



The Court of Justice of the European Communities

THE COURT OF JUSTICE
of the
EUROPEAN COMMUNITIES

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Introduction

The Court of Justice of the European Communities possesses several 'birth certificates'. When they created the first European Community, the authors of the Treaty of Paris (April 1951) determined the identity of the institutions which were to govern the European Coal and Steel Community. Article 7 of the ECSC Treaty establishes the institutions of the Coal and Steel Community: a High Authority, a Common Assembly, a Special Council of Ministers and a Court of Justice.

Recognizing that a new legal order was being created, but without perhaps at that time envisaging its future development and impetus, the authors of the Treaty clearly understood the necessity of creating an institution having the task of reviewing the legality of acts of the Community authorities, of maintaining a balance in their relations with the Member States and respect for their own powers and of developing a coherent and uniform interpretation of the provisions of Community law.

The Treaties of Rome which, in 1957, established the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) or Euratom, adopted the same institutional scheme as that of the Treaty of Paris (the High Authority being subsequently designated as 'the Commission').

The Court of Justice is therefore very much a Community institution.

The Convention on certain Institutions common to the European Communities of 25 March 1957 laid down at Article 3 that the jurisdiction which each of the three Treaties confers upon the Court of Justice should be exercised by a single court.

Characteristics of the Court of Justice

ECSC Treaty, Art. 31
EEC Treaty, Art. 164
EAEC Treaty, Art. 136

It is the task of the Court of Justice to ensure that in the interpretation and application of the Treaties and implementing regulations issued by the Council or the Commission the law is observed. A wide-ranging jurisdiction indeed, but a specialized one since the powers of the European Court are limited to Community law alone.

AN INTERNATIONAL COURT

The Treaties establishing the European Communities are instruments of international law.

By its very nature the Court forms part of the international legal system and indeed in one of its first important judgments of principle (Van Gend en Loos — Case 26-62) it stated that : ‘The Community constitutes a new legal order of international law’. Since disputes between States are matters for international courts, the Treaty gives the Court of Justice jurisdiction to rule in cases concerning failures by Member States to fulfil their obligations (see page 11).

However, the international nature of this procedure is somewhat limited by the fact that not only the Member States may bring such actions, — which is standard practice — but that they are also open to the Commission.

Although this intervention by the Commission may seem unorthodox by the standards of ordinary international law, it is nevertheless true that this power avoids the engendering of political tension between Member States, which would be the consequence of any dispute arising directly between them.

A CONSTITUTIONAL COURT

The Court of Justice of the European Communities is by no means the Supreme Court of a Federal State. It is however acting at the constitutional level when it

gives rulings regarding the respective rights and duties of the institutions of the Community as between each other and when it reaches decisions regarding the institutional balance to be maintained between the States and the Community.

In its mode of interpretation the Court also frequently refers to the fundamental objectives of the Treaties, in which connexion one may speak of 'an economic constitution'.

AN ADMINISTRATIVE COURT

Proceedings before the Community Court are to a considerable extent concerned with administrative matters. Special mention must be made of the procedure for establishing legality, which is closely allied to French administrative law and tends to equate the Court of Justice with a Supreme Court ensuring legality in the application and interpretation of common rules.

In this field, the Community legal order departs from general international legal practice, in which virtually all measures are taken by the States.

In fact, three treaties ensure the protection of *individuals* (natural or legal persons) against acts of the Community administration. There are many courses of action open to them : the action for annulment, the action for failure to act, the objection of illegality and the procedure for preliminary rulings, the latter necessarily involving the intervention of a national court (see *infra*, pages 11 to 15).

It should be noted that the Treaties of Rome (EEC and Euratom) imposed certain limitations on the provisions of the Treaty of Paris (ECSC) regarding the admissibility of actions for annulment brought by individuals. According to the ECSC Treaty, undertakings or associations may bring actions against individual decisions or recommendations concerning them or which they consider to involve a misuse of powers affecting them, whereas the EEC and Euratom Treaties allow individuals to bring such an action for annulment only against decisions *addressed to them* or against those which, although in the form of a regulation or a decision addressed to another person, are of *direct and individual concern to them*.

It was the intention of the authors of the Treaties of Rome that true legislative measures should not be subject to control through the procedure for the review of legality.

Another aspect of administrative procedure is the Court's jurisdiction in actions brought by officials of the European Civil Service. In fact the Court bears sole responsibility for the defence of the rights of the individual against illegal action on the part of the administration, that is to say, it has the task of settling disputes between officials and other servants of the Communities on the one hand and the institutions, the Communities or even the Member States on the other. Such disputes are generally decided by the Chambers of the Court. In order to reduce the volume of work which such staff cases represent for the Court, the procedure is soon to be modified so that a court of first instance will be entrusted with the task of examining the dispute at a factual level so that the Court will merely have to deliver judgment on the law.

The Court also discharges the important task of interpreting Community law. This interpretative role is supremely necessary in view of the incomplete state of integration achieved by the European Treaties. The Member States incorporate the Community legal order into their own legal systems and are subject thereto, the national courts are invited to apply Community law as an integral part of their own law and numerous provisions are directly applicable. It is therefore indispensable that a single institution should give a uniform interpretation of this new law. It is by the expedient of preliminary questions (see *infra*, page 13) that the Court discharges this task.

