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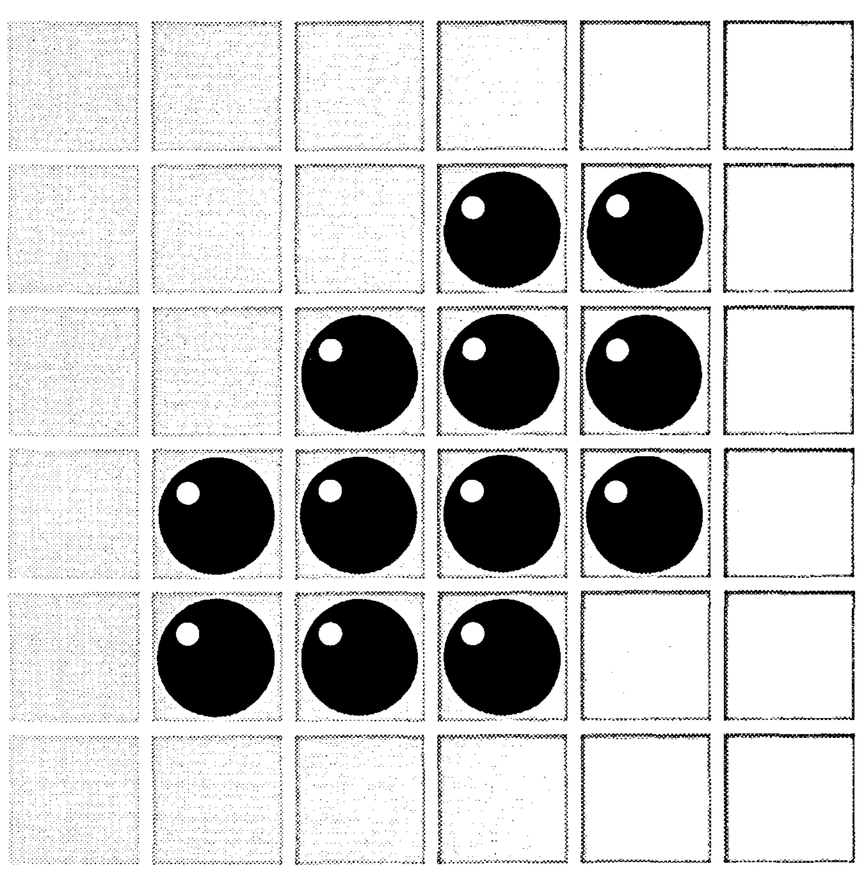
THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITY



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The Court of Justice of the European Community

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I — The Court in the Community institutional system

The European Community, founded on the Treaties of Paris and Rome, is governed by a quadripartite institutional system — novel in its conception, unique in its assignment of powers, different from all previous national and international systems, a Community system in letter and in spirit.

The Commission, an independent body with executive powers and responsibility, has 17 members chosen for their all-round capability by agreement between the governments of the Member States. It is responsible for monitoring the application of the Treaties and for the functioning and development of the common market.

The Council — the political decision-making centre — is a collective body with a legislative function; it is respresentative of the Member States since its members are ministers delegated by the various governments, and it ensures that all the Community countries play their part in the decision-making process.

The Parliament, consisting of representatives of the peoples of Europe, designated indirectly for many years but finally elected by direct universal suffrage since 1979, exercises limited but growing supervisory powers.

But the founding fathers went further than simply setting up these institutions. They also laid the foundations of a Community based on a system of law, with a new, autonomous and uniform body of law separate from and transcending national law, binding in its entirety and directly applicable in all Member States.

Having done this, it was then necessary to enforce the law, to see that everyone did not interpret and apply it in his own way and to guarantee that this common body of law kept its Community character and remained identical for everyone, whatever the circumstances. The Court of Justice, based from the outset in Luxembourg, was to handle, as the fourth institution, the task of ensuring that the law was observed in the interpretation and application of the Treaties.

II — Composition and organization of the Court

Thirteen judges and six advocates-general

Since the accession of Spain and Portugal to the European Community in January 1986, the Court has consisted of thirteen judges. In the words of the Treaties, the Court is 'assisted' by six advocates-general.

The judges are appointed by common accord of the governments of the Member States, a procedure which underlines the concept that the Court is just as much a Community institution as the Council, the Commission or the European Parliament. Members hold office for a renewable term of six years.

Every three years there is a partial replacement of the Court's membership. Seven or six judges and three advocates-general are replaced alternately. This ensures continuity of the Court's decisions, especially as most of the judges have had their term of office renewed at least once and sometimes twice.

The Treaties require judges to be chosen 'from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence'. There is no specific nationality requirement, but at the present time the Court has one judge from each Member State.

Since, however, the number of judges is not the same as the number of Member States, the 13th post of judge is assigned at the discretion of the governments. Up to now, that judge has been chosen from the nationals of the large Member States.

Because of the freedom of choice available, the members of the Court have come from widely differing professional backgrounds. Judges, politicians, diplomats, academics, advocates and senior officials have all brought with them their particular experience and thus made their own contribution to the authority of the Court's decisions.

The independence of the judges is guaranteed by their statute and is expressed in certain fundamental rules of procedure: their deliberations are secret; the judges are ir-

removable; they are immume from legal proceedings; and their immunity can be waived only by a unanimous decision of the Court itself, the person concerned obviously being excluded from the deliberations.

The judges select one of their number to be President for a renewable term of three years. The President directs the work of the Court and, in keeping with the criteria laid down by the Court, assigns cases to the Chambers when the application is received, appoints a judge-rapporteur for each case and sets the schedule for the various stages of the procedure and the dates of hearings and deliberations. He also gives judgment in summary proceedings on applications for provisional measures, though the decision may be referred to the full Court.

The advocates-generàl are appointed on the same terms and have to satisfy the same criteria with respect to independence and training as the judges. Nationality is immaterial. In practice, until recently the advocates-general were all nationals of the larger Community countries, but lately two posts of advocate-general have gone to a national of one of the smaller Member States.

The First Advocate-General, appointed by the Court for one year, assigns cases to individual advocates-general as soon as the Judge-Rapporteur has been appointed by the President.

The duties of the advocates-general should not be confused with those of a public prosecutor or similar kind of functionary such as the 'parquet' in a French court; rather, this is the task of the Commission. The advocates-general do not represent the Communities and cannot initiate proceedings themselves. According to the Treaties the function of the advocates-general is, 'acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court, in order to assist the Court in the performance of the tasks assigned to it'.

At a separate hearing some weeks after the lawyers have addressed the Court, the advocate-general comments on the various aspects of the case, weighs up the provisions of Community law, compares the case in point with previous rulings and proposes a legal solution to the dispute. He does not participate in the Court's deliberations.

Each judge and advocate-general is assisted by two law clerks — qualified lawyers who carry out research on questions both of procedure and of substantive law, study the cases and prepare procedural documents on cases pending before the Court. The judges and advocates-general are free to choose their own law clerks.

Plenary sessions and Chambers

The Court normally sits in plenary session. It must do so when hearing cases brought before it by a Member State or by one of the Community institutions, or when a Member State or a Community institution, being a party to a case or having made written observations on a request for a preliminary ruling, has request that the case be heard by the full Court. Its deliberations are only valid if there is an odd number of judges, the quorum being seven.

'Justice': detail of the bas-relief by Giacomo Manzù in the Large Entrance Hall of the Court of Justice

However, the Treaties and its own rules of procedure allow it to set up Chambers within the Court: there are currently four Chambers composed of three judges and two Chambers composed of six judges. No Chamber specializes in any particular subject. The Presidents of the Chambers are appointed annually by the Court, on the basis of an annual rotation.

Unlike cases brought by a Member State or an institution, the Court may refer to Chambers any request for a preliminary ruling, or any action brought by persons or firms, where, in the words of the rules of procedure, the difficulty or the importance of the case or particular circumstances are not such as to require that the Court decide it in plenary session.

The decision to assign a case is taken by the Court at the end of the written procedure upon consideration of the preliminary report presented by the Judge-Rapporteur and after the advocate-general has been heard.

Actions brought by officials or other employees of the institutions against the institutions are assigned to the Chambers in rotation and irrespective of the nature of the case, except where cases are linked.

At any stage in the proceedings the Chamber may refer to the Court a case assigned to or devolving upon it, if it considers that the case raises points of law requiring decision by the full Court.

The Registry and administration

The judges and advocates-general jointly appoint the Registrar of the Court, and one or more Assistant-Registrars, for a renewable term of six years. The Registrar acts as a kind of secretary-general to the Court, being responsible for the acceptance, transmission and custody of all documents and notifications. All pleadings are entered in his register and he is responsible for drawing up the minutes of each hearing. The Registrar is also responsible for Court administration: he is in charge of the budget and supervises the management and operation of each department.

The Court has its own language service, whose staff have to be proficient in several Community languages and have a legal background as the written pleadings, the opinions of the advocates-general and the Court's rulings must be properly translated into the ten procedural languages. A special department provides interpreters for hearings.

The Court has a library and documentation service covering national and Community legislation, case-law and legal literature, linked to the Community data-processing system (Celex); specialists can obtain access by this means to the whole of the Court's case-law.

A court of first instance

By virtue of the 'Single European Act' signed on 17 February 1986 in Luxembourg, at the request of the Court of Justice and after consulting the Commission and the European Parliament, the Council may, acting unanimously, attach to the Court of Justice a court of first instance, with jurisdiction to hear certain classes of action brought by natural or legal persons. Such a court would, in particular, be competent to hear actions brought by officials of the European Communities, competition cases and actions for damages. It would not be competent to hear actions brought by Member States, or to deal with questions referred for preliminary rulings. Its decisions would be subject to appeal to the Court of Justice on points of law.

The Council is to determine the composition of the court of first instance. Its members are to be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. Like the judges of the Court of Justice, they are to be appointed by common accord of the Governments of the Member States for a term of six years. The membership is to be partially renewed every three years, retiring members being eligible for reappointment.

III — The Court's powers

The Court ensures the observance of Community law

Each of the Treaties establishing the European Communities uses the same broad terms to define the specific responsibilities of the Court of Justice, which is to 'ensure that in the interpretation and application of this Treaty the law is observed'.

The implication of this rather laconic formula is that the Court interprets and applies the whole corpus of Community law from the basic Treaties to the various regulations, directives and decisions issued by the Council and the Commission. Its task is not to apply national law, but it may sometimes have to rule on the conformity of national law with Community law in an individual case concerning the failure of a Member State to fulfil an obligation. It may also occur, though this is very rare, that the Court is asked to apply and interpret national law in disputes involving contracts to which the Community is a party.

Although its jurisdiction is principally concerned with Community law, the Court is not cut off from national law since it draws its inspiration from the legal traditions that are common to the Member States and ensures respect both for the general principles of law and for fundamental human rights insofar as they have been incorporated into the Community legal order.

The supreme judicial authority

The Court is the Community's supreme judicial authority; there is no appeal against its rulings. And yet it is not the only body which enforces Community law.

National courts at all levels likewise have jurisdictions to apply and interpret Community law, which, to use words taken from a number of rulings, 'produce direct effects and create individual rights which national courts must protect'. Requests for preliminary rulings form the required link between the Court of Justice and the national courts, which may, and in some cases must, ask the Court to interpret Community law or to rule on the validity of acts by the Council and the Commission.

The various forms of action

Recourse to the Court is simple, although there are a variety of ways in which it may be made. A distinction may be drawn between proceedings against a Member State for failure to fulfil an obligation, proceedings for annulment, proceedings against an institution for failure to act, proceedings to establish liability and references for a preliminary ruling.

Proceedings for failure to fulfil an obligation

In the first place it is for the Commission, as guardian of the Treaties and of the decisions taken by the institutions, to initiate proceedings for failure to fulfil an obligation. If it considers that any part of the administration of a Member State has not honoured a Community obligation, it asks the Member State to make it comments and then issues a reasoned opinion. If the State does not act on the opinion within the time allowed in the opinion, it may be taken to the Court.

After notifying the Commission, a Member State may also initiate this procedure. Again, the Commission asks the Member State against which the breach is alleged to present its comments and then issues a reasoned opinion. If the Commission does not produce the opinion within three months from the date of the request, the matter may be referred directly to the Court. In practice, the Member States have tended to prefer settling their disputes within the Council or turning to the Commission. It was not until 1978 that Member States brought cases for failure to fulfil an obligation. In one case, a Member State complained that another Member State was impeding the free movement of sheepmeat. This action was withdrawn when the Commission brought an action as a result of which the national regulations were declared to be contrary to the Treaty. In the second case, one Member State requested the Court to find that another had not complied with its Treaty obligations by taking certain restrictive measures concerning fisheries. The accusation was upheld by a judgment of the Court.

If the Court agrees that the case is well-founded, it declares that an obligation has not been fulfilled. All the authorities of the Member State concerned are required to take the necessary measures to comply with the Court's judgment in their respective areas of competence.

If the Court finds that certain legislation of a Member State is incompatible with the Treaty, the authorities involved in the exercise of the legislative power must amend the legislation so as to bring it into conformity with the requirements of Community law.

The courts of the State concerned also have the obligation of ensuring in the course of their work that the judgment is observed.

If a State does not comply with the ruling, new proceedings may be brought for a declaration by the Court that the obligations arising from its first decision have not been complied with.

The Treaty does not provide any sanction where a Member State fails to give effect to a judgment. The effectiveness of Community law can, however, be ensured by national courts and by means of references for preliminary rulings.

In general, the Member States have complied, sooner or later, with the Court's judgment. In a limited number of cases the Court, in an action brought by the Commission, has had to deliver a second judgment, since the Member States concerned have not complied with the first one within a reasonable time. On two occasions, however, delay has ensued while the countries concerned tried to get Comunity rules introduced or changed by political means. If such behaviour became the norm, it would threaten the very foundations of the Community.

Up to the end of 1985, a total of 412 actions for failure to fulfil an obligation had been brought.

More than 100 were removed from the register because the Member States had brought the infringement to an end during the proceedings before the Court; the Commission thereupon discontinued its action. At the same date, the Court had given 165 judgments. The frequency of such cases is still rising sharply. Nevertheless, the deterrent and preventative effect of the procedure before the Commission is considerable, most cases being settled at the preliminary stage. Almost all Member States have had actions of this type brought against them, although some figure more frequently than others. The subjects of the actions range from customs duties and charges having equivalent effect to refusal to adopt the measures imposed by Community law in the field of trade, health, social welfare, etc.

Proceedings for annulment

Proceedings for annulment are directed against binding Community acts, be they of a general nature (regulations and directives) or decisions addressed to individuals taken by the Council and the Commission. Because opinions and recommendations do not have binding force, proceedings may not be brought in respect of them. In the words of the Treaty, grounds for annulment include lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rules of law relating to their application and missue of powers.

If the Court regards the action as well-founded, it declares the act in question void and of no effect, and the act then ceases to have any legal force as from the date when it originally took effect. Nevertheless, in the case of a regulation, the Court may confirm the validity of certain provisions, indicating, if it thinks it necessary, which of the effects of the regulation declared void must be considered definitive. On a number of occasions, in the interest of legal certainty, the Court has maintained the past effects of a regulation it has declared void.

Proceedings for annulment are a way of reviewing the legality under the Treaties of Community acts and of Commission decisions and regulations and of settling conflicts between the institutions over their respective powers under the Treaties.

The Member States and the Community institutions can seek the annulment of any binding act of the institutions, including those which, like regulations and directives, are of general application.

Only rarely have the Member States brought an action against the Council. Italy sought the annulment of regulations relating to the application of the competition rules and to the calculation of a premium for starch produced from potatoes; both actions were dismissed. In 1986 the United Kingdom brought an action for the annulment of a directive prohibiting the use of certain hormones in stockfarming, contending that the directive was illegal, having been adopted by a majority and not unanimously, that essential procedural requirements had been infringed and that the measures were unjusutified. It also sought the annulment of a directive laying down minimum standards for the protection of laying hens kept in battery cages, on the ground of a procedural defect. About the same time, Spain brought an action against the general rules applying the complementary mechanism governing, for a transitional period, trade in certain agricultural products between Spain and the other Community Member States. Greece sought the annulment of a decision closing the anti-dumping procedure concerning importations of natural magnesite.

