III/D/1294/79-EN
Orig: DE

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Brussels, October 1979

THE NEED FOR A EUROPEAN TRADE MARK SYSTEM. COMPETENCE OF THE EUROPEAN COMMUNITY TO CREATE ONE.

Commission Working Paper
Working Group on the Community Trade Mark

Contents

A. Introduction

The Commission decided on 6 July 1976 to draw up a regulation based on Article 235 [1] creating a Community trade mark and a directive based on Article 100 approximating national trade mark law. At the same time it prepared and published a memorandum setting out the reasons for these measures and describing the work that had gone into their preparation[2].

During the discussions concerning the memorandum and the first and second draft versions of the regulation, the question whether the Community was competent to take legislative (and administrative) measures in the trade mark sphere was raised several times. It was asked in particular whether it is legally possible and, if so, whether it is necessary to create the Community trade mark and the Trade Marks Office by means of a Community regulation.

The reasons why the Commission is proposing action in the field of trade marks are as follows. The common market in marked goods is extremely underdeveloped compared with the internal markets in other products. Even today, the only trade marks in existence are national ones. The extent to which they are protected is determined by national law and the protection available is effective only within the area over which the relevant national law operates. The protection afforded to trade marks in one Member State does not, as a rule, extend over the frontiers of the other Member States. Conversely, from the standpoint of any given national law, the protection of marks which is available abroad does not extend into the area of jurisdiction of that law. Identical or similar trade marks can therefore be protected in more than one Member State for the benefit of different proprietors. As a result, conflicts inevitably arise at the Community's internal frontiers. Each proprietor has exclusive rights. Consumers in the neighbouring country may be misled as to the origin of the product. A trade mark is, after all, protected not for its own sake but for the purpose of identifying goods and services. Importation of goods and services may thus be impeded by trade mark rights, and free trade and compeition between Member States can be affected thereby.

Consequently, ever since the EEC Treaty entered into force a solution has been sought to the problem of overcoming the barriers created by national trade mark rights. Certain judgments of the Court of Justice of the European Communities have in the meantime removed some of the rules which inhibited trade. In particular, the proprietor of a trade mark is no longer entitled to prohibit a third party from using the mark in respect of goods which have been marketed under it in another Member State by the proprietor himself or with his consent. In the absence of legislative measures at Community level, the Court of Justice felt it necessary to pronounce further judgments supporting the free movement of marked goods. From the point of view of trade mark protection, the future is dangerous if the Community does not adopt legislation forthwith.

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1) Unless otherwise indicated, the articles referred to in this paper are those of the Treaty establishing the European Economic Community.

2) Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76.

The fact is, however, that most of the obstacles to the free movement of goods which are created by trade mark laws remain with us still. This can be seen particularly in innumerable cases in which confusingly similar trade marks which have developed independently of one another in different Member States are owned by firms which have no business connection with each other.

It is essential, therefore, to harmonise those provisions of national trade mark law which directly affect the free movement of goods and services and freedom of competition in the Community. These are for the most part rules concerning the extent of the protection afforded to trade marks, their use, the amicable settlement of disputes arising out of conflict between trade marks, and the grounds for cancellation. A draft proposal for a Directive to harmonise the laws on trade marks is currently being discussed[1].

The harmonisation of national laws can reduce the number of trade mark conflicts, which, after all are prejudicial to the common market but it cannot eliminate their underlying cause. Harmonisation of the national systems of trade mark protection cannot in any way affect the restraints upon inter-State trade which arise because the national systems of law are autonomous and because the laws of the Member States are founded on the principle of territoriality. So long as national trade mark laws exist, their geographical area of application will remain limited within each Member State with the result that, even after harmonisation, numerous sources of conflict, both old and new, between identical or similar trade marks governed by different legal systems, will continue to exist. Where the domestic laws relating to trade marks so allow, a number of persons who are independent of each other can obtain protection of the same mark, or of similar marks, in different Member States and thereby prevent the importation of the relevant goods into their country.

These conflicts are an impediment to the free movement of goods and to competition, and they are detrimental to the proprietors of trade marks and to consumers. The only way in which they can be eliminated is by making trade mark protection co-extensive with the area of the common market. It will have to be possible to obtain a mark which is entirely independent of national laws on trade marks and which is valid throughout the Community. Since national trade mark protection can be neither abolished nor compulsorily changed into Community protection, the creation of a Community trade mark existing alongside national rights is the only means whereby a common market in marked goods can eventually be achieved.

Trade and industry both within and outside the Community have declared themselves overwhelmingly in favour of the creation of this new right which is to extend over the whole area of the Community. They expect to gain substantially from its use. National trade mark law has, of course, proved throughout the world to be an essential factor in promoting trade and industry. All the indications are that a Community trade mark system will provide the same impetus and produce the same consequences. The production of and trade in marked goods account for a

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[1] Draft Proposal for a Council Directive to harmonise the trade mark laws of the Member States, Document III/D/1293/79 of July 1979.

large part of the Community's economic activity. Business development, economic expansion and the standard of living of consumers in the Community depend to some extent on the profitability, capital expenditure, growth and international competitiveness of commerce and industry in producing and trading in marked goods. The introduction of the mark at Community level will open up new and additional channels of economic activity. It will make possible the development of new European markets for new products and services and the expansion of existing national markets into European ones. The mark will thus operate as an important integrating factor. As a result of the Community trade mark, moreover, undertakings will not have to acquire a range of national marks with the different procedures, higher costs and increased work-load that this involves. Lastly, the Community trade mark will have real economic significance for the consumer. It will increase the transparency of European markets, simplify choice and aid decision-making.

For these reasons, the Community ought not to remain inactive.

B. Main features of the draft regulation

The draft regulation[1] of 1978 proposes inter alia the following substantive trade mark law:

- the acquisition, by means of registration, of trade marks for goods or services, which marks are to be operative throughout the whole area of the Community (Articles 1 and 6 of the draft);
- registration of a Community trade mark and its maintenance only where no prior trade mark rights exist in any of the Member States (Articles 8 and 51);
- the obligation to use a Community trade mark (Article 9);
- determination of the extent of the protection afforded by a Community trade mark (Articles 10, 12, 13 and 14);
- the Community trade mark, as an item of property, is to be treated in the same way as a national trade mark (Article 19);
- transfer of a Community trade mark will operate over the whole area of the Community, but not over a lesser area (Article 20);
- after a certain period of time the validity of a Community mark cannot be contested (Article 55).

For purposes of the application of this substantive law the draft regulation provides for a number of official procedures, namely, registration (Title IV), renewal, surrender, lapse, cancellation (Title V). Title VI and VII govern legal protection. Title VIII governs jurisdiction and the procedure to be followed in actions relating to Community trade marks.

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1) Draft Council Regulation on the Community trade mark, document III/D/753/78 of July 1978.

For the implementation of these official procedures, the regulation proposes the creation of a Community Trade Mark Office and specifies the functions, legal status and organisation thereof and also its relationship to the Community institutions. The Office's function is to apply the procedures prescribed by the regulation (Article 2 of the draft). To help it perform this function, the Office is to have a legal personality (Article 118(1)). In all the Member States it is to enjoy the widest legal capacity available to legal persons who are subject to their laws (Article 118(2)). The fact that the Office is to have such legal personality, or legal capacity in national laws, does not mean that it is also to enjoy legal capacity in public international law. On the contrary, it follows from the nature of its function and powers, as described above, that it will not have capacity for purposes of international law. Under the terms of the draft, the Office will not have power to conclude international agreements. Moreover, it is given no privileges and immunities of its own. Instead, those of the Community are declared to be applicable to it (Article 121).

The Trade Mark Office is to enjoy certain rights and be placed under various obligations. Thus it will have power to address decisions to interested parties on the following matters:

- refusal to register the transfer of a Community trade mark (Article 20(4));
- dismissal of an application for a Community trade mark (Articles 31, 32 and 41);
- dismissal of the opposition of the proprietor of an earlier trade mark (Article 40(2));
- registration of a Community trade mark, renewal of registration (Articles 42 and 43);
- registration of the surrender of a Community trade mark (Article 44);
- declaration of the lapse of a Community trade mark (Article 62);
- declaration of invalidity of a Community trade mark (Article 62);
- fixing of the amount of costs of opposition, lapse or cancellation proceedings (Article 80);
- decisions in respect of appeals (Article 68);
- restitutio in integrum (Article 77(4)).

The regulation confers the following powers, in particular, on the Commission:

- appointment and dismissal of senior staff of the Office (Article 126);
- supervision of the legality of the acts of the President (Article 127(1));
- hearing of complaints from a Member State or interested party concerning the alleged illegality of an act of the President (Article 127(3));
- adoption of amendments to the implementing regulations (Article 142(3)).

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The following powers are to be conferred on the Court of Justice:

- hearing of further appeals ("in the interest of the parties") lodged by parties who are adversely affected by decisions of the Board of Appeal of the Office on grounds of infringement of an essential procedural requirement and of infringement of the regulation or any rule of law relating to its application (Article 69);
- hearing of further appeals on a point of law lodged by the Advocate-General at the Court of Justice against decisions of the Board of Appeal of the Office on grounds of infringement of an essential procedural requirement and of infringement of the regulation or any rule of law relating to its application (Article 70);
- the giving of judgment pursuant to any arbitration clause contained in a contract concluded by the Office (Article 122(2));
- the giving of judgment in disputes relating to compensation for damage in the case of the non-contractual liability of the Office (Article 122(3) and (4));
- the giving of judgment in disputes between the Office and its staff (Article 124):

The Council is to be granted the power to adopt implementing provisions as follows (Article 142):

- the implementing regulations;
- the rules of procedure of the Boards of Appeal of the Trade Mark Office;
- the rules relating to fees; and
- the Staff Regulations

C. Competence of the Community in relation to trade marks

I. The tasks entrusted to the Community

Article 4(I) distinguishes between "the tasks entrusted to the Community" (first sentence) and "the powers conferred" upon its institutions to carry out these tasks (second sentence). Consequently, the competence of the Community deriving from its tasks must be considered first of all.

The competence of the Community is not described by means of an exhaustive list of fields of operation but is rather more widely determined by the Community tasks, objectives and activities which are laid down as binding by the Treaty, particularly in Articles 2 and 3.

Article 2 provides that "the Community shall have as its task" to promote the Community objectives referred to therein, that is, inter alia, a harmonious development of economic activities throughout the Community, a continuous and balanced expansion, and an accelerated raising of the standard of living. The Community also has to promote these objectives in the field of goods and services marketed under trade marks. Article 2 covers every economic activity including the production of marked goods and their use by purchasers and consumers.

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Article 2 also provides that "the Community" is to promote these salient economic and social objectives by, inter alia, establishing a common market. According to the Treaty, the concept of a common market covers all goods and services irrespective of whether they are marketed under a trade mark or not.

Article 3 provides that these objectives are to be attained through "the activities of the Community". These activities include:

- the abolition, as between Member States, of obstacles to freedom of movement for goods and services (Article 3 (a) and (c);
- the establishment of a common customs tariff and of a common commercial policy towards third countries (Article 3 (b));
- the institution of a system ensuring that competition in the common market is not distorted (Article 3 (f)); and
- the approximation of the laws of Member States to the extent required for the proper functioning of the common market (Article 3 (h)).

Article 3 likewise contains no restrictions regarding the goods and services covered; it consequently covers them all. The Community's activities therefore extend so far as to cover goods and services marketed under a trade mark. Thus marked goods fall within the scope of the customs union established by the Community. They also fall within the scope of the common commercial policy which the Community is gradually developing towards third countries. Moreover, they must be able to circulate freely within the Community and the Community must also institute a system ensuring that competition in the Community is not distorted in the case of trade marks.

The same applies to the national legal provisions in question. Article 3 does not contain any restrictions in this respect either; it therefore covers them all so far as is necessary for the operation of the common market. The Community's "activities" therefore extend so far as to cover the trade mark law of the Member States. As in the case of goods and services which are not marketed under trade marks, the Community's "activities" are not restricted to executive or supervisory measures in individual cases, but cover legislative, including organizational, measures ("institution of a system").

II. Meaning of Article 36

Does Article 36 in any way alter this law-making power of the Community? Under the Treaty provisions on the free movement of goods, in particular Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Article 36 stipulates, however, that these provisions do not preclude (inter alia) prohibitions of or restrictions on imports justified on grounds of the protection of trade mark rights. Does Article 36 also limit the scope of Articles 100 and 235? Article 36 provides that:

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"The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Two conclusions can be drawn from this wording, bearing in mind that it mentions only Articles 30 to 34, and taking account of the fact that Article 36 is contained in the Title "Free movement of goods" and appears at the end of Chapter 2 (together with Article 37). First, the first sentence relates exclusively to those national provisions of trade mark law which impose restrictions on the free movement of goods. No other provisions are involved. Secondly, the first sentence provides for no exceptions to Articles 100 and 235 even in respect of the trade mark law provisions that it covers. Article 100 is in Part three of the Treaty "Policy of the Community", Title I "Common rules", Chapter 3 "Approximation of laws". Article 235 is in Part six "General and final provisions". As a result, therefore. of its position and wording, the first sentence of Article 36's restrictions affect only Articles 30 to 34 and not Articles 100 and 235. It does not reserve any powers to the Member States that rule out the adoption of Community measures for the approximation of laws and the creation of a composite law.

The case-law of the Court of Justice supports this contention. In the Simmenthal I case, it was submitted[1] that Article 36 leaves the matters to which it refers to be dealt with by Member States under their sovereign powers and that if the Community nevertheless takes legislative action in one of those fields, this cannot imply the surrender by the Member States of the powers reserved to them under Article 36. The Court of Justice rejected this interpretation of the EEC Treaty[2]:

"The fifth recital of Directive No. 64/432/EEC correctly states: 'Whereas the right of Member States under Article 36 of the Treaty to continue to apply prohibitions or restrictions on imports, exports or goods in transit justified on grounds of the protection of health and life of humans and animals nevertheless does not exempt them from the obligation to approximate the provisions on which those prohibitions and restrictions are based, in so far as the differences between those provisions hinder the implementation and functioning of the common agricultural policy'. Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article."

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1) Judgment of the Court of Justice of 15 December 1976, Case 35/76 "Health inspections", [1976] ECR 1871 1882 and 1885, Ground 13.

2) Loc. cit. Ground 14.

In Tedeschi v. Denkavit, the Court repeated the last sentence quoted above word for word and went on to say that[1]:

"Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive".

Article 36 is therefore applicable for as long as and to the extent that the Community does not use its own law-making powers or the legislative measures adopted by the Community do not actually remove the restriction. Consequently in the case of trade marks, Article 36 will, even after adoption of the directive and the regulation, still be applicable to any remaining cases of conflict between confusingly similar national trade marks of different origin in respect of similar goods.