CIVIL JURISDICTION

The Court of Justice has a power of unlimited jurisdiction to declare that the Community has incurred non-contractual liability. The Community may be ordered to make good any damage, whether caused by material acts or by legislative measures.

Composition and organization of the Court of Justice

*ECSC Treaty, Articles
31, 32, 32a and 32b
EEC Treaty, Articles
165, 166 and 167
EAEC Treaty, Articles
137, 138 and 139*

Judges and Advocates-General. The Court of Justice is composed of nine Judges. It is assisted by four Advocates-General. These numbers were fixed after the accession of the new Member States.

The Members of the Court are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognized competence.

Judges and Advocates-General are appointed by common accord of the Governments of the Member States for a term of six years. The appointments are renewable and every three years there is a partial replacement of Members, affecting five and four Judges alternately and two Advocates-General. The Judges elect a President of the Court of Justice from among their number for a term of three years; he may be re-elected. The Court designates the Presidents of Chambers and a first Advocate-General for a period of one year.

It is the duty of the Advocate-General, acting with complete impartiality and independence, to deliver, in open court, a reasoned opinion on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it. The origin of this post may be traced to the 'Commissaire du Gouvernement' before the French Conseil d'Etat. The opinion of the Advocate-General contains a full analysis of both facts and law, a study of the relevant legal doctrine and case-law and, often, a comparative study of various national laws. It suggests to the Court the legal solution to the dispute and is therefore a useful summing-up of the case.

The way in which the Advocate-General thus prepares the ground and offers a solution may also be compared to the activities of the *amicus curiae* in English law. The Advocate-General, who represents the 'common interest', acts entirely on his own initiative.

The particular functions entrusted to the President of the Court are enumerated in the Rules of Procedure, the latest version of which was approved by the Council of the European Communities on 26 November 1974.

Articles 8 & 9(2) of the Rules of Procedure

The President directs the judicial business and the administration of the Court; he presides at hearings and at deliberations in the deliberation Room. He assigns cases to one of the Chambers (the Court is composed of two Chambers, each directed by a President of Chamber) for the purposes of any measures of inquiry and designates from that Chamber a Judge to act as Rapporteur and the Advocate-General.

*ECSC Treaty, Art. 32c
EEC Treaty, Art. 168
EAEC Treaty, Art. 140*

Registrar. The Court of Justice appoints its Registrar and lays down the rules governing his service. He is appointed for six years and his term of office is renewable.

The Registrar fulfils a dual role :

- he is responsible for the Registry, involving the registration, transmission and custody of all procedural documents;
- he directs the administration, inasmuch as he is responsible for the management of the Court as regards finance, administration and accounts.

Jurisdiction¹ of the Court of Justice

ECSC Treaty, Art. 31
EEC Treaty, Art. 164
EAEC Treaty, Art. 136

'The Court shall ensure that in the interpretation and application of this Treaty ... the law is observed'.

These few words, which are identical in the three Treaties, outline the general task of the Court. That task is strictly limited to the interpretation and application of Community legal rules. It has no jurisdiction to interpret or, *a fortiori*, to review the validity of rules of national law. However, the Court's task cannot be confined strictly to the wording of the Treaties and to secondary Community law, that is to say measures adopted by the institutions, but extends to general principles of Community law and to the fundamental individual rights enshrined therein.

The Court is sovereign and its judgments may not be referred to any higher court. Finally, the Court of Justice, like the other institutions of the Community, can act only within the limits of the powers conferred upon it by the Treaties and subsequent agreements (second subparagraph of Article 4(1) of the EEC Treaty).

METHODS OF RECOURSE

The various legal remedies may be classified into two broad categories : direct actions and requests for preliminary rulings.

I — Direct Actions

These actions are pursued by means of adversary proceedings involving written and oral stages.

¹ This outline of the jurisdiction of the Court is undertaken with special reference to the EEC Treaty, since the ECSC and Euratom Treaties embody similar machinery.

ECSC Treaty, Articles
88 and 89
EAEC Treaty, Articles
141 to 143
EEC Treaty, Articles
169 to 171

Action for failure to fulfill an obligation. The Court has jurisdiction to give rulings on actions brought against Member States which have failed to fulfil an obligation under the Treaties.

Mention must be made of the important role played by the Commission in initiating and pursuing this procedure. In fact, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty or an implementing regulation, it submits to the Member State concerned a reasoned opinion requiring it to comply with the obligation in question. If, after a specified period, the Member State concerned does not adopt the measures necessary to comply with its Community obligations, the Commission refers the matter to the Court of Justice. This course of action is also open to the States themselves in the event of their considering that one of their partners has failed to fulfil such an obligation. However, before taking the matter to the Court of Justice, the applicant State must refer the matter to the Commission which, if it judges this to be necessary, delivers a reasoned opinion. This direct procedure, whereby a Member State can bring a direct action against another Member State, has never, in all the twenty years and more of the Court's existence, been employed, perhaps because, for readily understandable reasons of diplomacy and courtesy, the States prefer to leave to the Commission the responsibility of bringing proceedings before the Court. If the Court finds that a Member State has failed to fulfil an obligation under the Treaty, the State is required to take the necessary measures to comply with the judgment of the Court.