The Member States have brought about 40 actions against Commission decisions, dealing *inter alia* with free movement of goods, restructuring of industry, the lawfulness of national aids, transport, and the settlement of amounts due under the agricultural fund.

In 1981, the Grand Duchy of Luxembourg started proceedings for the annulment of a resolution of the European Parliament on the seat of the institutions of the European Community. On the substance of the case, the Court held that it was exclusively for the governments of the Member States to fix the seat, though provisional decisions on the places of work must respect Parliament's right to decide how to organize its proceedings and must not prevent it from operating properly. Parliament, on the other hand, under its powers to decide how to organize itself, had the right to take the necessary steps to ensure that it could function properly and that

there was nothing to disrupt its procedures. It thus had the right to hold all its plenary sessions in Strasbourg and to hold committee meetings and meetings of political groups in Brussels. It could maintain the infrastructure necessary to carry out the tasks conferred on it by the Treaties elsewhere than in Luxembourg, where its secretariat is. The Court held, however, that staff transfers must not exceed certain limits, since any *de jure* and *de facto* decision to transfer in whole or in part the secretariat or departments of it would contravene the decision on the provisional location of certain institutions adopted by the governments of the Member States at the same time as the Merger Treaty.

In 1983 Parliament adopted a resolution intended to divide the staff of its secretariat between Strasbourg and Brussels. Luxembourg brought a fresh action, and the Court held — contrary to Parliament's contention — that the resolution was a precise and concrete decision, capable of producing legal effects. On the point of substance, the Court held that Parliament had clearly exceeded its powers and the limits defined in the previous judgment as regards transfers of staff.

While the Council has never brought an action for annulment against the Commission, the latter has on several occasions brought actions to settle disputes with the Council. In 1971 it asked the Court to decide whether, at a specific date, the competence to negotiate and conclude the European Road Transport Agreement (ERTA) lay with the Community or with the Member States. The principle on which the case was brought was held to be well-founded, and the Commission's view was accepted in general terms, but the Court held that in the particular case there were no grounds for annulment. In 1983 the Court clarified the apportionment and management of a tariff quota under the Lomé Convention. On three occasions it has had to consider the annual adjustment of officials' salaries, decided upon by the Council.

The European Parliament once considered taking to the Court its dispute with the Council over their respective budgetary powers. It eventually decided not to do so, because the Council came round to Parliament's way of thinking. In 1982 the Council in turn brought a similar type of case against Parliament, but this was settled by a political compromise. At the end of 1985 a fresh dispute arose between the Council and Parliament on the question of budgetary powers. Parliament had, on its final reading, increased the budget beyond the level the Council considered proper. The Council and five Member States asked the Court to declare the budget void, but only partially, so as to safeguard the result of the Council's second reading. The Court expressly confirmed that the acts of Parliament, like the budget, that are intended to create legal effects in relation to third parties, may form the subject of an action for annulment. It told the Council and Parliament that they must reach an agreement on the budget. The Court took the view that its own task was simply to ensure that the institutions constituting the budgetary authority observed the limits of their powers, and refused to become involved in the negotiating process

between the Council and Parliament. It therefore annulled only the act of the President of Parliament declaring the budget finally adopted; this meant that the whole budget disappeared.

A private individual may bring an action for annulment of a decision addressed to him, or a decision which, although in the form of a regulation or of a decision addressed to another person, is of direct and individual concern to him. Such actions must be commenced within two months.

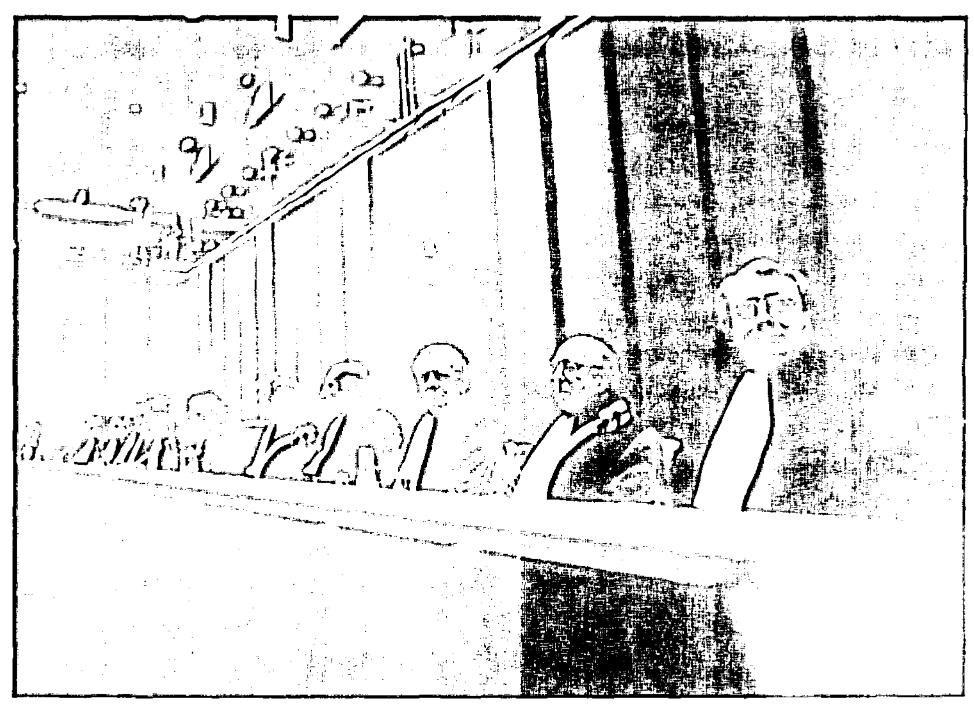
On this basis the Court may be called upon to rule on decisions the Commission has taken and penalties it has imposed on firms that have failed to observe the principle of free competition or have abused their dominant position on the European market. The Court, in the exercise of its power of review, may declare such decisions void, or reduce or increase fines and penalty payments.

Thus the Court partially annulled, on the ground that they were not well-founded, the Commission's decisions imposing heavy fines on almost all the sugar producers in the Community's six founder Member States; the firms had been accused of dividing the European market between them. The essential argument for altering the Commission's decision and reducing the fines was that the common organization of the market left very little room for free competition. In other cases the Court has fully confirmed the Commission's decisions.

The system of production and delivery quotas introduced as a means of coping with the steel crisis has resulted in many firms bringing actions complaining that they regarded their quotas as insufficient, or appealing against fines imposed on them for failing to observe their quotas. To a very large extent the Court has upheld the system. Only in exceptional cases have the fines, an essential corollary of the discipline involved, been reduced, on the ground that the Commission had not evaluated the circumstances correctly.

Private individuals may, in an action against a decision addressed to them personally or a penalty imposed on them, plead the illegality of the regulation on which the offending decision was based. Similarly, in an action for non-contractual liability, they may chaim that an act — even a regulation — is illegal if (i) they believe that the damage they have suffered arises from the application of that illegal act, and (ii) the Community can be held liable for the illegal act of the relevant institution.

To give but one example, the main producers of isoglucose, a liquid sweetener made from maize, brought an action for the annulment of the agricultural regulations reducing the production refunds on products used for manufacturing this sweetener. Their action was dismissed as inadmissible: the Court held that a regulation reducing or even abolishing a production refund for a full marketing year on a product manufactured from cereals was by its nature a measure having a general effect. It ap-



The Court of Justice in session. It comprises thirteen judges and six advocates-general.

plied to situations defined in objective terms and its legal effects on persons were considered in a general and abstract manner. The firms then aked for a preliminary ruling. This time the Court accepted their submission to the extent that, although it considered the reduction in production refunds to be valid, it held a new tax on the production of isoglucosoe to be illegal. Some time later, they secured the annulment of another regulation concerning isoglucose, this time because the Council, by acting before Parliament had delivered its opinion, had infringed one of the essential Treaty provisions concerning the allocation of powers.

Failure to act

Proceedings for failure to act provide a means of penalizing inactivity on the part of the Council or the Commission. Should the Council or the Commission infringe the Treaty by failing to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

Such actions are admissible only if the institution in question has previously been called upon to act. If the institution has not acted within two months of being invited to do so, an action may be brought within a further period of two months.

Proceedings for failure to act have rarely been successful. At the beginning of the 1970s, Parliament contemplated bringing such an action against the Council for failure to take a decision on the direct election of Parliament by universal suffrage. An opinion prepared by a panel of university professors, however, came to the conclusion that, even if the action were declared admissible, it was not certain that the Court would find against the Council since the Treaties did not set a precise date for direct elections. The decision taken by the Heads of State or Government at the 1974 Paris Summit finally resolved the problem.

In September 1982 the European Parliament resolved to bring proceedings of this type against the Council on the ground that the latter had failed to lay the foundations for a common transport policy. Parliament was partially successful. The Court declared the action admissible. It went on to hold that the Council had infringed the Treaty by failing to ensure freedom to provide services in international transport and to lay down conditions for the admission of non-resident carriers to national transport in a Member State. On the other hand, the Court declined to take cognizance, as Parliament requested, of the absence of a common transport policy as such, since the Treaty did not define that policy with sufficient clarity to enable the Court to pronounce on it. It did, however, recommend the Council to work continuously towards the progressive attainment of a common transport policy.

The institutions have considerable scope for taking proceedings for failure to act, but such cases can also be brought under identical conditions by private individuals or firms, who can complain that a Community institution has failed to take a binding decision (i.e. one other than a recommendation or opinion) concerning them. Admissibility is subject to the same conditions as those which apply to actions for annulment — the action not taken must have been of direct and personal concern to the applicant. Thus, private individuals cannot bring such an action against the omission of acts of a legislative nature.

Private individuals and firms have brought a number of such cases: the vast majority have been declared inadmissible and the others have failed; only two have been held to be well-founded.

Actions to establish liability

The Community may incur civil liability for damage caused by its institutions or servants in the performance of their duties in accordance with the general principles common to the laws of the Member States. The Treaties confer on the Court of Justice the exclusive jurisdiction to order the Community to pay damages because of its actions or its legislative acts on the principle of non-contractual liability. The Court decides the basis on which liability is to be determined, whether the damage is due to Community action, the amount of damage caused and the sum to be paid in com-

pensation. By contrast, the Community's contractual liability is subject to the general law of the Member States and to the jurisdiction of their courts.

Private persons have considerable scope for bringing actions for non-contractual liability. The common agricultural policy with its marketing regulations and systems of grants, refunds, levies and monetary compensatory amounts has given rise to voluminous litigation. So far the Court has been reluctant to find such cases, when they challenge a Community regulation, admissible. It has awarded damages only in exceptional cases, where it has been proved that the damage was due to a sufficiently flagrant infringement of a superior rule of law intended to protect the interests of private parties. For this purpose several conditions must be satisfied: the rule in question must be fundamental to the Community legal order; it must confer 'subjective rights' on private parties, and the applicant must be among those it is intended to protect; the infringement of the rule must be manifest; the damage must be suffered by a limited and clearly defined group of traders, and it must lie beyond the limits of the risks inherent in the kind of business concerned.

The powdered milk case is one of the better-known examples. To reduce the surplus of powdered milk, the Commission and the Council obliged the food industry to add powdered milk to animal feed in certain circumstances, mainly connected with the marketing of soya. A number of users felt that the Commission was imposing a disproportionate burden. They simultaneously began proceedings for damages both in the Court of Justice and in the appropriate national courts, which in their turn asked for a preliminary ruling on the legality of the system. The Court ruled that the powdered milk regulations were invalid because the obligation to buy at a disproportionately high price spread the burden unfairly over the different sectors of agriculture and was not a proper way of reducing the surpluses. But there is a difference between being legally in the right and being entitled to compensation. In a second judgment, the Court held that, where the question involves legislative powers allowing a considerable margin of discretion, as was necessarily so in the case of the common agricultural policy, the Community was only liable in damages where the relevant body had manifestly and seriously exceeded its powers. It did not consider this to be so in the powdered milk case.

In the isoglucose case, although the Court annulled the regulation imposing a tax on this liquid sweetener, it held that the Community had not incurred non-contractual liability. By contrast, in the quellmehl case the Court considered that, in the circumstances, the breach of Community law was sufficiently serious to warrant the award of damages; the damage suffered was held to be equivalent to the refunds that had not been paid.

A former employee of a Swiss multinational company, Stanley George Adams, was awarded partial compensation for damage he had suffered. He had given the Commission documents and other information on certain anti-competitive practices on

the part of his employer, and had then left Switzerland. The company was fined for abuse of a dominant position. The company succeeded in identifying the source of the Commission's information, partly by reference to the documents produced by the Commission during the examination of the case. The former employee returned to Switzerland, and was found guilty by the Swiss courts of industrial espionage. The Court of Justice held that the Commission was under a duty to preserve the confidential character of the information and the employee's identity, and that it had not taken all necessary steps to protect him from prosecution. The Court added that the employee himself had not shown all the prudence necessary in the circumstances.

Cases involving staff

The Court rules on all disputes between the Community and its staff in accordance with the provisions of the Staff Regulations. In this context it rules on the legality of the acts of the institutions in their capacity as employers. It annuls any decisions contrary to the Staff Regulations or the regulations implementing them. It may award damages or pecuniary compensation.

Requests for preliminary rulings

The Court is, by its very nature, the supreme guardian of Community law. But it is not the only court that has the power to apply and interpret this body of law that is common to all the Member States. There is a mass of provisions in the Treaties themselves and in secondary legislation that is directly and immediatly applicable in the legal systems of all the Member States. They confer individual rights on nationals of Members States. Private individuals may invoke them in their national courts both in relation to other individuals and in relation to the national authorities. The courts in each Member State have thus become Community courts.

To avoid differing and even conflicting interpretations, the Treaties introduced a system of preliminary rulings, which, without creating any hierarchical relationships, has institutionalized a fruitful cooperation between the Court of Justice and national courts.

The Treaty distinguishes between two kinds of preliminary rulings:

(i) rulings on interpretation, i.e. on the content and scope of the various treaties and the acts of the institutions, and

(ii) rulings on the validity of the acts of the Community institutions.

The term 'treaty' covers the whole of its provisions, including the annexes and amendments, and the various treaties of accession. The acts of the institutions are

mainly regulations, directives and decisions. International treaties concluded by the Community with non-member countries or international organizations also form an integral part of the Community legal order.

Preliminary rulings may be given only on Community law, not on national law. Nor can a ruling be given on the compatibility of national law with Community law. When confronted with such questions, the Court of Justice has always restricted itself to indicating how the Community law applicable to the case is to be interpreted, leaving it to the national court to decide for itself the question of compatibility.

Where a national court from which appeals may be made (a court of first instance or even of appeal) finds there is a problem regarding the interpretation of the Treaties *or of measures taken by the institutions*, or some question arises as to the validity of these measures, it may apply to the Court in Luxembourg for a preliminary ruling if it considers that it needs to do so in order to give judgment.

When a problem or question of this type arises in a national court (Constitutional Court, Court of Cassation, Council of State, Supreme Court, House of Lords), *against whose decisions there is no judicial remedy under national law*, that court is obliged by the Treaty to refer the matter to the Court of Justice.

In its judgment in the Cilfit case, the Court defined the extent and limits of the obligation on courts of final instance to request preliminary rulings. The Italian Court of Cassation had asked whether the fact that a question asked in a higher court did *not give rise to any reasonable doubt* released that court from its obligation to seek a preliminary ruling. The Court reiterated the purpose of the preliminary ruling and stated that national courts did not need to refer questions if:

(i) the question raised was irrelevant, as, for instance, if it could have no possible influence on the outcome of the dispute;

(ii) the Community rule had already been interpreted by the Court, whatever the circumstances leading to this ruling and wihout the matters in dispute necessarily being absolutely identical;

(iii) there was no reasonable doubt about how the question should be answered. Before reaching this conclusion, the national court had to be certain that courts in other Member States and the Court of Justice itself would agree and its conclusion had to take account of the characteristics of Community law and the special difficulties attached to its interpretation. It should also take into account the fact that Community legislation is drafted in several, equally authentic, language versions, that Community law has its own terminology and that legal concepts do not necessarily have the same meaning in Community law as they do in the various national legal systems. Finally, every provision of Community law must be seen in its context and interpreted in the light of the whole corpus of Community law, its purpose and the state of its development at the date when the provision in question was to be applied.