However, the Community not only has the power, by means of legislative measures, to remove so far as possible and to the extent necessary those restrictions on trade due to national rules which were originally authorized under the first sentence of Article 36; it has a duty to do so. This follows from Articles 3(a) and (h), 100 and 235 (or, where appropriate, Articles 43 or 75), which impose obligations on the Community institutions. As the recital quoted above from one of the directives that were issued shows, the Commission and the Council have always acknowledged this obligation and acted accordingly. In numerous fields, they have enacted directives and regulations which operate to safeguard the interests referred to in the first sentence of Article 36 and to remove or reduce such restrictions on trade as may occur from time to time. Examples of such fields are, the law on foodstuffs, veterinary law, the law concerning the protection of animals, the law on pharmaceutical products and the law relating to the protection of public health in the case of other goods.

The judgments cited above confirm the obligation to approximate laws in the fields covered by the first sentence of Article 36. None of the national rules which are exempted under the first sentence of Article 36 from the obligation to abolish restrictions on imports is immune from approximation. On the contrary, approximation is the means provided by the EEC Treaty for removing as far as possible restrictions on trade caused by national provisions. The Community is therefore competent and is indeed under an obligation to approximate those provisions which form the basis of prohibitions on imports due to trade mark law. Should such approximation not be sufficient to obviate the need for or to reduce the application of such prohibitions on imports, an attempt must be made to achieve this objective by creating a Community trade mark as well.

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1) Judgment of the Court of Justice of 5 October 1977, Case 5/77 [1977] 1555 - 1576, Ground 35. Cf also judgment of the Court of Justice of 5 April 1979, Case 148/78 "Ratti" [1979] ECR .... (as yet unpublished), cyclostyled text page 21, Ground 36.

It was certainly with this in mind that the Court, in delivering its judgments concerning the extent to which under Article 36, trade mark rights could be limited by national law, gave those judgments subject to the proviso "in the present state of Community law"[1]. The Court therefore assumes that law-making acts of the Community institutions in the field covered by the first sentence of Article 36 are also admissible in the case of trade mark law. The proviso can be interpreted, moreover, as an appeal by the Court to the Commission and Council actually to exercise their powers in this matter, failing which it reserves the right to alter the direction of its judgments.

III. Meaning of Article 222

Since in all the Member States trade mark rights are regarded as property rights, the question arises whether and, if so, to what extent this competence of the Community in relation to trade marks is limited by Article 222. Article 222 provides that:

"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership".

Thus the EEC Treaty does not itself regulate the systems of property ownership in the Member States nor does it empower the Community institutions to do so. It leaves the national systems of property ownership as they are and accepts them.

Article 222 is similar to Article 83 of the ECSC Treaty[2] and Article 91 of the Euratom Treaty[3], but it is not likewise restricted to specific items of property. Article 222 therefore also covers the rules governing the system of ownership of trade marks.

A study of the historic background to Article 222 shows that the Contracting Parties wished to protect themselves from interference by the Community in the matter of property ownership, which is of importance to their economic systems. Each Member State wished to retain the power to decide for itself whether the various means of production should be publicly or privately owned, or both. In particular, questions of expropriation of property so that it is held in public ownership, and of transfer of property into private ownership were to remain the preserve of the Member State.

This is the meaning of Article 222 and of the words "rules governing the system of property ownership" used in it. They mean the rules governing the way in which property is to be owned. Each Member State is to continue to decide whether trade marks are to be private and/or public property, whether they should be disappropriated or put into private ownership and, if so, for whose benefit and at whose expense.

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1) Judgment of the Court of Justice of 22 June 1976, Case 119/75 Terrapin v. Terranova [1976] ECR 1039 - 1061, Ground 7.

2) Article 83 provides: "The establishment of the Community shall in no way prejudice the system of ownership of the undertakings to which this Treaty applies."

3) Article 91 provides: "The system of ownership applicable to all objects, materials and assets which are not vested in the Community under this Chapter shall be determined by the law of each Member State."

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"Rules governing the system of property ownership" are not the same thing as "ownership" or "proprietary rights". The latter are by no means unaffected by the EEC Treaty. On the contrary, certain provisions of the Treaty and of the Community law derived therefrom govern the rights and obligations arising from ownership of movable and immovable property. They extend or limit not only the enjoyment or exercise of proprietary rights but also their scope and content.

The most noteworthy example is that of proprietary rights in undertakings. Under Article 54(3)(g), the Council and Commission are obliged to coordinate "the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms .....". The purpose of this coordination by means of directives, which has already been partly achieved, is to "make equivalent" the rights and duties of shareholders in the various types of companies which exist in the Member States. This means that Community law has to determine the content of and the limits upon ownership of companies in the Community. It is by this means that freedom of establishment, free movement of capital, investment in companies, their growth and undistorted competition between them is to be promoted in the common market. As this approximation of national law is not sufficient to set up a common market for companies, the Commission has also proposed to the Council a regulation based on Article 235 embodying a statute for European companies[1]. This regulation is intended to create new proprietary rights and to determine the extent to which they are protected.

Articles 54(3)(g) and 222 show how the EEC Treaty itself delimits the powers. The content of a proprietary right and the limits to, or scope, of the protection afforded to it may be laid down by the Community to the extent required by its objectives, and in particular to the extent required for the proper functioning of the common market. On the other hand, the assignment of property to private and/or public owners, and hence the question whether property is to be expropriated from private owners or to be transferred from public into private ownership, remain the preserve of the Member States. The established practice of the Commission and Council in the field of company law confirms this interpretation of Article 222.

It can scarcely be that a different rule applies to the field of trade mark law. A common market in goods and services marketed under trade mark is to be set up by approximating the content of and the limits upon the ownership of national trade marks and by creating and determining the extent of the protection afforded to a new proprietary right, the Community trade mark. In no other way can the restrictions on intra-Community trade be positively abolished. Article 222 is not designed to prevent the Community from attaining its objectives even in the vast field of intellectual property. It merely obliges the Community in the course of its activities to respect property ownership in the Member States.

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1) Bulletin of the European Communities, Supplement 4/1975.

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If the Contracting Parties had intended to reserve for themselves by means of Article 222 the power to determine the rules governing "industrial and commercial property" (Article 36), they would not have included such property in Article 36. Article 222 is, in fact, in Part six of the Treaty, "General and final provisions". Consequently, it applies to the provisions of Articles 30 to 34 as well. Owing to the fact that under Article 36 industrial and commercial property was excluded only from the prohibitions contained in Articles 30 to 34 - and what is more, only to the limited extent determined by the first and second sentences - the Member States expressly indicated that it is partly covered by Articles 30 to 34 and completely covered by the remaining Treaty provisions. Article 222 can therefore have only the other meaning referred to above. The difference in the terms used in Articles 36 and 222 - "property" and "rules governing the system of property ownership" - is further confirmation that Article 222 provides for no exception in the case of industrial and commercial property.

Nevertheless, the Community's legislative measures in relation to national trade mark law which are admissible on these grounds must also take account of the delimitation of powers specified in Article 222. The directive and the regulation must not encroach upon the essence, substance[1], or existence of trade mark ownership in the Member States. This would amount to more than a determination of the contents, protection and limits of trade mark ownership. It would be an action analogous to expropriation and would prejudice the rules in Member States governing the system of property ownership. The Community would not be competent to do this.

In this connection, it is worthwhile examining the limits that the Court of Justice has placed on the applicability to trade mark ownership of the prohibitions contained in the EEC Treaty (in particular Articles 30, 85 and 86). In well-established case law, the Court distinguishes between the obtaining or granting of trade mark rights and the exercise of those rights. The exercise of such rights is subject to the prohibitions, whereas the granting of them is not. In Consten and Grundig it was held that[2]:

"Article 222 confines itself to stating that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1)".

Since then, the Court has not had occasion to consider Article 222, but it has stated, relying on Article 36[3]

"that, although the Treaty does not affect the existence of rights recognised by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty".

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1) Judgment of the Court of Justice of 14 May 1974 - Nold, 4/73, [1974] ECR 491, 508, Ground of Judgment No. 14.

2) Judgment of the Court of Justice of 13 July 1966, Joined Cases 56 and 58/64 [1966] ECR 299 - 345.

3) Judgment of the Court of Justice of 8 June 1971, Case 78/70 Deutsche Grammophon v. Metro [1971] ECR 487 at 499-500, Ground 11; 3 July 1974, Case 192/73 Van Zuylen v. Hag [1974] ECR 731 - 743, Ground 8; 31 October 1974, Case 16/74 Centrafarm v. Winthrop [1974] ECR 1183 - 1194, Ground 6; 22 June 1976, Case 119/75 Terrapin v. Terranova [1976] ECR 1039 - 1061, Ground 5; 23 May 1978, Case 102/77 Hoffman-La Roche v. Centrafarm [1978] ECR 1139 - 1164, Ground 8; 10 October 1978, Case 3/78 Centrafarm v. American Home Products [1978] ECR 1823 - 1840, Ground 9.

The elements which to to make up the right of property in a trade mark are governed, however, not only by national law but also by Community law, which places limits on such ownership. Only those rights "which constitute the specific subject-matter of that property" are, in fact, to be regarded as elements constituting trade mark ownership[1]. The Court itself summed up its case law on this point in its judgment in Terrapin v. Terranova[2]. What remains unaffected, according to this judgment is the right of property in a trade mark in the sense in which the Court of Justice has interpreted the EEC Treaty in relation thereto, not as it is defined to be in the domestic laws of the Member States, which vary from one to the other.

A corresponding limit to law-making by the Community can be inferred from this well-established case law on the scope of the prohibitions in the Treaty regarding trade mark ownership, viz that although the extent of the protection afforded to trade mark ownership may be harmonized, neither the existence nor the substance of the rights flowing from trade mark ownership may in the process of harmonisation be encroached upon. The methods of determining when such ownership exists may therefore be harmonised, just as they may be dealt with by the Court's judgments on the prohibitions contained in the Treaty.

The draft directive respects this limit scrupulously. The same is true of the draft regulation. It provides for the creation of a new right of property at Community level, the extent of which is as precisely defined as that of the harmonised national rights of property in the draft directive.

D. Article 235: power of the institutions to create a trade mark system.

Article 3 provides that the activities of the Community are to be carried out "as provided in this Treaty", that is to say by means of the exercise of the powers conferred upon the Community institutions by the EEC Treaty.

The first sentence of Article 4(1) provides that the tasks entrusted to the Community are to be "carried out by [its] institutions". In other words, the competence of the Community deriving from its tasks is supplemented by the competence conferred on its institutions to carry out these tasks, in particular their legislative powers.

The second sentence adds that each institution shall act "within the limits of the powers conferred upon it by this Treaty". Thus, such action arises not by virtue of the tasks entursted to the Community but by virtue of the powers conferred by the Treaty. It therefore remains to be considered whether the Treaty has conferred legislative powers on the Community institutions to enable them to carry out the Community's tasks referred to at C.I above in the sphere of trade marks.

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1) Judgment of the Court of Justice of 22 June 1976, Case 119/75 [1976] ECR 1039 - 1061, Ground 5.

2) Loc. cit., Grounds 6 and 7.

Since the Treaty confers no specific power to lay down directly applicable Community law, i.e. to make regulations, concerning the protection of industrial and commercial property, Article 235 alone comes into question. This article provides that:

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

It is accordingly for the Community institutions to consider and decide whether and when action by the Community is necessary and whether the remaining requirements of Article 235 are met. In the words of the Court of Justice [1]:

"The power to take the measures envisaged by this article is conferred, not on the Member States acting together, but on the Council in its capacity as a Community institution. The Council acts on a proposal from the Commission and after consulting the Assembly."

In accordance with the procedural sequence of proposal, consultation and adoption, it is in the first instance for the Commission, in exercise of its powers and upon its own responsibility, to examine the need for action by the Community, before submitting a proposal to the Council. Only the Commission is empowered to make a proposal. After considering all aspects of the matter over a period of two years, the Commission concluded in the summer of 1976 that action by the Community was necessary to create a Community system of trade mark law and decided on 6 July 1976 to draw up the appropriate measures under Article 235[2].

I. Need for action by the Community

According to the wording of Article 235, the competence of the Community is subject to three restrictive conditions:

- the attainment of one of the objectives of the Community must be at stake;
- this objective must be one which is to be attained in the course of the operation of the common market;
- action by the Community must be necessary for this purpose.

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[1] Judgment of the Court of Justice of 18 February 1970, Case 38/69 Commission v. Italy [1970] ECR 47 - 57, Ground 10.

[2] See Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76, pp. 7-16.

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1. The Community objectives to be attained by means of the Community trade mark

The creation of a Community trade mark is designed to achieve, in relation to trade marks, the following Community objectives which are expressly laid down in the EEC Treaty:

- the abolition of obstacles to freedom of movement for goods and services (Article 3(a) and (c));
- the institution of a system ensuring that competition is not distorted (Article 3(f));
- the establishment of a common market (Article 2);
- the development of economic activities (Article 2).

The Court of Justice has expressly confirmed that the activities provided for in the various paragraphs of Article 3 are also objectives of the Community within the meaning of Article 235[1]. The Court has held moreover that the objectives set out in Articles 2 and 3 are not a general programme devoid of legal effect, but are binding law, and, further, that the individual provisions of the Treaty are to be interpreted by reference to them[2].

2. Attainment of objectives by means of the Community trade mark in the course of the operation of the common market

Whether action by the Community is necessary depends secondly on whether it is possible to attain the objective in question "in the course of the operation of the common market".

The extent of this restriction depends on what is meant by common market within the meaning of Article 235. There are no grounds for interpreting this term as used in that Article otherwise than by reference to Articles 2 and 3, i.e. in the sense of a European internal market based on principles, rules, procedures and policies embodied in Community law. As in Article 2 ("by establishing a common market") so also in Article 235 the words "in the course of the operation of the common market" have not only an instrumental character but also an objective-related character.

The objective sought by the Community is therefore not to be attained outside the common market, in the sense indicated above, but within it, in the course of its operation, and within the limits laid down by it. In attaining the Community's objective, the system of the common market and the operation of the common market must not be lost sight of. Indeed, they must not be impaired. The action taken must be geared to serve, facilitate, safeguard or promote the operation of the common market.

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1) Judgment of the Court of Justice of 12 July 1973, Case 8/73 "Value for customs purposes" [1973] ECR 897 - 907, Ground 3: "The establishment of a customs union ... is one of the objectives of the Community under Article 3(a) and (b) of the Treaty" within the meaning of Article 235 (which is referred to previously).

2) Judgment of the Court of Justice of 21 February 1973, Case 6/72 "Continental Can" [1973] ECR 215, 244 - 246 Grounds 23-25 to the end.

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The intention underlying the creation of a Community trade mark system is, exactly, the attainment of the Community objectives discussed above, by the establishment of a common market in marked goods which is properly organised from the legal point of view.

3. Need for a Community trade mark system

For the purposes of Article 235 it is not sufficient that a Community objective is to be attained and that the objective can be attained in the course of the operation of the common market. The attainment of the objective must also "prove necessary". Otherwise the Commission, and later on the Council, have no power to act.