ECSC Treaty, Articles
33 to 35
EAEC Treaty, Articles
146 to 148
EEC Treaty, Articles
173 to 175

Action for annulment and action for failure to act. The action for annulment is the means whereby the legality of measures adopted by the Council and by the Commission may be reviewed, that is to say the means whereby all or part of such measures may be annulled, whereas the action for failure to act is the means whereby inaction on the part of the Council or the Commission may be impugned.

The same conditions as to jurisdiction and admissibility apply to these two types of action, of which it may be said that one represents an action against positive acts and the other an action against negative behaviour.

EEC Treaty, Art. 173

The action for annulment. The action for annulment has a three-fold objective : review of the conformity with the establishing Treaties of measures adopted by the Community legislature, review of the legality of individual decisions and regulations of the Commission and the settlement of certain disputes between the institutions regarding their respective powers. The grounds for annulment enumerated in the Treaty are as follows : lack of competence, infringement of an essential procedural requirement, misuse of powers and infringement of the Treaty or of any rule of law relating to its application. The Court has un-

derstood this series of rules in a wide sense and has even recognized that the Community institutions may be bound by international agreements, such as GATT, which are binding upon all the Member States, and by international conventions, such as the European Convention for the Protection of Human Rights, which has been ratified by all the States of the Community.

The action for annulment is unconditionally admissible in the case of Member States and the institutions. On the other hand, the EEC Treaty introduced a restriction by comparison with the ECSC Treaty, inasmuch as this action is available only subject to strict limitations to individuals, whether natural or legal persons, who may institute proceedings only against decisions addressed to them personally or against those which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them. It follows that the action for annulment may not be employed by natural or legal persons to contest regulations of a general nature.

EEC Treaty, Art. 174 If the Court considers the action to be admissible and well founded, it annuls the act concerned. The annulment takes effect *erga omnes* and is binding in all the Member States, which are obliged to abstain from applying the contested measure.

However, the Treaty itself attenuates the severity of such a step by allowing the Court of Justice to state which of the effects of the regulation which it has annulled shall be considered as definitive.

EEC Treaty, Art. 175 *The action for failure to act.* The action for failure to act allows negligent or voluntary silence or inaction on the part of the Council or the Commission to be censured.

The institution must however previously have been called upon to act and is given a period of two months in which to do so.

The action for failure to act, like the action for annulment, is open mainly to the Member States and to the institutions, but, subject to the same restriction, it is available to individuals, who must show that the decision which the institution has failed to adopt is of direct and individual concern to them.

II — Actions in which the Court has unlimited jurisdiction

ECSC Treaty, Art. 36 *Actions against coercive measures adopted by the institutions of the Community.* Regulations made by the Council may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations. This provision has taken on particular importance in the field of *competition*.¹ The Court is empowered not only to annul administrative sanctions adopted by the Commission

¹ Regulation No 17 of the Council, Official Journal No 13, February 1962, p. 204.

against undertakings for infringement of the rules of competition, but may also amend them, that is to say, either reduce or increase the amount of the fines or periodic penalty payments.

*ECSC Treaty, Art. 40
EAEC Treaty, Articles
151 and 188
EEC Treaty, Articles
178 and 215, second
paragraph*

Actions based upon non-contractual liability. In accordance with the general principles common to the laws of the Member States, the Community must make good any damage caused by its institutions or by its servants in the performance of their duties. The Court of Justice has unlimited jurisdiction in this field both to assess the basis of liability and to decide whether responsibility for the damage may be ascribed to Community action, as well as to assess the amount of the damage and to quantify it.

*Staff Regulations of
Officials*

Actions brought by Community Public Servants. The Court exercises a power of unlimited jurisdiction pursuant to the Staff Regulations.

These cases are generally heard by the Chambers. In view of the ever growing number of cases, proposals are being made for the creation of a court of first instance with the task of examining the facts of disputes.

EEC Treaty, Art. 181

Decisions adopted pursuant to an arbitration clause. 'The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law'.

III — The procedure for preliminary rulings

EEC Treaty, Art. 177

Article 177 of the EEC Treaty states :

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning :

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

'Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

'Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice'.

This is undoubtedly the most important provision both as regards the assimilation of European law into the national legal systems and as regards the uniform interpretation of that law in all countries of the Community.

In order to understand the precise scope of this procedure it is necessary to bear in mind the nature of the Treaties establishing the Communities. They may be distinguished from standard international treaties in that the latter create rights and obligations only in respect of the states themselves and not for their nationals, whereas numerous provisions of Community law, both primary and secondary, are directly and immediately applicable within the legal order of each Member State.

That is to say that various provisions of the Treaty or of measures adopted in implementation thereof create individual rights in favour of nationals of the Member States on which individuals may rely before their courts. These rules are an integral part of the law in force within the national legal order and the courts of each of the Member States are themselves also Community courts to the extent to which they have jurisdiction to apply Community law. It was therefore imperative that a uniform interpretation of Community law should be guaranteed.

