados at the expense of imported liquors such as whiskey, gin and vodka.<sup>52</sup>

The Court held an Italian tax invalid in *Commission v. Italian Republic* because the tax discriminated against spirits produced from cured sugar cane which are mainly imported in favor of liquors distilled from wine which are typically Italian products.<sup>53</sup>

In *Commission v. Kingdom of Denmark*, a tax which favored aquavit (a liquor produced mainly in Denmark) at the expense of beverages having characteristics similar to aquavit was held to be discriminatory and therefore unenforceable. The Court in *Commission v. Kingdom of Denmark* adjudged that:

By the application of a discriminatory tax on spirits, as follows from Co-ordinated law No. 151 of April 4, 1978, the Kingdom of Denmark has failed, as regards products imported from other Member States, in its obligations under Article 95 of the EEC Treaty.<sup>54</sup>

### 3. *The Elimination of Quantitative Restrictions on Imports and Exports between Member States and Measures Having Equivalent Effect.*

It is obvious that customs duties and charges having the equivalent effect are not the sole obstacles to the free flow of trade between Member States. Trade can be impeded by a wide variety of "non-tariff" barriers, ranging from the imposition of quotas on imports and exports (i.e. quantitative restrictions) to laws, regulations or mere administrative formalities rendering importation and exportation more difficult or impossible. Thus, the Treaty prohibits in Articles 30<sup>55</sup> and 34<sup>56</sup> quanti-

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<sup>52</sup> [1980] E. Comm. Ct. J. Rep. 347, [1981] 2 Comm. Mkt. L.R. 631. The Court in *Commission v. French Republic* declared that:

By the application of discriminatory taxation of spirits as regards, first, geneva and other alcoholic beverages obtained from the distillation of cereals and secondly, spirits obtained from wine and fruit, under Articles 403 and 406 of the Code Général des Impôts, the French Republic has failed, as regards products imported from other Member States, to fulfill its obligations under Article 95 of the EEC Treaty.

*Id.* at 371, [1981] 2 Comm. Mkt. L.R. at 652.

<sup>53</sup> [1980] E. Comm. Ct. J. Rep. 385, [1981] 2 Comm. Mkt. L.R. 673. The Court in *Commission v. Italian Republic* held:

By the application of differential taxation on spirits in the form of tax banderoles affixed to receptacles containing spirits intended for retail, as provided for by the Italian tax legislation resulting from the provisions of Article 6 of Decree Law No. 745 of October 26, 1970, . . . as regards, first, spirits obtained by the distillation of cereals and sugar cane and secondly, spirits obtained from wine and marc, the Italian Republic has failed, as regards products imported from the other Member States, to fulfill its obligations under Article 95 of the EEC Treaty.

*Id.* at 397, [1981] 2 Comm. Mkt. L.R. at 685.

<sup>54</sup> [1980] E. Comm. Ct. J. Rep. 477, 490 [1981] 2 Comm. Mkt. L.R. 688, 703.

<sup>55</sup> Article 30 of the EEC Treaty provides that "[q]uantitative restrictions on importation and

tative restrictions on imports and exports respectively, as well as all measures having the equivalent effect between Member States.

In certain areas, however, where national sovereignty was not transferred to the Community, the Treaty had to make provisions which enabled Member States to regulate imports and exports so as to give effect to national policies. These reserved matters are dealt with in Article 36 which provides:

[T]he provisions of Articles 30 to 34 shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historic or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.<sup>57</sup>

Article 36 is of particular importance with regard to industrial and commercial property rights. The scheme of this article is to establish the principle that although the exercise of such rights may legitimately result in placing barriers in the way of the free movement of goods across frontiers, the exercise of those rights may not constitute a means of arbitrary discrimination or a disguised restriction between Member States.<sup>58</sup>

If the term "quantitative restriction" did not in itself raise enough difficult interpretation questions much more elusive is the concept of "measures having equivalent effect" which the Commission described in its first General Report<sup>59</sup> on the activities of the Communities, the latter concept as defined by the Commission appears to cover the totality of those laws, regulations and administrative measures and formalities which impede imports or exports, including those which make imports or exports more difficult or expensive. The Court has been called upon to consider this concept in relation to a wide diversity of matters.<sup>60</sup>

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all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States." EEC Treaty, *supra* note 1, at art. 30.

<sup>56</sup> *Id.* at art. 34. The first paragraph of article 34 provides that "[q]uantitative restrictions on exportation and any measures with equivalent effect shall hereby be prohibited as between Member States."

<sup>57</sup> EEC Treaty, *supra* note 1, at art. 36.

<sup>58</sup> This principle is itself an exception to the objective for the free movement of goods within the Community.

<sup>59</sup> [1967] COMM'N EUR. COMM. GEN'L REP. ON THE ACTIVITIES OF THE COMM. 41-42.

<sup>60</sup> Examples of matters in which the Court has considered the concept of "measures having equivalent effect" include designation of origin, *Commission v. Kingdom of Belgium*, [1979] E. C.

The Court in *Procureur du Roi v. B&G Dassonville*, defined measures equivalent to quantitative restrictions as being:

[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. . . .<sup>61</sup>

Obviously as with all broad formulations specific cases are bound to present problems. Other considerations such as the need to adequately protect designations of origin be kept in mind. In *Dassonville*, the question at issue was the right to sell in Belgium what was in fact genuine Scotch whisky, but which had been imported via France and, therefore, was not accompanied with a certificate of origin from the British Excise authorities which Belgian law requires.

The Court in *Dassonville* articulated the following test when considering proof of origin:

[i]n the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.<sup>62</sup>

The Commission was not satisfied that the system of certificates demanded by the Belgian government measured up to this test and therefore initiated proceedings under Article 169 against Belgium for failing to comply with Treaty obligations. The gravamen of the Commission's complaint was that if Belgium was prepared to accept bottles with appropriate labelling and fitted with the type of capsule which had to be destroyed in opening the bottle, all administrative difficulties for the importer would be eliminated and the authenticity of the product assured. However, the Belgian government would not accept this argument. The Belgian government asserted that under the Commission's

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Comm. Ct. J. Rep. 1761, [1980] 2 Comm. Mkt. L. Rep. 216; trademarks and patents, *EMI Records Limited v. CBS United Kingdom Limited*, [1976] E. Comm. Ct. J. Rep. 811, [1976] 2 Comm. Mkt. L. Rep. 235 (preliminary ruling); quality controls, *Procureur de la République, Besancon v. Bouhelier and Others*, [1979] E. Comm. Ct. J. Rep. 3151, [1980] 2 Comm. Mkt. L. Rep. 541 (preliminary ruling); pharmaceutical controls, *Officier van Justitie v. Kortmann*, [1981] E. Comm. Ct. J. Rep. 251 (preliminary ruling); sanitary and phytosanitary inspections, *Rewe-Zentralfinanz GmbH v. Landwirtschaftskammer*, [1975] E. Comm. Ct. J. Rep. 843, [1977] 1 Comm. Mkt. L. Rep. 599 (preliminary ruling); and, more recently, various forms of price control and price fixing by national authorities, *Pigs and Bacon Commission v. McCarren and Company, Limited*, [1979] E. Comm. Ct. J. Rep. 2161, [1979] 3 Comm. Mkt. L. Rep. 389 (preliminary ruling).