Could the abovementioned objectives of the Community (see 1 above) be attained without the creation of a Community trade mark system? What is its specific contribution to the attainment of these objectives?

a) Free movement of marked goods

The situation which nowadays still obtains, whereby the proprietor of a trade mark can acquire trade marks valid only at national level and therefore relies on the exclusive right attaching thereto in order to prevent the importation of products originating in other Member States which bear the same or a similar trade mark as his own can be progressively rectified only by creating a trade mark law which is directly applicable throughout the Community and a trade mark authority with Community-wide powers. There is no alternative to the Community trade mark. This is discussed more fully at II below.

b) Free competition in marked goods

This Community system is indispensable, moreover, in order to translate into reality, step by step, an important aspect of the creation of a system of undistorted competition, namely free competition in goods and services marketed under trade mark, unimpeded by provisions of national trade mark law. It is only by means of a Community trade mark system that trade mark protection can be integrated into a system of free intra-Community competition in marked goods.

c) The common market and competition in marked goods

Both aspects together - free movement of and free competition in marked goods and services within the Community - are essential elements of the third Community objective mentioned above, namely the establishment of a common market. It would appear, therefore, that a Community trade mark system is also necessary for the creation of a common market in goods and services which are to be marketed under trade marks.

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This is not all, however. It remains to be shown that a Community trade mark system is necessary to translate into reality the remaining aspects of the Treaty objectives of "the establishment of a common market" and "the institution of a system ensuring that competition is not distorted" and thereby to promote the fundamental objectives of Article 2. Both of these concepts imply not only the mutual opening up of national markets but also the creation of conditions which are opposite to a European internal market in marked goods.

At the present time, trade mark cover for the whole area of the Community can only be obtained by making application for registration of the same mark to a number of Trade Mark Offices whose procedures are different because they are governed by domestic laws. This would still be the case even after the national laws had been harmonised. The Community system of trade marks will make it possible, however, to obtain one trade mark for one territory comprising all the Member States by means of one application submitted to one trade mark office under one procedure governed by one law.

In this way, cross-frontier competition within the Community will, compared with national competition, no longer be burdened with and distorted by a multitude of applications, offices, procedures, laws, territorially limited property rights and sevenfold[1]) administrative costs with correspondingly high charges and fees. There will be legal and administrative arrangements at Community level, and rates of charges, in the same way as in the Member States. Without such a Community-wide system it will not be possible to set up the common market in marked goods, i.e. it will not develop into an internal market. Fragmentation of the Community as a result of the existence of different trade marks, laws, administrative arrangements and costs will be unavoidable.

The national trade mark offices would not be able to apply the trade mark law of the Community effectively, uniformly and cheaply. There would be difficulties as regards applications for marks, priority of applications, entry in the register, the extent to which acts done by the Trade Marks Offices would have effect throughout the territory of the Community, languages, the uniform application of the regulation and uniform legal protection of marks. Staff and administrative costs would inevitably be high. To this extent the position is no different from that of patent law. Since there has always been agreement among all governments and persons concerned with the matter that a European trade mark authority is an absolute necessity, there is no need to labour this aspect further.

d) Expansion of the economy by means of marked goods produced in Europe

To what extent then will the Community trade mark system promote economic expansion, which is one of the principal objectives of the Community laid down in Article 2?

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1) See pages 27 and 28

The introduction of the mark at Community level will open up new and extended channels of econonic activity. It will enable industrial and commercial undertakings to market their products and services throughout the Community under a single trade mark which enjoys Community-wide, uniform protection. It is therefore a new method, and an additional method, of developing new European markets for new products and services and of expanding existing national markets into European ones. It will thus make it easier to exploit the advantages of mass production. Intra-Community trade will be simplified, extended and rationalized.

For all of these reasons (a-d), the Commission considers it necessary within the meaning of Article 235 to create a Community-wide system of trade mark protection.

II. Absence of the necessary powers in the Treaty for attaining an objective of the Community

The Court of Justice has expressed its views on this as follows[1]:

"Article 235 offers a supplementary means of action and applies only in the cases for which the Treaty has not provided the necessary powers for the realisation of the object in view".

It must therefore be considered whether approximation of national trade mark law pursuant to Article 100 is sufficient to achieve the free movement of goods and free, undistorted competition in goods and services which are marketed under trade marks. The first paragraph of Article 100 states that:

"The Council shall, acting unanimously on a proposal from the Commission, 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 order to comply with this instruction, the Commission decided on 6 July 1976 to prepare a directive to approximate those provisions of trade mark law which impede the attainment of the above-mentioned objectives and hence the proper functioning of the common market in goods and services marketed under trade marks[2].

The draft directive[3], however, can achieve the desired results only in part. Between the result that can be achieved by means of approximation and the objective to be attained, namely a European internal market for marked goods, there is the following gap: even if national trade mark laws were harmonized, several persons acting independently could obtain protection in different Member States for the same or a similar trade mark and consequently prevent imports into their country of the marked goods in question.

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1) Judgment of the Court of Justice of 18 February 1964, Joined Cases 73 and 74/63 "Internationale Handelsvereniging" /1964/ ECR 3 - 29.

2) Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76, p. 12, points 35 - 38.

3) Draft Council Directive on the approximation of Member States' trade mark laws, Doc. III/D/1293/79 of July 1979.

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This is because, even after approximation, the registration of a trade mark will be governed solely by the trade mark law in force in the Member State concerned. Even in the future, therefore, Trade Marks Offices will disregard registrations under the law of other Member States. Even after approximation, every trade mark will have effect only within the Member State whose Trade Marks Office granted it, for each national Office grants exclusive rights specifically for its own national territory.

This situation is in turn due, to the fact that the rights arising under the trade mark and the powers of the trade mark authorities are defined and will continue to be defined by national laws. These are valid only within the respective national territories and afford rights which are effective only there. The rights arising under the trade mark are therefore of territorially limited scope.

The approximation of national laws by means of directives cannot alter this situation. The purpose of approximation is neither to extend exclusive rights geographically to the territory of the other Member States nor to replace them by exclusive rights which are effective throughout the Community, but only to adapt national trade mark laws to the requirements of the common market without calling their continued existence into question. Since approximation does not affect the territorial nature of trade mark laws and of the activities of trade mark authorities, it cannot overcome the territorial nature of exclusive rights. Directives can give rise to identical law in all the States, but not to one law of the Community.

Consequently, in order gradually to cover the gap between the exercise of the power to approximate laws by means of directives and the attainment of the Community objectives discussed above, a Community trade mark law should be created, applicable generally and directly in each Member State, which will harmonise any outstanding national trade mark laws, and a Community trade mark authority with Community-wide powers should be set up. Only in this way can exclusive rights which are valid throughout the Community be granted. Only in this way can the fragmentation into national territories which dismembers the common market be overcome, for each trade mark, so that it operates throughout the Community. The conflicts and hence the obstacles to the free movement of goods and services and to competition will diminish as more and more existing national trade marks are converted into Community trade marks and as new marks are increasingly registered as Community trade marks. The objectives of the Community can be attained much more readily by this means than by approximation of national laws alone.

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The approximation of national trade mark law cannot, therefore, achieve those specific aspects of the said objectives of the Community which, by the creation of a Community trade mark law, can progressively be achieved. The power conferred by Article 100 is not sufficient for the attainement of these remaining aspects of the above-mentioned objectives, nor for a gradual shifting from partial realisation to complete realisation of those objectives. Accordingly, the Treaty "has not provided the necessary powers" (Article 235). This makes the point. Article 235 does not require that the Treaty should provide no powers at all to attain the objectives. The Court of Justice has decided that Article 235 is also applicable where "the procedure prescribed by Article 100 for the approximation of legislation by means of directives does not provide a really adequate solution" for the attainment of a Community objective (and where there is doubt as to the extent of other powers provided for in the Treaty)[1]. The approximation of national trade mark law and the creation of a directly applicable Community trade mark law, in their respective areas of operation, are two complementary means of attaining the same objectives.

III. Adoption of appropriate measures

Where it is shown that, besides approximating the national laws relating to marks, other Community action is necessary for the purpose of attaining some of its objectives in the course of the operation of the common market, and that Article 100 does not provide the requisite powers to that end, "the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly take the appropriate measures" (Article 235).

Since, as already indicated (see II above), there is need of a Community trade mark law which is generally applicable, binding in its entirety and directly applicable in all Member States, a directive is not sufficient and a regulation is required (second paragraph of Article 189). Directives do, of course, lay down Community law, but as a matter of principle such Community law is not directly applicable in all Member States. The directive is merely addressed to the Member States (third paragraph of Article 189).

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1) Judgment of the Court of Justice of 12 July 1973, Case 8/73 "Value for customs purposes" [1973] ECR 897 - 907, Grounds 3 and 4.

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If, therefore, what is wanted is a Community law which has general application, is directly applicable in all Member States and is binding in its entirety, a regulation should be adopted. Because directives need to be incorporated into national law, in which case the exclusive rights granted will end at national frontiers, those aspects of the Community objectives which are here in question cannot be achieved by directives. But they can be achieved by means of a regulations. The Council Regulation proposed by the Commission on the Community trade mark is therefore an "appropriate measure" within the meaning of Article 235.

The substantive provisions concerning the Community trade marks which are contained in the draft regulation are the most "appropriate" means of attaining the Community objectives referred to (see I 3 above) although this need not be discussed in detail here in view of the foregoing commentary on the matter (see B and D I and II above). The adoption of these provisions would be a decisive step towards the attainment of the objectives laid down in the EEC Treaty.

In order to achieve these objectives, however, it is not enough simply to enact a substantive trade mark law. On the contrary, in order to enforce it many kinds of official action along prescribed lines and judicial protection of the parties concerned are indispensable. Trade marks need to be applied for, examined, registered, protected and monitored in accordance with appropriate official procedures. The same applies to the protection of earlier trade marks. Substantive trade mark law, its implemention by the administrative departments and the legal protection of the parties cannot be separated from one another.

This raises the question whether the Council's power to take "the appropriate measures" also covers:

- the creation of a Community Trade Marks Office;
- the conferment on the Office of the power to address the decisions listed at B to the relevant parties;
- the conferment of the powers listed at B on the Commission and the Court of Justice;
- the adoption of procedural rules.

1. Wording of Article 235

a) "Measures"

In the various language versions of Article 235, reference is made to "forskrifter", "Vorschriften", "measures", "dispositions", "disposizioni", "maatregelen". By comparing these various terms, it can be seen that Article 235 covers not only measures which make provision for something (i.e. which create an obligation to take a specific course of action) but also measures which, although they do not prescribe a specific course of action, nevertheless lay down substantive rules, or rules relating to procedure, legal protection, organisation or financing and which permit something to be done or initiate a procedure or confer power on an institution or create a Community body on which

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they confer powers. The term "Vorschriften" is used regularly in the German version of the EEC Treaty in this sense of "measures" (cf. in particular the second subparagraph of Article 79(3)). Indeed, having regard to the terms "Vorschriften" and "forskrifter" used in the German and Danish versions and to the terms used in the other four versions, there are no grounds for supposing that there was any intention of restricting the kinds of measures which could be taken under Article 235. On the contrary, the word "measures" means all Treaty provisions which confer powers on the Community institutions.

b) "Appropriate" measures

Next, Article 235 expressly authorises the taking of the "appropriate" measures. By using this adjective Article 235 leaves open the choice of the type of action to be taken. The means to be employed therefore depend on the circumstances of the case and on the Community objective to be attained, not the reverse. To "take the appropriate measures" means to adopt with legally binding effect those measures which prove necessary in each particular situation to attain a given Community objective in the course of the operation of the common market. If Article 235 were to be interpreted, not in conformity with its wording, but restrictively, it would lose much of its meaning and, at least in the trade mark sphere, could not be applied in a reasonable and effective manner.

c) "Action by the Community"

According to the introductory words of Article 235, it is sufficient that "action by the Community" should prove necessary. First of all, therefore, the provision applies to every type of action that may prove necessary to attain a Community objective in the course of the operation of the common market. Secondly, the words "by the Community" leave open the question whether such action is taken by Community institutions or bodies or by both.

2. Purpose of Article 235

The analysis made at 1 above of the wording of Article 235 is confirmed by the purpose of that Article. Supplementing the means which the EEC Treaty provides for the attainment of the Community's objectives is not only admissible under Article 235 but is actually its sole purpose. The provision is designed to fill the gap between the objectives laid down in the Treaty and the inadequate or completely non-existent means that the Treaty provides, or fails to provide for attaining them. The fact that the provision exists is proof that the Member States which concluded the Treaty were aware of the potential inadequacy of the means that they had made available and wished to prevent the institutions from being completely or partially paralysed as a result. Article 235 consequently refers to the objectives laid down in the Treaty and constitutes an addition to the series of measures prescribed by the Treaty for their attainment. Hence it does not exclude the use of any particular means but instead authorizes those measures which prove necessary and appropriate in each case.

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If, under Article 235, laws can be adopted which need to be implemented either by the Commission or by an existing or prospective specialized Community authority, there must be an implied intention to confer on the Commission by means of "appropriate measures" the necessary implementing powers and to afford effective legal protection against its decisions to the persons affected by them. Both sets of powers are covered by the power to take "the appropriate measures". To argue the contrary would in reality be tantamount to saying that the Community institutions and bodies are to be denied the possibility of implementing Community law adopted pursuant to Article 235. According to the Meroni judgments of the Court of Justice the maintenance of the legal protection of persons in the common market is an essential precondition to the conferment of decision-making powers on Community agencies (see E IV above). For these reasons and in view of the wording and purpose of Article 235, there can hardly be any doubt that the Trade Marks Office may be provided with "appropriate" implementing powers and that the Trade Marks Office, Commission and Court of Justice may be granted "appropriate" powers to ensure legal protection.

3. Previous practice

The above interpretation of Article 235 is confirmed by previous practice. Upon proposals from the Commission, the Council has already created three agencies which are endowed with legal personality distinct from that of the Community. It has established by means of separate Regulations, each based solely on Article 235,

- the European Monetary Cooperative Fund[1] (hereinafter called the Monetary Fund);
- the European Centre for the Development of Vocational Training[2] (hereinafter called the Centre); and
- the European Foundation for the improvement of living and working conditions[3] (hereinafter called the Foundation).

Although individual powers in respect of persons in the common market were not conferred on the Centre or on the Foundation, they were conferred on the Commission as the supervisory authority. It has the right and is under obligation to take decisions regarding complaints by a Member State or third party directly involved concerning the alleged illegality of an act of the agency concerned[4]. The Council thereby acknowledged that the vesting in the Commission of a power which hitherto did not exist in the field in question to address decisions to Member States or to interested third parties in the common market might be an "appropriate measure" within the meaning of Article 235.

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1) Regulation (EEC) No 907/73 of 2 April 1973, OJ No L 89 of 5 April 1973, p. 2

2) Regulation (EEC) No 337/75 of 10 February 1975, OJ No L 39 of 13 February 1975, p. 1.

3) Regulation (EEC) No 1365/75 of 26 May 1975, OJ No L 139 of 30 May 1975, p. 1.

4) Third paragraph of Article 18 of the regulation establishing the Centre, loc. cit.; third paragraph of Article 22 of the regulation establishing the Foundation, loc. cit.

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As a result, the competence of the Court of Justice is at the same time automatically extended to enable it to review the legality of such acts of the Commission (Articles 173 and 175) and indirectly of that of the agency in question. Article 127(3) of the draft Regulation on the Community trade mark is to the like effect.