The Treaty also lays down the detailed rules for this collaboration between the national court and the Community Court :

Where a question of Community law is raised before a court of first instance or of appeal, that court may refer the matter to the Court of Justice by way of a request for a preliminary ruling, and where any such question is raised before a supreme national court against whose decisions there is no judicial remedy under national law, that supreme court is bound to refer the matter to the Court of Justice. Accordingly, the latter may be seised of a case only by decision of a national court. The question referred must fall within the jurisdiction of the Court of Justice, that is to say, it must be limited to the interpretation or application of Community law. The Court of Justice is bound to reply to any question referred which falls within the limits of its jurisdiction, but it refrains from offering any solution to the dispute in the main action. Likewise, it has no jurisdiction to interpret national laws nor—within the context of the procedure for preliminary rulings—is it empowered to assess their uniformity with Community law. Only the national court may, if it considers it necessary, withdraw a question which it has referred to the Court. In short, in so far as the national court is concerned, this device constitutes a procedural step.

During more than twenty years of the Court's existence this procedure has become ever more important. After an uncertain start, between 1961 and 1966, less than ten judgments were given per year; between 1966 and 1969, between ten and fifteen judgments per year; between 1970 and 1974 the flood-gates were opened and judgments given per year on preliminary references have numbered between thirty and fifty.

Up to 1975 applications for preliminary rulings were assigned only to the Full Court. In view of the growth in the number of such cases, the new Rules of Procedure approved by the Council of the European Communities on 26 November 1974 allow them to be referred to the Chambers, on condition that they are cases which are of an essentially technical nature or concern matters for which there is already an established body of case-law. The decision to assign is taken by the Full Court

following presentation by the Judge-Rapporteur of his preparatory report and after the Advocate-General has been heard. A case may not be so assigned if a Member State has exercised its right to submit a statement of case or written observations, or if an institution expressly requests in its observations that the case be decided in plenary session.

The case-law of the Court, like that of national courts, has laid down the circumstances in which interpretation may be requested.

By way of example, the following are various cases for the purpose of which preliminary questions may be referred to the Court of Justice :

- to specify the meaning and scope of provisions of the Treaties or of measures of secondary law;
- to determine whether a provision of Community law refers to the legislation of one Member State or to that of another;
- to specify the effects of a Community rule as regards time;
- to decide which legal measures or acts are governed by Community law and which by national law;
- to determine whether Community rules may or must be clarified or supplemented by national legislation;
- to decide whether a provision of Community law has direct effect.

The second sphere of application of Article 177 of the EEC Treaty concerns the assessment of the validity of measures adopted by the institutions. The concept of validity relates not only to formal or external conformity, but also to inherent legality. It must be appreciated not only with reference to the text of the Treaty and to general legal principles but also possibly by reference to international law.

Procedure

*Protocol on the Statute
of the Court of Justice
Rules of Procedure*

The procedure before the Court of Justice is mixed : it comprises two stages, written and oral.

A distinction should be made between the procedure in direct actions and that in references for preliminary rulings.

In the case of a direct action, the written stage of the adversary proceedings is initiated by an application, sent by a lawyer to the Registry of the Court by registered letter. The application must contain :

- the name and permanent residence of the applicant;
- the name of the party against whom the application is made;
- the subject-matter of the dispute and the grounds on which the application is based;
- the form of order sought by the applicant;
- the nature of any evidence which he intends to adduce;
- the address for service chosen by the applicant in the place where the Court has its seat, giving the name of a person who is authorized and has expressed willingness to accept service.

The application is served by the Registry of the Court of Justice on the defendant, who lodges a defence. This is followed by the applicant's reply and finally by a rejoinder on the part of the defendant.

These documents must be lodged according to a strict time-limit which only the President of the Court may modify.

The written stage is followed by the oral stage of the procedure.

The President assigns each case to a Chamber and designates the Judge-Rapporteur who presents a preparatory report, either written or oral, briefly setting out the facts and subject-matter of the dispute. It is also at this stage of the procedure that a decision is reached on the question whether or not the case requires measures of

inquiry, such as experts' reports, an inspection of the place or thing in question or the taking of oral testimony. When the date of the hearing of the oral procedure has been fixed the Judge-Rapporteur commits to a report for the hearing the facts alleged and the arguments adduced by the parties and by the interveners, if any.

The case is then heard in public. After the hearing the Advocate-General delivers his opinion which not only contains a detailed study of the issues of fact and, above all, of law involved but also contains a proposal to the Court for the solution of the dispute.

The oral procedure is then closed and the Court deliberates upon the case. Judgment is given at a later public hearing. It is served on the parties and is thereafter enforceable in all the Member States.

A reference for a preliminary ruling displays certain differences. The national court submits questions to the Court of Justice on the validity or interpretation of a Community provision by way of a ruling of that court (decision, judgment or order), containing the text of the question or questions which it wishes to refer to the Court of Justice. This decision is transmitted by the registry of the national court to the Registry of the Court of Justice and is accompanied, where necessary, by a file serving to acquaint the Court of Justice with the context and scope of the questions referred. After a period of two months, within which the Commission, the Member States and the parties to the national proceedings may submit observations or a statement of case to the Court of Justice, they are invited to attend a hearing during which they are given the opportunity of submitting oral observations.