Naturally, in all these cases, the national courts remain completely free to refer questions to the Court if they consider this necessary, and at any stage of the procedure they consider appropriate. The parties may suggest to the judge that he makes use of the preliminary ruling procedure, but they have no means, apart from internal appeal procedures, of securing such a reference. Nevertheless, if a court of last instance refused to ask for a ruling, proceedings could be brought against the State concerned for failure to fulfil an obligation.

Preliminary rulings may be applied for only by a national court or tribunal. The national court alone decides, in complete independence, whether to refer a preliminary question and, if so, what its content should be. It may do so even if the parties have raised no question of Community law, and even if they are opposed to such a reference. The national court alone, as the only tribunal with direct knowledge of the facts of the case and the arguments of the parties, evaluates them and determines the legal background against which its request for interpretation should be set. The question must concern a matter within the jurisdic tion of the Court of Justice, that is to say, it must deal with the interpretation, or examination of the validity of Community law. the Court is obliged to reply to any question raised within the limits of its own jurisdiction. If questions are incorrectly formulated, or relate to matters outside the jurisdiction of the Court of Justice, it extracts from all the material provided by the national court the points of Community law requiring interpretation or, as the case may be, an examination of their validity. Only the national court may, if it thinks it necessary, withdraw a question once it has been referred to the Court.

Opinions vary on the authority enjoyed by preliminary rulings and particularly on whether they have general effect or are binding only on the parties concerned.

However, three points seem to have been accepted regarding references for interpretation:

(i) the interpretation given by the Court is binding on the court that requested it, and on any other court in the Member State concerned which may have to decide the same case; there is nothing to prevent it from referring a further question it if requires further clarification;

(ii) the interpretation serves as a basis for applying the relevant law in any subsequent case and other courts may invoke it without further reference to the Court of Justice;

(iii) a court may always ask the Court of Justice for a new interpretation.

As regards judgments given in response to requests for a preliminary ruling to assess validity, the general view is that if the Court declares a Community provision invalid the ruling is universally applicable: it is binding on all the courts or tribunals of the Member States, even if the judgment in question is not directly binding on them.

Whoever enacted the provision (Council or Commission) must withdraw it or amend it in accordance with the Court's decision. But when the Court declares that its scrutiny has not disclosed any factors which might deprive the relevant provision of its validity, this declaration has only a limited application and does not constitute full confirmation that the measure is valid. It may be invalid for reasons other than those already examined.

In the context of this procedure, the Court gives a 'ruling'. It interprets Community law and determines the legal situation in terms of that law. It does not determine the outcome of the case, which is a matter for the national court, applying Community law.

A particularly valuable collaboration, in the interest of a uniform application and interpretation of Community law, has thus been established between the Court of Justice and the national courts. It is the most far-reaching and the most intimate collaboration ever achieved between the judiciary of different nations.

The procedure has steadily gained importance so that now it accounts for the largest number of cases before the Court. This demonstrates both the extension of the field covered by Community law and its penetration into the legal order of the Member States. There was only one reference in 1961; there were 40 in 1972, 75 in 1976, and over 100 each year since 1978. The peak was reached in 1985 with 139 cases. Between 1958 and the end of December 1985, 1 444 cases were brought before the Court in the form of requests for preliminary rulings; the Court has given 1 201 rulings, 166 cases are pending and no ruling was given in 77 of them.

The common agricultural policy, with its numerous regulations, has produced the largest crop of references, followed by the problems arising from the free movement of goods, the custums union, social questions and the free movement of workers.

On the whole the process of securing uniform application and interpretation of Community law has been reasonably smooth, although some courts of last instance have disregarded their obligation to make references, or have relied on the 'acte clair' theory to deny the existence of such an obligation. The main points of difference between the Court of Justice and national courts concern fundamental rights, the right to plead directives and the limit in time of the invalidities established. But this has not adversely affected either collaboration between the Court and national courts or the basis of the Community legal system.

Requests for the Court's opinion

Under the three basic Treaties the Court has the power to give opinions. But the Court is not merely consulted for its views: its opinion has precise legal consequences.

If there are doubts about whether an international agreement that the Community intends to conclude would be compatible with the provisions of the EEC Treaty, the Council, the Commission or a Member State may ask the Court of Justice for an opinion. If the Court's opinion is unfavourable, the Treaties must be revised before the agreement can come into force.

The Court has given three such opinions. It has defined the concept of an international agreement, ruled on the scope of the common commercial policy and clarified the roles of the institutions in negotiating international agreements. It found that a draft agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels was incompatible with the EEC Treaty, but that the Community's responsibilities for commercial policy extended to the stabilization system of the International Natural Rubber Agreement negotiated within the United Nations Conference on Trade and Development. It found that the Community had exclusive competence to conclude an arrangement negotiated within the OECD on export credits.

Similar provisions govern consideration of whether draft conventions or agreements negotioted by Member States, firms or private persons in the nuclear field are in conformity with the Treaties. In the only ruling given so far, the Court ruled that a convention on the physical protection of nuclear materials, installation and transport, could be validly concluded only if the Community was on an equal footing with the Member States in the areas for which the Community was responsible. In view of the allocation of powers between the Community and the Member States, the Community could only implement commitments entered into under this convention within the institutional system set up by the Euratom Treaty.

The ECSC Treaty contains special provisions governing the adaptation of the rules on the exercise of the powers conferred on the High Authority. Such amendments are proposed jointly by the High Authority and the Council and submitted to the Court for its opinion. In considering them, the Court has full power to assess all points of fact and of law. If it finds the proposals compatible with the provisions of the Treaty, they are forwarded to Parliament for its approval. Under this heading the Court declared compatible with the Treaty a provision regarding authorization of specialization agreements on joint purchasing and sales agreements. It rejected a proposal concerning the grant of aids, but subsequently gave a favourable opinion on an amended version.

Further conventions

As a result of two conventions concluded by the Member States, the procedure for obtaining preliminary rulings has been extended, with some amendments, to the

Convention on the Mutual Recognition of Companies and Bodies Corporate and to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The second of these, also known as the Brussels Convention, has given rise to a flood of requests from national courts for preliminary rulings.

Arbitration

The Court may also exercise an arbitration function. When it does so, it acts pursuant to arbitration clauses in contracts under public or private law made by or on behalf of the Community. In such cases, its jurisdiction must be determined with due precision in the contract. Although such clauses are common in contracts entered into by the Commission, they have so far given rise to few cases.

IV — Court procedure

Court procedure involves two separate, successive stages, one written and one oral.

However, a distinction must be made between direct actions and requests for preliminary rulings.

Direct actions

Direct actions are usually brought before the Court by written application sent to the Court Registrar by registered post. The application must contain the names of the parties, the subject-matter of the dispute, a brief statement of the grounds on which the application is based, the form of order sought by the applicant and an indication of any evidence in support, together with an address for service in the place where the Court has its seat and the name of a person who is authorized and has expressed willingness to accept service. To be admissible, applications must also be lodged within the limitation periods determined by the Treaties.

Once it has been received, the application is entered in the Court register. The Court Registrar has a notice of the action, setting out the applicant's claims, published in the *Official Journal.* The President appoints a Judge-Rapporteur, whose duty it is to follow closely the progress of the case. The application is then served on the opposing party, who has a month in which to lodge a statement of defence. The applicant has a right of reply (one month) and the defendant a right of rejoinder within a further month. The time-limits for producing these documents must be strictly adhered to unless specific authorization to the contrary is obtained from the President of the Court.

The Court, after considering the preliminary report presented by the Judge-Rapporteur and hearing the advocate-general, meets in the Deliberation Room to decide whether a preparatory enquiry is necessary. This would involve the appearance of the parties, requests for documents, oral testimony, etc.

It also decides whether the case should be dealt with by the full Court or by the Chamber to which it has been assigned. On completion of the preparatory enquiry,

where this has been found necessary, or otherwise after the final pleading has been lodged, the President sets the date of the public hearing. In a report presented at the hearing, the Judge-Rapporteur summarizes the alleged facts and the submissions of the parties and of the interveners, if any.

The case is then argued by the parties at a public hearing before the judges. All points of view and all arguments may again be put before the Court. The judges and the advocate-general put to the parties any questions they think fit. Some weeks later the advocate-general gives his opinion, analysing the facts and the legal aspects in detail and proposing his solution to the dispute. There the oral procedure ends.

The Court then prepares its decision on the basis of a draft by the Judge-Rapporteur. Each judge may submit, orally or in writing, a proposal for an amendment or a counter-proposal. If during the deliberation the Court requires further information, it may re-open the procedure and ask the parties to give further explanations, oral or written, or it may order further inquiries.

Generally, about 18 months elapses between the lodging of an application and the Court's final decision. Although this time-lapse has grown longer over the years owing to the increasing number of cases, it is nevertheless still reasonable, especially when compared with the duration of proceedings before most courts in the Member States.

An application for revision of a judgment may be made within 10 years if a decisive fact is discovered which was unkown when the judgment was given.

Requests for preliminary rulings

A national court may put to the Court of Justice a question concerning the interpretation or validity of a Community provision. No particular form is prescribed for the submission of such a request, but it generally takes the form of a judicial decision (decree, judgment or order) in accordance with national legal procedure. Ideally it should contain a description of the case so far, a summary of the relevant facts, a statement of the legal problem confronting the national court and the exact text of the abstract question(s) which it wishes to ask the Court. Normally, it is accompanied by the background documents relating to the case. The questions are sent by the registrar of the national court to the Registrar of the Court in Luxembourg.

The Registrar has the application translated into all the Community languages and then notifies the parties concerned in the original case, the Member States, the Commission and, if the case concerns a Council act, the Council. He also has a notice

published in the *Official Journal* indicating the parties concerned and the questions put to the Court. Those notified then have two months in which to submit observations, Whilst the Commission always takes advantages of this possibility, the Council does so only where an act of its own is at issue. The Member States' response varies, but on the whole they frequently avail themselves of the opportunity, especially when the issues raised are of major general interest of them.

A hearing is then held at which all those entitled to submit written observations may present their arguments orally. The subsequent procedure is exactly the same as for direct actions. The Registrar sends the Court's judgment to the national court concerned. On average 18 months elapse between the lodging of a request for a preliminary ruling and the Court's decision.

Judgments

The judgments of the Court of Justice are reached by majority vote. Where the Court is equally divided, the vote of the most junior judge is disregarded. Since no dissenting opinion is made public, the judgments are signed by all the judges who took part in the deliberation. They are pronounced at a public hearing.

The Court may, if it thinks fit, give an interlocutory judgment in order to provide an initial clarification of certain principles, or a certain part of the problems raised, and give its final judgment at a later stage. In certain cases the Court, having found that an applicant is entitled to damages, may invite the parties to reach agreement on the amount, while reserving the right to make a final decision if the parties cannot agree.

Judgments are divided into three main parts. The first, headed 'Facts and procedure' described objectively the facts, the procedure followed in the case, the submissions of the parties and their arguments. It is followed by the central part of the judgment, setting out the grounds for the Court's decision. In this part the Court indicates in general terms the subject matter to the action, reviews the legal background and the history of the case, analyses the legal problems raised, and arrives at precise conclusions. The latter are repeated in the third part, known as the 'operative part' of the judgment.

When giving judgment the Court of Justice must also rule on costs. The only costs which the parties concerned have to bear are lawyers' fees, since there is no charge for the actual proceedings before the Court.

An application for a preliminary ruling constitutes an interlocutory proceeding in an action pending before a national judge and it is therefore for the judge in the main action, and not the Court, to decide on the question of costs.

The judgments are published in full in the European Court Reports, which appear in all the official languages. A summary appears in the *Official Journal.*

Interim measures and procedural disputes

The President of the Court may order interim measures by means of a summary procedure; alternatively, the matter may be referred to the Court. Where the case concerns a decision by one of the institutions, the President may order that decision to be suspended pending the final judgment. The order of the President of the Court has only an interim effect and is without prejudice to the Court's final decision on the substance of the case.

Any of the parties may apply for a decision on a preliminary objection or on any other procedural issue. Most applications concern questions of admissibility. The Court itself decides whether to consider the application separately or whether to reserve its decision for the final judgment.

The Member States and the institutions may intervene in cases before the Court. So also may any other person able to show a legitimate interest in the outcome of a case before the Court, except where the case is between Member States, between Community institutions or between Member States and institutions. The submissions made in the application to intervene may not have any other object than to support the submissions of one of the parties.

Interventions are not allowed in the case of requests for a preliminary ruling except where the national court has already granted a third party the right to intervene in the case in question. The governments of the Member States, and the Commission and the Council, may always submit written or oral observations if they consider it appropriate.

Representation of the parties

Any lawyer qualified to practise before a court in one of the Member States and, where national legislation grants him that right, any professor of law is, *ispo facto,* entitled to address the Court.

The parties are free to choose a lawyer from any Member State. In the case of requests for a preliminary ruling, the lawyers who appear before the Court of Justice will, in fact, very often be those conducting the case before the national court. In this type of case the Court applies the same rules regarding representation of the parties as the national court from which the case originates.

The Member States and Community institutions are represented in Court by agents, genrally members of their legal departments, who may be assisted by a legal adviser or an advocate, barrister or the like.

Languages

Although the language rules may appear rather clumsy, they do, in fact, make access to the Court as straightforward as possible. Proceedings may be conducted in Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish.

The choice of the language of the case lies with the applicant, except that:

(i) where the defendant is a Member State or a natural or legal person who is a national of a Member State, the language of the case is the official language of that State; where there is more than one official language, the applicant may choose whichever suits him best;

(ii) where both parties so request, the Court may authorize the use of another official Community language;

(iii) where one party so requests and where the other agrees, the Court may authorize the use of another language; this option is not open to the institutions.

Where a preliminary ruling has been requested, the language used is that of the national court which referred the case to the Court.

The Member States may use their own official language when intervening in a case before the Court or making observations on a request for a preliminary ruling.

The judges and advocates-general may speak at hearings in a language other than the language of the case.

The judgment is always delivered in the language of the case. Only documents in that language are authentic.

Legal aid

Where one of the parties is unable to meet all part of the costs incurred, he may request legal aid. The application must include supporting evidence. The Chamber to which the Judge-Rapporteur belongs then decides whether to grant legal aid in full or in part. He gives no reasons for its decision, and there is no appeal against it.

V — Activities of the Court

The European Communtiy has an economic purpose, even though its long-term aim is political. It is therefore hardly surprising that the Court's major achievements have been in the field of business law. But its activities go beyond purely economic matters and it has laid an extensive groundwork of case-law in the sphere of social welfare and agriculture.

Initially, the Court's main task was *to secure the attainment* of the customs union. This involved the removal of internal tariff barriers, and measures having equivalent effect, between the Member States and the introduction of common rules with regard to non-member countries. The gradual introduction of common rules on agriculture, transport, freedom of establishment, freedom to provide services and freedom of competition between undertakings led subsequently to an increasing number of actions. The Court also took a number of decisions on social affairs, affecting the direct interests of Community citizens in such fundamental areas as the freedom of movement for workers and social security rights of migrant workers.

Direct effect of Community law

The principles of direct applicability of Community law in the Member States and the primacy of Community rules over conflicting national rules are the twin pillars supporting the European Economic Community, a Community based on law. After the Treaties were ratified the Court soon had to decide a number of cases which involved settling a series of fundamental questions — is European law directly applicable as such to the nationals of the Community? Can they invoke Community law direct and have that law applied by judges in their own country with the safeguard of common institutions? Are judges under an obligation to apply Community regulations, directives or decisions regardless of their own country's legislation? Do the Community rules laid down in the Treaties and ratified by the Member States take precedence over national laws?

The Court was fully aware of what was at stake and lost no time in following the rationale of the Community to its logical conclusion and in deciding in favour of a real Community.

The van Gend en Loos case raised the question of the direct applicability of Community law. In September 1960, the Dutch company van Gend en Loos, which had imported an aqueous emulsion of ureaformaldehyde from Germany for use in the manufacture of glue, received a claim from the Dutch customs authorities for duty at a rate higher than the rate current for the product at the time when the Treaty of Rome entered into force.

