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The European Economic Community— A Profile

*Utz P. Toepke**

To enable those readers who may be unfamiliar with the history and structure of the European Economic Community to better understand the articles in this symposium, Dr. Toepke reviews the background, the institutions and the underlying theory of this unique legal phenomenon.

INTRODUCTION

Two main objectives underlie this article. Initially, the readers of this symposium on the European Economic Community (EEC) need a descriptive overview in order to understand and appreciate the phenomenon called the Common Market which has now existed in Western Europe for a quarter century. Thus, a point of reference will be provided for the detailed discussion of a variety of legal and social issues in the EEC by the distinguished writers in this symposium. Secondly, these issues will be put in perspective by showing that everything relating to the EEC is subject to the overriding objective mandated by its constitutive charter, the Treaty of Rome—namely the objective of integrating ten separate economies and distinctly different societies. Only when mindful of this objective can the reader view the Community for what it is: an organism of supranational character in constant evolution towards greater unity in virtually all aspects of life. Only this view allows an understanding of the multi-layered complexity often encountered in the attempt to solve a particular legal problem in EEC law. It is in the greater context of integration, with its attend-

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ant economic, social and political aspects, that such legal problems are usually resolved. The utilization of industrial and commercial property rights in the EEC is but one example. While this subject is treated in much greater depth elsewhere in this symposium, the introductory remarks in this section will conclude with an observation on that topic as illustrative of the way in which the Community consolidates a diversity of legal opinions in the common interest of all members.

I. THE COMMON MARKET

In 1957, six independent nations in Western Europe entered into a historic treaty that has become known by the name of the city in which it was signed, the Treaty of Rome.¹ In Article 1, the contracting parties agreed to establish among themselves a European Economic Community. The roots of this remarkable event may be traced both to a success and a failure in post-war European attempts to unite after a long history of rivalries and bloody conflicts. Six years prior to signing the Rome Treaty, the same nations had already agreed, in the so-called Treaty of Paris, to set up the European Coal and Steel Community (ECSC), thereby placing the whole of their coal and steel production under the command of a supranational, integrated organization headed by a "High Authority." Thus, for the first time in their history, national governments in Europe had agreed to delegate part of their sovereignty, albeit in selected sectors of their national economies, to a new type of international institution, a European authority enjoying executive powers to take decisions in the interest of all six countries. This delegation of sovereignty in the 1951 Treaty of Paris represented a unique turning point in European history, and set in motion a process of European unification that continues to this date.

The ECSC became a full success and inspired a European enthusiasm which only one year later, in 1952, led to another attempt at unification among the six countries. In May 1952, the six governments signed a treaty for the purpose of creating a European Defence Community (EDC). However, lacking a common European foreign policy as well as a general economic and military consensus, the plan was doomed to failure. The pace of integration had accelerated too quickly for some, and in August 1954 the French National Assembly rejected the idea. In the aftermath of this failure, the governments of the six

¹ Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (entered in force Jan. 1, 1958) [hereinafter cited as EEC Treaty]. The original signatories were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. The Treaty entered into force on January 1, 1958, after ratification by the parliaments of the signatory nations.

countries decided to adopt a more realistic approach toward unification in Western Europe.² It was agreed, building on the success of the ECSC and cautiously avoiding the political mistakes involved with the EDC, to broaden cooperation between the six countries in the economic field. At the same time, prospects for the common development and use of nuclear energy for peaceful purposes were explored. Eventually, these efforts culminated in the signing of two treaties—one setting up the European Atomic Energy Community (Euratom) and the other creating the European Economic Community (EEC).

With these two treaties entering into force in 1958, there existed, therefore, *three separate supranational organizations* in Western Europe, each based on its own constitutive treaty and each equipped with its own distinct institutions. In April 1965, however, the six countries concluded what has become known as the Merger Treaty,³ establishing a single Council of Ministers and a single executive Commission for all three entities. After ratification by the Member States, the Treaty became effective on July 1, 1967 and since then the three previously separate Communities have been combined and are now correctly referred to in the plural as the "European Communities" (EC).

The European Economic Community (EEC) remains the most important of the three entities because its scope is unlimited in the economic field. It is not restricted to a selected sector of the economy like the ECSC or Euratom and it is the EEC which has encouraged a growth in trade among its members "to a very substantial degree."⁴ Also, the Treaty of Rome is significant for creating a new legal order among independent nations which is imposed over the legal systems of the Member States not by force, as has happened so many times before in European history, but by mutual consent as the rule of law. The following remarks focus entirely on the EEC.

A. Development

The Treaty of Rome "is more than an agreement creating reciprocal obligations between the contracting States."⁵ It is the common en-

² This decision was reached at a conference of the six Foreign Ministers, held at Messina, Italy, in June 1955.

³ Treaty establishing a Single Council and a Single Commission of the European Communities, April 8, 1965, *ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW: EUROPEAN COMMUNITY TREATIES* B8030 (1974) [hereinafter cited as *Merger Treaty*].

⁴ I. WALTER, *THE EUROPEAN COMMON MARKET: GROWTH AND PATTERNS OF TRADE AND PRODUCTION* 155 (1967).

⁵ *van Gend & Loos v. Netherlands*, [1963] E. Comm. Ct. J. Rep. 1, [1963] *COMM. MKT. REP.* (CCH) ¶8008.

deavor of several European nations to strive, "for an unlimited period,"⁶ for economic expansion and higher standards of living as well as closer relations among themselves, ultimately achieving a political union of the peoples of Europe.⁷ The more immediate tasks of the EEC, in 1958, were the establishment of a "common market" by creating a *customs union*, through the gradual dismantling of all quotas, tariffs and other trade barriers that inhibited, at that time, the free movement of goods between the six countries.⁸ In addition, the Treaty called for the free movement of persons, services and capital.⁹ These are the famous *four freedoms* of the Community—free movement of goods, persons, services and capital—that have been filled with life since 1958 by a number of implementing regulations and, more importantly, several judgments of the Court of Justice of the European Communities.