The Regulations establishing the Centre and the Foundation each confer on the Court of Justice new powers to give judgment pursuant to any arbitration clause contained in a contract and, in the case of the non-contractual liability of the institutions, to give judgment in actions for damages caused by the agencies in question. This acknowledges that the vesting of jurisdiction in the Court of Justice may also be an "appropriate measure" within the meaning of Article 235. Article 122(2), (3) and (4) of the draft Regulation on the Community trade mark also confers like powers on the Court of Justice.

No power to address decisions to individuals is conferred on the Monetary Fund. It is, however, given new powers of general scope vis-à-vis the Member States. There were no such powers either at national or at Community level before this. The Fund is responsible among other things for bringing about such concerted action by the central banks as is necessary for the proper functioning of the Community foreign exchange system, and for the administration of very short-term financing and of short-term monetary support, their amalgamation into a new mechanism and - since 1979 - for the administration of the new European monetary system[1]. In this context, the Board of Governors of the Fund is empowered to adopt, acting unanimously, decisions and resolutions which are binding on the Member States (central banks)[2].

To recapitulate, it is clear from previous practice that all Member States have acknowledged by means of the Regulations adopted unanimously by the Council that the setting-up of institutions, the granting to them of legal capacity and the conferment on them and on the Commission and the Court of Justice of decision-making powers which did not previously exist and which the institutions have to exercise in their own right, can be "appropriate measures" within the meaning of Article 235 and can be necessary to attain a Community objective in the course of the operation of the common market.

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[1] Regulation (EEC) No 3181/78 of 18.12.1978, OJ No L 379 of 30.12.1978, p.2.

[2] See Regulation (EEC) No 907/73, loc. cit., in conjunction with Articles 1 to 3 of the Statutes and Article 2 of the Rules of Procedure of the Fund in which "decisions" and "resolutions" of the Board of Governors are expressly mentioned. Article 3 of Regulation (EEC) No. 3181/78, loc. cit., empowers and obliges the Board of Governors of the Fund, moreover, "to take the administrative measures necessary for the implementation" of the Regulation relating to the European monetary system.

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It was precisely in this sense that the Court of Justice interpreted that part of Article 75 which corresponds almost word for word in this respect with Article 235[1]:

"In order to attain the common transport policy..., the Council is empowered to lay down 'any other appropriate provisions', as expressly provided in Article 75(1)(c). The Community is therefore not only entitled to enter into contractual relations with a third country in this connection but also has the power, while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism... The Community may also... cooperate with a third country for the purpose of giving the organs of such an institution appropriate powers of decision..."

In the case in point, these organs are a Supervisory Board, a Board of Management, a Director and a court. They are to have the power to take decisions having general application (decisions which are binding in their entirety and directly applicable in all Member States and in Switzerland) and decisions addressed to individuals (concerning the compulsory contributions to be made by owners of vessels to the Fund and compensation for vessels voluntarily laid up). The court is to be given powers in the relevant field which are modelled more or less on those of the Court of Justice. As the quotation shows, the Court of Justice took the view that the creation of such an international body was permissible under Article 75, but declared the proposed set of rules incompatible with the Treaty because of the questionable structure and composition of the organs[2].

Like Article 75, Article 235 does not rule out the creation of agencies or the conferment of decision-making powers and powers of legal protection on them - still less on existing bodies and institutions. In the trade mark sphere as well the Council can take suitable, pertinent measures of all kinds which are considered necessary to attain the abovementioned Community objectives in the course of the operation of the common market. As in other fields, these objectives are decisive when a decision has to be taken as to the means which are to be employed in the field of trade marks.

4. Subparagraph (c) of the first paragraph of Article 177

The Council's power to create Community agencies is based on subparagraph (c) of the first paragraph of Article 177. This provision states that:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning (a).....; (b).....; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."

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1) Court of Justice, 26 April 1977, Opinion 1/76 - European Laying-up Fund for Inland Waterway Vessels - OJ No C 107 of 3 May 1977, p. 4 - p. 12, paragraph 5.

2) Loc. cit. pp. 13-16, paragraphs 8-14, 21-22.

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The bodies which the EEC Treaty has itself created (e.g. the European Investment Bank) are manifestly not the only ones that exist. On the contrary, subparagraph (c) of the first paragraph of Article 177 expressly provides that the Council may create new bodies. Article 235 is one of the provisions which have conferred on the Council the power necessary for this purpose.

The fact that subparagraph (c) of the first paragraph of Article 177 refers to the statutes of such bodies shows that the setting-up of institutions which have a certain degree of independence and their own powers is contemplated. The Member States did not lay down definitively in the Treaty which bodies besides the Community should have legal capacity. In particular, Article 129, which confers legal personality on the European Investment Bank, does not rule out the creation by the Council of further bodies having legal personality. Similarly, it cannot be inferred from those Treaty provisions which provide for the creation of bodies which do not have legal capacity (Court of Auditors, Article 4(3); a Monetary Committee with advisory status, Article 105(2); Economic and Social Committee, Article 193) that the creation by the Council of bodies having legal capacity is ruled out. There are moreover two different kinds of "body" - and this means that the reverse argument fails. Article 177 leads to the same conclusion.

IV. In particular: the need for and relevance of a Community Trade Marks Office with powers of enforcement

Under Article 235, the Trade Marks Office must be a necessary and appropriate body. As already explained in detail (see B and D I 3 c above), for the purposes of trade mark law it is essential to have administrative enforcement of every single trade mark at Community level. This is an extremely technical and specialized task. It must also be ensured from the organizational point of view that, once initiated, procedures culminate in a decision within a reasonable period. If one examines how the Member States provide for the enforcement of trade mark law, the following picture emerges:

In Denmark, this task was conferred on a Directorate for Patents and Trade Marks within the Ministry of Trade. The Registrar for Trade Marks and Designs is responsible for all activities connected with the registration of trade marks. Although he is included in the Ministry for administrative and budgetary purposes, in practice he acts independently. In the exercise of his responsibility for international cooperation in the field of legal policy, he coordinates his position with that of the Ministry.

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In Germany, an independent supreme Federal authority was set up, namely the German Patent Office in Munich. The Federal Minister of Justice is in overall control of this authority, which alone has the power to enforce the legal protection of industrial and commercial property. The development of the law governing industrial and commercial property is the preserve of the Federal Minister of Justice.

In France, a national institute for industrial and commercial property (Institut National de la Propriété Industrielle, INPI) was founded. It is a legal person governed by public law under the control of the Minister for Industry. In the field of enforcement, the Director of the INPI takes decisions on his own responsibility. In the legal policy field, he coordinates his position with that of the Ministry.

In Ireland, the head of the Patent Office (the Controller of Patents, Designs and Trade Marks) was given sole responsibility for carrying out tasks connected with the registration of trade marks. In the legal policy field, he coordinates his position with that of the Department of Industry, Commerce and Energy, to which the Office is subordinate.

In Italy, the Central Patent Office is responsible within the Ministry for Industry, Trade and Craft Trades for the tasks connected with the registration of trade marks. The Office is incorporated in the Ministry from the organizational and financial points of view but enjoys a certain degree of independence in the day-to-day administration of trade mark matters.

In the United Kingdom, the task of registering trade marks is entrusted to the comptroller-General for Patents, Designs and Trade Marks, who acts independently. In the legal policy field, he coordinates his position with that of the Department of Trade and Industry, to which his department is subordinate.

Belgium, Luxembourg and the Netherlands have established a joint trade marks authority, the Benelux Trade Marks Office, with its headquarters in The Hague. The Office is an independent body. Competence in legal policy matters is reserved to the appropriate authorities of the Contracting States.

In the case of the European Patent, the sixteen Contracting States have set up a separate international organization, the European Patent Office in Munich. This authority has legal personality. It performs its executive and judicial tasks independently and on its own responsibility. It is supervised by an Administrative Council, which also has sole competence in legal policy matters.

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All told it is apparent that the implementation of trade mark law in all the Member States is entrusted by the appropriate Ministeries, at least de facto, to bodies which are to a certain extent independent. A separate trade mark authority has proved necessary and useful everywhere, albeit with varying degrees of autonomy. Implementation of trade mark law is everywhere detached from ministerial, legal and economic policy activity proper, at least from the organizational point of view if not always as regards staffing (in some Member States leading personalities perform both functions at once).

As it has already stated in its "Memorandum on the creation of an EEC trade mark"[1], the Commission considers for these reasons that the setting-up of a Community Trade Marks Office which is largely independent from the technical point of view is a particularly appropriate means of instituting a system of trade mark law for the Community and of attaining the abovementioned Community objectives:

- such an Office would be in keeping with the executive and extremely technical nature of the decisions to be taken.

- It would contribute to the objectivity and effectiveness of the procedure in trade mark matters and hence to legal certainty.

- It would be relatively easy to set up and manage, could be organized on rational, clear and flexible lines and be staffed by genuine experts.

- It would thus constitute an appropriate and inexpensive means of dealing with thousands of individual cases with requisite speed.

- The vast volume of administrative work and the numerous technical decisions concerning implementation would be directed away from the Commission, which would accordingly not be burdened with them.

For all these reasons, if the Council were to set up a Community Trade Marks Office by Regulation and confer on it the abovementioned powers, it would be taking "appropriate measures" within the meaning of Article 235. This solution would reflect at Community level the state of affairs already obtaining in the Member States.

However, this is not the only course of action open to the Council. Its power to take "the appropriate measures" enables it to exercise its discretion when choosing measures to solve a particular problem. It can therefore establish the Trade Marks Office as a non-independent agency of the Commission or entrust to the Commission itself the task of implementing Community trade mark law. As the solutions adopted in the various Member States show, there is a whole range of alternatives which have all proved workable. If, therefore, the solution now contemplated by the Commission runs into difficulties, it will not hesitate to propose other "appropriate measures" to the Council.

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1) Bulletin of the European Communities, Supplement 8/76 p. 17, point 56 et passim.

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V. Need for and relevance of specific procedural provisions

1. Enforceability of decisions made by the Trade Mark Office in relation to costs

Article 80(4) of the draft Regulation states that:

"Any final decision of the Office fixing the amount of costs shall be deemed, for the purposes of enforcement in the Member States, to be a final decision given by a civil court of the State in the territory of which enforcement is to be carried out. Verification of this decision shall be limited to its authenticity."

This provision is necessary because the proceedings specified in Article 80 cannot be conducted effectively in the Trade Marks Office unless it is certain that costs can be enforced against an unsuccessful party. The proceedings provided for in Article 80 would be unrealistic without rules on enforcement of costs, since no litigant can rely on his unsuccessful opponent paying costs voluntarily.

Community law has hitherto been lacking in such rules. Article 192 refers only to decisions of the Council or Commission and not to those of subordinate agencies. The laws of the Member States likewise contain no rules which would enable decisions taken by a Community Trade Marks Office to be enforced.

The question therefore arises whether power can be conferred on the Trade Marks Office to grant rights which are enforceable in the Member States without verification as to their substance. In Articles 192 and 187, the Member States made provision for this as regards the decisions and judgments of the Council, Commission and Court of Justice. This does not mean, however, that such a power cannot be conferred on Community agencies. If it is necessary to set up a Community Trade Marks Office which takes decisions on costs in specific proceedings, it must also be permissible under Article 235 to adopt rules concerning the enforcement of such decisions.

Consequently, the Council must take appropriate measures pursuant to Article 235 as regards the enforcement of decisions of the Office in the matter of costs. Article 80(4) of the draft Regulation is based on Article 192 of the EEC Treaty and is therefore an "appropriate measure" within the meaning of Article 235. How it is to be framed in detail is a matter for the Council. There is therefore no need to consider the various detailed aspects of Article 80(4) in this working paper.

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2. Jurisiction and judicial proceedings in actions relating to Community trade marks

If the Community creates its own system of trade marks, it will be necessary to adopt rules of procedure for civil actions relating to Community trade marks. If this is not done, there will be a gap in the proposed system which may jeopardize its practical value.

The draft Regulation does not provide for the creation of new courts in the form of Community agencies to hear these civil actions. They are to be dealt with by the civil courts of the Member States and the domestic rules governing the same type of action in respect of a national trade mark are to apply (Article 93 of the draft Regulation). In consequence of this fundamental decision by the authors of the draft Regulation, the inevitable encroachment on the law of civil procedure of the Member States will be reduced to a minimum.

As regards jurisdiction for actions relating to Community trade marks and enforcement, the Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters (Convention on jurisdiction and enforcement) applies.

The system instituted by the Judgments Convention fails, however, to solve the special problems which arise where one Community trade mark can be infringed in several Member States. As in the cases covered by the European Patent Convention, it is considered necessary, because of the special position with regard to Community trade marks, to modify the rules contained in Articles 2, 5(3) and 16(4) of the Judgments Convention. Moreover, the second paragraph of Article 57 of the consolidated version of that Convention (9 October 1978[1]) expressly permits Acts of the institutions of the European Communities - including, therefore, regulations made under Article 235 - to contain such special provisions[2].

It is considered necessary, in particular, to supplement the rules on jurisdiction contained in the Judgments Convention with special provisions concerning actions for infringement of a Community trade mark. Article 91 of the draft Regulation contains the relevant provisions, which provide, amongst other things, in derogation from the Judgments Convention, that in certain circumstances actions may be heard by the courts of the Member State in which the plaintiff had his residence. The courts of the Member State in which the act of infringement is committed are to have jurisdiction only in respect of acts of infringement committed within the territory of that State (Article 91(2)).

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1) OJ No L 304 of 30 October 1978, p. 90

2) CF. the report by Professor Dr. P. Schlosser, OJ No C 59 of 5 March 1979, p. 142, point 247.

A special rule is also necessary to regulate the situation where there are concurrent proceedings in the Trade Marks Office and in the civil courts of the Member States. Such a "two-track" system is practicable only if the binding effect of decisions and the possibilities which exist for staying proceedings are clearly specified.

The same thing was found in connection with the similar problems arising out of Article 85(1) of the EEC Treaty, which provides for concurrent jurisdiction of the Commission and the courts of the Member States in relation to agreements between undertakings. In that instance, the Court of Justice solved the problem by its judgments on the provisional validity of agreements and the possibility of a stay of proceedings, whereas in the present case it is both possible and desirable to deal with the matter immediately in the Regulation.

Thus, Article 94 of the draft Regulation obliges the courts of the Member States to stay the proceedings where an application has been made to the Trade Marks Office for a declaration of lapse or cancellation of the Community trade mark. Also, Article 96 of the said draft Regulation provides that lapse or cancellation of a Community trade mark cannot be pleaded as defences in proceedings before the courts of Member States. It is only in the case where there is a counter-claim for a declaration of lapse or cancellation that under Article 95 of the draft the courts of the Member States also have jurisdiction.

The point made regarding Article 80(4) (see 1 above) is valid here also, namely that the provisions of Title VIII of the draft Regulation, which are intended to solve the problems involved, are "appropriate" within the meaning of Article 235. They are based extensively on European Patent law and on suggestions made by the experts consulted. The details of the structure of Title VIII are a matter for the Council, so particular points do not need to be discussed in detail in this working paper.