As a result of an agreement concluded between the Benelux countries in July 1958, aqueous emulsions had been transferred from a category of products taxed at 3% to another category taxed at 8%. The glue manufacturer protested to the national authorities on the grounds that the Treaty prohibited the common market countries from increasing the customs duties that they applied as between themselves on 1 January 1958, when the Treaty entered into force. The argument was dismissed and the industrialist appealed to an administrative court, which suspended proceedings and asked the Court of Justice whether the provisions of the Treaty of Rome, which, in normal circumstances, are addressed only to Member States, could vest rights in individuals.

The German, Belgian and Dutch Governments submitted their observations to the Court. In their view, only Member States or the Commission could bring alleged infringements of the Treaty before the Court. The Treaty, they maintained, conferred rights and imposed obligations only on the signatory States and certainly not on private individuals who must remain subject to their national law.

Since the principle of direct applicability was explicity mentioned in the Treaty in relation to regulations, but not in relation to the provisions of the Treaty itself, the Court sought to define the principle as an integral part of the concept of the common market and of the basic consequences of membership thereof.

With exemplary clarity the Court stated in its grounds of judgment that: 'The objective of the EEC Treaty . . . is to establish a common market, the functioning of which is of direct concern to interested parties in the Community.' This implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States . . . This view is confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also 'their citizens', the conclusion being that 'the Community constitutes a new legal order . . . for the benefit of which the States have limited their sovereign rights, albeit within the limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but it also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon

the institutions of the Community'. Subsequent events have done nothing to call into question the principles laid down by the Court. The national courts have not relented in their application of the principle.

Primacy of Community law

The Court also based itself on the logic of the new law in its affirmation of the primacy of Community law. Several months after the judgment establishing the direct applicability of Community law, a Milan judge brought before the Court a request for interpretation of the Treaty in a case calling for clarification of the situation in the event of a conflict between Community law and national law.

Mr Falminio Costa, a shareholder in Edison Volta, considered that he had suffered injury through the nationalization of the facilities for the production and distribution of electricity in his country. He refused to pay a bill for a few hundred lire presented by the new nationalized company, ENEL. Summoned before a court in Milan, he submitted in his defence that the nationalization law was contrary to the Treaty of Rome: the judge in the case therefore approached the Court of Justice. In the meantime, the Italian constitutional court had intervend in connection with the law establishing ENEL. In its view, the situation was straightforward: as the Rome Treaty had been ratified by an ordinary law, the provisions of a later conflicting law would have to take precedence over those of the Treaty.

In Luxembourg, the judges took a different view. In its judgment the Court pointed out that: 'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.'

The judges went on to say that: 'The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7. The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories . . .'.

'The precedence of Community law is confirmed by Article 189, whereby a regulation "shall be binding" and "directly applicable in all Member States". This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislation measure which could prevail over Community law.' The judges concluded that: 'It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and agricultural nature, be overridden by domestic legal provision, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'

The Court clarified this concept in the Simmenthal case, another *locus classicus.* Community provisions, it held, 'are a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law. This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law. Furthermore, in accordance with the principle of the precedence of Community law, the relationships between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.' According to the Court, it follows that 'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or even await the prior setting aside of such provisions by legislative or other constitutional means.'

Protection of fundamental rights

A German vine-grower, Mrs Liselotte Hauer, gave the Court an opportunity to rule on the need to ensure the protection of fundamental rights in the Community legal order.

She had applied for authorization to plant vines on land which she owned. The authorization was refused on the grounds that the new planting of vines was temporarily prohibited by a Community regulation. She appealed against that decision to the competent Administrative Court (Verwaltungsgericht), arguing that the Community provisions infringed her rights as owner of the property and her right to pursue her business activities freely.

Wishing to ensure the substantive unity and effectiveness of Community law, the Court of Justice declared that the question of an infringement of fundamental rights by a measure taken by the Community institutions could only be judged in the light of Community law itself. Accordingly, it was for the Court alone to define the nature of the guarantees afforded.

Although fully aware of the risk of conflict with national constitutional law, the Court nevertheless emphasized that 'fundamental rights form an integral part of the general principles of the law, the observance of which it ensures'. In safeguarding those rights, it was 'bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitution of those States are unacceptable in the Community'. It also took account of international treaties for the protection of human rights on which the Member States had collaborated or of which they were signatories. It follows that the protection accorded under Community law for fundamental human rights could not be any less complete than that required by the constitution of any of the Member States.

The Court nevertheless drew attention to the fact that, under the constitutional rules and practices of the Member States, there were certain fundamental rights — in this case the right to property and the freedom to pursue trade or professional activities — which, far from constituting unfettered prerogatives, must be regulated in the light of their social function, always provided that any restrictive action does not derogate from the real substance of the right in question.

Freedom of trade

The basic economic objective of the Community is to establish a common market, and the fundamental expression of this is the customs union. Under the terms of the Treaty of Rome it covers all trade in goods and involves the prohibition between Member States of customs duties and quantitative restrictions on imports and exports and the adoption of a common customs tariff in their relations with non-member countries. But the rules on freedom of movement do not apply only to the products of Member States, but also to products from non-member countries in free circulation in a Member State.

The majority of governments, frequently under pressure from business circles, were reluctant to remove protective barriers and face competition from their partners. Their reaction was to maintain or introduce taxes, restrictions and sometimes even overt or disguised prohibitions on imports. When cases of this type came before the Court, it banned such measures, reminding the Member States that they were obliged to respect the objectives laid down in the Treaties.

Charges having equivalent effect to customs duties

To prevent the prohibitions being circumvented, the authors of the Treaty also expressly prohibited charges having equivalent effect to customs duties and measures having equivalent effect to quantitative restrictions; this means measures which, although not quotas, nevertheless have the same restrictive effect, in that they (to quote the classic words of the Dassonville judgment) 'directly or indirectly, actually or potentially' formed an obstacle to trade between Member States. Governments displayed remarkable powers of ingenuity and imagination. A profusion of special taxes sprang up: statistical duties on imported or exported goods, taxes for administrative formalities on importation, charges for health inspections, taxes on packaging, taxes on the export of works of art.

Both in actions against the States concerned and in cases referred for preliminary rulings, no matter what they were called or how they were applied, whether they were imposed by the State or by public or private institutions, for the benefit of the State or of business firms, the Court pounced on them whenever they had even the slightest discriminatory effect on products originating in the Member States or on goods that were in free circulation in the EEC because they had crossed the Community's borders. Notable instances included an *ad valorem* tax of 0.33% on the import of unworked diamonds, the proceeds of which went towards a welfare fund for diamond workers to provide them with certain additional welfare benefits. Even a general system of taxation may be incompatible with the Treaty if the proceeds go to fund activities specifically benefiting a national product. The Court has allowed exceptions only when the charges constitute payment for a service actually rendered to the trader, the amount being commensurate with that service, or if the charge is part of a general internal system regularly applied according to uniform criteria to national products, imports and exports alike. Charges imposed uniformly by Community provisions are allowed only if the amount does not exceed the actual cost of the service.

Any taxes paid without due reason must be repaid. The Court has defined the following criteria, particularly in the San Giorgio case: the right to obtain repayment of taxes charged by a Member State in infringement of the rules of Community law is the consequence and the complement of the rights conferred on interested parties by the Community provisions prohibiting taxes having an effect equivalent to customs

duties. Although the repayment cannot be claimed otherwise than under the conditions of substance and form laid down by the various national laws on the subject, such conditions cannot be less favourable than those relating to similar claims of a purely internal nature, and cannot be such as to make the exercise of the rights conferred by the Community legal order practically impossible.

Community law does not prevent a national legal system from refusing repayment of taxes charged without due reason if this would involve an unjust enrichment of the persons entitled. There is thus nothing to prevent the courts from taking into account, in accordance with their national law, the fact that the taxes improperly charged have been included in the price of goods and thus passed on to the purchasers.

On the other hand, any requirements as to evidence are incompatible with Community law if they have the effect of making it practically impossible or excessively difficult to obtain repayment of taxes charged in infringement of Community law. Such is the case in particular of presumptions or rules of evidence which impose on the taxpayer the burden of showing that the taxes paid without due reason have not been passed on to others, or special limitations on the form of the evidence to be adduced, such as the exclusion of any form of proof other than documentary evidence.

The customs union necessarily implies that Member States may not obstruct or impede the movement of goods in transit. They may not therefore apply to goods in transit on their territory any transit duties or other charge concerning transit. However, charges representing the costs of transport or the cost of other services linked with transport are compatible with the Treaty.

Measures having equivalent effect to quantitative restrictions

The Member States tried to get round the liberalization provisions by means of discrimiatory administrative measures. The Belgian Government, for example, imposed special administrative formalities on whisky importers to exclude all but direct imports from Scotland. However, since the majority of Scottish products exported to the Continent travel via France for the practical reason of centralized shipment, these formalities amounted to a quantitative restriction and the Court accordingly ruled against them.

In the *Cassis de Dijon* case the Court held that fixing a minimum alcoholic strength for alcoholic beverages was a prohibited measure of equivalent effect, if in one Member State it was applied to alcoholic beverages lawfully produced and marketed in another Member State. The German spirits monopoly law (Branntweinmonopolgesetz) fixed a minimum alcoholic strength for specific categories of liqueurs and other alcoholic beverages. A German firm which planned to import Cassis de Dijon

was turned down by the Federal Monopoly Administration (Bundesmonopolverwaltung), on the grounds that the alcoholic strength was inadequate and that the product in question did not satisfy the conditions required for marketing in the Federal Republic. In its preliminary ruling the Court did not deny Member States the right to control the production and marketing of spirits within their own territory. But it emphasized that mandatory fixing of minimum strengths was neither an essential guarantee of the fairness of commercial transactions nor a purpose which is in the general interest such as to take precedence over the requirements of the free movement of goods.

German wine legislation reserved the use of a specific bottle called a Bocksbeutel for quality wines produced in Franconia, Baden-Franconia and four municipalities located in central Baden. This bottle, which has a characteristic bulbous shape, has been used for centuries in Franconia. In Northern Italy, in the region of Bolzano, it also has a tradition going back more than a hundred years. The Court, asked for a ruling on whether the German legislation was protectionist, ruled that a Member State cannot reserve the use of a particular shape of bottle for certain national products when the use of that shape or a similar shape of bottle accords with a fair and traditional practice in the State of origin. The Court did not dispute the right of Member States to enact measures designed to avoid confusion in the minds of consumers between wines of different origin and of different qualities. It pointed out however that the Community provisions on the labelling of wines make it possible to avoid such confusion.

Similarly the Court refused to allow Germany the right to reserve the designations *Sekt* and *Weinbrand* for home products, on the grounds that no Member State could be allowed to extend, by the artificial means of legislation, a generic term into a designation of origin in order to give domestic producers an advantage.

Certain Member States required that margarine should be marketed only in cube-shaped containers, ostensibly to avoid any confusion between butter and margarine. The Court did not hesitate to rule that this constituted a measure having equivalent effect to a quantitative restriction. While it did not deny the need for measures to protect consumers from confusion as between butter and margarine, it felt that this objective could be attained more effectively by less restrictive means, such as strict labelling requirements.

In an action for infringement of the Treaty brought by the Commission when the Irish Government organized a 'Buy Irish' campaign, the Court ruled that the campaign contravened the rules on free movement of goods: it was evidence of a deliberate intention to persuade people to buy home-produced goods rather than imported goods, and thus to impede imports from other Member States.

The Court has also held that Member States may not require that a firm, in order to sell its products, must have a registered office or a representative on their territory.

It has recognized, for example in the Roussel case, that Member States are entitled to take specific measures to eliminate inflation, but has made it clear that they must not discriminate against imported products in relation to national products.

Equality of taxation

The Member States have also frequently used taxation — the expression *par excellence* of their sovereignty — as a means of restricting imports. The Treaty establishing the European Economic Community, while not aimed at taking away the Member States' right to levy taxes, does stipulate that internal taxes, whatever their nature, must be applied without discrimination to domestic products as well as to products from other Member States and must not be misused for purely protectionist ends. The same principle applies to preferential tax arrangements; any such specific arrangements must be extended without discrimination to products of other Member States and with no distinctions based on the grounds for them. A large numer of actions have been brought against internal tax schemes, which have often been limited to particular industries or even to particular products; for example, there have been cases involving discriminatory taxation on imported spirits, discriminatory tax rebates for the engineering industry, excise duty on cocoa imports and a tax on imported timber.

The prohibition on tax discrimination does not apply only to similar products but also to products in partial or potential competition. In a famous case that lasted for five years because of the complexity of the subject, the Court told various Member States that they do not have the right to distort competition between light wines and beer; there is a distinct tendency — at least in certain Member States — to favour the 'national' drink. Obviously the Court did not lay down a scale of correct taxes but it emphasized that the conformity of taxation with the Treaty must be evaluated by reference to the volume, the alcoholic strength and the price of the products. In other cases the Court condemned discrimination against wine made from grapes in relation to wine made from fruit, and against whisky, gin and vodka in relation to national spirits made from fruit.

Some time ago France imposed two types of annual tax on motor vehicles: a differential tax on vehicles of not more than 16 h.p. and a special tax on vehicles of more than 16 h.p. The special tax was the multiple of the differential tax and in fact applied only to imported vehicles. A motorist, Michel Humblot, refused to pay the special tax and the Court upheld his point of view. It pointed out that the Member States are free to subject vehicles to a system of road tax in which the amount increases progressively in relation to an objective criterion such as the horse power; the tax must, however, have no discriminatory or protectionist effects.

Justified exceptions

The Treaty does not prevent the imposition of restrictions justified on the grounds of public morality, public policy or public security, prevention of unfair competition, protection of the health and life of humans and protection of national treasures. The Court has nevertheless emphasized on numerous occasions and in accordance with the provisions of the Treaty that these prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, nor limit imports or exports more than is necessary to attain a legitimate objective.

The Court has applied these principles in a large number of cases. Thus, the United Kingdom had decided to slaughter rather than vaccinate poultry in order to combat Newcastle disease.

It had at the same time prohibited the importation of poultrymeat from Member States authorizing vaccination. The Court did not dispute the right of the United Kingdom to prevent the spread of the disease; but it held that the absolute prohibition on imports of poultrymeat was excessive and hence unjustified, since it was applicable permanently even in the absence of any indication of the disease. France at one period subjected imports of Italian wine to excessively frequent analyses, thus delaying their arrival on its internal market. The Court condemned the protectionist character of this measure. In both cases it took into account the pressure known to have been exercised by local producers..

Parallel imports

Thus the Court has opened the way for parallel imports. Deutsche Grammophon, the German gramophone record manufacturer sold its records in Germany at a controlled price which was higher than the price at which they were sold in other Community countries by licensed agents with exclusive distribution rights in their national territory. Another German company had managed to obtain a supply of records from one of these agents, which it reimported and was able to sell in Germany at an appreciably lower price than that imposed by the manufacturer. This the manufacturer held to be an infringement of German copyright law. The Court ruled that, copyright notwithstanding, it is not permissible to prohibit the sale in a Member State of products placed on the market in another Member State, even if the selling price in the first country is higher than in other countries.

Protection of industrial property

Community law allows conditional exceptions to the principle of free movements in order to protect industrial and commercial property. But patent and trade mark rights

are often used to wall off markets. A classic example involved certain practices on the market for pharmaceutical products. The Court has always made it clear that restrictions on the free circulation of goods can be allowed only in exceptional circumstances and only insofar as they are necessary to safeguard rights which constitute the specific subject-matter of industrial and commercial property rights protected by the Treaty of Rome. This specific subject-matter is, in the Court's view, principally the guarantee that the holder, to reward his creative effort or to protect the reputation of his trade mark, has the sole right to exploit an invention for the purpose of manufacturing industrial products and putting them into circulation for the first time, either directly or by granting licences to third parties, as well as the right to oppose any infringement. This right, however, is exhausted once the product is first marketed, the holder thereafter being unable to oppose parallel marketing. The Court stressed that if the holder of a patent or trade mark were allowed to ban imports of protected products marketed in another Member State by him or with his consent, he would be able to partition off the national markets, so restricting trade between the Member States, although this is not necessary to protect the substance of the rights conferred by the patent or trade mark.