Membership in the EEC is open to any European state.¹⁰ However, as the Commission stated to the Council upon the occasion of Greece's accession to the EEC,¹¹ the principles of pluralist democracy and respect for human rights form part of the common heritage of all Member States and adherence to them is therefore an essential requirement of membership. This is corroborated by the "Joint Declaration of Fundamental Rights" made by the political institutions of the Community on April 5, 1977.¹²

Membership of the EEC has been enlarged twice since its beginning. In January 1972, treaties of accession were signed between the original six Member States and Denmark, Ireland, Norway and the United Kingdom. Subsequently, the people of Norway rejected membership in a referendum held in that country during September of 1972, but the other three States became new members of the three Communities on January 1, 1973. In May 1979, a treaty of accession was signed with Greece, and this country has become the Community's tenth member, on January 1, 1981. Negotiations for full membership are currently underway with Portugal and Spain. After the accession of

⁶ EEC Treaty, *supra* note 1, at art. 240.

⁷ *Id.* at Preamble and art. 2.

⁸ *Id.* at arts. 2, 3.

⁹ *Id.* at arts. 48, 52, 59, 67.

¹⁰ *Id.* at art. 237.

¹¹ 12 BULL. EUR. COMM. (No. 5) 73 (1979).

¹² See 20 O.J. EUR. COMM. (No. C 103) 1 (1977). See also Memorandum on the Accession of the European Communities to the European Convention on Human Rights, *adopted* Apr. 4, 1979, 12 BULL. EUR. COMM., Supp. 2/79 (1979).

Greece, the EEC now includes approximately 670,000 square miles and has a population just short of 270 million.

The establishment of the common market as a free trade zone among the original six Member States, in the sense of a customs union, was achieved in July 1968, ahead of the timetable laid down in the EEC Treaty. At that time, the Community also set up its common external tariff system and thus became a homogeneous trading block within the concert of trading nations. This event had been signaled one year earlier when the Commission signed on behalf of the Community, in addition to the individual Member States, the multinational trade agreements reached during the Kennedy round of negotiations within the framework of the General Agreement on Tariffs and Trade (GATT).

Not long after the achievement of a complete customs union, the EEC took another decisive step towards institutionalization when the six governments, in April 1970, agreed to provide the Community with its own resources. When first advanced by the Commission in 1965, the plan led to a hostile reaction by de Gaulle's France and subsequently to the so-called "policy of the empty chair" practiced by the French government during the course of 1965. At their summit conference at The Hague in December 1969, the leaders of the six countries rediscovered the political will that had helped to create the EEC in the first place and decided to allow the Commission to collect, on the Community's behalf, all customs duties on products imported into the EEC as well as all levies on agricultural imports. In addition, the EEC was to receive up to one percent of the value added tax (VAT), levied on an agreed assessment basis within the Member States. These decisions, when finalized and ratified, marked the beginning of the financial autonomy of the Community which has enabled it to finance the annual Community budget entirely from its own resources.

B. Institutions

The Treaty of Rome established a number of independent Community institutions modeled after those created by the ECSC Treaty. The two great minds behind the ideas that formed the new Europe, Robert Schuman and Jean Monnet, had recognized that only by creating an institutional form, based upon agreed procedures reflecting the international purpose of the Community, would the undertaking of unifying Europe be successful. In creating an independent staff of qualified people, solely committed to the objectives of the Treaty, they believed, the natural state of mind of national governments resisting

the transfer of powers could be balanced and eventually overcome. The result is a power center at the heart of the Community, called the Commission, combining both executive and legislative functions. In addition, the Commission is given the role of a guardian of the Treaty in that it "shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."¹³ The other major institutions are the Parliament (called the Assembly in the Treaty), the Council of Ministers, and the Court of Justice.

1. Commission

Generally speaking, the Commission is the motor of the Community and the Council of Ministers its political control.¹⁴ The Commission is organized into twenty Directorates (e.g., Directorate for Economic and Financial Affairs; Agriculture; Regional Policy; Competition; External Relations; etc.) and today, after Greece's accession, consists of fourteen members, who are appointed "by common accord of the governments of the Member States" for a renewable term of office of four years.¹⁵ Members of the Commission are chosen on the grounds of their general competence and independence. Both the Treaty of Rome and the Merger Treaty make it clear that the Commission is completely independent in the performance of its duties.¹⁶ Only the Parliament, if it carries a motion of censure by a two-thirds majority, can force the resignation of the Commission as a body.¹⁷

The Commission's primary task, in addition to the guardian role mentioned already, is to draw up proposals to further the interests of the Community. It can do so where the Treaty so provides or if it considers a particular proposal necessary.¹⁸ To this end, Article 15 of the Merger Treaty provides that the Council and the Commission shall consult each other and shall settle their methods of cooperation by

¹³ EEC Treaty, *supra* note 1, at art. 155.

¹⁴ As was mentioned, the Member States agreed in the 1965 Merger Treaty, note 3 *supra*, to establish a single Council and a single Commission of the European Communities. The Merger Treaty amended or replaced a number of provisions in the basic treaties of the previously separate bodies. It would be impossible in the context of this profile to review the details of these changes, or even the full scope of the original articles in the Rome Treaty. For further study, the reader is referred, *inter alia*, to 4 H. SMIT & P. HERZOG, *Preliminary Observations on Articles 145-154, No. 3, and Preliminary Observations on Articles 155-163, No. 3*, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY (Supp. 1979).

¹⁵ Merger Treaty, *supra* note 3, at art. 11.

¹⁶ The Commission's duties, in principle, are described in Article 155 of the Rome Treaty, note 1 *supra*.

¹⁷ *Id.* at art. 144.