Following the delivery of the Advocate-General's opinion the judgment given by the Court of Justice is notified to the national court by the intermediary of the registries.

Who is entitled to plead before the Court of Justice?

The Member States and the institutions of the Community are represented before the Court by Agents, generally members of their legal departments, who are also entitled to the assistance of an adviser or lawyer.

In respect of individuals, lawyers entitled to practise before a court of a Member State may appear before the Court of Justice. However, where the law of a Member State recognizes their right to do so university teachers of law may also appear before the Court. This is the case with university teachers in the Federal Republic of Germany.

What are the rules regarding language?

The procedural languages are the official languages of the Community; Court publications are published in those languages. The choice of the language of a case lies with the applicant, subject to certain provisions :

— if the defendant is a Member State or a natural or legal person having the nationality of a Member State, the language of the case is the official language of that

State; where the State has more than one official language, the applicant may choose between them;

- at the request of one of the parties, and after the opposite party and the Advocate-General have been heard, the Court may authorize another official language of the Community to be used for all or part of the proceedings. This option is not granted to institutions of the European Communities.

In the case of preliminary rulings, the language of the case is that of the national court or tribunal which is referring the matter to the Court. Texts of documents drawn up in the language of the case are authentic.

Who pays the costs of proceedings before the Court?

Proceedings before the Court are free of charge. The Court gives a decision as to costs in its final judgment or in the order which closes the proceedings.

Main themes of Community case-law

The Court of Justice of the European Communities is the Court of, *inter alia*, an economic community. It follows that the Court's sphere of activity principally covers the field of economic law. However, the Court is called upon to give judgment in a variety of cases lying outside the field of economic interests properly so-called. (The social sphere, human rights and fundamental guarantees of the Community Treaties, balance of powers between the institutions, and so on).

What are the substantive rules of law which it is the Court's task to apply?

- Mention must first be made of topics with the implementation of the customs union : external Community trade, linked to the establishment of common rules governing economic relations with third States, and internal trade and its corollary, the free movement of goods within the Community.
- We must next consider the more specialized fields for which the Treaty has laid down common rules, such as the Common Agricultural Policy, which has given rise to numerous cases involving the law on agriculture; the rules concerning transport, freedom of establishment and the provision of services, and the particularly important field covered by the rules of competition, that is to say the rules relating to restrictive agreements, to the abuse of dominant positions and to illegal interference by the States in the free play of competition.
- A final aspect—and not the least important—is the case-law of the Court on social problems. It is essentially concerned with two themes : freedom of movement for workers and social security for migrant workers.

I — Freedom of trade and a single market

The essential object of the Community, according to Article 2 of the EEC Treaty, is the establishment of a common market. Article 9 of the Treaty lays down that this common market shall be based upon a 'customs union' involving the abolition

of all obstacles to the free movement of goods, by the elimination of customs duties and of all charges having equivalent effect as well as all quantitative restrictions and measures having equivalent effect. From the very beginning the Community has had to fight against entrenched protectionism and the repercussions of this conflict are apparent in the case-law of the Court.

This judicial activity has led, in three successive waves, to a body of case-law in the following three fields : more or less open protectionist measures, overt interference with freedom of trade, and finally tax discrimination and disguised protectionism.

Overt interference with the free movement of goods

In the earliest days of the Community, the Member States appeared to want to neutralize the adverse effects of foreign competition on given economic sectors by the reflex action of the creation of taxes and restrictions, and even of prohibitions on import. These cases were to give rise to actions against Member States for failure to fulfil an obligation, and each of them resulted in the Member State concerned being found guilty of that failure. The following judgments may be cited in chronological order :

- *Commission v Italian Republic*, a case concerning imports of pigmeat — 19 December 1961 (Rec. p. 633)
- *Commission v Grand Duchy of Luxembourg and Kingdom of Belgium*, the ginger-bread case — 14 December 1962 ([1962] ECR 425)
- *Commission v Grand Duchy of Luxembourg and Kingdom of Belgium*, a case concerning milk products — 13 November 1964 ([1964] ECR 625)
- *Commission v Italian Republic*, a case concerning lead and zinc — 18 February 1970 (Rec. p. 47).

In all these cases, the case-law clearly indicates that the objectives stated in the Treaties establishing the Communities should be observed. The Court of Justice will not countenance in any way any practice on the part of a Member State, whether overt or covert, which may be at variance with the obligations it has undertaken to fulfil.

The principle of non-discrimination

This principle, which is the inspiration behind numerous provisions of the EEC Treaty, is applied to important effect in the sphere of taxation. The Treaty provides that internal taxes must be applied without discrimination to foreign and home products alike, so as to avoid the use of internal charges for protectionist purposes. When customs duties and quantitative restrictions were finally eliminated from intra-Community trade, it became apparent that there were 'tax barriers' resulting from disparities between national taxation laws and, more particularly, tax provisions whose effect was to put imported products at a disadvantage by comparison with domestic production. Mention should be made of the judgment of 16 June 1966 in *Lütticke* ([1966] ECR 19), and of the judgments of 3 and 4 April 1968 in *Molkereizentrale* ([1968] ECR 143), in which the Court firmly upheld the principle of non-

discrimination in matters of taxation. Numerous actions have been brought against Member States for failure to fulfil an obligation in the matter of domestic taxation systems which are limited to sectors or even particular products, such as the discriminatory charge on imported spirits (Commission v Italian Republic, 15 October 1969, Rec. p. 377); discriminatory tax refunds in favour of the engineering industry (Commission v Italian Republic, 19 November 1969, Rec. p. 433); the discriminatory excise duty imposed on imports of cocoa (Commission v Italian Republic, 15 April 1970, Rec. p. 187); the taxation of imports of wood (Commission v Kingdom of Belgium, 5 May 1970, Rec. p. 237).