Moreover, the holder of an exclusive right may not plead that right if the resulting ban on imports and sales entails a restriction on competition within the EEC. Though this right, being a creature of the law, is not itself covered by the rules of the Treaty of Rome concerning agreements or concerted practices in restraint of competition, the exercise of this right may be caught by the prohibitions if it constitutes the subject matter, the means or the consequence of a restrictive agreement, a concerted pratice or abuse of a dominant position.

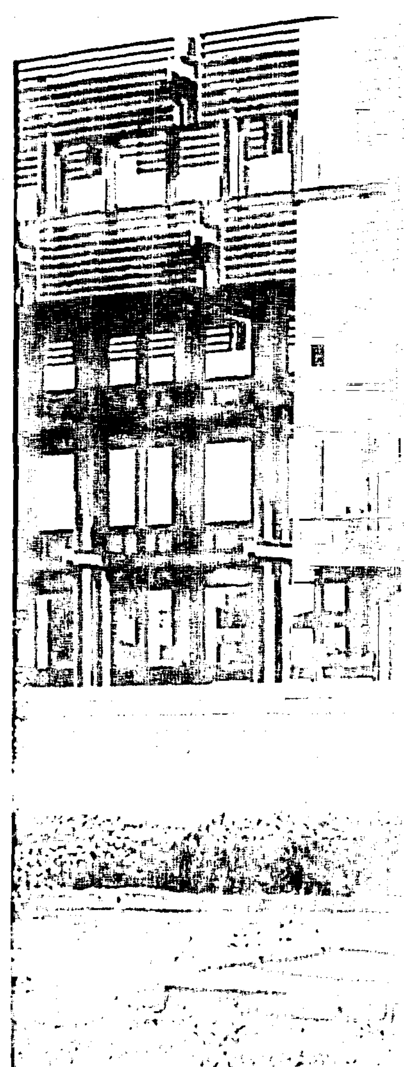
Mainly through preliminary rulings, the principle of exhaustion has been gradually (and logically) extended to copyright, model rights, rights in respect of slavish imitation and plant breeders' right. This principle does not, however, apply in relations with non-member countries (including those linked with the Community by economic agreements).

Transfers of currency

The liberation of transfers of currency can be attained only gradually, because of its close link with economic and monetary policy, which is a matter essentially within the responsibility of the Member States, and the possible dangers for national balances of payments. However, current payments relating to the movement of goods, services and capital, in the currency of the Member State where the creditor or the beneficiary resides, have already been liberated. Recognizing the lawfulness of the restrictions, the Court held in the Thompson case that Krugerrands and national coins which are legal tender are not goods within the meaning of the Community rules on freedom of movement, even if their commercial value exceeds their nominal value.

Guerrino Casati, an Italian national resident in Germany, had entered Italy with a substantial sum in German banknotes without having at the time of import completed the formalities prescribed by the Italian exchange regulations. Not having spent the banknotes, Mr Casati was charged, when leaving Italy, with illegal export of currency. The Court held that transfers of currency in the form of banknotes have not yet been liberated by the Treaty, and that the Member States may impose restrictions on such transfers even if they are intended for the purchase of goods. In another case, the Court held on the other hand that tourists, students and business travellers have the right to export banknotes within certain limits since expenditure on those activities constitutes payment for goods or services.

Nearly 30 years after the creation of the European Economic Community, the process of achieving a single common market cannot be considered to have been completed. The Court still has to deal with a considerable number of restrictive and protectionist measures.

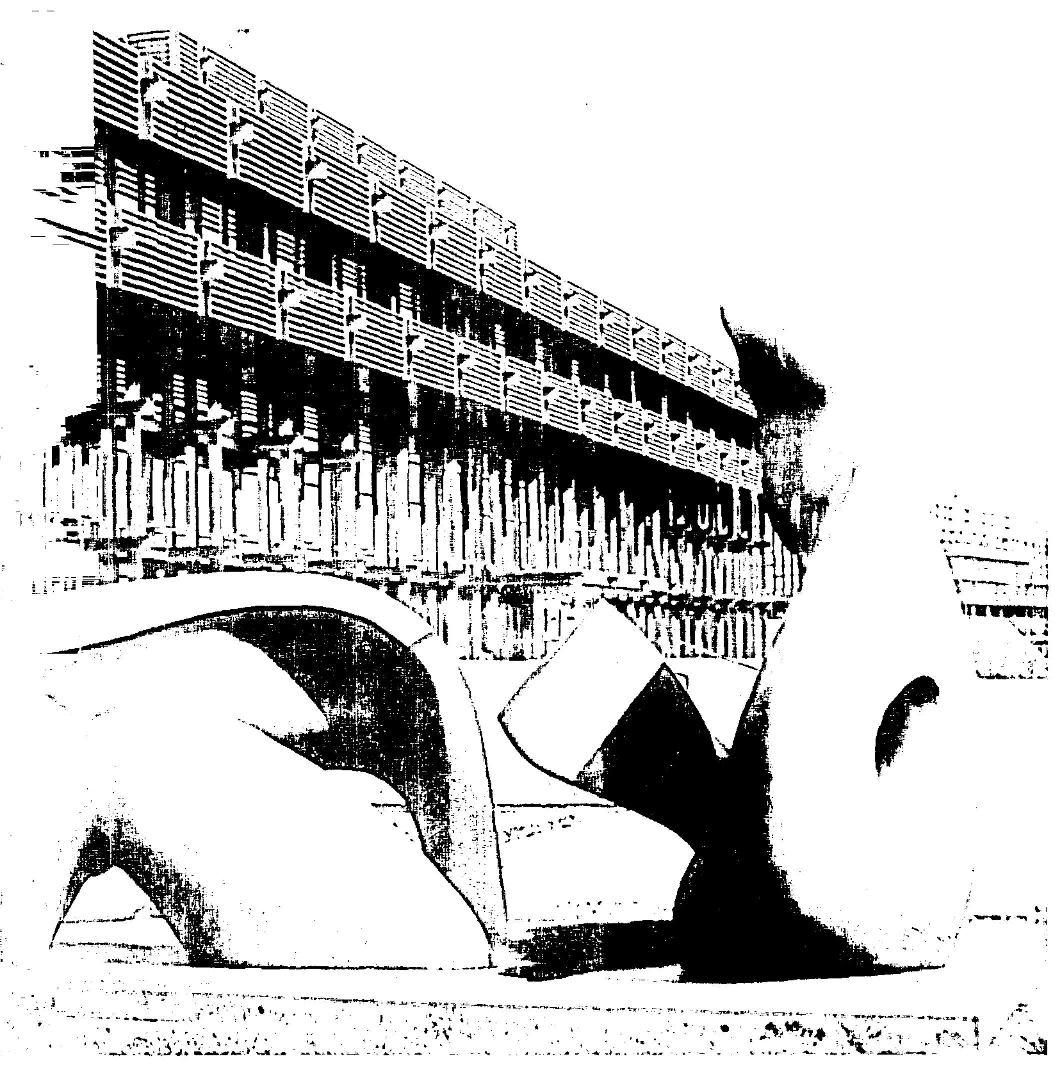


Competition

The principle of free and fair competition is fundamental to the Treaty of Rome, which was designed to guarantee all businessmen free access to the common market. The relevant rules are based on Articles 85 and 86 which, as is now well known, prohibit agreements, decisions and concerted practics by firms or groups of firms and any abuse of a dominant position likely to have a direct or indirect, immediate or potential impact on trade between Member States. There are many forms of anti-competitive conduct, and the Treaty, without attempting to give an exhaustive list, mentions some of them specifically — directly or indirectly fixing prices or other terms of business, limiting or controlling production, markets, technical development or investments, sharing markets or sources of supply, unfair trading condi-

tions and tying clauses. The Court's decisions over the years have brought to light various others.

Agreements and concerted practices do not qualify for exemption unless they help to improve the production or distribution of products or to promote technical or



Court of Justice of the European Communities (Centre européen, Luxembourg)

economic progress, while allowing consumers a fair share of the benefit. Nor must they impose on the firms involved restrictions that are not indispensable to the attainment of these objectives or enable them to eliminate competition for a substantial proportion of the products in question.

The advantages must be evident and general; individual advantages to the firms involved will not suffice. No similar exemptions exist for dominant positions: the Treaty does not forbid dominant positions as such, but only their abuse.

A fertile field of litigation

On the basis of rules laid down by the Council, the Commission enforces these principles, investigates infringements and, by means of decisions addressed directly to the firms concerned, orders them to be stopped, imposing fines where necessary. The firms concerned may then appeal against the decision to the Court. National courts have also rapidly become familiar with Community competition law and they, too, refer cases to Luxembourg, since the competition rules are directly applicable in all the Member States.

The rules of competition apply to a wide range of activities and there have been numerous cases, involving both the big multinationals and small businesses. The Court has given judgment in cases covering a wide range of industrial and commercial activities — radios, dyestuffs, quinine, cement, metal containers, sugar, beer, bananas, cigarettes, perfumes, lighters, household appliances, vitamins, medicines, cars, tyres, etc.

Generally speaking, when the Commission imposes penalties on firms they waste no time in taking the matter to the Court. The outcome of such action has varied enormously. Some of the Commission's decisions have been upheld, in others minor changes have been made and in yet others the decision has been annulled or the fines reduced. But this is not to say that firms can count on the Court's clemency. Whilst it adjusts the Commission's errors of assessment, the Court has been just as vigorous in its general approach to the rules of competition.

The Commission's powers of investigation

When the major electronics company IBM tried to block or at least hold up the Commission's investigations into its commercial practices at the enquiry stage, the Court held its action to be inadmissible. The Court ruled that, given their nature and the legal effects they produce, neither the initiation of an administrative procedure nor a statement of objections could be considered as being decisions within the meaning of the Treaty, which may be challenged in an action for a declaration that

they are void; they constituted no more than procedural measures adopted preparatory to the decision which represents their culmination.

The Commission's powers of investigation have their limits. The Court upheld a claim by the zinc producer AM&S Europe that the confidentiality of correspondence between companies and their legal advisers was protected as long as the correspondence fell within the framework of the rights of the defence and was conducted with a lawyer who was not an employee of his client. If a company under investigation refuses to disclose this specific correspondence, it must nevertheless provide the Commission's authorized officers, without revealing the contents, with particulars proving that it satisfies the conditions on which legal protection depends. It is for the Court to settle disputes as to how the protection is to the applied.

In the Akzo case the Court held that a third-party complainant cannot in any circumstances be informed, in the course of an enquiry, of the contents of documents containing a firm's business secrets. Before handing over any documents the Commission is bound to take a decision, setting out its reasons, which must be brought to the firm's notice. It must also give the firm an opportunity of asking the Court to review the Commission's evaluation and order it not to disclose the documents.

The Court has confirmed the Commission's authority to order interim measures in connection with the preservation of free competition, in particular to ensure that decisions ordering firms to stop infringements are effectively implemented. But it has stipulated that such measures can be taken only in urgent cases. They must also be of a temporary and conservatory nature and be confined to what the situation requires. Finally, the decision ordering interim measures must be in a form which can be attacked before the Court of Justice.

It has similarly confirmed the Commission's right to impose fines on firms committing infringements, and to fix these at a deterrent level, within the limits prescribed by the Community regulation on competition.

Territorial application

On numerous occasions the Court has clarified the territorial aspects of the rules of competition, a good example being the dyestuffs case. Nine dyestuffs manufacturers appealed against a Commission decision imposing fines on them for concerted pricing. Three of them had their head offices outside the Community and argued that the Commission could not impose fines for infringements committed outside the Communtiy. The Court established that the firms had fixed prices and other terms of sale and imposed them on their subsidiaries; it accordingly upheld the Commission's measures even in respect of the firms not located on Community territory, since the effects of the concerted practice were felt within the common market.

In another case firms argued that a purely national agreement operating in the territory of only one Member State could not affect trade between Member States so that one of the essential tests of the Community competition rules was not satisfied. The Court, however, held that'an agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpretation which the Treaty is designed to bring about and protecting domestic production'.

Can national rules on competition conflict with Community rules? Seven German firms raised the price of aniline on a number of occasions at the same time. They were fined by the competent German authorities and also ran the risk of being fined by the Commission. The Court endorsed the Commission's view. In keeping with the aims of the Treaty it ruled that application of national competition rules could only be permitted if they did not prejudice uniform application of the rules of the Treaty thoughout the common market. In theory therefore two parallel proceedings could be in progress at the same time. To avoid any duplication of penalties for the same offence the fine in the first case has to be taken into consideration when determining the fine in the second case.

Agreements and concerted practices

In the dyestuffs case, which involved the major European chemical firms, the Court held that the term 'concerted practice' covers a form of coordination between undertakings which, without involving any actual agreement, knowingly substitutes a practical cooperation between them for the risks of competition.

A selective distribution system may be lawful if it maintains a specialized trade, capable of furnishing specific services for highly technical products of high quality, and those services justify a reduction in price competition in favour of competition in aspects other than price. The restrictions are not acceptable, however, unless they do in fact aim at achieving an improvement in competition. Thus the choice of retailers must be made by reference to objective, qualitative criteria relating to the professional qualifications of the retailer and of his staff and the nature of his establishment. These conditions must be fixed in a uniform manner in relation to all potential retailers and applied in a non-discriminatory manner.

Abuse of a dominant position

In its judgment on the United Brands case, involving the banana market, the Court defined a dominant position as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'. Abuse was then defined in another case as behaviour by a dominant firm 'which is such as to influence the structure of a market where, as a result of the very presence of the firm in question, the degree of competition was weakened and which, through recourse to

methods different from those governing normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.

In the Continental Can case, concerning the metal containers market the Court pointed to the logical link between Article 85 on restrictive practices and Article 86 on abuse of a dominant position. It stressed that the rules of competition form a coherent system, with no loopholes. Moreover, it ruled the prohibition on abuse of a dominant position also applies when a firm acquires such a degree of dominance as a result of takeovers or mergers that competition is substantially fettered.

Supply contracts cannot prevent a purchaser from using the goods supplied in a way that suits his own economic interests. In the Court's view there is a restriction of competition when a contract imposes on a purchaser the obligation to use the goods supplied for his own needs, not to resell them in a specified area, and not to acquire customers in another specified area without first informing the seller.

A refusal to supply can also constitute abuse of a dominant position. In the Commercial Solvents case the Court held that a dominant firm on the market for a raw material, which, with the object of reserving such raw material for manufacturing its own derivatives, refused to supply a customer, itself a manufacturer of these derivatives, thereby eliminating all competition on the part of this customer, was abusing its dominant position.

The same applies to a fidelity rebate where it tends, by conferring financial advantages, to prevent customers from obtaining supplies from competing producers.

Franchising agreements

A franchising agreement concluded for the sale of wedding dresses enabled the Court to clarify the conformity of these agreements, a modern form of production and marketing, with the Treaty rules on competition. In its judgment in the Pronuptia case, which was confined to distribution agreements, the Court found that their compatibility generally depends on the clauses of the agreements and the economic context in which they are concluded. In particular, the franchisor is entitled to prevent the know-how and the assistance he has provided being used for the benefit of competitors and to arrange for the control indispensable to the preservation of the identity and the reputation of the network symbolized by his trade mark. The franchisor and the franchisee may not, on the other hand, agree on a sharing of markets. The franchisor may, however, indicate to the franchisee certain recommended prices, provided there is no concerted practice between the franchisor and the franchisees, or between the franchisees, with a view to actually applying these prices.

Abuse of trade marks and patents

Restrictive practices and the abuse of a dominant position can also apply to patents, trade marks and the like. The Court ruled that an association enjoying a *de facto* monopoly in a certain Member State for the management of copyrights, which demanded global assignment of all copyrights, without making any distinction between specific categories of rights, extending for a certain period after the member concerned had withdrawn, was abusing its dominant position. In the Sacchi case, the Court ruled that the grant of the exclusive right to transmit television signals does not in itself constitute an infringement of the Treaty. Discrimination by undertakings enjoying such exclusive rights against nationals of Member States by reason of their nationality is, however, incompatible with Community law.

In a judgment concerning imports of cosmetics, the Court confirmed that trademark rights as such are not covered by Articles 85 and 86 of the Treaty, but continue to protect the advantages inherent in their specific subject-matter. It also ruled that the exercise of industrial and commercial property rights may still be modified by the restrictions imposed by the rules of competition, particularly when it is apt to lead to a partitioning of markets and thus to impair the free movement of goods.