<sup>61</sup> [1974] E. Comm. Ct. J. Rep. 837, 852, [1974] 2 Comm. Mkt. L.R. 436, 453 (preliminary ruling).

<sup>62</sup> *Id.* at 853, [1974] 2 Comm. Mkt. L.R. at 454.

plan, it would still be too easy to falsify labels and capsules. The Court ultimately held that Belgium was not in breach of Article 30. Since certain changes had been made in the certificate procedure which effectively assured the authenticity of the product, while at the same time making parallel imports possible. Under these circumstances, the Court was not prepared to hold that the Belgian system was unreasonable.<sup>63</sup>

From the numerous decisions of the Court on the subject of measures having an effect equivalent to quantitative restrictions on imports and exports, I will refer to just three in order to illustrate the variety of national measures with which the Court must consider.

In *Commission v. Federal Republic of Germany*,<sup>64</sup> the Court granted the Commission's application for a declaration that the Federal Republic of Germany failed to fulfill its Treaty obligations because it reserved to German products the appellations "Sekt" and "Weinbrand". The effect of this limitation was that imported products satisfying the same legal obligations could not be marketed under these appellations, which are very popular in Germany. For the German consumer, these appellations denote a type and quality of beverage and do not constitute designations of origin. In this case, the Court ruled that:

By reserving these appellations to domestic production and by compelling the products of the other Member States to employ appellations that are unknown or less esteemed by the consumer, the legislation on vine products is calculated to favor the disposal of the domestic product on the German market to the detriment of the products of other Member States. Thus, this legislation on vine products involves measures having an effect equivalent to quantitative restrictions on imports. . . .<sup>65</sup>

In *Donckerwolcke v. Procureur de la Republique*, referred for a preliminary ruling by the Tribunal Correctionnel, Lille, the Court ruled that a Member State may require an importer to make a declaration concerning the origin of goods in order to avoid deflection of trade as prohibited under Article 115 of the Treaty. However, it cannot require him to declare something other than what he knows or may reasonably be expected to know.<sup>66</sup> Secondly, the Court held that the Member State's requirement must not impose a penalty disproportionate to its

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<sup>63</sup> *Commission v. Kingdom of Belgium*, [1979] E. Comm. Ct. J. Rep. 1761, [1980] 1 Comm. Mkt. L.R. 216.

<sup>64</sup> [1975] E. Comm. Ct. J. Rep. 181, [1975] 1 Comm. Mkt. L. R. 340.

<sup>65</sup> *Id.* at 198, [1975] 1 Comm. Mkt. L.R. at 364.

<sup>66</sup> [1976] E. Comm. Ct. J. Rep. 1921, 1941 [1977] 2 Comm. Mkt. L.R. 535, 554-555.

purely administrative character.<sup>67</sup> It is a fact, however, that many measures having an effect equivalent to a quantitative restriction, are merely administrative formalities which constitute to a greater or lesser degree, a constraint on trade.

The prohibition of measures equivalent to quantitative restrictions was recently considered in the context of national measures prescribing maximum or minimum selling prices for certain products. There often are important social reasons for imposing maximum or minimum selling prices. Minimum prices are generally imposed in order to prevent undercutting by large business to the detriment of small shopkeepers; maximum prices may be imposed in an effort to hold down the cost of living. At the same time, however, a minimum price fixed at a specific amount, although applicable without distinction to domestic and imported products, may have an adverse effect on the marketing of imported products. This adverse effect will occur when it is cheaper to produce the imported product, yet the minimum fixed price prevents the lower costs from being reflected in the retail selling price. The imposition of maximum prices, however, may result in a foreign product costing more to produce, and therefore being totally excluded from the market.

The Court recently considered national measures imposing minimum prices in the case of *Openbaar Ministerie of the Netherlands v. van Tiggele*.<sup>68</sup> In this case, Dutch legislation provided for a minimum retail selling price for certain types of gin. The Advocate General explained this system in the following manner:

It is both well known and accepted that widely-consumed products sold in a large self-service store are generally offered at lower prices than in businesses where customers are served individually by a shop assistant. Such lower prices are the result of economies in staffing costs brought about by the self-service system of marketing and generally through the discounts which large stores can obtain when purchasing goods since their orders are in bulk and usually greater than these of small-scale traders. Furthermore, the greater volume of sales permits large stores to restrict their profit margin per unit as compared with that required by small businesses. Thus, since the imposed price in question prevents unrestricted competition from lowering the price of alcoholic beverages to such a level that it would no longer be profitable for small-scale retailers, it constitutes a measure of support for the latter.<sup>69</sup>

The Court drew a distinction between the fixing of a minimum profit margin at a specific amount and the fixing of a specific minimum price.

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<sup>67</sup> *Id.*

<sup>68</sup> [1978] E. Comm. Ct. J. Rep. 25, [1978] 2 Comm. Mkt. L.R. 528 (preliminary ruling).

<sup>69</sup> *Id.* at 49, [1978] 2 Comm. Mkt. L.R. at 542.

Regarding the former case, the Court held that if it is applied without regard to whether the products are domestic or imported, it is incapable of producing an adverse effect on imported products which may be cheaper. The Court stated:

On the other hand this is not so in the case of a minimum price fixed at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price.<sup>70</sup>

There is in fact a copious body of case law relating to the conflict between national measures for price control and Community prohibitions on measures having the equivalent effect of quantitative restrictions. In particular, the Court is confronted with a conflict between a Community regulation setting up a common market organization for a certain agricultural product (which includes a common pricing system) and price control measures.<sup>71</sup>

Article 36,<sup>72</sup> has been the subject of many decisions by the Court of Justice and will no doubt continue to be regularly invoked since it provides the Member States with *prima facie* justification for imposing trade barriers which may in fact have been introduced for protectionist reasons. On the other hand, there are many situations in which Article 36 can legitimately be invoked. For example, in matters of sanitary control, where a Community scheme does not exist, a Member State may impose its own conditions when necessary to achieve objectives referred to in Article 36.<sup>73</sup>

One of the most delicate problems the Court must face is the resolution of the conflict between imperatives resulting from principles of the free movement of goods enshrined in the Treaty and exclusive rights, which are of a *territorial* character, and therefore derive from *national* legislation or industrial and commercial property rights. In considering whether the exercise of such a right is "justified" under Article 36, the Court attempts to ascertain what it calls the "specific subject-matter" of the protection accorded by the national law in question<sup>74</sup> and the "essential function" of the right at issue.<sup>75</sup> Even if the

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<sup>70</sup> *Id.* at 40, [1978] 2 Comm. Mkt. L.R. at 548.

<sup>71</sup> This complex field of law deserves in itself a lengthy dissertation and many useful and illuminating articles have been written on this difficult and important subject.