¹⁸ *Id.* at art. 155.

agreement. This cannot, however, mean that the Commission is required to consult the Council on every occasion, especially not before it wants to address a recommendation or opinion to that body.¹⁹ The Commission is given a fair amount of discretion in performing its duties in the Treaty of Rome and the Merger Treaty and consequently this consultation requirement must be considered fulfilled where the Commission aligns the general direction and contents of its activities with the Council, save for those situations where a specific provision of Community law demands consultation before taking action. Lastly, Article 155 gives the Commission "its own power of decision" as well as the delegated powers that may be conferred on it, from time to time, by the Council. That phrase, "its own power of decision," can only be interpreted to mean that the Commission has certain implied powers, even though a specific power to take decisions may not have been granted, whenever this would appear appropriate "to ensure the proper functioning and development of the common market."²⁰

Article 163 of the Treaty of Rome and Article 17 of the Merger Treaty regulate the manner in which Commission decisions are taken. "Decision" in this sense means every action by the Commission as a body, not merely the measure technically specified in Article 189, which will be discussed later. The law provides for but one procedure as regards the validity of Commission actions. To be valid, a Commission decision needs only a simple majority of the number of Commission members provided for in Article 10 of the Merger Treaty (currently 14). In addition, decisions must be taken in the presence of a quorum that is established by the Commission itself in its Provisional Rules of Procedure. With Greece having joined as the tenth member of the Community, the Commission recently raised this quorum to eight members.²¹ Commission members, however, need not appear and vote in person at a meeting, as these comments may appear to indicate. Article 11 of the Commission's Rules of Procedure allows for a written method of decision-making, basically by circulating a draft of the proposed decision to all Commission members and requiring them to raise objections by a specified date or the decision will be adopted. This procedure of taking decisions "by default" is in wide use within the Commission.²²

¹⁹ *Accord*, SMIT & HERZOG, *supra* note 14, at point 155.15.

²⁰ EEC Treaty, *supra* note 1, at art. 155.

²¹ 24 O.J. EUR. COMM. (No. L 8) 16 (1981).

²² For more details, see SMIT & HERZOG, *supra* note 14, at point 163.04.

2. Council of Ministers

The Council of Ministers is made up of representatives of the governments of all Member States. Usually, each government chooses which minister to send depending on the matter up for consideration, e.g., the Minister of Agriculture, Finance, Justice, etc. The "main" Member State representative on the Council, however, is each country's Foreign Minister. The Council is assisted by a Committee of Permanent Representatives (ambassadors of the Member States), often referred to as "COREPER," and by large groups of experts. The COREPER was acknowledged by the Merger Treaty, which gave it the responsibility for preparing the deliberations of the Council.²³ The Treaty of Rome contains a large number of provisions giving the Council the power to take decisions which result in Community law-making. This has led to a common belief that the Council of Ministers is the legislature of the EEC while the Commission is the executive. This view is superficial, at best. First, the Council can act on many occasions only upon a proposal from the Commission. Second, as has been described already, the Commission has its own rights of decision-making which, in individual situations, may be of a law-making nature. Most importantly, though, it is often another institution than the Council that creates new law in the EEC as shall be seen; this is the Court in Luxembourg.

Article 148 of the Treaty of Rome purports to introduce a voting procedure, as far as the Council is concerned, that is based on the system of simple majority. Nothing, however, could be further from the truth. Apart from the special Treaty provisions requiring a qualified majority or unanimity during the various stages of historical development of the Common Market a political decision of the six governments in January 1966 to resolve the 1965 crisis of the "empty chair policy" requires, to this date, quite contrary to the Treaty of Rome, that the Council shall seek a consensus on all matters before it. This phenomenon is known as the *Luxembourg compromise*. While it has been relaxed, to some degree, on certain issues of secondary importance, the fact remains that the Council of Ministers still insists on reaching unanimous decisions "when important interests of a Member State are at stake." Gaston Thorn, the new President of the Commission and long-time member of the Council of Ministers during his years as Cabinet Minister in Luxembourg's government, blames this procedure when he

²³ Merger Treaty, *supra* note 3, at art. 4.

says "the Council is not really the Council any more."²⁴

In order to carry out their respective tasks, both the Council and the Commission can issue regulations, directives, decisions, recommendations and opinions.²⁵ Only the first three are legally binding. *Regulations* become Community law automatically upon their adoption and are generally applicable in all Member States. *Directives* are binding, as to the results to be achieved, upon each Member State to which they are addressed, but they leave to the Member States the choice of form and methods of attaining these results. *Decisions* are binding upon those to whom they are addressed (Member States, enterprises or individuals) as single-case determinations. The nomenclature provided in Article 189, however, is not exhaustive.²⁶ Both the Council and the Commission may take other legally relevant action of *sui generis* character and have done so in the past (e.g., fiscal actions; actions with respect to third countries; acts of organizational nature, etc.).

3. *European Council*

Not to be confused with the Council of Ministers is the European Council, born out of another political compromise in Europe, at the Paris Summit in December 1974. At this summit meeting, the nine Member States accepted a suggestion, made in order to revive the spirit of the earlier Hague Summit which had resulted in a call for a European economic and monetary union, to meet three times a year and whenever necessary as the "European Council" to debate European affairs and important questions of foreign policy. While not an institution established by the Treaty, this European Council has become an important instrument in the political process of European integration, representing the highest level of political authority of all Member States. It is composed of the Heads of State or Government of each Member State.

4. *European Parliament*

The European Parliament is limited in its powers by the Treaty of Rome to those of consultation; it has no legislative function. However, the Parliament which sits in Strasbourg and sometimes in Luxembourg,

²⁴ President Thorn added that the Council of Ministers stopped working when ministers stopped speaking frankly to each other. *Crisis in EC Institutions: Thorn on What Should be Done*, 224 EUROPE 22, 23 (1981).

²⁵ EEC Treaty, *supra* note 1, at art. 189.