VI. Conclusions

For the reasons set out at III, IV and V, the authority conferred on the Council by Article 235 to take "the appropriate measures" includes the following powers:

- to create the Community trade mark law contained in the draft Regulation and the procedures laid down therein;
- to set up and organise the Trade Marks Office as a Community body and, in particular, to confer on it the power to take the decisions specified at B in respect of individuals;
- to confer on the Commission the powers of action and supervision specified at B;
- to confer on the Board of Appeal of the Trade Marks Office and on the Court of Justice the powers to protect legal rights specified at B;
- to confer on itself and on the Commission the law-making powers specified at B which are necessary to implement the Regulation on trade marks.

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E. Limits to the conferring of powers on the institutions and on a Trade Marks Office

Article 235 authorizes the taking of any "appropriate measures". Since this general expression is subject to no restrictions, a specific type of act - namely the conferring on the Office of the power to take decisions in trade mark matters - can be excluded from the authorization granted by Article 235 only if this follows from other provisions of the EEC Treaty. It must first be considered, therefore, whether the Treaty in fact allows the creation of new powers. If it does, it must then be considered whether the Treaty itself confers on the Commission alone the power to implement the Regulation on trade marks. If it does not, it must next be considered whether the Council is obliged under the EEC Treaty to confer on the Commission the power to implement the Community trade mark law. If it is not, consideration must be given to whether and to what extent the EEC Treaty places restrictions on the conferring of powers on a Community Trade Marks Office.

I. Article 4

1. Creation of new powers

The second sentence of Article 4(1) provides that:

"Each institution shall act within the limits of the powers conferred upon it by this Treaty."

Does this provision preclude the creation of new powers to be exercised by the Commission, the Court of Justice and a Community Trade Marks Office?

If the second sentence provides that each institution must act within the limits of the powers conferred upon it by the Treaty, it may not exercise any other powers. On the other hand, the second subparagraph of Article 79(3), Article 121, the fourth subparagraph of Article 155 and Article 172 expressly authorize the Council to confer powers on or delegate powers to other institutions. Moreover, Articles 43(3), 75(1)(c), 84(2), 113(2) and (4), 179 and 235 implicitly authorize the Council to confer powers on itself or on other institutions and on existing and newly created Community bodies. The second sentence of Article 4(1) must, therefore, cover those powers which the Treaty indirectly confers on the institutions and bodies, since it authorizes the Council to confer them on itself or on other institutions and bodies and hence to create them. Whether Article 235 contains a like authority must be ascertained by interpreting that article (as was done at D III). Nothing can be inferred in this respect, however, from Article 4(1). On the contrary, the second sentence ("within the limits of") refers amongst other things to the power conferred on the Council by Article 235, and therefore based on the EEC Treaty, to take "appropriate measures" with a view to attaining a Community objective and hence, if necessary, to confer on the Community institutions and bodies powers that are new, previously non-existent and therefore vested neither in itself nor the Member States.

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The fact that the EEC Treaty enumerates the powers granted to the institutions does not, therefore, rule out the granting of new powers to them or to Community bodies. The sole point at issue here is the exercise of a power conferred on the Council by the Treaty, and more specifically by Article 235. This exercise of an existing power consisting in the adoption of a trade mark regulation involves the creation by the Council of specific powers (adoption of implementing regulations) for itself (self conferment), others for the Commission (particularly to amend the implementing regulations and to supervise the legality of the various acts of management of the Office), others for the Office (notably to take decisions in trade mark matters) and others still (e.g. the hearing of appeals) for the Court of Justice. As already indicated, the Council's law-making powers under Article 235 include the power to vest in the Council, the Commission, the Court of Justice and other bodies the right to exercise powers of application, implementation and legal protection, which were previously non-existent.

This makes it clear that the creation of a Community trade mark organization does not alter or add to the EEC Treaty, but instead constitutes in complete conformity with Article 4(1) the carrying out of a Community task (see C above) by its institutions within the limits of the powers conferred on them by the Treaty and in particular by Article 235 (see D above).

For these reasons, the draft Regulation does not provide for the transfer to the Community of sovereign powers of the Member States. A new transfer of additional powers which are currently vested in the Member States would not be covered by the EEC Treaty and could therefore only be done by a new Treaty between the Member States in conformity with their constitutional law. Article 235, like other similar provisions, (eg. Article 100) does not authorize the Community institutions to assume powers which are vested in the Member States. The fact is that the EEC Treaty (Article 235) has already conferred certain powers on the institutions (see also Article 100, etc.). They may avail themselves of these powers at the proper time. If they do so, the competence of the Community is not extended to a new field. It is simply that the power which already exists for this purpose is actually being exercised, so that the field in question then becomes governed by Community law.

Consequently, as soon as the Treaty was concluded, or when they acceded to it, the Member States transferred to the Council as a Community institution the power to take appropriate measures in the trade mark sphere as well. Article 235 also ranks among those provisions which have transferred to the Council not only the individual authorizations provided for in the EEC Treaty but also sovereign powers of the Member States. Since, as already indicated (see D above), the draft Regulation remains within the bounds of the measures allowed under Article 235, it is covered by an authorization which was granted to the Community institutions as long ago as 1958. The time at which the institutions avail themselves of this authorization is immaterial.

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2. Position of the Commission

The first sentence of Article 4(1) provides that:

"The tasks entrusted to the Community shall be carried out by the following institutions:

- an Assembly,
- a Council
- a Commission
- a Court of Justice"

The Treaty makes a distinction between these four Community "institutions" and "bodies established by an act of the Council" (subparagraph c of the first paragraph of Article 177). It might therefore be concluded from the first sentence of Article 4(1) that only an "institution" and not a "body" may carry out Community tasks.

Such listing of the "institutions", however, amounts in no way to a topic argument. In any event, the creation of a Trade Marks Office does not constitute the setting-up of an additional institution; it represents only the establishment of a Community body (Article 118(1) of the draft Regulation). If, however, there were any substance in the foregoing line of argument, not only would the creation of new bodies expressly provided for in the Treaty (Article 40(3) and (4)) or merely authorized by it (Articles 43(3), 75(1)(c), 84(2), 113(2) and (4), 179 and 235) be inadmissible because they have been entrusted with specific tasks, (Monetary Fund, Centre, Foundation) but there would also be a conflict with existing, independent bodies set up by the EEC Treaty itself by reason of the tasks entrusted to them by the Treaty (Economic and Social Committee, Court of Auditors, European Investment Bank). Such an interpretation of the first sentence of Article 4(1), at variance as it is with the system of institutions and bodies enshrined in the EEC Treaty, would be incorrect.

The first sentence should rather be read in conjunction with the second sentence. This states that each institution shall act "within the limits of the powers conferred upon it by this Treaty". Article 235 also ranks among these provisions which confer powers. As already pointed out (see D III above), this article empowers the Council not only to confer powers on other institutions but also to create bodies and vest them with the necessary powers. Article 177(1)(c) confirms that the Treaty contains such authority. If the Council avails itself thereof it is acting within the limits of a power conferred upon it. Article 4(1) consequently does not itself confer on the Commission the power to implement the Regulation on trade marks, but in conjunction with Article 235 authorizes the Council to confer on the Commission or on a Trade Marks Office the power to carry out this Community task.

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It remains to be considered whether this conclusion is consistent with Article 155.

II. Article 155

1. Position of the Commission under the first and third indents

The first part of Article 155 provides that:

"In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied".

Does the Commission therefore have to apply, implement and execute the trade mark Regulation? Or is its task, that is to say its power and duty, limited to ensuring its application by others, i.e. national and Community bodies including the Trade Marks Office?

From the way the provision is worded it would appear that the Commission has general authority to implement Regulations from the administrative point of view, and this directly by virtue of the EEC Treaty. In so far as it is not qualified by the following indents, the provision therefore calls for the exercise of care and circumspection when organizing the Community trade mark system.

It is thus doubtful whether the Commission's task of ensuring "that /the regulation/ /is/ applied" also includes the taking of binding decisions addressed to individuals in the common market (fourth paragraph of Article 189). The third indent of Article 155 makes the Commission's task of having "its own power of decision" subject to the restriction "in the manner provided for in this Treaty". The decision-making power therefore exists only if it is conferred on the Commission by a Treaty provision. This restriction would be rendered to all practical purposes invalid if the Commission has decision-making power under the wider wording of the first indent of Article 155.

This provision therefore contains a general instruction to the Commission to implement regulations from the administrative point of view. The Commission must exert an influence over the Trade Marks Office and be in a position at least to supervise it. The draft Regulation accordingly confers on the Commission the power to appoint and dismiss senior staff of the Office and to assume the legal supervision of the management of the Office (Articles 126 and 127). The Office is also accountable to it (Article 125(2)(d)). The first indent of Article 155 does not, however, vest any decision-making powers in the Commission

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and therefore does not limit the Council's power under Article 235 to take appropriate measures by conferring suitable decision-making powers on the Commission and by creating a body with its own decision-making powers.

2. Fourth indent

(a) Relationship to Article 235

The possession by the Council of the power to grant to the Commission (on the basis of the authorizations to act contained in the EEC Treaty, including Article 235) the right to implement regulations follows not only as indicated from the wording and purpose of Article 235 itself (see D III 1 and 2 above) but also expressly from the fourth indent of Article 155. This provision states that:

"In order to ensure the proper functioning and development of the common market, the Commission shall: ...

- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter".

The fourth indent of Article 155 therefore expressly provides that the Council may lay down rules in which it confers on the Commission powers to implement those rules. Article 155 is, however, not itself the basis for the laying down of such rules, but instead refers to the various authorizations to act contained in the EEC Treaty. One of these authorizations is Article 235.

b) Implementation by means of Commission regulations

It was queried earlier whether the term "implementation" also covers the power to make law in the form of implementing regulations. The Court of Justice answered this question in the affirmative[1]:

"Both the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot therefore be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council according to the procedure in Article 43. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision. On the

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1) Judgments of the Court of Justice of 17 December 1970, Case 25/70 "Köster" [1970] ECR 1161 - 1170, Ground 6

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other hand, the provisions implementing the basic regulations may be adopted according to a procedure different from that in Article 43, either by the Council itself or by the Commission by virtue of an authorization complying with Article 155."

According to this well-established case-law and to the practice of the Council and Commission, it would be permissible to confer on the Commission the power to adopt the implementing regulations, the rules of procedure of the Boards of Appeal of the Office and the regulations governing the fees charged by the Office if their substance does not "go beyond the limits of the implementation of the principles of the basic regulation"[1]. An example is provided by the rules on cartels, concerning which the Court of Justice held that[2]:

"In Article 19 of Regulation No 17 the Council has provided that undertakings which were parties to one of the procedures provided for by that regulation shall have the opportunity of being heard by the Commission. In Article 24 of the same regulation the Council has conferred on the Commission power to adopt implementing provisions concerning such hearings. /This happened in the case of Commission Regulation No 99/63/. Since the principle that the persons concerned shall be given the opportunity of being heard by the Commission was adopted by the Council the rules laying down the procedure to be followed in this connection, however important they may be, constitute implementing provisions within the meaning of the above-mentioned Article 155. Consequently it was lawful for the Council to entrust the institution authorized to apply this procedure with the task of laying down its details."

The present draft of the trade mark Regulation adopts this solution for the adoption of amendments to the implementing regulations (Article 142(3)): "The Commission is authorized to adopt amendments to the implementing regulations on the recommendation of the Management Committee."

The Council may also reserve for itself the right to adopt the abovementioned implementing regulations, as is provided for in the present draft of the trade mark Regulation (Article 142(1) and (2)) except in the case of the amendments just referred to (Article 142(3)).

c) Implementation by means of Commission decisions

If it is therefore both permissible and consistent with established practice to confer on the Commission the power to adopt regulations implementing basic regulations, it is a fortiori permissible to confer on it the power to address to persons in the common market the decisions specified in the basic regulation. In the words of the Court of Justice[3]:

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1) Loc. cit. Ground 7.

2) Judgment of the Court of Justice of 15 July 1970, Case 41/69 "ACF Chemiefarma" /1970/ ECR 661 - 688, Grounds 63-66.

3) "ACF Chemiefarma" - decision loc. cit. Ground 62

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"Article 155.... does not restrict this authority [pursuant to Article 87 to give effect to the principles of cartel law by means of Council regulations] to powers other than those of drawing up regulations."

Article 155 therefore covers the Commission's authority to take decisions.

In point of fact, regulations amount to the making of law while decisions constitute application of the law. The former are addressed to all citizens of the common market, the latter to individuals. The former involve the legislative enforcement of the principles of the basic regulation. the latter their administrative enforcement in individual cases. This clearly constitutes "implementation" of the basic regulation made by the Council in the strict sense of the word. The only thing that has ever been in doubt is whether "implementation" also includes the exercise of legislative powers, and in this connection, on the meaning of the word "implementation", the Court of Justice held that:

"When Article 155 of the Treaty provides that 'the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter', it follows from the context of the Treaty in which it must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation... the Council may be led to confer on the Commission wide powers of discretion and action."

In the light of this binding interpretation, there can be no objection to conferring on the Commission the power to take decisions concerning the legality of a disputed act of the President of the Office (Article 127(3) of the draft). This power is also in keeping with the general instruction to the Commission laid down in the first indent of Article 155. It would be no less permissible to confer on it the power to take all other decisions in trade mark matters conferred on the Trade Marks Office under the present draft of the Regulation.

Indeed, the fourth indent of Article 155 makes no distinction between the various types of implementing powers which the Council can transfer to the Commission and therefore covers all acts allowed under the Treaty, including regulations, directives and decisions. The provision is proof that the Member States did not wish to lay down definitively in the Treaty the fields in which the Commission has power to take decisions in individual cases. This depends rather, in each particular case, on whether and to what extent the Council uses the authority conferred on it by the Treaty. Article 88 confirms this in the

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1) Judgment of the Court of Justice of 30 October 1975 "Rey Soda" 23/75 - ECR 1975, 1279 1300, Grounds 10 and 11.

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field of cartels by empowering the authorities of the Member States to implement Articles 85 and 86 pending entry into force of the provisions adopted under Article 87. Article 235 authorizes the conferment of implementing powers on the Commission or on some other agency only where such action by the Community proves necessary and appropriate for the attainment of one of its objectives.

d) Implementation by means of decisions of a Trade Marks Office

The fourth indent of Article 155 of the Treaty does not automatically and generally confer on the Commission the power to implement the rules laid down by the Council. It merely enables the Council to confer such implementing powers on the Commission in individual cases. The use by the Council of the fourth indent of Article 155 is "optional"[1].

In addition to this, the administrative implementation of Community Regulations by Community institutions or bodies is necessary only in quite exceptional cases. As a rule, action by national authorities and courts is sufficient. It has already been explained (at D I 3(c) and IV above) why the implementation of the trade mark Regulation calls for the setting-up of a trade marks organization at Community level.

For these reasons, the fourth indent of Article 155 gives the Council ample room for manoeuvre. Does the provision prevent it from conferring power to take decisions in individual cases pursuant to Article 235 on a Community body set up for that purpose?