<sup>72</sup> EEC Treaty, *supra* note 1, at art. 36.

<sup>73</sup> See, e.g., *Tedeschi v. Denkavit Commerciale*, [1977] E. Comm. Ct. J. Rep. 1555, [1978] 1 Comm. Mkt. L.R. 1.

<sup>74</sup> For example, in the case of a trademark, the Court must ascertain whether the proprietor of a mark has the exclusive right under national law to use that mark to put the marked product into circulation. See *Terrapin (Overseas) Ltd. v. Terranova Industrie*, [1976] E. Comm. Ct. J. Rep.

Court finds that the rights in question are being exercised in conformity with the nature of the subject matter and function which they exist to protect, the Court may further consider whether their use in a context of anti-competitive practices should be categorized as "arbitrary discrimination" or as a "disguised restriction" within the meaning of the proviso to Article 36. Recently, the Court has been particularly scrupulous in attempting to ensure that the "core" of an industrial or commercial property right is not eroded.<sup>76</sup>

#### 4. *State Aids and State Monopolies*

Article 37<sup>77</sup> of the Treaty requires that State monopolies of a commercial character be progressively adjusted so that at the end of the transitional period there is no discrimination regarding the conditions under which goods are processed and marketed between nationals of Member States. This article is not the only Treaty provision to acknowledge the power of the individual states to affect commerce either internally or externally. Article 90<sup>78</sup> deals with problems which arise when public undertakings and specially granted undertakings are given exclusive rights. Article 92<sup>79</sup> accords deal with the question of State aids, mainly by prohibiting, with certain limited exceptions, the granting of State aids without the Commission's prior approval.

Cases involving Articles 90 and 92 have often been complicated by the existence of State monopolies. For example, in *Pigs Marketing Board (Northern Ireland) v. Redman*<sup>80</sup> and *Pigs and Bacon Commission v. McCarren and Company*,<sup>81</sup> the Court considered the compatibility of the State pig marketing systems of Northern Ireland and the Irish Republic respectively with a number of Treaty provisions, including those relating to State aids. In these cases, however, since there was a com-

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1039, [1976] 2 Comm. Mkt. L.R. 482 (preliminary ruling); *EMI Records Limited v. CBS Schallplatten GmbH*, [1976] E. Comm. Ct. J. Rep. 913, [1976] 2 Comm. Mkt. L.R. 235 (preliminary ruling).

<sup>75</sup> In the case of a trademark, the Court must determine the identity of the origin of the marked product for the consumer or final user. *See* *Commission v. Kingdom of Belgium*, [1979] E. Comm. Ct. J. Rep. 1761, [1980] 1 Comm. Mkt. L.R. 216.

<sup>76</sup> *See* *Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapferer & Co.*, [1976] E. Comm. Ct. J. Rep. 1039, [1976] 2 Comm. Mkt. L.R. 482; *Hoffmann-La Roche v. Centrafarm*, [1978] E. Comm. Ct. J. Rep. 1139, [1978] 3 Comm. Mkt. L.R. 217 (preliminary ruling); *Centrafarm v. American Home Products Corporation*, [1978] E. Comm. Ct. J. Rep. 1823, [1979] 1 Comm. Mkt. L.R. 326.

<sup>77</sup> EEC Treaty, *supra* note 1, at art. 37.

<sup>78</sup> *Id.* at art. 90.

<sup>79</sup> *Id.* at art. 92.

<sup>80</sup> [1978] E. Comm. Ct. J. Rep. 2347, [1979] 1 Comm. Mkt. L.R. 177 (preliminary ruling).

<sup>81</sup> [1979] E. Comm. Ct. J. Rep. 2161, [1979] 3 Comm. Mkt. L.R. 389 (preliminary ruling).

mon Community scheme for pork and bacon, the Court preferred to approach the problem by considering first the nature of the Community scheme and then the compatibility of the national marketing systems with the Community plan. The Court in *Pigs Marketing Board*<sup>82</sup> acknowledged the primacy of the common agricultural policy over other Treaty provisions stating: "the provisions of the Treaty relating to the common agricultural policy have precedence, in case of any discrepancy, over the other rules relating to the establishment of the Common Market."<sup>83</sup>

An analogous approach was adopted by the Court in *Hansen v. Hauptzollamt Flensburg*<sup>84</sup> concerning state alcohol monopoly in Germany. Despite this state monopoly, certain categories of producers, generally the small-scale producers of fruit-based liqueurs, may make and sell their products without being required to pass them through the monopoly. Thus, they pay a slightly lower tax than generally levied on liqueurs sold by the monopoly and by importers of foreign-produced alcohol.

The Advocate General, in an earlier case, laid down the following legal test: "Article 37 is the sole criterion for judging monopoly charges and monopoly equalization, since Article 37 is *lex specialis* in relation to Article 95."<sup>85</sup>

In *Hansen*, however, the Advocate General did not agree stating: "[i]n my view, it is preferable to take account also of Article 95, the general provisions concerning tax discrimination."<sup>86</sup>

The *Hansen* court followed this latter approach. The Court stated: "[i]t appears preferable to examine the problem raised by the national court primarily from the point of view of the rule on taxation laid down in Article 95, because it is of a general nature, and not from the point of view of Article 37, which is specific to arrangements for State monopolies."<sup>87</sup>

The Court concluded that in light of Article 95, any preferential aspect of the German tax system should be extended without discrimination to spirits coming from other Member States.

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<sup>82</sup> [1978] E. Comm. Ct. J. Rep. 2347, [1979] 1 Comm. Mkt. L.R. 177.

<sup>83</sup> [1978] E. Comm. Ct. J. Rep. at 2370, [1979] 1 Comm. Mkt. L.R. at 200.

<sup>84</sup> [1978] E. Comm. Ct. J. Rep. 1787, [1979] 1 Comm. Mkt. L.R. 604 (preliminary ruling).

<sup>85</sup> *Rewe-Zentrale des Lebensmittel-Grosshandels GmbH v. Hauptzollamt Landau/Pfalz*, [1976] E. Comm. Ct. J. Rep. 181, 210, [1976] 2 Comm. Mkt. L.R. 1, 14 (preliminary ruling).

<sup>86</sup> [1978] E. Comm. Ct. J. Rep. at 1817, [1979] 1 Comm. Mkt. L.R. at 612.

<sup>87</sup> *Id.*, at 1806, [1979] 1 Comm. Mkt. L.R. at 624.



### *B. The Social Law of the Community*

The preamble to the Treaty delegates to the Member States among other things, the task of bringing about social progress and "the constant improvement of the living and working conditions" of their nationals. The means of achieving these objectives are sought in the main by measures designed to achieve freedom of movement for workers, entail the abolition of any discrimination based on nationality between workers of the Member States regarding employment, remuneration and other employment conditions attain freedom for Community citizens to establish themselves and provide services in any Member States, and bring about equal remuneration for men and women. These principles, though not yet fully operative, have been implemented to a large extent by many regulations and directives of the Council, the Commission and by numerous decisions of the Court of Justice and national courts.