²⁶ VON DER GROEBEN, VON BOECKH & THIESING, KOMMENTAR ZUM EWG VERTRAG (2d ed. 1974) (Anm. II 2 to Article 189).

has the "power of the purse" in the Community in that it must approve the Community budget. Recently elected for the first time by direct universal suffrage, as required for the past twenty-two years by Article 138 of the Rome Treaty, the Parliament asserted this budgetary power in a dispute over the 1980 budget. On December 13, 1979, the new Parliament, elected in June of that year, rejected the draft budget transmitted to it by the Council for the first time in Community history and asked for a new draft to be prepared. The dispute was not settled until the summer of the following year.²⁷

Parliament now has 434 members, 410 of which were elected directly in June 1979, and 24 Greek members who were designated by their national parliament as were all European parliamentarians until the historic elections of 1979. These elections, in fact, marked the first transnational elections in man's history and they have been described, by the French Gaullist Edgar Faure, as the passage of Europe beyond purely economic unification to political and social unification as well.²⁸ This may explain why every political party in Europe (with the possible exception of the British Labour Party), notwithstanding its opposition to the idea of European integration, was anxious to be represented in this forum of Community public opinion that will undoubtedly help shape the future of Europe.

5. Court of Justice

The Court of Justice has the task of ensuring that in the interpretation and application of the three basic treaties (ECSC, EEC and Euratom), as well as the secondary legislation issuing under these treaties, the law is observed.²⁹ Far beyond this role, however, the Court has evolved over the years to become a prime integrator of the Common Market. Many of its judgments have created new law, advancing the interests of the Community, and all of them (save for the Court's jurisprudence related to employee disputes between the Community and its staff) show a consistent pattern of taking aim at the remaining barriers to intra-Community trade or at any attempts to partition the market anew. The areas involving the free movement of goods³⁰ and the Treaty's rules on competition³¹ are perhaps the most important ex-

²⁷ It should be repeated here, for reasons of completeness, that the Parliament can fire the Commission as a whole if it passes a no-confidence vote by a two-thirds majority.

²⁸ See 214 EUROPE 8 (1979).

²⁹ See, with regard to the European Economic Community, EEC Treaty, *supra* note 1, at art. 164.

³⁰ *Id.* at arts. 30, 36.

³¹ *Id.* at arts. 85-86.

amples in this respect, but many others could be mentioned as well.³² In fact, the Court's influence on the development of Community law over the past two decades has been so profound that it has been suggested, given the inactive role played by the Council of Ministers as legislators and the European Parliament's limited function as an advisory institution, that the Court is the *de facto* legislative power in the EEC.³³ To some extent, certainly in the two areas just mentioned, this appears to be an accurate statement.

The Court now consists of eleven judges, one from each Member State, with the exception of France which today has two judges on the bench.³⁴ Judges are appointed "by common accord of the Governments of the Member States for a term of six years," but may be eligible for reappointment.³⁵ They are chosen "from persons whose independence is beyond doubt"³⁶ to stress the impartiality of the Court and its independence from all other Community institutions as well as the Member States. Unlike the Commission, where Article 157 (now in the form of Article 10 of the Merger Treaty) expressly requires that "only nationals of Member States may be members of the Commission," the Treaty of Rome does not contain any express requirement of nationality regarding the appointment to the Court as judge. Instead, professional competence is the prime measure in this respect. Article 167 demands that only persons "who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence" shall be chosen. As long as the governments of the Member States continue to appoint only nationals of EEC countries, as they have in the past, this means, for all practical purposes, that only lawyers are eligible for appointment to the Court, because all Member States require a law degree as a prerequisite for eligibility to their highest judicial office.

In addition to judges, the Court has a number of Advocates General who assist the judges in arriving at their decisions. As of April 1981, there are five Advocates General at the Court. Article 166(2) de-

³² For instance, the Court has clarified the relationship between Community law and the national laws of the Member States; confirmed the principle of free movement of persons, the right of establishment and held directly applicable to the Member States the Treaty's equal pay clause (Article 119).

³³ See van Gerven, *Twelve Years EEC Competition Law (1962-73) Revisited*, 11 COMM. MKT. L. REV. 38, 46 (1974).

³⁴ Upon the Court's request pursuant to Article 165(3) of the EEC Treaty, note 1 *supra*, the Council increased the number of judges at the Court from ten to eleven, 24 O.J. EUR. COMM. (No. L 100) 20 (1981).

³⁵ EEC Treaty, *supra* note 1, at art. 167.

³⁶ *Id.* at art. 167(1).

scribes the principal task of an Advocate General broadly as the duty, to be performed with impartiality and independence, to publicly render a reasoned report on all disputes before the Court. Everything said above regarding the appointment of judges applies equally in the case of Advocates General. One Advocate General is assigned by the President of the Court to each case and he must deliver a written opinion on the case after the oral hearing has taken place before the Court. This may be the reason why the Advocate General's opinion is sometimes, incorrectly, referred to as a judgment of first instance. This opinion is really nothing more than an informed opinion; it does not decide anything and the Court is in no way bound by it. On the other hand, the Court does follow the Advocate General's opinion quite often in practice, and relies on the arguments advanced by the Advocate General in the reasoning of its judgments. Thus, it is often worthwhile to study the opinion delivered by the Advocate General carefully.

This is not the appropriate forum to describe the procedure before the Court in detail.³⁷ Generally, the Court decides its cases in full Court, as a collegiate body. This does not mean, however, that all decisions must be unanimous. Owing to the secrecy attached to the Court's deliberations, this is just the appearance of matters. Only the judges will know whether a particular case was decided unanimously or by a majority of votes.