Measures having effects equivalent to customs duties and quantitative restrictions

In order to ensure that these prohibitions were not circumvented by indirect or disguised action on the part of national authorities, the authors of the Treaty were at pains to append to each such rule a prohibition on 'measures having equivalent effect', that is to say, fiscal or commercial measures which, although not ostensibly in the nature of customs duties or quantitative restrictions, nevertheless had the same restrictive effect on trade.

In the field of charges having an effect equivalent to customs duties, the Court has had occasion to classify as such : a statistical levy on exported goods (Commission v Italian Republic, 1 July 1969, Rec. p. 193); a charge of 0.5 % for administrative services on importation (Commission v Italian Republic, 18 November 1970, Rec. p. 961; S.A.C.E. judgment of 17 December 1970, Rec. p. 1213, and the Politi judgment of 14 December 1971, Rec. p. 1039); a charge for sanitary inspection (Marimex, judgment of 14 December 1972, Rec. p. 1309); an unloading charge (Variola, judgment of 10 October 1973, [1973] ECR 981); an *ad valorem* charge of one-third per cent on imports of unworked diamonds (Diamanarbeiders, judgment of 1 July 1969, Rec. p. 211). This last judgment displays the extreme rigour of the Court's position on this matter. In fact the charge was minimal and was levied on a specific commodity, the revenue from the charge being devoted to a Social Fund for Diamond Workers which was intended to give the latter certain additional social advantages.

Measures having effects equivalent to quantitative restrictions came to the attention of the Court at a somewhat later date. Mention should be made of the Dassonville judgment of 11 July 1974 ([1974] ECR 837) concerning the free movement of Scotch whisky. In this case the Court classified as measures having an effect equivalent to quantitative restrictions administrative formalities designed to exclude any importation of a product otherwise than directly from the country of origin. A further significant judgment has been given in an action against Germany for failure to fulfil an obligation and concerns the designations 'Sekt' and 'Weinbrand' (Commission v Federal Republic of Germany, 20 February 1975). The conclusion to be drawn from this judgment is that a Member State cannot introduce legislation to promote artificially a generic designation to the status of an appellation of origin so as to secure an advantage for the national product.

II — Competition

It is surely unnecessary to emphasize the importance of the rules concerning competition law in a body of law which, by its nature and objectives, is principally economic.

In the national context 'restrictive agreements' and 'monopolies' represent familiar aspects of competition law. Community law has added a new dimension based on the prohibition of restrictive agreements and the exploitation of dominant positions, these concepts being governed by Articles 85 and 86 of the EEC Treaty. The Treaty also condemns State intervention between national economies in the context of the Common Market as a whole.

For Community law to take effect it is necessary, at least at first, that practices which are inimical to competition should affect trade between Member States. In the course of the many cases brought before it the Court of Justice has had occasion to define the field of application of Community competition law. A few examples chosen from recent case-law may illustrate this edifice of competition law :

- The 'territorial' aspect of the application of competition rules was defined by the Court in nine judgments dated 14 July 1972, in the so-called Dye-stuffs Cases (Rec. p. 619). Nine manufacturers of dye-stuffs had brought actions against a Commission decision fining them for contravening Article 85(1) of the EEC Treaty, in that they took concerted action in raising prices in 1964, 1965 and 1967. Three of the applicant undertakings, the registered offices of which were situated outside the Community, had claimed that the Commission could not impose fines in respect of acts which they had committed outside the Community. The Court, having established that the applicants had determined compulsory prices and other conditions of sale for their subsidiaries within the Community, confirmed the penalties imposed by the Commission, even with respect to undertakings not situated within the Community territory.
- The Cementhandelaren case of 10 October 1972 (Rec. p. 988) was concerned with a purely national agreement, limited to Netherlands territory. The relevant association of cement manufacturers attempted to argue from this that trade between Member States could not be affected. The Court held that an agreement covering the whole of the territory of a Member State has, by its very nature, the effect of consolidating partitions erected on a national basis, and thereby inhibits the economic interpenetration intended by the Treaty and ensures protection for national production.
- In the Istituto Chemioterapico Italiano and Commercial Solvents judgment of 6 March 1974 ([1974] ECR 223), the Court of Justice stated, *inter alia*, that the prohibition on abuse of a dominant position, in so far as it might affect trade between Member States, was intended to define the sphere of application of Community rules in relation to national laws. It could not therefore be interpreted as limiting the field of application of the prohibition which it contained to industrial and commercial activities supplying the Member States. It was sufficient that the free movement of goods between the Community and third countries

should be inhibited. The two companies had requested the annulment of a Commission decision imposing on them fines and periodic penalty payments for refusing to supply a competing company with pharmaceutical products. The companies claimed in their reply that their refusal to sell the product (an anti-tubercular medicament) was not an obstacle to trade between Member States of the EEC, since it was intended for export to developing countries.