The wording and purpose of Article 155 do not preclude this. The provision describes the Commission's tasks, but reserves for it alone only the tasks described in subparagraphs 1, 2 and 3. Whether and to what extent the Council confers on the Commission the power to perform executive tasks in individual cases depends on the need for execution by the Community, the extent of the authorization to act in question and the Council's discretion. Article 235 provides that "action by the Community" must also prove necessary in the field of execution. The article leaves open the question as to who should act in such circumstances, i.e. a Community institution or body. The measures taken must, however, be "appropriate". The question whether the conferring on the Commission or on a Community body of power to take decisions in individual trade mark matters is an "appropriate" measure is therefore decided by the Council on a proposal from the Commission under

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1) "Köster" judgment, loc. cit., 1171, Ground 9. Cf. also the above quotation from the "Rey Soda" judgment.

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Article 235. Here, however, the Council is not free to exercise its discretion but is bound by the fact that the fourth indent of Article 155 can be interpreted as an invitation to the Council to charge the Commission in the ordinary course of things with the administrative execution of Council Regulations by means of individual decisions. The article does not contain a hard and fast rule, however, but allows certain exceptions where they are warranted by the circumstances and this would include execution by a Trade Marks Office within the limits provided for in the basic regulation.

III. Clearly defined executive powers

In the Meroni judgments, the Court of Justice decided that the delegation of decision-making powers to bodies was subject to certain limitations. The relevance of these to the proposed European trade mark system will now be examined.

Subparagraph (b) of the first paragraph of Article 53 of the ECSC Treaty provides that:

"the High authority [now the Commission] may a) .....b) with the unanimous assent of the Council, itself make any financial arrangements serving the same purposes [performance of the economic tasks of the High Authority set out in Article 3]."

On the strength of this authorization, the High Authority created an equalization mechanism for scrap imported from non-member countries and delegated to it, financial powers of general and individual scope.

The Court held that[1]:

"... under Article 53 as regards the execution of the financial arrangements mentioned therein, it is only the delegation of those powers "necessary for the performance of the tasks set out in Article 3" which may be authorized. Such delegations of powers, however, can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the High Authority. .... the delegation of powers granted to the Brussels agencies [of the body] gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty."

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1) Judgment of the Court of Justice of 13 June 1958, Cases 9/56 and 10/56 "Meroni" [1957 and 1958] ECR 133 at 152 and 154, 157 - 173 and 175.

If one judges the proposed conferment of decision-making powers on the Trade Marks Office according to these criteria, the following conclusions can be drawn:

The Office is a technical body. Its task is to execute the Community's trade mark law, which calls for special expertise. It takes specific individual decisions addressed to persons in the common market. All decisions of the Office - namely those concerning applications for Community trade marks, opposition by proprietors of earlier trade marks, the registration, lapse and cancellation of Community trade marks, costs, appeals and restitution - are taken on the basis of detailed provisions of the trade mark Regulation which define the manner in which it is to be put into effect (see the article of the draft Regulation quoted at B above). The Office has merely to examine whether the characteristics of such provisions of the regulation as may from time to time be applicable correspond to the facts of the case in point. This is a task of pure classification. These provisions do not allow "a degree of latitude" or "a wide margin of discretion", let alone an opportunity to execute an "economic policy" [1]. The Court of Justice will examine the decisions of the Boards of Appeal of the Office for errors of law. The Commission will assume the legal supervision of the management of the Office (see B above for further details). The Office will not have the power to make regulations.

It follows from this that the draft Regulation confers on the Office only "implementing powers" which are "clearly defined", whose exercise is "supervised" by the Court of Justice or the Commission and which do not allow the Office any "discretionary power" involving a "wide margin of discretion".

Moreover, the Court of Justice has continued to develop its case-law with regard to Article 75(1)(c) of the EEC treaty. In its opinion on the European Laying-Up Fund for Inland Waterway Vessels already referred to (at D III 3 above), which is to be empowered to address decisions to individuals, the Court of Justice pointed out the problems inherent in the vesting in the Fund of legislativ powers belonging to the Community institutions, and stated [2] :

"However, it is unnecessary in this opinion to solve the problem thus posed. In fact the provisions of the Statute define and limit the powers which the latter grants to the organs of the Fund so clearly and precisely that in this case they are only executive powers. Thus the field in which the organs may take action is limited to the sphere of the voluntary laying-up of the excess carrying capacity subject to the condition that financial compensations is paid by a Fund financed by contributions levied on the vessels using the inland waterways covered by the Fund ... The Fund may not be used with the aim of fixing a permanent minimum level for

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1) The Court of Justice uses these terms in the Meroni judgments, loc. cit., pp. 154 and 175

2) Court of Justice, 26 April 1977, Opinion 1/76, OJ No. C 107 of 3 May 1977, p. 4 - 14 and 15, paragraph 16.

freight rates during all periods of slack demand or of remedying structural imbalance. More particularly, the rate of contributions ... for the first year of the operation of the system is laid down in the actual terms of the Statute and subsequent amendments by decision of the Supervisory Board must either remain within certain limits or result from a unanimous decision."

The individual decisions (e.g. on compensation) based on this clearly present no problems. A closer inspection of the proposed provisions of the Statute of the Fund reveals, however, a very flexible development of the strict criteria laid down in the Meroni judgments. [1)]

IV. Affording of legal protection

1. Conferring of powers expressly, disclosure of reasons on which decisions are based, management report of operations

Three further limits must, according to the Meroni judgments, be respected when conferring powers on agencies.

First, "a delegation of powers cannot be presumed and ... the delegating authority must take an express decision transferring them." [2)] This condition is complied with in the draft Regulation on trade marks.

Secondly, the agency's decisions must state the reasons on which they are based [3)]. This obligation is in keeping with Article 190 of the EEC Treaty: ".... decisions of the Council and of the Commission shall state the reasons on which they are based ... "

A corresponding provision is incorporated in the proposal for a Regulation on trade marks.

Thirdly, the agency must publish a management report each year [4)]. The draft Regulation on trade marks makes provision for this in Article 125 (2) (d).

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1) Cf. OJ No. C 208 of 3 September 1976, pp. 2 and 8, Articles 10, 19, 20 and 23.

2) Judgment in Case 9/56 "Meroni", loc. cit., p. 151.

3) "Meroni" judgments, loc. cit., pp. 149 and 164.

4) "Meroni" judgments, loc. cit.

2. Appeal proceedings: Trade Marks Office, Boards of Appeal, Court of Justice

An appeal will lie from decisions of the various divisions of the Trade Marks Office (Articles 63 to 66 of the draft regulation) to the Boards of Appeal of the Office which will each consist of three legally qualified, independent members (Articles 139, 140 and 68). A further appeal to the Court of Justice will lie from decisions of the Boards of Appeal (Article 69(1)). The Court of Justice will examine only points of law (second sentence of Article 69(2)).

The model for this appeals procedure (Trade Marks Office - Board of Appeal - Court of Justice) is taken from the Convention for the European patent for the common market [1]. There is general agreement that in trade mark matters too the direct hearing of appeals by the Court of Justice would be neither possible nor desirable in view of the very large number of them. It would be unsatisfactory, if the Court, which is the supreme judicial authority of the Community, were to be overburdened with an excessive number of cases which involve questions of fact. It is important that the review procedure afforded by the Court of Justice be confined to questions of law and take the form of further appeals. [2] For these reasons the interposition of an intermediate review body for questions of fact and of law is considered indispensable.

The Meroni judgments require, however, that the actions of the body entrusted with this task be subject to judicial control equivalent to that provided for in Article 173 of the EEC Treaty. Do the controls exercised by the Boards of Appeal and the following of further appeals to the Court of Justice from their decisions offer the same guarantees as those which the Court of Justice could provide in regard to appeals on points of fact and of law from decisions of the Commission ?

The Meroni judgments decided that coal and steel undertakings should be protected and that their rights should not be undermined. This had in fact occurred because a decision-making power of the High Authority had been delegated to another body. Persons who are subject to the laws of the common market should be able to rely on there being no withdrawal by the secondary legislation of the Community, of the protection afforded. by the treaty itself in respect of the field governed by it.

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1) OJ No. L 17 of 26.1.1976, Articles 62 and 63.

2) Proposals made by the Court of Justice on measures to ensure the proper performance of its tasks, 31 January 1979, page 2, Annex to Council Document 4679/79 (JUR 36) of 7 February 1979.

The European trade mark system does not yet exist and the Treaty makes no provision for it. A form of legal protection which hitherto did not exist under the Treaty is to be created with the help of Article 235. This protection fulfils the special technical requirements of trade mark law and is "necessary" and "appropriate". It is moreover in the interests of the citizens of the common market that a suitable system be established. This calls for three authorities, and not an exact copy of the EEC Treaty, which offers only two. Two of these three authorities would have special technical qualifications and experience in trade mark matters. Under a two-stage procedure this would be true only of the first authority - the appropriate division of the Trade Marks Office. The Court of Justice would be less well equipped to examine the facts and hear evidence than the Boards of Appeal, which specialize in such matters. The legal protection of the parties concerned, which was the overriding consideration in the Meroni judgments, can thus be ensured in trade mark matters, in the framework of Article 235, in a different way, and more effectively, than by referring decisions of the first authority to the Commission, followed automatically by a full review by the Court of Justice (Article 173). Compared with a two-stage solution, the three-stage solution not only maintains the legal protection of the citizen at its present level but actually increases it.

V. Safeguarding the institutional structure of the Community and the balance of powers

The Court of Justice said, on this subject that[1]:

"The objectives set out in Article 3 of the ECSC Treaty are binding not only on the High Authority, but on the "institutions of the Community ... within the limits of their respective powers, in the common interest". From that provision there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings ... to which it applies."

This principle should also be borne in mind in the European Economic Community. Article 3 of the ECSC Treaty, in the way in which the Court of Justice refers to it here, is comparable to Article 4 of the EEC Treaty (see text at I above). In the Köster judgment the Court expressly confirmed that, when secondary legislation of the Community was being adopted, "the Community structure and the institutional balance" should not be "distorted". In the Court's view[2], even when an international body managed by the EEC and a non-member State was being set up

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1) "Meroni" judgments, loc.cit., pp. 152 and 173.

2) Court of Justice, 26 April 1977, Opinion 1/76 - European Laying-Up Fund for Inland Waterway Vessels - OJ No C 107 of 3 May 1977, p. 4 - 14, paragraph 14.

"an appropriate balance in the composition of the organs of the Fund ... must not result in weakening the institutions of the Community ... even for a specific and limited objective".

1. Position of the Court of Justice

The conferring on Boards of Appeal of the Office of power to take decisions in respect of appeals might arouse objections were the Court of Justice to have the sole right under the EEC Treaty to give judgment at Community level.

Article 164 charges the Court of Justice to ensure "that ... the law is observed". This necessarily involves reviewing the decisions of subordinate authorities in regard to errors of law, but not the repetition of complicated statements of facts.

This contention is supported in the first place by the fact that Article 179 permits the creation of an administrative tribunal of the European Communities under the Court of Justice[1]. The Commission has recently proposed to the Council the adoption of a regulation to this effect[2]. The Court has expressed its views on this matter as follows[3]:

"... the Court of Justice has examined the proposal for a Regulation submitted by the Commission and entirely approves in principle the setting up of an administrative tribunal with the task of settling at first instance disputes between the Communities and their employees.

The Court takes the view that, since an action for annulment of the decisions of such a tribunal will be available before the Court of Justice, the requirements of Article 179 of the EEC Treaty and the parallel provisions of the other two Treaties will be satisfied and that the new tribunal can therefore be set up within the framework of the Staff Regulations of Officials. The Court also feels that the structure of the tribunal and the procedural provisions laid down in the Commission's proposal comply with the essential requirements of Community law".

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1) Article 179 provides: "The Court of Justice shall have jurisdiction in any dispuite between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment." As already indicated (see D III above) Article 235 contains a much more extensive power.

2) Proposal for a Council Regulation ... establishing an Administrative Tribunal of the European Communities, OJ No C 225 of 22 September 1978, p. 6

3) Letter from its Preisdent to the President of the Council dated 27 September 1978, Council document R/2522/78 (JUR 156) of 4 October 1978.

The second indication is the fact that in the Euratom Treaty provision is made for an additional body (not yet created) with judicial functions, namely the Arbitration Committee under Article 18. It is intended that this Committee should have optional jurisdiction in addition to that of the courts of the Member States over the grant of patent and utility model licenses in the field of nuclear energy. It consists of fifteen people who exercise judicial responsibilities. It sits in the form of arbitration boards consisting of three members[1]. Appeals from its decisions, which are addressed to individuals, lie to the Court of Justice (second paragraph of Article 18). Its decisions have the force of res judicata between the parties concerned and are enforceable (third paragraph of Article 18).

The setting-up in a third sector of intellectual property of a specialized authority under the Court of Justice which relieves the latter of the task of examining facts is therefore compatible with the requirement of "appropriate" (Article 235), legal protection (meaning effective legal protection) and with the "institutinnal structure of the Community" and the "balance of powers" (Meroni, Köster). The essential thing is that the Court of Justice should have power to review decisions of the Boards of Appeal by way of a further appeal on a point of law.

In order that such judicial control may also be exercised in cases in which the parties do not appeal against decisions, which are of dubious legal validity, it is stipulated that the Advocate-General at the Court of Justice may lodge a further appeal on a point of law to the Court (Article 70(1)). This ensures that in relation to the Community's trade mark law the Court of Justice can fully perform the task imposed upon it by the Treaty of "ensuring that the law is observed".

So long as this is so, and in particular so long as the Court of Justice is able to ensure the uniform application of the Community's trade mark law and thereby perform its role as supreme custodian of the law, its position as a Community institution will not be distorted and the balance between itself as authority which interprets the law and the Trade Marks Office as the authority which enforces the law will not be disturbed. The balance will, on the contrary, be maintained and consolidated by means of the Boards of Appeal, each of which will have three legally expert, independent members and be similar to a court of law.

As far as the institutional questinn is concerned, the Court of Justice has itself commented as follows[2]:

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1) Cf. for further details Regulation No 7/63/Euratom of the Council of 3 December 1963, OJ No 180 of 10 December 1963, p. 2849.

2) Proposals on European Union in Reports on European Union, Bulletin of the European Communities, Supplement 9/75, p. 17 - 20.

"Because of the need to ensure uniform application of the law in all the Member States, it is of fundamental importance that the judicial system should be subject to a single supreme court. Any new structure involving the coexistence of a number of separate or competing courts must therefore be avoided.

Indeed, with a view to ensuring that in the interpretation and application of the Treaties the law is observed, the jurisdiction of the Court should be extended to cover any new powers to be exercised by the institutions.

It is therefore of the first importance that there should be one indpendent Community court".

2. Position of the Commission

It remains to be discussed whether the setting-up of a Trade Marks Office with decision-making powers vis-à-vis citizens of the common market would "render ineffective" or "distort" the "institutional structure of the Community" or the "Community structure" and the "balance of forces" or the "institutional balance".