Essentially, there are two categories of cases which come before the Court, in addition to the labor and employee relation disputes between the Community and its staff. *Direct actions* may be brought by the Commission, the Council or a Member State challenging the legality of regulations, directives or decisions by the Council or the Commission.³⁸ Under certain circumstances, a natural or legal person may bring such a case; for instance, a company can appeal a Commission decision that is addressed to it in, say, competition matters. Secondly, *references for preliminary rulings* can be made by a national court in one of the Member States on questions involving the interpretation of both primary and secondary Community law.³⁹ There are other important instances in which the Court will have jurisdiction to hear a case, such as a Commission complaint pursuant to Article 169 against a

³⁷ For further study in the English language, the following are recommended by way of example only. 1 D.G. VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (1965); SMIT & HERZOG, *supra* note 14, at points 173.03-173.20, 175.03-175.30 and 177.03-177.26. See also A. MACKEY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES: COMPOSITION, ORGANIZATION, AND PROCEDURE*, in *ENTERPRISE LAW OF THE 80's* (ABA Press 1980).

³⁸ EEC Treaty, *supra* note 1, at art. 173.

³⁹ *Id.* at art. 177.

Member State where the Commission feels that this State has "failed to fulfill an obligation under this Treaty," or a suit by a private person against the Commission pursuant to Article 215(2) for damages, based on the non-contractual liability of the Community as a legal personality.⁴⁰

Proceedings before the European Court of Justice, quite unlike anything lawyers are used to in U.S. litigation, are primarily written proceedings. They are also considerably swifter than anything U.S. lawyers have seen in the court rooms of this country. For instance, in 1978 the average duration of direct cases brought before the Court was little more than nine months, and that of referral cases brought by national courts for a preliminary ruling of the Court of Justice was only six months.⁴¹

6. *Economic and Social Committee*

The last Community institution to be mentioned in this article is the Economic and Social Committee. It assists both the Commission and the Council and has advisory status.⁴² Since Greece's accession this Committee has 156 members who are representatives of various sectors of economic and social life in the Member States. Members are appointed for renewable four year terms by the Council of Ministers.⁴³ The Committee must be consulted before decisions are taken either by the Commission or the Council on a large number of subjects (e.g., the free movement of persons, according to Articles 49, 54). Obviously, the opinions delivered by the Committee have no binding effect, but a failure to consult the Committee where the consultation is required by law would make a subsequent decision defective and open it to challenge before the Court under Article 173. The Committee today has its own right of initiative, provided by the political decision taken at the Paris Summit during October 1972 and later implemented, in June 1974, through a change of the Committee's Rules of Procedure. In recent years, this right of initiative has been increasingly used by the Committee, and this institution has thus assumed a more important role in the political life of the Community. Especially in areas such as industrial or energy policy, the Community's relations with the outside world and matters concerning the social aspects of life in the EEC, the Committee has chosen to make its voice heard. In times of economic crisis based

⁴⁰ *Id.* at art. 210.

⁴¹ See MACKAY, *supra* note 37, at 9.

⁴² EEC Treaty, *supra* note 1, at art. 193.

⁴³ *Id.* at art. 194.

on energy problems, rising inflation, unemployment and other socially sensitive causes, the Committee can be expected, owing to its diverse membership, to play an ever increasing role in the formulation of future EEC policies.

C. Treaty-Making Authority

Having its own legal personality, the Community is capable of concluding its own treaties with other states or international organizations, independent of the Member States. Article 228 makes this clear and spells out the procedure to be followed for the conclusion of such treaties. They shall be negotiated by the Commission and concluded by the Council, "subject to the powers vested in the Commission in this field," and after consulting the Parliament where so required by the Treaty. The quoted phrase indicates that the Commission has the competence to conclude certain treaties by itself, without the Council. This competence is, however, limited in extent and mainly related to the areas mentioned in Article 229, such as the General Agreement on Tariffs and Trade (GATT) and relations with the United Nations. The effects of agreements concluded between the Community and outside parties are also mentioned in Article 228; they are legally binding on the institutions of the Community *and* on the Member States.

Article 228, in and of itself, does not establish the right of the Community to conclude such agreements or treaties. Such right must be provided for expressly in the Treaty itself.⁴⁴ The two main examples can be found in Article 113 regarding the Community's common commercial policy, in particular tariff and trade agreements, and Article 238 regarding association agreements. The Community's competence under the Treaty to conclude international agreements and that of the Member States to act independently would appear to be mutually exclusive, at least in cases where the cost of financing a particular operation or mechanism envisaged in the agreement is to be totally borne by the Community budget.⁴⁵ It has been accepted, however, that Member States may also make such agreements or treaties as long as the Community has not exercised its powers, provided they observe the basic command of Article 5(2) requiring them to abstain from any measure

⁴⁴ Under Article 235, however, the Council may take "appropriate measures" if such action is necessary to attain a Treaty objective.

⁴⁵ See Advisory Opinion, International Agreement on Natural Rubber, [1979] E. Comm. Ct. J. Rep. 2871, [1979] COMM. MKT. REP. (CCH) ¶8600. The Court confirmed, on the basis of the concept of a common commercial policy pursuant to Article 113, that the Community had the exclusive competence to conclude the Natural Rubber Agreement, with the proviso mentioned in the text.

which could jeopardize the attainment of the objectives of the EEC Treaty.⁴⁶

The Community has, in fact, concluded both bilateral and multi-lateral treaties with most of the world's nations and the major international organizations. Most importantly, perhaps, it has entered into *free-trade agreements* with the countries of the European Free Trade Association (EFTA) that have not joined the EEC, or applied for membership, such as Austria, Sweden, Switzerland and Norway. Thus, a huge free trade zone, comprising virtually all of Western Europe and with more than 300 million people, has been created. Also, the Community has concluded an important *association agreement*, in the context of the Youndé Convention first, and since 1975, in the Lomé Convention, with a large number of developing countries in Africa, the Caribbean and the Pacific. This agreement, in its second stage as of January 1, 1981, and presently linking sixty developing countries to the Community, provides for commercial cooperation and allows virtually all agricultural products originating in these countries free access to the EEC market. In addition, financial aid is being provided for industrial development in these countries through the European Development Fund and the European Investment Bank. Finally, as a further example of the Community's external relations, a cooperation agreement was recently signed between the EEC and the five countries of the Association of South-East Asian Nations (ASEAN).⁴⁷ This cooperation agreement is the first of its type in that it links the EEC with another regional group of nations, somewhat like the Community itself. It is an agreement of non-preferential character which covers trade as well as economic and development cooperation.