Public undertakings and transport

Like private firms, public undertakings, meaning those companies on which the public authorities may directly or indirectly exert a dominant influence through ownership, financial holdings or the rules governing them, and, within certain limits, companies responsible for running services of general economic interest are also covered by the competition rules. Dismissing the application by France, Italy and the United Kingdom for annulment of the directive on the transparency of financial relations between the Member States and public undertakings, the Court confirmed the Commission's right to adopt the necessary directives and to ask the Member States for specific information concerning public funds released to public undertakings and their actual use.

In giving its preliminary ruling in the Nouvelles Frontières case, the Court made it clear that the transport sector in general and air transport in particular are subject to the Treaty competition rules. Since no specific rules on air transport have been adopted at Community level, the administrative authorities and the courts of Member States remain competent to apply Articles 85 and 86 of the Treaty. The Commission may always, either on the request of a Member State or on its own initiative, carry out enquiries into cases of infringement, propose means of bringing them to an end, issue a reasoned decision finding that there is an infringement and authorize the Member States to take the necessary measures according to the conditions and detailed procedures laid down. In any event, Member States may not approve air fares

which have been formally found to be the result of an unlawful agreement, a decision between associations of undertakings or a concerted practice.

State aids

But the Commission's powers do not stop at information. By means of a procedure laid down in the Treaty it has the authority to appraise public aid schemes and, if need be, insist that the State concerned terminate or adjust any aid scheme which is incompatible with the common market, adversely affects trade between the Member States and distorts competition. Here again, the Commission has had the full support of the Court, particularly in cases where the Member States refused to act on the decisions within the time allowed.

The Court has enormous scope in applying the rules of free competition to the market place. By means of its decisions, it has succeeded in imposing and enforcing these rules in the interests of the consumer, the small retailer — who is at the mercy of restrictive practices and agreements — and of businesses themselves, looking for security in the law and for protection from predatory competition. The Court has not hesitated to impose penalties for abuses when necessary, but has shown tolerance when the consumer was not affected and competing goods were available.

The rules of competition are now recognized throughout the Community thanks to a threefold approach: preventive and repressive action by the Commission, the direct effect of the Treaty and its uniform application by national courts and the Court of Justice.

The agricultural common market

The agricultural common market is undoubtedly the area in which the Community has made its greatest strides towards integration. The Treaty of Rome drew the basic outlines of the market, and over the years the Council, acting on Commission proposals, has gradually completed the picture by setting up the various mechanisms which now ensure that European farmers obtain remunerative prices for their products on a single market where all but a few of the products are regulated by their own special set of measures. A protective import levy imposed as a safeguard against imports entering the Community from non-member countries at low prices and an export refund system helps Community farmers find buyers for their produce on the world market by aligning their prices on world market prices.

The complexity of the market, the technical refinement of the system, the monetary difficulties and the subsequent introduction of monetary compensatory amounts, along with clever operators making use of the inevitable loopholes in the system, have fostered much litigation. In this respect the common agricultural policy is top

of the list by far. Consequently, it soon became apparent that integration in this sector rested with the national courts and the Court of Justice.

Oddly enough, it is not the farmers who have brought most of the agricultural cases before the Court. Apart from the Italian farmer (a woman as it happens) who had to go before the Court in order to obtain payment of the premiums to which she was entitled for slaughtering her cows, or the German farmer who attempted (in vain) to have the co-responsibility levy which had been introduced as a means of curbing milk production declared contrary to the Treaty, most of the legal proceedings at the European Court have been brought as a result of commercial transactions or of disputes concerning levies, refunds, denaturing premiums or monetary compensatory amounts. Thus it is mainly traders who have kept the Court busy.

It is also worth noting that the number of cases handled by the courts varies considerably, and always has done, from one Member State to another. In Germany and Italy in particular, those concerned have not been slow to bring their cases before the national courts. Yet the largest agricultural nation in the Community (France) has produced the smallest number of cases. The Commission has brought an increasing number of cases against Member States for failure to meet their obligations. They have involved such matters as the taxation of milk products, the premiums for slaughtering dairy cows, the premiums for grubbing-up fruit trees, the implementation of the directives on forest materials, the taxes on potable spirits, the establishment of the viticultural land register and the payment of export refunds.

Confirmation of basic principles

A mass of case-law has confirmed the basic principles of the common agricultural policy, particularly the unity of the market, Community preference, liability for unlawful acts and the obligation to make due reparation, as well as the legislative autonomy of the common organizations of the market and the uniformity of the legal system.

The rules laid down for establishing the common market apply to agricultural products whenever no exception is provided for. The Court has always taken a narrow view of exceptions. It has upheld them only when the general rules clashed with principles held to be essential in implementing the common agricultural policy. It has ruled out the view that either the rules or the principles should take precedence, and has concentrated on reconciling them.

The judges in Luxembourg endeavour in their decisions to uphold the objectives, guidelines and methods of the common agricultural policy as defined in the Treaty.

Again and again they have made it perfectly clear that once the Community has adopted legislation setting up a common organization of a particular market the Mem-

ber States are under an obligation to refrain from taking any measures that might derogate from it or run counter to it. National measures or practices likely to interfere with import or export trends or to affect the free formation of prices on the market are accordingly to be regarded as incompatible with the common organization of the market, which aims at ensuring freedom of trade within the Community by eliminating not only barriers to trade but also any arrangements likely to distort intra-Community trade. Whenever a Member State or its regional or other authorities go beyond the intervention provided for in the Community rules there is a potential obstacle to smooth operation of the common organization of the market.

Only very rarely has the Court annulled a Council or Commission regulation. Such a decision can only be justified if the institution concerned has seriously overstepped its powers. Typical instances are the milk-powder case, the case involving production refunds for gritz made from maize (quellmehl) and the isoglucose case.

Implementation of the technical measures associated with the agricultural common market has led to major legal disputes concerning export refunds, levies, denaturing premiums, threshold prices, intervention prices and so on.

One of the prerequisites for smooth operation of a system laying down common prices for agricultural produce as part of a market organization based on a standard unit of account is that the relationship between the various national currencies must remain stable. However, serious disturbances on the currency markets forced the Council to seek a remedy so as to uphold the common price system, and this was how monetary compensatory amounts came to be introduced. Numerous judgments by the Court have confirmed that compensatory amounts are lawful in view of the exceptional circumstances faced by the common agricultural policy. But the Court has nevertheless awakened all concerned to the fact that although monetary compensatory amounts compensate for exchange-rate fluctuation, they also carry the risk of market fragmentation and trade disruption. At the same time it has also tried to curb the tendency to extend the coverage of monetary compensatory amounts to include certain derived products.

Marketing of products

When the import or export of a product is declared to the responsible authorities, the mere indication of the name of the product is not sufficient to identify it for the purpose of calculating the customs duty, the levy or the refund. The customs nomenclature meets this requirement.

The Court has had to look into the marketing of a wide variety of products ranging from the 'parson's nose' in the case of turkeys to farmyard poultry, from frozen caribou meat to brandied cherries or from crushed maize seeds to Thai meal derived

from tapioca residues. It has never shirked the often highly technical problems that come before it, for its verdict is essential to ensuring uniform application of the Common Customs Tariff and of the levy and refund arrangements as well as to preventing deflections of trade.

Of course, fraudulent changes of description occur with certain products. Mayonnaise is sometimes redesignated 'resolidified butter' for re-export purposes in order to obtain the appropriate refund. In the same way 'solid caramel' may turn out upon analysis to be made up largely of butter. One dealer engaged in exporting sausages from Germany to Yugoslavia applied for an export subsidy, but then analysis of the product revealed that the sausages consisted of fats and low-grade meat offals. Since the products no longer satisfied the Community definition of 'sausages', the application for export subsidies had to be turned down.

Common fisheries policy

The establishment of a common fisheries policy was a source of much political controversy. The Member States, initially unable to establish a body of Community rules, have repeatedly taken unilateral measures. The Court has nevertheless made things plain. It has said loud and clear that since 1 January 1979, the end of the transitional period of the Act of Accession of Denmark, Ireland and the United Kingdom, the power to take measures for the conservation of fish stocks has lain exclusively and permanently with the Community. Since that date the Member States have no longer been entitled to exercise their own authority in the matter of conservation in waters under their jurisdiction. The Council's failure to act did not restore this competence to the Member States, with *carte blanche* to act unilaterally. The Court held that protection of the common interest required the Member States not only to consult the Commission and in good faith seek its approval, but also to refrain from laying down national conservation measures in the face of objections, reservations or conditions that the Commission might make. Moreover, the Community's fishermen should be allowed equal access to fishing grounds under the jurisdiction of the Member States.

Equality of treatment of Community citizens

The objective of the Communities is not simply an economic one; of course national frontiers are to be abolished, but a form of human integration is also aimed at. As the preamble to the Treaty of Rome puts it, the Member States are 'determined to lay the foundations of an ever closer union among the peoples of Europe' and have affirmed 'as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples'. The chapters on free movement of per-

sons codify in general terms the rights of workers, persons providing services and those seeking establishment on the principle of equal treatment for nationals of all Member States. Detailed rules for achieving this have been laid down in Council regulations and directives, although they have not always met the deadlines laid down by the Treaties.

There is an abundance of Court of Justice cases in matters relating to Community social law, more than in the competition field and nearly as many as in agriculture. There is a regular flow of cases from all the Member States.

Italian workers are actually those who most frequently benefit from developments here, as they are far and away the largest class of plaintiff in cases referred to the Court. After all, Italy has provided the majority of Europe's migrant workers.

Individual rights

The Treaty of Rome entitles workers and members of their families to accept offers of employment actually made, to move freely within the territory of Member States for this purpose, to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of national workers and to remain in the territory of a Member State after having been employed there.

The Court has interpreted the principle of freedom of movement as conferring on workers individual rights which may be relied on against States and invoked before national courts. It has ensured uniform application of the Community rules by eliminating both direct and indirect discrimination liable to affect foreign workers, not only at work, but also in ordinary family life. By giving the key concepts a Community definition, the Court has removed the power to interpret them from the hands of national authorities.

The meaning of 'worker'

One of the first points the Luxembourg judges had to clarify was the actual definition of a 'worker'. If the Member States were to be left to decide unilaterally what was meant in the Treaty by the term 'worker' the concept might well lose all substance.

The Court felt that a very broad definition was needed. In a series of judgments it has therefore defined workers as those who, being nationals of a Member State, carry on activity as employed persons and benefit, under whatever description, from a national system of social security. It excludes self-employed persons, who benefit from freedom of establishment and freedom to provide services, but the term does

not cover only those actually employed full-time or part-time, but all those treated in a similar manner. It is not restricted to migrants or to travel in connection with a job.

In another case the Court took the logic of the system so far as to find that the national authorities were no longer required, or even entitled, to grant permits to workers of other Member States who wished to enter their territories, as the worker was entitled to enter without prior authorization. Once allowed in, the person concerned could not be treated any differently from the national worker as regards conditions of employment.

National treatment for migrant workers

The Court has not permitted any exception as regards conditions of employment. Thus it has recognized that migrant workers have the right to have their periods of military service taken into account for seniority purposes, the right to the special protection from dismissal provided for handicapped persons and in case of accidents at work, the right to separation allowances, the right to be affiliated to the national social security system despite working for the firm in a non-Member State, the right to training courses and occupational retraining free of charge where these benefits are available to nationals.

In other case, particularly the Gravier case, the Court has gone even further, urging freedom of access to occupational training generally. According to the Court's reasoning, freedom of movement permits people to obtain a qualification in the Member State where they intend to carry on their activities and allows them the opportunity to complete their training and develop their talents in the Member State where the occupational training schemes include the appropriate specialization. The Court has also drawn the conclusion that the Member States cannot impose a charge, a registration fee or a 'minerval' as a condition of access to courses of occupational training on students who are nationals of other Member States if such a charge is not imposed on national students.

The Court has also held that the Community rules must prevail over the various national provisions concerning the calculation of social security benefits, which rival each other in complexity. In numerous rulings, it has endorsed the principle of aggregation and apportionment. A retired person is entitled to his pension acquired in one Member State after he has taken up residence in another. A pension cannot be altered simply because the beneficiary resides in the territory of a Member State other than the one where the institutional liable is situated.

For the purpose of acquiring and retaining a right to benefit, all periods of employment completed in the various Member States must be taken into account. When

various periods of employment are aggregated in order to acquire entitlement to benefit in a given Member State, that benefit must then be calculated by reference to the proportion which the period of employment in that State bears to the aggregate of the periods spent in employment. Migrant workers must also receive social assistance guaranteeing a minimum subsistence level if a State grants this to its own citizens. No condition regarding length of residence may be imposed if none is imposed on nationals of the Member State in question.

Family protection

The spouse and children of a migrant worker employed or self-employed on the territory of a Member State also have the right to settle there and to take up any employment, even if they have the nationality of a non-member State. In the Court's view this privilege includes even the right of access to professions subject to a system of administrative authorization and specific professional rules, provided the person concerned has the professional qualifications and diplomas required by the legislation of the host Member State. Thus a Cypriot national, Emir Gül, husband of a British national working in the Federal Republic of Germany, was granted the right of access to the profession of medical specialist in Germany.

In several judgments the Court has emphasized that the children of migrant workers must be admitted to courses of general education and occupational training.

They are entitled to the same assitance as children of citizens of the State of residence, such as interest-free loans, scholarships, advantages to assist the rehabilitation of the handicapped, etc. The widow of a migrant worker, Anita Cristini, was held to be entitled to a card entitling large families to reduced railways fares, a benefit previously reserved for French citizens.

Restrictions and safeguards

The only restrictions on freedom of movement are those justified on grounds of public policy, public security or public health.

However, the Court has stated explicitly on several occasions that the justifications for restrictive measures on grounds of public policy, public security or public health must be considered in the light of Community rules, the principle of non-discrimination and proper legal safeguards.

In one case the judges stressed that the right to enter another Member State and stay there was conferred directly on anyone covered by Community law, whether or not a residence permit was issued by the host country. The fact that such persons neglect

to carry out the formalities relating to residence by foreigners does not constitute, *per se*, a threat to public policy nor justify expulsion or temporary detention pending expulsion, though it may be subject to a penalty commensurate with the gravity of the offence.

According to the Bonsignore case, any restriction on free movement must be based exclusively on the personal conduct of the person concerned, with no exclusions on the basis of whole categories. If a threat to public policy is to be invoked, there must not only be that disturbance of the public peace that any violation of the law entails but also a genuine and sufficiently serious threat to a fundamental interest of society.

According to the Adoui judgment a Member State cannot order expulsion by reason of behaviour which, when engaged in by its own nationals, does not lead to punitive measures or any other real and effective measures designed to combat such behaviour. According to the Rutili case it is clear that membership of trade unions and the exercise of trade union rights cannot justify reliance on the exception for public policy. In the Royer Case it was held that when a residence permit is refused or cancelled, or expulsion is ordered, the interested party must, save in case of urgency duly established, be able to exhaust the available remedies on the same terms as nationals. However, the Pecastaing case made it clear that where an expulsion order is made the person concerned does not have the right to remain in the Member State in question throughout the legal proceedings.

Following the same approach, in the Mutsch case the judges in Luxembourg granted migrant workers the right to use their own language in legal proceedings on the same conditions as national workers.

Employment in the public service

Though Member States have a legitimate interest in reserving posts in the public service for their own nationals, this right is not unqualified. Ruling in a case where the Commission had brought proceedings against Belgium for failure to honour its obligations, the Court held that this reservation was confined to posts related to the exercise of power conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. It accordingly decided that nationals of other Member States must be allowed access to the jobs, among others, of loader, driver, plate-layer, shunter, handler, railway cleaner, carpenter, gardener, electrician, plumber and hospital and children's nurse in municipal services.

It expressly excluded the posts of technical office manager, general supervisor, supervisor of public works, stocktaker, architect and nightwatchman.