- The Court has had occasion to define what must be understood by the 'pattern of competition' within the Community. It did so in an important judgment of 21 February 1973, *Europemballage and Continental Can* ([1973] ECR 215). This case raised a fundamental problem : the relationship between Article 85, concerning restrictive agreements, and Article 86, concerning dominant positions, the question actually raised being whether these two provisions form a unified system. The Court placed Article 86 in the context of that system, showing that in conformity with the general objective of the competition policy stated in Article 3, the Treaty contains a coherent system of rules of competition, so that no legal vacuum can be deemed to exist between Articles 85 and 86.
- The Court of Justice also further defined competition law in the field of the Commission's powers in the procedure provided by Article 85(3) for exemption from Article 85(1) of the Treaty. The Court ruled in its judgment in the *Transocean Marine Paints Association* case of 23 October 1974 ([1974] ECR 1063) that the Commission must be in a position at any moment to check whether the conditions justifying the exemption are still present.
- Apart from specific aspects of competition law the Court of Justice has had occasion to consider the effect of the Common Market on the protection of industrial and commercial property rights. In fact any right to industrial or commercial protection confers on the holder of that right a position of exclusivity, which, although legitimate in itself, may also form the subject matter of restrictive agreements or give rise to monopolistic exploitation. The case of *Belgische Radio en Televisie v Sabam and Fonior* (Judgment of 21 March 1974, [1974] ECR 313) raised the question whether an abuse of a dominant position is committed by an undertaking which exercises a *de facto* monopoly in a Member State for the management of copyrights and which requires of its members the global assignment, for a period of five years following the withdrawal of a member, of all copyrights, without drawing any distinction between specific categories of such rights. The Court ruled that such practices may constitute an abuse. In the *G. Sacchi (Cable Television)* judgment of 30 April 1974 ([1974] ECR 409), the Court had occasion to specify that the grant of the exclusive right to transmit television signals does not as such constitute a breach of the Treaty. However, discrimination by undertakings enjoying such exclusive rights against nationals of Member States by reason of their nationality is incompatible with Community law.
- Finally, two cases in which the Court of Justice gave rulings concerning the limitations on the use of a patent or trade-mark.

In the so-called Café Hag case, Van Zuylen, judgment of 3 July 1974 ([1974] ECR 731), the Court ruled that the national character of laws relating to trademark protection cannot be used to partition the Common Market—the trademarks in question having of course the same origin. In this case the matter at issue was the trade-mark ‘Café Hag’, registered at Bremen and sold to a Belgian trader. In the Centrafarm, Winthrop and Sterling Drug judgments of 31 October 1974 ([1974] ECR 1147), the Court of Justice held that the sole purpose of patents is to prevent fraud and that they must not be used or abused for purposes of commercial policy. The existence of a patent must neither impede the free movement of goods within the European Community nor serve to create new restrictions on trade.

III — The Community as a ‘social union’

The expressions ‘Economic Community’ and ‘Common Market’ merely convey the Europe of trade and industry, the Europe of business.

However, right from the beginning, the Community has had a social aspect.

The EEC Treaty contains a number of provisions intended to allow nationals of all Member States—including both employed workers and self-employed persons—to exercise the most diverse economic activities in conditions of freedom and equality. The two basic principles of the system are those of freedom of movement of persons and equality of treatment for nationals of all the Member States. Numerous substantive provisions derive from these principles; freedom of movement for employed persons; freedom of economic establishment and the provision of services; equality between nationals of all the Member States as regards the right of access to and exercise of professional or trade activities of all kinds; equal rights in the field of social security.

The field of application of the rules of social policy

Article 48 of the EEC Treaty prohibits all discrimination based upon nationality ‘between workers of the Member States as regards employment, remuneration and other conditions of work and employment’. Article 51 entrusts to the Council the task of establishing in the field of social security ‘such measures ... as are necessary to provide freedom of movement for workers’.

What is the personal and material field of application of these provisions?

Who is the ‘worker’ protected by the Community’s social law?

At first sight, in order to benefit from the social protection provided by the Treaty and Community regulations, three characteristics must be present : to be a worker, employed and migrant. In practice, over the years, Community case-law has had to define these terms and elaborate, in the light of the text of the regulations, both the social security techniques implemented by them and socially satisfactory solutions for a whole range of individuals worthy of special attention who do not possess the three requisite characteristics : unemployed migrant workers, employed workers who are not exactly migrant, and so on.

A number of judgments illustrate this case-law :

The Hockstra (née Unger) judgment of 19 March 1964 ([1964] ECR 177) states that Community rules are not intended to restrict protection only to the worker in employment but tend to protect also the worker who, having left his job, is capable of taking another.