II. THE COMMON RULES

A well-known European official of many years, Robert Marjolin, was asked, in 1980, to explain what the European Community is. It is, he responded, "essentially a set of rules which the sovereign states have agreed to respect in their dealings with each other, in well-defined fields of action, and which do not limit their freedom of movement

⁴⁶ See *Commission v. Council*, concerning the European Agreement on Working Conditions in International Road Transport (E.R.T.A.), [1971] C.J. Comm. E. Rec. 263, [1971] COMM. MKT. REP. (CCH) ¶8134. The Court held that the Member States, in this area governed by the Community's common transport policy, had acted in the interest and for the account of the Community, in accordance with their Article 5 obligations, since they had conducted their negotiations and concluded the agreement collectively, pursuant to a procedure decided upon by the Council.

⁴⁷ Agreement of March 7, 1980 between the EEC and Indonesia, Malaysia, the Philippines, Singapore and Thailand, 23 O.J. EUR. COMM. (No. L 144) 2 (1980).

elsewhere.”⁴⁸ This response characterizes, better than any other explanation in the author’s opinion, the unique make-up of the Community. It is not merely the far-reaching principles and objectives the Member States have agreed upon but the common rules and institutions, set up to provide those principles effective form and to transform them into day-to-day reality, that have brought about the lasting change in relations between the Member States. More than anything else during the thirty-year history of European unification, these common rules and institutions have forged integration among the participating countries. It is the common rules and institutions which provide the *unification element* that makes the Community so unique. An illustration of this is provided by the free-trade agreements between the Community and all former EFTA members that have not joined the Community. As a result of these agreements the common external tariff of the EEC does not apply in trade between these countries and the Community. The EFTA countries thus enjoy a customs union with the Community, just like the EEC Member States among themselves. However, they do not participate in the Community’s common policies as no common rules or institutions for working together in daily life have been agreed upon. Therefore, this cooperation between EFTA countries and Community countries lacks any unification characteristics and is distinctly different from the bond that exists between the ten Member States.

Foremost among the common rules are the Treaty rules of law. They, in fact, represent the essence of the unique relationship between the Member States which has been termed by the Court “a new legal order in international law.”⁴⁹ One should recall that this legal order is based on a partial surrender of sovereignty by the Member States. Consequently, not only individuals and companies are subject to this legal order but the Member States as well. As a result, *Community law supersedes conflicting national law*. The preeminence of Community law is confirmed by Article 189, which declares that regulations made by the Council or the Commission (i.e., secondary Community law) are “binding” and “directly applicable in each Member State.” In 1964, the Court made it clear that this preeminence also precludes any subsequent national legislation that would be incompatible with Community law. The Court reached this result by applying Article 5(2), which demands that Member States refrain from measures that could jeopardize

⁴⁸ COUNCIL PAPERS ON INTERNATIONAL AFFAIRS, LEFFINGWELL LECTURES 73 (Council on Foreign Rel. 1980).

⁴⁹ *van Gend & Loos v. Netherlands*, note 5 *supra*.

the attainment of the objectives of the EEC Treaty.⁵⁰ A rich body of case law has since confirmed the supremacy of Community law over the national legal systems.⁵¹ The Court has also held that the obligations arising out of the Treaty of Rome have direct effects for individuals, thus creating personal rights which the national courts must safeguard.⁵²

A variety of detailed policies, all described in terms of specific rules that create genuine obligations for the Member States, are set forth in the Treaty of Rome. Apart from the rules relating to the establishment of a customs union and the free movement of persons, services and capital, these are, in particular, the common agricultural policy, the common transport policy and the Community's competition policy. The basic principles of the *common agricultural policy* may be summarized as follows: a single market and common price shall be established for all agricultural products, with financial solidarity provided through a European Agricultural Guidance and Guarantee Fund. This has been achieved to a large extent. Community farm produce is to be given preference over that of third countries. Persons working in agriculture are assured a comparable standard of living to that of workers in other economic sectors. The *common transport policy* as yet relates only to transport by road, rail and inland waterway.⁵³ The Council must decide to what extent the common rules laid down in the Treaty and a very large number of implementing regulations shall apply to transport by air or sea, but it has not yet done so. The *competition policy* of the Community is aimed at the removal of existing obstacles to trade between the Member States and guarantees both fair and free competition. Article 3(f) demands, as one of the principal tasks of the

⁵⁰ See *F. Costa v. Ente nazionale Energia elettrica impresa gia della Edison Volta (E.N.E.L.)*, [1964] E. Comm. Ct. J. Rep. 585, [1964] COMM. MKT. REP. (CCH) ¶8023. "The transfer by the States from their internal legal systems over to the Community legal order, of rights and obligations to reflect those set forth in the Treaty, therefore entails a definitive limitation of their sovereign rights, against which a subsequent unilateral act that would be incompatible with the Community concept cannot be asserted." *Id.* at 594, [1971] COMM. MKT. REP. (CCH) ¶8023, at 7391.

⁵¹ See, e.g., *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] E. Comm. Ct. J. Rep. 629, [1978] COMM. MKT. REP. (CCH) ¶8476; *Ministère Public v. Ratti*, [1979] E. Comm. Ct. J. Rep. 1629, [1979] COMM. MKT. REP. (CCH) ¶8569.