The fields covered by these Treaty principles is vast and the most one can hope to do in the context of a brief article of general scope is to highlight certain of the most important aspects and developments of the case law in this area.

#### *1. Freedom of movement for workers*

Article 48 provides that "[f]reedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest".<sup>88</sup> The Court has been quick to hold that the term "worker" must have a Community meaning. It applies to all those who, under whatever title, are covered by the various national systems of social security, that is to say, not only employed persons in the strict sense of the term, but all those treated as such under those systems.<sup>89</sup>

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<sup>88</sup> EEC Treaty, *supra* note 1, at art. 48, para. 1. The transition period was twelve years long, *id.* at art. 8, para. 1, and began on Jan. 1, 1958, the date that the Treaty took effect, [1977] COMM. MKT. REP. (CCH) ¶ 196.05. The transition period ended as scheduled on Dec. 31, 1969. *Id.* at ¶ 196.11. Recent signatories to the treaty have established individual transition periods. Greece, for example, became the tenth member of the Community in May, 1979, *id.* at ¶ 7441.01, and freedom of movement of workers between the Community and Greece will be achieved over a seven year transitional period, scheduled to end in 1986. *Id.* at ¶ 7441.07.

However, the Community achieved the policy of complete mobility of workers between the original signatory members eighteen months before the end of the Treaty's twelve year transition period. Regulation No. 1612/68, which the Council adopted on Oct. 15, 1968 prohibited employment discrimination by any Community employer against nationals of Member States. 11 J.O. COMM. EUR. (No. L 257) 1 (1968); [1971] COMM. MKT. REP. (CCH) ¶ 1031A-Y. The only exception to this remains to be employment in a member nation's public service, EEC Treaty, *supra* note 1, at art. 48, para. 4.

<sup>89</sup> *Unger v. Bestuur der Bedrijfsvereniging Voor Detailhandel en Ambachten*, [1964] E. Comm. Ct. J. Rep. 177, 185, 187, [1964] Comm. Mkt. L.R. 319, 330, 333.

Thus, the term has been held to cover non-manual workers, travelling business representatives and others.<sup>90</sup>

Under the second paragraph of Article 48, freedom of movement for workers entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."<sup>91</sup> In *Commission v. France*, the Court held that by maintaining in force a French law providing that a certain proportion of the ship's personnel of commercial vessels had to be recruited from French nationals, the French Republic was in breach of its obligations under Article 48.<sup>92</sup>

The third paragraph of Article 48 declares that freedom of movement for workers shall entail the right, "*subject to limitations justified on grounds of public policy, public security or public health*":

- (a) to accept offers of employment actually made,
- (b) to move freely within the territory of Member States for this purpose,
- (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State . . . and
- (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions . . . in implementing regulations to be drawn up by the Commission.<sup>93</sup>

The concept of "public policy" is found in all the legal systems of the Member States, yet, it is a difficult concept to define with precision. In view of this, the Council attempted to lay down more concrete principles than previously available, notably by way of directives. The first and most important Directive was No. 64/221/EEC of February 25, 1964.<sup>94</sup> Article 3 of that Directive provides, in particular, that "meas-

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<sup>90</sup> Yet freedom of movement is guaranteed only to those who wish entry to a member country either to carry out an economic activity or to obtain services, or because they are a family member of a person in those pursuits. Thus, the Commission has ruled that it was permissible for France to refuse entry to nationals of Luxembourg, the Federal Republic of Germany, and Belgium who were to demonstrate against a nuclear power plant inside France. Written Question No. 233/79, Submitted by Mr. Hoffman, Member of the European Parliament to the Commission of the European Communities, 22, O.J. EUR. COMM. (No. L 214) 31 (1979).

<sup>91</sup> EEC Treaty, *supra* note 1, at art. 48, para. 2.

<sup>92</sup> *Commission v. French Republic*, [1974] E. Comm. Ct. J. Rep. 359, 372-73, [1974] 2 Comm. Mkt. L.R. 216, 230-31.

<sup>93</sup> EEC Treaty, *supra* note 1, at art. 48, para. 3 (emphasis added).

<sup>94</sup> 7 J.O. COMM. EUR. (No. 56) 850 (1964), O.J. EUR. COMM. 117 (SPEC. ED. 1963-64).

Directive No. 72/194 of May 18, 1972, 15 J.O. COMM. EUR. (No. L 121) 32 (1972), O.J. EUR. COMM. 474 (SPEC. ED. 1972 (II)) and Directive No. 75/35 of Dec. 17, 1974, 15 O.J. EUR. COMM. (No. L 14) 14 (1975) broadened the 1964 Directive (No. 64/221) to include Member State nationals who stay in a member state's territory under rights extended by Regulation No. 1251/70, 13 J.O. COMM. EUR. (No. L 142) 24-26 (1970), O.J. EUR. COMM. 402-404 (SPEC. ED. 1970 (II)) (setting conditions on the right of workers to remain in a member state after employment in that

ures taken on grounds of public policy or of public security shall be based *exclusively* on the *personal conduct* of the individual concerned"<sup>95</sup> and that "previous convictions shall not *in themselves* constitute grounds for the taking of such measures."<sup>96</sup> Thus, reasons of public policy cannot be invoked for economic purposes.

It is possible to discern in the Court's decisions regarding the "public policy exceptions" to the free movement of workers, an unmistakable trend, after initial hesitation, towards a restrictive interpretation of the internal concept of public policy. Thus the Court in effect is reinforcing the security of workers who have established themselves in a host Member State.

The first decision by the Court regarding the "public policy exception" was Case 41/74 *Van Duyn v. Home Office*<sup>97</sup>. In this case, Miss Van Duyn, a Dutch national, had accepted a position as a secretary with the Church of Scientology in England. That sect propagates a philosophy which is considered socially harmful in Great Britain but which is not unlawful so that British nationals are allowed to practice it. The Court of Justice, in *Van Duyn*, while insisting that the scope of the concept of public policy could not be fixed unilaterally by the Member States without control by the Community institutions, decided in effect that the United Kingdom was entitled to prevent a national or another State from taking gainful employment within its territory with an organization whose activities are considered by the host country as being socially harmful without, however, being unlawful despite there being no restriction imposed on its nationals wishing to take such employment.<sup>98</sup> In reality, the Court of Justice confirmed the content of British public policy in the manner in which it had been assessed by the British government.

The Court of Justice refused to allow deportation of an individual on general public policy grounds. In *Bonsignore v. Oberstadtdirektor de Stadt Koln*,<sup>99</sup> the Court held that in order to deport an individual for a statutory offense, the decision must be based on the "personal conduct" of the offender. The facts of the case are as follows. *Bonsignore*, an

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state), or under rights extended by Directive No. 75/34 of Dec. 17, 1974. Directive No. 75/34 relates to nationals of Member States who exercise their right to remain in the territory of another member state "after having pursued therein an activity in a self-employed capacity." 18 O.J. EUR. COMM. (No. L 14) 14 (1975).

<sup>95</sup> 7 J.O. COMM. EUR. (No. 56) 851 (1964). O.J. EUR. COMM. 118 (Spec. Ed. 1963-64) (emphasis added).