The judgments in Singer, of 9 December 1965 ([1965] ECR 965), and Caisse de Maladie des Chemins de Fer Luxembourgeois, of 12 November 1969 (Rec. p. 405), confirm that the worker who suffers an accident while on holiday or on a pleasure trip enjoys the protection of Community rules. The Ugliola judgment, of 15 October 1969 (Rec. p. 363), accords the same rights to a migrant worker for the period during which he is engaged in national service in his country of origin.

The social policy rules of the Common Market in relation to employed workers also protect the 'family helper', engaged in agricultural work (cf. judgment in Jansen of 27 October 1971, Rec. p. 859).

The De Cicco judgment, of 19 December 1968 ([1968] ECR 473), treats craftsmen in the same way as employed workers to the extent to which, pursuant to the provisions of a national law, they are protected against one or more risks by the extension to them of schemes organized for the benefit of workers in general.

Thus the case-law of the Court is moving away from the strict concept of the 'migrant-employed-worker' towards a wider concept of the socially protected 'Community citizen'.

What advantages are covered by the concept of 'social security'? How is the principle of equality of treatment to be applied in view of the variety of social security schemes?

At the national level new systems of social security are developing, based far more upon the idea of social interdependence than upon participation in the work process. As far as finance is concerned, there is a move away from the system of contributions towards a varying degree of taxation of resources.

Naturally enough, the case-law of the Court reflects this evolution. The problem was raised for the first time in the Torrekens judgment, of 7 May 1969 (Rec. p. 125), concerning a non-contributory social security scheme, in fact the payment of an allowance to aged wage-earners.

The Frilli judgment, of 22 June 1972 (Rec. p. 457), concerns the application to an Italian national resident in Belgium of the Belgian law instituting a guaranteed income for old people.

The judgments in Heinze, of 16 November 1972 (Rec. p. 1105), and Michel S., of 11 April 1973 ([1973] ECR 457) confirm the equality of nationals of all the Member States in the field of medical welfare and allowances for handicapped persons.

The judgments in Casagrande, of 3 July 1974 ([1974] ECR 773), and Alaimo, of 29 January 1975, confirm equality of treatment for nationals of the Member States in the field of scholastic allowances.

Free movement of persons and public policy

Up to the present time the application of the provisions relating to free movement of persons does not appear to have raised any major problem within the Community. However, the Court of Justice has been called upon to examine the problem of the line of demarcation to be drawn between the principle of free movement and the exception relating to public policy and public security contained in Articles 48 and 56 of the EEC Treaty. This question has been interpreted in the judgments in *Van Duyn*, of 4 December 1974, and *Bonsignore*, of 26 February 1975.

Professional or trade activities and the principle of equality of treatment

As regards professional or trade activities, the EEC Treaty embodies the principle of equality of treatment. This rule is specified in Article 48 in relation to employed persons, in Article 52 in relation to the right of establishment and in Article 60 in relation to the provision of services.

In all areas of professional or trade activities the Member States must refrain from making any distinction between their own nationals and nationals of the other Member States. Of course, they retain their sovereign power to lay down by law the conditions for entry to the various occupations and the rules governing their exercise. However, and this is where Community law intervenes, it is no longer permissible to discriminate, in the application of those provisions, between nationals of one Member State and those of the others.

Two particularly interesting cases illustrate these principles: the judgment in *Reyners v Belgian State*, of 21 June 1974 ([1974] ECR 631), in which the Court declared that the rule as to non-discrimination applies to the particular situation of the profession of advocate, and the judgment in *Van Binsbergen*, of 3 December 1974, stating that the same applies in the case of an authorized agent. These two cases differ in the sense that, in *Reyners*, it was the nationality of the plaintiff in the main action which constituted the obstacle, whereas in *Van Binsbergen* the question turned on a matter of residence.

Conclusion

'Such therefore, with all its powers and procedures, is the Court of Justice of the Communities to which has been entrusted the safeguarding of the law. It is the judge of legality within the Community and has direct jurisdiction over the institutions, the Member States and individuals. However, as official interpreter of that law, it maintains an uninterrupted dialogue with the courts and tribunals of the Member States for the purpose of ensuring the uniform application of the legislation throughout the Community, irrespective of state frontiers. This dual role gives it the character of an original but authentic court, more akin to a domestic than an international court'.

'... Heterogeneous, subtle, pragmatic, evolving—these are the characteristics of a law expressly created to ensure the foundation and, further, the expansion of a society of a new type, of a law at every manifestation of which more and more numerous elements of a multi-national, multi-state community take root in a society based on separate nations and states and, at the same time, promote the need for an extension of the Community concept.

This law has been observed striving, through the management of a common market, towards a nascent community. Rooted as it is in international law—under the auspices of the Treaties—it has little by little taken on elements gathered from all sources of law : from international law to domestic law, from public law to private law and even economic law, which it is progressively absorbing into its being until the day when, we believe, finally structured within a multi-national framework, it will be seen to be a truly internal legal order'.

These few words in conclusion are taken from an address in which Mr Robert Lecourt, President of the Court of Justice of the European Communities since 1967, expressed his thoughts on the role of the judge *vis-à-vis* the Common Market.¹

¹ Taken from 'Etudes et travaux de l'Institut universitaire de hautes études internationales' No 10. Geneva 1970.