⁵² See, e.g., *Ministère Public v. van Wesemael*, [1979] E. Comm. Ct. J. Rep. 35, [1979] COMM. MKT. REP. (CCH) ¶8533 (regarding Article 59 and the freedom to provide services); *Macarthys Ltd. v. Wendy Smith*, [1980] E. Comm. Ct. J. Rep. 1275, [1980] COMM. MKT. REP. (CCH) ¶8653 (regarding Article 119 and the requirement of equal pay for men and women); *Belgische Radio en Televisie v. SABAM*, [1974] E. Comm. Ct. J. Rep. 51, [1974] COMM. MKT. REP. (CCH) ¶8268 (regarding Articles 85, 86 and the direct effect of the prohibitions of restraints on competition and the abuse of dominance).

⁵³ EEC Treaty, *supra* note 1, at art. 84.

Community, "the institution of a system ensuring that competition in the Common Market is not distorted."

In contrast, the Treaty is virtually silent on matters of general economic and monetary policy. Article 113 simply states that after the transitional period has ended (*i.e.*, December 31, 1969, officially), "the common commercial policy shall be based on uniform principles." But the Treaty does not call for the substitution of the individual economic and monetary policies of the Member States with a single Community policy. Rather, this development was urged by the Heads of State or of Government at their 1969 summit meeting at The Hague. The creation of a true *economic and monetary union* among Member States, a declared goal of the Community ever since the Hague Summit, is thus based upon an extemporaneous political act by the governments of the Member States rather than any common rules laid down in the Treaty. It may be capricious to suggest that this is the cause for the failure, so far, of the plan to achieve the desired results, but the lack of any concrete procedures in this field clearly subjected the plan to the vicissitudes of daily political life in the various Member States and the shifting priorities of the governments in response to the creeping crisis in all the Community economies since the first oil shock in 1973. To be fair, it must be said that some progress has been made and some tangible results have been attained, most notably the European Monetary System (EMS) in 1979. This may ultimately lead to the achievement of the final goal, provided there is a continuing injection of political will into the process. Today, however, more than two years after the originally envisaged date for its completion, the full economic and monetary union among Member States with a common Community currency remains but a dream.⁵⁴ While the Common Market has led to a great liberalization of trade and a distinctive degree of integration in Western Europe, it still lacks the final success since the common rules agreed upon to date will not succeed in bringing about the ultimate goal of complete integration without their necessary corollary—a truly common economic and monetary policy.

⁵⁴ The European unit of account (EUA) has the rudimentary characteristics of a common means of payment but it is not a common currency. Rather, it is an accounting measure expressed on the basis of a "basket" of Community currencies, first used by the European Development Fund and the European Investment Bank in connection with the 1975 Lome Convention. For more detail, see Dixon, *The European Unit of Account*, 14 COMM. MKT. L. REV. 191 *et seq.* (1977). As of January 1, 1981, the EUA was replaced by the European Currency Unit (ECU).

III. THE COMMON INTEREST

To the foreign observer, frequent reports of disagreement between Member States' governments on a variety of EEC questions in recent years may relate a picture of disarray, or even crisis, in the Community. This is deceptive. Unquestionably, there are at all times contentious issues to be dealt with, as would be expected in a political undertaking such as the EEC. But this should not lead to the conclusion that the Member States are now in a process of disintegration. Progress is slower today than formerly, simply because so much has already been achieved. One must remember the tremendous interdependence existing among all of the Member States, as reflected in the annual trade statistics and the foreign investment figures confirming year after year the ever-increasing closeness of ties among the Community countries.⁵⁵ One should not underestimate the solid common interest that flows from this situation, despite regular Cassandra cries published by the news media. This common interest provides healthy stability, in political terms, for Europe today and in the future.⁵⁶ It is appropriate to conclude this summary profile for this symposium of ideas on the current state of Community affairs with a commentary emphasizing this common interest among Member States.

As a lawyer, the author takes particular pleasure from the fact that Europe's common interest, indeed its common destiny, is built upon, and governed by, a freely chosen set of rules and legal procedures—the rule of law has replaced the rule of force in Western Europe, with no way of return (except by outside impact). The Treaty of Rome provides a vehicle to transform, in day-to-day life, the common interest of all Member States into tangible progress in virtually all fields of economic and social behavior. One of the major means by which this can be accomplished is a process commonly referred to as *harmonization*. Article 100 provides that the Council, upon proposal from the Commission, shall “issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.” In other words, Community law shall be created to change (har-

⁵⁵ As an example, exports by all EEC countries to other Member States have exceeded for many years the exports to non-EEC countries. In 1978 and 1979, EEC countries also imported more goods from their partners in the Community than from non-Member States. See *Monthly External Trade Bull.* 6, 7 (Special No. 1958-1979).

⁵⁶ To cite Robert Marjolin once again, “[a]fter more than thirty years of achievements and frustration, Europe has probably reached a point of relative stability. No major progress, nor setback is in sight. Europe is not, of course, absolutely static, but the movements one can detect are very slow, sometimes hardly perceptible.” LEFFINGWELL LECTURES, *supra* note 48, at 12.

monize) national laws where required in the interest of all to afford everyone the benefits of the wider, unified market created by the EEC.

No better example can be thought of in this respect than the free movement of goods throughout the Community. This is the quintessential element of a common market and indeed, many directives have been issued under Article 100 to provide for this free movement of goods. The harmonization process, however, can also be effected through judgments of the Court, declaring certain national law inapplicable where it stands in the way of free product circulation or where it is used so as to interfere with the objectives of the Common Market. An excellent illustration in this respect is the treatment given industrial and commercial property rights by the Court in Luxembourg. In a dramatic way, this treatment illuminates how, in the common interest of all, the individual interest of a patent, trademark or copyright owner must yield to the demands of a unified market. For the reader not particularly familiar with the legal character and the detailed workings of the EEC, the following remarks may provide an explanation, albeit a cursory one, of this treatment within the EEC.