<sup>96</sup> *Id.* at art. 3, para. 2 (emphasis added).

<sup>97</sup> [1974] E. Comm. Ct. J. Rep. 1337, [1975] 1 Comm. Mkt. L.R. 1 (preliminary ruling).

<sup>98</sup> *Id.* at 1352, [1975] 1 Comm. Mkt. L.R. at 18.

<sup>99</sup> [1975] E. Comm. Ct. J. Rep. 297, [1975] 1 Comm. Mkt. L.R. 472 (preliminary ruling).

Italian national, went to work in Germany in 1968. In 1971, he bought a pistol without being in possession of a firearms permit. While handling the pistol, he accidentally killed his brother. He was fined for the offense pursuant to the firearms legislation, but was not punished for negligently causing the death of his brother. However, he was ordered to be deported from German territory by an administrative decision on the grounds that:

since offenses by aliens involving the use of arms has risen to a substantial degree, during recent years, a further increase in these crimes of violence must, be countered by the immediate expulsion of aliens who had come to the notice of the authorities for offenses against the firearms legislation.<sup>100</sup>

The administrative *reason for the decision* was one of a "general preventive nature," namely to deter other foreign nationals from committing an identical offense, and was not based on "the personal conduct" of Bonsignore revealing the existence of a sufficiently grave and foreseeable threat to the security and public policy of the host country. Thus, Germany could not deport Bonsignore under their present reasoning.<sup>101</sup>

The Court in *Rutili v. Minister for the Interior*<sup>102</sup> reiterated the principle that restrictions on movement within the Common Market must be based on the "personal conduct of the alien." Furthermore, for the first time the Court of Justice linked its decision to the European Convention for the Protection of Human Rights & Fundamental Freedoms, which provides that restrictions on fundamental rights, imposed by reason of the needs of public policy, must not go beyond what is necessary for the protection of those rights "in a democratic society".<sup>103</sup> In *Rutili*, the French Prefect of Police restricted the resident's permit of an Italian national, Rutili, prohibiting him from residing in Lorraine. Rutili had engaged in trade union activities a number of which were of political character. It was after these political incidents that the limitation had been placed on his permit, his presence in Lorraine having been qualified as "likely to disturb public policy".<sup>104</sup> The case was referred to the Court of Justice from the Tribunal Administratif, Paris. The Court, in holding that the restriction on movement must be based on individual conduct, further stated that public policy reservation cannot be invoked on grounds arising from the exercise of trade union activities.<sup>105</sup>

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<sup>100</sup> *Id.* at 310, [1975] 1 Comm. Mkt. L.R. at 477 (Submissions of the Advocate General).

<sup>101</sup> *Id.* at 306-08, [1975] 1 Comm. Mkt. L.R. at 488-89.

<sup>102</sup> [1975] E. Comm. Ct. J. Rep. 1219, [1976] 1 Comm. Mkt. L.R. 140 (preliminary ruling).

<sup>103</sup> *Id.* at 1232, [1976] 1 Comm. Mkt. L.R. at 155.

<sup>104</sup> *Id.* at 1222, 1228, [1976] 1 Comm. Mkt. L.R. at 142, 153.

<sup>105</sup> *Id.* at 1232, [1976] 1 Comm. Mkt. L.R. at 155.

The Court made clear in *Royer*,<sup>106</sup> that the right of a Community national to enter a Member State and reside therein, is acquired independently of the issue of a residence permit.<sup>107</sup> Furthermore, the right of residence extends to the worker's spouse.<sup>108</sup> In *re Watson*,<sup>109</sup> the Court held that failure to comply with legal formalities concerning access to a residence in a Member State does not justify a decision ordering expulsion as a breach of public policy.<sup>110</sup>

In its ruling in *Regina v. Bouchereau*,<sup>111</sup> the Court narrowed even further its interpretation of the "public policy" exception to the freedom of movement for workers. Bouchereau, a French national, pleaded and was found guilty in July, 1976, of unlawful possession of cannabis, an offense punishable under the Misuse of Drugs Act 1971. Previously, in January of that year, he had been found guilty of an identical offense before another court and conditionally discharged for twelve months. The Magistrate was to make a recommendation regarding deportation to the Secretary of State pursuant to section 6(1) of the Immigration Act 1971. Bouchereau argued that Article 48 of the Treaty and the provisions of the 1964 Directive prevented such a recommendation from being made. Amongst other things, the Magistrate sought guidance on the interpretation to be given to the concept of "public policy" under Article 48.

The Court, recognizing that circumstances justifying recourse to the notion of public policy may vary from one country to another and therefore the competent national authorities provided for a margin of discretion within the limits imposed by Community law, held that in order to deport an individual on public policy grounds there must be a sufficiently serious threat to fundamental societal interest. The Court stated:

In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the require-

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<sup>106</sup> Jean Noel Royer, [1976] E. Comm. Ct. J. Rep. 497, [1976] 2 Comm. Mkt. L.R. 619 (preliminary ruling).

<sup>107</sup> *Id.* at 512, [1976] 2 Comm. Mkt. L.R. at 639.

<sup>108</sup> *Id.*, [1976] 2 Comm. Mkt. L.R. at 639.

<sup>109</sup> Lynne Watson and Alessandro Belmann, [1976] E. Comm. Ct. J. Rep. 1185, [1976] 2 Comm. Mkt. L.R. 552 (preliminary ruling).

<sup>110</sup> *Id.* at 1198-99, 1200-01, [1976] 2 Comm. Mkt. L.R. at 571-73.

<sup>111</sup> [1977] E. Comm. Ct. J. Rep. 1999, [1977] 2 Comm. Mkt. L.R. 800 (preliminary ruling). The case followed a request made by a Metropolitan Stipendary Magistrate, sitting at Malborough Street Magistrate's Court in London.

ments of public policy affecting one of the fundamental interests of society.<sup>112</sup>

Article 51 of the Treaty provides that the Council shall:

... adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependents:

(a) *aggregation*, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; and

(b) payment of benefits to persons resident in the territories of Member States.<sup>113</sup>

In implementation of Article 51, the Council has adopted successive regulations which create rules to coordinate the national legislative systems on social security.<sup>114</sup> These regulations create rules coordinating the national legislative systems on social security. In applying these rules, the Court has attempted to reduce the distortions between national schemes by providing the worker, his dependents, and survivors, rights in the Community legal system which are capable of preserving the advantages acquired under various national schemes and of aggregating them. The reason for this application of the regulations as explained is that the objective of social progress laid down in the Treaty would be repudiated if, in order to use the freedom of movement available to him, the worker were to lose rights already acquired in one Member State without having them replaced by at least equivalent benefits in another. The Court has therefore not hesitated to say that certain provisions on aggregation contained in the regulations are incompatible with Article 51 and, therefore, invalid to the extent to which their application has the effect of *reducing* a benefit *already acquired* in one Member State alone.<sup>115</sup>

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<sup>112</sup> *Id.* at 2014, [1977] 2 Comm. Mkt. L.R. at 824.