In the Meroni judgments, the Court of Justice held that the security inherent in those concepts was rendered ineffective where the body was not provided for in the ECSC Treaty and where the power delegated was discretionary[1]:

"To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective".

It is not intended, however, that any discretionary powers be conferred on the Trade Marks Office. This has already been stated in detail (see III above). The sentence quoted does not apply, therefore to the present case.

Consequently, the Trade Marks Office, although not expressly provided for in the Treaty, can be created.

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1) Judgment of 13 June 1958, Cases 9/56 and 10/56 "Meroni" [1958] ECR 133 - 152 and 157 - 173.

The establishment of a Trade Marks Office and the conferring on it of decision-making power vis-à-vis individuals might be objected to if the EEC Treaty had given to the Commission a monopoly in the matter of implementation at Community level. It has already been explained at length why this is not so (see I 2 and II above). The following points however, should also be noted.

The Trade Marks Office is intended not as a new institution but as a Community body supervised from the legal point of view by the Commission. The institutional structure of the Community and the balance between the four institutions will remain unaffected. There will be no transfer of authority between the Council and the Commission. The organizational structure of the Community will, of course, be enlarged but this will be achieved without modifying the system, without reorganization, reform or alteration of the distribution of powers among the institutions.

Secondly, the powers which are to be conferred on the Trade Marks Office are not currently vested in the Council, Commission and Court of Justice (or the Member States). No abandonment or delegation of existing powers is planned. No one will be forfeiting a power vested in him in favour of another. Instead, the Council will merely be using the power conferred on it by the Member States under Article 235 of the Treaty to create bodies and confer powers on them. What is being established, therefore, is a new Office with new rights and obligations. The distribution of powers among the Community institutions and the balance between them (and between the Community and the Member States) will remain unchanged.

Thirdly, the Trade Marks Office is to receive no legislative powers. These remain reserved for the Council and Commission (see II 2 a and b above for further details). This ensures compliance with the Köster decision of the Court of Justice[1].

Fourthly, the Trade Marks Office is to receive no power to address decisions decisions to Member States. It will be granted solely the power to address to citizens of the common market. It has already been pointed out that under Article 155 the Commission has no monopoly over such decisions (see II 2 d above).

Fifthly, the Trade Marks Office is to be monitored in many respects by the Commission. It will have to report back to the Commission each year about its activities; its senior staff will be appointed and dismissed by the Commission; senior staff will be subject to the Commission's disciplinary authority; the management of the Office will be subject to the legal supervision of the Commission; the latter will be obliged to take action in the event of any infringement of Community law; Member States and third parties directly and personally concerned will be able to demand an examination of the legality of any act of the President of the Office.

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1) Judgment of the Court of Justice of 17 December 1970, Case 25/70 [1970] ECR 1161 - 1171, Ground 9.

Sixthly, the legality of the acts of the Commission and hence also of those of the Trade Marks Office will be reviewed in turn by the Court of Justice. If the Commission fails in its duty to supervise the Office, or if it takes an unjust decision or fails to take any decision at all, an action may be brought against it by the Member States or by those directly and personally concerned (Articles 173 and 175 of the EEC Treaty). The draft Regulation, in conjunction with the Treaty, therefore contains a comprehensive system of safeguards designed to protect Community law and, in particular, the rights of individuals, via the performance by the Office of its functions.

Seventhly, the Trade Marks Office will be subject to the budgetary rules of the Communities. Its expenditure will be financed out of their budget and its income from fees will flow into it. The Office will therefore be subject to the control of the Council and European Parliament provided for in the EEC Treaty and in the budgetary provisions contained in the secondary legislation. The Court of Auditors of the Community will monitor the administration of its finances.

In view of all the foregoing, it is clear that the creation of the Trade Marks Office in the form of a Community body does not adversely affect, encroach upon or distort the positions of the four Community institutions created by the Treaty. On the contrary, it respects them fully. Moreover, the Office fits harmoniously into the institutional structure of the Community without jeopardizing either its technical and administrative independence or the independence of its staff.

F. Need for a Regulation

The question has repeatedly been raised whether it would be more appropriate if action were taken, not by the Community on the basis of its power under Article 235 of the EEC Treaty in the form of a Council Regulation, but by the Member States on the basis of their treaty-making powers as subjects of international law.

I. Historical background

1. Trade mark law

The historical background to the Community trade mark will first of all be outlined in order to explain why the conclusion of a convention was advocated. On 19 December 1960, the senior officials of the six original Member States responsible for the protection of industrial property rights stated that they considered it "appropriate to draw up a draft convention creating a European trade mark law that will exist side by side with national laws".[1] They had already come to the conclusion on 19 November 1959 that an approximation of national trade mark laws pursuant to Article 100 was both possible and necessary, but that it would not be an adequate means of attaining the objectives of the EEC Treaty[2].

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1) EEC, Commission, Directorate-General for competition, Doc. IV/6739/3/60, p. 3 at II 1.

2) EEC, Commission, Directorate-General for Competition, minutes of the meeting of 19 November 1959 on the introduction of the approximation of laws in the field of the protection of industrial property rights, Doc. IV/5697/59, p. 3-11.

It was therefore agreed on 19 December 1960 that "on the one hand the national laws governing the protection of industrial property rights ... should be approximated, while on the other three draft conventions on patents, trade marks and industrial designs should be drawn up"[1]. The view was that "simplification and unification to the extent envisaged can be fully achieved only by means of the conclusion of conventions"[2]. Reference was also made to "the limited scope of the Rome Treaty's provisions on the protection of industrial property and the advantages ot be gained from opening up the planned conventions to accession by non-member States"[3].

However, none of these three points was examined in greater detail.

With regard to the last point, the Member States and the Commission came to the conclusion some time ago that the inclusion of non-member countries in the Community trade mark system is undesirable. This is because from the economic and legal points of view an autnnomous, unitary trade mark is necessary only for the territory of the Member States. Only there do conditions similar to those prevailing in an internal market have to be created. The practicability of the system would be seriously jeopardized, moreover, by the existence of an even greater number of prior rights conflicting with the Community trade mark[4]. Consequently, subsequent accession will be possible (as well as necessary) only in the case of States that become members of the European Economic Community. In this respect the position is the same as in the case of the Community patent.[5] The possibility of participation by European non-member States which create a customs union or a free trade area with the Community might nevertheless be considered at a later date[6]. The position here is the same as in the case of the Community patent[7].

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1) See Doc. IV/6739/3/60 referred to above, p. 1

2) loc. cit.

3) loc. cit.

4) Cf., for further details, Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76, p. 18, points 58 and 59.

5) Cf. Article 95 of the Community Patent Convention, OJ No L 17 of 26 January 1976, p. 25.

6) Memorandum, loc. cit.

7) Cf. Article 96 of the Community Patent Convention, loc. cit.

Such a determination of the conditions and details for applying the rules governing the Community trade mark to a non-member State is possible, however, not only if the matter is dealt with by means of a convention between the Member States but also if it is dealt with by means of a Community Regulation. Rules embodied in regulations or directives may also subsequently be extended in an appropriate manner to cover one or more non-member countries by means of an agreement between the Community and those countries[1].

As far as the first and second points of the proposals put forward in 1960 by the senior officials of the six Member States are concerned, the record shows that at that time nobody had thought of Article 235 and the new instrument of a Council regulation as an alternative to the traditional method of a convention. This is understandable because in 1959 and 1960 even the customs union had not yet been set up.

The direction that the work took twenty years ago cannot therefore be regarded as a preliminary decision not to apply Article 235. The senior officials would in any case not have been competent to take such a decision. It is solely for the Community institutions (i.e., pending submission of a proposal, the Commission, then the European Parliament and afterwards the Council) to decide whether Article 235 applies (see D before I above). As regards the only article to be discussed in detail at that time, namely Article 100, the above position was made clear by the appropriate Member of the Commission as long ago as 1959[2] and it was acknowledged in the informal decisions of the senior officials[3]. A further attempt to clarify the situation was made in 1963[4]. In 1965, the various Governments involved suspended the work. Towards the end of 1972 the nine Heads of State and of Government recommended that Article 235 be used "as widely as possible"[5]. This gave rise to a new situation from the political point of view also. Accordingly, the Commission announced in May 1973 that it was then seeking a Community solution and that the publication of the 1964 preliminary draft did not mean that a preliminary decision had been taken in favour of a convention[6]. In 1976, it explained in greater depth the reasons why it was advocating the adoption of a regulation[7].

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1) Cf., for example, Article 29 of Directive 73/239/EEC of 24 July 1973, OJ No L 228 of 16 August 1973, p. 3 - 14 and the draft of the "Agreement between the Swiss Confederation and the European Economic Community on direct insurance other than life assurance", consolidated text of 21 June 1979.

2) Cf. Doc. IV/5697/59 referred to above, p. 11

3) Loc. cit. Annex 1, p. 2 and Annex 2, p. 4 par. 3b.

4) Minutes of the meeting of 21 October 1963, Doc. 11726/IV/63, pp. 3-4, 12

5) Point 15 of the declaration issued at the conference held in Paris on 19 and 20 October 1972, Bulletin of the European Communities 10/1972, p. 23

6) EC, Commission, Preliminary Draft of a Convention for a European Trade Mark, Luxembourg, 1973, p. 4

7) Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76, pp. 15-16.

It pointed out at the same time that the Community law-making procedure afforded all interested parties at least as good an opportunity to acquire information and enter into consultations as the inter-State procedure[1]. Experience gained in the course of the preparation of the draft regulation appears since to have confirmed this.

2. Patent law

The Convention for the European Patent for the common market (Community Patent Convention)[2], which was signed in 1975, has been adduced as a further argument in favour of the conclusion of an international treaty. What has been said with regard to trade marks during the period from 1959 to 1964 applies here too. Work was suspended between 1965 and 1969. When it was resumed, the choice of a convention suggested itself mainly because the six then Member States decided in 1969 to establish, in conjunction with numerous non-member States, a "European Patent Organization" separate from the European Community and to confer on it the power to grant patents throughout Europe. For this purpose a convention was essential.

The outstanding issue of the introduction of a Community patent was of concern only to the Member States of the Community. A separate instrument was needed for this purpose. For the historical reasons set out at 1 above and in view of the close affinities between both schemes, the solution of a convention was adopted in 1969 for the Community patent also. The question of the choice of legal instrument was not raised again at that time. The Paris summit conference of the enlarged Community was still a long way off.

Finally, one major problem was not encountered in the field of trade mark law: there is no need for a pan-European trade mark organization with a pan-European procedure for the granting of trade marks. The Madrid Agreement of 1891[3] already make possible, with the help of the World Intellectural Property Organization, the international registration and hence the grant of a "batch" of natinal trade marks in the marjority of European States. The Trademark Registration Treaty of 12 June 1973[4] which is not yet in force, will further simplify international registration. The only task now remaining is the creation of a autonomous, unitary trade mark for the territory of the Member States.

For these reasons, the approach adopted twenty years ago for the Community patent and actually retained for that purpose does not constitute a precedent be followed in the case of the Community trade mark.

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1) Loc. cit., p. 16 point 51.

2) OJ No L 17 of 26 January 1976.

3) Agreement on the international registration of trade marks.

4) Cf., for further details, Commission, Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76, p. 14, points 39-43.

It might be added that experience since gained with the ratification of the Community Patent Convention has been disappointing, little progress has been made in bringing about the remaining conventions on unification of the law and the progressive enlargement of the Community has raised other difficult problems in the field of conventions which can hardly be avoided.

Such difficulties and their consequences do not occur in the case of Regulations. The adoption of Regulations is also much less time-consuming. The Regulation enjoys, moreover, a number of legal advantages over the convention. Lastly, its use is in keeping with the development of the Community and with political guidelines laid down by the European Council.

II. Ratification of multilateral conventions

Difficulties in only one Member State result in a convention entering into force considerably behind schedule or not at all. Such difficulties were experiences even when the Community had only six Member States. The Convention on jurisdiction and enforcement of judgments in civil and commercial matters (the Judgments Convention)[1] did not enter into force until nearly four and a half years after signature, and the Protocol concerning its interpretation by the Court of Justice[2] came into force after a further two and a half years. That makes seven years in all. Other conventions on unification of the law have so far not entered into force. Twelve years have gone by without ratification of the Convention on the mutual recognition of companies and bodies corporate (the Recognition Convention)[3] by the Netherlands, despite the fact that the other original Member States ratified it long ago.

Since 1973 multilateral conventions have had to surmount national hurdles in nine Member States. These are not only of a substantive and political nature, but in two countries are also constitutional in character.

1. Denmark

Denmark takes the view that ratification of the Community Patent Convention falls under Article 20 of its Constitution since the convention

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1) OJ No L 299, 31 December 1972, p. 32

2) OJ No L 204, 2 August 1975, p. 28

3) Supplement to Bulletin No 2-1969 of the European Communities, p. 5.

transfers to international bodies powers which in principle should be vested in Danish authorities[1]. The adoption of the law ratifying the convention therefore requires either a five-sixths majority of members of Parliament (150 out of 179 votes) or a simple majority and a referendum in which the No-vote is less than 30% of the total electorate[2]. A five-sixths majority was not forthcoming in the Folketing. It was not considered advisable to insist on a vote aimed at obtaining a simple majority and to organize a plebiscite in view of the technical nature of the issue, the cost to the public and to the Government, and the general expense.

If the Community trade mark were to be created by a convention, Article 20 of the Danish Constitution would again apply. In that event, powers vested in Danish authorities would be transferred to international authorities (the Trade Marks Office, the Court of Justice). If, on the other hand, the Council makes a Regulation, it will be directly applicable in Denmark also (second paragraph of Article 189). Article 20 of the Constitution will not then apply. The Council will merely be exercising the power, transferred to it by the Danish Act of Accession of 11 October 1972 on the basis of Article 20 of the Constitution and therefore no longer vested in Danish authorities, to make law within the limits of Article 235 and to transfer to the Community institutions and bodies powers to implement and safeguard such law (see E I 1 above).

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1) Article 20 (1) provides: "Powers vested in the authorities of the Realm under this Constitutional Act may, to such extent as shall be provided by statute, be delegated to internatinnal authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation."

2) Article 20 (2) provides: "For the enactement of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in section 42."

2. Ireland

The Irish Constitution lays down the principle that only Irish courts and judges may administer justice[1]. An exception is provided for only in the case of Community law and of national laws necessitated by the obligations of membership of the Communities[2]. Since the Community Patent Convention was not adopted by Community institutions, the first case does not apply. Whether the alternative situation obtains - an obligation under Community law to ratify the convention - appears doubtful. If it were ratified, therefore, there would be a danger that Irish courts might declare the convention unconstitutional.

For these reasons, the entry into force of the Community Patent Convention has been pending for the past four years; a further long delay is to be expected. If the Community trade mark were created by means of a Convention, the same difficulties would arise. The Irish Government has repeatedly pointed this out and adopted the same attitude towards conventions planned in other fields. If, on the other hand, the Council adopts the proposed regulation, the constitutional issue does not arise.