No EEC-wide system for the protection of industrial or commercial property rights was adopted at the time the Community was created. The Treaty of Rome, in Article 222, recognized instead the various systems of property ownership existing in the Member States. Patents, trademarks and copyrights were protected in all Member States granting the exclusive right to sell and/or manufacture the protected product within the territory of the individual State. This has not changed, and the protection of these property rights in the EEC is therefore still a national affair, based on the well-established principle of territoriality.⁵⁷ In contrast, the Common Market was created to overcome all kinds of barriers to trade between the Member States and therefore demands, as has been described, complete freedom of movement of goods. In addition, the EEC is based on the principle of free competition.

With these two legal systems coexisting in the Community after 1958, the national protection of industrial property rights of a territorial nature on the one hand and the Treaty rules relating to the free movement of goods and free competition on the other, conflicts were inevita-

⁵⁷ The Community Patent Convention, 19 O.J. EUR. COMM. (No. L 17) 1 (1976), which allows for transnational patent protection in the future, is excluded from consideration here as it is not relevant to the problem to be discussed *infra*. Article 43(2) of that Convention permits territorially limited licenses under a European patent. This conflict, as the Commission says, will have to be resolved in court. See EUROPEAN COMMUNITIES COMMISSION, FIFTH REPORT ON COMPETITION POLICY point 11 (1976).

ble. A balance had to be struck between both systems without jeopardizing the essential content of the national rights or the objectives of the EEC Treaty. This delicate task fell onto the Court of Justice. In its case law the Court has reconciled the basic Community principle of free trade across all intra-EEC borders with the protection granted industrial property rights by the laws of the various Member States. This reconciliation was achieved by extrapolating from Article 36 an interface delineating the supremacy, under certain circumstances, of EEC law or national law, respectively. In an analogy to the legal systems existing in all Member States, whereby distinctions are made between restrictions on the use of property in favor of an essential public interest and the deprivation of the right of ownership as such, the Court distinguished in its judgments between the existence of a patent, trademark or copyright and the exercise of such rights by their owners. The Court pointed out that Article 36, while it allows certain prohibitions or restrictions on free trade in the EEC for the purpose of safeguarding some general goals of public interest (among them "the protection of industrial and commercial property"), it nevertheless demands that these prohibitions or restrictions shall not be used as "a means of arbitrary discrimination or a disguised restriction on trade between Member States."

As early as 1966, the Court held that neither Article 222 nor Article 36 prevent Community law "from having an influence on the exercise of industrial property rights under domestic law."⁵⁸ During the years that followed the Court struck down, in approximately a dozen judgments, attempts by companies that wanted to exercise their national patents, trademarks or copyrights in order to prevent imports, re-imports, or parallel imports of the protected products into their territories. As a result, the privileges provided to holders of industrial property rights under national legislation have been severely curtailed in the EEC.⁵⁹ The use of industrial property rights in the Common Market may not lead to a partitioning of this market. The holder of the right cannot prevent the importation into his territory of the protected product once he has himself put the product onto the market anywhere in the EEC or allowed this to happen by granting a license. On the

⁵⁸ *Consten and Grundig v. EEC Commission*, [1966] C.J. Comm. E. Rec. 429, [1966] COMM. MKT. REP. (CCH) ¶8046, at 7654.

⁵⁹ *See, e.g., Deutsche Grammophon v. Metro SB Grossmärkte*, [1971] C.J. Comm. E. Rec. 487, [1971] COMM. MKT. REP. (CCH) ¶8106 (regarding copyrights); *Van Zuylen Frères v. Hag AG*, [1974] E. Comm. Ct. J. Rep. 731, [1974] COMM. MKT. REP. (CCH) ¶8230 (regarding trademarks); *Centrafarm BV v. Sterling Drug Inc.*, [1974] E. Comm. Ct. J. Rep. 1147, [1974] COMM. MKT. REP. (CCH) ¶8246 (regarding patents).

other hand, it remains necessary under the jurisprudence of the Court to balance the principles of free EEC trade and national ownership rights differently where this is required to protect the very existence of the industrial property right in a given case. The key to understanding this difference between the existence of particular rights and the exercise of those rights by their owners is the specific subject matter of the patent right, the trademark or the copyright. The Court defines this, in the case of patents and trademarks, as the right of the owner to exploit commercially, by way of making the *first* sale, the exclusive right granted by national legislation. Trademarks are additionally defined as a guarantee of origin protecting the consumer. Thus, on occasion, a patent, trademark or copyright owner may prevail over an importer in the EEC where the objective of industrial property right protection would be undermined by upholding Community law principles in the specific situation.⁶⁰

In summary, then, it can be stated that industrial and commercial property rights of the traditional type, (i.e., with territorial character) are still alive in the EEC and may, depending on the circumstances, still provide protection against third parties where this is necessary to preserve the very essence of the right. In most cases, however, the restraints on the *use* of the right, as defined by the Court in order to encourage the free movement of goods within the EEC, will override national laws that appear to grant shelter from foreign competition in other EEC countries. For the purposes of trading in patented, trademarked or copyrighted goods in the Community, one should assume, in case of doubt, that the Commission or the Court will probably decide a particular situation in favor of Community interests over national law, a principle that may be referred to as "*in dubio pro communitate*."

⁶⁰ Regarding trademarks, *see, e.g.*, Terrapin v. Terranova, [1976] E. Comm. Ct. J. Rep. 1039, [1976] COMM. MKT. REP. (CCH) ¶8362; Hoffmann-LaRoche v. Centrafarm, [1978] E. Comm. Ct. J. Rep. 1139, [1978] COMM. MKT. REP. (CCH) ¶8466; Centrafarm v. American Home Products, [1978] E. Comm. Ct. J. Rep. 1823, [1978] COMM. MKT. REP. (CCH) ¶8475.