Equal pay for men and women

Although the chapter on social provisions in the Treaty of Rome is rather vague, it does, nonetheless, contain one specific provision — the principle of equal pay for men and women, pay meaning the basic or minimum regular wage or salary and any other benefits paid directly or indirectly, in cash or in kind, by the employer. Since the Member States had not applied this principle, it was the Court which ultimately gave women their rights. A Belgian air hostess, Gabrielle Defrenne, had brought an action in a Belgian court for damages on the grounds that male and female air crew received unequal pay. In a ruling which has since attracted great attention, the Court held that Article 119 of the Treaty of Rome did not simply lay down an abstract principle but actually endowed those subject to it with rights which national courts were obliged to safeguard, without Community or national measures being needed to apply them.

It stressed that it was the duty of these courts to ensure protection of the right to equal pay, notably in cases of discrimination directly resulting from legal provisions or collective agreements and in cases where men and women doing the same work in the same private or public undertaking or service are paid at different rates. According to the Court equal pay should have been fully guaranteed by the original Member States with effect from January 1962 — the beginning of the second stage of the transition period — and by the new Member States from January 1973, when the Act of Accession came into force. To avoid a flood of applications for retroactive compensation and the economic upheaval that this would entail, it ruled that, with the exception of cases commenced prior to the judgment, the direct effect of Article 119 could be invoked only in cases of unequal treatment arising after the decision.

Once this barrier had been lifted, other cases were not slow to follow, and the Court had plenty of opportunities to spell out the implications of that case. Thus, Member States are obliged to take effective steps to attain the objective of equality and to ensure that the rights thus conferred can in fact be enforced before national courts. In the Smith case the Court stated that the principle of equal pay for equal work was not confined to situations in which men and women perform the same work for the same employer at the same time. It also applied in cases where a woman was known to be getting less pay than a man who had previously held the same job.

The judges also stated in another case that the fact that part-time work was paid at a lower hourly rate than full-time work did not in itself constitute prohibited discrimination, if the rates were applied equally to men and women. By contrast, if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the

undertaking in question cannot be explained by factors other than discrimination based on sex.

Three German women had suffered discrimination in relation to access to employment. Two of them, Sabine von Colson and Elisabeth Kamann, qualified social workers, had sought employment in a penal institution. The responsible authority refused to employ them on the ground of the problems and risks involved in the employment of female candidates in institutions reserved for male prisoners. The other woman, Dorit Harz, a commercial engineer, was refused a post as manager on the ground that only men worked in marketing agricultural raw materials and that the religious and social structures of the Middle Eastern countries with which the employer had extensive commercial dealings excluded the possibility that a woman could conclude contracts there and maintain existing ones.

The Court could not hold that they had a right to an employment contract, since such an obligation is not covered by the Community directives. It did hold, however, that the women who had suffered discrimination were entitled to compensation commensurate with the loss they had suffered. Whilst the Court left it ot the Member States to choose what the sanction should be, it made it clear that the sanction should be such as to ensure an effective protection by the courts. It must also have a genuine deterrent effect on the employer. A purely symbolic compensation, for example repayment of the expenses involved in applying for the posts, was in any case insufficient.

Measures based on the protection of public security do not justify any general reservation on the implementation of the principle of equal treatment. Exceptionally, however, in a situation where terrorist attacks are frequent, a Member State may reserve general police duties to men equipped with firearms. In applying such a derogation, it must in any event respect the principle of proportionality, allocate duties to women which can be carried out without firearms and examine periodically whether the derogation should be maintained.

In the Roberts, Marshall and Beets cases the Court did not dispute the right of Member States to fix a different minimum retirement age for men and women. It did however make it clear that women cannot be compelled to retire simply because they have reached the age at which they are entitled to a pension, where this is different for men and women. Moreover, the voluntary severance grants paid by an employer to men and women wishing to leave their employment must be equivalent.

Although statutory social security schemes do not fall within the provisions of Article 119, company pension schemes based on contract, supplementing the statutory social security benefits, do in the Court's view constitute an advantage paid by the employer to the worker, and must therefore observe the principle of equality. That principle is infringed, according to the Weber case, when a firm excludes part-time

employees from the company's pension scheme, if this measure affects substantially more women than men, unless the measure can be explained by factors objectively justified and not involving any discrimination.

On the other hand, a father, Ulrich Hofmann, failed in his attempt to obtain maternity leave. The Court held that the Community directives do not impose on the Member States the obligation to permit the alternative of granting such leave to the father, and are not intended to regulate the organization of the family or to modify the sharing out of responsibilities between the couple.

Freedom to provide services

It was the Court, too, which made a breakthrough as regards freedom to provide services and the right of establishment. This fundamental freedom covers the setting up of agencies, subsidiaries or branches, the formation and management of firms and companies, and the taking up and pursuit of self-employed activities. It, too, guarantees equal treatment with nationals. Under the Treaty of Rome all restrictions should have been abolished by the end of the transitional period, but the Council did not implement the programme imposed on it within the prescribed time-limits.

Reclutance to act here was overcome by a judgment given in clear and precise terms and from the mid-1970s quicker progress was made in implementing the Treaty.

A legal adviser, Johannes van Binsbergen, who was an independent legal representative in the Netherlands, was refused authorization to represent a client because he had transferred his residence to Belgium. When the case was referred to it the Court stated that restrictions on freedom to provide services should have been abolished at the end of the transitional period, which was the absolute time-limit for the entry into force of all the rules provided for by the Treaty; the provisions of the Treaty had become absolute by then. It ruled that, at least as far as the specific requirement of nationality or residence was concerned, the Treaty contained a definite obligation to attain a specified result and that the Member States could not delay or compromise the attainment of that result simply through the absence of the necessary directives. The Court argued that the relevant articles have direct effect and may accordingly be invoked before national courts, at least in so far as they are designed to eliminate any discrimination against the person providing services on grounds of nationality or of residence in a Member State other than the one in which the service is to be provided. Similarly, a Dutch insurance broker, Robert Coenen, having moved into Belgium, was allowed to continue his activities in his country of origin. The Belgian firm Transporoute was granted the right to submit a tender for public works in the Grand Duchy of Luxembourg without having to have a registered office or an establishment there.

But, depending on the particular nature of the services provided, the Court allows Member States to require any person providing services to comply in the general interest with objectively necessary occupational rules govering the organization of the profession and qualifications, ethics, supervision and liability, where those rules are incumbent on all persons established within the territory of the State where the services are being provided. Such rules must, however, be applied without discrimination.

Removal of restrictions on the freedom of Member States' nationals to provide services means that the person providing the services may go to the Member State where the recipient of the services in established and that the recipent may go to the State where the person providing the services is established. These principles have been applied in an interesting way in the joined Luisi and Carbone cases as regards tourists, recipients of medical services and persons making journeys for study or business purposes, all these persons being recipients of services.

The Court held that transfers of currency by way of remuneration for these services are payments and not movements of capital, even if they are effected by the physical transfer of banknotes. Member States can no longer, therefore, impose restrictions on these payments, except where the balance of payments is seriously endagered, in which case the necessary measures must be taken in accordance with the procedures provided by the EEC Treaty.

Whilst the Member States are thus obliged to authorize payments in the currency of the Member States in which the creditor or the beneficiary resides, they nevertheless retain, by reason of their specific responsibilities for monetary questions, the power to verify whether transfers of currency ostensibly intended for payments that have been liberated are in reality being used for the purpose of speculative movements of capital.

However, the Court emphasized that such checks must always respect the limits imposed by Community law and particularly those arising from the freedom to provide services and the freedom of payments in that connection. They cannot therefore have the effect of limiting payments and transfers relating to the provision of services to a certain amount for each transaction or for a particular period, since in that case they would be a restriction on the freedoms granted by the Treaty. Nor may such checks, by the manner in which they are carried out, make these freedoms illusory or make their exercise subject to the discretion of the administration.

The Member States may however impose fixed limits within which no check is carried out, and for expenditure beyond these limits require evidence of the genuineness of the payment for provision of services. The limit must not however be fixed in such a way as to jeopardize the free movement of services.

It is for the national court to determine in each case whether the checks on transfer of currency in the particular case before it do in fact respect these limits.

Freedom of establishment

The refusal to allow the Dutch lawyer Jean Reyners to engage in his profession in Belgium provided the Court with an ideal case with which to enforce the principle of freedom of establishment open to professional people, and at the same time to clarify the exception to this freedom. The person in question was born in Belgium of Dutch parents, had studied in Belgium and had obtained the qualifications needed for access to the bar, but had retained his Dutch nationality. He was not allowed to register on the grounds that under Belgian law the profession was open only to Belgian nationals.

The Court stated that the rule requiring Member States to treat nationals of other Member States in the same way as their own nationals was one of the basic legal provisions of the Community. It stressed that as the rule referred to a series of legal provisions actually applied by the country of establishment to its own nationals it could by its very nature be invoked directly by nationals of all the Member States. The achievement of free movement before the end of the transitional period should have been facilitated, by, but was not conditional on, the implementation of a programme of gradual measures. Since the Council had failed to take the necessary measures before the appointed time, the directives had become superfluous as regards the implementation of the rule governing national treatment, since the latter was imposed — with direct effect — by the Treaty itself.

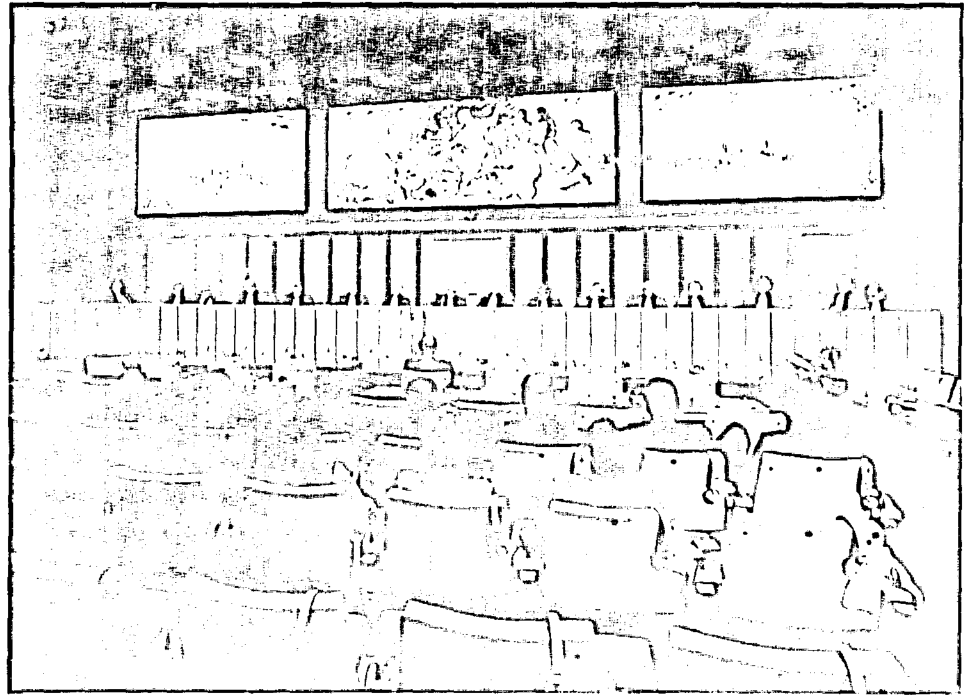
At the same time the Court pointed out that, in accordance with the Treaty, restrictions on freedom of establishment must be limited to those activities which, in themselves, involved direct and specific involvement in the exercise of official authority. According to the Court, in an occupation such as the legal profession, the activities of giving legal advice and assistance or representing and defending parties to court cases cannot be described in this way even though the performance of these activities entails fulfilling obligations or exercising exclusive rights determined by law.

The Court denied the French authorities the right, in their dealings with the Belgian lawyer Jan Theiffry and the British architect Richard Hugh Patrick, to rely on the absence of a Community directive, since the freedom of establishment can be achieved by applying national rules on recognition of professional qualifications in a manner in conformity with the Treaties. In other cases, on the other hand, it has recognized that in the absence of (or pending) harmonization a State may require Community citizens to observe its national rules.

Member States may not impose any penal or administrative sanctions on a person who is exercising his profession without registration in the professional register, if such registration has been refused in infringement of Community law.

Whilst recognizing the compatibility of professional bodies with Community law, the Court has nevertheless held that they have no right, by means of their internal

professional rules, to impair the freedoms conferred by the Treaty. By virtue of these principles the Austrian veterinary surgeon Vincent Auer, a naturalized Frenchman with an Italian qualification, was finally able to exercise his profession after having fought for 25 years before professional bodies and the courts. The German lawyer Onno Klopp, a member of a firm of lawyers in Düsseldorf, sought admission to the Paris Bar. He stated that he nevertheless wished to remain a member of the Düsseldorf Bar and to keep his residence and chambers in that city. The Paris Bar Council



Formal hearing of the Court of Justice of the European Communities

rejected his request on the ground that an *avocat,* even if he satisfies all personal requirements, could have only one professional domicile, which must be within the jurisdiction of the court in which he practises. The Court of Justice rejected this contention. It made it clear that the legislation of a Member State cannot require that a lawyer should have only one establishment in the whole of Community territory. Such a restriction, it pointed out, would have the consequence that once established in a specific Member State the lawyer could no longer rely on the freedoms laid down by the Treaty in order to establish himself in another Member State, except at the price of abandoning his existing establishment.

In a similar case the Court struck down a rule requiring doctors to have their names removed from the register in one Member State before they could practise in another. Such restrictions are compatible with the Treaty only if they are in fact justified by general obligations inherent in the proper exercise of the profession.

The Court's judgments have thus made a vital contribution to social integration by ensuring that the principle of equal trreatment has direct effect not only in the acts of governments authorities but also in collective agreements, for they have placed a strict interpretation upon the public policy exception, submitted restrictions to the principle of proportionality and confirmed the protection given to the fundamental rights of the individual.

VI — The Community's achievements

But what view do those who work in the courtroom have of the Community? Robert Lecourt, former President of the Court of Justice, has observed that the Community is a Community based on law. The authority of Community law is beyond doubt since Community law is binding. But Community law is law with a specific objective. The end is the living force behind the law. The law created the common market and is now its guardian. Furthermore, the law is there to protect individuals in a multinational entity. Finally, it is the means of legal integration, the effects of which are filtering through gradually to the innermost core of daily life. Consequently, the basic characteristics of Community law — its authority, direct effect, uniformity, primacy and irreversibility — constitute the binding force which holds the Community together.

With the Council, the Commission and Parliament, the Court has thus built up over the years an impressive range of achievements, comprising not only the specific points that have been settled, but a whole complex of permanent and fundamental elements, essential for the cohesion and the very existence of the Community, and no longer open to challenge.

Whilst the future development of the Community depends essentially on the will and dynamism of the political institutions, the Court will continue in the future also to make its own unique contribution, acting — in the words of the famours judge Pierre Pescatore — 'both as a guarantor of what exists already and as a catalyst of new developments'.