<sup>113</sup> EEC Treaty, *supra* note 1, at art. 51 (emphasis added).

<sup>114</sup> The first set of regulations consisted of Regulation No. 3, 1 J.O. COMM. EUR. (No. 30) 561 (1958), concerning social security for migrant workers, and Regulation No. 4, 1 J.O. COMM. EUR. (No. 30) 597 (1958), which set out implementing procedures and supplementary procedures for the social security provisions. Regulations 3 and 4 entered into force on Jan. 1, 1959.

Regulation No. 1408/71, 14 J.O. COMM. EUR. (No. L 149) 2 (1971), O.J. EUR. COMM. 416 (Spec. Ed. 1971 (I)) superceded Regulation No. 3. Notably, Regulation No. 1408/71 broadened the definition of "worker" to include all those covered in optional or compulsory social security schemes for employed persons. Regulation No. 574/72 of Mar. 21, 1972, 15 J.O. COMM. EUR. (No. L 74) 1 (1972), O.J. EUR. COMM. 159 (Spec. Ed. 1972 (I)), superceded Regulation No. 4, fixing the procedure for the implementation of Regulation No. 1408/71. Regulation No. 574/72 entered into force in Oct., 1972. *Id.* at art. 122, 15 J.O. COMM. EUR. (No. L 74) at 41, O.J. EUR. COMM. at 199 (Spec. Ed. 1972 (I)).

<sup>115</sup> See, e.g., *Fonds National de Retraite des Ouvriers Mineurs (FNROM) v. Yvon Salmon*, [1980] E. Comm. Ct. J. Rep. 1937, [1981] 1 Comm. Mkt. L.R. 303 (preliminary ruling); *Niemann*

This very cursory account of Community law in the field of social security for facilitating freedom of movement for migrant workers and their families gives little indication of the voluminous case law of the Court in this field. There are many other aspects of this area beyond the scope of this article.<sup>116</sup> Instead, I will focus on the Treaty provisions which guarantee the freedom to pursue an occupation within the other Member States.

## 2. *Freedoms granted by the Treaty to self-employed persons*

The Treaty provisions regarding the pursuit of occupations are based on the principle of equality of treatment for community nationals. Thus, Article 7<sup>117</sup> prohibits in general terms any discrimination on grounds of nationality. Article 48<sup>118</sup> regarding employed persons and Article 53<sup>119</sup> regarding the right of establishment give more specific expressions of this principle of equality of treatment.

The second paragraph of Article 52 states that “. . . [f]reedom of establishment shall include the right to take up and pursue activities as self-employed persons . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected. . .”<sup>120</sup> In order to make it easier for persons to take up these activities, Article 57 provides that the Council shall issue directives “. . . for the mutual recognition of diplomas, certificates and other evidence of formal qualifications<sup>121</sup> and for the coordination of the provisions laid down by law, regulation or administrative action”

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v. Bundesversicherungsanstalt für Angestellte, [1974] E. Comm. Ct. J. Rep. 571 (preliminary ruling); Petroni v. Off. National des Pensions pour Travailleurs Salaries (ONPTS), [1975] E. Comm. Ct. J. Rep. 1149 (preliminary ruling).

It is only when aggregation of the periods is necessary in order to *establish* a right to benefit that the calculation of the benefit is *apportioned* so as to correlate with the length of the period of work carried out in a given Member State compared to the total of the period of work carried out in the whole of the Community. See, e.g. Kalsbeek (nee van der Veen) v. Bestuur der Sociale Verzekeringsbank and Nine Other Cases, [1964] E. Comm. Ct. J. Rep. 565, [1964] Comm. Mkt. L.R. 548 (reference for a preliminary ruling).

<sup>116</sup> The problems which arise in balancing benefits in one Member State against different benefits payable in another, for example, are beyond the scope of this article. See Romano v. Institut National d' Assurance Maladie-Invalidite, Case No. 98/80, May 14, 1981 (unreported), European Court of Justice (First Chamber) which dealt with a Belgian invalidity pension, whose scheme provided for it to be reduced by a pension amount which the pensioner also received from Italy.

<sup>117</sup> EEC Treaty, *supra* note 1, at art. 7.

<sup>118</sup> *Id.* at art. 48. See text accompanying notes 86-107 *supra*.

<sup>119</sup> *Id.* at art. 53. Article 53 prohibits member states from introducing “. . . any new restrictions on the right of establishment in the territories of other Member States,” except as the Treaty otherwise provides. *Id.*

<sup>120</sup> EEC Treaty, *supra* note 1, at art. 52, para. 2.

<sup>121</sup> *Id.* at art. 57, para. 1.

concerning the taking up and pursuit of such activities.<sup>122</sup> Unhappily, the directives provided for by Article 57 have largely not yet been adopted. But this factor has proved to be of minor importance since the Court ruled in *Reyners v. Belgian State*<sup>123</sup> that Article 52 is a directly applicable provision of Community law, despite the absence, in a particular sphere, of the directives prescribed by Article 57(1).<sup>124</sup>

Article 59 provides for the progressive elimination of restrictions on the right to provide services.<sup>125</sup> Article 60<sup>126</sup> supplies a non-exhaustive definition of "services"<sup>127</sup> and in its third paragraph states that:

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.<sup>128</sup>

The Court ruled in 1974 that Article 59 became directly applicable at the expiration of the transitional period.<sup>129</sup>

The Court in *Van Binsbergen v. Bestuur van de Bedrijfsvereniging*

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<sup>122</sup> *Id.*, para. 2.

<sup>123</sup> [1974] E. Comm. Ct. J. Rep. 631, [1974] 2 Comm. Mkt. L.R. 305 (preliminary ruling).

<sup>124</sup> *Id.* at 652, [1974] 2 Comm. Mkt. L.R. at 327. The Court was able to use this interpretation of the "self-executing" character of Article 52 to rule in Case 71/76, *Thieffry v. Conseil de l'Ordre des Avocats a la Court de Paris*, [1977] E. Comm. Ct. J. Rep. 765, [1977] 2 Comm. Mkt. L.R. 373 (preliminary ruling) that:

[w]hen a national of one Member State desirous of exercising a professional activity, such as the profession of advocate, in another Member State has obtained a diploma in his country of origin which has been recognized as an equivalent qualification by the competent authority under the legislation of the country of establishment and which has thus enabled him to sit for and pass the special qualifying examination for the profession in question, the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes, even in the absence of the directives provided for in Article 57, a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty. *Id.* at 779, [1977] 2 Comm. Mkt. L.R. at 404-05. Similarly, in Case 11/77, *Patrick v. Ministre des Affaires Culturelles*, [1977] E. Comm. Ct. J. Rep. 1199, [1977] 2 Comm. Mkt. L.R. 523, the Court stated in its judgment that:

[w]ith effect from January 1, 1973, a national of a new Member State who holds a qualification recognized by the competent authorities of the Member State of establishment as equivalent to the certificate issued and required in that State enjoys the right to be admitted to the profession of architect and to practice it under the same conditions as nationals of the Member State of establishment without being required to satisfy any additional conditions. *Id.* at 1206-07, [1977] 2 Comm. Mkt. L.R. at 530-31.