III. Enlargement of the Community

On 1 January 1981, Greece will become a member of the Community. Portugal and Spain should follow two to three years later. With twelve Member States, of course, the problems and risks inherent in the ratification of conventions will increase considerably. Regulations will, as before, stand a much better chance of being accepted by the Council within a reasonable period. They enter into force on the twentieth day following their publication or on the date specified in them (first paragraph of Article 191). Detailed statistics show that, from the time work starts on them until the (probable) date of their entry into force, between fourteen and twenty-three years go by in the case of conventions, whereas the corresponding time-span in the case of comparable regulations or directives (including, moreover, their incorporation into national law) is usually reduced by about half.

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1) Article 34 states: "(1) Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution ... .

(4) 4 No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution."

2) The second sentence of Article 29 (4) 3 states: "... No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State."

1. Greece

While it would be possible for the Commission, in view of the present state of the discussion, to submit to the Council the proposal for a regulation on the Community trade mark during the first half of 1980, it would be technically and politically impossible to draw up a convention before then and have it ready for signature by the Nine at the end of 1980 just prior to Greek accession. The negotiations would therefore have to be continued or begun in 1981 by the Community of ten Member States. Considerable delay would be unavoidable. This is precisely what happened in the case of three draft conventions "on the international merger of sociétés anonymes"[1], "on bankruptcy, winding-up, arrangements, compositions and similar proceedings" and "on the law applicable to contractual and non-contractual obligations". These texts were drawn up in 1972 by the six original Member States. Since 1973 - i.e. for the past seven years - they have practically had to be renegotiated by the enlarged Community.

In contrast to this, the proposal for a regulation on the Community trade mark can be debated in the European Parliament and the Economic and Social Committee without delay as from the Autumn of 1980. The adjustments required as a result of Greek accession can be worked out in 1981 and incorporated immediately in the Commission's proposal to the Council once it has been finalized in the light of the opinions of the consultative bodies.

2. Portugal, Spain

If the Community trade mark were created by means of a convention and if the negotiations leading up to it were still proceeding at the moment of accession to the Community, they would have to be continued with twelve participants. This would probably lead to considerable delay, judging by past experience (see 1 above). If a convention signed by the Ten existed at the time of accession, the new Member States would have to accede to it on the basis of the Acts concerning the conditions of their accession to the Community, and what is more upon their accession to the Community[2].

The negotiations concerning adjustments to the Judgments Convention between the Six and Denmark, Ireland and the United Kingdom lasted almost six years from the moment of accession to the Community. Ratification of the Accession Convention is currently in progress, and it is required of all nine Member States[3]. Consequently, until it enters into force everywhere, uniform law will apply only in parts of the Community (the territory of the six original Member States). For the past seven years, i.e. ever since the Community was enlarged on 1 January 1973, it has not been possible for the

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1) Bulletin of the European Communities, Supplement 13/1973

2) Cf. Article 3 of the Act concerning the Conditions of Accession of Denmark, Ireland and the United Kingdom, OJ Special Edition No L 73, 27 March 1972, p. 14.

3) Convention of Accession of 9 October 1968 ... to the Convention on ..., OJ No L 304, 30 October 1978.

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convention to contribute to the functioning of the enlarged common market and hence its principal objective has been only partially attained. When Greece joins, the procedure described will recommence in 1981. A few years later, the same will happen with Portugal and Spain. The Convention, which will hardly have been changed on each occasion, will therefore have to be ratified by the Parliaments of the original Member States at least four times within the space of a few years. In the case of the Recognition Convention, the adjustment negotiations with Denmark, Ireland and the United Kingdom did not begin until the seventh year following their accession to the Community.

If a regulation on the Community trade mark is adhered to and if it is adopted before the date of accession, its effects will automatically extend from then on to the new Member State(s). It will be directly applicable there also without further formality. Any necessary technical adjustments will be made before accession in the course of the accession negotiations. More far-reaching amendments are ruled out (respect for the "acquis commautaire"). If accession takes place before the regulation is adopted, the new Member States will participate from the date of accession in the Community's law-making procedures without any stage, to all practical purposes, having to be repeated as in the case of a convention. The delay that occurs will, as past experience would indicate, be of much shorter duration than in the case of a convention.

IV. Characteristics of Regulations

1. Procedure

From the point of view of the procedure involved in law-making, a Regulation has a certain number of advantages over a convention. They are explained above (see I and II). A Regulation does not have to be ratified. It will apply automatically in the new Member States from the moment of their accession. This means that it would be possible to avoid a situation in which, following enlargement of the Community, non-uniform laws would be in operation for a period of several years. There would also be no need to have long negotiations for the purpose of making adaptations to a Regulation. A regulation will be more effective and will take less time.

The following paragraph sets out a number of other points which illustrate how a Regulation is superior to a Convention. They are recorded here in purely summary fashion.

2. Substantive features

A Regulation has the following substantive advantages over a convention:

1) From the legal point of view a Regulation forms part of Community law i.e. it does not apply as international law in some Member States and as uniform domestic law in others - it is autonomous and common to all the Member States. It has the same binding force everywhere.

2) Geographically it applies throughout the whole area of the Community and it spans the intra-Community frontiers of the national legal systems.

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3) It applies directly in every Member State. This means that within each area of national jurisdiction no law-making procedure is required and no order need be made for application of the Regulation. The "directness" of a Regulation makes it similar to domestic law but it produces its effects in all the Member States.

4) It is uniformly applicable in all the Member States. They cannot make reservations about a Regulation or decline to apply some part of it in their territory on the ground that they are not in favour of that part.

5) It cannot be denounced, repealed or amended by a Member State.

6) It receives uniform application in every Member State. The court has no power to refuse to apply it in a particular case on the ground that it offends national public policy.

7) In the event of conflict with domestic law, a Regulation takes precedence (priority of application).

8) Want of reciprocity is not a ground for refusing to apply a Regulation in a Member State.

3. Legal protection

A Regulation has these advantages over a convention from the point of view of the legal protection it affords:

1) An autonomous institution of the Community monitors and enforces observance of Regulations by the various authorities in each Member State. This ensures that Regulations receive uniform application. The relevant institution of the Community will take legal proceedings, if necessary, to attain these ends and the case will be heard by the Community's own court. Member States may also, if they wish, take similar action and invoke the assistance of the court in order that Regulations are actually applied.

2) Uniform interpretation of a Community Regulation by the national courts, tribunals and administrative departments in the Member States is automatically assured by the Community's Court of Justice which gives preliminary rulings for the benefit of all the Member States and their peoples. This produces consistent judgments in the Member States, consistent case-law and uniform application throughout the Community.

3) The Community's own Court gives preliminary rulings on questions concerning the validity of Regulations where this has been put in issue before national courts. This not only ensures the uniform validity (or the uniform invalidity) of Regulations in the whole Community, it also enables private individuals to take action so that Community law is observed by national and Community institutions alike.

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4) The legality of a Regulation and, therefore, the legality of acts of the Council and Commission are supervised by the Community's own Court. Proceedings may be brought therein by Member States, Council and Commission. Observance of Community law and particularly of the EEC Treaty with its legal and institutional guarantees, is further ensured by these means.

V. Conclusions

Thanks to the Regulation the Community has available an instrument whereby truly uniform law can be introduced and which from several points of view (namely the likelihood of its entering into force, duration of the law-making procedure, kind of procedure, legal characteristics and effects of a Regulation, and the application thereof) is very much superior to inter-state conventions between the Member States of the Community. It is perfectly suited to the needs of a common market in products marketed under trade marks. Directives harmonising national laws on trade marks inevitably leave gaps in the arrangements for free movement of marked goods and services and for undistorted competition. Regulations can fill those gaps admirably. They are as consistent and effective as domestic law, but, of course, they operate at Community level; this relieves them from being tied to a specific national area of jurisdiction and distinguishes them from domestic law.

The Community, of course, has institutions and use must be made of them for purposes of the European trade mark system. With its present institutions for law-making, execution of policy and determination of cases at law, the Community offers a flexible framework into which the European trade mark system and the Trade Marks Office can fit quite easily. It is neither necessary nor desirable to create a new international organisation for this purpose. One does better to remember what Mr. Leo Tindemans, Prime Minister of Belgium, said to the European Council in his report on European Union[1]: "In building Europe the general tendency towards administrative decentralisation in all our countries must always be borne in mind. The institutions of the Union must be at pains to establish specialised executive agencies, as the need arises, to carry out particular tasks. Common agencies of this kind will have to have flexible constitutions which enable them to be run individually, but responsible, under the guidance of the institutions." The European Council "shared the views expressed by the Prime Minister of Belgium concerning the need ..... to give the Union, step by step, the instruments and institutions it needs in order to progress".[2] The establishment of a Community Trade Marks Office by Council Regulation fits this political prospect.

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1) Bulletin of the European Communities, Supplement 1/76, p. 34 (point 5).

2) European Council meeting, 29 and 30 November 1976 at the Hague; President's conclusions, SI(76) 870/2, p.5 (point 4, paragraph 2).

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The same is to be said about basing the Regulation on Article 235. Under the heading "Strengthening of the institutions", the nine Heads of State or Government declared:[1] "that they were agreed that .... all the provisions of the Treaties should be used, including Article 235 of the EEC Treaty".

This has been done since 1973 onwards. The Council has utilised Article 235 in adopting legislation in the following fields amongst others: customs union, external trade, agriculture (including the setting up of a common policy on fisheries), vocational training and the right to carry on the vocation, recognition of qualifications, equality of the sexes in relation to employment, occupational training and development, social security, right of residence, protection of the environment (including bird conservation), consumer protection, energy, budgetary matters (correcting mechanism), currencies, setting up of the European Monetary Fund, creation and management of the ECU, lending by the Community, loans to Member States to promote monetary stability, loans for the promotion of investment in the Community, the European Regional Development Fund, creation of a system of Community aid for undertakings in the data processing industry, Community aid for regions damaged by earthquakes, creation of a European Centre for the development of vocational training, creation of a European Foundation for the improvement of living and working conditions, exchange of workers, the fight against poverty, promotion of research, development and technology in various industries, creation of an information and documentation network. At 1 October 1979 the number of texts adopted under Article 235 was in the vicinity of 190.

Although the foregoing texts based solely on Article 235 relate mostly to topics or policies which are "peripheral", the Draft Regulation on the Community trade mark goes to the very heart of the Community's task, namely the creation of the common market (Article 2). A number of essential activities are involved which expressly form part of the Community's "activities" (Article 3), viz. the removal of obstacles to the free movement of goods and services, and the creation of conditions of undistorted competition. The matter is thus not merely marginal; it is fundamental. This is why the draft in its scope and conception as a piece of Community action is fully consonant with the guidelines laid down by the European Council[2]: "The European Council is agreed that the safeguarding and development of the Common Market by further measures to remove trade barriers and distortions of competition are a permanent task of the Community".

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1) Point 15 of the final declaration of the Summit Conference, 18 and 19 October 1972 in Paris, Bulletin of the European Communities, No. 10-1972, p.24.

2) European Council, 6 and 7 July 1978 in Bremen, President's conclusions, p.7 (point 1.6).

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It should be noted that the Community trade mark is being created for the purpose of completing and supplementing one of the other basic tasks expressly given to the Community namely the approximation of national laws (Article 3, paragraph h). Article 235 is used as the legal basis in so far only as the Directive whose adoption is provided for by Article 100 for the purpose of harmonising those provisions of trade mark law which impede intra-Community trade and competition is inadequate to set up a common market in marked products. Thus the Regulation is not a substitute for harmonisation of law by means of a Directive under Article 100, nor for the national laws on trade marks; it supplements both of them in relation to a matter which is vital in the EEC Treaty, namely the creation of a European internal market for goods and services marketed under trade marks. By definition, only the Community trade mark fits the common market exactly. It is a positive and essential adjunct thereto.

The fact that the trade mark law contained in the draft Regulation consists, like all trade mark laws, of a complex of substantive, procedural and administrative rules does not in any way affect the competence of the Community or that of its institutions. There is no question here of severable competence. It is purely and simply a matter of the Council's exercising its undivided power to take all "appropriate measures" to attain the above-mentioned objectives of the Community.

As Article 235 attracts the unanimity rule the interests of every one of the Member States are covered. On this very important point there is nothing to differentiate a Community text of law from a convention.

The Court of Justice has, drawn the attention of the Heads of State or of Government to a somewhat serious result which would flow from their declining to use Article 235 for the purpose of creating new law. Under the heading "The essentials for legislating effectively" the Court of Justice observes that[1]: "If, consistently with the EEC Treaty, Article 235 were to be used, Community law could develop by means of a gradual expansion of its scope of application.... But if, on the contrary, some other procedure were to be used which was merely international in character (by whatever name it were known) Community law could be in danger of becoming sterile and of having no prospect of development".

The European Parliament is awaiting the proposal for a Regulation with great interest. It has asked the Commission to present the text to it as soon as possible and has expressed its satisfaction with the Commission's initiative[2]. The Commission has informed Parliament that its proposal will be ready at the beginning of 1980[3].

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1) Suggestions of the Court of Justice on European Union, see: Reports on European Union, Bulletin of the European Communities, Supplement 9/75, p. 17(19).

2) Resolution of 13 October 1979, OJ No C261, 6.11.78, p.49 (point 7) and the report of Member of Parliament Damseaux on the subject, European Parliament, Working Papers 1978-1979, document 334/78 of 5 October 1978, p.12, and Debates of the European Parliament, Annex OJ No 234, October 1978, p. 253.

3) See Debates of the European Parliament above-mentioned, and replies to written questions No 501/78, OJ No C 287, 30.11.78, p.13, and No. 548/78, OJ No C 257, 30.10.78, p.13.

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In its resolutions, debates and reports the European Parliament has repeatedly stressed that the Commission and the Council are bound to use Article 235 where the conditions contained therein are met.[1] It is only then that Parliament can exercise its right to be consulted and to express an opinion, and, by proposing amendments, to play its democratic role in the process of making European law. Just as Parliament did, the Commission pointed out in its Memorandum of 1976 that both the Council and the Commission are under obligation to use Article 235 in creating a European trade mark system if the conditions specified in that Article are satisfied[2]: "The EEC Treaty provides that the objectives of the Community specified therein are to be attained by the use of powers conferred by the Treaty on the Community institutions..... Article 235 of the Treaty ..... states that ..... the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

Since 1979, Parliament has consisted of members who are directly elected by the citizens of the Common Market. This lends special significance to the obligation quoted above and to parliamentary involvement, which is requisite under Article 235. The combination of these factors will strengthen democratic control of the law-making process in the Community and make it easier, not least from the political point of view, to use Article 235 for the purpose of setting up a European System of trade marks.

Only if Article 235 is used will it be possible for Parliament and the Council, as budgetary authority, and the Court of Auditors, as control body, to exercise both direct democratic control and independent official control over the budget of the proposed Trade Marks Office.

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1) Member of Parliament Tindemans, speaking for the European People's Party at the first session of the new Parliament after its members had been elected for the first time by direct vote of the electorate, expressed the hope that the fullest possible use would be made of Article 235.

2) Memorandum on the creation of an EEC trade mark, Bulletin of the European Communities, Supplement 8/76, pp. 14-15 (points 44 and 47).