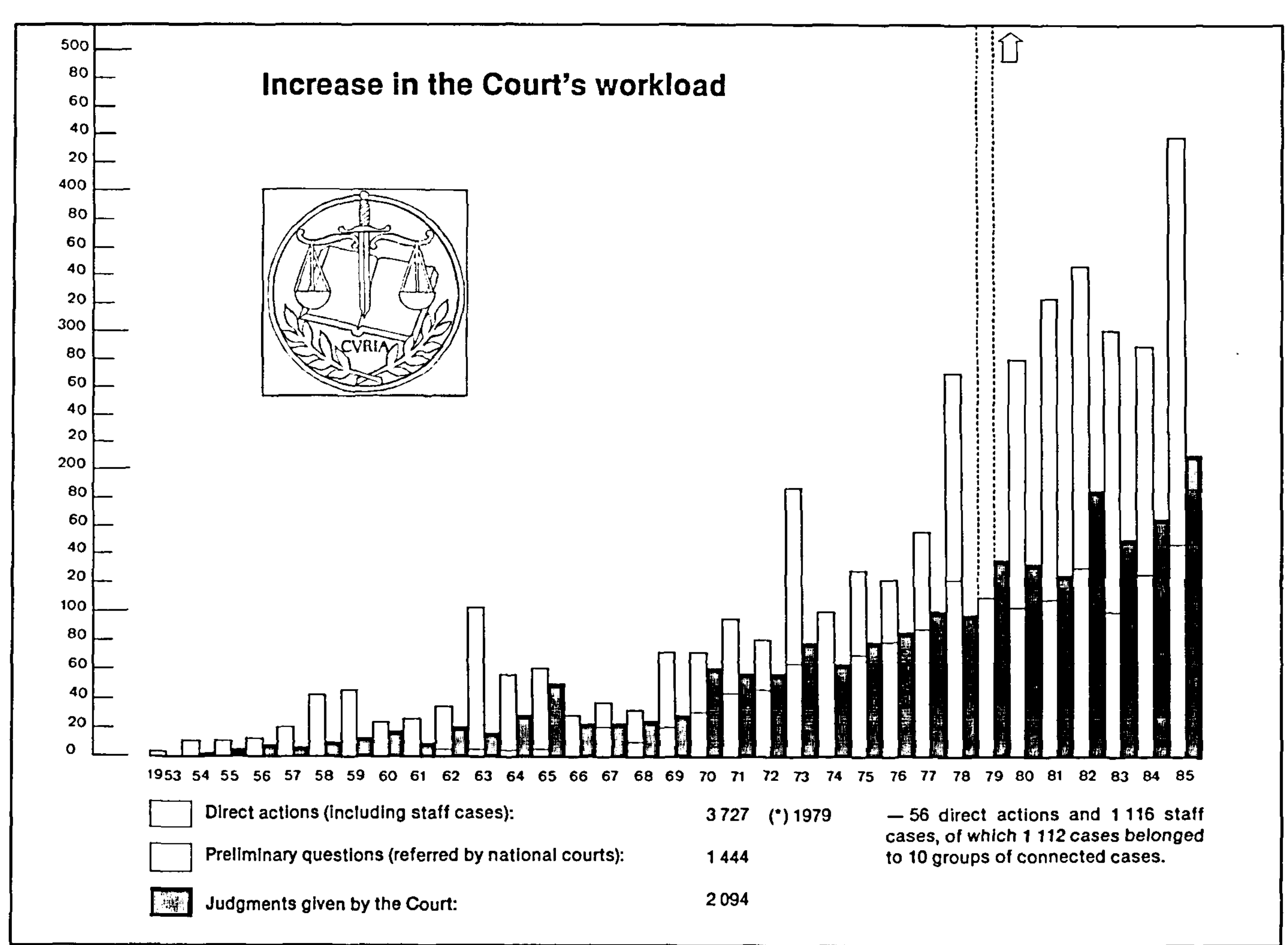

Increase in the Court's workload
500
80
60
40
20
400
80
60
40
20
300
80
60
40
20
200
80
60
40
20
100
80
60
40
20
0
CVRIA
1953 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85
Direct actions (including staff cases): 3 727
Preliminary questions (referred by national courts): 1 444
Judgments given by the Court: 2 094
(*) 1979 — 56 direct actions and 1 116 staff cases, of which 1 112 cases belonged to 10 groups of connected cases.

TABLE 1

Cases brought since 1953 analysed by subject-matter[1]

Situation at 31 December 1985

(the Court of Justice took up its duties under the ECSC Treaty in 1953 and under the EEC and EAEC Treaties in 1958)

Type of case	Direct actions											
	ECSC				EEC							EAI
	Scrap equa-lization	Trans-port	Com-pet-ition	Other[2]	Free move-ment of goods and cus-oms union	Right of estab-lish-ment, free-dom to supply ser-vices	Tax cases	Com-pet-ition	Social secu-rity and free move-ment of work-ers	Agri-cul-tural policy	Other	
Cases brought	167	35	27	239	134	35	52	195	11	250	416	11
Cases not resulting in a judgment	25	6	10	83	43	11	8	15	4	31	89	1
Cases decided	142	29	17	122	65	6	30	157	5	176	187	3
Cases pending	–	–	–	34	26	18	14	23	2	43	140	7

[1] Cases concerning several subjects are classified under the most important heading.
[2] Levies, investment declarations, tax charges, miners' bonuses.
[3] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Brussels Convention').

Cases concerning Community staff law	Requests for preliminary rulings										
	Free movement of goods and customs union	Right of establishment, freedom to supply services	Tax cases	Competition	Social security and freedom of movement of workers	Agricultural policy	Transport	Conventions, Article 220[1]	Privileges and immunities	Other	Total
2155	341	40	88	61	265	410	29	55	9	146	5 171
1120	18	1	2	5	16	20	4	3	1	7	1 523
698	294	32	58	53	220	359	20	48	7	110	2 838
337	29	7	28	3	29	31	5	4	1	29	810

TABLE 2

Cases brought since 1958 analysed by type (EEC Treaty)[1]

Situation at 31 December 1985

(the Court of Justice took up its duties under the EEC Treaty in 1958)

Type of case	Proceedings brought under													Protocols, Conventions, Art. 220	Grand total[2]
	Arts 169 and 93	Art. 170	Art. 171	Article 173				Art. 175	Article 177			Art. 181	Art. 215		
				By governments	By individuals	By Community institutions	Total		Validity	Interpretation	Total				
Case brought	412	2	13	81	8	361	450	30	202	1180	1382	9	206	55	2 559
Cases not resulting in a judgment	114	1	3	9	3	42	54	5	5	69	74	3	29	3	286
Case decided	165	1	3	39	5	253	297	24	175	971	1146	3	152	48	1 839
In favour of applicant[3]	149	1	3	13	2	70	85	3	–	–	–	3	12	–	256
Dismissed on the substance[4]	15		–	25	3	125	153	3	–	–	–	–	124	–	295
Dismissed as inadmissible	1	–	–	1	–	58	59	18	–	–	–	–	16	–	94
Cases pending	133	–	7	33	–	66	99	1	22	140	162	3	25	4	434

[1] Excluding proceedings by staff and cases concerning the interpretation of the Protocol on Privileges and Immunities and of the Staff Regulations. (See Table 1 for these).
[2] Totals may be smaller than the sum of individual items because some cases are based on more than one Treaty article.
[3] In respect of at least one of the applicant's main claims.
[4] This also covers proceedings rejected partly as inadmissible and partly on the substance.

TABLE 3

Cases brought since 1953 under the ECSC Treaty[1] and since 1958 under the EAEC Treaty[1]

Situation at 31 December 1985

(the Court of Justice took up its duties under the ECSC Treaty in 1953 and under the EAEC Treaty in 1958)

Type of case	Number of proceedings instituted									Total	
	By governments		By Community institutions		By individuals (undertakings)		Art. 41 ECSC	Art. 150 EAEC	Art. 153 EAEC		
	ECSC	EAEC	ECSC	EAEC	ECSC	EAEC	Questions of validity	Questions of interpretation		ECSC	EAEC
Cases brought	25	–	–	1	442	8	4	3	2	471	14
Cases not resulting in a judgment	9	–	–	–	115	–	–	–	1	124	1
Cases decided	15	–	–	1	294	1	4	3	1	313	6
In favour of applicant[2]	6	–	–	1	62	1	–	–	–	68	2
Dismissed on the substance[3]	9	–	–	–	174	–	–	–	1	183	1
Dismissed as inadmissible	–	–	–	–	58	–	–	–	–	58	–
Cases pending	1	–	–	–	33	7	–	–	–	34	7

[1] Excluding proceedings by staff and cases concerning the interpretation of the Protocol on Privileges and Immunities and of the Staff Regulations.
[2] In respect of at least one of the applicant's main claims.
[3] This also covers proceedings rejected partly as inadmissible and partly on the substance.

Direct actions brought by:	1953-85
Belgium	6
Denmark	3
Germany	21
Greece	1
France	16
Ireland	6
Italy	28
Luxembourg	4
Netherlands	15
United Kingdom	9
Total brought by Member States:	109
Commission	435
Council	2
European Parliament	1
Individuals or firms	1 025
Total:	1 572

Direct actions brought against:	1953-85
Belgium	71
Denmark	11
Germany	33
Greece	16
France	76
Ireland	22
Italy	140
Luxembourg	20
Netherlands	20
United Kingdom	21
Total brought against Member States:	430
Commission	964
Council	71
Commission and Council	93
European Parliament	9
Individuals or firms	4
Total:	1 572

Subject-matter of direct actions	1961-85
1. EEC	
Discriminations (Article 7)	1
Free movement of goods (Articles 9-11)	22
Customs duties (Articles 12-17)	26
Common customs tariff (Articles 18-29)	6
Quantitative restrictions (Articles 30-35)	78
Commercial and industrial property (Article 36)	6
National monopolies (Articles 37)	3
Agricultural market (Articles 38-47)	266
European Agricultural Guidance and Guarantee Fund (EAGGF)	29
Free movement of workers (Article 48)	6
Social security for migrant workers (Article 51)	6
Right of establishment (Articles 52-58)	29
Freedom to provide services (Articles 59-60)	17
Free movement of capital (Articles 67-73)	1
Transport (Articles 74-84)	16
Restrictive practices, dominant positions (Articles 85-90)	198
Dumping (Article 91)	29
State aids (Articles 92-94)	51
Internal taxation (Articles 95-99)	54
Approximation of laws (Articles 100-102)	139
Conjunctural policy (Article 103)	5
Commercial policy (Articles 110-116)	23
Social policy (Articles 117-122)	6

Subject matter of direct actions *(continued)*	1961-85
European Social Fund (Articles 123 - 128)	4
Compliance with Court judgments (Article 171)	13
Procedural questions (Article 177)	1
Arbitration clauses (Article 181)	7
Financial contribution by Member States (Article 209)	3
Non-contractual liability (Article 215)	178
Safeguard measures (Article 226)	29
Staff law	7
Functioning of the Communities	22
Community competence	2
Accession of the Hellenic Republic	6
Accession of Spain and Portugal	-
Lomé Conventions	4
EEC/third country association agreements	1
2. EAEC	
Supply (Articles 52-76)	1
Arbitration clause (Article 153)	4
Staff of the joint undertakings (Articles 146 and 188)	7

Subject matter of direct actions	1953-85
3. ECSC	
Coal market	15
Control by the High Authority	2
Quantitative restrictions (Article 4(a))	1
State aids (Article 4(c))	10
Consultative Committee (Article 18)	1
Non-contractual liability (Article 40)	64
Verifications (Article 47)	8
Levies (Articles 49-50)	8
Scrap equalization (Article 53)	167
Investments (Article 54)	3
Quota system (Article 58)	145
Prices (Articles 60-64)	42
Restrictive practices and concentrations (Articles 65-66)	27
Transport (Article 70)	35
Commercial policy (Article 71-75)	1
Supply	2
Functioning of the Communities	22
4. Privileges and immunities	7
5. Staff law	2 155

Source of requests for preliminary rulings
(Situation at 31 December 1985)

Member State	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	Total
Belgium	–	–	–	–	–	–	5	1	4	4	1	5	8	5	7	11	16	7	13	14	12	10	9	13	13	158
Denmark	–	–	–	–	–	–	–	–	–	–	–	–	–	–	1	–	1	3	1	2	1	1	4	2	–	16
FR of Germany	–	–	–	–	4	–	11	4	11	21	18	20	37	15	26	28	30	46	33	24	41	36	36	38	40	519
Greece	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	0
France	–	–	–	–	2	–	3	1	1	2	6	1	4	6	15	8	14	12	18	14	17	39	15	34	45	257
Ireland	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	1	2	1	2	3	–	–	2	1	2	14
Italy	–	–	–	2	–	–	–	1	–	2	5	4	5	5	14	12	7	11	19	19	12	18	7	10	11	164
Luxembourg	–	–	1	–	–	–	1	–	1	–	1	–	1	–	1	–	–	–	1	–	4	–	–	–	6	17
Netherlands	1	5	5	4	1	1	3	2	–	3	6	10	6	7	4	14	9	38	11	17	17	21	19	22	14	240
United Kingdom	–	–	–	–	–	–	–	–	–	–	–	–	–	1	1	1	5	5	8	6	5	4	6	9	8	59
Total	1	5	6	6	7	1	23	9	17	32	37	40	61	39	69	75	84	123	106	99	109	129	98	129	139	1 444

Courts making references for preliminary rulings

	Total 1961 to 1985
Belgium	
– Cour de Cassation	25
– Conseil d'Etat	6
Other courts	127
Total:	158
Denmark	
– Højesteret	3
Other courts	13
Total:	16
Germany	
– Bundesverfassungsgericht	0
– Bundesgerichtshof	26
– Bundesarbeitsgericht	4
– Bundesverwaltungsgericht	15
– Bundesfinanzhof	81
– Bundessozialgericht	25
Other courts	368
Total:	519
Greece	
– Arios Pagos	0
– Simvoulio tis Epikratias	0
Other courts	0
Total:	0
France	
– Cour de Cassation	29
– Conseil d'État	7
Other courts	221
Total:	257
Ireland	
– An Chúirt Uachtarach	0
– An Ard-Chúirt	9
– An Chúirt Chuarda	1
– An Chúirt Duiche	1
Other courts	3
Total:	14

Italy		
– Corte costituzionale		0
– Corte suprema di Cassazione		33
– Consiglio di Stato		0
Other courts		131
	Total:	164
Luxembourg		
– Cour supérieure de justice		6
– Conseil d'État		5
Other courts		6
	Total:	17
Netherlands		
– Raad van State		6
– Hoge Raad		31
– Centrale Raad van Beroep		27
– College van Beroep voor het Bedrijfsleven		59
– Tariefcommissie		16
Other courts		101
	Total:	240
United Kingdom		
– House of Lords		5
– Privy Council		0
– Court of Appeal		5
– Inner House of Court of Session		0
– Court of Appeal of N. Ireland		0
Other courts		49
	Total:	59

Subject-matter references for preliminary rulings	1961-85
1. EEC	
Discriminations (Article 7)	5
Free movement of goods (Articles 9-11)	38
Customs duties (Articles 12-17)	96
Common customs tariff (Articles 18-29)	116
Quantitative restrictions (Articles 30-35)	119
Comercial and industrial property (Article 36)	28
National monopolies (Article 37)	16
Agricultural market (Articles 38-47)	507
European Agricultural Guidance and Guarantee Fund (Article 40)	4
Free movement of workers (Article 48)	53
Social security for migrant workers (Article 51)	211
Right of establishment (Articles 52-58)	24
Freedom to provide services (Articles 59-60)	19
Free movement of capital (Articles 67-73)	4
Transport (Articles 74-84)	29
Restrictive practices, dominant positions (Articles 85-90)	68
State aids (Articles 92-94)	16
Internal taxation (Articles 95-98)	60
Value-added tax (Article 99)	37
Approximation of laws (Articles 100-102)	51
Conjunctural policy (Article 103)	4
Balance of payments (Articles 104-109)	4
Commercial policy (Articles 110-116)	16
Social policy (Articles 117-122)	5

Subject-matter references for preliminary rulings *(continued)*	*1961-85*
Equal pay (Article 119)	6
Procedural questions (Article 177)	17
Non-contractual liablity (Article 215)	2
Application of Article 220	1
Safeguard measures (Article 226)	7
Equal treatment of men and women (Article 235)	17
Functioning of the Communities	9
Staff law	5
Accession of the Hellenic Republic	1
EEC/AASM Association	3
EEC/third country association agreements	14
Judgments Convention (27.9.1986)	55
Lomé Convention	2
Privileges and immunities	9
2. EAEC (Article 150)	
Privileges and immunities	1
Procedural questions (Article 152)	1
Non-contractual liability (Article 188)	1
3. ECSC (Article 41)	1953-85
Levies (Article 49)	1
Coal market	1
Prices (Articles 60-64)	1
Dumping	1

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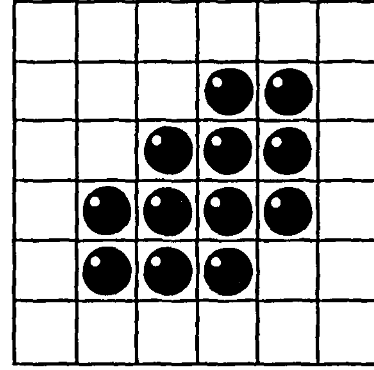
EN

The founding fathers of the Community did more than simply set up a number of institutions; they also laid the foundations of a legal union, based on a new, autonomous and uniform body of law transcending national law and binding in its entirety on all the Member States.



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