<sup>125</sup> EEC Treaty, *supra* note 1, at art. 59. Article 59 applies specifically to the nationals of a Member State other than the state in which the service would be performed. *Id.*

<sup>126</sup> EEC Treaty, *supra* note 1, at art. 60.

<sup>127</sup> Article 60 states that the Treaty covers services normally provided for remuneration, not covered by other Treaty provisions which relate ". . . to freedom of movement for goods, capital, and persons." "Services", as Article 60 defines them, particularly include activities of an industrial or commercial character, and the activities of craftsmen and of the professions. *Id.*

<sup>128</sup> *Id.*, para. 3.

<sup>129</sup> *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] E. Comm. Ct. J. Rep. 1299, [1975] 1 Comm. Mkt. L.R. 298 (preliminary ruling).



*voor de Metaalnijverheid*<sup>130</sup> affirmed the right to provide services in its interpretation of Articles 59 and 60. In that case, the appellant in the proceedings before the *Centrale Raad van Beroep* (the referring court) had entrusted the defense of his interests to a legal representative of Netherlands nationality entitled to act before courts where representation by an *advocaat* is not obligatory. This legal representative during the course of the proceedings, transferred his residence from the Netherlands to Belgium. His capacity to represent the party in question was contested on the basis of a provision of Netherlands law which require that only persons residing in the Netherlands may act as a legal representative before that courts. This prompted the *Centrale Raad van Beroep* to refer to the Court two questions on the interpretation of Articles 59 and 60 of the Treaty.

The Court ruled:

1. The first paragraph of Article 59 and the third paragraph of Article 60 of the EEC Treaty must be interpreted as meaning that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the applicable national law;
2. The first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and may therefore be relied on before the national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or the fact that he resides in a Member State other than that in which the service is to be provided.<sup>131</sup>

The Court has held in the field of sport, insofar as it constitutes an economic activity within the meaning of Article 2 of the Treaty that professional or semiprofessional sportsmen are to be regarded as workers or as persons providing services;<sup>132</sup> therefore, they are entitled to practice their sport in all Member States notwithstanding discriminatory measures based on nationality established by public authorities or sporting organizations.<sup>133</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1312-13, [1975] 1 Comm. Mkt. L.R. at 315.

<sup>132</sup> *Dona v. Mantero*, [1976] E. Comm. Ct. J. Rep. 1333, 1340, [1976] 2 Comm. Mkt. L.R. 578, 587 (preliminary ruling); *Walgrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] E. Comm. Ct. J. Rep. 1405, 1418, [1974] 1 Comm. Mkt. L.R. 320, 331-32 (preliminary ruling).

<sup>133</sup> It is important to note, however, that only discriminatory measures of an economic nature have been held incompatible with the treaty. A sporting organization may still apply measures which relate to the particular nature and context of sporting matches. If the discriminatory measures are "of sporting interest only", then such measures may "limit the right to take part in [sporting] matches as professional or semi-professional players" solely to nationals of the state of the

Recently, the Court has held in *Procureur de Roi v. Debauve*<sup>134</sup> that Articles 59 and 60 do not preclude national rules prohibiting the transmission of advertisements by cable television if those rules are applied without distinction as to the national or foreign origin of the advertisements or the nationality of the person providing the service and the place where he is established.<sup>135</sup> Nor have these articles been held to preclude an assignee of a performing right for a cinematographic film within a Member State from relying upon this right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion even if the exhibited film is transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.<sup>136</sup>

### 3. *The Principle of Equal Pay for Men and Women*

Article 119 of the Treaty mandates equal pay for men and women. Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.<sup>137</sup>

In addition certain Community Directives have been issued on the subject of equal pay and equal treatment for men and women. For example, Directive 75/117 provides for the harmonization of the Member States' laws relating to the application of the principle of *equal pay* for men and women;<sup>138</sup> Directive 76/207 requires *equal treatment* for men and women regarding access to employment, vocational training, pro-

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issuing sporting organization. *Dona v. Mantero*, [1976] E. Comm. Ct. J. Rep. at 1342, [1976] 2 Comm. Mkt. L.R. at 588.

<sup>134</sup> [1980] E. Comm. Ct. J. Rep. 833, [1981] 2 Comm. Mkt. L.R. 362 (preliminary ruling).

<sup>135</sup> *Id.*, at 863, [1981] 2 Comm. Mkt. L.R. at 395-396. However, Articles 59 and 60 of the EEC Treaty, note 1 *supra*, do not regulate the broadcasting of advertisements by television. Instead, advertisements fall under treaty provisions relating to the free movement of goods. *Guiseppi Sacci*, [1974] E. Comm. Ct. J. Rep. 409, [1974] 2 Comm. Mkt. L.R. 177 (preliminary ruling).

<sup>136</sup> *S.A. Compagnie Generale pour la Diffusion de la Television, Coditel, and Others v. S.A. Cine Vog Films and Others*, [1980] E. Comm. Ct. J. Rep. 881, [1981] 2 Comm. Mkt. L.R. 362 (preliminary ruling).

<sup>137</sup> EEC Treaty, *supra* note 1, at art. 119.

<sup>138</sup> 10 O.J. EUR. COMM. (No. L 45) 19 (1975).

motions and working conditions;<sup>139</sup> and Directive 79/7 mandates *equal treatment* for men and women *in matters of social security*.<sup>140</sup>

Regarding the decisions of the Court in this field, and in particular on the nature and scope of Article 119, no discussion would be complete without an examination of the *Defrenne* cases.<sup>141</sup> Miss Defrenne was an air hostess in the employment of the Belgian airline, Sabena S.A. The Court's decisions in each of these cases resulted from requests for preliminary rulings from Belgian courts in which Miss Defrenne was engaged in litigation over various aspects of what she considered to be discriminatory treatment of the basis of her sex.

At issue in *Defrenne I* was a retirement pension established within the framework of a social security scheme laid down by legislation. The Court held that such a retirement pension "does not constitute the Belgian benefit paid indirectly by this employer to the employee by reason of the latter's employment within the meaning of Article 119, paragraph 2, of the EEC Treaty."<sup>142</sup> Thus, according to the Court, Miss Defrenne was not receiving discriminatory treatment from her employer within the scope of Article 119.

But the leading case on equal pay for men and women is *Defrenne II*.<sup>143</sup> The action before the Cour du Travail, Brussels, was between Miss Defrenne and her employer Sabena S.A. concerning compensation claimed by Miss Defrenne on the ground that between February 15, 1963 and February 1, 1966, she suffered as a female worker discrimination in terms of pay with male colleagues who were doing the same work as "cabin steward". It was agreed between the parties that the work was identical and there was no dispute as to the existence of discrimination in pay to the detriment of Miss Defrenne during the period in question.

The national court asked the Court of Justice whether Article 119 introduced directly into the national law of each Member State the principle that men and women should receive equal pay for equal work and therefore did it independently of any national provision, entitle

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<sup>139</sup> 19 O.J. EUR. COMM. (No. L 39) 40 (1976). For a discussion of this Directive and related action, see [1978] COMM. MKT. REP. (CCH) ¶ 3910.123.

<sup>140</sup> 22 O.J. EUR. COMM. (No. L 6) 24 (1979).

<sup>141</sup> Gabrielle Defrenne v. Belgian State, [1971] E. Comm. Ct. J. Rep. 445, [1974] 1 Comm. Mkt. L.R. 494 (reference for a preliminary ruling) [hereinafter "*Defrenne I*"]; Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aérienne Sabena, [1976] E. Comm. Ct. J. Rep. 455, [1976] 2 Comm. Mkt. L.R. 98 (preliminary ruling) [hereinafter "*Defrenne II*"]; Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aérienne Sabena, [1978] E. Comm. Ct. J. Rep. 1365, [1978] 3 Comm. Mkt. L. R. 312 (preliminary ruling) [hereinafter "*Defrenne III*"].

<sup>142</sup> *Defrenne I*, [1971] E. Comm. Ct. J. Rep. at 452-53, [1974] 1 Comm. Mkt. L.R. at 508-09.

<sup>143</sup> *Defrenne II*, [1976] E. Comm. Ct. J. Rep. at 457, [1976] 2 Comm. Mkt. L.R. at 102.

workers to institute proceedings before national courts in order to ensure its observance. If so, from what date must this effect be recognized?

On the question of the "direct effect" of Article 119 the Court pointed out that this article had a twofold purpose. First, an *economic* one. The aim of the article was to avoid a situation in which undertakings established in States which had actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which had not yet eliminated discrimination against women workers as regards pay.<sup>144</sup> Second, Article 119 formed part of one of the *social* objectives of the Community, namely to ensure by common action the social progress and working conditions of their peoples, as is emphasized by the Preamble to the Treaty. That double aim illustrated that the principles of equal pay formed part of the foundations of the Community.<sup>145</sup>

The Court recognized, however, that a distinction must be drawn within the whole area of application of Article 119 between, first, *direct and overt discrimination*, which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article and, secondly, *indirect and disguised discrimination* which can only be identified by reference to more explicit implementing provisions of a Community or national character.<sup>146</sup> However, the Court noted that among the forms of *direct* discrimination identifiable solely by the criteria laid down by Article 119, there must be included those which have their origin in legislative provisions or in collective labor agreements.<sup>147</sup> Thus, direct discrimination included situations where men and women received unequal pay for equal work carried out in the same establishment or service, whether public or private. The *Defrenne II* case was one such situation and Article 119 was directly applicable. Thus, Article 119 could give rise to individual rights which the courts must protect. The Court therefore replied to the first part of the question in the following manner:

the principle of equal pay contained in Article 119 may be relied on before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labor agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out

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<sup>144</sup> *Id.* at 472, [1976] 2 Comm. Mkt. L.R. at 122.

<sup>145</sup> *Id.*, [1976] 2 Comm. Mkt. L.R. at 122.

<sup>146</sup> *Id.* at 473, [1976] 2 Comm. Mkt. L.R. at 123.

<sup>147</sup> *Id.* at 473, [1976] 2 Comm. Mkt. L.R. at 123-24.

in the same establishment or service, whether private or public.<sup>148</sup>

The Court, however, ruled that the direct effect of Article 119 could not be relied upon in order to support claims concerning pay periods prior to the date of the Court's judgment, "except regarding those workers who had already brought legal proceedings or made an equivalent claim."<sup>149</sup> The converse situation could, according to the British and Irish governments, who had submitted observations on the case, have disastrous financial consequences on numerous undertakings, even to the extent of driving them into bankruptcy. While not founding its ruling on these observations, the Court referred to the fact that several Member States had been dilatory in implementing Article 119, and furthermore, that the Commission had failed to initiate proceedings against these States under Article 169.<sup>150</sup> The Court declared that it was appropriate to take "exceptionally" into account and, therefore, considered the fact that, over a prolonged period, the parties concerned had been led to continue with practices contrary to Article 119, although not yet prohibited by their national law.<sup>151</sup> Further, as the general level at which pay would have been fixed could not be known, important considerations of legal certainty affecting all the interests involved, made it impossible in principle to reopen questions as to the past.<sup>152</sup> If this reasoning may be open to criticism, the result may perhaps still be thought to be sound!<sup>153</sup> Finally, and most recently, in Case 129/79, *Macarthys Ltd. v. Wendy Smith*,<sup>154</sup> the Court explained its interpretation of Article 119.<sup>155</sup>

### III. CONCLUSION

The foregoing pages have given only a cursory and incomplete<sup>156</sup>

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<sup>148</sup> *Id.* at 476, [1976] 2 Comm. Mkt. L.R. at 125.

<sup>149</sup> *Id.* at 481, [1976] 2 Comm. Mkt. L.R. at 128.

<sup>150</sup> *Id.* at 480, [1976] 2 Comm. Mkt. L.R. at 128.

<sup>151</sup> *Id.*, [1976] 2 Comm. Mkt. L.R. at 128.

<sup>152</sup> *Id.* at 481, [1976] 2 Comm. Mkt. L.R. at 128.

<sup>153</sup> In *Defrenne III*, [1978] E. Comm. Ct. J. Rep. 1365, [1978] 3 Comm. Mkt. L.R. 312, the Court refused to interpret Article 119 as prescribing in addition to equal pay, equality in respect to other working conditions.

<sup>154</sup> *Macarthys Ltd. v. Wendy Smith*, [1980] E. Comm. Ct. J. Rep. 1275, [1980] 2 Comm. Mkt. L.R. 205 (preliminary ruling).

<sup>155</sup> The Court ruled that the principle of equal pay for equal work of Article 119 was not confined to situations where men and women are contemporaneously doing equal work for the same employer. [1980] E. Comm. Ct. J. Rep. at 1290, [1980] 2 Comm. Mkt. L.R. at 214-16. Thus, Article 119 guaranteed women pay equal to that of men previously employed in positions involving equal work. *Id.* at 1291, [1980] 2 Comm. Mkt. L.R. at 216.

<sup>156</sup> For example, I have felt constrained to omit, in the interest of comparative brevity, any treatment, which perforce would have to be fairly lengthy, of the rules on *competition* enshrined in

overview of the range of problems with which the Court has had to deal under the various aspects of its jurisdiction under the EEC Treaty since its inception 23 years ago. In some areas, it has opted for bold solutions, such as the doctrines of "direct effects" and the primacy of Community law; while in others it has shown itself to be more circumspect. Its ever increasing work load does, however, attest to its vigor as the sole judicial institution of the Community. The furtherance of the Community aims, as expressed in the Treaty, is never far from the Court's collective mind when considering the manifold problems of Community law with which it is confronted.

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the Treaty and their interpretation and application by the Commission and the Court. Similarly, I have given no account of the interpretation of the Common Customs Tariff, which is the subject of numerous decisions of the Court.